Flash Reports on Labour Law June 2018

Summary and country reports

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

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Flash Report 06/2018

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Executive Summary

1 National level developments

In June 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
- Equal treatment
- Posting of workers.

Working time

In **Austria**, the government has presented its proposed amendments to the Act on Working Time and the Act on Rest Time. The proposal foresees that the maximum daily working time shall be extended, that limits to overtime shall be abolished except for the limit provided by Directive 2003/88/EC, that a reduction of rest periods shall be allowed by law and for all establishments if certain conditions are met. Further, the Supreme Court has confirmed that the time employees spend to put on their working clothes shall be defined as working time and treated accordingly. In **Denmark**, the Supreme Court held, as regards the legislative intervention in form of Act 409 of 2013, that the provisions on the right to deviate from daily and weekly rest periods have the characteristics of collective agreement provisions, and that the deviations are not in breach of Article 18 of the Working Time Directive. In **Iceland**, the Supreme Court ruled that if the weekly rest day is not respected by the employer, the employer is required to pay the employee extra remuneration for each instance of violation of the rule on the weekly rest day, even if the collective agreement does not state that the weekly rest day should be remunerated. In **Luxembourg**, Bill No. 7324 implements time-saving accounts for employees, i.e. those who have concluded a contract of private law. This was the second attempt to implement time-saving accounts for private law contracts and to promote work-life balance after discussions had been unsuccessful over the last couple of years. In **Norway**, the Norwegian Supreme Court ruled that the disputed travel time – a policeman had performed work during three trips to and from a workplace different from his usual one – was to be counted as working time. In **Poland**, the draft of the amendment to the Labour Code concerning on-call time as well as the remuneration of employees managing the establishment in the name of the employer was submitted to the legislative procedure. The aim of the draft is to change the concept of on–call time and to introduce new provisions on the status of employees who occupy managerial position within the undertaking.

Equal treatment

In the **Czech Republic**, the Constitutional Court held that there was no evidence of unequal treatment in the case of a national expert seconded to the European Commission. It agreed with the Ministry of Environment, which stated that Commission Decision divides national experts into two distinct categories – the first being financed by the European institution, the second's financial backing being left to the national states. A comparison of the working conditions of those in the former category with those who fall under the latter would accordingly not be adequate. In **France**, the Court of Cassation traditionally considers that differences in treatment between different branches of a company are justified when they are provided in a collective bargaining agreement. In the present case, the Court had to deal with the question of whether an end of strike protocol constituted a collective bargaining agreement enabling a difference in treatment. In **Hungary**, the *Kúria* clarified the distinction between discrimination and justified unequal treatment, stressing that the principle of equal pay for equal work does not mean that all employers have to pay the same wages without regard of objective circumstances, such as the employee's experience. In **Iceland**, two Acts regarding equal treatment have been adopted – Act No. 86/2018, on equal treatment in the labour market, intending to fight discrimination as well as to establish and sustain equal treatment of

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individuals in the labour market, regardless of race, ethnicity, religion, beliefs, disability, reduced ability to work, age, sexual orientation, sexual awareness, gender, and sexual expression, and Act No. 85/2018, on equal treatment regardless of race and ethnicity, intending to fight discrimination in all areas of society in addition to the labour market.

Posting of workers

In **Denmark**, the Labour Court decided a case where an Italian entity provided services to a construction site in Denmark, including the posting of Italian workers to that site. The ruling in particular protects the equalisation of expenses for posting entities with Danish entities. As far as holiday payments were concerned, an unfavourable position could be justified by the social purpose of ensuring the rights of workers. For pension payments the situation was less clear with regard to alignment with EU law, but solved through the settlement of the case. In **France**, the Court of Cassation held that all employees of companies in which profit-sharing and incentive plans are included in collective bargaining agreements should benefit from the distribution of the company's profits, emphasising that the posted employees still belonged to the staff of the company during their posting. In **Iceland**, Act No. 75/2018, on amending the Act on the Rights and Obligations of Foreign Companies that temporarily post employees to Iceland and their working conditions has been adopted, amending several other acts. The Act aims to implement Directive 2014/67/EU. In **Luxembourg**, Bill No. 7319, facilitating the posting of workers to Luxembourg, removes any administrative obligation to notify the posting of workers in specific cases, and, at the same time, increases the maximum administrative fine in case of violation of the administrative obligations.

2 Implications of CJEU and EFTA-Court rulings

Case C-57/17, *Checca Honrado* – Termination of employment

In case C-57/17, *Checa Honrado* the CJEU held that the first paragraph of Article 3 of Directive 2008/94 must be interpreted as meaning that, where, according to the national legislation in question, some forms of statutory compensation payable on termination of a contract of employment at the worker's request and those payable in the case of dismissals on objective grounds, such as those envisaged by the referring court, fall within the concept of 'severance pay on termination of employment relationships', within the meaning of that provision, statutory compensation payable on termination of a contract of employment at the worker's request on account of a transfer of workplace by the employer, obliging the worker to change residence, must also fall within that concept.

In **Belgium**, the Court's judgment is of significance since Spanish labour law is comparable to Belgian dismissal law on this point. If the employer unilaterally changes the work place in a substantial manner—which is an essential element of the employment contract—the employee can invoke implicit dismissal by the employer with the result that s/he can invoke the lump sum as compensation in case of unlawful dismissal, although the employee had the choice of continuing to work or to opt for termination of the employment contract. In **Latvia**, the Law on the Protection of Employees in the Event of Insolvency of the Employer explicitly provides that severance pay, among other elements of 'pay', must be provided by the guarantee institution (Article 4(1)(4)). Latvian law therefore already is in compliance with the finding of the CJEU in case C-57/17. In **Spain**, the judgment will have an impact by increasing the obligations of the Wage Guarantee Fund. Either a legal reform will be approved, or the courts must apply the interpretation of the Court of Justice. The Court's argument on the equality between the two types of severance pay (Articles 40 and 41 on the one hand and Article 50

of the Labour Code on the other hand), however, might be disputed from a Spanish perspective.

Cases C-677/16, *Montero Mateos* and C-574/16, *Grupo Norte Facility* – Fixed-term work

According to the CJEU ruling in case C-677/16, *Montero Mateos*, clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation which does not provide for any compensation to be paid to workers employed under a fixed-term contract entered into to temporarily cover a post while the selection or promotion procedure to fill the post permanently takes place, such as the temporary replacement contract at issue in the main proceedings, on the expiry of the term for which that contract was concluded, whereas compensation is payable to permanent workers in case their employment contracts are terminated on objective grounds.

In case C-574/16, *Grupo Norte Facility* the CJEU held that Clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation under which the compensation paid to workers employed under fixed-term contracts entered into in order to cover working hours no longer covered as a result of a worker taking partial retirement, such as the relief contract at issue in the main proceedings, on expiry of the term for which those contracts were concluded, is less than the compensation awarded to permanent workers on termination of their employment contract on objective grounds.

In **Latvia**, severance pay is not in principle envisaged in case a fixed-term contract expires. Accordindly the CJEU's judgment in case C-574/16, *Grupo Norte Facility* has no impact on Latvian law. In **Spain**, the two rulings of the CJEU in cases C-677/16, *Montero Mateos* and C-574/16, *Grupo Norte Facility* should be the end of a period of uncertainty caused by the CJEU's *De Diego Porras* (C-596/14) ruling. It is stated (paragraph 62) that: "Spanish law does not treat fixed-term workers and comparable permanent workers differently, since Article 53(1)(b) of the Workers' Statute provides for statutory compensation equivalent to twenty days' remuneration per year of service with the employer to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration". In **Sweden**, the legislation differs from the Spanish one described in case C-677/16, *Montero Mateos* as no statutory compensation is paid to the employee if the termination is lawful or fair. This applies to both fixed-term and permanent contracts. The Swedish Employment Protection Act offers a comparatively extensive notice period, between one and six months, but fixed-term contracts expire at the end of the agreed term and the ordinary provisions on notice periods thus do not apply.

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

Topic	Countries
Working time	AT, DK, IS, LU, NO, PL
Equal Treatment	CZ, FR, HU, IS
Posting of workers	DK, FR, IS, LU
Transfer of undertakings	AT, FR, ES
Fixed-term work	AT, DE, PT
Part-time work	FR, DE, UK
Dismissal law	ES, LU
Collective redundancies	AT, ES
Anti-discrimination law	FI, HR
Annual leave	BE, IE
Third-country nationals	BE, LT
Labour Inspectorate	AT, LU
Seafarers	HR, IT
Right to strike	SE, DE
Termination of employment	RO
Redundancy	FI
Temporary agency work	NO
Information and consultation	FR
Data protection	RO
Maternity leave	CZ
Sick leave	LU
Special leaves	EE
Worker classification	UK
Brexit	UK
Trade unions and Armed Forces	IT

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Austria

Summary

(I) The government has presented its proposed amendments to the Act on Working Time and the Act on Rest Time, which have already been subject to severe criticism.

(II) According to the Supreme Court, non-contractual employees who are not permanently but only temporarily assigned to perform work at a user undertaking are not covered by the transfer of the part of the user undertaking to which they have been temporarily assigned and shall therefore remain employed with their original contractual employer.

(III) The Supreme Court ruled that all intended terminations initiated by the employer are to be included in the threshold at which the obligation arises for the employer to inform the local office of the Public Employment Service. This threshold applies when the employer issues termination agreements (within a 30-day period) and not only once the employees are later dismissed if they reject the termination agreement.

(IV) The Supreme Court has held that in order to verify whether a justification for a fixed-term contract exists, a distinction between real external reasons and reasons that are part of the employer's entrepreneurial risk shall be considered. In the present case, the employer could compete for new contracts with the Public Employment Service and could influence the possibility of being awarded new contracts by designing the offers. If this approach is not successful and if not all employees can be deployed under such contracts, they can be made redundant by giving notice. The successive fixed-term contracts in this case therefore constituted a circumvention of protection against dismissal.

(V) The Supreme Court has confirmed that the time employees spend to put on their working clothes shall be defined as working time and treated accordingly.

(VI) The Ministry of Labour, Health and Social Affairs has issued a new guideline for labour inspectorates.

1 National Legislation

1.1 Working time

Factual part

As laid out in Flash Report December 2017, the Government Programme contains plans to enhance working time flexibility. The government has presented its proposed amendments (303/A) to the Act on Working Time (*Arbeitszeitgesetz*, AZG) and the Act on Resting Time (*Arbeitsruhegesetz*, ARG). The proposal is currently still being amended, but it is expected to pass Parliament on 05 July 2018. The amendments are scheduled to enter into force on 01 January 2019. The bill was scrutinised in public and by legal experts. On 30 June 2018, a protest march took place in Vienna with around 100 000 participants.

The proposed bill raised nationwide criticism, not only in terms of its content (see below), but also for the way it was presented to Parliament: the bill was not presented to Parliament as a government proposal, which is open to evaluation by stakeholders. Instead, it was presented as a parliamentary initiative, which does not require public evaluation (only debate in Parliament).

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1.1.1 Working hours

Austrian working time law provides for maximum working hours. To date, the maximum daily working time is ten hours; the maximum weekly working time is 50 hours. Exceeding this limit (e.g. a 12-hour working day and a 60-hour working week) is possible in certain cases, but depends on agreement by the social partners (Collective Bargaining Agreements (CBAs) and/or works council agreement). In certain situations, the lack of a works council (and hence, the impossibility of consent) can be replaced with the worker's individual consent and agreement of an occupational health physician. Also, the labour inspectorate may allow working times beyond these limits.

