Flash Reports on Labour Law August 2018

Summary and country reports

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

August 2018

EUROPEAN COMMISSION

Directorate DG Employment, Social Affairs and Inclusion

Unit B.2 – Working Conditions

Contact: : Marie LAGUARRIGUE

E-mail: Marie.LAGUARRIGUE@ec.europa.eu

European Commission

B-1049 Brussels

LEGAL NOTICE

This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: http://ec.europa.eu/social/easi.

Luxembourg: Publications Office of the European Union, **2017**

ISBN ABC 12345678

DOI 987654321

Country	Labour Law Experts
Austria	Martin Risak
	Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Nataša Randlová
Denmark	Natalie Videbaek Munkholm
Estonia	Gaabriel Tavits
Finland	Matleena Engblom
France	Francis Kessler
Germany	Bernd Waas
Greece	Costas Papadimitriou
Hungary	Gyorgy Kiss
Iceland	Leifur Gunnarsson
Ireland	Anthony Kerr
Italy	Edoardo Ales
Latvia	Kristine Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Barend Barentsen
Norway	Helga Aune
	Lill Egeland
Poland	Leszek Mitrus
Portugal	José João Abrantes
	Rita Canas da Silva
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Polonca Končar
Spain	Joaquín García-Murcia
	Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar
United Kingdom	Catherine Barnard

European Commission

Table of Contents

Executive Summary

1 National level developments

In August 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
- Transfer of undertakings
- Employee surveillance
- Dismissal law

Working Time

In **Austria**, the Supreme Court upheld the previous instances' decisions that the travel time of service technicians working for an employer and traveling from their place of residence to the first customer, as well as the travel time from the last costumer back to their place of residence, must be considered working time, in line with the CJEU case law in the *Federación de Servicios Privados del sindicato Comisiones obreras* case. In the **Czech Republic**, the Supreme Court has ruled that the mere possibility that an emergency may arise does not on its own constitute 'a continuous process that cannot be interrupted' and, according to Czech law, is not considered working time, but rest time. This decision might diverge from the CJEU case law on the difference between 'working time' and 'rest periods' such as in the *Simap* and *Jaeger* cases. In **France**, the Court of cassation decided a case of itinerary workers who spent considerable time travelling to costumer's premises. The Court of cassation highlighted that French legislation is in line with CJEU case law, since French labour law imposes an obligation on the employer to compensate itinerary workers for their commute to their first and from their last clients. In **Ireland**, the Labour Court upheld an adjudication officer's decision that the employer had infringed Irish law in respect of the complainant by permitting her to work in excess of the statutory maximum number of hours a week permitted by the Organisation of Working Time Act. In support of her complaint, the worker submitted copies of emails she had sent to and/or received from the employer before the normal starting time and after the standard finishing time on numerous occasions. The court accepted that the employer was aware of the hours the complainant was working but took no steps to curtail it and awarded her compensation. In **Luxemburg**, a new law regulating the working time of civil servants has been approved. It implements the time saving accounts for civil servants and assimilated persons in State administrations and public institutions as well as other changes in the regulation of working time of civil servants.

Transfer of undertakings

In **Austria**, the Supreme Court upheld the opinion of the lower courts that had declared the existence of a transfer of undertaking even though not all employees were absorbed by the new employer, because the employees themselves constituted the real value of the company. In line with CJEU case law, they constituted an economic unit. In the **Netherlands**, the Court of Appeals has confirmed the ruling of the Cantonal Judge Alkmaar in the *Bogra* case. In this case, the facts allowed the court to conclude that there was no pre-pack of the transfer, and therefore the protection of employees under the Directive, which is applicable to the pre-pack of an undertaking, did not apply, but on the contrary, the exception for transfers after insolvencies, as laid down in the Directive and national legislation, does. In the **United Kingdom**, with effect from 02 July 2018, where there has been a transfer of employees, all national minimum wage liabilities, including the full penalty amount, will be enforced against the transferee employer. The financial penalty is up to 200 per cent of the pay arrears, capped at GBP 20 000 per worker.

Employee surveillance

In **Germany**, the Federal Labour Court, in a case where an employer referred to a video recording as evidence in a dismissal,

ruled that the tape recordings could still be used in court proceedings even if they were a couple of months old when the employer gave notice of dismissal. However, the Court did not feel to be in a position to determine whether there was a legitimate open video surveillance. In **Luxemburg**, a new law has been passed to reorganise the national data protection authority.

Dismissal law

In **Hungary**, the Supreme Court has ruled that a dismissal procedure does not comply with the Labour Code, when based on the unilateral decision of the employer, if it does not provide a period of grace for the employee to obtain the necessary skills and qualifications to perform her work duties and if the employee was employed for a long period of time without being requested to upgrade her skills. In **Italy**, Article 3 of Law Decree No. 78 of 12 July 2018 has modified the indemnity to be paid in case of unjustified dismissal**.**

2 Implications of CJEU and EFTA-Court rulings

CJEU joined cases C-61/17; C 62/17 and C 72/17 of 07 August 2018, *Bichat et al.*

In its joined rulings *Bichat et al*, the CJEU had to interpret the meaning of the first subparagraph of Article 2(4) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. According to the Court, it must be interpreted as meaning that the term 'undertaking controlling the employer' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies.

In **Latvia,** according to Article 4 of the Latvian labour law, the 'employer' is a natural or legal person who concludes an employment contract with an 'employee'. Article 107, which implements Directive 98/59/EC, uses the same term 'employer'. Latvian law does not explicitly implement the requirements of Article 2(4) of the Directive. Therefore, the aforementioned cases may require a broader interpretation of the term 'employer' than the one currently provided for by the Labour Law. In **Norway,** no amendments seem necessary, since the Working Environment Act includes a similar content as the CJEU interpretation. In future cases, the term 'superior authority' of the Norwegian law will be interpreted in line with the ruling. In **Spain,** this ruling will not have an impact, since Article 42 of the Commercial Code defines the control of one company over another in very similar terms as that of the CJEU. Therefore, Spanish law is fully consistent with EU law. In **Sweden,** the Swedish concept of employer has been construed in a narrower way, with general reference to the legal entity in which the individual employee is employed. However, in relation to the employer's duty to negotiate with the authorised collective partners (the trade unions) prior to making any significant decision, the Swedish Labour Court has repeatedly stated that the strong influence of a parent company does not limit or exclude the employer's duty to negotiate. The decision of the CJEU might indicate that the Swedish provisions on the duty to negotiate in cases of collective redundancies are more expansive than the interpretation of the Directive. The defining words would be "*by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies*" as stated by the CJEU. The interpretation of 'other links in law' remains for the national courts to make.

CJEU case C-472/16 of 07 August 2018, *Colino Sigüenza*

According to this CJEU ruling, Article 1(1) of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers

of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that a situation where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that Directive.

This ruling also states that Article 4(1) of Directive 2001/23/EC must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23/EC, which it will be for the referring court to ascertain.

In **Latvia**, the concept of 'a transfer of undertaking' is defined in a very general manner, without a more detailed definition of the specific conditions. Such a regulation is most likely ineffective for the enforcement of respective rights, taking into account only several cases brought before the court on the basis of rights deriving from Directive 2001/23/EC. It follows that the decision in case C-472/16 has an impact on Latvian law, as it requires a broad and detailed interpretation of the term 'transfer of undertaking' than is currently provided by the Labour Law. In **Norway**, no amendments to Norwegian law are necessary, since the Working Environment Act states that the rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer shall be transferred to the new employer. In **Spain**, this ruling will not have a significant impact since the underlying problem is the existence of fraud in the actions of the undertakings involved. The Spanish Supreme Court has stated that it is irrelevant that the previous contractor was not the owner of the transferred means. What is truly relevant is the transfer of assets that affect an economic entity that maintains its identity. However, in this ruling, the employment contracts had been terminated before the transfer of undertaking. Therefore, the underlying problem is not the concept of transfer of undertaking, but whether the termination of contracts had taken place to avoid the application of Article 44 of the Labour Code and the Directive. No legal or case law reform is necessary, but instead a judicial assessment of the existence of fraud in each specific case.

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

Topic	Countries
Working time	AT, CZ, FR, IE, LU
Transfer of undertakings	AT, NL, UK
Employee surveillance	DE, LU
Dismissal law	HU, IT
Employment policies	IT, ES
Temporary agency work	IT, UK
Health and safety	LI, LU
Wages	EE, PL
Social elections	LU
Social dialogue	AT
Pension rights	LU
Ancillary work	BE
Disabled workers	HR
Incapacity/professional illness	CZ
Posting of workers	DK
Flexicurity	DK
Freedom to choose a profession	FR
Meal allowance	FR
Strike	DE
Digitalisation of work	DE
Collective agreements	EL
Contingent employment	IE
Fixed-term contracts	IT
Casual workers	IT
Part-time work	LU
Platform work	PT
Gender Equality	PT
Immigration	ES
Collective dismissal	ES
Harassment at work	ES
Information and consultation	SE

Austria

Summary

(I) A decision of the Supreme Court deals with the legal qualification of travel time as working time.

(II) A decision of the Supreme Court deals with the qualification of a change of employer in the cleaning sector as a transfer of undertaking.

(III) Recent significant amendments to the Act on Working Time (AZG) and the Act on Rest Periods (ARG) that entered into force on 01 September 2018 continue to preoccupy the ongoing social dialogue. The trade unions announced major actions to mitigate the effects of the amended laws, specifically in the upcoming annual rounds of negotiations on the respective sectorial agreements.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time: legal qualification of travel time

Supreme Court, No. 9 ObA 8/18v, 24 July 2018

The Austrian definition of working time in § 2 (1) of the Working Time Act *(Arbeitszeitgesetz)* is as follows:

"*For the understanding of this Federal Act*

1. *Working time is the time from the beginning to the end of work without any in-work rest breaks;"*

The defendant in the case decided by the Supreme Court of 24 July 2018, 9 ObA 8/18v, employed around 190 customer service technicians. The activity of the customer service technicians is the commissioning, maintenance and repair of heating appliances. They carry out the tasks assigned to them in their respective assigned areas of operation and travel daily from their place of residence to the customers and return to their place of residence after finishing their work for their last customer. The customer service technicians use a company vehicle provided by the defendant, which contains the necessary work materials and tools. These cars get stocked with all necessary work equipment and spare parts by the employer's cooperation partners, who know where the company vehicles are located during the night and open the vehicles with a spare key. The customer service technicians are informed electronically in the morning before they start working about the appointments they will have on the respective working days.

The time of travel to the first customer and the time of return from the last customer to the customer service technician's residence is compared; the shorter travel time is not considered working time but is still remunerated as such. Thirty minutes per day are deducted as an 'employee' contribution to take time saved into account, because the employees do not have to travel to the seat of the employer. The field service technicians have to document their travel time and take the shortest route to the customer, as the employer bills the customers for the travel time. Private activities on the way to or from the customer, such as bringing and picking up children to or from school or kindergarten are acceptable. If there is a break of more than 15 minutes, this will not be paid.

The works council at the employer demanded a declaratory judgement that the travel time from the service technicians' place of residence to the customer and back after completing the work for the last customer is to be qualified as working time based on the CJEU ruling in the case C-266/14, 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* .

All courts up to the Supreme Court sustained this argument and considered the travel time to be working time, as the employee is not able to autonomously dispose of her time. This was due to the fact that the employee has to use the company car which contains the necessary work materials and tools and is not free to choose any other means of transportation. She also has to take the shortest route possible and document the time spent traveling to the first customer and from the last customer back to the place of residence. Without referring to the European legal framework, this travel time is to be considered working time under the national legislation. This is also in line with Working Time Directive 2003/88/EC and the interpretation provided by the CJEU in the case *Federación de Servicios Privados del sindicato Comisiones obreras*. In the latter case, the employee was less restricted in her autonomy, and the disputed travel time in the present case had to therefore even more so be qualified as working time.

2.2 Transfer of undertaking

Supreme Court, No. 9 ObA 17/18 t, 24 July 2018

Austrian labour law does not include a legal definition of transfer of undertaking, a business or part of a business, but applies the European understanding as developed by the CJEU.

In the case decided by the Supreme Court of 24 July 2018, 9 ObA 17/18t, both the defendant and his brother ran a cleaning company. Employees originally working with the defendant's brother were told that they could not continue working for financial reasons, which is why they would be dismissed. They were, however, given the option to start working for the defendant two weeks later, who had established his own cleaning company approximately two months earlier. Thirty-one of the employees (i.e. half of the workforce) applied to work for the defendant and were hired. It was then disputed whether this was to be qualified as a transfer of undertaking.

The lower courts ruled that the fact that the defendant did not take on all of the employees does not preclude the assumption of a transfer of undertaking. The obvious intention behind the hiring of the defendant's brother's former employees was to continue the existing business and not merely to cover a need for human resources that was independent of the business' continuation. Rather, the defendant, who had previously employed only five employees, tried to increase his client base after taking over half of his brother's workforce by also seeking to establish business relations with his brother's clients. The contacts had partly been established by the father of the two. Apart from the leased vehicles that were returned, the proceeds of the sale of the brother's company's assets amounted to approximately EUR 2 000, which shows that the real value of the company was its employees.

