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May 2018

Summary and country reports

Written by The European Centre of Expertise (ECE), based on reports submitted by the Network of Labour Law Experts

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Executive Summary

1 National level developments

In May 2018, important developments in labour law took place in many Member States and European Economic Area (EEA) countries (see Table 1). Legislative initiatives and case law focused specifically on the following issues:

- Working time
- Temporary agency work
- Posting of workers
- Collective agreements
- Fixed-term contracts
- Dismissal law.

Working time

In **Austria**, there is an ongoing parliamentary debate on the initiative to increase the maximum daily working time from ten to twelve hours. In **Denmark**, the Supreme Court issued a ruling regarding derogations from provisions on daily breaks and daily and weekly rest periods in the Working Time Directive, opening the possibility for limitations to daily and weekly rest periods by law. In **Latvia**, the Constitutional Court issued a ruling on the unequal treatment of medical doctors with regard to the regulation of overtime work, determining that the Latvian regulation is contrary to the Constitution, considering that the only reason justifying unequal treatment is budgetary considerations, which on their own, however, do not constitute a legitimate aim for unequal treatment. A new bill has been approved in **Luxembourg**. In **Poland**, the draft of an amendment to the Labour Code to reduce the working time of employees with parental duties is subject to the preliminary stages of the legislative process. The underlying idea is to reduce the daily working time of an employee who is a parent or custodian of a child below the age of 15 years to seven hours (instead of currently eight hours). In **Portugal**, the government entered into negotiations with the social partners to revise the labour legislation. One of the proposed changes is the possibility to establish a 'bank of working hours' in collective agreements, which would allow for compensation of overtime work, notably through free time, remuneration or vacation.

Temporary agency work

In **Belgium**, the Flemish government has decided to allow temporary agency work. Temporary agency work will become possible in the Flemish public services and local authorities. This makes Flanders the first government in Belgium to allow such work. The period for using temporary agency employees is limited to 12 months. In **Italy**, temporary work agencies will need to meet new personnel and structural requirements to obtain or renew authorisation to operate.

Posting of workers

In **Denmark**, The Ministry of Employment has proposed a number of amendments to the Statutory Act on Posting. The Parliamentary Committee on Employment delivered two reports on the proposed Amendment Act in May. The Committee agreed to support an increase of the daily penalty for not registering at the RUT registry to a maximum of DKK 1500, raised from a maximum of initially DKK 1000 in the first proposal. This proposal has been adopted by Parliament. In **Lithuania**, the Kaunas Regional Court issued a ruling in which by relying on Directive 96/71, it has interpreted a provision of Lithuanian law under which the regulations on posting do not apply if the posting does not exceed 30 days – the rules on minimum wage shall be applicable not from the 31st day, but from the 1st day of posting, if the posting exceeds 30 days within the last one-year period.

Collective agreements

In a ruling on working time for public servants the Supreme Court in **Denmark** assessed the concept of 'collective agreement' in national law. It held that derogations from daily and weekly rest periods established by legislation have the

same characteristics as collective agreements. The ruling, in theory, opens the possibility for limitations of daily and weekly rest periods by legislation for employees covered by collective agreements. In **Sweden**, the Labour Court made a final judgment following the CJEU ruling in case C-336/15 *Unionen v. Almega*, which concerned the status of collective agreements in a transfer of undertaking context, specifically the issue of extended notice periods for dismissed employees. The Labour Court concluded that the industrial parties that had negotiated new collective agreements were allowed to transfer the provision on extended notice periods to the new collective agreement.

Fixed-term contracts

In **France,** the Court of Cassation refused to reclassify the fixed-term contract of an employee into one of indefinite duration due to the principle of the separation of powers. In **Portugal**, the government and social partners are negotiating several proposals to improve working relationships, including the reduction of fixed-term work. As an alternative to fixed-term contracts, it is proposed to introduce permanent employment contracts with a six-month probation period instead of three, especially for a first employment contract.

Dismissal law

In **Belgium**, the Court of Cassation ruled that the absence of any legal possibility to appeal violates Articles 10 and 11 of the Constitution concerning the prohibition of discrimination in the law and the employee or the employer must be able to appeal against the decision of the joint committee body that proposes dismissals in case of collective dismissal. The Court further holds that when the labour court has to assess the joint committee body's decision on the economic or technical reasons, it exercises control with full jurisdiction over the actual existence of those reasons. In **Norway,** the Supreme Court found that in a case in which the employer had vacant management positions in one department but recruited an external candidate and shortly thereafter downsized another department and terminated the contract of another employee without considering whether the mentioned vacant management positions in the first department were "suitable posts" for the dismissed employees, the employer should have assessed whether they could have been moved to the vacant management positions.

2 Implications of CJEU and EFTA Court Rulings

Case C-518/15 *Matzak* – Voluntary work

In case C-518/15 *Matzak*, the question of the qualification of volunteers as workers is of importance. An analysis of this issue and the possible impact of the ruling in different jurisdictions is provided.

In **Cyprus**, national law has not dealt with the issue of the qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive. The question of whether a volunteer would qualify as a worker has not been addressed before a Cypriot court**.** In **Germany**, it is acknowledged that the term 'workers' is defined autonomously and at the same time extensively, in EU law. Several commentators have highlighted the fact that the courts will have to base their rulings on the notion of worker as defined by the CJEU. In **Latvia,** volunteer work is regulated by the Voluntary Work Law. This law stipulates that voluntary work may not have the aim of financial gain. It follows that if work is remunerated, it must be considered to be regular employment relationships governed by labour law. The Voluntary Work Law does not regulate issues on working time and rest periods. In **Portugal**, the concept of 'worker' for the purpose of the Working Time Directive is in line with the general notion of 'worker' established in the Portuguese Law (Articles 11 and 12 of the Labour Code). Thus, such a 'volunteer' shall be covered by the working time regulation. In **Sweden,** there are limited, if any, explicit sources that clearly state that all volunteers are

covered by the Working Time Act transposing the Directive. However, the health and safety provisions are broadly applied outside the narrow scope of paid employment contracts as well, and some case law also supports the application in other fields of labour law. For instance, parents 'working' voluntarily in a child care unit for a limited period of time were considered employees under the collective agreement – but most likely not under the Employment Protection Act.

Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

Topic	Countries
Dismissal law	FI, FR, ES, HU
Working time	AT, DE, EE, PL
Temporary agency work	DE, IS, LI, NO
Labour Inspectorate	AT, ES
Employment policies	BE, ES
Apprenticeship	FR, HR
Part-time work	DE, DK
Teleworking	FR, RO
Equal Treatment	DE, FR
Notice period	BE
Maternity leave	BG
Fixed-term work	DK
Disability	DK
Social Dialogue	EE
Paid leave for temporary workers	FR
Information and consultation	FR
Wages	DE
Employment contract	DE
Seafarers	IE
Collective agreements	LI
Posting of workers	LT
Unemployment	NL
Permanent employment	NO
Undeclared work	RO
Day-labourers	RO
Third-country nationals	SI
Annual leave	SI
Zero-hours contract	UK

Austria

Summary

(I) The introduction of new maximum working hours is still subject to parliamentary debate. A government proposal was announced for September.

(II) The government has also proposed an initiative to amend administrative penal law, with potential consequences for compliance with working standards (health and safety, minimum wage, working time, etc.).

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

The issue of qualification of (certain) volunteers as 'workers' for the purpose of the Working Time Directive:

The CJEU has ruled that under national law, Mr *Matzak* did not have the status of professional firefighter, but was instead considered a volunteer firefighter. Nevertheless, this is irrelevant for his classification as a 'worker' within the meaning of Directive 2003/88 (paragraph 30). The Court then held that a person in Mr Mazak's position must be classified as a 'worker' within the meaning of Directive 2003/88, in so far as it appears from the information available that he was integrated into the Nivelles' fire service, where he pursued real and genuine activities under the direction of another person and received remuneration. It is for the referring court to verify whether that is the case (paragraph 31).

The same criteria would also generally apply to determine whether the Austrian working time laws are applicable to firefighters. As in the case before the CJUE, firefighters in Austria can either be professional firefighters in an employment relationship or volunteer firefighters who do not receive remuneration (see, for example ,section 4 and 5 of the Viennese Fire Service Act – *Wiener Feuerwehrgesetz*). Volunteer firefighters are not covered by the definition of worker developed by the CJEU, as the criteria "remuneration" is missing.

The question whether standby time is (or is not) counted under national law towards the maximum weekly working time and against minimum rest periods:

As mentioned earlier (see February Flash Report), two different types of standby time are known in Austrian labour law:

1) standby time that is considered working time, since the possibility to carry out other activities is significantly restricted. Such standby time is therefore considered working time, but allows for an extension of daily working time.

2) there are times during which the employee has to be reachable and arrive at the workplace within a certain period of time (cf. Wolf, in Mazal/Risak, *Das Arbeitsrecht*, chapter XI, note 4). The courts have considered on-call time with a duty to arrive at the workplace within 30 minutes as rest time (Supreme Court of 6.4.2005, 9 Ob A 71/04p). A response time of 8 minutes would very likely result in the qualification of the standby time as working time.

Standby time that is considered working time may be extended for up to 60 hours per week and 12 hours a day by a collective agreement/works agreement/the labour inspectorate if the working time regularly and significantly (about one-third of the working time) is standby time (section 5 of the Working Time Act). If the working time is standby time to an extent of more than one half and if recreational possibilities do exist during that time, the working time can be further extended (section 5a of the Working Time Act).

The impact of the case beyond the firefighting/civil protection sector:

As standby times like that in the case *Matzak* would be considered working time even outside the firefighting/civil protection sector, the case has an impact beyond those sectors. In our view, Austrian court decisions are very much in line with the ruling of the CJEU (see above) and would therefore be in line with the CJEU's jurisprudence.

4 Other relevant information

4.1 Working time

As described earlier (see December 2017 and April 2018 Flash Reports), the aim to increase the maximum daily working time from ten to twelve hours (the normal daily working time currently being eight hours) is still subject to parliamentary debate. A parliamentary initiative (*Initiativantrag*) by the liberal opposition party NEOS was postponed by the two government parties (the conservative ÖVP and the right-wing populist FPÖ), but the Minister of Labour and Social Affairs announced that the government will present a legislative proposal to Parliament in September 2018.

Meanwhile, legal scholars are publicly debating the effects of such an amendment on employment contracts with an all-in clause. While some argue that an all-in clause does not cover the 12-hour working day, hence resulting in an additional entitlement to overtime pay, the general notion is that this depends on the individual interpretation of the contract.

Sources:

A summary of the parliamentary debate on the increased flexibility of working time/"12 hours working day" is available here.

A press release on the debate of the effects of a change in the law on employment contracts with an all-In clause is available here.

4.2 Administrative penal law

Several laws on workers' health and safety, on working time and on the payment of minimum wage are subject to administrative penal law. Hence, any amendments in the field of administrative penal law will have widespread practical consequences in the field of labour law. A ministerial draft was issued on 16 May 2018 to address some of the

criticism generally voiced by enterprises, claiming that current administrative penal law leads to disproportionate outcomes (e.g. high fines for individuals). Two of the key issues are briefly addressed below. The draft is now open to public debate/ statements by the interested public

- Principle of accumulation

Administrative penal law generally applies the so-called principle of accumulation. In labour law, the principle of accumulation generally implies that a violation of these laws is penalised per worker: the fines increase with the number of workers affected as well as with the number of breaches. This principle of accumulation has been criticised by some as being disproportionate, as one mistake may affect many workers and may consequently lead to disproportionate fines. Others argue that the principle of accumulation is an effective tool to ensure compliance of companies of all sizes, as the potential fines increase with the number of workers the employer is responsible for.

The government has introduced a proposal to abolish the principle of accumulation as a general notion in administrative penal law. It should only remain applicable to areas of administrative penal law where it is necessary to ensure compliance. Currently, it is unclear what areas of labour law would be affected by the abolishment of the principle of accumulation.

- Presumption of guilt

In administrative penal law, guilt is generally presumed in cases where negligence in a certain matter suffices to violate a norm, which is a punishable offence. This presumption of guilt helps authorities swiftly determine whether an offence has taken place and the applicable fine, yet it is perceived as an extremely difficult and practically often impossible hurdle for the accused to overcome, as they must prove that they have taken all possible measures to prevent a particular breach.

The government has proposed an amendment to the presumption of guilt when a fine of EUR 50 000 or higher is involved. In such cases, guilt shall not be a presumption if the person responsible for the offence can prove that he or she installed a quality-assured organisation to prevent the offence in question, and if he or she can prove that this organisation has been regularly monitored and controlled, either externally or internally.

Sources:

The proposed amendments to the law is available here.

Explanatory notes to the proposed amendments are available here.

A version in English of the Administrative Penal Act is available here.

Belgium

Summary

(I) The national legislator has introduced an act that incorporates a mobility allowance and a Royal Decree that establishes a pilot project to prevent burn-out.

(II) The Flemish government has introduced a law allowing temporary work agencies to place workers at user undertakings. Two national cases on the dismissal of protected workers and working time are analysed.

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Mobility allowance

The legislator has introduced a system whereby an employee who has a company car as part of her payroll package, which she can also use in her private life, can exchange the car for a monetary mobility allowance corresponding to the financial benefit of the car and which is taxed in the same advantageous way.

This is a voluntary system. The employer cannot be required to introduce a mobility allowance and the employee cannot be required to exchange her company car for such an allowance. The employer can only introduce the system if she has made one or more company car(s) available during the preceding 36 months prior to the introduction of this scheme. The worker may only apply for the mobility allowance if, at the time of the application, she has had a company car with the current employer for at least three continuous months and had a company car with the current employer for at least 12 months within a 36-month period preceding the application. On joining the company, the employee can only apply for a mobility allowance if she already received a mobility allowance from her previous employer or if she already had a company car with her previous employer for 12 months within a period of 36 months prior to the application and at least three continuous months immediately prior to leaving the company. The employee's application and the employer's decision must be made in writing and, if the decision is positive, the application will be part of the employment contract. It must also be kept in accordance with the legislation on the keeping of social documents.

If the employee receives the mobility allowance, the benefit of the exchanged company car and of all other related advantages will cease completely from the first day of the month in which the mobility allowance is granted. The exchange is only possible for one company car per employee. Each worker is entitled to only one mobility allowance. In addition, all commercial vehicles at the employee's disposal must meet the time requirements at the time of application. If one of the vehicles was not available long enough, the employee will have to exchange all vehicles for one compensation. The granting of the mobility allowance does not confer any right on the worker, except for its payment by the employer and equal treatment with the benefit of the private use of the company car. A collective bargaining agreement may provide for more favourable provisions, but these provisions may not lead to an extension of rights (social security and annual leave).

The mobility allowance is maintained as long as the employee does not have a company car at her disposal again. The compensation also ends when the employee starts a job for which no company car is provided for in the payroll system.

The mobility allowance consists of a sum of money corresponding to the annual value of the benefit from the use of the company car. It is calculated at 20 percent of six-sevenths of the catalogue value of the company car (in accordance with Article 36, § 2,

Code on Income Tax). If the employee also has a fuel card, it is 24 percent instead of 20 percent. If the employee made a personal contribution towards the company car, this will be deducted. The law also specifies which company car is to be taken into account if more than one vehicle is exchanged. The amount must be included in the employment contract.

The taxable portion is comparable to the taxable benefit for the company car. The employee does not pay any social security contributions and the employer can deduct the compensation according to the CO2 emissions of the exchanged car (75-90 percent).

The exchanged company car may not have been linked to a full or partial replacement or conversion of wages, contributions, benefits in kind or any other benefit or supplement thereto, whether or not liable to social security contributions.

1.2 Temporary agency work

The starting point for Belgian employment legislation is a ban on temporary agency work as a matter of principle, with exceptions. Now, the Flemish government has made temporary agency work legally possible under its competence in Belgium as a federal state.

Temporary agency work employment will become possible in the Flemish public services and local authorities. This makes Flanders the first government in Belgium to allow temporary agency work. The period for using temporary employment is limited to 12 months.

With the exception of the reason for inflow, temporary agency work is only allowed for the same exceptional reasons as it is possible in the private sector. The Flemish public services and local authorities may use temporary employment in the following cases:

- temporary replacement of a contractual staff member whose employment contract has been suspended;
- temporary replacement of a contractual staff member whose employment contract has been terminated;
- temporary replacement of a contractual staff member with a part-time career break or with a reduction of the work performance in the context of the health care credit system;
- temporary replacement of a civil servant who does not perform his duties or performs them only on a part-time basis;
- a temporary increase in work;
- performance of exceptional work;
- in the context of social policy measures to improve employment;
- for artistic services or artistic works.

1.3 Pilot project on the prevention of burn-out related to work

With this Royal Decree, a pilot project on burn-out will commence at the latest on 01 November 2018. More specifically, the Federal Agency for occupational risks (FEDRIS) will take part in a pilot project to support employees who are or are likely to be affected by burn-out. The project is aimed at 300 to 1 000 workers who

(i) are employed in the financial services sector, excluding insurance and pension funds, or in the sector of hospitals or nursing homes;

(ii) are threatened by or have been affected at an early stage by a syndrome of professional exhaustion as a result of a work-related psychosocial risk;

(iii) are still at work (but have difficulties or have been absent for a short time), or have been incapacitated for work for less than two months.

The scheme essentially provides for a counselling programme by a burn-out counsellor at the expenses of FEDRIS.

2 Court Rulings

2.1 Dismissal law

Belgian Cour de Cassation 12 March 2018, No. S.17.0060.N.

Factual part

This dispute concerned the dismissal of so-called protected workers in the context of multiple dismissals of 17 employees at company level. In this case, the employee representative challenged the decision of the Joint Committee in the context of the procedure against his employer to obtain the dismissal compensation provided for in the Act of 19 March on the dismissal of employee representatives.

In accordance with the Law of 19 March 1991 on the dismissal of employee representatives, staff representatives or candidate personnel representatives in the works council or in the committee for prevention and safety at work may only be dismissed for economic or technical reasons that have already been approved in advance by the competent joint committee.

The first problem in this case is that the law does not provide a jurisdictional appeal against decisions of the joint committee.

As the Constitutional Court has already ruled, the Court of Cassation determined that the absence of any legal appeal violates Articles 10 and 11 of the Constitution concerning the prohibition of discrimination in the law and that the employee or the employer must therefore be able to appeal against the decision of the joint body and the dispute to the court decision of the Joint Committee.

The Court further held that when the labour court has to assess the decision of the body of the joint committee to determine the economic or technical reasons, it exercises control with full jurisdiction over the existence of those reasons. This verification does not imply an assessment of the appropriateness of the measures envisaged by the worker to deal with the economic or technical reasons invoked. Moreover, according to the Court, the reasons to be assessed should not be limited to cases of closure of the undertaking or of a division of it or of dismissal of a specific staff group.