Proposed bill:

- The maximum daily working time shall be extended from ten to 12 hours, the maximum weekly working time from 50 to 60 hours;
- If an agreement on flexi-time exists, 12-hour workdays (without overtime bonuses) are only possible if full day compensatory time can be taken. If the worker works 12 hours upon the employer's request (and not because the worker choses to work longer hours), these hours are to be considered overtime, triggering surcharges.

As the workers will keep their entitlement to a daily eleven-hour rest period (Article 3 of Directive 2003/88/EC), the proposal is in conformity with EU law.

1.1.2 Limits on overtime work

To date, the law provided several limits on overtime: generally, no more than five hours of overtime per week are possible. In addition, a worker can work an additional 60 hours of overtime per year. The maximum hours of overtime a worker can work per week is ten hours. This generally caps overtime hours at 320 hours per year. The general limit of 48 hours per week within a reference period as provided for in the Directive on Working Time 2003/88/EC applies. The laws permit more overtime than the current overtime limited to specific situations; the consent of the social partners or the approval of an occupational health physician (see above) have been removed.

Proposed bill:

- The only limit that remains is the limit provided for in the Directive on Working Time 2003/88/EC, e.g. no more than an average 48 hours within a 17-week period. Hence, 20 hours of overtime work per week, i.e. five "twelve-hour days", are possible; and a total of 416 hours of overtime per year (proposed § 7 Abs 1 AZG).

As the average working time for each seven-day period, including overtime, does not exceed 48 hours within a reference period not exceeding four months (Article 6 of Directive 2003/88/EC – in Austria, it is only 17 weeks), the proposal is in conformity with EU law.

1.1.3 Refusal to perform overtime work

Currently, the law allows employers to request a worker to work overtime only if the overtime is within the limits of the law (see above) and if no interests of the worker worthy of consideration (e.g. care obligations, etc.) stand in the way (§ 6 Abs 2 AZG).

Proposed bill:

- The refusal to perform overtime work will not be amended, but a new right to refusal to work the 11th and 12th working hour is introduced: the worker is entitled to refuse to work the 11th and the 12th hour for overriding personal

reasons and may not be disadvantaged or discriminated against because of this choice. In the most recent amendment to the proposal, this was changed to a right to refuse to work the 11th and 12th hour without giving a reason. Workers may now also challenge a termination that is based on their refusal to perform overtime for the 11th/12th hours in court.

The right to refuse to work overtime in its original form was — according to statements by government officials—intended as a stronger mechanism than the current protection against overtime. In fact, it was weaker: for the 9th and 10th hour of overtime work, the employer could only request the employee to work overtime under certain conditions; for the 11th and 12th hour of overtime, the employer may request them, but it is up to the worker to decide whether she feels the conditions are met. This provision has been subject to heavy criticism, and will be amended before the law passes Parliament: government officials have stated that overtime for the 11th and 12th hour should only be performed on a "voluntary basis" and have therefore included a right to reject such overtime work without having to provide any reasons.

This amendment is in conformity with Directive 2003/88/EC.

1.1.4 Exceptions of the Act on Working Time/Act on Rest Periods

Currently, the Act on Working Time lists a number of workers to whom it does not apply (§ 1 Abs 2 AZG). One of the most prominent exceptions is that of managing executives, or more precisely "executive employees" (*'Leitende Angestellte'*, § 1 Abs 2 Z 9 AZG and § 1 Abs 2 ARG). Executive employees are defined as employees who have been assigned key management tasks on their own responsibility. Family workers are not currently on that list of exceptions.

Proposed bill:

- The exception has now been amended and uses the wording of the Directive 2003/88/EC to describe managing executives or other persons with autonomous decision-taking powers. They, and family workers, are exempt from the Acts if—on account of the specific characteristics of the activity concerned—the duration of the working time is not measured and/or predetermined or can be determined by themselves.

This amendment is in line with Directive 2003/88/EC.

Interestingly, the proposal takes (in its explanatory note) the view that this amendment would broaden the current exception to include more executive employees (Explanatory Note to §1 Abs 2 Z 8 AZG), covering not only 1st and 2nd level management, but 3rd level management as well. This understanding seems to be a somewhat overbroad interpretation of Article 17 para 1 of the Directive (see the Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time on the scope of the 'autonomous workers' derogation). In fact, the amendment possibly limits, and not broadens, the scope of the exception.

1.1.5 Daily rest period

In the tourism and hospitality industry, the law currently allows the applicable CBA to reduce the rest period from eleven to eight hours for full-time kitchen staff/waiters in seasonal establishments if certain conditions are met.

Proposed bill:

- The proposal allows the reduction of rest periods in the tourism and hospitality sector by law, bypassing the CBA. The reduction is now not limited to seasonal establishments, but applies to all establishments, if the working hours provide

for an at least three-hour break within two "shifts", and the reduction in the rest period is compensated within four weeks/at the end of the season.

This amendment is in conformity with Directive 2003/88/EC. Article 17 para 3 lit. d permits deviations from Article 3 of the Directive by law, when there is a foreseeable surge in activity, particularly in tourism. Article 17 para 4 lit. d also allows deviations in case of activities involving periods of work divided across the day.

1.1.6 Work on weekends/weekly rest

Currently, work on weekends is only permitted in very specific sectors, most of them listed in a regulation of the Minister of Labour and Social Affairs (*Arbeitsruhegesetz-Verordnung*), and only for the number of workers absolutely necessary (§ 2 Abs 2 ARG).

Proposed bill:

- The proposal asserts that in case of temporary need, exceptions from the prohibition of work on weekends and public holidays may be agreed in works council agreements, for four weekends/or public holidays per year. In case no works council has been installed, such an agreement is possible between the employer and the worker.

This amendment is in conformity with Directive 2003/88/EC, as workers remain entitled to weekly rest periods during the week.

Analytical part

The proposed amendments in do not exceed the limits of Directive 2003/88/EC. Yet, they propose a significant change of the Austrian tradition of regulating working time: so far, deviations from the conventional standards of maximum working times and minimum rest periods were possible, but required prior agreement of the social partners (via CBAs or works council agreements), and/or the involvement of the labour inspectorate.

According to this proposal, these extensions no longer require the involvement of social partners, the labour inspectorate or occupational health physicians. The 12-hour working day and the 60-hour working week are now provided for in the Act on Working Time itself, and are as such open to the individual agreement between the employer and the worker. Collective agreements and works council agreements may limit the maximum working time in favour of the worker. Yet, for workers who fall under CBAs that do not have lower working time limits than the new law or who do not fall under a CBA (two percent of the work force), or do not have an (active) works council representation, the new law fully applies. The proposal shifts agreements on working time from the collective level to the individual level. This has raised nationwide criticism from trade unions, occupational health physicians, the churches and even some employers, and led to demonstrations of a significant size and some strike actions.

Sources:

An overview of the legislative process is available here and here.

For press comments, please see the following links:

Die Presse, 25 June 2018: Regierung: ‚Der 8-Stunden-Tag bleibt, Flexibilität kommt'.

Die Presse, 21 June 2018: ‚Konzernkanzler Kurz, Arbeiterverräter Strache': SPÖ-Protest gegen Arbeitszeitgesetz.

Die Presse, 19 June 2018: Arbeitszeit: Schwarze Gewerkschafter warnen vor Falle für junge Familien.

Die Presse, 18 June 2018: Nach Kontroverse: Gleitzeitzuschläge bleiben bestehen.

Kurier, 21 June 2018: 12-Stunden-Tag: Wie freiwillig ist ‚freiwillig'?.

Der Standard, 17 June 2018: Arbeitsrechtsexperte zu Regierungsplänen: ‚Zwölfstundentag wird zum Normalfall'.

Der Standard, 16 December 2017: Arbeitszeit: Erleichterungen und Hintertüren für Arbeitgeber.

Der Standard, 25 June 2018: Betriebsvereinbarung kann Zwölfstundentag verhindern.

ORF, 30 June 2018: Zehntausende bei Demo gegen Zwölfstundentag.

Kurier, 28 June 2018: Arbeitszeit: Bischoskonferenz übt heftige Kritik an Regierung.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, No. 9 ObA 19/18m, 21 March 2018

Factual part

A worker had been employed by a company (C1) that assigned him to work for another company (C2), which in turn posted him to work for a third company (C3). When C2 assigned the work being carried out by C3 to another company (C4), it was undisputedly held to be a transfer of undertaking. What was disputed in this case was whether the worker concerned had also changed employers and was now employed by C4. C1 and C2 belonged to the same owner and could therefore be considered to belong to the same group of undertakings.

Section 3 (1) of the Act on the Adaption of Contractual Employment Law provides for the following transposition of Council Directive 2001/23/EC of 12 March 2001 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:

> *"If a company, business or part of a business is transferred to another owner (transfer of undertaking), the transferee as an employer with all rights and obligations takes over all existing employment relationships at the time of the transfer."* (unofficial translation by the Author)

The plaintiff, i.e. the employee, argued on the basis of the CJEU's decision in the *Albron* case (C-242/09) that he had been transferred to C4 by the provision of law. In the mentioned decision, the Court established that in the event of a transfer of an undertaking belonging to a group to an undertaking outside that group, it is also possible to consider the group company to which the employees were permanently assigned as the 'transferor' without, however, being linked to the latter by a contract of employment, under the condition that one of the companies belonging to the group is linked by such an employment contract with the employee concerned.

All Austrian courts, including the Supreme Court (Supreme Court, No. 9 ObA 19/18m, 21 March 2018), rejected the claim. In line with the Austrian literature cited in the decision on the interpretation of the CJEU's decision in the *Albron* case, it was argued that this decision only referred to special circumstances: all employees of the group of companies (Heineken International) were only employed by one company and assigned to work in all other companies of the group. And they were additionally assigned to those companies on a permanent basis. The decision was therefore interpreted that, as

a rule, non-contractual employees who are not permanently assigned, namely only temporarily assigned, are not covered by the transfer on the part of the user undertaking and therefore remain to be employed with their original contractual employer.

In the present case, the worker, after 31 years of employment, had only been assigned for 10 months to the user undertaking for one project prior to the transfer. Thus, the criteria of the *Albron* case referring to a permanent assignment did not apply, and a change of employers by provision of law had not taken place.

Analytical part

The restrictive interpretation of the CJEU's decision in the *Albron* case taken by the Austrian Supreme Court is in line with the prevailing legal opinion in Austria and seems to be correct and in line with Directive 2001/23/EC. The decision extensively argues why the CJEU decision only concerns special cases of assignments within a group of companies, and only if they are permanent. It then applies these criteria to the case in a convincing way and thereby also provides guidance for future cases that courts might have to deal with.

2.2 Collective redundancy

Supreme Court, No. 9 ObA 119/17s, 25 April 2018

Factual part

In Austria, the provisions in § 45a of the Act on the Promotion of the Labour Market (*Arbeitsmarktpolitikförderungsgesetz*) provide as follows:

"(1) *Employers must inform the regional office of the Public Employment Service of the place of employment by written notice if they intend to terminate the employment relationships*

1. *of at least five employees in establishments with usually more than 20 and less than 100 employees or*
2. *or of at least five per cent of employees in companies with between 100 and 600 employees or*
3. *of at least 30 employees in establishments with usually more than 600 employees or*
4. *of at least five workers who have reached the age of 50,*

within a period of 30 days.

(2) The notification referred to in paragraph 1 must be made at least 30 days before the first declaration of termination of employment. (...)

(5) Dismissals, which intend to terminate employment relationships within the meaning of paragraph 1, are legally invalid if they take place

1. before notification of the advertisement referred to in paragraph 1 with the regional office of the Public Employment Service or

2. after notification of the regional office of the Public Employment Service within the deadline set in accordance with paragraph 2 without prior consent of the regional office in accordance with paragraph 8." (unofficial translation by the Author)

In the present case, it was disputed how the relevant number of employees was to be calculated and whether offers by the employer to arrive at a consensual termination agreement were to be included in the number of intended terminations. Another contentious issue was the point of time the relevant numbers are terminated.