The Supreme Court therefore ruled that the legal opinion of the lower courts, namely that this had been a transfer of undertaking from the defendant's brother to the defendant did not constitute a misjudgement in need of correction.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Social dialogue on the working time regulation

The recent major amendments to the Act on Working Time (*Arbeitszeitgesetz*, AZG) and the Act on Rest Periods (*Arbeitsruhegesetz*, ARG) that entered into force on 01 September 2018 continue to preoccupy the ongoing social dialogue. The trade unions announced significant actions to mitigate the effects of the amended laws, specifically in the upcoming annual rounds of negotiations on the respective sectorial agreements (*'Herbstlohnrunden'*). The trade unions, organised in the Austrian Federation of Trade Unions (ÖGB), are considering joint strike actions by all trade unions.

Sources:

Press articles relating to this issue are available here and here.

Belgium

Summary

(I) According to the Law of 18 July 2018, anyone who already is engaged in a professional main activity and earns an additional income from an ancillary activity in her free time against payment, may earn up to EUR 6 130 per year (indexed amount 2018) without paying income tax or social security contributions. This activity must involve association work, services provided by citizens to citizens or activities in the sub-economy.

(II) The Court of Justice confirmed in a case of the European Commission versus Belgium on 11 July 2018, the principle binding force of the A1 declaration and clarified that European legislation does not allow Member States to provide that an A1 declaration can be disregarded in national legislation in case of fraud. The provisions of the Belgium Programme Law of 27 December 2012 concerning the fight against fraudulent postings infringes the EU Regulations No. 883/2004/EC and 987/2009/EC on social security.

(III) If a worker posted by her employer to perform work in another Member State is replaced by another worker posted by a different employer, the second worker cannot remain subject to the legislation of the Member State in which her employer usually carries out its activities.

1 National Legislation

1.1 Ancillary work and tax regulation.

According to the Law of 18 July 2018, anyone who already is engaged in a professional main activity and earns an additional income from an ancillary activity in her free time against payment, may earn up to EUR 6 130 per year (indexed amount 2018) without paying income tax or social security contributions. This activity must involve association work, services provided by citizens to citizens or activities in the sub-economy. The combined income from association work and from services to citizens may not exceed EUR 510.83 per month (indexed amount 2018).

Additional jobs are possible for employees who work at least 4/5th, civil servants, self-employed persons in their main occupation and pensioners. From 15 July 2018, ancillary jobs must be declared against payment.

The ancillary work can be found on the government website. Such work is based on one of the following three pillars:

- association work;
- occasional services between citizens;
- the collaborative economy organised through the intermediary of a recognised platform.

The two first pillars, association work and occasional services between citizens, are new legislative conceptions and will be briefly explained.

Association work

Such services are paid services for non-profit sociocultural associations, de facto associations or public authorities. The services may not be professional and must be on the list of permitted activities. The association must declare its work.

The list of activities is an integral part of the law and includes 17 categories, ranging from animator to care for babies and toddlers.

An association can be established by two or more people (parent committees, neighbourhood committees). This is possible with or without a company registration number.

Volunteering, which is free and without obligation, differs from association work. No agreement is concluded, no declaration is issued, and it is unpaid. Volunteers can only have their expenses reimbursed (maximum EUR 34.03 per day). Being a volunteer and paying for additional work to the same association is not possible, unless the volunteer does not receive an expense allowance, either.

The details are specified in the Law of 18 July 2018. The legislator, for example, refers to activities (set up by an organisation) that are performed against payment for the benefit of one or more persons, of a group or organisation or of society as a whole. The 'association worker' usually (and primarily) carries out a professional activity that meets the conditions laid down in the law (4/5th employment).

Associative workers may not, during the same period, be linked to the organization for which the association's work is carried out as volunteers, self-employed or civil servants or employees.

At the latest at the effective commencement of the association's work, the association worker and the organisation conclude a written agreement, which can be in electronic form. The law specifies what must be included in this agreement as a minimum, e.g. a general description of the intended activities and the place and scope of the association work. The outline of the standard agreement can later be established in the Royal Decree. If such an agreement has not been concluded, the activity cannot be regarded as association work.

The performance of the agreement is suspended in certain cases, for example, in the event of temporary force majeure or unforeseen special circumstances. During this period of suspension, the association worker cannot claim compensation. The agreement can be terminated. The obligations also end in case of death and force majeure.

In the event that the association worker causes damage to the organisation or to third parties during the performance of the agreement, the organisation shall be civilly liable for this damage. The association worker shall only be liable in the event of fraud, gross negligence or ordinary rather than accidental minor negligence.

The organisations take out an insurance contract that covers at least the organisation's civil liability, with the exception of contractual liability. In addition, they must take out an insurance contract for any physical damage suffered by association workers as a result of accidents while performing association work or on their way to and from these activities, and as a result of illnesses related to the performance of association work. Coverage can be extended by Royal Decree and the minimum guarantee conditions can be determined.

Measures on occupational safety, psychosocial aspects, ergonomics, etc. to promote the wellbeing of association workers. To this end, the organisation introduces general prevention principles, such as the prevention of risks and the control of resource-related risks. Each association worker must also ensure her own safety and health (and that of other persons involved). A Royal Decree may elaborate this aspect in more detail.

The parties may agree on a fee for association work. This includes all fees for the reimbursement of expenses or travel expenses. As indicated on the government website, certain annual ceilings apply (with a reference in the Income Tax Code). Taxation is dealt with in a separate text.

An unemployed person who is entitled to unemployment benefits may, while retaining payment of this benefit, work as an association worker, if she informs the unemployment office in advance and in writing, and on condition that it is a mere continuation of the execution of an expiring agreement on association work, which was already effectively executed before the onset of unemployment.

Within the framework of compulsory insurance for medical care and other benefits, association work is not considered an activity, insofar as the advisory doctor establishes that these activities are compatible with the general health of the person concerned, and that these activities are a mere continuation of the execution of an expiring agreement on association work, which had already been concluded and effectively executed before the commencement of the incapacity for work. A similar arrangement is registered in the Royal Decree of 20 July 1971 on the establishment of a benefit insurance and maternity insurance for self-employed persons.

Special conditions in law aim to prevent the conversion of regular work into association work.

The organisation that uses association workers must use an electronic application module that records each individual service provider's precise starting and ending times (and the related fee). A Royal Decree will specify the further details.

Occasional services between citizens

Such services refer to occasional, paid services from one private person for another private person. These may not entail professional services and may not be provided through the already existing system of a recognised platform.

The list of activities is an integral part of the law and includes 11 categories, ranging from sports lessons to managing real estate to animal sitting. The individual who performs the work must make the declaration.

Importantly, anyone who performs services for a fellow citizen may not do so with regular frequency. For example, an apprentice may not mow a neighbour's lawn every week for a fee.

The Law of 18 July 2018 also deals with compensation. A natural person who usually and primarily carries out a professional activity that meets the conditions of the law may not 'merely participate in activities'.

Occasional service providers may not perform the activities as a self-employed person and she may not carry out or cooperate in acts of unfair competition (in relation to the employer or employers who employs her). The required minimum employment is 4/5ths of a full-time job as defined in the law, including a list of services that are not taken into account for the calculation of services provided.

Occasional service providers must be insured to cover the risks resulting from civil liability. A Royal Decree can stipulate the minimum guaranteed conditions. Occasional services are considered to be provided in the private sphere.

Those benefiting from and those providing occasional services may agree on a fee for the provision of occasional services. As indicated on the government website, certain annual ceilings apply (with a reference in the Income Tax Code). Taxation is dealt with in a separate text.

The occasional service provider must use an electronic application module that registers and keeps a record of the service provider's precise starting and ending times (and the related fee). A Royal Decree will elaborate the further details.

A separate chapter with 'common provisions' addresses:

- The consequences of compliance with the conditions of application, including the amendment of the Employment Contracts Act and the Social Security Act that do not apply, but also amendments to the Collective Bargaining Agreement Act, the Labour Act, the Wage Protection Act, the Employment Regulations Act which are neither applicable to occasional services between citizens or association work;
- The legal consequences of non-compliance with the conditions of application: if the restrictions to association work are violated, the agreement may be requalified as an employment contract. If the legal limitations to occasional services between citizens are exceeded, the individual providing the services cannot be regarded as an occasional service provider and her benefits shall be automatically presumed to have been provided to her in accordance with her social security status as a self-employed worker.

Entry into force of the legal provisions

Generally speaking, the title of the Law of 18 July 2018 'Social Affairs', which deals with association work and occasional services between citizens, entered into force retroactively on 20 February 2018. The government evaluated this regulation after one year. The evaluation results have been forwarded to the House of Representatives.

Certain activities could only be exercised as of 01 July 2018. This was the case, for example, for care of persons in need of care (night-time and day-time care).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 A1 Certificates

CJEU case C-356/15, 11 July 2018, European Commission supported by Ireland v. Belgium

The Belgian legislator introduced an anti-abuse rule in the 'Programme' Law of 27 December 2012, which allowed national courts, the social security authorities and the social inspectors to unilaterally reject fraudulent A1 certificates. This rule was introduced to support the fight against social security fraud, but was not applied in practice. This anti-abuse rule has now been definitively blocked by the courts after the European Commission initiated an infringement procedure against Belgium.

Pursuant to previous case law (CJEU cases C-178/97, 30 March 2000, *Banks*; C-202/97, 10 February 2000, *Fitzwilliam*; C-2/05, 26 January 2006, *Herbosch-Kiere* and C-620/15, 27 April 2017, *Rosa Flussschiff*), the Court confirmed the generally binding force of A1 certificates. According to the Court, Member States cannot unilaterally decide to reject A1 certificates, even in cases of manifest error, but must follow the specific dialogue and reconciliation procedure of the European co-ordination regulations to settle their disputes on the validity and accuracy of an A1 certificate.

Firstly, the Member State must request the sending state's social security authorities to reconsider or withdraw the A1 certificate they have issued. If the Member State disagrees, the case must be brought before an administrative commission to resolve the dispute. Should the commission fail to resolve the dispute, the Member States can

initiate a non-compliance procedure before the European Court of Justice, which will evaluate the accuracy of the A1 certificate.

The Court emphasised the binding force of the A1 certificates and referred to its recent case C-359/16, 06 February 2018, *Altun*, which was pronounced earlier this year during the court proceedings between the European Commission and Belgium. According to the Court, A1 certificates can be disregarded by the national courts in case of fraud if certain conditions are met.

3.2 Posting of workers

CJEU case C-527/16, 06 September 2018, Alpenrind

An Austrian court referred a number of preliminary questions to the European Court of Justice concerning the binding force of the A1 social security documents of a posted worker. Specifically, the court asked whether the document is also binding if the Administrative Commission for the Coordination of Social Security Systems has ruled on the withdrawal of that document, but the issuing institution has not withdrawn it. In addition, the Court was asked whether such a document has retroactive effect.

The Austrian company *Alpenrind* has been operating an abattoir in Salzburg since 1997. From 2012 to 2014, *Alpenrind* employed workers posted to Austria by the Hungarian company Martimpex to cut and pack meat. Both before and after that period, the work was carried out by workers of another Hungarian company, Martin-Meat. For approximately 250 workers posted by Martimpex from 01 February 2012 to 13 December 2013, the Hungarian social security institution issued A1 certificates attesting that the Hungarian social security system applied - some with retroactive effect and some in cases in which the Austrian social security institution, the '*Salzburger Gebietskrankenkasse'*, had already determined that the workers concerned were subject to compulsory social security insurance in Austria.

The decision of the Austrian social security institution establishing that the workers were subject to compulsory insurance in Austria was challenged before the Austrian courts. It is against that background that the Verwaltungsgerichtshof asked the Court of Justice to clarify the EU rules relating to the coordination of social security systems and, in particular, the binding effect of the A1 certificates.

The Court held that an A1 certificate issued by the competent social security institution of a Member State (Hungary in this case) is binding on both the social security institutions and the courts of the Member State in which the activity is carried out (Austria) as long as that certificate has not been withdrawn or declared invalid by the Member State in which it was issued (Hungary), except in cases of fraud.

The same applies where, as in the present case, the competent authorities of the two Member States have brought the matter before the Administrative Commission for the Coordination of the Social Security Systems and it has concluded that that certificate was incorrectly issued and should be withdrawn.

The portable A1 document issued by the competent institution of a Member State is also binding for the social security institution of the other Member State in which the activity is carried out and for the courts of that Member State, and may have retroactive effect, even if that certificate was issued only after that Member State determined that the worker concerned was subject to compulsory insurance under its legislation.

The Court also held that in a case in which a worker posted by her employer to carry out work in another Member State is replaced by another worker posted by a different employer, the second worker cannot remain subject to the legislation of the Member State in which her employer usually carries out its activities.

4 Other relevant information

Nothing to report.

Croatia

Summary

The Minister of Labour and Pension System has issued five regulations related to the employment of persons with disabilities.