Analytical part

The ruling of the Cour de Cassation is in line with an earlier ruling of the Belgian Constitutional Court No. 57/93 of 08 July 1993 that the absence of any legal appeal violates Articles 10 and 11 of the Constitution concerning the prohibition of discrimination in the law and that the employee or the employer must therefore be able to appeal against the decision of the joint committee and to refer the dispute to the court.

The ruling of the Cour de Cassation on the unlimited jurisdiction is in line with the opinion of the Advocate-General at the Cour de Cassation and the majority of the legal doctrine (see F. LAGASSE, *"Le licenciement des travailleurs protégés"*, *Orientations* 1995, p. 181; L. ELIAERTS and I. VAN HIEL, *Beschermde werknemer*, in *Bibliotheek Sociaal recht*, Gent, Larcier, 2012, p. 179; B. MERGITS, *De bijzondere ontslagregeling van de*

personeelsafgevaardigden, Mechelen, Kluwer, 2012, p. 60; I. PLETS, S., DEMEESTERE, J. HOFKENS and A. VANDENBERGEN, *20 jaar wet Ontslagregeling Personeelsafgevaardigden*, Antwerp, Intersentia, 2011, p. 113).

2.2 Working time

Appeal Labour Court of Antwerp of 17 April 2018, No. 2017/AA/141

Factual part

A couple worked together in a mobile team in the cleaning sector and regularly traveled to different clients throughout the working day. The employer reimbursed these trips with a mobility allowance. According to the workers, the time spent moving from the place of residence to the first and last place of employment and the time spent moving between the locations was working time.

According to the Labour Court of Antwerp, travelling time is working time for mobile teams (in the cleaning sector) when the employee regularly travels to different clients throughout the working day. The time spent moving from the place of residence to the first and last place of employment and the time spent moving between the locations is working time.

Analytical part

The Labour Court referred to the concept of working time in the European Working Time Directive 2003/88, and stated that the national court has an obligation to interpret national law in accordance with European law to the furthest extent possible. The Labour Court then referred to the *Tyco* ruling C-266/14 which held that the time spent daily by workers without a fixed or customary place of work on the journey between their place of residence and the location of the customer designated by the employer is working time within the meaning of the Working Time Directive. The Labour Court continued that in this case, too, travelling time must therefore be regarded as working time; a different reading would be contrary to the purpose of the Working Time Directive.

Now that the travelling time is working time, the important question remains as to how it should be compensated. The Labour Court is right to point out that neither European nor Belgian legislation provides for compensation. A sectoral collective bargaining agreement does provide for a mobility allowance for travelling time, but this does not apply to mobile butterfly teams to which the employee belongs according to the Labour Court, so that according to the Labour Court, the same wage must be paid for the travelling time as for the actual work. In addition, the limit for overtime in the sector has been set at 37 hours and the Labour Court considers that it is possible to go back to the beginning of the employment, so that the worker is granted the amount of EUR 56 322,30 gross in wage arrears. However, he must himself repay the mobility allowance received of EUR 4 880,09 net.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

The issue of qualification of volunteers as workers for the purpose of the Working Time Directive

i) The personal scope of the Working Time Directive 2003/88 (Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/C 165/01), Official Journal of the European Union, 24 May 2017)

The concept of 'worker' is not defined in the Directive itself. The Court of Justice excluded the application of a definition derived from national legislation and/or practices (CJEU Judgments of 14 October 2010, *Union syndicale Solidaires Isère v Premier Ministre and Others*, C-428/09; ECJ 21 February 2018, *Ville de Nivelles v Rudy Matzak*, C-518/15, point 28 & 29).

On the contrary, the Court held that this concept could not be interpreted differently according to the law of Member States but had an autonomous meaning specific to European Union law. It considered that the concept of worker could not be interpreted narrowly and concluded that it 'must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. The Court thereby linked the interpretation of 'worker' for the purposes of Directive 2003/88 to that established by case law in the context of the free movement of workers as laid down in Article 45 of the Treaty.

The Court holds that 'it is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved.'

However, it has issued guidance on the application of these criteria and established that the category 'worker' under EU law is independent from the national one (35). It has, for example, held that employees in a body governed by public law qualify as 'workers', irrespective of their civil servant status (CJEU case C-519/09, 07 April 2011, *Dieter May v AOK Rheinland/Hamburg — Die Gesundheitskasse*, (…)

It is not the status of the person under national law that is decisive for the applicability of the Working Time Directive (CJEU case C-518/15 of 21 February 2018, *Matzak*, point 29). On the contrary, its applicability will depend on whether the person concerned qualifies as a 'worker' according to the EU legal definition of worker. This is based on aspects of her concrete working arrangements, in particular on whether the person performs effective and genuine activities under the direction and supervision of another person and for remuneration.

The Court decided that the sui generis legal nature of the employment relationship under national law did not have any consequence as to whether the person was a worker for the Directive 2003/88 (CJEU case C-428/09 of 14 October 2010, *Union syndicale Solidaires Isère v Premier Ministre and Others*).

Although there was no specific case law before the *Matzak* ruling on the situation of 'volunteers', (…) in respect of the Working Time Directive, the same assessment, on the basis of the criteria presented above, could lead to individuals under any form of contractual relationship being categorised as 'workers' and therefore as being covered by the Working Time Directive.

The CJEU recently ruled in the Belgian case of voluntary firefighters that the fact that under national law Mr *Matzak* does not have the status of professional firefighter, but that of a volunteer firefighter, is irrelevant for his classification as 'worker' within the meaning of Directive 2003/88/EC. The CJEU in the case C-518/15, *Ville de Nivelles v Matzak* concluded: "*Having regard to the foregoing, it must be held that a person in Mr Matzak's circumstances must be classified as a 'worker', within the meaning of Directive*

2003/88, in so far as it appears from the information available to the Court that he was integrated into the Nivelles fire service where he pursued real, genuine activities under the direction of another person for which he received remuneration; it is for the referring court to verify whether that is the case."

ii) Belgian legislation and case law

The Labour Law of 16 March 1971 regulates working time in the private sector (Article 1) for employers and their employees who have concluded an employment contract.

Article 1 of the Labour Law states:

"This Law applies to employers and employees. In addition, a number of categories of persons are treated in the same way as employees and those who employ them as employers. In particular, the following categories are concerned:

Persons who, other than by virtue of an employment contract, perform work under the authority of another person."

An employer is the party to an employment contract in whose service the other party, the employee, undertakes to work under the authority of that employer against the payment of a salary.

With regard to working hours, the Labour Act of 16 March 1971 does not apply to employers governed by public law, such as the Belgian State, provinces and municipalities, and their staff, except when the staff are employed in institutions with industrial or commercial activities (Article 3 of the Labour Law).

Working time in the public sector is regulated by the Law of 14 December 2000 laying down certain aspects of the organisation of working time in the public sector. This law applies to employees and employers in the public sector, with the exception of establishments that are industrial or engaged in a commercial activity, and in establishments which provide medical, prophylactic or hygienic care.

However, the provisions of Article 186 "de la loi-programme du 30 décembre 2009 portant dispositions diverses", interpreting Article 3 (scope) of the aw of 14 December 2000 laying down certain aspects of the organisation of working time in the public sector specified that voluntary firefighters are excluded from the scope of the main law transposing the Working Time Directive for the public sector.

The idea behind this exclusion was that voluntary firefighters are bound by a sui generis contract, but certainly not as an employee with an employment contact, neither as a public servant nominated unilaterally by a public authority (Parl. Doc. Senat 2009-2010, N° 4-1553/5, p. 18: A. Exposé introductif de Mme Annemie Turtelboom, Ministre de l'Intérieur; Report to the King in the Royal Decree of 19 April 2014 on pecuniary status. Moniteur belge's (01 October 2014) operational staff in the emergency areas. The Belgian Constitutional Court has accepted this exclusion from the personnel scope in a ruling on discrimination in the law. As regards the differences between volunteer firefighters and professional firefighters, the Belgian Constitutional Court ruled in judgment number 103/2013 of 09 July 2013, the following: "having regard to the fact that voluntary firefighters and the professional firefighters carry out similar tasks in the same body, they are comparable categories. However, the Court also held that:

"the voluntary, occasional and complementary nature of the activity of the volunteer firefighter justifies that the provision at issue excludes him from the scope of application of a legislation providing guarantees, such as the Law of 14 December 2000 to civil servants respect of the minimum periods of daily rest, weekly rest, annual leave, work breaks, maximum weekly working time and certain aspects of night work and of the work."

The more relevant legislation is a federal Law of 15 May 2007 on civil protection. Within the framework of this new law, a new regulation of the legal status of firefighters has

been enacted in two Royal Decrees. The law was partially implemented as regards the financial and administrative status of the operational staff of the rescue zones, including firefighters, by the Royal Decrees of 19 April 2014 (Moniteur belge 01 October 2014, p. 77440 – 77573). The choice of the so-called *sui generis* status of voluntary firefighters is maintained in these royal decrees. The motivation for this choice is as follows. "The legal status of the voluntary staff member is unilaterally governed by decree. The choice of the so-called sui generis status of the voluntary firefighter is maintained in these royal decrees.

The voluntary staff member is in a statutory situation. But he is not appointed as a permanent statutory civil servant. The Law of 03 July 1978 on Employment Contracts and the Law of 03 July 2005 on the rights of volunteers do not apply to him. The legal status of a voluntary firefighter is *sui generis*. In view of the specific role they play in the organisation of the rescue zones, in particular the fact that they only provide services if they are called up by the intervention zone, some rights are granted and others are not. Voluntary firefighters have the opportunity to spend the hours during which they may or may not be available, in real time. These flexibilities in the ability to make oneself available is a guarantee for the nature of the civic involvement of these firefighters. Because it is not a full-time or a permanent appointment, and volunteer firefighters themselves have another main activity, certain rights are not provided for, such as leave to leave, re-employment and a specific end-of-career schemes. (...) It was therefore decided to explicitly maintain in the text that the voluntary firefighters are in a *sui generis* statutory situation. It is important to stress that their relationship has "consequences other than those of the professional firefighter" (Moniteur belge 01 October 2014, p. 77476).

The Belgian Conseil d'État (Conseil d'Etat, 17 February 2011, no 211.332/2011, Brassine v Ville de Huy; Conseil d'Etat, 01 July 2011, no 214.390/2011, Fochesato v Ville de Nivelles, Conseil d'État, 29 December 2011, no 217.081, Moniquet v. Stad Landen) and the Court of Appeal of Liège (Cour d'Appel de Liège, 05 June 2012, repertoire no. 4269/2012, Ville de Couvin v Ponsart and others.) decided already earlier that in case the voluntary firefighter is a public servant.

After the *Matzak* ruling, there is little doubt that, notwithstanding that *sui generis* status of the voluntary firefighter is maintained, Belgian courts will consider that volunteer firefighters fall under the concept of "worker" in the Working Time Directive. As a matter of fact, voluntary firefighters are generally integrated into the local fire service where they pursue real, genuine activities under the direction of another person for which they receive remuneration.

The issue whether standby time is or is not counted under national law towards the maximum weekly working time and against minimum rest periods

In line with CJEU ruling C-303/98, *Simap*, of 03 October 2000, Belgian case law judges that the period of physical presence and availability of the worker at the place of work during, *it est* the standby period with a view to providing her professional services must be regarded as working time and carrying out her duties, is counted under national law towards the maximum weekly working time (see Article 19 Labour Law of 16 March 1971) and against minimum rest periods (Appeal Labour Court Liège, 25 February 2004, Journal des tribunaux de travail 2004, 433; Appeal Labour Court Mons 21 March 2005, Journal des tribunaux de travail 2005, 453).

After the *Matzak* ruling, where the Court ruled that standby time during which a worker, in this case a voluntary firefighter, is required to spend at home with the duty to respond to calls from her employer within eight minutes, which very significantly restricts the opportunities to carry out other activities, must be regarded as 'working time' for the Working Time Directive. Therefore, this kind of working shall also be counted under national law towards the maximum weekly working time and against minimum rest periods.

The issue whether the Matzak-ruling could have an impact beyond the firefighting/civil protection sector

This ruling not only has an impact on the civil protection sector. It seems that the judgment may also have an impact on other voluntary service providers who find themselves in a similar situation as the volunteer firefighter *Matzak*. This could include, for example, volunteer ambulance drivers and others. The future will make it clear.

4 Other relevant information

Nothing to report.

Bulgaria

Summary

(I) Only two minor changes were made to Bulgarian labour legislation in May 2018. They concern working time under short-term employment seasonal contracts and labour migration and mobility.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Labour migration and labour mobility

Ordinance No. 81 of the Council of Ministers of 21 May 2018 on the Amendment and Supplement of the Regulations on the Implementation of the Labour Migration and Labour Mobility Act (State Gazette No. 41 of 25 May 2018) regulates the different documents that must be presented to the Employment Agency for different cases of employment of foreigners in Bulgaria.

1.2 Short-term employment contract

Article 114a of the Labour Code regulates the short-term seasonal Farm Employment Contract for individual working days. The working time under such contracts is one full-time working day. An amendment to Article 114a(4) of the Labour Code (State Gazette No. 47 of 22 May 2018) allows for half-day working days under such contracts.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Bulgarian legislation does not regulate voluntary activities extensively. The Disaster Protection Act (promulgated in the State Gazette No. 102 of 19 December 2006, amended and supplemented. Last amendments in State Gazette No. 97 of 5 December 2017). According to Article 39(1) of this Act "*Volunteer shall denote any person participating in a voluntary formation for prevention or control of disasters, fires and emergency situations and elimination of consequences thereof*".

The Act does not treat volunteers as workers, but as persons who perform work without entering into an employment relationship (arg. Article 43(3) of the Disaster Protection Act related with Article 4(3), items 5—6 of the Social Insurance Code). This means that Bulgarian legislation does not qualify volunteers as workers, including for the purpose of the Working Time Directive.

Standby time is regulated in Bulgaria in the Ordinance of the Council of Ministers for Duty and Standby Time of 1994, applicable only to workers under an employment relationship. It is not considered working time, which is the reason why remuneration for such work is lower. If the worker fulfils her obligations, it is paid as overtime.

The case C-518/15, *Matzak* must be taken into consideration in the discussion of the Draft Act on Volunteers that is currently taking place in Bulgaria.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) The Amendment to the Act on Professional Rehabilitation and Employment of Persons with Disabilities and the Amendment to the Aliens Act have been adopted.

(II) The regulations on training required to handle sources of ionizing radiation, the application of radiological safety measures and the management of technical processes in nuclear facilities has been published in the Official Gazette.

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Amendment to an act on equal treatment

The Amendment to the Act on Professional Rehabilitation and Employment of Persons with Disabilities has been adopted (Official Gazette No. 39/2018). The novelties, among others, relate to reasonable accommodation and priority in employment of persons with disabilities. Employers' obligation to provide reasonable accommodation is regulated in detail (Article 12(4) and has been amended in that the employer is required to adjust the workplace and working environment to the needs of the disabled person, taking into account their organisational, psychophysical and social aspects, and also relates to the testing and interviews of candidates (Article 7(1) has been amended in this regard). Persons with disabilities are entitled to priority in employment, even if the vacant post has been advertised internally (Paragraph 21 has been added to Article 9). However, persons with disabilities are not entitled to priority in employment when the post relates to active employment policy measures of public works (Paragraph 20 to has been added to Article 9).

1.2 Amendment to the Aliens Act

The Amendment to the Aliens Act has been adopted (Official Gazette No. 46/2018).

Among others, Article 82 of the Aliens Act, which regulates the right of aliens to work in Croatia for a duration shorter than 90 days, has been amended.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The work of professional and volunteer firefighters in Croatia is regulated in the Firefighting Act (Official Gazette no. 106/99, 117/01, 36/02, 96/03, 174/04, 38/09, 80/10). It does not provide much detail about their working time. Article 25a regulates the working time of professional firefighters, guaranteeing a daily rest period of at least 12 hours. It does not mention standby service for professional or for volunteer firefighters. The Croatian Firefighting Association protects volunteer firefighters (see here). The Government of the Republic of Croatia adopted the Activity Programme on

Implementing Measures of Fire Protection of Interest for the Republic of Croatia in 2018 (Official Gazette No. 28/2018) – *Program aktivnosti u provedbi posebnih mjera zaštite od požara od interesa za Republiku Hrvatsku*. Under the Programme, at least 500 volunteer firefighters are to be on standby (see: 39.b). The County Firefighting Association must adopt plans of engagement of firefighters, which among others must include the duty of firefighters to respond to calls (see: 40. b). No other sources on standby time of firefighters exist. Volunteer firefighters are mostly engaged during the tourist season (from 01 June until the end of September) and very rarely outside the tourist season (source: interview with the representative of the Croatian Firefighting Association). However, in the mentioned plans on the engagement of firefighters, the judgment in the *Matzak* case will need to be taken into account:

- Volunteers are not considered workers. However, the Volunteering Act (Official Gazette No. 58/2007, 22/2011), Article 11(2) provides for limitations to volunteering to 40 hours a week (within a period of more than three months without interruption of at least three months).
- Standby time, according to Article 60(2) of the Labour Act, i.e. the period during which the worker is available at the employer's request to perform work should the need arise, is not be considered working time, if the worker is neither present at her workplace nor at another place determined by the employer. According to Article 60(3) of the Labour Act, the availability period and remuneration needs to be regulated in the employment contract or collective agreement. However, the period during which the worker is present at work upon the employer's request is considered working time, notwithstanding whether the work is performed at the place determined by the employer or the place selected by the worker (Article 60(4) of the Labour Act). This provision should be interpreted in line with the judgment in the *Matzak* case or be amended to deem certain standby periods as working time (whenever the obligation to respond to calls from the employer significantly restrict the opportunities of the employee to conduct other activities).
- Derogations from the 48-hour work week are either regulated in the Labour Act (for managerial and family workers, see Article 88(3)) or in separate laws such as the Health Care Act of 2008, amended in 2017 (Article 162(6) or the Act on Working Time, Compulsory Rest Periods for Mobile Workers and Recording Equipment in Road Transport of 2013 (as amended in 2015 and 2017) (see Article 5(2)). For instance, with the prior written consent of the employee in the health care sector, she can work more than 48 hours a week. However, the rules on redistribution of working time allows for certain flexibility for employers in other sectors as well. Article 67(1) of the Labour Act states as follows:

  > (1) Where the nature of the work requires it, full-time or part-time work may be reorganised within a period, which may not exceed twelve successive months, to exceed the full-time or part-time work in one period, and is less than full-time or part-time work in another period; this must be done in such a manner that the average working time under the redistribution scheme may not exceed the full-time or part-time working hours.
  >
  > (2) Where the redistribution of working time is not agreed upon and provided for in a collective agreement or an agreement between the works council and the employer, the employer shall establish the redistribution of working time schemes including reference to the work and a number of workers covered by the redistribution of working time scheme, and shall submit that redistribution scheme to a labour inspector in advance.
  >
  > (3) The redistributed working time shall not be considered overtime work.