The Supreme Court (Supreme Court, No. 9 ObA 119/17s, 25 April 2018), like the lower courts, ruled that all intended terminations initiated by the employer were to be included in the threshold at which the obligation arises at which the employer must inform the local office of the Public Employment Service. This threshold applies when the employer offers termination agreements (within a 30-day period) and not only once the employees are later dismissed in case the offers are not accepted. The court rejected the argument that the relevant point in time is only that when it becomes clear that the employees will be made redundant and that the end date of the termination is of no relevance at all (see also CJEU case C-188/03, 27 January 2005, *Junk*).

Analytical part

The Supreme Court referred to the CJEU'S jurisprudence (CJEU case C-188/03, 27. Januar 2005, *Junk*) on several occasions. The decision seems to be in line with Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, as it interprets the Austrian provisions rather extensively. In the opinion of the Supreme Court, the obligation to inform the Public Employment Service arises at a fairly early point in time and the calculation of the relevant numbers must not only be included for actual dismissals but for all other terminations (even those by mutual agreement) initiated by the employer.

2.3 Consecutive fixed-term contracts

Supreme Court, No. 9 ObA 4/18f, 25 April 2018

Factual part

In Austria, there is no explicit statutory provision in employment law prohibiting the extension of a fixed-term contract or for the conclusion of successive fixed-term contracts. Long standing case law, however, considers this a circumvention of protection against dismissal (this only applies to giving notice or summary dismissals) and of provisions that base an employee's right or entitlement to uninterrupted employment (e.g. the statutory minimum length of notice periods or sick leave). It therefore construes the assumption that successive fixed-term contracts that are not justified by good reason are used by the employer to circumvent provisions protecting the employee. The employer must therefore justify the conclusion of a second fixed-term, otherwise the agreement on the fixed term is void and the contract will be deemed one of indefinite duration (e.g. Supreme Court, No. 9 Ob A 156/08v, 28 January 2009).

In the present case, an employee had been employed under two successive fixed-term contracts, the employer arguing that the employee was carrying out fixed-term contracts under the Public Employment Service's training programme as a trainer. Any change of trainers must be agreed with the Public Employment Service, thus limiting the use of the worker for other projects. It was disputed whether this constituted an objective ground to extend the fixed-term contract.

The labour court of first instance decided in favour of the worker, stating that the conventional entrepreneurial risk would otherwise be shifted to the worker. The court of appeals, however, accepted the appeal and reversed the first decision based on the argument that this constituted an external reason that could not be influenced by the employer.

The Supreme Court (Supreme Court, No. 9 ObA 4/18f, 25 April 2018) again decided against the employer, distinguishing between real external reasons like a "dead" season and those that fall under the employer's entrepreneurial risk. In the present case, the employer could compete for new contracts with the Public Employment Service and could influence the possibility of being awarded new contracts by designing the offers itself. If this was unsuccessful and if not all employees could be deployed to conclude

such contracts, the employer could make them redundant by giving notice. The successive fixed-term contracts in this case therefore constituted a circumvention of protection against dismissal.

Analytical part

It does not seem that Austria has properly transposed the measures to prevent abuse of fixed-term contracts in the Fixed-Term Directive 1999/70/EC as the reference to the general clauses and jurisprudence regarding the persons concerned is not sufficiently transparent (c.f. Risak, M. and Jöst, A., *Aktuelle Neuerungen im Arbeitsrecht*, *ZAS* 2002, 97). Apart from this, the decision seems to be in line with the Directive, as the general entrepreneurial risk that a contract with a customer is not extended is not to be considered an objective reason justifying the renewal of such contracts or relationships.

2.4 Working time

Supreme Court, No. 9 ObA 29/18g, 17 May 2018

Factual part

The institutional regulations of a hospital stipulate that employees must wear service uniforms and protective clothing (e.g. doctors, nursing staff). Wearing the service uniform and protective clothing outside the hospital area is not permitted. The service uniform must be worn before starting work and must be stored in the facility and not taken home for hygienic and legal reasons. It was disputed whether the time it takes to change from regular clothes into the service uniform and protective clothing (and back into regular clothes) as well as the time to collect the clothing and bring it back constitutes working time. The hospital argued that this was a preparatory act that only takes an insignificant amount of time and therefore did not qualify as working time.

The Austrian courts up to the Supreme Court agreed with the claim, arguing that in the present case the employees were required in accordance with their employment contract to wear a service uniform and protective clothing and were only allowed to change into them at the hospital and had to leave the clothes there. The employees could therefore not decide whether they wanted to change at home or at the workplace and the time spent changing and fetching or bringing back the service uniform and protective clothing constituted working time.

The court distinguished this case from two previous cases (No. 9 ObA 89/02g; No. 9 ObA 133/02b) involving circus musicians who had to change into their uniforms in their trailers before each performance. The court in that case decided that the time it takes for a worker to get dressed before going to work is generally not considered working time. Constellations in which this could be seen differently—such as the need for a time consuming costume—would have to be claimed and proven.

Analytical part

This ruling is in line with the Working Time Directive 2003/88/EG and the CJEU case C-266/14, 10. September 2015, *Tyco*, which was also mentioned in the Supreme Court decision. According to Article 2 of the Directive, 'working time' refers to any period during which the worker is working, at the employer's disposal and carrying out her activity or duties in accordance with national laws and/or practice. In the *Tyco* case, the CJEU stressed that in order for a worker to be regarded as being at the disposal of her employer, that worker must be placed in a situation in which she is legally required to obey the employer's instructions and carry out her activity for that employer. Conversely, the possibility for workers to manage their time without major constraints

and to pursue their own interests may be an indication that the period of time in question does not constitute working time within the meaning of Directive 2003/88.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Belgium

Summary

(I) A Royal Decree relating to annual leave entitlements for half-days worked due to health issues was issued on 07 June 2018.

(II) New regulations relating to single permits for third-country nationals to reside and work in the territory of a Member State have been issued, requiring further legislation at the federal and regional levels.

(III) The '*Cour de Cassation*' held that the fact that the company's working regulations provide for certain full-time workers to be covered by a six-day system is not sufficient to rule that Saturdays must in any event be regarded as days of interruption for the calculation of entitlements to public holiday pay.

(IV) The CJEU's decision in the *Checa Honrado* case will have implications for Belgium, since Spanish labour law is comparable to Belgian dismissal law on this issue.

1 National Legislation

1.1 Annual leave

The Royal Decree on assimilation, on annual leave of parts of the day in the event of partial resumption of work following illness, accident, accident at work or occupational disease, on the assimilation of half-days of incapacity for work ('*Moniteur belge*', 21 June 2018) was issued on 07 June 2018.

The number of holidays and holiday pay to which an employee is entitled in a given calendar year is determined in proportion to the work performed in the preceding calendar year (Article 3 of Royal Decree, 30 March 1967 on annual paid holidays).

However, days on which an employee is prevented from working due to sickness, accident, occupational disease or accident at work shall be treated as days worked so that the employee does not lose any holiday entitlement by reason of incapacity for work (Article 3 of Law, 28 June 1971 on annual paid holidays).

Until recently, strictly speaking, only those days on which work performance was completely interrupted by an incapacity for work were taken into account to equate days worked.

This rule caused problems in the event of partial resumption of work by an incapacitated (white collar) employee. An employee who, with the permission of the advisory doctor of the health insurance fund, only worked half a day, only accumulated holiday entitlements based on half a day's work. This employee would then have fewer holidays as well as holiday pay in the following year than if she had not partially resumed work or if she had resumed work for several full days a week.

For blue collar workers, these half days have long been equated with full days of work by the National Office for Annual Holidays and the various holiday funds.

To avoid a loss of holiday entitlements when a disabled white collar employee resumes work on a part-time basis, the Annual Paid Holidays Decree of 30 March 1967 was amended by the recent Royal Decree mentioned above.

It is now stipulated that in the event of illness or accident, the non-performing "parts of the day" will be taken into account for the calculation of the employee's annual leave and the amount of holiday pay in the event of partial resumption of work with the approval of the sickness insurance fund's medical officer.

The same shall apply in case of partial resumption of work following an occupational disease or accident at work.

The new regulation entered into force on 01 January 2018. This means that it applies to the service year 2018 and holiday year 2019.

In practice, the new regulation will only affect white collar employees. The National Board for Annual Holidays and the holiday funds already now equate the hours not worked on days of partial resumption of work with the hours worked by a blue collar worker.

1.2 Third-country nationals

The Law of 09 May 2018 on the Employment of Foreign Nationals with Special Residence Status as well as the Law of 09 May 2018 introducing Article 175/1 into the Social Penal Code and the Law of 09 May 2018 amending the Law of 3 July 2005 on the Rights of Volunteers (‘*Moniteur belge*’, 08 June 2018) have been issued.

The European ‘Single Permit’ Directive 2011/98/EC of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, obliges the Member States to use a single application procedure to issue a single permit for residence and work to non-EU nationals. However, non-EU nationals wishing to work in Belgium need two separate documents, namely a work permit and a residence permit. The transformation into a ‘single permit’ is complex as the competences with regard to employment of foreigners are first and foremost divided between the federal and the regional governments. In addition, further legislation is required for the single permit to be applied to and effectively issued.

First, a basic law was introduced to replace the current Foreign Labour Law of 30 April 1999, except for au pairs for whom a few articles remain applicable. This new law provides that foreign nationals who have a right of residence in Belgium are allowed to work on the basis of special residence. However, the modalities need to still be defined in a royal decree. The new system will abolish the current type C work permit.

In addition, a second law adjusts the sanctions regime in the Social Penal Code. Finally, a third law adapts the rights of volunteers so that a ‘single permit’ will not be required for volunteer work.

The new federal legislation can only enter into force after, among other things, other necessary federal and regional legislation has been issued.

2 Court Rulings

2.1 Public holiday pay following end of employment

Belgian Cour de Cassation, No. S.17.0002.F, 11 June 2018

Factual part

In accordance with Article 14 of the Royal Decree of 18 April 1974 determining the implementation of the Law of 04 January 1974 on public holidays, the former employer remains obliged to pay the wages for one public holiday that falls into the period of fourteen days following the end of the employment contract or of the performance of work, provided that the employee has, without interruption attributable to her, remained in the service of the employer for a period of fifteen days to one month. In case of employment of more than one month, the period is extended to 30 days. This payment obligation on the part of the former employer will only continue to exist if the employee

does not yet have a new employer. If the employee has already concluded a new employment contract, the new employer will have to pay the public holiday.

The second paragraph of the aforementioned Article provides that the days on which the employee does not usually work do not count as an interruption of periods of employment. These days are therefore taken into account when determining the duration of the employee's period of employment.

According to the '*Cour de Cassation*' (See: Cass. 11 June 2018, No. S.17.0002.F), the specific situation of the employee concerned must be evaluated to determine whether or not certain days should be considered as a period of interruption of employment. The fact that a company's working regulations provide for certain full-time workers to be covered by a six-day system is not sufficient to rule that Saturdays must in any event be regarded as days of interruption. Saturdays during which the worker employed in a work system is not required to work full time on the basis of a plan or schedule of work that is applicable to her constitute days during which she does not usually work within the meaning of the aforementioned Article 14, and are therefore not work interruptions attributable to the worker within the meaning of Article 14 of the Royal Decree of 18 April 1974 determining the implementation of the Law of 04 January 1974 on public holidays, even if the six-day work week system is in effect.