1 National Legislation

1.1 Employment of persons with disabilities

The Minister of Labour and Pension System has issued a set of regulations related to the inclusion of persons with disabilities in the labour market.

According to the regulations on quotas for employment of persons with disabilities (Official Gazette No. 75/2018), employers who employ at least 20 employees need to employ workers with disabilities totalling 3 per cent of the total number of employees (Article 1 of the Regulations). Some employers are excluded from this obligation: branches of foreign persons, foreign diplomatic and consular missions and sheltered employment (which is regulated by separate regulations). Alternative quotas are regulated as well (Article 6 of the Regulations). Employers who fail to fulfil the obligation to employ persons with disabilities pay fines in the amount of 30 per cent of minimum wage for each person with a disability the employer would have to employ in order to fulfil the prescribed quota (Article 14(1) of the Regulations). Employers who employ a higher number of persons with disabilities than prescribed by law or who employ persons with disabilities although they were not covered by the quota system, are awarded a grant in the amount of 30 per cent of minimum wage monthly for each employee with a disability employed above the relevant quota.

Regulations on the content and the keeping of records of employees with disabilities were also published (Official Gazette No. 75/2018)

The regulations on the content and the keeping of records of employees with disabilities regulates the content and the keeping of records of employees with disabilities by the Croatian Pension Insurance Institute.

According to the regulations on subsidies for employment of persons with disabilities (Official Gazette No. 75/2018), the subsidies are paid by the Institute for training, professional rehabilitation and the employment of persons with disabilities (Article 1 of the Regulations). An employer who employs a person with a disability can be awarded a salary subsidy of a given amount, the partial financing of the costs of training for the person with the disability, subsidies for reasonable accommodation, etc.

The regulations on sheltered employment (Official Gazette No. 75/2018) regulate the conditions that need to be fulfilled to work in sheltered employment, the procedure to obtain the status of a sheltered employee and the relevant supervisory mechanisms.

The regulations on professional rehabilitation and centres for professional rehabilitation of persons with disabilities (Official Gazette No. 75/2018) regulate professional rehabilitation, entitlements to the right to professional rehabilitation and the work of centres for professional rehabilitation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Czech Republic

Summary

(I) According to the new Act No. 181/2018 Coll., compensation of loss of earnings after the end of a period of incapacity for work due to a work-related injury or occupational disease is calculated based on the difference between the amount of the employee's average salary prior to the work-related injury or the development of an occupational disease and the amount of salary after such an incident.

(II) The Supreme Court has issued a ruling on break periods at work that clarifies the interpretation of Czech law in this point but may deviate from approach of the CJEU in its case law.

1 National Legislation

1.1 Compensation of loss of earnings after the end of incapacity for work due to a work-related injury or occupational disease

Act No. 181/2018 Coll. amending Act No. 262/2006 Coll. the Labour Code, as amended, and other related acts, was published on 16 August 2018 with the effective date set for 01 October 2018.

Compensation of loss of earnings after the end of a period of incapacity for work due to a work-related injury or occupational disease is calculated based on the difference between the amount of the employee's average salary prior to the work-related injury or development of an occupational disease and the amount of salary after such an incident.

If the employment relationship is terminated after the period of incapacity for work and the terminated employee is registered as a jobseeker with the Labour Office, she will receive the same amount of compensation for as long as she is registered as a jobseeker.

In cases in which the jobseeker did not receive such compensation during the period prior to registration as a jobseeker, the relevant legislation artificially sets the amount of salary following the work-related injury or development of an occupational disease to the amount of minimum wage.

However, the legislation failed to specify whether this should be based on the present minimum wage or the minimum wage effective at the time of registering as a jobseeker. This has resulted in inequality between beneficiaries of different insurance companies.

The new Act strictly defines that the fictional earnings for the period following the work-related injury or development of an occupational disease are to be of the same amount as the minimum wage at the time of registration as a jobseeker.

2 Court Rulings

2.1 Working time

Supreme Court, No. 21 Cdo 6013/2017, 12 June 2018

The Supreme Court has ruled that 'work that cannot be interrupted' (where 'adequate time for lunch and rest' is provided instead of 'breaks for lunch and rest') constitute a continuous process that cannot be discontinued and which requires continuous control and attention of the employee, whereas a looming possibility of emergency situations arising where the performance of work would be necessary alone lacks the continuous nature particular to such uninterruptable work. The decision was issued on 12 June 2018 under file No. 21 Cdo 6013/2017.

Czech labour law provides for two types of breaks, namely:

- 'breaks for lunch and rest' in the duration of at least 30 minutes, no later than after six hours of continuous work (4.5 hours in case of minor employees) – considered 'rest' and 'not remunerated'; and
- 'adequate time for lunch and rest' provided when work / operations cannot be interrupted (instead of 'breaks for lunch and rest') – considered 'working time' and 'remunerated'.

Recently, a case involving these two types of breaks came before the Supreme Court of the Czech Republic. A fireman and an employee of a transport company claimed unpaid salary for an 'adequate period of time for lunch and rest', as they worked continuously and could not, at any time, leave the workplace. The employer considered the break to be a regular 'break for lunch and rest' and did not compensate the employees during that time, as it was not considered working time.

As to the specificities of the case, the organisation of the work allowed for precise break times to be scheduled in such a way as to not affect the employees' duties. All work was carried out at the employer's premises (the employees did not leave the premises, but all facilities for refreshment and relaxation were available there). The employees were only restricted by having to carry a radio transmitter on the off chance of being called to duty.

Firstly, the Supreme Court reiterated that 'adequate time for lunch and rest' can only be provided when the employer cannot provide a regular (and preferable) 'break for lunch and rest' due to works / operations that cannot be interrupted.

Further, the Court stated that 'work / operations that cannot be interrupted' constitute a continuous process that cannot be discontinued and which requires the employee's continuous control and attention. The fact that an unforeseen need for performance of work could not be ruled out at any moment during the break time has no bearing on the conclusion; as such, the looming possibility of emergency situations arising where the performance of work becomes necessary alone lacks the continuous nature specific to such uninterruptable work.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Denmark

Summary

(I) The Ministry of Employment has released new information about the Danish labour market rules and obligations related to the Enforcement Directive on increased knowledge of and compliance with the rules in the receiving Member State.

(II) A new flexicurity measure has been introduced. A government initiative was adopted to finance specific efforts of the local job centres in case of large-scale redundancies resulting from company closures, with the aim of assisting redundant workers to re-enter the labour market as quickly as possible.

1 National Legislation

1.1 Enforcement Directive

The Ministry of Employment has issued further information for companies providing services in Denmark, including the posting of workers, as part of the transposition of the Enforcement Directive. The aim is to raise awareness among companies providing services in Denmark and to comply with the rules and regulations of the Danish labour market.

The initiatives launched include a new 'pixie book' (a small, simple, easy to read book format with basic information) and a flyer, both with information about the rules and rights on the Danish labour market. The information is aimed at foreign companies and employees, and the purpose is to contribute to adherence to the health and safety regulations in the Act on Working Environment, and the requirement of registering the entity with the RUT-registry.

The information will be available in English, German and Polish, and has been published on the official website of the Ministry of Employment and of the Danish Working Environment Authority.

Sources:

The rules and rights of employees who work in Denmark are available here.

The rules and rights when providing services in Denmark are available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Flexicurity and large-scale redundancies

The Minister of Employment has initiated two 'grants', '*varslingspuljer*', that are available for local initiatives when large numbers of employees are dismissed, in order to assist the employees in finding new employment as quickly as possible.

The purpose of the 'grants' (ordinary and additional) is to initiate and finance the activities of the local job centres in connection with large company closures or large-scale redundancies of significance for the local area. The specially financed activities aim to provide prompt and efficient measures to help jobseekers find new employment, by providing training for new skills or qualifications, assisting with job applications, etc. The company and local job centre apply for the special grants and describe the activities that will be undertaken. The initiatives are available for all terminated and dismissed employees, regardless of their place of residence.

Two grants have been approved by the Minister:

- A grant for DKK 1 million (EUR 140 000) for the provision of training for 75 dismissed employees from a food production company, Scanflavours. The employees were paid hourly and had very specific skills in food production, hence it will be necessary to train them for different types of jobs so they can find new employment in the local area;

- A grant for DKK 540 000 (EUR 75 000) for the training of 39 dismissed unskilled workers from a chemicals factory, Cheminova. The perspective of finding new unskilled employment in the area for so many workers is very low, so the money will be used to train the employees for employment in different sectors of construction, industrial production, transportation or logistics.

Estonia

Summary

(I) The monthly average wage was increased in the second quarter.

(II) Trade unions have published a draft agreement on the new monthly minimum wage.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Monthly average wage

The monthly average wage has been increased. The average monthly wage in Estonia in the second quarter was EUR 1 312. Although the increase in the monthly average wage was slower than last year at the same time and slower than in the last quarter, it has nonetheless increased.

The monthly average wage in April was EUR 1 312, in May EUR 1 298 and in June EUR 1 354 (gross). The average hourly wage in the second quarter was EUR 7.50.

The highest monthly average wage is paid in the finance and insurance sector – EUR 2 192 and in the information and communication sector – EUR 2 169 per month. The lowest monthly average wage is earned in the tourism and catering services sector – EUR 819 per month.

The monthly average wage will continue to rise because there is a workforce shortage. In order to find employees, employers are forced to offer higher wages than they used to.

The monthly minimum wage at present is EUR 500 per month.

Sources:

Further information is also available on the webpage of the Estonian Statistical Board, last accessed on 06 September 2018.

4.2 Plan for new monthly minimum wage

The Estonian Trade Unions' Confederation has published a proposal on the collective agreement regarding the new monthly minimum wage. The draft of the agreement was published on the website of the Confederation. According to the draft agreement, the new monthly minimum wage will be EUR 540 (gross) and EUR 3.21 per hour. The new monthly average wage will be applied starting from 01 January 2019.

The draft collective agreement will be published and every individual has the right to give her opinion and make a proposal to the draft within a one-month period.

The monthly minimum wage will be agreed between the Estonian Employers' Association and the Estonian Trade Unions' Confederation. This agreement will apply to every employer and employee.

France

Summary

(I) The new bill on the freedom to choose one's professional future, also referred to as the second part of the reform of the social model after the Macron Ordinances and known as '*Pénicaud II*', was finally adopted by the French Parliament on 01 August 2018. However, three measures were immediately introduced before the Constitutional Court. The new bill has been partially invalidated by the Constitutional Court (Constitutional Court decision of 04 September 2018 No. 2018-769 DC), i.e. the law has not yet been promulgated.

(II) The Macron government is moving ahead with its reforms and bills to foster economic development and modernise the French model by finding inspiration in (and improving upon) other legal systems and political cultures. The next step is the *Loi Pacte*, intended to help companies innovate, evolve, grow and create new jobs.

(III) According to the Supreme Court, the employer may grant those employees who eat their meals at odd hours on account of being deployed either in shift work, night work or on some other unusual schedule, a meal allowance to make up for the extra cost thereby incurred.

(IV) Following the CJEU's reasoning in the case C-266/14, 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, the Supreme Court stated that employers must compensate itinerant workers for their commute to and from their first and last customer.

1 National Legislation

1.1 Draft bill on the freedom to choose one's professional future

The new bill on the freedom to choose one's professional future, also referred to as the second part of the reform of the social model after the Macron Ordinances and known as '*Pénicaud II*', was finally adopted by the French Parliament on 01 August 2018.

However, three measures were immediately introduced before the Constitutional Court. The new bill has been partially invalidated by the Constitutional Court (Constitutional Court decision of 04 September 2018, No. 2018-769 DC), i.e. the law has not been yet promulgated.

The general aim of the reform is to give each employee the freedom to choose her own development path and to threby enhance her business potential.