(4) The redistributed working time may not exceed 48 hours a week during the period in which it lasts longer than the full-time or part-time working hours, including overtime work.

(5) By way of derogation from the provision of paragraph 4 of this Article, the redistributed working time during the period in which it lasts longer than full-time or part-time work may exceed 48 hours a week, but may not exceed 56 or 60 hours a week if the employer performs seasonal business activities, under the assumption that it is provided for in a collective agreement and that the worker gives the employer a written statement of her voluntary consent to such work.

(6) The worker who does not agree to work longer than 48 hours a week under the redistributed working time scheme must not suffer any adverse consequences.

(7) The employer shall, upon request, deliver the list of workers who have given their written consent referred to in paragraph 5 of this Article to the labour inspector.

(8) The redistributed working time in the period during which it exceeds either the full-time or part-time working hours may last up to four months, unless otherwise provided for in a collective agreement, in which case it may not exceed six months.

(9) The fixed-term employment contract for work performed under a redistributed working time scheme shall be concluded for such a period so the worker's average working time corresponds to the full-time or part-time work defined in the contract.

- Regarding the possible implications of the judgment in the *Matzak* case beyond the firefighting sector, one can conclude that it must be taken into account with regard to the standby time of employees in the health care sector. According to Article 52(3) of the Collective Agreement for health care and health insurance (Official Gazette No. 29/2018), the employees need to respond to a call for work without delay during standby time and they need to arrive at the workplace within an hour at the latest. Although the response time is not the same as in the *Matzak* case, the obligation to arrive at the workplace within an hour can be burdensome (i.e. it can significantly restrict the opportunity to carry out any other activities) when the employee does not live nearby her workplace.

4 Other relevant information

4.1 Training of employees exposed to ionizing radiation

The regulations on training required to handle sources of ionizing radiation, the application of radiological safety measures and the management of technical processes in nuclear facilities has been issued by the head of the State Bureau for Radiological and Nuclear Safety (Official Gazette No. 42/2018)

It regulates, among others, the vocational training of employees exposed to ionizing radiation. The training is financed by the employer who must bear all the costs related to it (Articles 27 and 49 of the Regulations on training required to handle sources of ionizing radiation, the application of radiological safety measures and the management of technical processes in nuclear facilities).

Cyprus

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Cypriot law has not dealt with the issue of the qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive. The question whether a volunteer qualifies as a worker has not been addressed before a Cypriot court.

The March Flah Report discussed how standby time is (or is not) counted under national law towards the maximum weekly working time and against minimum rest periods.

The March Flash Report discussed how this case could have an impact beyond the firefighting/civil protection sector for employment relationships with working times that are very flexible, i.e. entail on-call work. The Cypriot law provides for rights to reference hours in which working hours may vary for workers employed in jobs whose nature or type contains a flexible arrangement of working time, such as those in shift work and on-call work. There are different categories of workers to whom such arrangements apply, such as medical practitioners, nurses, carriers, as well as those in basic services provision, workers in shops that are opened at odd hours, workers in the hotel and catering sector, seafarers, flight personnel and mobile workers.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Concept of working time and rest periods in reference to standby times of firefighters. Is standby time counted under national law towards the maximum weekly working time and against minimum rest periods?

Standby time is generally considered part of an employee's rest period. Such times are only counted towards the maximum weekly working time if the employee is called upon and actually performs work. Since the general conditions of standby time are not as strict as in the above-mentioned case C-518/15, the legislation seems to not be in breach of the EU *acquis*; however, this may not apply to some individual contracts.

The general rule on standby time as defined in Section 78 of Act No. 262/2006 Sb., the Labour Code states that standby time as *"a period during which an employee is on call to perform work, as covered by his employment contract, and which in case of urgent need must be done in addition to his schedule of shifts. Standby may only take place at a place agreed with an employee but it must be at a place other than the employer's workplaces."*

Such standby time is not considered part of the working time. However, its location and conditions are based entirely on an individual agreement. The parties in question may thus find themselves to be in breach of the EU *aquis* if the agreed conditions are very restrictive for the employee (regarding the place of standby and the requirement to reach the employer's workplace within a certain time limit) as in the CJEU case.

How relevant is the issue of qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive?

The judgment's classification of (certain) volunteers as workers for the purposes of the working time regulation should not significantly impact the interpretation of the issue at hand as it is unclear whether Czech legislation would not qualify (some) volunteers in employment relationships as workers.

Could this case have an impact beyond the firefighting/civil protection sector?

This judgment may affect employees in the field of transport.

Section 3 b) of the Government Decree No. 589/2006 Coll., Stating Deviations from the Working Time Regulation and Regulation on Rest Periods of Employees in Transport, specifies the term "standby period" as the time spent waiting at the national borders or due to the prohibition of driving on certain days or in certain hours, time spent accompanying the vehicle while on a ferry boat or a train and the time spent by the driver in the moving vehicle when someone else (a second driver) is driving. Such standby time does not constitute a part of the minimum rest period required by law and is also in accordance with EU legislation.

However, Section 3 c) of the same Government Decree states that the waiting time of bus drivers (and bus attendants) between individual journeys as specified by the bus schedule is not considered working time, since the employee does not drive nor does she perform any other work for the employer (for instance, checking revenues or doing regular bus maintenance).

If the above-mentioned judgment is taken into account, one may argue that such employees are also required to spend their waiting time wherever the last bus stop is. The main difference from the case in question is, however, that firefighters do not know when they have to respond to a call while a bus driver follows a schedule and can thus use her time more effectively.

This judgment may possibly affect voluntary firefighters.

Section 20 2) of Government Decree No. 172/2001 Coll., on implementation of Act on Fire Safety, states that a plan of performance of voluntary firefighters' duty is developed in that a fire safety unit is ready for action and that standby time is organised in shifts and/or as a weekly arrangement. However, no further limitations are set, so it depends on the individual plans whether the EU *aquis* is followed.

This judgment may possibly affect all employees on standby.

In conclusion, the abovementioned case does not have immediate consequences for any profession in the Czech Republic; however, if the European Court of Justice upholds this general view on working time in future cases – if conditions by which standby time was performed were concluded to be very limiting for employees (regarding the place of standby and the requirement to reach the employer's workplace within a certain time limit), employees may claim that performance of standby work should be counted as working time and should be remunerated accordingly. In light of the CJEU case, employees may be successful with such claims before the court.

4 Other relevant information

4.1 Current governmental situation

As has already been discussed, the government has failed to gain the approval (confidence) of the Chamber of Deputies of Parliament of the Czech Republic and has resigned. A new government has not yet been appointed - the outgoing government will remain in place until a new government is designated.

As a result of these circumstances, very few new developments have taken place in terms of national legislation on labour law.

Denmark

Summary

(I) National legislation has been passed to introduce additional fines to coerce posting entities into registering with the national RUT registry. Now, daily fines of up to a maximum of DKK 1500 (EUR 200) can be enforced.

(II) The Supreme Court has stated that provisions in law can have the characteristics of a collective agreement, and thus fulfill Article 18 of the Working Time Directive and derogate from the rules on daily and weekly rest periods.

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Posting of workers

Factual part

The Ministry of Employment proposed a number of amendments to the Statutory Act on Posting on 21 March 2018 (see also March 2018 Flash Report).

The Parliamentary Committee on Employment, *Beskæftigelsesudvalget,* delivered two reports in May on the proposed Amendment Act. The Committee finally agreed to support an increase in the daily fine to a maximum of DKK 1500 for not registering with the RUT registry, raised from a maximum of DKK 1000 in the first proposal.

The proposal was passed by Parliament on 24 May with 106 votes in favour of the amendment, and 0 votes opposed to it.

Analytical part

The amendment is an important political development, as the current government has committed to continue fighting social dumping, and as part of this to increase the efforts against companies that do not register with the RUT.

The legislation is in line with the aim to fight social dumping by facilitating control over the posting entities performing work in Denmark. The legislation enforces the existing obligation to register a posting entity with the RUT registry, which is the database of foreign entities performing services in Denmark.

The regulation will most likely increase and improve the control over posting entities and ensure proper working conditions for workers who perform work in Denmark, including their occupational health and safety, salaries, working time and other working conditions.

The legislation is in line with the EU *acquis*.

Sources:

Link to Parliament Committee report of 16 May 2018 is available here.

Link to Parliament Committee report of 23 May 2018 is available here.

2 Court Rulings

2.1 Lockout

Supreme Court ruling of 01 June 2018, case 141/2017

Factual part

The case is one of many cases concerning the consequences of the major lockout of school teachers in 2013. The lockout was interrupted by legislation, specifically by Law 409, which established the salary and working conditions for teachers, until the next period of negotiation.

This case concerned the question of derogations from provisions on daily breaks and daily and weekly rest periods in the Working Time Directive.

The Supreme Court found that the provisions on overnight field trips and working time could be established by law, cf. Article 17, 3, b). Further, the Court found, that the provisions were in line with the interpretations in CJEU ruling C-428/09, *Union syndicale Solidaires Isère.* Therefore, the provisions were not a violation of the Working Time Directive.

The Supreme Court further assessed whether the provisions which did not concern overnight field trips but allowed the daily rest period to be reduced to 8 hours once per week, were in line with Article 18 of the Directive, stating that such derogations can only be allowed by agreement between the social partners. The concept of collective agreement was assessed under both national law and practice. The Supreme Court found that the provisions derogating from daily and weekly rest periods had the same characteristics as collective agreements, as they become an integral part of the collective agreements on the same terms as if the provisions were a result of an agreement, since disputes on the interpretation of the provisions will be assessed by industrial dispute resolution mechanisms (like other collective agreements), and the provisions build on existing agreements on working time for Crown Servants, which the trade union of teachers is a signatory to and, finally, because the provisions to a large extent are a natural extension and continuation of what the parties had already agreed to.

Analytical part

This is an important development in national law. The ordinary courts apply a flexible interpretation of what constitutes a collective agreement in order to satisfy the Working Time Directive requirements to adequate protection of workers with regard to procedures allowing derogations from daily and weekly rest periods.

The ruling, in theory, opens the possibility for limitations of daily and weekly rest periods by legislation, for employees covered by collective agreements signed by trade unions that are party to the original agreement on working time for Crown Servants. This would impact large groups of public employees.

However, the ruling also takes into consideration that there was no evidence before the court that the provisions in legislation had been applied to an extent that exceeded the existing agreement on working time for Crown Servants.

The entire collection of cases following the wake of the 2013 lockout is a sensitive matter in Denmark. There are probably no likely implications for the EU *aquis*. The Supreme Court's assessment of the provisions by law being the same as the provisions by agreement is very specific for this case, and the assessment draws lines to several elements of collective agreements, including former agreed derogations from the Working Time Directive. As such, the case is assessed to lie within the margin of the Member States to apply the provisions, and in this, within the margin of interpretation what is a collective agreement, specifically left to the Member States.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The concept of workers in Danish law is aligned with the concept of workers as applied by the CJEU in the Working Time Directive. In Denmark, rescue personnel such as ambulance assistants, ambulance nurses, paramedics, firefighters and rescuers, automobile assistance and roadside emergency assistance are covered by the collective agreements for rescue personnel, and the agreements expressly state that these workers are subject to the provisions of the Directive on Working Time.

For persons not covered by a collective agreement, the Act on Working Time provides limits in relation to weekly working hours and requirements of daily breaks. The Act on Working Time applies to *'a person receiving remuneration for the performance of personal work in an employment relationship'*, cf. section 2(1). There is no minimum amount of weekly working hours as a threshold for the application of the Act. The Act also applies to part-time employees.

The Act applies to rescue workers. The provisions on daily breaks, section 3, and limitations to night work, sections 5-7, do not apply to mobile workers employed by a company performing goods and passenger transports by air or by road, cf. section 2(2). The provisions on maximum weekly working time, section 4, apply to all types of workers.

The Act on Occupational Health and Safety regulates daily and weekly rest periods. The Act applies to *'work performed for an employer'*, cf. section 2(1). There is no minimum threshold for the application of the Act, nor with regard to weekly working hours or even with regard to remuneration, cf. section 2(4).

The scope of the act is the broadest with regard to the definition of worker in Danish law. Exemptions include work performed in private households, work performed by members of the employer's family which are part of the employer's household, and work performed by military personnel in military service, cf. section 2(2). Sections 50-58 provide regulations on daily and weekly rest periods. Automatic exceptions, sections 50(3), 51(2), and 54, do not apply to rescue personnel. Limitations can be permissible under certain criteria, cf. sections 50(2), 51(3), 52, 53 and 55. If limitations have been accepted, it is a requirement for the workers to receive adequate compensatory rest periods, or adequate protection in the unlikely case that the given circumstances do not allow for compensatory rest periods.

The Minister of Employment has issued an executive order on daily and weekly rest periods (2002).

The CJEU ruling C-518/15 *Matzak* is not considered to have an influence on the personal scope of the Act on Working Time or the Act on Occupational Health and Safety implementing the Working Time Directive. Nor does it influence the personal scope of the protection found in collective agreements. This refers to the qualification as a part-time or full-time employee and in relation to being employed as a rescue worker.

Standby time for rescue personnel is (now) counted under national law towards the maximum weekly working time and against minimum rest periods

The executive order on daily and weekly rest periods states that standby time performed at the workplace counts as working time, whereas standby time performed at home counts as a rest period, until it is interrupted by a call for work. The Danish Working Environment Authority, *Arbejdstilsynet,* can give dispensation to agreements for rescue personnel with regard to reductions of the daily rest periods and move the weekly rest periods.

In 2011, a rescuer employed by Falck, which at the time had a near monopoly over rescue services in Denmark, claimed that Falck had violated the EU Directive on Working Time. The case was settled before reaching the courts.

In 2012, the Danish Working Environment Authority issued orders to employers of employees, drivers and officers performing on-call duties. The order established that the provisions on daily and weekly rest periods should be upheld for personnel performing on-call duties. The case was upheld by the Appeals Board for Working Environment.

This created awareness of the need to align collective agreements and approvals of the Danish Working Environment Authority of agreements using the options of deviating from the rules.

The Working Environment Authority has approved a model for 24-hour shifts for rescue personnel, whereby a 24-hour shift is considered 24 hours of work for both working time and rest periods. The agreement establishes that rescue workers can work 92 24-hour shifts per year, i.e. an average weekly working time of 48 hours per week. Additionally, the agreement establishes that during the 24-hour period, ambulance drivers are only allowed to drive ambulances - including emergency drives – for 8.5 hours distributed over the 24-hour period.

The new collective agreement for rescue workers (2017-2020) establishes that when working a 24-hour-shift, the rescue worker will automatically have to end her shift after having completed 13 hours of (actual) work. This means that since 2017, firefighters agreements limit their shifts to maximum 13 hours of (actual) work.

The Danish state of law is considered to be in line with the CJEU ruling in terms of what counts as working hours under the Working Time Directive.

Due to the recent awareness of the issue by the social partners and national courts and the ensuing amendments to the collective agreements and case law under the Act on Occupational Health and Safety, the case is assessed as having a consolidating impact on the working time of national firefighting/civil protection services.

Sources:

A press release on the case against Falck is available here.

The Executive Order on daily and weekly rest periods (2002) is available here.

The Statement of the Danish Working Environment Authority on on-call duty and rest periods (1997) is available here.

The Collective Agreement of Rescue Personnel between 3F and Falck is available here.

The Collective Agreement for Rescue Personnel between 3F and Response is available here.

The Collective Agreement for Rescue Personnel between 3F and BIOS is available here.

4 Other relevant information

4.1 New Statutory Act prohibiting discrimination on the grounds of disability

Disabled persons have been entitled to protection against discrimination in employment since 2004, with the implementation of Directive 2000/78 on Equal Treatment. This new Act protects against discrimination on the grounds of disability in all areas of society.

This is the third criteria for general protection against discrimination in all areas of society. Other criteria are race and ethnicity, and gender.

It is a significant development in Danish discrimination law and will possibly influence access to employment of disabled persons.

4.2 Freedom of expression of employees

Ombudsman statement FOB 2018-12

A local municipality issued a warning to an employee for a critical statement published in a Facebook group for employees in the home-care section of the local municipality. The statement spread to persons outside the group of home-care employees. The statement was critical about a manager's verbal aggression and use of improper language against the employee, about several alleged complaints against that manager, and about the employer being concerned about the poor working environment in the home-care section due to complaints.

The local municipality issued a written warning to the employee, because the statements were unnecessarily critical and came across in a negative and rude tone, and because of the undocumented allegations of several complaints about the manager and the working environment.

The local municipality had recommended employees to use internal channels for criticism before publicly making critical statements.

The Ombudsman stated that the Ministry of Justice Guidelines for public employees' freedom of expression include a right to criticise the conditions at the workplace, but not in an unreasonable rude way. Likewise, it is not within the freedom of expression to make clearly untrue statements about the conditions within one's own area of work.

The Ombudsman found that the employee's statements on the experience of verbal aggression lied within the freedom of expression. The fact that the employee regretted and apologised for making the statements afterwards cannot lead to a different assessment of the scope of the freedom of expression in this case. The Ombudsman also found that the statements about several other complaints were also within the freedom of expression, as objective circumstances could indicate the truthfulness of such allegations.

A public employee is not required to first use internal channels to criticise the conditions at work before publicly criticising the working conditions. It may be more appropriate and suitable to improve the working conditions and to preserve future relationships at work. The employer cannot state that this is a requirement. This is clearly stated in the Guidelines issued by the Ministry of Justice.

The Ombudsman found that the employee's freedom to choose public criticism should have been observed more clearly by the employer. The Ombudsman concluded that the disciplinary sanction of a warning was unlawful.

Estonia

Summary

(I) An analysis of CJEU case C-518/15, *Matzak* is provided.

(II) In Estonia, the monthly average wage has increased. The trade unions and employers have started negotiations to determine a new monthly minimum wage.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and concept of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

This case concerned the meaning of working time and rest periods as well as that of so-called 'standby time'.

The second question was whether 'volunteers' could be considered workers, taking the circumstances of the case into account.

Rescue services in Estonia are regulated in the Rescue Act. According to section 32 of the Rescue Act, a rescue volunteer is a person who voluntarily participates in rescue services or in the prevention of disasters on the basis of and pursuant to the procedure provided by law. A rescue volunteer shall follow the principle of lawfulness, proportionality and expediency. She shall apply necessary measures to persons posing a threat or who are in danger.

The Rescue Act does not regulate the activity of rescue volunteers as workers. Taking into account the circumstances of the case mentioned above, it is not excluded that for the purpose of the Working Time Directive, the volunteers in Estonia may be deemed to be workers. According to the case law of the Estonian Supreme Court, there have thus far not been any cases in which a volunteer was counted as a worker. The impact of this decision may therefore be important.