Analytical part

The important judgment of the '*Cour de Cassation*' is in line with the Law of 04 January 1974 on public holidays. The question of the employee's "usual day of inactivity" was addressed in the context of the introduction of the 5-day work week, and it has been clarified that it can be any day of the week, other than Sunday, following the organisation of the work in the enterprise or in the branch of activity and that in certain enterprises, this date may not be the same for all workers (House of Representatives, Report Committee on Employment and Labour, 1973-1974, No. 709/2, p.3).

3 Implications of CJEU Rulings and ECHR

3.1 Termination of employment

CJEU case C-57/17, 28 June 2018, E. S. Checa Honrado/Fondo de Garantía Salarial

Factual part

Mrs. E. S. Checa Honrado worked as a cleaner in a theme park in Benidorm. Her employer informed her that as of 15 May 2011, her work place would be moved to a theme park in San Martín de la Vega (Madrid region), more than 450 km from her original work place. In accordance with the possibilities provided for in the Spanish labour law on the status of workers in cases where a change in the place of work requires the worker to move, she opted to terminate the employment contract with an allowance of 20 days' salary per year of service at the expense of the employer.

However, her employer was declared insolvent before she was able to obtain full payment of the compensation. Mrs Checa Honrado then claimed payment of the balance of the compensation from the Spanish Wage Guarantee Fund, the Fondo de Garantía Salarial (Fogasa). With reference to its judgment of 11 November 2015 in *C. Pujante Rivera* (CJEU case C-422/14), the Court of Justice reiterated that Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of employer insolvency applies in all cases where the employment contract is terminated on grounds unrelated to the employee. The Court of Justice found that the scheme and the allowance provided for by the Spanish law on employment status applied in the event of a change in place of work in cases justified on economic, technical, organisational or production grounds. Although the worker had the choice of either moving and continuing to work or opt for

termination of the employment contract, the Court of Justice concluded that in such cases, it is not the worker's intention to terminate the employment contract. The termination of the employment contract was in fact the result of the employer's intention to significantly change the employment contract by adjusting the place of work to such an extent that the employee would be required to move. The Spanish Wage Guarantee Fund was therefore ordered to pay the compensation to which Mrs Checa Honrado is entitled.

Analytical part

The CJEU's decision is of significance for Belgium, since Spanish labour law is comparable to Belgian dismissal law on this point. If the employer unilaterally changes the work place in a substantial manner—which is an essential element of the employment contract—the employee can invoke implicit dismissal by the employer with the result that she can invoke the lump sum as compensation in case of unlawful dismissal, although the employee had the choice of continuing to work or to opt for termination of the employment contract.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) The Constitutional Court of the Republic of Croatia has abolished the provision regulating visible and inappropriate tattoos as obstacles for employment in the police.

(II) The collective agreement in the hospitality sector as well as the amendment to the collective agreement in the construction sector have been extended.

(III) The fixed-term collective agreement for elementary schools as well as the collective agreement for secondary schools have been concluded.

(IV) The amendment to the decision on annual quotas of work permits for the employment of aliens has been adopted by the Government of the Republic of Croatia.

(V) The following regulations have been issued: regulations on the conditions and measures of protection from ionising radiation for activities with sources of ionising radiation; regulations on notification, registration, approvals and transfer of sources of ionising radiation; and regulations on mediation on employment of seafarers.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Anti-discrimination law

Constitutional Court of the Republic of Croatia, No. U-II-2064/2010, 23 April 2018

The Constitutional Court of the Republic of Croatia has abolished the provision of the regulations on measures and the manner of determination of the mental and physical health of persons employed by the police and of police officers, and on the composition and mode of operation of health commissions in authorised health care institutions. The abolished provision regulated visible tattoos and inappropriate tattoos as obstacles for employment in the police force. Such tattoos were seen as a deviation from the health condition affecting the mental and physical ability of job candidates to work for the police. Since the correlation between tattoos and the inability to perform the tasks of the job has not been proven in medical science, the Constitutional Court found that the Minister of Police had exceeded its powers as defined by the Police Act when introducing that controversial provision in the above-mentioned regulations.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Extension of collective agreements

The collective agreement in the hospitality sector as well as the amendment to the collective agreement in the construction sector have been extended to all employees and employers in the sector of hospitality and construction, respectively (see Official Gazette No. 49/2018).

4.2 Collective agreements for employees in elementary and secondary schools

The fixed-term collective agreement for elementary schools as well as the collective agreement for secondary schools have been concluded (see Official Gazette No. 51/2018). They will expire on 01 March 2022. Both agreements could be dismissed in case of substantial changes in the economic situation.

4.3 Annual quota of work permits for employment of aliens in 2018

The amendment to the Decision on Annual Quotas of Work Permits for the Employment of Aliens has been adopted by the Government of the Republic of Croatia (see Official Gazette No. 53/2018). The overall number of work permits has been increased from 31 000 to 35 500. The quota of work permits for new employment has been increased in the sector of tourism and hospitality (from 4 660 to 7 660). Due to the need for seasonal workers in the tourism and hospitality sector and in the agriculture and forestry sector, the quota of work permits for employment of alien seasonal workers in these sectors has been increased as well.

4.4 Regulations on conditions and measures of protection from ioniying radiation for activities with sources of ionising radiation

Based on the Act on Radiological and Nuclear Safety (see Official Gazette No. 141/2013, 39/2015 and 130/2017), the head of the State Bureau for Radiological and Nuclear Safety, together with the Minister of Construction, has issued regulations on the conditions and measures of protection from ionising radiation for activities with sources of ionising radiation (see Official Gazette No. 53/2018). It guarantees the occupational health and safety of workers handling devices that produce ionising radiation to workers handling X-ray devices, etc. Although it only indirectly refers to workers, it is worth mentioning that the head of the State Bureau for Radiological and Nuclear Safety has issued regulations on notification, registration, approvals and transfer of sources of ionising radiation as well (Official Gazette No. 54/2018). The regulations provide that the employer cannot obtain permission to handle sources of ionising radiation unless she proves that the employees have undergone specific vocational training and have been issued a health certificate.

4.5 Regulations on mediation in the employment of seafarers

Based on the Maritime Code, the Minister of Sea, Transport and Infrastructure in agreement with the Minister of Labour and Pension System has issued regulations on mediation in the employment of seafarers (see Official Gazette No. 55/2018). It regulates the preconditions that need to be fulfilled by persons engaged in mediation in the employment of seafarers, the procedure and manner of their accreditation and supervision of their work. It regulates, among others, that the agent may only charge a fee for the work performed in relation to the employment of the seafarer from the ship owner (Article 14(1)). She is not allowed to directly or indirectly charge compensation for employment mediation from the seafarer (Article 15(1)).

Article 16 guarantees employment protection of the seafarer. It states:

> *"(1) An agent shall ensure that a seafarer has signed an employment contract which must be in conformity with the applicable law and must at least contain the standards established by applicable international treaties and / or national collective agreements prior to assigning the seafarer to the ship.*

(2) The contract of employment with the seafarer shall be signed by the ship owner or agent on behalf of the ship owner.

(3) Prior to signing the contract of employment, the agent shall inform the seafarer of her rights and obligations arising from the employment contract.

(4) The agent, before signing the contract referred to in paragraph 1 of this Article, is required to check whether there is shipping insurance liability in case of death, damage to health or bodily injury of a seafarer, at least at the level determined by the applicable law and the collective agreement, and that there is a system of insurance of repatriation of seafarer, and to inform the seafarer of that.

(5) The agent must have the proof that the ship owner has an insurance or other financial guarantee for the damage caused to the seafarer as a result of the failure of the ship owner to abide by the employment contract.

(6) Before signing the contract referred to in paragraph 1 of this Article, the agent shall check whether the seafarer meets the conditions for boarding a particular ship, in a specific post and in a certain capacity.

(7) The mediator shall enable the seafarer to carefully review the conditions of employment before and after the signing of the employment contract and to be handed her copy before boarding the ship."

European Commission

Czech Republic

Summary

(I) The Draft Act amending Act No. 262/2006 Coll., the Labour Code, as amended, and other related acts, is currently in the legislative procedure and has been sent to the government by Parliament to issue a statement.

(II) The Constitutional Court of the Czech Republic has ruled (in accordance with the Supreme Court of the Czech Republic) that there has been no breach of rights of the Czech "cost-free" national expert as far as the unequal treatment of national experts seconded to the European Commission is concerned.

1 National Legislation

1.1 Maternity leave

The Draft Act amending Act No. 262/2006 Coll., the Labour Code, as amended, and other related acts, is currently in the legislative procedure and has been sent to the government by Parliament to issue a statement.

The Draft Act aims to change the attitude of the public towards maternity leave and parental leave. Members of Parliament believe that the current term used for this legal leave does not do justice to the reality of maternity leave and that it should be renamed. New terms such as "maternity care" and "parental care" should be introduced instead, so it does not sound like a "vacation".

The Draft Act is being deliberated by the government and will then be returned to Parliament for a 1st reading. The preliminary effective date is set to the first day of the third calendar month following its publication.

2 Court Rulings

2.1 Equal treatment of national experts seconded to the European Commission

Constitutional Court of the Czech Republic, No. IV. ÚS 3756/16, 19 April 2018

The Constitutional Court of the Czech Republic has ruled (in accordance with the Supreme Court of the Czech Republic) that there has been no breach of rights of the Czech "cost-free" national expert as far as the unequal treatment of national experts seconded to the European Commission is concerned. The decision was issued on 19 April 2018 under file No. IV. ÚS 3756/16.

The claimant had been employed by the State (Ministry of Environment). Based on Article 2 of Commission Decision C (2008) 6866, the claimant was sent as a "cost-free" national expert to the European Commission. The State provided her with her average wage based on her wage in the Czech Republic and paid her costs for her transfer to Brussels and back as well as all of her insurances. However, it failed to reimburse her for the increased costs of living. The claimant stated that she was entitled to this based on Government Decree No. 62/1994 Coll.

The question put before the Constitutional Court was whether this constituted unequal treatment in breach of Article 1 of the Charter of Fundamental Rights and Freedoms as well as of Article 20 of the Charter of Fundamental Rights of the European Union, and if this was a violation of the claimant's right to working conditions with respect to her dignity according to Article 31 of the Charter of Fundamental Rights of the European

Union as well as a similarly formulated right in Article 28 of the Charter of Fundamental Rights and Freedoms.

The Supreme Court ruled that Government Decree No. 62/1994 Coll. does not apply to the claimant, as the claimant had entirely ceased to perform work for the employer and only worked for the Commission. Her situation falls under Section 199 (3) of the Labour Code instead and thus constitutes "another important personal obstacle to work". Based on this section, the employee is only entitled to a compensatory salary in the amount of her average earnings. This was later confirmed by the Constitutional Court.

The Constitutional Court held that there was no evidence of unequal treatment in the present case. It agreed with the Ministry of Environment, which stated that the aforementioned Commission Decision divides national experts into two distinct categories. The first category is financed by the European institution. Since the employees falling into the second category are seconded to the Commission primarily to enhance their own knowledge and experience, their financial backing is left to national states. The claimant should thus not compare the working conditions of those in the former category with those who fall under the latter.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Denmark

Summary

(I) The Danish labour court has ruled that the Italian company Solesi when posting workers to Denmark was in breach of the collective agreement by not depositing holiday payments pension payments up front. The requirement to deposit pension payments is not in breach of the Pensions Directive or the Posting of Workers Directive. The labour court did not refer any questions to the CJEU.

(II) According to the Working Time Directive Articles 17 and 18, legislative interventions, Act 409 of 2013 was deemed to be a collective agreement in the understanding of Article 18 of the Directive, and the Statutory Act was not considered in breach thereof.