The reform covers the following main points:

- The personal training account (in French '*Compte personnel de formation'*) introduced in January 2015 will from 01 January 2019 be credited in euros whilst at present it is credited in hours. The hours accrued by 31 December 2018 will be converted into euros and the figures will soon be set out in a decree. The objective is for such accounts to become the main tool of development of the employee's skills. The holder of the account will now be able to choose and pay directly for her training courses;
- The apprenticeship agreement is in principle aimed at youth who participate in work/study training programmes in order to obtain a diploma. The age limit was previously 25 years but it has now been increased to 29. Such an agreement can be agreed for a minimum period of 6 months and a maximum period of 3 years, subject to a few cases where further extension is allowed. It has also been possible since March 2018 for an apprentice to perform part of her contract

abroad for a maximum period of one year. The new bill specifies that the training course can be completed outside the EU, provided that the initial contract is performed in France for a duration of at least 6 months. In addition, the new bill has simplified the possibilities of termination of such an agreement by allowing the employer to terminate the contract in specific cases, notably serious misconduct, physical inability to work, force majeure, etc.;

- The principle of equal opportunities has long been recognised by law. That said, in real terms, a difference of 10 per cent continues to exist between the average salary of a man and that of a woman in an equivalent position. The bill requires employers of at least 50 employees to measure the difference in salary and to adopt any necessary adjustment measures at the latest by 01 January 2020 (for companies employing between 50 and 250 employees) and by the latest on 01 January 2019 (for companies employing more than 250 employees). If the results after a three-year period are still beneath the level set out by decree, the companies could be fined;
- The fight against sexual harassment is also covered by the bill. In companies of at least 250 employees, an advisor should be appointed to guide, inform and accompany the employees. In smaller companies of at least 11 employees, such a role should be carried out by the staff representatives (social and economic committee). In very small companies of fewer than 11 employees, the Regional Joint Interprofessional Commission would in principle be in charge of such a task. Employers will now have to post any civil and criminal actions at the work premises and in the workplace in the event of sexual harassment as well as the details of the relevant authorities and agencies (which will be set out by decree). This obligation is in addition to the employer's current obligation to post the criminal sanctions applicable in the event of sexual harassment;
- Measures to encourage employment: on an experimental basis, it will be possible from 01 January 2019 to 31 December 2020, to agree to a sole fixed-term contract to replace several employees in the sectors described by decree (once it is published). That said, this should not have as an object or effect to provide for a position related to the normal and permanent activities of the company;
- The threshold to put in place the social and economic committee – employees employed under an occupational integration contract (in French '*contrat unique d'insertion*') should be included in the company's headcount to assess the threshold of number of staff representatives;
- The unemployment contributions and charges for employees currently at a rate of 0.95 per cent will no longer be applicable from 01 January 2019. From 01 October to 31 December 2018, such contributions will be suspended and employees will no longer contribute to the unemployment insurance scheme;
- Employers' unemployment contributions and charges will be amended and will vary according to the sector of activity of the company and the number of terminations of contracts, resulting in the registration of the employee with the unemployment agency;
- Employees who resign from their post will as of 01 January 2019 be able to benefit from unemployment benefits, provided that their decision of resignation is taken within the scope of plans by the employer for a real and serious career change of the employee. That said, there are a few steps that need to be taken to verify whether or not the career change is indeed real and serious;
- Independent workers strictly defined in the employment code could, from 01 January 2019, benefit from unemployment benefits, provided an insolvency proceeding has been opened or they have been put into liquidation.

1.2 Draft bill for an Action Plan for Business Growth and Transformation

The Macron government is quickly moving ahead with its reforms and bills to foster economic development and the modernisation of the French model by finding inspiration in (and improving upon) the content of other legal systems and political cultures. The next step is the '*Loi Pacte'*, intended to help companies innovate, evolve, grow and create new jobs.

The main goals in relation with labour law regulations:

- Removal of the '*forfait social*' (employer's social contributions) on profit-sharing and participation. Incentive agreements will be facilitated for companies with fewer than 250 employees;
- Facilitate the transfer of business. The Dutreil Pact will be amended in favour of free transfers of companies. Business transfers to employees and the financing of the takeover of small businesses will be facilitated;
- Simplify and ensure the portability of retirement savings products. Everyone will be able to keep and grow their savings throughout their career and the capital outflow will be facilitated.

The action plan will also include regulatory and non-regulatory measures as well as fiscal measures that will be incorporated into the 2019 financial project. The 'PACTE' law will be examined by the French Parliament during September 2018.

2 Court Rulings

2.1 Meal allowance in case of unusual schedule

Labour Division (Chambre sociale) of the Court of cassation, 28 June 2018, No. 17-11.714

The employer may grant those employees, who take their meals at odd hours on account of being deployed either in shift work, night work or in some other unusual schedule, a meal allowance to make up for the extra cost thereby incurred. Although the employees will receive that allowance as a lump sum, and will not need to present vouchers, receipts etc., it will nevertheless qualify as business expenses rather than a taxable wage perk.

The French Supreme Court (*Cour de Cassation*) has held that where the employer grants such allowances, whether for day- or for night-work (the former owing to company custom, the latter via an ad hoc Rider to the Collective Bargaining Agreement), they need not be included in annual leave payment calculations:

> "*attendu qu'une prime de panier ayant pour objet de compenser le surcoût du repas consécutif à un travail posté, de nuit ou selon des horaires atypiques constitue, nonobstant son caractère forfaitaire et le fait que son versement ne soit soumis à la production d'aucun justificatif, un remboursement de frais et non un complément de salaire ; qu'ayant fait ressortir que les primes de panier, de jour et de nuit, versées par l'employeur, la première en vertu d'un usage, la seconde en application de l'article 16 de l'avenant « Mensuels » du 5 avril 1994 à la convention collective des industries métallurgiques mécaniques similaires et connexes du Jura, avaient un tel objet, la cour d'appel en a exactement déduit que l'employeur n'avait pas à inclure ces primes dans l'assiette de calcul des congés payés*".

2.2 Working time

Labour Division (Chambre sociale) of the Court of Cassation, 30 May 2018, No. 16-20634

The French Supreme Court recently heard a case concerning itinerant workers that resembled the CJEU case C-266/14, 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*. An employee appealed a May 2016 ruling by Lyon's Court of Appeals. Like Tyco's employees, he spent a significant amount of time traveling from his home to his first customer.

The *Cour de Cassation* issued a decision on 30 May 2018 that harkens back to the core of the French Labour Code and the Directive 2003/88/EC.

The French Supreme Court thus reasoned that the only concrete precedent set by case C-266/14, 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras* is that employers must compensate itinerant workers for their commute to and from their first and last customer. France's labour code already mandates this. As noted, when the length of the commute surpasses the usual trip between one's home and the workplace, an employee shall be compensated with either time or money. Unlike C-266/14, the French employer did not breach the Directive 2003/88/EC because the employee was being paid in compliance with French labour law. The Court therefore ruled that the employee's working time and compensation were indeed legal and that the French employer did not have to grant an additional rest period, paid leave or overtime, and therefer does not need to pay any damages.

> "*attendu, qu'ainsi que l'a énoncé l'arrêt de la Cour de justice de l'Union européenne C-266/14 du 10 septembre 2015 (Tyco, points 48 et 49), il résulte de la jurisprudence de la Cour que, exception faite de l'hypothèse particulière visée à l'article 7, paragraphe 1, de la directive 2003/88 en matière de congé annuel payé, celle-ci se borne à réglementer certains aspects de l'aménagement du temps de travail, de telle sorte que, en principe, elle ne trouve pas à s'appliquer à la rémunération des travailleurs (voir arrêt Dellas e.a., C-14/04, EU:C:2005:728, point 38, ainsi que ordonnances Vorel, C-437/05, EU:C:2007:23, point 32, et Grigore, C-258/10, EU:C:2011:122, points 81 et 83), et que, partant, le mode de rémunération des travailleurs dans une situation telle que celle en cause au principal, dans laquelle les travailleurs n'ont pas de lieu de travail fixe ou habituel et effectuent des déplacements quotidiens entre leur domicile et les sites du premier et du dernier clients désignés par leur employeur, relève, non pas de ladite directive, mais des dispositions pertinentes du droit national;*
>
> *Et attendu que la cour d'appel, après avoir exactement retenu par motifs adoptés qu'en application de l'article L. 3121-4 du code du travail dans sa rédaction applicable au litige, le temps de déplacement qui dépasse le temps normal de trajet doit faire l'objet d'une contrepartie, soit sous forme de repos, soit sous forme financière, a estimé que le salarié avait été indemnisé de ses temps de déplacement".*

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) According to the Federal Labour Court, recordings from legitimate open video surveillance can be used as evidence in dismissal court proceedings, even if the recordings were made some months prior to the dismissal.

(II) According to the Federal Labour Court, 'strike-breaking premiums' are, in principle, admissible means to be used by the employer in a labour dispute.

(III) A comprehensive report on digitalisation of work has been published, which is based on a survey of works councils.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Possible inadmissibility of evidence in case of video surveillance

Federal Labour Court, No. 2 AZR 133/18, 23 August 2018

In the case of the Federal Labour Court of 23 August 2018 – 2 AZR 133/18, the employer ran a lottery agency for which the plaintiff worked. The store room was video monitored. On the occasion of a random sample of the inventory, the employer found that it was lower than it should have been. He then evaluated video recordings on which the plaintiff could be seen taking property-damaging actions. The employer terminated the employment relationship without notice. In the subsequent dismissal dispute, the employer made claims for damages and referred to the video recordings as evidence.

The Federal Labour Court ruled that the tape recordings could be used in court proceedings, even if they were a couple of months old when the employer gave notice. According to the Court, the employer did not have to evaluate the recordings immediately. He was allowed to wait until he saw a legitimate cause to do so. The Court did not feel that it was in a position to determine whether there was a legitimate open video surveillance in the underlying case. Should the video surveillance have been lawful, the provisions of the General Data Protection Regulation applicable since 25 May 2018 would not, however, preclude the use of the applicant´s personal data collected in court proceedings.

2.2 Admissibility of 'strike-breaking premiums'

Federal Labour Court, No. 1 AZR 287/17, 14 August 2018

In the case Federal Labour Court of 14 August 2018 – 1 AZR 287/17, the union had called a strike to induce the employer to conclude a collective bargaining agreement. The employer then promised in a company notice to pay a strike-breaking premium to all employees who would not participate in the strike. The plaintiff, however, did participate in the strike and did not work on several days. He later claimed payment of premiums, based in particular on the labour law principle of equal treatment. In this context, he argued that the premium was unlawful, especially in light of the amount promised by the employer.

The Federal Labour Court dismissed the claim. In the Court's view, while it was true that the promise of a payment to all strike breakers constituted discrimination between striking and non-striking workers, this unequal treatment was justified since the employer wanted to counter operational business disruptions and thereby counteract the strike pressure. In arriving at its decision, the Court stressed the principle acknowledged in case law according to which the social opponents are basically free to choose the 'weapons' they want to use in industrial action (so-called '*Kampfmittelfreiheit*'). This freedom applies to both unions and employers/employers´ associations and is limited only by the principle of proportionality. In applying this principle, the Court held that the strike-breaking premium was not inappropriate, even if it exceeded the daily earnings of some strikers several times over.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Report on Digitalisation of Work

The Institute of Economic and Social Research (WSI), which is an independent academic institute within the Hans-Böckler-Foundation, a non-profit organisation fostering co-determination and promoting research and academic study on behalf of the German Confederation of Trade Unions (DGB), has recently published a report on 'Digitalisation of Work' ('*Die Digitalisierung der Arbeit*').

The report is based on a survey of works councils. Though works councils, in principle, see the digital transformation positively and stress the possibilities of involvement, a decline in employee satisfaction also seems evident. In particular, work intensity has been increasing significantly, according to the works councils.

Sources:

The report is available here.

Greece

Summary

The principle of favour towards the workers' position was reintroduced in August 2018, meaning that in case of a plurality of collective bargaining agreements with the same scope of application, the one containing the clauses that are more favourable for workers will prevail.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Collective agreements

Before the financial crisis, in the event of a plurality of collective agreements with a different scope of application, the principle of 'more favourable for the worker' applied (Article 10 of Law 1876/1990). Pursuant to a number of successive legislative changes, it was provided that company collective agreements could include less favourable working conditions than those contained in the branch collective agreements (Law 3845/2010, Law 3899/2010, Law 4024/2011, Law 4472/2017). Thus, priority was, in any case, given to the company collective agreement, regardless of whether it contained less favourable terms than those provided in the branch agreements.

This priority was valid up to the end of the 'Programme of economic adjustment' in August 2018.

Greece has reintroduced collective bargaining based on the principle of 'more favourable for the worker'.

The branch collective agreements usually regulate the labour relations of the members of signatory trade unions. However, the Minister of Labour had the power to extend the scope of a collective agreement and make it binding upon all the workers of a given economic sector or occupation, i.e., to impose—if the necessary prerequisites were met—their application not only on members of signatory organisations, but also on non-unionised employees and to non-members of signatory employers' organisations (Article 11 of Law 1876/1990). This option granted to the Minister of Labour had been suspended by Law 4046/2012 up to the end of the 'Programme of economic adjustment' in August 2018.

Hungary

Summary

According to the *Kúria*, a dismissal is unlawful if an employee is dismissed due to lack of qualification if she was assigned to her duties for a long period of time without the employer requesting she complete training or acquire new skills; the employer must provide the employee a reasonable amount of time to obtain any qualifications she needs to continue performing her job duties.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Unlawful dismissal

Supreme Court, No. MfV.I.10.491/2017, 23 July 2018

According to case law of the *Kúria* (Supreme Court), the dismissal procedure does not comply with Section 6 of the Labour Code (hereinafter: LC), if it does not provide a period of grace for the employee to obtain the necessary skills and qualifications to perform her work duties and which is based solely on the employer's decision and if the employee was employed for a long period of time without being requested to upgrade her skills.

In case Mfv.I.10.491/2017, the employee (plaintiff) had been employed by the employer (defendant) as an economic agent since 03 March 2005. According to the director's instruction issued on 03 April 2014, an individual could only be employed as an economic agent if she had the appropriate qualifications. An official labour audit revealed that the plaintiff was employed without having acquired the necessary qualifications. The director requested the employee to certify that he had the necessary skills to work as an economic agent directly after the labour audit's findings were issued. The employee was not able to certify that he had the necessary skills and the employer terminated the employment relationship on 07 July 2014. The reason for dismissal was the inability of the employee to perform his work duties.