The regulation of so-called standby time is established in section 48 of the Employment Contracts Act. According to this section:

- If an employee and an employer have agreed that the employee shall be available to the employer for the performance of duties outside of working time (on-call time), remuneration, which is not less than one-tenth of the agreed wages, shall be paid to the employee (See also *Töö- ja puhkeaeg, Tööinspektsioon*, 2016, available in Estonian here).
- An agreement on the application of on-call time, which does not guarantee the employee the possibility of using daily and weekly rest periods, is void.
- The part of the on-call time during which the employee is subordinated to the management and control of the employer is considered working time.

- The on-call time is neither considered working time nor a rest period. It is nonetheless necessary to guarantee the daily and weekly rest periods. This sets limits for the maximum working time and for the minimum rest period.

The *Matzak* case and the definition of standby time it provides may have an impact not only on the rescue services but also on other economic activities.

4 Other relevant information

4.1 Monthly minimum wage

Trade unions and employers' representatives have started negotiations to establish a new monthly minimum wage. The aim is to conclude a new state-wide agreement by the end of September 2018 on a new monthly minimum wage. The minimum wage will entail the monthly as well as the hourly minimum wage.

According to the agreement reached last year, the trade unions and the employers' representatives will start new negotiations after the Bank of Estonia has published its forecast for economic growth.

The possible level of minimum wage will be based on forecasts of economic growth. In 2018, the monthly minimum wage is EUR 500 gross. The minimum hourly wage is EUR 2.97.

4.2 Monthly average wage has increased

In the first quarter, the average monthly wage was EUR 1,242 gross. Compared to the first quarter of 2017, the increase has been 7.7 percent. In January, the monthly average wage was EUR 1,220, in February EUR 1,213 and in March EUR 1,295 (see also here).

The average wage per hour was EUR 7.38, the increase compared to the previous year (2017) is 3.5 percent.

The monthly average wage was the highest in state agencies and companies (EUR 1,537 gross) and in companies owned by foreign capital (EUR 1,510).

The highest average in the region was in northern Estonia (EUR 1,386) and lowest on islands (EUR 896).

According to economic activity, the highest monthly average wage was in the finance and insurance sector (EUR 2,196) and the lowest in the accommodation and catering sector (EUR 809).

Finland

Summary

(I) The Supreme Court has issued a remarkable judgment on discrimination on grounds of disability.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Discrimination on grounds of disability

Supreme Court ruling KKO: 2018:39 of 18 May 2018

In the present case, the claimant, a bus driver, had been working for a bus company from 16 March 2011 to 31 July 2012. The parties had concluded three nearly successive employment contracts for fixed-term contracts. Once the last contract came to an end, the company did not offer a new contract to the driver.

The occupational health care provider had not issued a doctor's certificate for the claimant as being "suitable for the task", because the claimant was seriously overweight. The claimant's obesity met all the criteria of a disease, classified in the international disease classification (ICD) of the World Health Organization.

The Supreme Court stated that obesity can be considered a disability, and thus represent a ground for discrimination. In its case C-354 *Kaltoft*, the European Court of Justice considered obesity as a restriction for normal participation in the employment market.

The Supreme Court decided that the company had discriminated the claimant. The company should have organised an occupational health clarification and only thereafter make a decision about the claimant's capacity to perform the tasks of a bus driver.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

In Finland, the Working Hours Act does not cover volunteers. The Act is only applied to persons working under an employment contract (1:1) as regulated in the Employment Contracts Act (1:1).

Standby time is not counted under Finnish law towards the maximum weekly working time and against minimum rest periods (6:29).

It does not seem that case C-518/15, *Matzak* will have any direct impact beyond the firefighting/civil protection sector. In *Matzak*, the CJEU stated that the 8-minute standby time is so restrictive that the standby time must be regarded to be working time. In KKO 2015:49, the standby time was 15 minutes, which is nearly double that time. In KKO 2015:48, the standby time was 5 minutes, and the Supreme Court decided that the timeline was so restrictive that this time was to be regarded as working time. This is in line with the *Matzak* case.

The Working Hours Act also states that standby time must not unreasonably restrict the employee's leisure time (2:5). In practice, this means that if the standby time unreasonably restricts the employee's leisure time (as in the *Matzak* case or KKO 2015:48), it cannot be regarded as standby time but as working time.

4 Other relevant information

4.1 Reforms in the areas of social and health care

A fundamental reform plan (see also March Flash Report) concerning social and health care (*Sosiaali- ja terveydenhuollon uudistus, Sote*) is still in the making, and it looks like Parliament will not confirm the project before the summer holidays. The arguments concerning the pros and cons of the reform are continuously being presented by the politicians, and no consensus has yet been found – even with regard to the basic questions.

The plan is to hold an election on the new social- and health area. The election was planned for October this year, but time is running out.

France

Summary

(I) The Labour Ministry has issued two publications. One is on the Social and Economic Committee and its operations and provides some answers to legal questions. The other publication is on contractual collective terminations.

(II) A number of national rulings that deal with fixed-term work, information and consultation of employees and gender equality are analysed.

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Social and Economic Committee

On 19 April 2018, the Labour Ministry published 100 questions and answers on the Social and Economic Committee on its website.

This document reflects the content of Ordinance No. 2017-1386 of 22 September 2017. However, some specifications are highlighted.

These questions and answers have informative purposes only and no normative force.

1.1.1 Transitional period until 31 December 2019

Several extensions and reductions are possible

To give companies the necessary time to apply the new rules on social dialogue, the Ordinances postulate that the employer may reduce or extend the current mandates during the transitional period for a maximum of one year (until 31 December 2019). The question is: can the employer in this case decide several extensions of the mandates of less than one year?

According to the Ministry of Labour, there is no limitation to the number of extensions or reductions of the mandates during the transitional period. The provisions only restrict the total duration of the extensions or reductions of the mandates, limiting it to one year.

Extensions of the mandates which came to an end between 23 September and 31 December 2017

Concerning those representatives whose mandates ended between 23 September and 31 December 2017, the automatic extension of the mandates until 01 January 2018 provided by the Ordinances is not taken into account to assess the maximum duration of the mandates' extension which the employer can impose.

Non-proceedings minutes

The Ministry of Labour asserts that when non-proceedings minutes were established before the date of publication of the Ordinances, they keep their normative force for the duration of the mandates of the respective election.

For example, if non-proceedings minutes were established on 03 June 2015 and if the mandates last four years, these minutes are valid until 03 June 2019.

Protective status

During the transitional period, the representatives will benefit from a protective status under the same conditions as before the publication of the Ordinances, which means

that during the six months after the end of the mandates, they are protected by special rules; their dismissal must be authorised by the labour inspector.

1.1.2 Implementation of the Social and Economic Committee and proximity representatives

Bargaining with the Social and Economic Committee of the collective bargaining agreement implementing it

If a trade union representative exists in the company, the number and scope of the separate establishments can only be negotiated with the union representative. Negotiating with the Social and Economic Committee is not possible, even in case of failure of the negotiations.

Appointment of proximity representatives by the Social and Economic Committee

Only the Social and Economic Committee can decide to institute proximity representatives. The collective bargaining agreement cannot provide that the proximity representatives are appointed by the representative trade unions among the company's employees or directly by the employees.

1.1.3 Composition of the Social and Economic Committee

Modification of the number of elected representatives and/or the number of delegation hours

It is possible to provide a number of elected representatives which is lower than the number determined in the Labour Code if the number of delegation hours in each college does not decrease.

The questions and answers document provides an example: if the company counts 180 employees, there are 9 elected members of the Social and Economic Committee with 21 delegation hours per month (189 delegation hours overall). The pre-election agreement can reduce the number of elected members to 7 and increase the number of delegation hours to 27 (27 x 7 = 189).

Number of representatives to elect

The number of representatives to elect is determined according to the total workforce of the company on the first ballot.

1.1.4 Organisation of elections at the Social and Economic Committee in the absence of candidates

The question is: if there is no candidate for the elections, does the employer have to continue the electoral process?

The Ministry of Labour states that the answer depends on the size of the company:

- In companies with 11 to 20 employees, professional elections do not need to be organised (Labour Code, Article L. 2314-5). The employer establishes non-proceedings minutes;
- In companies with more than 20 employees, the employer must invite the trade unions to negotiate a pre-electoral agreement. At the end of the electoral process, if there is still no candidate on the first and second ballot, non-proceedings minutes are established.

1.1.5 Appointment of union representative

The union representative must be appointed among the candidates in the professional elections who collected 10 percent of the votes cast at the first ballot of the last elections.

However, a trade union can appoint its union representative among its other candidates when all elected members who obtained at least 10 percent of the votes cast reject an appointment as union representatives.

1.1.6 Restriction on the number of successive mandates

The restriction of three successive mandates at the Social and Economic Committee is applicable from the first mandate as a member of the Social and Economic Committee.

1.1.7 Competence of establishments' Social and Economic Committees

The competence of establishments' Social and Economic Committees is determined based on the total workforce of the company and not of the establishment.

In an establishment with less than 50 employees belonging to a company with more than 50 employees, the establishment's Social and Economic Committee has the competence of the Social and Economic Committee of companies with more than 50 employees.

1.1.8 Delegation hours

Counting of time spent in meetings

The Ministry of Labour asserts that the time spent in meetings of the Social and Economic Committee is not deducted from the delegation hours.

However, time spent in meetings of commissions is not deducted from the limit of 30 hours per year in companies between 300 and 1,000 employees and 60 hours per year in companies with more than 1,000 employees.

Distribution of delegation hours

Pursuant to Article L. 2315-9 of the French Labour Code, titular members of the Social and Economic Committee can distribute their delegation hours among each other every month. Proximity representatives can benefit from this distribution.

1.1.9 Health and security training

For all members of the Social and Economic Committee, health and security training lasts at least 5 days in companies with more than 300 employees and 3 days in companies with less than 300 employees.

1.2 Contractual collective termination

Ordinance No. 2017-1387 of 22 September 2017 created "the Contractual Collective Termination", enabling the termination of employment contracts through a negotiated collective bargaining agreement (Labour Code, Article L. 1237-17 *et seq*). The content of the voluntary contractual resolutions plan is determined by collective bargaining agreement, which is submitted to the Administration for validation. These voluntary contractual resolutions plans are autonomous from social plans: the contractual resolutions are determined on a voluntary basis and exclude any layoffs.

On 19 April 2018, the Labour Ministry published 25 questions and answers on its website. This document only has informative character.

1.2.1 No specific economic context to negotiate a contractual collective termination

The negotiation of an agreement implementing a contractual collective termination does not require the existence of economic difficulties.

The Ministry of Labour specifies that the contractual collective termination is not connected to the dismissal based on economic reasons and does not have to be based on an economic ground as defined in Article L. 1233-3 of the French Labour Code.

1.2.2 Contractual collective terminations do not cancel out the autonomous voluntary departure plans

Contractual collective terminations are different from autonomous voluntary departure plans.

First, a contractual collective termination must be implemented by a collective bargaining agreement. An autonomous voluntary departure plan can, on the contrary, be negotiated in the context of a redundancy plan or be unilaterally implemented. In that case, the employer does not have to prove the existence of an economic ground defined in Article L. 1233-3 of the French Labour Code to propose a contractual collective termination.

These are the reasons why the Ministry of Labour clearly specifies in the questions and answers document that the contractual collective termination is a new regime which does not substitute the previous regimes. An autonomous voluntary departure plan can be implemented.

1.2.3 No simultaneous implementation of a contractual collective termination and a redundancy plan for the same workforce reduction plan

The objective of a contractual collective termination is to facilitate the planning of employment and to adapt employees' skills to the company's development. The goal is furthermore to conclude a collective bargaining agreement allowing the employees to choose voluntary departure.

The contractual collective termination cannot be implemented in the same time as a redundancy plan in the context of the same workforce reduction project, as it is not linked to any economic ground and the removal of posts.

1.2.4 From a contractual collective termination to a voluntary departure plan

A company can negotiate a contractual collective termination agreement and ultimately decide to implement a voluntary departure plan in case the situation develops differently. In that case, the Ministry of Labour asserts that the employer will have to restart the redundancy proceeding.

Likewise, the negotiation of a voluntary departure plan may evolve into a contractual collective termination agreement.

2 Court Rulings

2.1 Fixed term work

Labour Division (Chambre sociale) of the Court of Cassation, No. 16-20.423, of 09 May 2018

Factual part

In this ruling, the Court of Cassation dealt with a case in which a protected employee, who was an adviser before the French Labour Tribunal ("*Conseil de prud'hommes*"), had concluded an initial fixed-term contract with a company in 2009, followed by several contracts up to 2012. The employer then decided to not renew the last contract which included a renewal clause.

The employer requested authorisation from the labour inspector, in accordance with Article L. 2412-13 of the French Labour Code.

The non-renewal was initially refused by the labour inspector, but the Ministry authorised it. The employee then initiated legal action before the French Labour Tribunal and claimed reclassification of her first fixed-term contract into one of indefinite duration.

Analytical part

The Court of Appeal rejected the reclassification of the first fixed-term contract into one of indefinite duration. It stated that it could not assess the reality and the seriousness of the reasons for the administrative authority to authorise the termination of the employment contract without violating the principle of the separation of powers.

According to the employee, the administrative authority only considered the last fixed-term contract, whereas she had requested the reclassification of her first fixed-term contract.

The Court of Cassation rejected the reclassification, stating that the judicial judge cannot, without violating the principle of the separation of powers, make a decision on a reclassification of a fixed-term contract into one of indefinite duration in the presence of an administrative authorisation of non-renewal of a fixed-term contract. The request of reclassification was inadmissible:

> *"Mais attendu que le juge judiciaire ne peut, sans violer le principe de séparation des pouvoirs, en l'état d'une autorisation administrative de non-renouvellement d'un contrat à durée déterminée en application des articles L. 2412-13 et L. 2421-8 du code du travail devenue définitive, statuer sur une demande de requalification du contrat de travail à durée déterminée en un contrat de travail à durée indéterminée"*

The Council of State previously held that in case of a request for authorisation of non-renewal of a fixed-term contract, the labour inspector must check the nature of the employment contract (Council of State, 06 May 1996, N°146161). The administration must evaluate the entire employment relationship and not only the last employment contract.

The administration authorised the termination of the employment contract because it considered that there was no scope for reclassification into a contract of indefinite duration. The judicial judge cannot make a decision on the same aspect because of the principle of separation of powers.

2.2 Information and consultation of employees

Labour Division (Chambre sociale) of the Court of Cassation, No. 16-27.866 of 12 April 2018

Factual part

In this ruling, the Court of Cassation ruled in a case that took place in 2016, when a bank decided to introduce an artificial intelligence app to automatically answer questions.

The Health, Safety and Work Conditions Committee asked for the opinion of an expert, on whether this change had an impact on the employees' working conditions, since this new software could change the job descriptions of the employees in the agencies.

Analytical part

As a reminder, Article L. 4614-12 of the French Labour Code provides that the Health, Safety and Work Conditions Committee can ask experts for advice in case an important project could modify the health, security and work conditions in the company .

The Court of Cassation annulled the Health, Safety and Work Conditions Committee's deliberation, holding that this new software would help the employees sift through the mails by priority order. The app also made it possible to respond directly to clients by proposing adapted answers according to the question asked.

The Court of Cassation held that the impact on the work conditions was low, i.e. the implementation of this software did not constitute an important project. The Health, Safety and Work Conditions Committee could not, therefore, request expertise advice:

> *"Mais attendu qu'ayant relevé que l'introduction du programme informatique Watson va aider les chargés de clientèle à traiter les abondants courriels qu'ils reçoivent soit en les réorientant à partir des mots clés qu'ils contiennent vers le guichet où ils pourront être directement traités en raison des compétences préalablement définies par le chef d'agence au vu de la demande, soit en les traitant par ordre de priorité en raison de l'urgence qu'ils présentent et qui leur sera signalée, soit encore à y répondre d'une manière appropriée en proposant une déclinaison de situations permettant d'adapter sans oublis la réponse à la question posée, qu'elle se traduit donc directement en termes de conséquences mineures dans les conditions de travail directes des salariés dont les tâches vont se trouver facilitées, le président du tribunal de grande instance, qui n'était pas tenu de suivre les parties dans le détail de leur argumentation, a pu en déduire que l'existence d'un projet important modifiant les conditions de santé et de sécurité ou les conditions de travail des salariés n'était pas démontrée et a annulé à bon droit la délibération du CHSCT désignant un expert ; que le moyen n'est pas fondé"*

2.3 Gender equality in trade union's elections

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-60.133 of 9 May 2018

Factual part

A trade union (CFDT) presented its list of alternate candidates for the election of a single staff delegation of an association in February 2017. This trade union won all the seats to be filled.

Another trade union (FO) claimed that CFDT presented two women at the top of the list of alternate candidates and did not respect the alternation of women and men rule. As

the first candidate on the list was a woman, the second candidate had to be a man. Therefore, FO claimed the annulment of the mandate of the second woman on the list.

Analytical part

As a reminder, Article L. 2314-30 of the French Labour Code states that the list of candidates must be composed alternatively by a man and a woman until there is no candidate of one of the two sexes.

In case of violation of this rule, the mandate of the candidate who is wrongly placed on the list of candidates is null (Labour Code, Article L.2314-32).

However, the Court of Cassation held that in this case, the circumstances of the elections justified an annulment of the mandate of the alternate candidate. The election is not null when gender representation is respected. In this case, there was the same number of women and men in the list and all the candidates were elected, hence the gender representation was respected:

> *"Mais attendu que la constatation par le juge, après l'élection, du non-respect par une liste de candidats de la règle de l'alternance prévue par la deuxième phrase du premier alinéa de l'article L. 2324-22-1 du code du travail entraîne l'annulation de l'élection de tout élu dont le positionnement sur la liste de candidats ne respecte pas ces prescriptions, à moins que la liste corresponde à la proportion de femmes et d'hommes au sein du collège concerné et que tous les candidats de la liste aient été élus ;*
>
> *Et attendu qu'ayant constaté que tous les candidats de la liste du syndicat CFDT avaient été élus et que cette liste représentait la proportion de femmes et d'hommes au sein du collège unique, le tribunal a statué à bon droit"*

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The CJEU considered that there was no derogation authorising the employer to not apply Directive 2003/88/EC on the organisation of working time to volunteer firemen.

In the Court's opinion, the determining element to qualify the working time according to Directive 2003/88/EC is the fact that the employee must be physically present in a place determined by the employer and to remain there in order to work in case of necessity.

Under French legislation, volunteer firefighters benefit from a particular status established in Law No. 2011-851 of 20 July 2011 and by the Internal Security Code. The Labour Code is not applicable to volunteer firefighters (Law No. 2011-851, 20 July 2011, Article 3), which means that provisions related to working time do not apply to them.

However, the CJEU held that Directive 2003/88/EC concerning certain aspects of the organisation of working time is applicable to volunteer firefighters. When on-call periods are considered as working time, they must be taken into account to calculate the total working hours. Maximum hours of work and minimum hours of rest must be respected.