(III) Limitation periods in national law were found to be 'reasonable' and not in breach of the '*effet utile*' of EU law. The former employee of Ajos A/S was not entitled to claim damages for the incomplete implementation of the Employment Directive by the State.

(IV) The Minister of Employment's explanation paper on sharing economy and unemployment payments (No. 9432 of 14 June 2018), explaining the calculation methods for earning rights to supplement unemployment benefits (for part-time work) has been published.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Labour Court, No. AR 2015.0251, 08 December 2017

Factual part

Solesi, an Italian entity, provided services to a construction site in Denmark. The services provided included the posting of Italian workers to the site.

Solesi was not a member of a Danish Employers' Association, and was not covered by a collective agreement. Solesi was required to conclude a collective agreement for pay and working conditions of the workers. The requirement was supported by a notice announcing industrial action against Solesi, including secondary actions. Solesi consequently signed a collective agreement.

The question was whether Solesi had breached the agreement by:

- Not depositing payments with the trade union 3F's holiday accounts for pension payments, maternity leave payments, paid holidays and other days off with pay, equalling 28.55 percent of the workers' gross salaries, cf. section 3 of the agreement;
- Not adequately paying overtime work;
- Whether the claim to pay a penalty to the trade union 3F for breach of the agreement on behalf of the workers not organised in the signatory trade union 3F is a breach of ECHR Article 11 or of Article 12 of the EU Charter of Fundamental Rights.

The claimant, the Danish Confederation of Trade Unions on behalf of the trade union 3F, argued that:

- The collective agreement is valid, fulfils the requirements to be applied nationally and was concluded by the most representative social partners within the given sector;
- Calculating the outstanding amounts: Solesi underpaid their workers over a 9-month period. Solesi did not deposit the full amount due per worker. The burden of proof to document that the payments correspond to the number of persons was on Solesi, and Solesi had not documented the number of persons working on the site. Solesi did not dispute this claim and estimated the trade union's calculations of the number of workers on the site and the total outstanding payments;
- Converting pension payments into salaries: the Act on Posting of Workers section 6a aims to prevent social dumping and to ensure equal treatment and working conditions of workers who work in Denmark in comparison with Danish employees. Collective action can be used against posting entities to ensure that the posted workers earn a salary that corresponds to what Danish employers are required to pay their workers in accordance with collective agreements for performing the same work. Worker-related contributions carried by the employer can be converted into salaries for posted workers. This is the intention of the Act on Posting of Workers;
- There was no outright conflict, but a conflict notice was issued. There was no unlawful coercion, the conflict notices were in line with Danish and EU law for conflicts with posting entities;
- The provisions in the agreement are not in breach of EU law. Danish employers' contributions, e.g. pension payments, can be converted into deposited salaries to place Danish and foreign companies on equal footing. The pension payments in the collective agreement can be converted into salaries;
- The collective agreement provides that double payment of holiday pay can be prevented. The posting entity can request deposits for holiday payments to be refunded if they can prove that holiday payments have been paid or deposited in their home country;
- Regarding deposited payments converted from pension payments, this is not a breach of Directive 98/49/EC of 29 June 1998 on Pension Rights (hereinafter, Pensions Directive), as the agreement does not prescribe that payments should be made to supplementary pension schemes. The payments made by Solesi in the home country to *Istituto Nazionale della Previdenza Sociale* (INPS) was not to an occupational pension fund according to the evidence provided. Solesi did not document payments to a supplementary pension fund (Prevedi) in the home country;
- Regarding deposited payments converted from holiday payments, Solesi did not document that it had made payments to a holiday fund in Italy. Solesi likewise did not report correctly to the 3F holiday fund, and it is unclear which workers worked during which periods, and it was therefore impossible for the Danish pension funds to refund any holiday payments to Solesi. This is in line with CJEU case C-49/98, 25 October 2001, *Finalarte u.a.*, in which the Court approved a German holiday fund on the condition that the regulation gives workers a real advantage and contributes to their social protection. The requirement of deposits to the holiday fund applies to organised as well as non-organised posted workers. The application of the national regulation is proportional in relation to the purpose of general

societal interest. The holiday fund paid out holiday payments to the workers in connection with another dispute with an Italian construction company. To ensure that posted workers can enjoy their social rights, up front deposits should be made to the holiday fund;

- Referring questions to the CJEU is in line with earlier rulings from the CJEU, yielding principles for how the national court should assess whether a holiday fund is in breach of EU law. There is no such lack of clarity of EU law that can support a referral to the CJEU. Any question regarding the lack of implementation of the Pensions Directive was not decisive for the present case. There is no requirement in the collective agreement nor in the notice of collective action for Solesi to make payments to a supplementary pension programme. In addition, Solesi did not provide any documentation that it made payments to a supplementary pension scheme in its home country, or how much. 3F acknowledges that any payments to a supplementary pension fund in the home country must be deducted from the deposited payments;
- The principles applied by the Danish labour court to issue fines are not in breach of ECHR Article 11 or Article 12 of the EU Charter on Fundamental Rights. Solesi presumed that the trade union 3F directly or indirectly received payments from non-organised workers. This is not correct. If the labour court found that Solesi breached the agreement, the fine would be calculated on this basis in accordance with the Act on Labour Courts section 12. This situation is not comparable to the rulings Solesi referred to as justification for breaching ECHR Article 11 or Article 12 of the EU Charter on Fundamental Rights;
- Referral to the CJEU is not necessary.

Solesi argued that:

- Solesi was not bound by the collective agreement as it had been coerced into signing it by the notice of collective action. The process of negotiation was not in line with the accepted negotiation procedures. Therefore, the collective agreement was invalid under Danish law;
- The collective agreement is invalid under EU law, as it contained provisions that require foreign posting entities to make up front deposits of holiday payments to the holiday fund of the trade union 3F, which is in breach of the rules of free movement. The provisions on pensions are in breach of Article 6(2) of the Pensions Directive. The fast-track procedure to resolve disputes by way of industrial arbitration and the burden of proof rules of section 85 of the collective agreement for foreign employers are discriminatory on the basis of nationality. Hence, the collective agreement was in breach of EU law and not valid;
- Regarding the question of holiday payments, Solesi was required to deposit holiday payments up front according to the Danish collective agreement, even though it had already contributed to holiday funds in Italy, namely to Cassa Edile. This would be a double payment, with the up-front payment having to be made at an earlier time than that of Danish companies, which is a breach of the EU principle of free exchange of services. This requires better liquidity for posting entities than for Danish companies. Such a restriction is not a *bagatelle*. The restriction is based solely on the fact that 3F did not recognise the Italian holiday fund, Cassa Edile, which in itself is discriminatory on the basis of nationality. Solesi had not received any refunds of holiday payments for over 3 years since its first deposit. The collective agreement did not provide a legal basis for the requirement to

specify the names of the workers. Not paying the outstanding amount of DKK 1 418.547 (EUR 200 000) was without legal basis and was harassment. The requirement to deposit holiday payments up front is a breach of EU law, as the deposits would likely be used to finance the activities of 3F. The arrangement of up-front deposits for foreign companies had been removed from the new collective agreement;

- Regarding the question of pension payments, the obligation in section 3 of the collective agreement was a breach of Directive 96/71/EC of 16 December 1996 on Posting of Workers (hereinafter, Posting of Workers Directive) Article 3, section 1, letter c and of the Pensions Directive Article 6 section 2. First, a Danish agreement cannot require a foreign service provider to pay supplementary pension contributions, cf. the Posting of Workers Directive Article 3 (1) letter c, but only the minimum payment. The fact that entitlement to pension payments arises after 6 months of employment entails that pension payments cannot be considered payments in accordance with the understanding of the Posting of Workers Directive. Therefore, it is also unlawful to initiate a conflict in support of an agreement with such a provision. The fact that the agreement did not include the possibility to evaluate up front whether payments to pension funds in Italy, such as the pension payments to Prevedi, was also in breach of the Posting of Workers Directive ought to be nored. Additionally, Solesi was exempt from any obligation to pay supplementary pension contributions in the host country, if payments to a supplementary pension scheme were made in the home country, cf. Pensions Directive Article 6(2). The agreement must be interpreted in conformity with EU law, as it implements the Pensions Directive in Danish law. It was contested that 3F could circumvent EU law obligations by converting pension contributions into salaries. This constituted an unlawful circumvention of Article 6(2) Pensions Directive. When Solesi made pension contributions to Prevedi in Italy, any obligation to pay pension contributions in Denmark was a breach of EU law;
- The calculations of outstanding payments were made on estimates. The calculations were made for 8 workers, and then multiplied to cover 130 workers. Only 1.8 percent of the entire calculated claim was based on actual data. Any statistical or economic method would reject such a calculation. This extrapolation was an attempt to ease the burden of proof, and the evidence provided was incomplete, non-representative and did not document the alleged cost reductions for non-organised workers. The calculations did not deduct the outstanding holiday payments of approx. DKK 1.5 million (EUR 200 000);
- If the implementation of the Posting of Workers Directive by the collective agreement is incomplete, Solesi should not bear the risk or costs. This was a matter involving the trade union 3F and the Danish State;
- Fines based on non-organised workers' salaries was a breach of ECHR Article 11 and of Article 12 EU Charter of Fundamental Rights protecting the freedom of association. The case law of the CJEU and Danish case law, including of the labour court, states that a trade union is entitled to receive payments from non-organised workers, if the payments are used solely to cover expenses in relation to actual costs, such as administrative expenses. Means from non-organised workers cannot be used to finance the trade union's activities, and transparency is required with regard to the use of the funds.

The labour court ruled that:

- Industrial action had not been initiated but only notified, and Solesi was not subject to unlawful coercion;
- The notice of conflict was lawful under Danish law, as well as under EU law. The collective agreement did not conflict with EU law, the Posting of Workers Directive, nor the principles of the CJEU in case C-341/05, 18 December 2007, *Laval*
  - The question of deposited payments was in line with the preliminary works to the Act on Posting of Workers. The labour court can repeal a decision to transform elements of the collective agreement into salaries, if this puts the foreign entity in a less favourable position compared to a Danish employer's obligation under a collective agreement in the same sector. The criteria of the CJEU in ruling C-577/10, 19 December 2012, *Kommission / Belgien*, pt. 47-49 must be applied;
  - Regarding holiday payments: the labour court stated that the Italian holiday scheme Cassa Edile was less favourable than the Danish one. The labour court asserted that foreign companies are in a less favourable position with regard to the requirement of liquidity compared to Danish firms. This arrangement aims to protect the rights of posted workers. This concerns the right to correct calculations of holiday payments. The requirement to deposit holiday payments up front has been necessary to ensure the rights of the many non-organised workers. 3F administrated the arrangement in a reasonable way by providing guidance, and it was not possible to refund the payments as it was unclear how the payments had been distributed to the individual worker. This specification is in line with the rules for the administration of holiday payments and is justified;
  - Regarding pensions: Solesi already contributed pension payments for the workers to Prevedi in Italy, which is a supplementary pension scheme. The claimant argued that the contributions to INPS were not protected under Article 6(2) of the Pensions Directive, as INPS is a social security scheme covered by Regulation 883/2004. Solesi did not dispute this argument. Solesi argued that Prevedi pensions were supplementary. The documentation provided by Solesi did not indicate any deposits on behalf of the workers in Denmark, not to Prevedi and not via payments to Cassa Edile. There was no basis establishing that the requirement to make up-front pension deposits as part of the Danish collective agreement was in breach of the Pensions Directive;
  - Referral to the CJEU: the labour court found that the assessment of the evidence of the specific circumstances of the case entailed that it was not necessary to refer questions on holiday pay and pension payments to the CJEU;
  - The calculations based on estimates were considered fair and conservative. They were made on a conservative estimation of the number of workers at the site and their working hours. These numbers were not disputed by Solesi, nor did Solesi provide any documentation to the contrary of the calculations;
  - Fines payable to the trade union 3F for no-organised workers were not a breach of Article 11 of the ECHR nor of Article 12 of the EU Charter of Fundamental Rights. This would have been the case if 3F could have exploited the payments for non-organised workers, as the no-organised workers had chosen to not become members of the trade union. The labour court stated that foreign service providers are obliged to pay a fine to the trade union, the fine being calculated on the basis of the cost

reduction the company was provided due to the breach of agreement with a supplementary penal element. One of the basic considerations of the rules, to prevent social dumping, would not be obtained otherwise. In previous cases, large fines have been issued to posting entities to be paid to the trade union, which is party to the collective agreement;

- Referral to the CJEU: the labour court did not find grounds to refer a question to the CJEU.