The employee claimed that the dismissal was unlawful. He argued that he had previously worked as an economic agent without having the necessary skills. He stated that the requirement to have specific skills was solely based on a decision of the employer and not on a legal norm. The employee stated that he was willing to acquire the necessary qualifications, but that the employer had not given him adequate time to do so.

The Labour Court in the first instance rejected the claim. The Court of Appeal upturned the decision of the Labour Court and stated that the dismissal was unlawful. The defendant in its application for review asked to maintain the judgment of the Labour Court.

The *Kúria* stated that the application for review was unjustified. The requirement for specific skills was not based on a legal norm. Employers must be extremely careful when taking unilateral decisions. The '*Kúria'* referred to Section 6 Sub 3. This rule is as follows:

> "*Employers shall take into account the interests of workers under the principle of equitable assessment; where the mode of performance is defined by a unilateral act, it shall be done so as not to cause an unreasonable disadvantage to the worker affected*."

The *Kúria* asserted that the employer has the obligation to evaluate the given circumstances, which she takes into account, in advance. The employer was aware of the employee's qualifications. Despite this fact, the employee had been employed in this job for a long time. The qualification requirements were changed not by a legal norm, but by a unilateral decision of the employer. For this reason, changing the requirements for a specific post at a later stage without having communicated these at the commencement of work may violate the requirements of good faith and fairness. The employer should have given the employee an appropriate grace period to acquire the necessary skills. Consequently, the dismissal by the employer was deemed unreasonable.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

(I) Labour Court finds employer permitted worker to work excessive hours.

(II) The Economic and Social Research Institute (hereinafter: ESRI) has published a report that finds that 'non-permanent employment' is not an extensive feature of the labour market in Ireland.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Labour Court, 13 July 2018, Kepak Convenience Foods v O'Hara

In *Kepak Convenience Foods v O'Hara*, the Labour Court upheld an adjudication officer's decision that the employer had infringed Section 15 of the Organisation of Working Time Act 1997 in respect of the complainant (a business development executive), by permitting her to work in excess of the statutory maximum number of hours a week permitted by the Act. In support of her complaint, the worker submitted copies of emails that she sent to and/or received from the employer before normal starting times and after normal end times on numerous occasions. The court accepted that the employer was aware of the hours the complainant was working, but took no steps to curtail it and awarded her EUR 7 500 in compensation.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Contingent employment

The ESRI has published a report entitled 'Measuring Contingent Employment in Ireland', which finds that the incidence of contingent employment (defined as employees on temporary contracts and freelancers) ranged from eight per cent to nine per cent of total employment between 1998 and 2005 before increasing to over ten per cent between 2011 and 2013. By 2016, however, the percentage had fallen back towards its pre-recession level. Accordingly, the report concludes that the evidence does not support the view put forward by some that the incidence of contingent employment has been increasing steadily over time in Ireland. The report also found that freelance workers were more heavily concentrated in the 45 to 54 age category, tended to be male and educated to tertiary level; while workers on temporary contracts were much more likely to be aged 24 to 34. The report's projection as to the likely future path of contingent employment shows the percentage rising to ten per cent in 2025, with the increase driven by a rise in the number of freelancers.

Italy

Summary

The report analyses Law Decree No. 78 of 12 July 2018 on 'Urgent measures for the dignity of workers and companies', approved by Parliament, with some modifications, by Act No. 96 of 09 August 2018. Section I refers to working conditions containing measures aimed at fighting precariousness at work. Section II contains measures to fight delocalisation and the safeguard of employment levels.

1 National Legislation

Law Decree No. 78 of 12 July 2018 on 'Urgent measures for the dignity of workers and companies', has been published in the Italian Official Journal No. 161/18 on 13 July 2018, entering into force the next day. Parliament approved the decree, with some modifications, by Act No. 96 of 09 August 2018, published in the Italian Official Journal No. 186/18 on 11 August 2018 and entering into force the next day.

Section I refers to working conditions containing measures aimed at fighting precariousness at work. Section II contains measures to fight delocalisation and the safeguard of employment levels, by envisioning the revocation (with restitution) of state assistance in case of relocation within a five-year period from the allocation of the benefit. Referring to state assistance, these provisions fall outside the scope of labour law. The report will therefore focus on Section I.

1.1 Fixed-term contracts

Article 1 - *Modifications to the regulation of fixed-term contracts*

Legislative Decree No. 81 of 2015 is modified as follows:

a) Article 19 (Agreement on the term and its maximum duration):

- Para. 1 is substituted by the following:
  "1. A term of the duration of the employment contract may not exceed 12 [formerly 36] months. The contract may have a longer duration, yet in any case not exceeding 24 months, only if at least one of the following conditions is fulfilled:

  a) temporary and objective conditions, not linked to the ordinary activity, or the need to substitute other workers;

  b) needs linked to a temporary, relevant and not programmable increase of the ordinary activity.";
- 1-*bis*) After Para. 1, the following is added:
  "1-*bis*. In case of a fixed-term employment relationship agreed for more than 12 months outside the conditions mentioned in para. 1, the fixed-term contract is transformed into an open-ended one from the expiry of the 12-month term";
- Para. 2 is modified as follows:
  "2. If not otherwise provided by collective agreements signed at company level, by Workers Representative Bodies (RSA or RSU) or at branch level, by comparatively most representative trade unions, the overall period of time covered by fixed-term contracts concluded between the same employer and the same worker (fixed-term agency work missions included), entailing assignments

of the same level falling within the same category, cannot exceed 24 [formerly 36] months. In case the 24 [formerly 36] months limit is exceeded by a single or by a succession of contracts or agency work missions, the employment relationship is transformed (by a judge's order) into an open-ended one from the day on which the 24 [formerly 36] months' limit was exceeded";

- Para. 4 is substituted by the following:
  "4. With the exception of employment relationships not exceeding a 12-day duration, a term to the duration of the employment relationship is null and void if not provided in writing. A copy of the written statement of the term must be delivered to the worker within 5 days from the commencement of work. In case of successive fixed-term contracts, the written statement shall specify the needs, as referred to in Para. 1, upon which the contract has been concluded; in case of extension, such a specification is only needed in case the overall duration exceeds 12 months".

b) Article 21 (Extensions and successive fixed-term contracts):

- A new Para. has been added:
  "01. A successive fixed-term contract can only be signed if one of the conditions provided under Para 1 has been fulfilled. A fixed-term contract can be freely extended within its first 12 months of duration. After that, it can be extended only if one of the conditions provided under Article 19 Para 1 has been fulfilled. In case of violation of phrase 1 and 2, the fixed-term contract is transformed into an open-ended one. As for seasonal activities, successive fixed-term contracts or the extension of existing ones can also be agreed if the conditions provided under Article 19 Para 1 are not fulfilled.";
- Para. 1 has been modified as follows:
  "1. A term which does not already exceed the 24- [formerly 36] month period can be extended with the worker's consent, for a maximum of 4 [formerly 5] times up to the limit of 24 [formerly 36] months. If the number of extensions exceeds 4, the fixed-term contract will be deemed to be one of indefinite duration".

c) Article 28 (Limitation period and protection):

- Para. 1 is modified as follows:
  "Any worker who wants to sue the employer for violations of the regulation on fixed-term contracts shall notify him or her in writing within 180 [formerly 120] days from the termination of the contract. The worker shall lodge the claim before the court within 180 days from the written communication to the employer".

d) Further directly applicable provisions:

The mentioned modifications will apply to fixed-term contracts signed after the coming into force of Law Decree No. 78/2018. They will also apply to successive fixed-term contracts and to extensions of ongoing fixed-term contracts agreed after 31 October 2018.

The modifications shall not apply to public administrations.

e) The law No. 96 of 09 of August 2018 has added a paragraph 1-bis to Article 1 of Law Decree No. 78 of 12 July 2018:

- 1-bis) Financial support aimed to support stable youth employment

"1. In order to increase stable youth employment, in case an employer hires workers under the age of 35 in 2019 and 2020, financial support of 50 per cent (occupational accidents and industrial diseases excluded) for a maximum period of 36 months for a maximum amount of EUR 3.000 will be paid to employers who fall within the scope of application of Legislative Decree 4 March 2015, No. 23 (Contratto a tutele crescenti).

2. The financial support mentioned in Para 1 is provided to employers who hire individuals under the age of 35 for the first time, i.e. the employee cannot have been previously hired under a contract of indefinite duration. Previous apprenticeships with a different employer that have not been successful do not play a role.

3. By Decree of the Ministry of Labour and Social Policies, in agreement with the Ministry of Economy and Finance, to be adopted within 60 days from the entry into force of this Act, practical arrangements for the use of the financial support will be defined".

1.2 Temporary Agency work

Article 2 - *Modifications to the regulation of Temporary Agency Work*

According to the new wording of Article 29 para. 2 Legislative Decree No. 81 of 2015 [exclusions from the application of fixed-term legislation as provided by Legislative Decree No. 81 of 2015], fixed-term contract regulations, as provided by Legislative Decree No. 81 of 2015, do not apply to TAW in port docks as regulated in Article 17 Act 28 January 1994, No. 84.

a) Article 31 Legislative Decree No. 81 of 2015 is substituted by the following:

"2. If not otherwise provided by collective agreements applied by the user, and without prejudice of the limit foreseen by Article 23 [20 %], the number of fixed-term workers, TAW, included cannot exceed 30 per cent of the number of open-ended employees on 1 January. If the mission starts during the year, the percentage shall be calculated on the basis of the number of permanent employees at the moment of conclusion of the contract with the TAW. TAW by workers are entitled to unemployment benefits, 'disadvantaged' and 'highly disadvantaged' workers shall not be taken into account".

b) Article 34 (*Regulation of employment relationships*) Legislative Decree No. 81/2015 is modified as follows:

"2. In case of fixed-term hiring, the employment relationship between the temporary work agency and the temporary agency worker is regulated in accordance with Section III [fixed-term work], with the exclusion of Article 21 Para. 2 [extensions and reiterations], 23 [calculation of fixed-term workers' percentage in the undertaking] and 24 [priorities in hiring]".

c) The law No. 96 of 09 August modifies Article 2 of Law Decree No. 78 of 12 July by adding a new Paragraph 1-*bis* that establishes that adds the following after Article 38 Legislative Decree No. 81 of 2015:

> *"Art. 38-bis (Fraudulent agency work) – 1. Without prejudice of the sanctions foreseen by Article 18 Legislative Decree 10 September 276, when agency work is provided with the specific aim of circumventing mandatory legislative or collectively agreed provisions applied to the employees, the agency and the user are fined EUR 20 for each worker involved on each day of the mission".*

An a new paragraph 1-ter: In the case of TAW, the conditions foreseen in Article 19 Para 1 let. a) Legislative Decree No. 81 of 2015 only apply to the user.

1.3 Casual workers

The Law No. 96 of 09 August 2018 modifies Article 2 of the Law Decree No. 78/2018 with the following content:

Article 2-bis - *Provisions favouring the worker within the framework of casual work (lavoro occasionale) as regulated by Law Decree No. 50 of 24 April 2017, validated by Act No. 96 of 21 June 2017*

Article 54-*bis* of Act No. 96 of 2017 allows casual work for activities that, over the year, in case of:

- Remuneration that does not exceed EUR 5 000 per worker with reference to all of her contractors;
- Remuneration that does not exceed EUR 5 000 for each contractor as far as the overall use of casual work is concerned;
- Remuneration that does not exceed EUR 2 500 for each worker by the same contractor. In any case, activities carried out for the same contractor may not exceed 280 days per year. In case of violation of the provisions under c), the worker may lodge a claim in court requesting recognition of a subordinate employment relationship with the relevant contractor.

Contractors may be physical persons outside the exercise of their professional activities, using casual work as far as homeworking, home care or home teaching are concerned. In this case, the contractor has to purchase the so-called '*Libretto Famiglia*', an electronic, personalised and prepaid instrument from *Istituto Nazionale della Previdenza Sociale* (INPS).

The use of casual work must be communicated to INPS within three days of the month in which the casual work commenced, specifying the name of the worker, the remuneration, the workplace, and the duration of the performance of work. The worker will receive a copy of the communication per SMS or e-mail.

Contractors may also be companies employing no more than five workers. In this case, a casual work contract will be concluded. The written form is not required. However, the user must pay the employee's remuneration through the INPS website, communicating, at least one hour before the activity starts, the name of the worker, the remuneration, the workplace, and the duration of the performance. The worker will receive a copy of the communication per SMS or e-mail. The remuneration for each activity may not amount to less than EUR 36 and the performance of work may not exceed more than four hours per day.

Casual workers are entitled to the same social protection as coordinated autonomous workers. They are also covered by the working time regulation. Casual work cannot be used between contractors and workers already linked by an employment contract and within six months after a dismissal has occurred.