Nevertheless, these on-call periods are not taken into consideration to calculate wage, as Directive 2003/88/EC is only about health and security.

To determine whether an on-call period constitutes working time or not, French legislation considers that on-call periods without being called for work are rest periods, without distinguishing whether the employee can pursue her personal interests during that time. Indeed, since Law No. 2016-1088 of 8 August 2016, Article L. 3121-9 of the

French Labour Code defines on-call periods as a period during which the employee, without being at the workplace and without being at the employer's permanent and immediate disposal, must intervene in order to perform work for the company.

The Court of Cassation deems that only an intervention is considered effective working time. When an employee had to be reachable to answer a phone call of her employer to perform an urgent task, these periods of time are on-call periods which are not considered effective working time:

> *"Mais attendu que, selon l'article L. 3121-5 du code du travail constitue une astreinte la période pendant laquelle le salarié, sans être à la disposition permanente et immédiate de l'employeur, a l'obligation de demeurer à son domicile ou à proximité afin d'être en mesure d'intervenir pour effectuer un travail au service de l'entreprise, la durée de cette intervention étant considérée comme un temps de travail effectif ; qu'ayant constaté que le salarié était tenu durant les périodes litigieuses de pouvoir être joint téléphoniquement en vue de répondre à un appel de l'employeur pour effectuer un travail urgent au service de l'entreprise, la cour d'appel, sans avoir commis la dénaturation alléguée, a pu décider que les périodes litigieuses constituaient des périodes d'astreintes"*
>
> Labour Division (Chambre sociale) of the Court of Cassation, No. 14-14.919 of 02 March 2016

The Court of Cassation also held that the travelling time in order to intervene constitutes effective working time:

> *"Mais attendu que selon l'article L. 212-4 bis du code du travail, une période d'astreinte s'entend comme une période pendant laquelle le salarié, sans être à la disposition permanente et immédiate de l'employeur, a l'obligation de demeurer à son domicile ou à proximité afin d'être en mesure d'intervenir pour effectuer un travail au service de l'entreprise, la durée de cette intervention étant considérée comme un temps de travail effectif ; qu'il en résulte que le temps de déplacement accompli lors de périodes d'astreintes fait partie intégrante de l'intervention et constitue un temps de travail effectif"*
>
> Labour Division (Chambre sociale) of the Court of Cassation, No. 06-43.834 of 31 October 2007

The European Committee of Social Rights challenged the French legislation, considering that the equalisation of on-call periods without intervention with rest periods violated the right to a reasonable working time and was not consistent with Article 2.1 of the European Social Charter of 1996.

In the *Matzak* case, the CJEU assessed, *in concreto,* the freedom or constraints of the volunteer firefighter during on-call periods. As he had to be reachable and intervene within eight minutes in case of necessity, the on-call periods constituted effective working time which had to be taken into account to calculate respect for the maximum working hours and the minimum hours of rest.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) A number of court rulings on different topics are analysed.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Work Councils

Federal Labour Court – 7 ABR 60/16, 23 May 2018

Under section 54(1) sentence 1, 52 (2) of the Works Constitution Act (*Betriebsverfassungsgesetz*), in groups of companies within the meaning of section 18(1) of the Stock Corporation Act (*Aktiengesetz*), a so-called group works council can be established by way of resolution of the general works councils or works councils. In the view of the Federal Labour Court, the prerequisites for the establishment of a group works council are not met if the controlling company is domiciled abroad (Switzerland, in the underlying case) and if there is no sub-group headquartered in Germany that has significant decision-making powers in personnel, social and economic matters.

Source:

A press release of the Federal Labour Code's decision is available here.

2.2 Maternity benefits

Federal Labour Court – 5 AZR 263/17, 23 May 2018

If an independent nanny, who, according to sections 22 et seq, § 43 of the Social Code (*Sozialgesetzbuch*) VIII cares for children in a child day care centre as a day care provider, becomes pregnant, she is not entitled to a subsidy for maternity benefits (*Zuschuss zum Mutterschaftsgeld*) under the Maternity Protection Act (*Mutterschutzgesetz*). Nothing else results from EU law.

In the view of the Court, the day care provider did not qualify as an employee of the district which runs the day care centre, since she was not subject to instructions from the district. Moreover, no claim could arise under Directive 2010/41/EU as the Directive was not sufficiently precise in defining the debtor. According to the Court, the same was true with regard to the UN Convention of Women's Rights.

Source:

A press release of the Federal Labour Court is available here.

2.3 Holidays

Federal Administrative Court – 8 C 13.17, 09 May 2018

According to a ruling of the Federal Administrative Court, holiday days, even if they exceed the statutory minimum holiday days, may not be considered as compensatory days when calculating the average maximum working time under the Working Hours Act (*Arbeitszeitgesetz*). In the view of the Court, this position is in line with EU law, since the Working Time Directive requires Member States to ensure a minimum standard without excluding any other national standards that improve that standard.

Source:

A press release of the Federal Administrative Court's decision is available here.

2.4 Privacy

State Labour Court Thuringia – 6 Sa 442/17 and 6 Sa 444/17, 16 May 2018

In the underlying case, a municipal employer changed the existing rules on on-call work to set up an emergency service. In this context, he asked his employees to provide him with their private mobile phone numbers to ensure that he was able to reach them in an emergency, even if they did not work on-call.

The Court ruled that an employee does not have to provide the employer with her private mobile phone number to secure an emergency service outside on-call duty. In the view of the Court, an obligation of the employee to inform the employer about a private telephone number constitutes a significant interference with the right to informational self-determination (derived by the Court from Articles 1 and 2 of the German Constitution), which is not justified when balancing the mutual interests.

Source:

A press release commenting the case is available here.

2.5 Rights of the employee

State Labour Court Düsseldorf – 7 Sa 278/17, 09 May 2018

In the underlying case, the plaintiff was employed by the defendant, a firm that offered hotel services. He was a so-called room-boy who cleaned guest rooms and suites in a hotel. The defendant paid the employees the applicable minimum wage. The employment contract stipulated that the working hours were based on the service and operational plans.

According to the Court, this stipulation was null and void, however, as it would unilaterally shift the so-called business risk to the employee and allow a working time of 0 to 48 hours per week. According to the Court, the plaintiff could base his pay claim of section 615 sentence 3 of the Civil Code.

Section 615 reads as follows: *"If the person entitled to services is in default in accepting the services, then the party owing the services may demand the agreed remuneration for the services not rendered as the result of the default without being obliged to provide cure. However, he must allow to be credited against him what he saves as a result of not performing the services or acquires or wilfully fails to acquire through use of his employment elsewhere. Sentences 1 and 2 apply with the necessary modifications in cases in which the employer bears the risk of loss of working hours."*

Source:

A press release commenting the case is available here.

2.6 Co-determination

District Court Dortmund – 18 O 71/17 [AktE], 22 February 2018

The Codetermination Act (*Mitbestimmungsgesetz*) of 1976 requires that half of the members of the supervisory board of directors are employee representatives. According to section 1 of the Act, the law applies to all corporations with more than 2,000 employees.

According to the District Court, the threshold covers employees of a group employed in Germany. When determining the threshold of 2,000 employees, neither the employees employed in foreign companies of a German group nor the employees employed by the group's foreign subsidiaries are to be included. In the view of the Court, this is in line both with the German Constitution and Article 45 of the TFEU. With regard to the latter, the Court explicitly referred to the ruling of the CJEU in case C-566/15, *Erzberger,* of 18 July 2017.

Source:

The ruling is available here.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive

According to the CJEU, volunteers may qualify as 'workers' for the purpose of the Working Time Directive. It is acknowledged in Germany, that the term 'workers' is defined autonomously and at the same time comprehensively (see, for instance, Gallner, in: Franzen/Gallner/Oetker, *Kommentar zum europäischen Arbeitsrecht*, 2nd. ed, 2018, Art 1 RL 2003/88/EG 580, note 37). Several commentators have emphasized that the courts will have to base their rulings on the notion of worker as substantiated by the CJEU (see, for instance, Krimphove: *Der Fall Matzak – Europäische Definitions-Prärogative arbeitsrechtlicher Begriffe?*, in: ArbRAktuell 2018, p. 137)

Standby time in national law counts towards the maximum weekly working time and against minimum rest periods.

As regards the qualification of standby time as working time, it has been argued that although there are major dogmatic differences, German law "is not too far from this line" [the line developed by the CJEU] (see Bayreuther, *Rufbereitschaft als Arbeitszeit?*, in: NZA 2018, 358 (350); similarly Sagan, NJW 2018, 1073 referring to Federal Labour Court of 31.01.2002 – 6 AZR 214/00).

Impact beyond the firefighting/civil protection sector

It has been argued that the ruling will significantly impact the members of voluntary fire departments. It has also been argued that the conceivable transfer of the decision's rationale to all 'volunteers' will make it even more important (see again Krimphove: *Der Fall Matzak – Europäische Definitions-Prärogative arbeitsrechtlicher Begriffe?*,in: ArbRAktuell 2018, p. 137, also referring to the judgment of CJEU case C-175/16 *Hannele Hälvä* of 26.07.2017; the author rightly adds, however, that the CJEU has underscored in *Matzak* that Directive 2003/88 does not govern the question of workers' remuneration; see note 49).

4 Other relevant information

Nothing to report.

Greece

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

There do not seem to be any implications for Greek law with regard to the qualification of volunteer firefighters as 'workers' for the purpose of the Working Time Directive as they are not, pursuant to Greek legislation, remunerated.

In the Flash Report of March 2018 on the above judgment (see March 2018 Flash Report), the following was stated:

According to the Greek Supreme Court (1102/2009, 1352/2009), if the employee agrees to restrict her freedom in terms of time, maintaining her physical and mental faculty in her readiness to perform work (on-call duty), all the provisions of labour law, and particularly those concerning working time and minimum pay, are applied.

On the contrary, the abovementioned rules are not applied if the employee concerned is not required during the period of employment to maintain her physical and mental faculties in readiness. The worker's on-call time is not considered working time and the provisions stipulated in laws and collective agreements on minimum pay do not apply to such contracts. Only if the employee performs work is she entitled to minimum pay.

In the reporter's opinion, the judgment clarifies the issue of on-call work when the employee does not remain at the workplace, but is nevertheless at the disposal of the employer, who can contact her, even if the employee can manage her time with fewer restrictions and pursue her own interests. There are, therefore, indirect implications for Greek labour law.

4 Other relevant information

According to the Ministry of Employment, some amendments to the Labour Law are expected in June 2018 to meet Greece's latest obligations *vis-à-vis* creditors.

Hungary

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C 518/15, 21 February 2018, Matzak

Working time and rest periods are regulated in Act I of 2012 of the Labour Code (hereinafter: LC). The legal status of firefighters differs. A distinction is made between the legal status of voluntary firefighters, professional firefighters and firefighters who are employed by the local government or other employer.

Voluntary firefighters have set up associations. They perform their work within the scope of these associations. Voluntary firefighters associations help the work of professional firefighters within the scope of the cooperation agreement. The 2/2014 (I. 17.) General Director's Order of National Defence against Disaster regulates the conditions for intervention by voluntary firefighters. Section 11 of the Order regulates standby duty. Under this rule, voluntary firefighters are divided into two groups: interferer I and interferer II. Interferer I must perform a minimum of 4 500 hours, interferer II must perform a minimum of 3000 hours of standby duty per association. It should be noted that the activity of voluntary firefighters based on membership in firefighters' associations and on the cooperation agreement between the association and professional firefighters' authorities. The legal status of voluntary firefighters cannot be interpreted as an employee. Such activities are occasionally and charitable.

(The legal status of the voluntary firemen's association is regulated in Act XXXI of 1996 on the Fire Brigade.)

The legal status of local governments' fire brigades is a so-called public body, thus the legal status of firefighters who are employed by the local government or other employer is covered by the LC. Consequently, the working time and rest periods of such firefighters are regulated in the LC.

The concept of working time is found in Section 86 Sub 1: "'*Working time' shall mean the duration from the commencement until the end of the period prescribed for working, covering also any preparatory and concluding activities related to working*".

Section 112 regulates standby duty. According to this rule, the duration of standby duty may not exceed 168 hours a month, which shall be taken as the average in the event that a banking of working hours is used. The employee may be ordered to stand by no more than four times a month if it covers the weekly rest periods. In the collective agreement, any derogation from this rule is only allowed to the benefit of the employees.

The regulations for firefighters employed by another employer are the same as those employed by the local government.

The legal status of professional firefighters is regulated in Act XLII on the Legal Status of Professional Staff of Law Enforcement Bodies. Section 141 of this Act regulates standby duty. Under this rule, the service superintendent may require service delivery outside of regular working hours, at any station, and at any time. The duration of standby duty per month may not exceed 260 hours.

4 Other relevant information

Nothing to report.

Iceland

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Regarding the status of collective bargaining agreements and statutory law, the principle is that statutory provisions provide for a minimum that may not be derogated from to the detriment of the employee, unless statutory law explicitly permits such derogations. One example of this is specified in Article 53(2) of Act No. 46/1980, on working environment, hygiene and safety at work, which permits reductions of the daily rest time of eleven consecutive hours in total, cf. Article 53(1) of the Act, to eight hours based on an agreement between the social partners.

Under Icelandic law, volunteering is only permitted for charities and cultural or humanitarian activities. Volunteer work in economically active companies is not permissible. Therefore, whether someone is considered a 'worker' primarily depends on whether she participates in some activity other than charitable work or cultural or humanitarian activities. The Icelandic Association for Search and Rescue has many volunteers, for example, and Act No. 43/2003 on rescue forces and rescue teams regulates their work. However, the Act does not touch on working time and it is likely that volunteers would not be considered 'workers' under the Working Time Directive (Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time) as the Association is run on a voluntary basis. Thus, as a general rule, a volunteer would not be considered a 'worker' in Icelandic law for the purpose of the Working Time Directive.

Many collective agreements contain provisions on payments for standby time. For example, Art. 2(8) of the Collective Agreement between Business Iceland and the Commercial Federation of Iceland stipulates that for every hour a worker is required to stay at home and be ready to be called for work, she should receive 33 percent of her hourly wage. If she is not required to respond immediately but is ready to come to work immediately upon being reached, she receives half the above-mentioned wage. Such provisions are quite common in collective agreements in Iceland. However, the issue of standby time and whether it constitutes 'working time' or 'resting time' for the purpose of the Working Time Directive is not touched upon in the major collective agreements. From those sources one could infer that according to Icelandic labour law, standby time has not been considered 'working time' as stipulated in the Working Time Directive, Act No. 46/1980, on working environment, hygiene and safety at work, or the relevant collective agreements, and that standby time does not count towards the maximum weekly working time and against minimum rest periods.

However, it must be added that the issue has not been disputed in Iceland. In light of case C-518/15, *Matzak*, the issue should be brought up by the legislator and/or the social partners regarding what constitutes 'working time' and 'resting period' and what occupations could potentially be influenced by the judgment.

4 Other relevant information

Nothing to report.

Ireland

Summary

(I) The Minister for Business, Enterprise and Innovation has amended the Employment Permits Regulations to address labour shortages in the agri-food sector.

(II) Significant amendments have been made to the Employment (Miscellaneous Provisions) Bill.

1 National Legislation

1.1 Agriculture sector workers

The Minister for Business, Enterprise and Innovation has amended the Employment Permits Regulations 2017 (S.I. No. 95 of 2017), with effect from 21 May 2018, so as to temporarily remove horticultural workers, dairy farm assistants and meat processor operatives from the ineligible list for employment permits: Employment Permits (Amendment) (No. 2) Regulations 2018 (S.I. No. 163 of 2018). Quotas of 500, 50 and 250, respectively, are imposed. There is a requirement for the permit holders to have access to suitable accommodation and training (including language training) and a minimum remuneration threshold of EUR 22,000 for this group of workers.

1.2 Employment Bill reform

Significant changes have been made to the Employment (Miscellaneous Provisions) Bill 2017 by the Select Committee on Employment Affairs and Social Protection [see here]. The Bill seeks to ban zero-hours contracts and provides workers with the right to request more working hours. The reference period for consideration of working hours has been reduced from 18 to 12 months, and the bands of hours have been tightened. The Bill now provides for eight (not four) bands: Band A (3 hours or more, less than 6 hours); Band B (6 hours or more, less than 11 hours); Band C (11 hours or more, less than 16 hours); Band D (16 hours or more, less than 21 hours); Band E (21 hours or more, less than 26 hours); Band F (26 hours or more, less than 31 hours); Band G (31 hours or more, less than 36 hours); Band H (36 hours or more). This banded hours system will allow workers to move into a range of hours which better reflect the reality of the situation as opposed to what is in the contract.

Another amendment is to make it a criminal offence for an employer to deliberately or recklessly provide misleading information on an employee's statement of terms of employment.

The amendments have been welcomed by the trade unions but the employers' organisation (IBEC) has criticised them, saying that they represent "State micromanagement of contracts of employment".

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

For an analysis of case C-518/15, *Matzak*, see March 2018 Flash Report.

4 Other relevant information

Nothing to report.

Italy

Summary

In May, two Decrees by the Minister of Labour and Social Affairs were published in the Official Journal, one on financial incentives by the National Labour Inspectorate to fight undeclared work and one on the requirements a temporary work agency providing temporary workers has to meet to obtain authorisation or to keep its authorisation to operate as a temporary work agency.

1 National Legislation

1.1 Undeclared work

According to a Ministerial Decree of 6 March 2018 (published in the OJ on 22 May 2018), EUR 10 million raised from fines issued by the National Labour Inspectorate will be returned to finance the fight against undeclared work. The funds can be used for the purchase of instruments and as economic incentives for labour inspectors working in difficult situations.

1.2 Temporary agency work

According to a Ministerial Decree of 10 April 2018 (published in the OJ on 22 May 2018), to obtain authorisation or to keep a current authorisation to operate as a temporary work agency, the temporary work agency (hereinafter TWA) has to meet new personnel and structural requirements.

TWAs that provide temporary agency workers (hereinafter TAW) and placement services (Article 4(1) lett. a), b), c) Legislative decree No. 276 of 2003) shall employ at least 4 units of qualified personnel at headquarters, 2 in each establishment in which a person responsible shall be appointed. TWA providing recruitment and relocation services (Article 4(1) lett. d) and e) Legislative Decree No. 276 of 2003) shall employ at least 2 units of qualified personnel at headquarters, 1 in each establishment, who shall be appointed as the person responsible (Article 1(1) MD).

Qualified personnel include managers, supervisors or employees who have the necessary skills and two-year seniority in the relevant field of provision of TAWs, placement, recruitment or relocation services. To acquire such seniority, training courses organised by the regions can be taken into account. A two-year enrolment in the Labour Consultant register may substitute the two-year seniority requirement (Article 1(2), (3) and (4) MD).