Analytical part

This ruling is important for Danish law. It promotes the view that foreign entities posting workers to Denmark should, as a starting point, have the same level of expenses as Danish companies. This is in line with the purpose of the Act on Posting of Workers, implementing the Posting of Workers Directive, and amended following the cases CJEU C-341/05, 18 December 2007, *Laval* and CJEU C-438/05, 11 December 2007, *Viking*.

The purpose is to prevent social dumping (foreign workers performing work in Denmark under payment and working conditions that are significantly lower than the Danish standards within the same sector) and equal competition between posting entities and Danish companies (levelling the expenses for workers).

The ruling in particular protects the equalisation of expenses for posting entities with Danish entities. As the payments in this case concerned holiday payments, an unfavourable position could be justified by the social purpose of ensuring the rights of workers.

The pension payments was more unclear with regard to alignment with EU law. However, as the case in the end was settled on the basis of the evidence provided, and as the trade union agreed that payments to supplementary pension funds in the home country should be deducted from payments to Danish supplementary pensions, the case was settled.

The question of 'deduction' of pension contributions from Danish pension contributions as one solution, or 'omission' of Danish pension contributions thereof is a national occupational pension scheme, regardless of the size of contributions in the home country, was not assessed.

The ruling does not directly break from earlier case law, but confirms the tendency of Danish courts to apply Danish legislation to posting entities in a way that upholds the Danish model of negotiating agreements and requiring posting entities to pay expenses related to workers. It is also in line with the Danish '*acquis*' to not refer questions to the CJEU, if the EU principles are considered clear. In this case, the labour court stated that the evidence in the case entailed that preliminary rulings were not required.

The ruling concerns fair and reasonable working conditions for posted workers, which is a sensitive political matter.

There are no likely implications for the EU '*acquis*', as the ruling in the end was based on an assessment of the evidence rather than on the application of EU law.

2.2 Working time

Supreme Court, case 141/2017, 01 June 2018

Factual part

Act 409 of 2013 ended a major collective action between teachers and municipalities in 2013. The teachers had been locked out for 3.5 weeks and the conflict was ended by

parliamentary legislation in order for the parties to resolve the dispute. The legislative intervention was Act 409.

The case concerned deviations of the Act from the Working Time Directive's provision on daily breaks and weekly rest periods, with weekly rest periods being reduced from 11 to 8 hours once per week.

Some provisions in Act 409 concerned the right to deviate from the right to weekly rest periods when the teachers were at camps, etc. Such deviations were accepted by the CJEU in case C-428/09, 14 October 2010, *Union syndicale Solidaires Isère*, interpreting Article 17 paragraph 3 letter b of the Working Time Directive. Deviations in these situations can be provided by law, and the provisions of Act 409 were not considered to be in breach of the Working Time Directive.

For the other provisions in Act 409, in which the right to deviate was not limited to camps, etc., Article 18 of the Working Time Directive provides that such deviations should be provided in collective agreements only.

The Supreme Court stated that the term 'collective agreement' is not defined in the Directive. Interpreting and applying the concept 'collective agreement' must be carried out based on national legislation and case law.

The Court further stated that the right to deviate is an integral part of the Act and the provisions are part of the new collective agreements between the parties as though the parties themselves had directly concluded the agreement. This includes that disputes on the interpretation of deviation provisions must be settled in accordance with the normal dispute resolution procedures that parties can amend the provisions if they agree. The specific provisions on deviations from daily and weekly rest periods are based on the Working Time Agreement for Civil Servants, which the teachers' trade union is party to, and the provisions are by and large a continuation and extension of what the parties had previously agreed to. No information was provided whether the right to deviate was used in a more comprehensive manner compared to earlier collective agreements.

Therefore, the provisions on the right to deviate from daily and weekly rest periods have the characteristics of collective agreement provisions, and the deviations are not in breach of Article 18 of the Working Time Directive.

Analytical part

This is the first time that any court in Denmark has ruled that provisions in a statutory act equal provisions provided in a collective agreement.

The likely implications are that when Parliament decides to end an industrial conflict through a legislative intervention, it is already accepted that some provisions could be viewed as collective agreement provisions from an EU law perspective.

This is a pragmatic ruling in an area of close interrelationship between collectively bargained provisions and intervening legislation in this specific situation. The Court's assessment tipped in favour of the collective agreement solution, which is pragmatic and focuses on specific formal and material elements of the Act, instead of a principled ruling based solely on the technical classification of an Act or a collective agreement.

The matter is not very sensitive, as it is very rare for Parliament to intervene in industrial actions, and the question will most likely arise in only very rare cases, if at all again.

It is probably borderline with the EU *acquis* to establish that a legislative act, even when based on provisions agreed to by the social partners, equals a collective agreement as stipulated in Article 18 of the Working Time Directive.

2.3 Right to damages and limitation periods

Eastern High Court, nr B-929-17, 29 May 2018

Factual part

The case concerned a claim for damages against the State as a consequence of the incomplete implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter, the Employment Directive).

In June 2009, an employee stopped working for the private company Ajos A/S. Ajos refused to pay the employee a severance payment, because he was entitled to receive an old age pension according to the then Act on Salaried Employees section 2a(3).

The CJEU ruled in case C-499/08, 12 October 2010, *Ole Andersen,* that a state of law in which severance payment can be refused on the basis that the employee is entitled to receive an old age pension, even if the employee choses to continue to be active on the labour market, is a breach of the prohibition of discrimination on grounds of age in Employment Directive 2000/78/EC.

In June 2012, the employee initiated a claim for severance payment from Ajos, as the CJEU ruling of Ole Andersen had proved that the Employment Directive had been incorrectly implemented in Danish law.

In June 2014, the employee initiated a claim for damages from the Danish State, as the Employment Directive had been incorrectly implemented.

The case against Ajos was referred by the Supreme Court to the CJEU in September 2014. The CJEU ruled on the matter in case C-441/14, 19 April 2016, *DI*. The Supreme Court's final ruling in the Ajos case in December 2017 stated that the employee was not entitled to severance payment, as the principle of age discrimination was not directly applicable between private parties with the consequence that it overrules an express provision in Danish law, as such a principle that was not covered by the Danish law of accession to the EU.

The present case concerned the case against the State for damages.

The claim was raised against the State in June 2014, which was exactly 5 years after he had stopped working in June 2009.

According to the Statute of Limitations section 4(1), a five-year limitation applies to claims based on an employment agreement. According to section 3(1), the usual limitation period is three years.

The High Court ruled that the claim was not based on an employment agreement but on the States' incomplete implementation of the Employment Directive. Therefore, the three-year limitation applied in this case.

The limitation period was not suspended.

First, the limitation period cannot be suspended under section 3(2) of the Statute of Limitations. There were no extraordinary circumstances that caused the delay in filing a claim against the Ministry of Employment, either at the time the claimant stopped working in June 2009, or at least at the time of the Ole Andersen ruling in October 2010. Also, the employee could have notified the Ministry of Employment before filing the claim, and such notification would have suspended the limitation period according to section 22(2) of the Statute of Limitation.

Second, the limitation period is not in breach of the EU principle of '*effet utile'.* In the cases C-445/06, 24 March 2009, *Danske Slagterier,* and joined cases C-89/10, 08 September 2011, *Q-Beef and Bosschaert* and C-96/10, 06 April 2010, *Frans Bosschaert*, a reasonable limitation period is accepted, unless the limitation period entirely disposes

of the possibility to have a claim assessed before the courts. There is no basis in EU law to assume that a three-year limitation period is not a reasonable limitation period. The employee had the opportunity to have his claim assessed before national courts within the three-year limitation period, which is also evidenced by the fact that Ole Andersen had his claim assessed at the same time.

The employee's claim against the State was not filed within the period of limitation of three years.

Analytical part

This is not an important development in national law.

The ruling tests the default three-year limitation period in national law against EU law. The ruling investigates whether the employee had opportunities to have his claim assessed within the limitation period, and if the limitation period thus is 'reasonable' and in line with EU law.

There are no likely implications.

The ruling is not a sensitive matter, as limitation periods are applied to the case regardless of the underlying history of claims. The underlying ruling of Ajos was sensitive, as the Supreme Court had not followed the guidelines of the CJEU with regard to what constitutes legem and with regard to giving the general principle of prohibition on discrimination on grounds of age preference over Danish law.

The ruling is in line with the EU *acquis* on limitation periods.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Unemployment payments

Minister of Employment – Explanation paper on sharing economy and unemployment payments, No. 9432 of 14 June 2018, explaining calculation methods for earning rights to supplementing unemployment payments (for part-time work) was published.

European Commission

Estonia

Summary

A new type of leave for employees who need to care for family members with disabilities has been introduced.

1 National Legislation

1.1 Special leave

The Estonian Parliament has adopted changes to the Employment Contracts Act to guarantee additional leave days for employees who have to care for a family member with a disability. This a new type of leave that did not exist before in Estonian labour legislation. So far, additional days of leave were only granted to parents with children with disabilities.

The new leave entails five working days that can be used at once (five consecutive working days) or individually. The leave must be used during the calendar year and shall be agreed with the employer.

It is financed from the State budget. The rate of pay is the monthly minimum salary, which is established by the government. In 2018, the amount per day is EUR 23.62.

Although the amendment is important, employees who have to care for family members with disabilities do not consider it a satisfactory solution.

Source:

Information provided by the Ministry of Social Affairs of 02 July 2018 is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Finland

Summary

(I) The Supreme Court ruled in a case of workplace discrimination, clarifying the concept of industrial action in that context.

(II) The labour court decided a case on workforce reductions, stressing the different factors to be taken into consideration.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Anti-discrimination law

Supreme Court, Judgement No. KKO 2018:46, Record No. S2017/10, 13 June 2018

In the present case, the claimant had made a request to the occupational safety and health authorities concerning incorrect treatment by the claimant's foreman. When the issue was under procedure, the claimant's employer (an organisation) decided to terminate her employment contract.

The Supreme Court stated that the action the claimant had made, taking the incorrect treatment to the relevant authorities, was to be regarded as an industrial action in the sense of the Finnish Criminal Code 47:3,2. According to the Criminal Code, an employer must not put an employee in an inferior position because of religion, political opinion, political or industrial activity or a comparable circumstance and shall be sentenced for work discrimination to a fine or imprisonment.

Since it was proved that the request issue had affected the termination of the claimant's employment contract, the president of the organisation was sentenced to a fine for work discrimination.