1.4 Individual dismissal

Article 3 - *Indemnity to be paid in case of unjustified dismissal and increase of the contribution due in case of use of fixed-term contract*

a) Article 3 Para.1 Legislative Decree No. 23 of 2015 is modified as follows:

> *"If the just cause or the subjective or economic reasons alleged by the employer in order to dismiss the worker is assessed as ungrounded, the judge declares the termination of the employment relationship from the day of the dismissal and orders the employer to pay an indemnity amounting to 2 months of the employee's last wage, occasional grants and reimbursements excluded, for each year of work. In any case, the total amount of the indemnity shall not be lower than 6 [formerly 4] months and cannot exceed 36 [formerly 24] months of wage (occasional grants and reimbursements excluded). No social security contribution on these sums is due".*

b) The Law No. 96 of 09 August 2018 modifies Article 3 of the Law Decree No. 78/2018 with the following content:

1-bis. Article 6 Para. 1 Legislative Decree No. 23 of 2015 is modified as follows:

> *"In case of dismissal of workers falling under the scope of application of Article 1 Legislative Decree No. 23 0f 2015, in order to avoid judicial review, the possibility to engage in any other conciliation and arbitration procedure provided by the law or by the collective agreement is left to the parties, and the employer, within 60 days from the dismissal, may offer the worker, formally, a sum amounting to 1 month of wage, as calculated in the above, for each year of work. In any case, that sum shall not be lower than 3 [formerly 2] months and cannot exceed 27 months [formerly 18] of wage calculated as referred to in the above. No social security contribution and taxes on these sums are due. The sum shall be paid by bank draft to the worker during the conciliation procedure that shall take place either in court or by a trade union or by the Local Labour Office or by a Certification Commission. Acceptance of the bank draft terminates the employment relationship. By accepting the bank draft, the worker renounces his/her right to lodge a claim against the dismissal. Any other sum agreed within the conciliation procedure is taxed".*

c) The lump sum contribution the employer must pay in case of abuse of fixed-term employment contracts, already set at 1.4 per cent of the relevant wage for which social insurance contributions are due in accordance with Article 2 para. 28 Act No. 92/2012, is increased by 0.5 per cent [1.9 per cent in total] for each successive fixed-term contract (or temporary agency work contract) with the same worker. The increase does not apply to domestic work.

1.5 Others

The Law No.96 of 09 August 2018 further introduced the following contents:

Article 4 *bis* *Modification of the regulation of fixed-term contracts within the education sector*

Para. 131 Article 1 Act 13 July 2015, No. 107 is withdrawn.

As of 01 September 2016, fixed-term contracts signed with teachers as well as with administrative and auxiliary staff employed within the public education sector to cover vacant and free positions, may not exceed the overall duration of 36 months, even if it is not consecutive, with the same worker.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Latvia

Summary

The decisions of the CJEU in the joined cases C-61/17, C 62/17, C 72/17, 07 August 2018, *Bichat et al* and C-472/16, 07 August 2018, *Colino Sigüenza* have implications on Latvian law, because the Labour Law provides a very narrow concept of 'employer' and a very general definition of the concept of 'transfer of undertaking'.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Concept of employer

CJEU joined cases C-61/17, C 62/17, C 72/17, 07 August 2018, Bichat et al

According to Article 4 of the Latvian Labour Law, the 'employer' is a natural or legal person who concludes an employment contract with an 'employee'. Article 107, which implements Directive 98/59/EC, uses the same term 'employer'. Therefore, Latvian law does not explicitly implement the requirements of Article 2(4) of the Directive.

3.2 Transfer of undertakings

CJEU case C-472/16, 07 August 2018, Colino Sigüenza

The concept of 'a transfer of undertaking' is defined in the Latvian Labour Law in a very general manner, without a more detailed definition of the specific conditions. Such a regulation is most likely ineffective for the enforcement of respective rights, taking into account only several cases brought before the court on the basis of rights deriving from Directive 2001/23/EC.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

On 06 July 2018, the EEA Joint Committee amended Annex XVIII to the EEA Agreement and incorporated Commission Directive 2017/164/EU of 31 January 2017, establishing a fourth list of indicative occupational exposure limit values into the EEA Agreement.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Health and safety

Annex XVIII to the EEA Agreement

On 06 July 2018, the EEA Joint Committee in Brussels amended Annex XVIII to the EEA Agreement and incorporates Commission Directive 2017/164/EU of 31 January 2017, establishing a fourth list of indicative occupational exposure limit values pursuant to Council Directive 98/24/EC, and amending Commission Directives 91/322/EEC, 2000/39/EC and 2009/161/EU, into the EEA Agreement (Decision of the EEA Joint Committee No. 159/2018). The decision entered into force on 07 July 2018.

Source:

See the Liechtenstein Landesgesetzblatt No. 163 of 23 August 2018 here.

Luxembourg

Summary

(I) Multiple laws that were voted on before the parliamentary break have been published. These laws introduce important changes in the regulation of employee surveillance, sickness leave and supplementary pension rights.

(II) The working time legislation for civil servants has been reviewed with the introduction of time savings accounts.

(III) A new bill has been passed implementing the Directive 2016/943/EU on trade secrets.

1 National Legislation

1.1 Data protection and employee surveillance

In the context of the General Data Protection Regulation (GDPR), a law has been passed to reorganise the national data protection authority (*Commission Nationale pour la Protection des Données*, CNPD) and implement the GDPR: The

> "*Loi du 1er août 2018 portant organisation de la Commission nationale pour la protection des données et mise en oeuvre du règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données*".

Concerning Article 88 of the GDPR dealing with data processing in the context of employment, Luxembourg did not implement any specific rules for general personal data processed by the employer. However, the existing rules on employee surveillance had to be adapted. The new law modifies Article L. 261-1 of the Labour Code.

Scope

Paragraph (1) of the new Article states that any processing of data for the purpose of monitoring employees in their employment relationship ('*à des fins de surveillance des salariés dans le cadre des relations de travail'*) must respect Article 6 of the GDPR on lawfulness of processing. This provision as such is self-evident and redundant. Three points can be highlighted:

- As a change to the former legislation, there is no restriction of surveillance of employees to specific cases, as long as the general principles of the GDPR are respected;
- The scope of application of Article L. 261-1 is unclear. Paragraph (1) uses the concept of '*salariés*' (employees), which is a restrictive concept as such and would not include other categories of workers, such as apprentices, trainees or persons with subsidised contracts. The other paragraphs seem to cover civil servants. The legislator's intention was probably to cover any person carrying out subordinated work;
- Unlike the former legislation, the concept of '*surveillance*' is no longer defined. The GDPR does not define this concept, either. In some cases, a '*surveillance*' of employees may qualify as 'profiling' within the meaning of the GDPR.

Collective rights

In addition to the individual right for information and the right to complain granted by the GDPR to each citizen and thus to each worker, paragraph (2) of the new Article adds a collective layer to these rights. Indeed, the employee representatives (mostly the employee's delegates, *délégués du personnel*) must be informed about the intention in advance, including a detailed description of the purpose of the data processing, its practical implementation and the period for which the personal data will be stored. The employer must also give a formal promise (*engagement formel*) thatshe will not use the data for any other purpose than that stated to the employee representatives. The text only gives a right for 'information' and not for 'consultation'. In practice, however, a consultation should take place. If the employee representatives disagree, they can ask the CNPD for an 'opinion' on the 'conformity' (probably meaning the 'lawfulness', not the advisability) of the intended data processing.

It is unclear what the legal value of the employer's 'formal promise' is. It is also unclear what the legal value of the CNPD's 'opinion' is. As the State Council emphasised, the CNPD has the conflicting mission to issue an opinion and to monitor GDPR compliance, so the opinion seems to be more or less binding, and may thus turn out to be some sort of prior authorisation.

Co-decision

In some cases, especially if the purpose of the surveillance is to grant health and safety, to control production or to manage a flexitime scheme, its implementation is a matter of co-decision. Article L. 261-1 simply refers to Article L. 414-9 on co-decision subjects. It is not clear if a co-decision for such data processing is given in any case or, like the ordinary rules, only in companies with 150 employees or more. In any case, co-decision means that the employer does not have the right to implement the data processing if the employee representatives do not give their consent. A complex procedure has been put in place in 2016 in case no agreement can be found.

Sanctions

The initial bill projected to implement criminal sanctions in case the employer does not comply with Article L. 261-1, but this idea was abandoned. Thus, only administrative fines can be pronounced by the CNPD.

However, not respecting the right to prior information or the principle of co-decision of employee representatives is an 'offence of obstruction' ('*délit d'entrave'*) that can be sanctioned by a criminal court.

On a civil level, it will be interesting to see how case law will deal with the validity of evidence if the principles above were not respected.

Protection against retaliation

Paragraph (5) of the new article reminds (in accordance with the GDPR) that any employee can file a complaint before the CNPD. It adds that such a complaint is not a valid ground for dismissal. Even though only 'dismissal' is mentioned, it seems obvious that the same applies to any other type of disciplinary sanction. A dismissal that would be based on such a complaint would not be voidable, but would be considered unfair (*licenciement abusive*) and entitle the empoyee to damages.

Source:

Loi du 1er août 2018 portant organisation de la Commission nationale pour la protection des données et mise en oeuvre du règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données.

1.2 Sickness leave

Bill No. 7311 (*Loi du 10 août 2018 modifiant 1. le Code du travail ; et 2. le Code de la sécurité sociale en matière de maintien du contrat de travail et de reprise progressive du travail en cas d'incapacité prolongée*) was voted on after a very quick legislative procedure. No substantial changes have been made to the initial bill, so the details presented in June 2018 Flash Report can be referred to. The bill implements two major changes affecting labour law:

Part-time work on health grounds (*mi-temps thérapeutique*). The informal practice of progressively returning to work:

- The employee must have been on sick leave for at least one month during the last three months;
- The employer must agree;
- The referring physician (*médecin traitant*) must formulate a request, indicating that a progressive resumption of work is favourable for the employee's recovery process;
- The medical control of the social security institutions shall decide whether part-time work on health grounds is granted or not.

If these conditions are met, the employee can progressively return to work and, in many situations, receive full pay from the national health insurance.

In relation to the maximum duration of sick leave, the maximum duration of wage continuation (by the employer and by the health insurance) was set at 52 weeks over a reference period of 104 weeks. When this threshold was met, the employment contract automatically ended. The admissible duration of sick leave has thus been set to 78 weeks (+50 per cent). The additional expense will be mainly carried by the health insurance.

1.3 Working time

1.3.1 Working time of civil servants

Bill No. 7171 (*Loi du 1er août 2018 portant fixation des conditions et modalités d'un compte épargne-temps dans la Fonction publique et modification: 1° du Code du travail; et 2° de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État)* has been adopted. It implements time savings accounts (working time accounts, *compte épargne-temps*) for civil servants and employees in State administrations and public institutions (*établissement public*). A bill on time savings accounts for private law contracts is pending (see also June 2018 Flash Report). During the legislative procedure, it was also decided to implement new rules on the general working time of civil servants.

The unit for crediting and consuming the account are hours and minutes, except for teaching staff where the units are the 'lessons'.

The time savings account is credited as follows:

Automatically:

- The annual leave the worker did not take and that exceeds 25 days per year (which is the legal minimum for private law employment relationships; it was decided not to refer to the European mandatory minimum of 20 days);
- Excess time in flexitime accounts.

On the worker's request:

- The annual leave that the worker could not take within the year due to extended sick leave;
- Compensation for overtime;
- Extra holiday granted for good service (*congé de reconnaissance*).

The use of the saved hours is granted by the head of the administration on the worker's request. The request can be rejected or postponed.

The total duration of a combination of annual leave and the time savings account may not exceed one year. The maximum amount that can be credited on the account is 1 800 hours (or 900 lessons); every credit exceeding this maximum is lost without compensation.

If the civil servant leaves the State service, she is entitled to an indemnity calculated on the basis of her total salary (including household allowance and periodic premiums) at the wage rate applicable at the time the indemnity is paid out.

1.3.2 Other changes in working time

In a first set of articles, some clarifications are implemented, and the general principles are reaffirmed, including:

- The definition of working time, inspired by Article 2 of Directive 2003/88/EC, concerning certain aspects of the organisation of working time;
- The basic principle that the normal working time is eight hours per day and 40 hours per week;
- The principle of a daily break where the working day is longer than six hours, as required by Article 4 of the Directive. The minimum duration of this break is set at 30 minutes. The minimum lunch break that flexitime civil servants have to observe is also reduced from one hour to 30 minutes;
- The principle of a daily rest period of 11 consecutive hours, as required by Article 3 of the Directive.

In a second step, some changes have been implemented:

- In case a flexitime scheme applies, the standard time frame is extended and can range from 6:30 (formerly 7:00) a.m. to 7:30 p.m;
- The rules on overtime have only slightly been adapted. The first eight hours of overtime work per month are credited to the time savings account mentioned above. All other overtime hours are financially compensated;
- The rules on 'authorised absence' ('dispense de service') are clarified to prevent differences in treatment between administrations. These cases include, for example, blood donation, technical control of vehicles, administrative formalities, preparation of exams, etc.;

- The law also aligns the leave for personal reasons (congé pour raisons personnelles) of civil servants to the new provisions applicable to private law contracts (see also December 2017 Flash Report).