TWA shall forward their organisational chart with the names and CVs of the qualified persons defined above to ANPAL. The organisational chart shall be accessible to clients (Article 1(5) MD).

As for the structural requirements, TWAs shall be provided with premises and accommodations adequate for the provision of services they offer to clients. In particular, premises shall be exclusively used by the TWA and shall fulfil urban development, building, health and safety and accessibility requirements. One responsible person, whose name shall be visible to clients, shall be at the premises. The opening hours shall be clearly indicated as well as the number of the relevant authorisation and the field(s) of activity for which the authorisation has been issued. TWAs shall have at least 6 establishments with counters open to the public (Article 2 MD).

As far as the provision of TAWs and placement services is concerned, TWAs shall be located in at least 4 regions of the country with premises open to the public for at least 20 hours a week, with at least two available operators (Article 2 MD).

Already authorised TWAs shall meet the mentioned requirements within one year from the issuing of the Ministerial Decree (22 May 2019) (Article 2 MD).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 New government

Italy has a new government since 01 June 2018. Luigi Di Maio has been appointed Vice Prime Minister and Minister of Labour and Social Affairs. The new government will stand for a confidence vote in Parliament in the days to come.

Latvia

Summary

(I) The Constitutional Court decided that unequal treatment of medics in comparison to other employees with regard to the right to increased pay for overtime work is unconstitutional.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

5 National Legislation

Nothing to report.

6 Court Rulings

6.1 Overtime work

Constitutional Court, No. 2017-15-01, 16 May 2018

On 10 May 2017, the Constitutional Court—in response to the application of the Ombudsperson—initiated a case on this matter, namely on the unequal treatment of medical personnel in comparison to other employees under Article 91 of the Constitution with regard to pay for overtime work.

Specifically, Article 53(2) and (3) of the Medical Treatment Law (Ārstniecības likums, OG No. 167/168, 1 July 1997, amendments in the Official Gazette No. 117, 13 June 2017, entered into force on 1 July 2017) stipulates that the normal working time of medics is extended or that their regular weekly working time is 60 hours per week, while the standard working time for all employees according to Article 131(1) of the Labour Code is limited to 40 hours per week (*Darba likums*, Official Gazette No. 105, 6 July 2001). In addition, Article 53(7) of the Medical Treatment Law restricts the application of Article 68(1) of the Labour Code, which stipulates that employees are entitled to 100 percent extra pay or 200 percent pay for overtime work. Article 53 (7) of the Medical Treatment Law provides that the latter provision is not applicable to the medical staff employed in the public sector.

Since this regulation was adopted during the financial crisis in 2009, it was considered transitional. In response to the protests of medics, Parliament adopted amendments to the Medical Treatment Law on 8 June 2017, providing that the Cabinet of Ministers is under the obligation to elaborate a plan for transitional measures related to the working time of medical personnel employed in the public sector. The amended law stipulates that until the adoption of such a plan, medical personnel may be employed for no longer than 55 hours per week and are entitled to a 10 percent increase in pay (or 110 percent in total) for overtime work as defined by the Labour Law.

On 15 May 2018, the Constitutional Court delivered its decision (Case No.2017-15-01, Official Gazette No. 95, 16 May 2018). The Court found that Article 53^1(2) and (3) of the Medical Treatment Law and transitional provisions envisaging a gradual increase in pay for overtime work is contrary to the principle of equal treatment as stipulated in Article 91 of the Constitution. Specifically, it found that the only aim put forward by the legislator to justify different treatment between medics and other employees with regard to entitlement to 100 percent extra pay for overtime work was budgetary considerations. Even though measures adopted to ensure budgetary balance might exist, as highlighted by the Constitutional Court, budget restraints as the sole reason may not constitute the legitimate justification for unequal treatment.

7 Implications of CJEU Rulings and ECHR

7.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Volunteer workers

Volunteer work in Latvia is regulated by the Voluntary Work Law (*Brīvprātīgā darba likums*, Official Gazette No. 127, 2 July 2015). The law stipulates that voluntary work may not have the aim of financial gain. It follows that if work is remunerated, it must be considered to be a regular employment relationship governed by labour law (*Darba likums*, Official Gazette No. 105, 6 July 2001). The Voluntary Work Law also does not regulate issues related to working time and rest periods.

Standby time

Under Latvian law, standby time must be considered working time.

The definition of 'working time' is provided in Article 130(1) of the Labour Law (*Darba likums*, Official Gazette No. 105, 6 July 2001). The definition provides that the working time is the time an employee is at the disposal of an employer. Thus, the law does not explicitly determine whether standby time spent at home must be considered working time. There is no respective case law of the Supreme Court clarifying this particular issue, however, as regards medical doctors, the general practice is that all standby time either spent at the hospital or at home is considered working time. This practice demonstrates that the definition of 'working time' applicable in Latvia does not correspond to the requirements of EU law, and the decision of the CJEU in case C-518/15 *Matzak* therefore has implications on Latvian law, because Latvian law departs from the uniform concept of 'working time' under Directive 2003/88/EC.

8 Other relevant information

Nothing to report.

Liechtenstein

Summary

(I) An analysis of CJEU case C-518/15, *Matzak* is provided.
(II) The 'Europe Day' and the 'Package Meeting' with ESA took place in Liechtenstein.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time an definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Factual part

In case C-518/15, the CJEU (Fifth Chamber) ruled as follows:

- Article 17(3)(c)(iii) of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that the Member States may not derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'.
- Article 15 of Directive 2003/88/EC must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that directive.
- Article 2 of Directive 2003/88/EC must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the prior classification of those periods as 'working time' or 'rest period'.
- Article 2 of Directive 2003/88/EC must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'.

Analytical part

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive

March Flash Report set out which acts and ordinances of national law had been reviewed in connection with the present case. It does not follow from these regulations that volunteers are to be treated differently from other workers. Under Liechtenstein law—

in accordance with the CJEU judgment—the defining feature of an employment relationship resides in the fact that for a certain period of time, a person performs services for and under the direction of another person in return for which she receives remuneration (CJEU case C-518/15 No. 28). Therefore, the status of volunteer is irrelevant for the classification as a worker.

Standby time counted under national law towards the maximum weekly working time and against minimum rest periods

As a general rule, standby time is not counted under national law towards the maximum weekly working time and against minimum rest periods, if it can be carried out outside the establishment. According to the Swiss Federal Supreme Court, however, this only applies if the worker is actually able to use the extended leisure and recreational opportunities (Swiss Federal Supreme Court of 4 May 2010 – 4A_94/2010 No. 4.4; this was assumed in the present case with a worker who could perform standby time at home and had to be ready for work within 15 minutes). The rule of the Swiss Federal Supreme Court is similar to that of the CJEU. When interpreting Liechtenstein's labour law, which is to a large extent identical with Swiss labour law or at least bears considerable similarities, the courts of Liechtenstein regularly take Swiss case law into account. It can therefore be assumed that the courts of Liechtenstein will share the view of the Swiss Federal Supreme Court, if they have to rule on such a case. In doing so, the ruling should be in compliance with the CJEU judgment. If standby time is qualified as working time, it must consequently be counted under national law towards the maximum weekly working time and against minimum rest periods.

Impact of this case beyond the firefighting/civil protection sector

The worker in the present case was required to respond to calls from his employer within 8 minutes and to be physically present at the place determined by the employer which was his home (CJEU case C-518/15 No. 61). These criteria are strongly related to the individual case. However, an addition in the judgment results in a generalisation given by the CJEU itself: standby time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, *very significantly restricting the opportunities for other activities,* must be regarded as 'working time' (CJEU case C-518/15 No. 66). The decisive criterion for qualification as working time is therefore whether standby time very significantly restricts the opportunities for other activities. If this is the case, working time must be assumed also beyond the firefighting/civil protection sector.

4 Other relevant information

4.1 Europe Day

This year's Europe Day was held in Liechtenstein at the invitation of the responsible EU ambassador under the motto "Future Europe".

This year the so-called Package Meeting with ESA (EFTA Surveillance Authority) took place again in Liechtenstein.

An anniversary event was held to mark the tenth anniversary of the IMI (Internal Market Information System). IMI is used, inter alia, in connection with the posting of workers.

Lithuania

Summary

(I) The Lithuanian regional court (second instance) in appeal turned over the wrongful interpretation of Directive 96/71/EC. The court stated that the rights of posted workers shall be applicable not from the 31st day of posting but from the 1st day, but only if the posting exceeds 30 days in total.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Kaunas Regional Court, No. 2A-454-638/2018

The Kaunas regional court (second instance) has issued a ruling (Kaunas Regional Court in case No. 2A-454-638/2018) dealing with the national regulations on the posting of employees within the scope of the provision of services. A Lithuanian company refused to grant the Norwegian minimum wage for a Lithuanian carpenter for the period of his posting to Norway. The Lithuanian district court held that the employer's duty to ensure that the post worker is paid the host country's minimum wage only starts on the 31st day of the posting period. The reason for this was the national provision under which the posting rules do not apply if the posting does not exceed 30 days, i.e. the work is 'non-significant'. Relying on Directive 96/71/EC, the regional court interpreted this provision differently – the rules on minimum wage shall be applicable not from the 31st day onwards, but from the 1st day of the posting, if the posting exceeded 30 days during the last 1-year period.

However, it shall be borne in mind that the provision, which entailed the obligation of the Lithuanian employer to ensure payment to the posted Lithuanian worker of the host country's minimum wage, ceased to exist. With the change in the law in June 2016, this obligation was abolished. Today, posted Lithuanian workers may only seek payment of the minimum wage under the host country's rules (if they require so) and, probably, only in the courts of the host country.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

If a person is paid for work (i.e. receives a salary or payment in kind), she shall be considered an employee. Volunteers are not employees because they provide services without payment for such services.

No category of employees is excluded from the working time regulations. In other words, if the so-called 'volunteer' is considered an employee (because she is paid for work), the working time rules fully apply. Unpaid volunteers are not covered by working time regulations because they are not employees.

The present Lithuanian legal regime includes a special regulation on standby time (at home). In accordance with Article 118 (4) of the Labour Code, an employee time (at home). In workplace during rest periods during which she is on-call to perform certain tasks or to arrive at the workplace (so-called passive on-call duty served at home), shall not be considered working time; only the time of actual performance of work shall be considered working time. Such on-call duty may not take place for more than a consecutive two-week period within four weeks. An agreement on passive on-call duty served at home shall be concluded in the employment contract, and the employee shall be paid an additional fee in the amount of no less than 20 percent of the employeehe base (rate) wages for each week of on-call duty served outside the workplace. The actual performance of activities shall be paid as actual time worked, but not exceeding 60 hours per week. A person may not be assigned to passive on-call duty served at home on a day she has been working for 11 consecutive and uninterrupted hours.

In Lithuania, there is traditionally a strong pattern of generalisation with regard to how the CJEUronrulings shall be implementedsation with regard to how tby the Court is accepted without the circumstances and limitations of the case being scrutinised. The affected sector and activity has no relevance unless it is strongly emphasised in the ruling of the CJEU.

The Ministry of Social Security and Labour has already received demands from the national trade union confederation to amend the Labour Code and implement the key principle of the judgment onfeat all types of standby time served at home (regardless of the sector, type of activity or scope of the employeeor, bligation) shall be considered working time. Against the Lithuanian background, where only two types of time exist (paid working time and unpaid rest periods), this would also mean the obligation to ensure payment of 100 percent for all standby times and even more severe consequences (extra payment for night-work, calculation and payment of overtime, requirement to observe maximum working time limitations, etc.). The Ministry is still considering measures to implement the judgment.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

(I) The social elections have been postponed from autumn 2018 to spring 2019 to prevent them from taking place during the same period as the national elections which might mean they would not get sufficient attention by the public.

(II) A new bill was deposited to regulate working time in agriculture, viniculture and horticulture.

(III) A new bill has been proposed to modernise and digitalise the social elections.

(IV) A new bill aims to reform the rules on professional reinstatement (reclassement professionnel) of persons who, for health reasons, are unable to continue to perform their current work, but who are not fully unfit for all work and are thus not entitled to a disability pension.

(V) A new bill states that disputes on the labour procurement contract (contrat de mise à disposition) signed between the user undertaking and the temporary work agency shall be referred to the Justice of Peace if the economic value is higher than EUR 20,000, or to the commercial section of the District Court.

(VI) A new bill extends the exception to rules on the authorisation to provide manpower (mise à disposition de main-d'oeuvre) to all authorised "societal impact companies" (sociétés d'impact social), i.e. companies regulated by the Law of 12 December 2016, its main purpose not being the generation of profit.

(VII) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Social elections

The Law of 7 May 2018 (*Loi du 7 mai 2018 portant modification 1) du Code du travail; 2) de la loi modifiée du 4 avril 1924 portant création de chambres professionnelles à base élective*) has postponed the social elections from autumn 2018 to spring 2019 to prevent them from taking place during the same period as the national elections, which would imply that they might not get sufficient attention by the public.

This change appears to be definitive and will affect all future social elections, which usually take place every 5 years. The social elections mainly concern the trade unions that will be represented in the *Chambre des Salariés*[1] and the employee delegates (*délégués du personnel*) elected within each company employing 15 employees or more.

Consequently, the ongoing mandates have been extended by a few months. The same extension is granted to representatives in European works councils or in European societies.

1.2 Working time in agriculture

Article L. 211-2 of the Labour Code states that special laws, collective agreements or decrees will regulate the working time for employees occupied in family-type undertakings in agriculture, viticulture and horticulture. However, such texts have never

[1] The result of these elections is a major criterion determining whether a trade union can be considered representative or not. It must obtain at least 20 percent of the votes (national representativeness) or 50 percent of the votes of a specific sector (sectoral representativeness).

entered into force, hence, for a long time, practice and case law considered that this sector was not subject to any national regulation on working time. In practice, there were very few judicial disputes.

However, the Court of Appeal (CSJ, 8e, 9 November 2017, 41734) recently considered that as long as no specific texts are in force, the general legislation on working time applies by default.

In response to this case, a new bill (*Projet de loi No. 7289 portant sur la durée de travail des salariés occupés dans les secteurs de l'agriculture, de la viticulture et de l'horticulture et portant modification du Code du travail*) was deposited to regulate working time in agriculture, viniculture and horticulture. The bill modifies the Labour Code by adding a new chapter; the proposed rules are very short and flexible:

- The normal working time is limited to 8 hours per day and 40 hours per week;
- The employer can flexibilise this working time by introducing a reference period of up to 6 months. As compensation for increased flexibility, a reference period of at least 4 months entitles the employee to 2 additional days of leave per year. A reference period of 6 months entitles the employee to 3 additional days of leave.
- During this reference period, the average working time must be respected.
- However, the working time can be increased to 10 hours per day and 40 hours per week. Considering the very seasonal character of such work, during a maximum duration of six weeks per year, the maximum duration may even be increased to 12 hours per day and 60 hours per week.
- Any work exceeding these limits qualifies as overtime (*heures supplémentaires*).

Concerning the scope of application of these new rules, they will apply to:

- All employees (*salariés*), apprentices and trainees
- Working in the sector of agriculture, viticulture or horticulture. According to the parliamentary documents, the concept of "horticulture" should be interpreted in a broad way, including gardening companies (*jardinage*), landscape gardeners (*paysagiste*), tree growers (*pépiniériste*), arboriculturists (*arboriculteur*) and market gardeners (*maraîcher*)
- Only for "specific activities within these sectors" (*les activités propres de ces secteurs).* This very vague limitation might lead to some discussion in the future. According to the parliamentary documents, commercial activities in particular shall be excluded and thus be subject to the general rules on working time.
- The rules shall apply to all undertakings, not only to "family-type" undertaking.

These employees will thus be subject to the new "Chapter VI" of the division on working time, and excluded from the general provisions of "Chapter I". Thus:

- There are no provisions on how the reference period is fixed. In the reporter's opinion, a trade union's consent is not required and the employer can decide on its own
- The rules on night work and rest periods (*temps de repos*) do not apply
- Overtime entitles the employee to an overtime premium, but it seems that no specific authorisation (by the employee delegates or the labour inspectorate) is required, as is the case for regular employees
- There are no rules on the establishment of work schedules (*plan d'organisation du travail*), so it is not clear within what timeframe employees are informed about their working time, what form it takes and under what conditions the employer can change their work schedule

- The obligation to keep a record of all worked hours (L. 211-29) is not applicable
- Unlike the general rules on working time and the other specific sectors, there are no criminal sanctions in case of infringement.

This exclusion from the general rules in "Chapter 1" could raise the question whether the bill complies with European Directive 2003/88/CE on working time.

- The exclusion of Article 17 (1) pt. b) (family workers) does not apply, because the new rules will also apply to undertakings that are not family size
- The derogation of Article 17 (2) will not help, as no equivalent protection rules have been established
- Concerning the derogations of Article 17(3), they mention agriculture, but not viticulture and horticulture. It is questionable whether these sectors can generally be considered as requiring continuity of production or as having a foreseeable surge in activity.

Compliance issues could thus arise concerning:

- Daily rest periods (Article 3), as no rest period of 11 hours is provided for
- Breaks (Article 4) and weekly rest periods (Article 5), as the law does not mention them.
- Night work (Article 8 to 11)[2], as no specific provisions apply.

The Directive does not explicitly require effective and proportionate sanctions.

1.3 Bill on digitalisation of social elections

As mentioned above, the social elections will be postponed by some months in order to not collide with the legislative elections. Furthermore, as a major reform on employee delegates was voted on in 2016 and will fully come into effect with these social elections, the procedural rules will have to be adapted by a grand-ducal decree. Furthermore, the new Bill No. 7290 (*Projet de loi No. 7290 portant modification des Articles L. 413-1, L. 414-14, L. 414-15 et L. 416-1 du Code du travail*) aims to modernise and digitalise the social elections. The purpose is to simplify the administration for the employers and for the labour inspectorate (*Inspection du travail et des mines*) which supervises the elections and collects the results.

On the public electronic platform (myguichet.lu), different forms will be made available, especially concerning:

- the report that there were no candidates (*procès-verbal de non-élection*),
- the report that the number of candidates is the same as the number of delegates to elect, so they are declared elected without any voting (*procès-verbal d'élection d'office)*,
- the identity of the president, vice president, secretary and other members of the executive committee (*bureau*),
- the identity of the persons designated as special delegates for occupational health and safety (*délégué à la sécurité et à la santé*) and for gender equality (*délégué à l'égalité*).

To simplify identification, the data must include the national identification number (*matricule national*). It is up to the employers to complete these electronic declarations.

[2] For Article 12, the general rules on occupational health and security for night workers are applicable.

From a personal perspective, the reporter agrees with the approach of the bill, but has two points of criticism: first of all, does it make sense to exclusively require electronic declarations and to prohibit any other form of communication? Situations may arise where the standard forms are not appropriate. Secondly, it would be better to take a more general approach on electronic communications, declarations and contractual agreements (between employers and authorities, but also between employers and employees), rather than to create legislation for a very specific area.