2.2 Redundancy

Labour Court, Judgment No. TT 2018:64, Record No. R 89/17, 19 June 2018

The case concerned an order of workforce reduction. In Finland, this issue is regulated in many collective agreements, not in legislation. In the collective agreement in question (chemical sector), the social partners had agreed that the employees dismissed last or laid off by the employer shall be those whose vocational skills and other abilities are important for the enterprise's operations and those working for the same employer who have lost part of their working capacity. The employer shall also take note of the employee's length of service and number of dependants.

It was clarified that the employees who had not been made redundant could not be regarded as more important to the undertaking from the point of view of their vocational skills or other abilities. This meant that the claimant who had a longer service and more dependants should not have been dismissed. The employer was judged to pay a compensatory fine of EUR 3 000 to the claimant's trade union for violating the collective agreement. The federation of the employers was also judged to pay a compensatory fine of EUR 3 000 for neglecting the obligation to supervise its member undertakings.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

France

Summary

(I) Decree No. 2018-347 defines the new conditions making electronically registered letters equivalent to the traditional registered letter.

(II) Decree No. 2018-362 changes the collective bargaining agreement deposit process, depending on the level of the collective bargaining agreement.

(III) The Court of Cassation has issued four rulings relating to part-time work, posting, information and consultation of employees, as well as equal treatment. The Council of State dealt with a case involving a transfer of undertakings.

1 National Legislation

1.1 Decree No. 2018-347 of 09 May 2018 related to electronically registered letters

To conclude or execute a contract, the sending of a registered letter with an acknowledgement of receipt can be required to prove that the letter was sent.

From now on, the sending can be done electronically. Decree No. 2018-347 of 09 May 2018, which will replace Decree No. 2011-144 of 02 February 2011 from 01 January 2019, defines the new conditions making electronically registered letters equivalent to the traditional registered letter.

1.1.1. Use of an electronically registered letter in labour law

In labour law, an electronically registered letter can be used to send employment contracts or the recruitment commitment.

It can also be used for the execution of the employment contract, such as the sending of certificates, the notification of disciplinary sanctions or a proposal for an amendment of the employment contract.

The use of an electronically registered letter is prohibited for sending a dismissal notification and other forms of terminations of employment contracts.

1.1.2 Current conditions of application

Currently, the sending of an electronically registered letter must meet several conditions.

First, the third party forwarding the letter must guarantee the identity of the recipient and the sender.

If the recipient is not professional, a previous agreement from the recipient must be obtained by the sender and the sender must indicate this agreement to the third party.

The shipping and receipt dates must be guaranteed and verifiable.

Before sending an electronically registered letter, the third party must inform the recipient by mail that an electronically registered letter will be sent to her. The sender must specify whether she will accept or reject this letter within a period of 15 days from the day after this information was sent. The recipient is not informed of the sender's identity.

If the recipient accepts the electronically registered letter, the third party shall send it to the mail address indicated by the sender. If the recipient refuses the letter, the third party must inform the sender.

The sender and recipient can choose to send an electronically registered letter in hard copy.

The sender must indicate whether she has acknowledged receipt of the letter. In that case, the third party shall send the sender a mail specifying the identification number of the sending, date and hour of the electronic deposit if the recipient authorised or rejected the electronically registered letter.

1.1.3 Conditions of application from 01 January 2019

From 01 January 2019, notifications of electronically registered letters will be easier to send and will offer better guarantees for the recipient.

The sender will no longer have to inform the third party of the previous agreement with the non-professional recipient. However, the sending process remains the same.

The sender will no longer have to choose the acknowledgement of receipt option to be informed of the date and hour of the electronically registered letter and will obtain evidence of rejection or absence of a claim of receipt of the electronically registered letter by the recipient.

The third party must keep evidence of the electronic deposit of sending the registered letter and of the receipt, rejection or absence of a claim by the recipient for at least one year.

The sender has a right of access to this information for one year.

1.2 Decree No. 2018-362 of 15 May 2018 related to the collective bargaining agreement deposit process

Collective bargaining agreements concluded at the level of the company, establishment, group and group of companies must be deposited online on a new platform (‘*TéléAccords*’).

Decree No. 2018-362 of 15 May 2018 modifies the collective bargaining agreement deposit process. Its aim is to secure the deposit of the agreements and to ease the deposit for the publication of collective bargaining agreements. A deposit in hard copy has been removed.

The decree is applicable to collective bargaining agreements concluded as of 01 September 2017. However, companies that have already deposited their collective bargaining agreements do not have to deposit them again.

1.2.1 Deposit of collective bargaining agreements concluded at the level of the group, company, establishment and group of companies

Collective bargaining agreements concluded at the level of the group, company, establishment and group of companies must be deposited on the online platform *‘TéléAccords’*.

This platform replaces the sending by mail of the file documents and the transmission of a copy of the file deposit to the administrative authority.

The depositor must provide some information on her identity, the company and the collective bargaining agreement.

The file is automatically transmitted to the administrative authority.

The collective bargaining agreement is consequently published in the French national database '*Légifrance*'.

The depositor is the legal representative of the group, company or establishment. As regards collective bargaining agreements of groups of companies, the legal representatives of the companies must deposit the agreement.

1.2.2 Deposit of collective bargaining agreements concluded at the level of the branch, professional and interprofessional

The deposit process of collective bargaining agreements concluded at the branch, professional and interprofessional level has not been modified. They are still deposited by the earliest petitioner at the Labour Ministry.

There should be two copies of the deposit, a hard copy signed by the parties and an electronic one.

1.2.3 Documents required for the deposit

In all cases, the documents required for the deposit are the collective bargaining agreement signed by the parties and the copy of the letter, mail, acknowledgement of receipt of the text by all representative trade unions following the signing of the agreement.

For collective bargaining agreements concluded at the branch, professional and interprofessional level, the required documents are a version of the collective bargaining agreement without the names and surnames of the negotiators and signatories and without the provisions that the parties do not want to be published. In addition, the document in which the partial publication of the collective bargaining agreement is decided must be transmitted.

For collective bargaining agreements concluded at the level of the group, company, establishment and group of companies, the minutes of the result of the vote must be transmitted when the collective bargaining agreement is concluded following employee consultations.

2 Court Rulings

2.1 Part-time work

Labour Division (Chambre sociale) of the Court of cassation, No. 17-14.658, 13 June 2018

In case No. 17-14.658, a security officer claimed requalification of his part-time employment contract into a full-time one. The contract was requalified. He challenged the amount provided to him as backpay, particularly the dog bonus provided by the collective bargaining agreement.

Article 7 of Appendix VI of the collective bargaining agreement of prevention and security companies provides that security officers who own a dog are entitled to a general reimbursement of the expenses related to the dog's maintenance (EUR 0.61 per hour of work).

The Court of Appeal rejected the employee's claim for backpay. The dog bonus was a form of reimbursement of professional expenses payable for effective hours of work – a backpay cannot be granted for hours of work which were not actually worked.

In other words, if a part-time employment contract is requalified into a full-time employment contract, the employee can obtain a backpay corresponding to a full-time job. However, the employee cannot benefit from the reimbursement of expenses related to effective working time.

> *"Mais attendu que l'article 7 de l'annexe IV de la Convention collective nationale des entreprises de prévention et de sécurité du 15 février 1985 étendue par arrêté du 25 juillet 1985, modifié par avenant du 27 septembre 2002, étendu par arrêté du 23 décembre 2002 prévoit que les agents d'exploitation conducteurs de chien de garde et de défense propriétaires de leur chien, âgé de 18 mois, tatoué et inscrit au registre de la société centrale canine, bénéficient d'un remboursement forfaitaire correspondant à l'amortissement et aux dépenses d'entretien, que le remboursement forfaitaire est égal à 0,61 euros par heure de travail de l'équipe conducteur-chien, que le remboursement est porté à 0,80 euros lorsque le chien qui remplit les conditions précédentes fait l'objet d'un certificat de dressage délivré par un dresseur patenté ou un organisme officiel, que ce remboursement est porté à 1,06 euros si le chien qui remplit l'ensemble des conditions précédentes est de plus inscrit au Livre des origines françaises et entraîné régulièrement dans un club canin ; qu'il en résulte que, nonobstant son caractère forfaitaire, la prime de chien a la nature d'un remboursement de frais professionnels qui n'est due que par heure de travail effective de l'équipe conducteur-chien ;*
>
> *Et attendu qu'ayant, constaté que le salarié avait perçu pour chaque heure de travail effectif accomplie avec l'aide d'un chien un remboursement forfaitaire de 1,06 euro, la cour d'appel en a exactement déduit qu'il devait être débouté de sa demande au titre des périodes non travaillées ; que le moyen n'est pas fondé"*
>
> Labour Division (Chambre sociale) of the Court of cassation, No. 17-14.658, 13 June 2018

2.2 Posting of workers

Labour Division (Chambre sociale) of the Court of cassation, No. 17-14.372, 06 June 2018

In case No.17-14.372, two collective bargaining agreements were concluded in a bank on profit-sharing and incentive plans. These agreements expressly exclude posted employees from their scope of application.

Four employees posted to London, Singapore and New York claimed payment of amounts resulting from the profit-sharing and incentive plans.

The company argued that the profit-sharing and incentive plans did not have to be provided to employees of a French company, whose work was being performed abroad and whose wages were being directly paid by the company abroad, and that they therefore could not benefit from the profit-sharing and incentive plans.

The Court of Appeal rejected the company's argument and ordered it to pay the employees the amounts of the profit-sharing and incentive plans.

The Court of Cassation held that all employees of companies in which profit-sharing and incentive plans are included in collective bargaining agreements should benefit from the distribution of the company's profits. The company had to pay the employees, even though they did not work in France or were not paid in France. The Court of Cassation emphasised that the employees still belonged to the staff of the company during their posting.

The clause excluding posted workers from the profit-sharing and incentive plans was deemed unwritten.

"Mais attendu qu'il résulte de l'article L. 3342-1 du code du travail que tous les salariés de l'entreprise où a été conclu un accord de participation doivent avoir la possibilité de bénéficier de la répartition des résultats de l'entreprise, sans que puisse leur être opposé le fait qu'ils n'exécutent pas leur activité en France ou qu'ils n'y sont pas rémunérés ; que la clause d'un accord de participation excluant les salariés détachés à l'étranger dans une succursale est réputée non écrite ;

Et attendu qu'ayant constaté que les salariés n'avaient jamais cessé d'appartenir à l'effectif de la société BNP Paribas durant leur période de détachement dans les succursales concernées, la cour d'appel a, par ces seuls motifs, légalement justifié sa décision ;

[...]

Mais attendu qu'il résulte de l'article L. 3342-1 du code du travail que tous les salariés de l'entreprise où a été conclu un accord d'intéressement doivent avoir la possibilité de bénéficier de la répartition des résultats de l'entreprise, sans que puisse leur être opposé le fait qu'ils n'exécutent pas leur activité en France ou qu'ils n'y sont pas rémunérés ; que la clause d'un accord d'intéressement excluant les salariés détachés à l'étranger dans une succursale est réputée non écrite ;

Et attendu qu'ayant constaté que les salariés n'avaient jamais cessé d'appartenir à l'effectif de la société BNP Paribas durant leur période de détachement dans les succursales concernées, la cour d'appel a, par ces seuls motifs, abstraction faite des motifs erronés mais surabondants tenant à l'application du principe d'égalité de traitement, légalement justifié sa decision"

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-14.372, 06 June 2018

2.3 Transfer of undertakings

Council of State, No. 391860, 06 June 2018

In case No. 391860, an employee of an association established in 1989 and also a staff representative was asked to conclude a public law contract with a university following the transfer of the association's activity to a university.

The employee refused to conclude such a contract, as it introduced substantial changes to her employment contract.

The university asked the labour inspector to authorise the employee's dismissal which it did.

The employee asked for the annulment of this authorisation.