Thirdly, in order to increase clarity and legibility of legislation, other aspects of working time are rearranged with no or little changes, or by reference to existing legislation. This includes the rules on annual leave and special leaves. For maternity leave, the law refers to the Labour Code.

For sick leave, it was projected to clarify part-time work on health grounds (*mi-temps thérapeutique*), as is the case for private law contracts, but this reform has been postponed.

1.4 Supplementary pension rights

Bill No. 7119 on supplementary pension rights (*Loi du 1er août 2018 portant : 1. transposition de la directive 2014/50/UE du Parlement européen et du Conseil du 16 avril 2014 relative aux prescriptions minimales visant à accroître la mobilité des travailleurs entre les Etats membres en améliorant l'acquisition et la préservation des droits à pension complémentaire ; 2. modification de la loi modifiée du 8 juin 1999 relative aux régimes complémentaires de pension ; 3. modification de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenue*) has been voted on. This law implements Directive 2014/50/EU and accomplished the implementation of two older directives.

The scope of the national legislation is extended to independent workers, but this aspect is of no relevance for labour law or European law, as the directive only applies to employed persons. The same applies to the rather technical changes concerning tax law.

Luxembourg has chosen, in accordance with the suggestion in Recital 6 of the Directive, to extend the new rules to scheme members who change employment within Luxembourg, in consideration of preventing unequal treatment, especially with regard to the numerous cross-border commuters.

The various definitions provided by the legislation have been adapted to be in line with Article 3 of the Directive.

Article 9 of the law now states that for affiliates that entered the service after 20 May 2018, the vesting period or waiting period cannot exceed three years (Article 4 of the Directive). The minimum age limit of 21 years has also been implemented.

Article 18 of the law deals with the right to information (Article 6 of the Directive). General information must be delivered spontaneously at least once a year. The information on how a termination of employment would affect the supplementary pension rights must be provided on request. No difference is made between active members and persons with dormant pension rights.

Concerning the preservation of dormant pension rights, the initial bill projected that defined benefits schemes should be ‘indexed’, i.e. adapted to the variation of the cost of living (in accordance with the rules that apply in Luxembourg to all salaries and retirement allowances). The State Council, however, objected, especially as dormant rights could be treated in a more favourable way than active rights. Article 11 of the law now states that in case the employee leaves the scheme before retirement age, her acquired rights are fully granted, even in case of dismissal with immediate effect. Their value is evaluated:

- In a defined benefits scheme, only the nominal value is guaranteed, calculated according to a certain pro-rate taking into account the date the

contract ends and the theoretical retirement age (or maximum contribution age);

- In a defined contribution plan, the acquired reserves are adapted according to the rate of interest built into the supplementary pension scheme; if such a rate does not exist, they are adapted with regard to performance (return on investments) of the scheme.

According to Article 5 (3) of the Directive, the possibility of a payback (*rachat de droits acquis*) has not been fully abrogated, especially to avoid disproportionate administrative burdens. Payback is possible on the employee's request, if the amount does not exceed a threshold of three monthly minimum wages (ca. EUR 6 150). However, if the outgoing employee leaves the country (i.e. if she switches to an activity that is not subject to health insurance in Luxembourg), payback is always possible. Indeed, the legislator took into consideration the difficulties of staying in contact with the beneficiary and the possible tax disadvantages she could suffer.

1.5 Other laws and decrees

Bill No. 7290 on digitalisation of social elections (*Loi du 10 août 2018 portant modification des articles L. 413-1, L. 414-14, L. 414-15 et L. 416-1 du Code du travail*), has been voted on without any substantial changes (see May 2018 Flash Report). Its main purpose is to require employees to use an electronic platform to declare the results of social elections and to not send unstandardized paper documents to the labour inspectorate.

A grand-ducal decree (*règlement grand-ducal du 20 juillet 2018 modifiant le règlement grand-ducal du 14 novembre 2016 concernant la protection de la sécurité et de la santé des salariés contre les risques liés à des agents chimiques sur le lieu de travail*) has transposed Directive 2017/164/EU, establishing a fourth list of indicative occupational exposure limit values, by adapting the annex of chemical agents and limit values. Luxembourg made use of the possibility of a transitional period ending in 2023 concerning certain limit values in underground mining and tunnelling.

1.6 Trade secrets

A bill (*projet de loi n° 7353 sur la protection des savoir-faire et des informations commerciales non divulgués (secrets d'affaires) contre l'obtention, l'utilisation et la divulgation illicites*) has been deposited to implement Directive 2016/943/EU on the protection of trade secrets. This subject mainly affects commercial and intellectual property law, but some provisions deal with employees' obligations.

Article 1 (3) of the Directive (no restriction of the mobility of employees) is nearly literally copied into Article 1 (2) of the bill.

Article 3 (1) of the Directive (lawful acquisition of trade secrets by workers and their representatives) has been literally transposed in Article 3 (1) of the bill.

The derogation in Article 5, point c) of the Directive (disclosure by workers to their representatives; legitimate exercise of their functions) is literally transposed in Article 5.c) of the bill.

According to the copy-paste approach of the implementation, these three texts appear to comply with European law. However, it would have been preferable to adapt the legal terms and concepts to the specificities of Luxembourg's national legislation.

Article 14 (1) of the Directive states that Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer, where they act without intent. This

provision has not been explicitly implemented in the bill. However, according to the general rules of the Labour Code (Article L. 121-9), employees are not liable towards their employer except in case of 'voluntary action' (i.e. intent, '*actes volontaires*') or 'gross negligence' ('*negligence grave*').

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Netherlands

Summary

To be able to invoke the provisions on employee protection stipulated in Directive 2001/23/EC, a transfer of undertaking via a pre-pack must have been prepared in great detail prior to declaring insolvency and put into effect immediately after that declaration.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Amsterdam Court of Appeals, ECLI: NL: GHAMS: 2018:2339, 10 July 2018, Bogra

The *Bogra* case concerned the so-called 'pre-pack' in which a transfer of undertaking (assets, workers) had been minutely prepared prior to declaring bankruptcy in order to enable a swift relaunch of the undertaking's viable units. According to CJEU ruling in case C-126/16, 22 June 2017, *Smallsteps* of (see also June 2017 Flash Report), the protection of employees in accordance with the transfers of undertakings Directive may be applicable in case of a pre-pack, even though the transferor is involved in insolvency proceedings.

The Court of Appeals confirmed the ruling of the Cantonal Judge Alkmaar (see October 2017 Flash Report).

In the present case, the question arose whether the protection of employees under the Directive was applicable to the pre-pack of an undertaking (*Bogra*), which built coffins. Only part of Bogra's staff was hired by Bogra Uitvaartkisten, the new company that was founded following Bogra's bankruptcy. The court held that no transfer of undertaking had taken place resulting in employment under the same conditions for all employees of the transferor.

The court pointed out that the facts and circumstances in the Bogra case differed from those in the CJEU case C-126/16, *Smallsteps*. According to the court, one important difference is that in *Smallsteps*, the transfer of undertaking had been prepared in great detail before bankruptcy was declared and that the transfer was put into effect immediately thereafter. In *Bogra,* some research on a transfer of undertaking had been carried out before the declaration of bankruptcy. Negotiations with prospective buyers had taken place, but no total agreement had been reached. Additionally, Bogra Uitvaartkisten did not start its activities immediately after Bogra's insolvency, but only a few weeks later. Therefore, there was no pre-pack in the sense of *Smallsteps*. The court held that the exception for transfers after insolvencies, as laid down in the Directive and national legislation, applied.

Pre-pack proceedings and their consequences for the protection of workers in case of transfers of undertakings have been heatedly debated in the last few years. It remains to be seen, however, whether Bogra will be an exception or rather the rule. After *Smallsteps,* a debate arose about the feasibility and validity of pre-packs. The Bogra ruling is the first at the level of an appellate court confirming that there is still room for transfers of undertakings to be prepared before bankruptcy is declared, without the Directive being applicable. In earlier case law, pre-packs tended to be accepted and

recognised as 'legitimate' insolvencies, exempt from the protection prescribed by Directive 2001/23/EC.

The debate whether or not prepared continuations after insolvencies would be exempt from Directive 2001/23/EC seemed to have halted after the *Smallsteps* judgment. Most authors held that this would only be the case in exceptional cases. Now the question has come to the fore again. The Court's reasoning—not every detail had been arranged in advance, there were only a few days between insolvency and the relaunch—suggests that there is quite a bit of leeway for undertakings facing bankruptcy.

The trade unions acting on the employees' behalf argued that the management and shareholders of Bogra deliberately manipulated the transfer to avoid the applicability of the Directive. They suggest that they acted in bad faith and that the one and only aim was to deny employees their rights, and to abuse insolvency proceedings to do so. The time lapse between the bankruptcy and a relaunch was introduced at the very last moment with the sole purpose of deviating from *Smallsteps*, but not for operational reasons. However, according to the Cantonal Judge and the Court of Appeals, the employees and their unions failed to prove bad faith.

The likely implications for the EU acquis remain to be seen. The CJEU left some room for prepared continuations after insolvencies, the question is whether or not this approach remains within the limits set by the EU. It should be reiterated that the factual circumstances of this case differ from those the CJEU dealt with.

On 17 July 2018, the Court of Appeals Arnhem-Leeuwarden also held that a pre-arranged continuation after bankruptcy did not qualify as a pre-pack in the sense of *Smallsteps*. Therefore, the Directive did not apply. The case concerned the bankruptcy and transfer of a fish processing company, Heiploeg.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Norway

Summary

The CJEU joined cases C-61/17; C-62-17 and C-72/17 *Bichat et al,* as well as case C-472/16 *Colino Sigüenza* are analysed regarding their impact on Norwegian law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Collective redundancies

CJEU joined cases C-61/17, C 62/17, C 72/17, 07 August 2018, Bichat et al

No amendments to Norwegian law seem necessary following the ruling in cases *Bichat et al*. Section 15-2(2) last sentence of the Working Environment Act states:

> "*The employer shall be obliged to enter into consultations even if the projected redundancies are caused by someone other than the employer who has superior authority over the employer, such as the management of a group of companies.*"

3.2 Transfer of undertaking

Case C-472/16, 07 August 2018, Colino Sigüenza

No amendments to Norwegian law seem necessary following the ruling in case C-472/16, 07 August 2018, *Colino Sigüenza*. Section 16-2(1) first sentence of the Working Environment Act states:

> "*The rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer (our underlining) shall be transferred to the new employer*."

4 Other relevant information

Nothing to report.

Poland

Summary

The draft of the amendment to the Law on the method for calculating the minimum wage of employees engaged in medical professions at medical institutions has been submitted to Parliament.

1 National Legislation

1.1 Minimum wage in health care sector

On 01 August 2018, the government draft of the amendment to the Law of 08 June 2017 on the method for calculating the minimum wage of employees engaged in medical professions at medical institutions was submitted to the *Sejm* (the lower chamber of Parliament).

The Law of 08 June 2017 determines the method for calculating the minimum wage of employees who are engaged in medical professions at medical institutions, taking into account the type of work they perform. It also regulates the method for reaching the minimum wage, as well as the method for calculating a gradual pay raise. For further information on the abovementioned Law, see June 2017 Flash Report).

The key notion underlying the proposed amendment is to extend the personal scope of application of the law. Under the new provisions, the regulations would not only apply to persons who carry out medical activities, but would also apply to some other employees in the health care sector. Thus, new groups of employees in the health care sector would be guaranteed statutory level of basic remuneration, which would be more favourable than the general provisions on minimum wage.

The government proposes the following amendments:

- The title of the Law would be rephrased to: 'Law on the method for calculating minimum wage for some employees employed in medical institutions';
- New professional categories would be covered by the Law, i.e. its application would be extended to cover those employees who do not have medical professions, but whose activities are crucial for providing health care. Those key employees are identified by the Minister of Health in accordance with the Law of 15 April 2011 on therapeutic activities. As a result, they would be covered not by general provisions on minimum wage, i.e. by the Law of 10 October 2002 on minimum wage for work, but by the abovementioned Law on minimum wages in the health care sector. Thus, they could expect a gradual annual raise of their statutory minimum basic pay, which also influences other components of remuneration;
- The Law also provides methods for calculating gradual pay raises of the employees covered by it. The minimum pay in medical institutions should be subject to an agreement that can be concluded by the parties entitled to conclude a collective labour agreement, i.e. the employer and a trade union. If there is no trade union in an institution, the agreement can be concluded between the employer and an employee elected by the staff. The agreement should be concluded by 31 May of each year. If there is no agreement, the method for calculating the pay raise can be determined by an individual at management level at the medical institution. The draft provides that such a decision should be taken by 15 June of each year (under current regulations, there is no such deadline).

Sources:

The draft of the Law and its substantiation can be found here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

Law No. 45/2018, of 10 August 2018 ('Transport in Vehicles De-characterised through Electronic Platforms') and Law No. 60/2018, of 21 August 2018 on measures to promote equal remuneration among men and women have been approved.