1.4 Bill on professional reinstatement

A new bill (*Projet de loi No. 7309 portant modification 1. du Code du travail ; 2. du Code de la sécurité sociale 3. de la loi du 23 juillet 2015 portant modification du Code du travail et du Code de la sécurité sociale concernant le dispositif du reclassement interne et externe*) aims to reform the rules on professional reinstatement (*reclassement professionnel*) of persons who, for health reasons, are unable to continue to perform their current tasks, but are not fully unfit for all types of work and are thus not entitled to a disability pension (*pension d'invalidité*). This legislation was introduced in 2002 and reformed many times, most recently in 2016.

In a nutshell, if the occupational physician (*médecin du travail*) detects a potential inability for work, a specific procedure is initiated which can lead

- to an "internal reinstatement" (*reclassement interne*) within the undertaking. The employee can be paid an indemnity to compensate losses in salary, especially if her working time is reduced;
- to an "external reinstatement" (*reclassement externe*) which means that the employment contract ends and the Job Centre (ADEM) tries to find a suitable workplace for the employee. The employee receives an indemnity equivalent to unemployment benefits and when this measure expires, she can be paid another allowance (*indemnité d'attente*) under certain conditions.

Internal reinstatement is mandatory in some cases. Internally reinstated employees benefit from a 12-month special protection against dismissal.

The bill contains a certain number of procedural modifications and clarifications on how the various indemnities are paid. Other changes that shall be implemented include:

- external reinstatement is a "preferential" solution for the employer because the contract ends without any indemnities and the Job Centre takes care of the employees. Therefore, the bill introduces a new indemnity that the employer has to pay , i.e.

Seniority	Indemnity
< 5 years	/
5 to 10 years	1 month of salary
10 to 15 years	2 months of salary
15 to 20 years	3 months of salary
≥ 20 years	4 months of salary

- In order to avoid abuse, it is no longer possible to reduce the working time by up to 50 percent; the reduction is limited to 20 percent. Only in exceptional and motivated cases can this reduction reach 75 percent.
- As in the past, employers with less than 25 employees cannot be required to internal reinstatements; employers with 25 employees or more are required to do so (unless they establish that this would 'seriously harm' their undertaking). The bill, however, reintroduces maximum quotas, which were abolished in 2016.

Depending on the size of the company, it can be required to employ a certain percentage of workers who are either disabled or being professionally reinstated.

- The bill widens the circle of persons who can benefit from professional reinstatement, especially by reducing the required seniority in certain situations or by suppressing the requirement that the employee occupied a high-risk position. No specific pre-requirements will be applicable in case the health problem is primarily attributable to a work-related accident or occupational disease.

1.5 Judicial competence concerning the labour procurement contract

Bill No. 7307 (*Projet de loi n° 7307 sur le renforcement de l'efficacité de la Justice civile et commerciale portant modification : 1° du Nouveau Code de procédure civile 2° du Code du travail 3° de la loi modifiée du 18 février 1885 sur les pourvois et la procédure en cassation 4° de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire*) deals with judicial competence concerning labour procurement contracta (*contrat de mise à disposition*) concluded between the user undertaking and the temporary work agency. It is a commercial contract and it is specified that, depending on the value of the claim, it must be addressed to the Justice of Peace (< EUR 20,000) or to the commercial section of the District Court.

1.6 Provision of manpower

The provision of manpower (*mise à disposition de main-d'oeuvre*) is limited to authorised temporary work agencies and in some other very restrictive cases (e.g. to avoid dismissals or in the context of a group restructuring). A general exception is granted to non-profit associations and institutions (Article L. 133-1). Bill No. 7293 (*Projet de loi No. 7293 portant modification 1. du Code du travail; 2. de la loi modifiée du 25 février 1979 concernant l'aide au logement; 3. de la loi modifiée du 19 juillet 1991 portant création d'un Service de la formation des adultes; 4. de la loi modifiée du 6 janvier 1996 sur la coopération au développement; 5. de la loi modifiée du 31 mai 1999 portant création d'un fonds national de la recherche dans le secteur public; 6. de la loi modifiée du 21 septembre 2006 sur le bail à usage d'habitation et modifiant certaines dispositions du Code civil; 7. de la loi du 12 décembre 2016 portant création des sociétés d'impact sociétal*) extends this exception to all authorised "societal impact companies" (*sociétés d'impact social*), i.e. companies regulated by the Law of 12 December 2016, whose main purpose is not to generate profit.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Volunteers

Concerning the qualification of volunteers as 'workers', it must be emphasised that in the case decided by the CJEU, Mr. *Matzak* was remunerated, which excludes the concept of "*bénévole*" at the local level. Indeed, volunteers are not remunerated for their work

and can only get a reimbursement of their expenses. Genuinely unpaid volunteers do not fall within the scope of application of the Directive and of Luxembourg's national legislation. The main issue here would be to determine whether the claimant was working under the direction of another person. A clear distinction must be made between unpaid "*bénévoles*" and remunerated/compensated "*volontaires*".

According to Article L. 211-1 of the Labour Code, Luxembourg's legislation on working time only applies to employees ("*salariés*"), which as such is too restrictive with respect to the Directive and the larger, autonomous European concept of worker.

In Luxembourg, volunteer firefighters and emergency services personnel are not considered to be employees. The law simply states that their "activity is voluntary and non-professional, governed by its own rules" (Article 22 de la Loi du 27 mars 2018 portant organisation de la sécurité civile et création d'un Corps grand-ducal d'incendie et de secours («*l'activité de pompier volontaire repose sur le volontariat et elle n'est pas exercée à titre professionnel, mais dans des conditions qui lui sont propres*»). However, they are paid an indemnity (*indemnité, ca. EUR 1/hour of availability time*) that is exempt from income tax and limited to a certain amount. They can also get payments for a complementary pension scheme and after 15 years of service, can benefit from an "*allocation de reconnaissance*". They are thus remunerated. As they are integrated into a hierarchical structure and must follow specific rules, they are also subordinated. According to the *Matzak* case, they would thus qualify as "workers".

Standby time

Standby time is not counted towards the maximum weekly working time and against minimum rest periods. The concepts 'working time' and 'rest period' are mutually exclusive, so if standby time is not working time, it is a rest period.

Scope of application

The reporter does not see any reason why this case would be limited to the sector of firefighting and civil protection. The Court deals with the general definition of working time, which is an autonomous European concept applicable to all workers.

Collective agreements

Concerning the possibilities in Luxembourg for national agreements or collective agreements to derogate from statutory provisions on working time, especially as regards standby time, the following texts can be found in the Labour Code:

- as a general rule, collective agreements can only derogate in a more favourable way from statutory provisions (Article L. 162-12 (6), L. 211-30). For example, they can define working time more extensively than required by the Directive or set lower limits for daily or weekly working time (L. 211-5).
- Collective agreements play an important role in defining the reference period (*période de reference*) for work schedules (*plan d'organisation du travail*) or flexitime (*horaire mobile*). The employer can decide on her own to implement a period of up to 4 months; with the union's consent, the period can be extended up to 12 months (L. 211-6).
- Article L. 211-2 of the Labour Code states that collective agreements can regulate working time:
    - for domestic services;
    - for family-type companies in agriculture, viticulture and horticulture (see the bill mentioned above);
    - for persons in hospitals and similar institutions (*personnel occupé dans les établissements ayant pour objet le traitement ou l'hospitalisation des*

malades, des infirmes, des indigents et des aliénés, dans les dispensaires, les maisons pour enfants, les sanatoriums, les maisons de repos, les maisons de retraite, les colonies de vacances, les orphelinats et les internats).

Collective agreements only exist for the last case. This text provides no restrictions and no limit on how working time should be regulated in this sector. Of course, Courts would take the European framework into consideration.

- Article L. 211-4 al. 2 states that collective agreements can define the concept of working time for "intermittent tasks" (*travaux essentiellement intermittents*). This regulation was introduced for persons that have multiple interruptions within their working day, and is not used in practice. Anyhow, it would not be legally possible to define working time in a less favourable way than the Directive.
- Article L. 211-13 provides that in strictly delimited sectors with exceptional seasonal peaks concentrated within a period of no more than 6 weeks, collective agreements can provide a maximum daily working time of up to 12 hours and a maximum weekly working time of up to 60 hours. The agreement must provide sufficient rest periods in order to guarantee the worker's health and safety. The Minister of Labour must approve these provisions of a collective agreement.
- Article L. 211-31 provides that collective agreements or national agreements can deviate from statutory provisions in a certain number of activities. This provision is copy-pasted from Article 17 (3) of the Directive, as regards the list, the rules where a derogation is possible (daily rest, breaks, weekly rest period, length of night work, reference periods) and the principle that equivalent periods of compensatory rest must be granted.

4 Other relevant information

Nothing to report.

Malta

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The Employment and Industrial Relations Act, Article 2, Chapter 452 of the Revised Edition of the Laws of Malta, does not include volunteers in its definition of "employee". Hence, it would appear that the term "employees" does not include "volunteers", not even in the application of the Organisation of Working Time Regulations, S.L. 452.87.

As regards whether standby time is indeed considered as working time, the Organisation of Working Time Regulations must be taken into consideration. The Organisation of Working Time Regulations (SL 452.87) defines "working time" as follows: any period during which the worker is available for service to the employer and is carrying out her activity or duties, and includes any relevant training and any other additional period which is to be treated as working time for the purpose of these regulations under any relevant agreement, and "work" shall be construed accordingly. This essentially means that for any time to be regarded as "working time" in terms of this definition, the worker has to "carry out his activity or duties". This interpretation may essentially look very different from the concept behind the fourth reply given by the CJEU in this ruling, because during standby time, the worker is not effectively "carrying out his activity or duties". She is just "waiting for a call" as it were. Hence, standby time cannot be regarded as working time based on this definition. Standby time is thus not, under national law, counted towards the maximum weekly working time and against minimum rest periods.

The case could have implications beyond the firefighting and civil protection sector. Many workers are on call and on standby, so this ruling could very well have an implication wherever standby workers are involved.

4 Other relevant information

Nothing to report.

Netherlands

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

Volunteers

On the issue of qualification of (some) volunteers as 'workers' for the purpose of the Working Time Directive, it should be noted that the Netherlands *Arbeidstijdenwet* (Atw, Working Time Act) makes use of a fairly broad definition of both the notions of 'employer' and 'employee'. Therefore, the implications of the judgment seem to be rather limited. It should be noted that the 'volunteer' in the *Matzak* case received remuneration for this work.

Standby time

Standby time, in general, is not counted as working time in the Netherlands. The worker is at home and (relatively) free to do what she wants to do. However, being on standby under the very specific circumstances as in the *Matzak* case (8 minutes response time a.o., and other restrictions) could be seen as working time under the current legislation and case law, since the worker is under the employer's authority and instructions at home..

Scope of application

It is dependent on the scope and meaning of the *Matzak* ruling: does it entail all types of standby time, or not? If the former is the case, the impact could be tremendous: in all types of sectors, workers are on-call/standby in case of 'trouble', e.g. doctors and other health care workers, operators of power stations and other industrial facilities, emergency repairmen, etc.

4 Other relevant information

Nothing to report.

Norway

Summary

(I) The Supreme Court has issued a ruling on the duty to consider "suitable work" in redundancies.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal

Norwegian Supreme Court, HR-2018-880-A, 09 May 2018

In its ruling HR-2018-880-A, the Norwegian Supreme Court dealt with a case concerning terminations due to redundancies. Section 15-7(2) of the Norwegian Working Environment Act states that "*Dismissal due to curtailed operations or rationalisation measures is not objectively justified if the employer has other suitable work in the undertaking to offer the employee.*"

In the case before the Supreme Court, the employer had vacant management positions in one department and recruited one external candidate and shortly thereafter, downsized in another department and terminated claimant without considering whether the vacant management positions in the other department were "suitable work". The Supreme Court found that the employer should have assessed whether the vacant management positions in the other department were "suitable work", and sent the case back to the Appellate Court.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Norwegian law is in line with the CJEU ruling in case C-518/15 on on-call time. Under Norwegian law, on-call duty such as that in the *Matzak* judgment is defined as working time under section 10-4(3) of the Working Environment Act. As a main rule, 1/7 of the on-call time shall be calculated as ordinary working hours. The CJEU ruling will therefore not necessitate any amendments to Norwegian law.

As regards Mr *Matzak's* classification as a 'worker', the CJEU reminds that the "defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he receives remuneration". Norwegian courts have applied the same criteria to the notion of employee as the CJEU, including in HR-2016-1366-A and Rt-2013-354. The CJEU ruling will therefore not necessitate any amendments to Norwegian law.

4 Other relevant information

Nothing to report.

Poland

Summary

(I) The draft of the amendment to the Labour Code on reducing the working time of employees with parental duties by one hour has been submitted to Parliament.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

(III) The employers' organisation "Lewiatan" lodged a motion in the Constitutional Tribunal to evaluate the constitutionality of the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days.

1 National Legislation

1.1 Working time

On 8 May 2018, the draft of the amendment to the Labour Code (LC) on reducing the working time of employees with parental duties was subject to preliminary stages of the legislative process. The basic idea is to reduce the regular daily working time to seven hours (instead of currently eight hours) of employees who are parents or custodians of a child below the age of 15 years. The remuneration would not be reduced. If both parents and custodians are employees, only one can take recourse to a reduction of working time. In such a situation, the employees should inform the employer which of them would use the reduced working time. The rule would be the subject of the new § 3 of Article 178 LC.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

It should be emphasised that under Polish law:

- Volunteers are not regarded as workers for the purposes of the application of the Working Time Directive 2003/88/EC.
- Under Article 151^5 § 2 LC, the time on on-call duty is not counted towards working time if, during that period, the employee does not perform actual work. The time an employee is on on-call duty cannot violate the daily and weekly right to rest, as provided in Articles 132 and 133 LC (these provisions implement Directive 2003/88 with reference to rest periods). Thus, the provisions defy rest periods (the latter cannot be violated by standby time).
- There are no express regulations on situations in which an employee or firefighter (or another officer) must be reachable at home during on-call duty and be required to reach the workplace within a short period of time. In the reporter's view, such a situation would be regarded as "regular" on-call time. It would not be treated as the performance of employee duties, unless work would be effectively carried out. Consequently, such on-call time would not be regarded as working time, irrespective of the fact that carrying out personal activities would be significantly restricted. Therefore, Polish law seems to be incompatible with Directive 2003/88

as interpreted by the CJEU in the case *Matzak* (especially para 59 and 65) and may require some amendments.

4 Other relevant information

4.1 Working time

On 17 May 2018, the employers' organisation "Lewiatan" lodged a motion with the Constitutional Tribunal to analyse the constitutionality of the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (Journal of Laws 2018, item 305)

The abovementioned law prohibits trade activities on Sundays. It took effect on 1 March 2018. The ban is gradually being introduced. After 1 January 2020, a general prohibition to carry out trade activities on Sundays will apply. At the same time, the Law provides numerous exceptions to the ban (see also Flash Report, January 2018, point 1.B., with further references).

The employers claim that the new regulations create a group of subjects who are not covered by the ban. Consequently, there is an unjustified differentiation of situations of various employee groups. Thus, some constitutional principles have been violated, i.e. the protection of work, freedom of work, equality and proportionality. The provisions of the law are unclear and cause serious doubts. It is very difficult to apply and to enforce the law. Moreover, *vacatio legis* was very short indeed and gave employers no possibility to adjust to new circumstances.

Portugal

Summary

(I) An analysis of CJEU case C-518/15, *Matzak* is provided.

(II) The social partners are debating a proposal to reform Portuguese labour law on issues that concern fixed-term work and working time.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The notion of 'worker' for the purposes of the Working Time Directive covers situations in which a person for a certain period of time provides services for and under the direction of another person in return for remuneration. Therefore, a national regulation that qualifies her as a volunteer is not relevant to exclude the protection granted by the Directive. In Portugal, volunteering is based on the principle of gratuitousness. Therefore and as a general rule, the work provided by the volunteer is unpaid (Article 6 (6) of Law No. 71/98, 3 November). In the reporter's view, the concept of 'worker' for the purpose of the Working Time Directive is in line with the general notion of 'worker' established in Portuguese law (Articles 11 and 12 of the Labour Code). Thus, a 'volunteer' shall be covered by the working time regulation.

The question regarding whether standby time is (or is not) counted towards the maximum weekly working time and against minimum rest periods under national law is controversial. However, this case may lead to a clarification of the legal solution.

4 Other relevant information

4.1 Fixed-term work and working time

The Portuguese government has entered into negotiations with the social partners to revise the labour legislation, in particular to reduce precariousness and to promote a rebalance of the employment relationship. One of the main measures under discussion is the reduction of cases that allow the parties to conclude fixed-term contracts. As an alternative to fixed-term contracts, it is being discussed to allow permanent employment contracts with a trial period of 180 days (currently, for the majority of workers, probation is 90 days), in particular for a first job employment contract.

The other measure is related to working time. At present, the parties to an employment contract can establish a 'bank of hours', which allows for compensation of overtime wor,k notably through free time, remuneration or vacation. The government would introduce such a model of working time only if established in a collective agreement.

Romania

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

Adding to the analysis in the March 2018 Flash Report, it must be stated that the *Matzak* ruling may result in developments in the field of labour relationships of policemen and firefighters.

Under Romanian law, the rules on working time laid down in the Labour Code are applicable only to employees who have an employment contract. Civil servants and special civil servants (such as policemen and firefighters) are not considered employees and do not have a contract of employment. They benefit from derogatory rules contained in special laws. As regards these rules, the so-called 'standby duty at home' is sometimes regulated in secondary legislation.

Thus, Article 3 of Government Emergency Ordinance No. 9/2017 regarding some budgetary measures in 2017 (published in the *Official Gazette of Romania, No. 79 din 30 ianuarie 2017*), the extension of some deadlines, as well as the modification and completion of some normative acts provide:

> *"Military personnel, police officers, civil servants with special status in the penitentiary administration system and civilian personnel in public institutions in the defence, public order and national security system, scheduled to ensure the continuity of the specific tasks outside the normal working hours, at the domicile, are entitled for this period to a 40 percent increase of the basic salary/grade pay/grade salary, granted in accordance with the legal provisions in force."*

In applying this text, the Minister of Internal Affairs adopted Order No. 78/2017 on the conditions for granting the salary increase for the staff of the Ministry of Internal Affairs scheduled to ensure the continuity of the specific tasks outside the normal working hours, at the domicile, and the activities for which the continuity of the specific tasks is ensured (published in the Official Gazette of Romania, No. 489 of 29 June 2017). The activities that take place after the working hours concern:

Intervention in the rural environment by personnel from rural police stations, communal police and communal police stations, upon notifications of the Single National Emergency Call System and other reported events regarding the defence of the fundamental rights and freedoms of the person, private property and public order, prevention and investigation of offenses, respect for order and public peace, where it is not possible to ensure the fulfilment of specific tasks within the shift work;

On-the-spot investigation and specialised intervention for catching offenders in the act of committing it, carried out by the personnel of the judicial, forensic and operative police structures, organised within the Romanian Police and the Romanian Border Police, when it is not possible to ensure the fulfilment of the specific tasks within the shift work.