1 National Legislation

1.1 Platform work in transport sector

Law No. 45/2018, of 10 August 2018 establishes the legal framework for the activity of individual and remunerated passenger transport in vehicles organised through electronic platforms that organise the transport and make it available to interested parties ('Transport in Vehicles De-characterised through Electronic Platforms') (Article 1 (1)).

'Transport in Vehicles De-characterised through Electronic Platforms' is carried out by legal persons (Article 2 (1)) and is subject to a license (Article 3 (1)). Drivers shall be registered by an electronic platform (Article 10 (1)) and, among other requirements, shall conclude a written contract signed by both parties.

This contract could be qualified as an employment contract, notably through the application of the presumption of an employment relationship pursuant to Article 12 of the Labour Code (Article 10 (2) (e) and (10)). For the purposes of this presumption, it is considered that the equipment and instruments of work are all those belonging to the beneficiary or exploited by the beneficiary or any other type of lease (Article 10 (11)). It should also be pointed out that, without prejudice to other legislation in force, the driver shall comply with the working time regime for employees engaged in mobile transport activities (Decree Law No. 237/2007, of 19 June 2007) or with the working time regime for independent drivers (Decree Law No. 117/2012, of 05 June 2012), depending on the type of contract in force between the parties (Article 10 (12)). This new regime will enter into force on 01 November 2018 (Article 33)).

1.2 Gender equality and non-discrimination

Law No. 60/2018, of 21 August 2018 introduces measures to promote remuneration equality among women and men who perform equal work or work of equal value (Article 1).

In the first half of each year, the government will publish (i) general and sectorial information about differences in remuneration between women and men, and (ii) an assessment of the differences in remuneration between women and men per company, profession and level of qualifications (Article 3 (1)). Upon receiving this assessment, the labour inspectorate will notify the employers to deliver an evaluation plan for the differences in remuneration (Article 5 (1)), which shall be implemented in the following 12 months (Article 5 (2)). At the end of this 12-month period, the employer shall inform the labour inspectorate about the outcome of the implementation of the plan (Article 5 (3)).

The differences in remuneration that are not justified by the employer will be deemed discriminatory (Article 5 (5)). Upon request of the employee or the trade union representative and the hearing of the employer, the public body competent to act in the field of equal opportunities between women and men may issue an opinion regarding salary discrimination (Article 6 (1) to (6)). This opinion will be delivered to the applicant and to the labour inspectorate (Article 6 (7)).

The differences in remuneration that are not justified by the employer will be deemed discriminatory (Article 6 (8)). A dismissal or any disciplinary sanction shall be deemed abusive, if it is determined within one year from the request of an opinion to the public body competent to act in the field of equal opportunities between women and men (Article 7 (1)).

Any retaliation act against the employee will be invalid (Article 7 (2)).

The courts shall notify the public body competent to act in the field of equal opportunities between women and men about rulings on salary discrimination (Article 9)).

This new regime will enter into force on 21 February 2019 (Article 33)).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Spain

Summary

There are no relevant developments this month because the activity in Parliament ceases in August and judicial activity reduces significantly. CJEU case law will not have a significant impact on the Spanish legal system.

1 National Legislation

1.1 Activation programme for employment

The Activation Programme for Employment ended in April 2018, but this Royal Decree Law allows those who were excluded from the programme to benefit from it again on an extraordinary basis, if their exclusion was motivated by temporary reasons, such as the starting of a fixed-term employment contract or self-employment.

Source:

The Royal Decree is available here.

1.2 Immigration

Order PCI/842/2018 published the Agreement of the Council of Ministers of 03 August 2018, which establishes the Coordination Authority to address irregular immigration in the area of the Strait of Gibraltar, Alboran Sea and adjacent waters. The Order designates an Authority to coordinate all operational actions related to irregular immigration in those areas, and creates a Coordination Centre that is integrated into the existing FRONTEX Coordination and Control Centre, with representation of the Army, intelligence bodies, police, customs surveillance, maritime authorities and various bodies of social assistance, and even the Red Cross.

Source:

The Order is available here.

2 Court Rulings

2.1 Harassment at work

Constitutional Court, No. 81/2018, 16 July 2018

The plaintiff was a police inspector (a civil servant) in a city council and had a serious labour conflict with the city council management, which asked him to leave his post due to a lack of confidence. This situation affected his health and forced him to request sick leave on several occasions. The Constitutional Court considered that there were no acts aimed at undermining the dignity of the worker, nor persecutory, offensive, hostile or degrading conduct against him. A conflictive work environment does not constitute harassment at work, since conflicts and tensions exist in every professional organisation.

Source:

The judgment is available here.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertaking

CJEU case C-472/16, 11 July 2018, Colino Sigüenza

According to this CJEU ruling, Article 1(1) of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that Directive.

This ruling also states that Article 4(1) of Directive 2001/23/EC must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23/EC, which it will be for the referring court to ascertain.

3.2 Collective dismissal

CJEU joined cases C-61/17, C 62/17, C 72/17, 07 August 2018, Bichat et al

According to the CJEU ruling in *Bichat et al*, the first subparagraph of Article 2(4) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as meaning that the term 'undertaking controlling the employer' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies.

Source:

The Spanish Commercial Code is available here.

4 Other relevant information

Nothing to report.

Sweden

Summary

The CJEU has ruled in a case concerning information and consultation prior to collective redundancies that the term 'undertaking controlled by the employer' in Article 2.4 of the Directive on Collective Redundancies should be interpreted in a broad sense as covering "*all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies*".

---

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Collective dismissal

CJEU joined cases C-61/17, C 62/17, C 72/17, 07 August 2018, Bichat et al

The CJEU has ruled in the joined cases *Bichat et al*, emerging from the '*Landesarbeitsgericht'* (Appellation labour court) in Berlin. The cases concerned collective dismissals under Directive 98/59/EC on collective dismissals and the interpretation of Article 2.4 and the concept of 'undertaking controlling the employer'.

The three different applicants had been employed at APSB since 1988 and 1992 respectively. APSB had provided its services exclusively to *GlobeGround* Berlin (GGB), an entity that was the only controlling shareholder of APSB. Since GGB performed poorly financially, the company (GGB) started decreasing its activities and to downscale its contractual commitments with APSB. GGB appeared at the annual general meeting of APSB in September 2014 as the only shareholder with a vote, when the meeting decided to cancel future operations of the company (APSB) and discontinue the operational organisation.

In January 2015, ASPB informed the works council about collective dismissals and asked for the council's opinion on the matter. The works council concluded that the redundancy was based on fictional losses, but this opinion did not alter the route decided by the management. The applicants were notified about their redundancy in January 2015, with a termination of their employment contract end of August that same year.

After appeal from the '*Arbeitsgericht'* (labour court) in Berlin-Brandenburg, the '*Landesarbeitsgericht'* referred the following questions to the CJEU:

> *"(1) Must the notion of a controlling undertaking specified in the first subparagraph of Article 2(4) of [Directive 98/59] ... be understood to mean only an undertaking whose influence is ensured through shareholdings and voting rights or does a contractual or de facto influence (for example, as a result of the power of natural persons to give instructions) suffice?*

(2) *If the answer to Question 1 is to the effect that an influence ensured through shareholdings and voting rights is not required:*

Does it constitute a "decision regarding collective redundancies" within the meaning of the first paragraph of Article 2(4) of Directive 98/59 if the controlling undertaking imposes requirements on the employer such that it is economically necessary for the employer to effect collective redundancies?

(3) *If Question 2 is answered in the affirmative:*

Does the second subparagraph of Article 2(4) in conjunction with Article 2(3)(a), Article 2(3)(b)(i) and Article 2(1) of Directive 98/59 require the workers' representatives also to be informed of the economic or other grounds on which the controlling undertaking has taken its decisions that have led the employer to contemplate collective redundancies?

(4) *Is it compatible with Article 2(4) in conjunction with Article 2(3)(a), Article 2(3)(b)(i) and Article 2(1) of Directive 98/59 to place on workers pursuing a judicial process to assert the invalidity of their dismissal effected in the context of collective dismissals, on the basis that the employer effecting the dismissal did not properly consult the workers' representatives, a burden of presenting the facts and adducing evidence that goes beyond presenting the indicia for a controlling influence?*

(5) *If Question 4 is answered in the affirmative:*

What further obligations to present facts and adduce evidence may be placed on the workers in the present case pursuant to the abovementioned provisions?"

The CJEU discussed the purpose and consequences of an extended interpretation of 'controlling undertaking' and concluded the case by answering only the first question. The Court found that the meaning of the provisions in section 2.4 of the Directive should be

> "*interpreted as meaning that the term 'undertaking controlling the employer' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies*".

Sources:

The Prop. 1994/95:102 of the government is available here.

The Swedish Co-Determination Act is available here.

4 Other relevant information

4.1 Upcoming general election

Sweden is currently monitoring the upcoming general election on 09 September. Only limited labour law reforms have been introduced during the political campaigns. The most recent concerns a Social Democrat proposal to expand the parental leave scheme with another paid week (80 per cent of the salary) annually per parent for every child between the age of four and 16 years. The outcome of the election is very unclear and the future of this particular proposal is even more uncertain.

United Kingdom

Summary

(I) The Employment Appeal Tribunal has issued a judgment relevant for the definition of agency workers

(II) The Employment Appeal Tribunal had to decide on the existence of a transfer of undertaking.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Agency work

Employment Appeal Tribunal, No. UKEAT/0309/17/LA, 26 April 2018, Brooknight Guarding Ltd v Matei

In Brooknight Guarding Ltd v Matei, the Employment Appeal Tribunal (EAT) said that an employee on a zero-hours contract was an agency worker due to the temporary nature of his assignment. As the EAT explained,

> "*the Respondent security company had employed the Claimant as a security guard on a 'zero-hours' contract for some 21 months. His contract had included a flexibility clause enabling the Respondent to assign him to different sites as required, although the Claimant was generally (although not exclusively) supplied by the Respondent to Mitie Security Ltd, providing security services at the Citi Group site in London. The ET found the Claimant was being used as a 'cover security guard' and concluded that he was an agency worker for the purposes of the Agency Workers Regulations 2010. The Respondent appealed, contending that the ET had failed to apply the correct test and had wrongly treated the 'zero-hours' contract and the Claimant's relatively short period of service as determinative*."

The EAT held, dismissing the appeal,

> "*that in determining whether the Claimant was an agency worker for the purposes of the Agency Workers Regulations 2010, the question for the ET was whether he had been supplied by the Respondent to work temporarily for Mitie, i.e. that he was working on a temporary and not a permanent basis. In answering that question, the ET had to have regard to the work carried out by the Claimant as a matter of practice. Although the ET had considered the nature of the Claimant's contract and relatively short period of employment to be relevant, it had not treated those factors as determinative; it had, rather, looked at the nature of the work for which the Claimant had been supplied and had found that it was to provide cover for Mitie as and when required. That was a finding supported not only by the Claimant's evidence but also by Mitie's description of the services provided. The ET had thus applied the correct legal test and reached a permissible conclusion that the Claimant was an agency worker*."

2.2 Transfer of undertakings

Employment Appeal Tribunal, No. UKEAT/0003/18/RN, 23 August 2018, Nicholls & Ors v LB Croydon

In Nicholls & Ors v LB Croydon, the EAT considered whether a transfer of undertaking had taken place in the case of the transfer of the public health team of Croydon Primary Care Trust (which was concerned mainly with the commissioning of public health services) to the London Borough of Croydon. The Secretary of State made "*The Health and Social Care Act 2012 ('Croydon Primary Care Trust') Staff Transfer Scheme 2013 which replicated some but not all aspects of* the *TUPE Regulations"*. Specifically, the right to claim automatic unfair dismissal (TUPE reg 7(1)) under the Scheme was time-barred. The employees therefore relied on the provision of TUPE itself. The question for the ET was whether there was a transfer of an economic entity, or, instead, a transfer of administrative functions between public administrative authorities.

While the EAT agreed that the public health team's activity in purchasing or commissioning health services was not an economic activity, the ET also found that most of the work done by the public health team could be, and was, offered by 'non-state actors operating in the same market'. That would normally be a strong indication that the public health team was carrying on an 'economic' activity. The tribunal should have explained its reasons for not drawing from that finding the conclusion that the team was carrying on an economic activity. Therefore, the case had to be remitted to another tribunal for reconsideration.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Transfer of undertaking

With effect from 02 July 2018, HMRC has said that where there has been a TUPE transfer of employees, all national minimum wage liabilities, including the full penalty amount, will be enforced against the transferee employer. The financial penalty is up to 200 per cent of the pay arrears, capped at GBP 20 000 per worker.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:

via EU Bookshop (http://bookshop.europa.eu);

- more than one copy or posters/maps:
  from the European Union's representations
  (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries
  (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service
  (http://europa.eu/europedirect/index_en.htm) or calling 00 800 6 7 8 9 10 11
  (freephone number from anywhere in the EU) (*).

  (*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions:

- via one of the sales agents of the Publications Office of the European Union
  (http://publications.europa.eu/others/agents/index_en.htm).


Publications Office