Even though there is no provision for a period of time during which the staff carrying out such standby duty at home must return to the establishment, the legal wording implies that the return must take place immediately, to deal with the situation - considered as urgent - that has occurred.

However, according to Article 4 (4) of the Order of the Minister of Internal Affairs No. 78/2017, "ensuring continuity in the performance of specific tasks outside normal working hours, at the domicile, does not constitute work carried out during normal working hours nor overtime during the period in which the activities are effectively carried out, and the hours set in the total amount of scheduled monthly time are not to be compensated with corresponding free time."

4 Other relevant information

Nothing to report.

Slovakia

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

On the issue of qualification of certain volunteers as 'workers' for the purpose of the Working Time Directive

Two acts have been adopted in Slovakia that related to the judgment in case C-518/15: Act No. 315/2001 Coll. on fire and rescue corps and Act No. 314/2001 Coll. on protection against fires. Act No. 315/2001 Coll. on fire and rescue corps also regulates the civil service and the legal relationships that are related to the establishment, changes and termination of the civil service of the members of the Fire and Rescue Corps. This Act does not regulate the activities of voluntary members of the fire corps. Act No. 314/2001 Coll. on protection against fires regulates some of the issues of voluntary membership of fire corps. It should be emphasised that according to Article 30 paragraph 1 of this Act, firefighting, i.e. rescue work, is carried out by the Fire and Rescue Corps, which consists of members and is established by a special regulation, Act No. 315/2001 Coll. on fire and rescue corps. According to Article 30 paragraph 2, the activities under paragraph 1 shall also be carried out by fire units:

- a fire unit (department) consisting of employees of a legal person or a natural person-entrepreneur;
- a fire corps consisting of employees of a legal entity or a natural person-entrepreneur;
- voluntary fire corps of the municipality.

According to Article 30 paragraph 3 of the Act, employees of a legal person or a natural person-entrepreneur included in the fire unit (department) referred to in paragraph 2 letter a/ perform activities in that unit as their employment ('the employee'). However, according to Article 30 paragraph 4, employees of a legal person or a natural person-entrepreneur included in the fire corps and referred to in paragraph 2 letter b/, and natural persons included in the voluntary fire corps of the municipality referred to in paragraph 2 letter c/ do not normally carry out activities in these corps as their regular employment (hereinafter referred to as 'member'); in the municipality's voluntary fire corps they are usually members of the Voluntary Fire Protection. Act No. 37/2014 Coll. on voluntary fire protection of the Slovak Republic does not regulate the factors addressed in of the *Matzak* ruling.

As regards the issue of qualification of some volunteers as 'workers' for the purposes of Directive 2003/88/EC, national legislation distinguishes between 'volunteers' and 'workers' ('employees'). The 'conversion' of a volunteer into an employee in relation with working time is not legally regulated. This would contradict the meaning, purpose, concept and logic of the legal regulation. If a volunteer, for example, agreed to or obligates herself to arrive at a certain place of work within 10 minutes, it does not make her an employee. If, for example, 3 hours of standby time go by without the need for her to intervene and the volunteer is then fully inactive for 3 weeks, should she still be considered a worker? Or was she a worker for only 3 hours?

Regarding the question, if standby time is (or is not) counted under national law towards the maximum weekly working time and against minimum rest periods

The legal regulation of standby time in the Labour Code (Act No. 311/2001 Coll.) already takes into account certain conclusions stemming from the case law of the CJEU. The Labour Code regulates labour law relationships in the private (business) sphere and in public service (special regulations apply to civil service). The Labour Code distinguishes between standby time at the workplace and outside the employee's workplace.

According to Article 96 paragraph 2 of the Labour Code, if the employee remains at the workplace and is on standby but ultimately does not perform work, the time will be considered inactive standby time and is counted towards the employee's maximum weekly working time. According to Article 96 paragraph 6 of the Labour Code, if an employee who is on standby does perform work, the time she worked will be considered active standby time, which is treated as overtime work. The legislation on rest periods must be observed, which explicitly excludes standby time regulation (Articles 91-93 of the LC).

The time during which the employee remains at an agreed location outside the workplace and is prepared to perform work but is ultimately not called for work is considered inactive standby time and is not counted towards the employee's maximum working time (Article 96 paragraph 4 of the Labour Code). There is no detailed regulation in the Labour Code on the specific time within which the employee must arrive at the workplace.

The legal situation (performance of work is treated as overtime work) is similar for the professional members of the fire and rescue corps. According to Article 122 paragraph 3 of Act No. 315/2001 Coll. on fire and rescue corps, standby time during which civil services were performed is always deemed overtime state service.

The legislation on rest periods must also be observed, which explicitly excludes standby time (Articles 87-89 of Act No. 315/2001 Coll).

4 Other relevant information

Nothing to report.

Slovenia

Summary

An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

The sectoral collective agreement only applies to the professional firemen.

Regarding the status of volunteers within the firefighting activity and some points of departure related to the working time issues, it is worth mentioning:

- Firefighting activities in Slovenia are carried out by a large number of volunteers. Regional and local units of volunteer firefighters, established in accordance with the Societies Act, are members of the Association of Firefighters of Slovenia. Individual regional or local units may be composed of some professional firefighters (as a rule, they perform work that is of organisational and managerial nature and the most demanding professional tasks related to firefighting) and the volunteers who often represent the majority of firefighters within the unit. The professional firefighters have the status of workers. Their employment contracts are concluded in accordance with the Employment Relationships Act (ERA-1), the Civil Servants Act (ZJU) and the Fire Service Act (ZGas). The latter contains provisions on 'on-duty' work ("*dežurstvo*") and on 'readiness for work' ("*pripravljenost na delo*", meaning standby at home).
- Volunteer firefighters, as a rule, conclude employment contracts with different employers outside the firefighting sector. They receive appropriate training to be able to carry out firefighting activities. They must also fulfil certain conditions to carry out firefighting activities (age, skills, etc.) In case of fires and other natural disasters, they join professional firefighters in carrying out their tasks outside their working hours time and/or when their place of employment allows them to leave. This explains why the respective legal norms do not cover the issues related to the working time of volunteers (including standby). They are predominantly restricted to organisational aspects of volunteers' involvement in firefighting services.
- According to Slovenian legislation, standby time (at home) is not counted towards working time and workers are not entitled to pay. It has always been understood that volunteering represents a special working condition. In the case of standby time, workers were/are paid a supplement to their wage for the work performed within the "normal" working hours. This situation is not in accordance with the case law of the CJEU.

- Due to the above described situation, the question of the relationship between standby time and the limitations of weekly working hours and/or the minimum duration of rest periods is more or less the object of academic discussions.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) A royal decree which defines lung cancer by inhalation of silica dust as occupational disease has been enacted.

(II) The Supreme Court issued a ruling on the concept of employee and the transfer of undertaking.

(III) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

1.1 Occupational disease

Royal Decree 257/2018, of 04 May, includes lung cancer by inhalation of silica dust in the catalogue of occupational diseases.

2 Court Rulings

2.1 Concept of employee

Supreme Court case 1773/2018 of 10 March 2018

The Supreme Court has declared that an employment relationship exists between two teachers and an academy that organised vocational training courses for unemployed people. The teachers had signed a contract as self-employed workers.

2.2 Transfer of undertakings

Supreme Court case 1798/2018 of 20 April 2018

The Supreme Court reiterated its doctrine on the application of rules of transfers of undertakings when the contractor completes the activity and the main undertaking begins to perform this activity on its own. This ruling clarifies that a transfer of undertaking takes place when a transfer of assets to carry out this activity (or a succession of staff) occurs.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

A further analysis of the CJEU ruling in the *Matzak* case is provided regarding some specific aspects.

According to Article 1 of the Labour Code "*this law shall apply to workers who voluntarily provide their remunerated services for others and under the organisation and direction of another natural or legal person, defined as employer or entrepreneur*".

Article 3.1.d) of the Labour Code provides that "jobs performed on account of friendship, benevolence or good neighbourly relationships" are excluded from the scope of Labour Law.

In Spain, so-called "volunteer firefighters" are not workers, but volunteers. Volunteerism is regulated by a specific Law of 2015. Article 3 of that Law establishes

that volunteerism is not an employment relationship. Thus, volunteer firefighters are excluded from Labour Law and there are no rules on working time. On occasion, the courts have declared that some volunteer firefighters are workers and that Labour Law is applicable, but because of the circumstances of the specific case (work within the management and organisation of public administrations, for instance). Volunteers do not receive a wage, but could receive compensation for maintenance or travel expenses. When this compensation is high, an equivalent to a wage, the courts consider that it is not volunteerism, but an employment contract.

As a general rule, the courts consider that volunteer firefighters are volunteers and not workers under Labour Law. Firefighters hired as workers must pass a series of tests that volunteer firefighters do not have to complete. Therefore, the qualification of volunteer firefighters as employees could imply fraud, because they would be granted the same status as professional firefighters without having completed the same tests.

- whether standby time is (or not) counted under national law towards the maximum weekly working time and against minimum rest periods; and firefighters are either salaried workers or civil servants in Spain and the hours of presence at work are part of their working time in both cases. As a general rule, standby time is not working time when the workers are not at the employer's premises, although the worker is usually entitled to a salary supplement. Thus, standby time is not counted towards the maximum weekly working time and against minimum rest periods, because firefighters are not workers under Labour Law;
- whether this case could have an impact beyond the firefighting/civil protection sector;
- the *Matzak* ruling could have an impact in Spain in all sectors in which worker have agreed to standby time. For example, this is common in the health sector for doctors and certain nurses, or even in the private sector for computer programmers who must be able to resolve any interruptions that may arise in computer programmes. It also could have an impact on multi-utility companies where on-call work seems to be expanding.

However, the facts in the *Matzak* ruling are not common, because the worker had to reach his place of work after a call from the employer within 8 minutes. There is no rule for such a situation in Spain, but such a short notice period is not common. Obviously, if this happens, the courts will need to respect this ruling.

4 Other relevant information

4.1 Collective agreements

The influence of EU law and case law of the CJEU and the ECHR have led collective agreements to include rules on the control and monitoring of workers, in particular in relation to the computer equipment they use at work. The purpose is to eliminate the expectation of privacy and to comply with the requirements of personal data protection legislation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data). An example is Article 11 of the Collective Agreement *of Grupo Constant Servicios Empresariales*.

4.2 Unemployment

Unemployment decreased again in April (86.683 people). The total number of unemployed continued at its lowest level in the last nine years, standing at 3.335.868 unemployed.

4.3 Current governmental situation

Legislative activity has been very limited due to the difficulty of reaching agreements among the different political parties. This situation is likely to continue in the near future. A motion of censure has led to a change in government, although it will be difficult for the new government to obtain sufficient support in Parliament to proceed with labour reforms.

Sweden

Summary

(I) The Swedish Labour Court made a final decision in the case between Unionen and Almega on collective agreement provisions on notice periods in the transfer of undertaking case C-336/15 Unionen.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Labour Court decision AD 2018 nr 35, 30 May 2018

After the preliminary ruling of the CJEU in a Swedish case on employee rights originating from collective agreements in a situation of a transfer of undertaking, (case C-336/15 ECLI:EU:C:2017:276, *Unionen v. Almega Tjänsteförbunden, ISS Facility Services AB*), the Swedish Labour Court issued a final judgment on 30 May 2018. While the preliminary ruling from the CJEU was somewhat vague, it indicated that the rights under the same wording to subsequent collective agreements' protection should be understood as part of the transfer of undertakings. However, the Swedish Labour Court's decision AD 2018 No. 35 points in a slightly different, or other, direction, as the Court concluded that the industrial parties who negotiated the new collective agreements were capable of transferring the provision on extended notice periods to the new collective agreements.

The case concerned questions about the status of previous regulations in collective agreements and to what extent, and with what meaning, these regulations had been transferred into new collective agreements years after the transfer of undertaking had taken place. The employees, who had been transferred to the service provider ISS, had worked for the company for at least ten years, with the employers involved in the transfer of undertaking, and all aged 55 years or more. The collective agreement covering the previous employer (AstraZeneca and Apoteket AB, respectively) provided for an extended period of notice by six months, from the statutory six months to twelve months.

Upon the dismissal of the employees by ISS, more than one year after the transfer of undertaking had taken place, the employees were not granted this extended notice period. The employer (ISS) argued that the employees had not been continuously employed for the required ten years. The ten-year employment requirement was identical in both the collective agreement covering the employment at the new employer (ISS) and in the collective agreement of the transferors (AstraZeneca AB, and Apoteket AB).

In its judgment, the CJEU states that Article 3 of Directive 2001/23/EC must be interpreted as 'meaning that, in circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employer acquired with the transferor.'

The Swedish Labour Court concludes that the CJEU's judgment must be understood as follows. The Transfer of Undertaking Directive 2001/23/EC is not breached if the provision in the currently applicable collective agreement is applied in accordance with the meaning of that agreement more than one year after the transfer of undertaking has taken place. Based on this, the Labour Court found that the provisions of the current collective agreement require 10 years of continuous employment with the (current, in fact, new) employer to generate an extended period of notice. The Labour Court pointed out that this was well in line with the opinion of Swedish labour law that the application of employment provisions after the expiry of a collective agreement is a matter of interest subject to ordinary negotiations, eventual industrial conflicts and by the conclusion of collective agreements under domestic law.

Source:

Mulder, Bernard Johann, *Anställningen vid verksamhetsövergång*, Juristförlaget i Lund, 2004.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

In case C-518/15 *Matzak* ECLI:EU:C:2018:82, the CJEU addressed issues related to working time and periods of rest in relation to standby time and standby time at home under the Working Time Directive 2003/88/EC.

The case C-518/15 *Matzak*, referred to the CJEU from the Cour du Travail de Bruxelles, concerned firefighters who occasionally were on standby, or standby at home. The Court concluded that the Member States may not derogate from the Directive's regulation on working time and rest periods (first question) "with regard to certain categories of firefighters". Furthermore, the Court found that Article 15 of the Directive must be interpreted to preclude Member States from maintaining or adopting less restrictive definitions of working time than postulated in the Directive, Article 2 (second question). Thirdly, the Court stated that working time and different forms of working time that are not paid were subject to the regulation in the Directive (third question). Finally, the Court revisited the issue of standby time spent at home and concluded that a duty to be on-call or standby at home with a requirement to respond to emergency calls within 8 minutes would be considered working time under the Directive, since it "significantly restricted the opportunities for other activities".

Source:

L Lunning, G Toijer, *Anställningsskydd, En lagkommentar,* Norsteds Juridik, Stockholm, 2016, p. 22, 25.

4 Other relevant information

Nothing to report.

United Kingdom

Summary

(I) The Employment Appeal Tribunal confirms the status of worker for a courier worker.

(II) An analysis of CJEU case C-518/15, *Matzak* is provided.

(III) The situation of UK post-Brexit remains uncertain

(IV) Uber has announced payment of maternity, paternity and sick pay to its drivers.

(V) The government has issued new guidelines for insolvency procedures.

(VI) The Director of the Labour Market Enforcement has issued a new report on workers' rights enforcement.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Platform work and the definition of worker

EAT decision in Addison Lee v Gascoigne *Appeal No. UKEAT/0289/17/LA, 11 May 2018*

There has been a run of cases on the question whether gig economy staff are workers as opposed to self-employed persons. The leading case concerned Uber, and the follow up is considered below. In the meantime in *Addison Lee v Gascoigne*, the EAT has confirmed the ET's judgment that a cycle courier working for Addison Lee was a worker under the Working Time Regulations 1998 and the Employment Rights Act 1996.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

In the present case, the Court ruled that Article 2 of Directive 2003/88/EC must be interpreted as meaning that standby time which a worker spends at home with the duty to respond to calls from her employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'. This will have practical implications in the UK. The UK has already struggled with the implementation of the broad definition of working time to include on-call workers. The definition of 'very significantly restricting' will be crucial.

Specifically, as far as firefighters are concerned, in the UK retained firefighters are required to be available within 5 minutes of a call out, and they receive a retained fee based on the hours per week that they are contracted to be on-call, with extra payment for responding to calls. The current rates are available here.

4 Other relevant information

4.1 Brexit

The UK government has published slides on its views of the shape of the UK-EU partnership. On labour rights it does not reiterate the Prime Minister's commitment that there will be no regression. Instead it refers, somewhat opaquely, to legal protection for workers that keeps pace with the changing labour market. For some this harks back to the suggestion made earlier in the Brexit White Paper that: "We are committed to maintaining our status as a global leader on workers' rights and will make sure legal protection for workers keeps pace with the changing labour market."

4.2 Uber

Uber drivers were found to be workers in a case brought before the Employment Tribunal last year. The company has now announced that it will pay its drivers sick pay and maternity and paternity payments.

4.3 Consultation in insolvency

There have long been tensions between how directors and insolvency practitioners comply, in an insolvency context, with the requirement under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and employment law. The government has now indicated that new guidelines will set out minimum expectations for insolvency practitioners to:

- notify the government in advance of collective redundancy proposals;
- comply with the requirement to consult when seeking to rescue or wind up a business;
- provide information on how to ensure legal compliance when electing employee representatives.

4.1 Better enforcement of rights

The new Director of Labour Market Enforcement has published his report. The Director of Labour Market Enforcement , Sir David Metcalf, calls for holiday pay to be enforced and payslips for all workers. A new independent report includes recommendations for bigger financial penalties for employers who break the law and tougher enforcement of rights for agency workers.

Sir David Metcalf calls for large companies to share responsibility for wrongdoing in the supply chain, including naming firms whose suppliers break employment laws. HMRC stats showed how its enforcement team helped 200,000 workers get pay owed to them. Sir David Metcalf's independent strategy published today (Wednesday, 09 May 2018) includes recommendations on:

- higher financial penalties for employers who exploit their workers and pursue more prosecutions;
- enforcing holiday pay and making it the law that employers must provide a statement of rights for employees and a payslip for all workers;
- making leading brands jointly responsible for non-compliance in their supply chains. This would be done in private but with public naming of the brand and supplier for failure to correct non-compliance;

- more resources to the Employment Agency Standards Inspectorate to enforce current regulations and expanding their remit to cover umbrella companies and intermediaries;
- locally or regionally piloting licencing of hand car washes and nail bars, which have been identified as sectors at risk of labour exploitation;
- tackling 'phoenixing' - the practice of directors dissolving their companies to avoid paying workers tribunal awards and other enforcement penalties.

The report is launched as new HMRC stats show that its enforcement teams have doubled the number of underpaid workers they have recouped money for to up to 200,000 workers in 2017.

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