The administrative Court of Appeal rejected the employee's request. The Council of State overturned this decision.

Pursuant to Article L. 1224-3 of the French Labour Code, interpreted in light of Directive 2001/23/EC, when the termination of the employment contract of a protected employee results from her refusal to accept the contract proposed by a public entity, the termination must be considered to have been initiated by the employer.

Previous authorisation to dismiss the employee must be obtained. The labour inspector or the Minister of Labour must determine that the conditions for dismissal are met, and particularly that the new public employer proposed to the employee offers the employee the material terms of the previous employment contract (except if the provisions in the public official's employment or her general wage conditions represent an obstacle). They must also ensure that the measure is not related to the employee's representative

functions or her union membership and that no public interest reason opposes the authorisation.

> *"3. Considérant, d'une part, qu'aux termes de l'article 4 de la directive 2001/23/CE du Conseil du 12 mars 2001 concernant le rapprochement des législations des Etats membres relatives au maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'entreprises ou d'établissements : " 1. Le transfert d'une entreprise, d'un établissement ou d'une partie d'entreprise ou d'établissement ne constitue pas en lui-même un motif de licenciement pour le cédant ou le cessionnaire. Cette disposition ne fait pas obstacle à des licenciements pouvant intervenir pour des raisons économiques, techniques ou d'organisation impliquant des changements sur le plan de l'emploi. (...) /2. Si le contrat de travail ou la relation de travail est résilié du fait que le transfert entraîne une modification substantielle des conditions de travail au détriment du travailleur, la résiliation du contrat de travail ou de la relation de travail est considérée comme intervenue du fait de l'employeur " ; qu'en vertu des dispositions de l'article L. 1224-3 du code du travail citées au point 1 et interprétées à la lumière de ces dispositions de la directive du Conseil du 12 mars 2001 qu'elles transposent, dans le cas où la rupture du contrat de travail d'un salarié protégé résulte de son refus d'accepter le contrat qu'une personne publique lui propose en application de l'article L. 1224-3, cette rupture doit être regardée comme intervenant du fait de l'employeur ;*
>
> *4. Considérant, d'autre part, qu'en application des dispositions du code du travail, les salariés légalement investis de fonctions représentatives bénéficient d'une protection exceptionnelle dans l'intérêt de l'ensemble des travailleurs qu'ils représentent ; qu'à ce titre, leur licenciement, ou toute autre forme de rupture de leur contrat de travail, suppose, dès lors qu'il doit être regardé comme intervenant du fait de l'employeur, l'autorisation préalable de l'inspecteur du travail ; que lorsque ce licenciement est envisagé, il ne doit pas être en rapport avec les fonctions représentatives normalement exercées ou l'appartenance syndicale de l'intéressé ; qu'en outre, pour refuser l'autorisation sollicitée, l'autorité administrative a la faculté de retenir des motifs d'intérêt général relevant de son pouvoir d'appréciation de l'opportunité, sous réserve qu'une atteinte excessive ne soit pas portée à l'un ou l'autre des intérêts en présence ;*
>
> *5. Considérant qu'il résulte des points 3 et 4 ci-dessus que la rupture du contrat de travail d'un salarié protégé qui fait suite à son refus d'accepter le contrat qu'une personne publique lui propose en application des dispositions de l'article L. 1224-3 du code du travail est soumise à l'ensemble de la procédure prévue en cas de licenciement d'un salarié protégé et est, dès lors, subordonnée à l'obtention d'une autorisation administrative préalable ; qu'à ce titre, il appartient à l'inspecteur du travail ou, le cas échéant, au ministre chargé du travail, saisi par la voie du recours hiérarchique, de vérifier, sous le contrôle du juge de l'excès de pouvoir, d'une part, que les conditions légales de cette rupture sont remplies, notamment le respect par le nouvel employeur public de son obligation de proposer au salarié une offre reprenant les clauses substantielles de son contrat antérieur sauf si des dispositions régissant l'emploi des agents publics ou les conditions générales de leur rémunération y font obstacle, d'autre part, que la mesure envisagée n'est pas en rapport avec les fonctions représentatives exercées par l'intéressé ou avec son appartenance syndicale et, enfin, qu'aucun motif d'intérêt général ne s'oppose à ce que l'autorisation soit accordée"*
>
> Council of State, No. 391860, 06 June 2018

2.4 Information and consultation of employees

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-21.068, 06 June 2018

On 22 February 2017, the Labour Division of the Court of Cassation held that an agreement concluded by two committees on health, safety and working conditions of the same company on each committee's scope of application was unlawful. The Court of Cassation considered that this distribution had to be decided by the employer and the works council. Pursuant to Article L. 4613-4 of the French Labour Code, in establishments with at least 500 employees, the number of committees on health, safety and working conditions to be implemented is determined by an agreement between the employer and the works council, and not by committees on health, safety and working conditions.

The case was submitted to the Court of Cassation, as trade unions requested the annulment of the appointments of the committees on health, safety and working conditions which took place in application of this agreement.

The Court of Cassation held that the agreement concluded by the committee on health, safety and working conditions was only declared unlawful by the Court of Cassation in 2017. It applied before 2017, so it was not possible to challenge the appointments resulting from the agreement.

The Court of Cassation stated that the annulment of a collective bargaining agreement related to the implementation of representatives does not apply retroactively.

> *"Mais attendu que la nullité d'un accord collectif relatif à la mise en place d'institutions représentatives du personnel n'a pas d'effet rétroactif"*
>
> Labour Division (Chambre sociale) of the Court of cassation, No. 17-21.068, 06 June 2018

The consequences of this decision are limited because the committee on health, safety and working conditions as such will be abolished on 31 December 2019. However, this solution can be applied to future agreements on the implementation of the Social and Economic Committee. Assuming that the judge annuls a collective bargaining agreement that implements the Social and Economic Committee, this annulment will not apply retroactively. This annulment will not have consequences on the elections and the committee's decisions.

This solution is consistent with the Court of Cassation's previous case law on the annulment of elections of staff representatives. Indeed, the annulment of the election of works council members does not apply retroactively and does not have any effect on the appointment of union representatives (Labour Division (Chambre sociale) of the Court of Cassation, No. 15-60.171, 11 May 2016). By the same token, the annulment of elections of staff representatives does not remove their protected status (Labour Division (Chambre sociale) of the Court of Cassation, No. 97-40.765, 11 May 1999).

2.5 Equitable wage

Labour Division (Chambre sociale) of the Court of cassation, No. 17-12.782, 30 May 2018

In case No. 17-12.782, an end of strike protocol was concluded and provided a 13th month bonus for only one branch of the company.

Several employees and a trade union claimed violation of equal treatment and the extension and payment of the bonus.

The Court of Cassation traditionally considers that differences in treatment between different branches of a company are justified when they are provided in a collective bargaining agreement.

In the present case, the question was whether or not this presumption of justification applied to an end of strike protocol.

The legal nature of an end of strike protocol depends on the context in which it is adopted. It can be considered a transaction (Labour Division (Chambre sociale) of the Court of Cassation, No. 78-40.058, 25 April 1979), a unilateral commitment (Labour Division (Chambre sociale) of the Court of Cassation, No. 90-45.186, 02 December 1992) or a collective bargaining agreement if it was signed by a representative trade union following negotiations with union representatives (Labour Division (Chambre sociale) of the Court of Cassation, No. 08-40.256, 08 April 2009).

To determine whether the end of strike protocol is a collective bargaining agreement, the Court of Cassation asserted that the solution depended on the date of conclusion of the end of strike protocol.

If the collective bargaining agreement was concluded before the end of the transition period provided by Law No. 2008-789 of 20 August 2008, it had to have been negotiated with union representatives and signed by one of them to be considered a collective bargaining agreement.

If the collective bargaining agreement was concluded after the end of the transition period, it had to have been negotiated and signed by the representative trade unions in the company and respect the conditions provided in Articles L. 2232-12 and L. 2232-13 of the French Labour Code.

This transition period lasted until the results of the first elections in the company or establishments, with the date of the first negotiations on the end of strike protocol was after 21 August 2008.

If the end of strike protocol is considered to be a collective bargaining agreement, the differences in treatment are justified (Labour Division (Chambre sociale) of the Court of Cassation, No. 15-18.444, 03 November 2016, Labour Division (Chambre sociale) of the Court of Cassation, No. 16-17.517, 04 October 2017). The entity challenging the differences in treatment must prove that they are not related to any professional reason.

> *"Attendu, d'une part, qu'un protocole de fin de conflit constitue un accord collectif dès lors que, conclu avant l'expiration de la période transitoire instaurée aux articles 11 à 13 de la loi n° 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale, il a été signé après négociation avec les délégués syndicaux par l'un d'entre eux, et que, conclu postérieurement à l'expiration de la période transitoire précitée, il a été négocié et signé avec des organisations syndicales représentatives dans l'entreprise ou l'établissement dans les conditions visées aux articles L. 2232-12 et L. 2232-13 du code du travail, dans leur rédaction applicable en la cause ;*
>
> *Attendu, d'autre part, que les différences de traitement entre des salariés appartenant à la même entreprise de nettoyage mais affectés à des sites ou des établissements distincts, opérées par voie d'un protocole de fin de conflit ayant valeur d'accord collectif, sont présumées justifiées, de sorte qu'il appartient à celui qui les conteste de démontrer qu'elles sont étrangères à toute considération de nature professionnelle ;*
>
> *Attendu que pour faire droit à la demande des salariés en paiement d'une prime de treizième mois, les arrêts, après avoir constaté que celle-ci résultait d'un protocole de fin de conflit du 20 décembre 2000, lequel avait été signé par la société Hôpital service SFGH et les délégués syndicaux CGT et CFDT, et ne concernait que les salariés affectés à l'hôpital Lapeyronie à Montpellier, retiennent*

que les intéressés caractérisent une inégalité de rémunération entre salariés appartenant à la même catégorie professionnelle et exerçant un travail égal ou de valeur égale, et que l'employeur ne justifie pas d'éléments objectifs et pertinents qui légitimeraient cette différence de traitement ;

Qu'en statuant ainsi, alors qu'il résultait de ces constatations que la différence de traitement résultait d'un protocole de fin de conflit ayant valeur d'accord collectif, ce dont elle aurait dû déduire qu'elle était présumée justifiée et qu'il appartenait à celui qui la contestait de démontrer qu'elle était étrangère à toute considération de nature professionnelle, la cour d'appel a violé le texte et le principe susvisés"

Labour Division (Chambre sociale) of the Court of cassation, No. 17-12.782, 30 May 2018

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Germany

Summary

(I) According to a government response, there are no concrete plans to establish a separate law on employee data protection.

(II) The government has reached an agreement on a bill amending the Act on Part-time and Fixed-term Contracts.

(III) The Federal Labour Court held that recent legislation did not change the requirements for the capacity to bargain collectively.

(IV) The Federal Constitutional Court ruled that section 14(2) sentence 1 of the Act on Part-time and Fixed-term Contracts is in line with the Constitution while the interpretation of that provision by the Federal Labour Court is not.

(V) The Federal Constitutional Court decided that the ban on strike action for civil servants is in conformity with the Constitution.

1 National Legislation

1.1 Data protection

On 11 June 2018, the government responded to a request from the FDP parliamentary group that it is prepared to look into the possibility of creating a separate law on employee data protection. According to the government, no concrete plans for this exist at this stage, however.

Source:

The government response is available here.

1.2 Part-time work

On 13 June 2018, the Federal Cabinet agreed on a bill amending the Act on Part-time and Fixed-term Contracts (*Teilzeit-und Befristungsgesetz*). Among other things, the new Act aims to establish a right to a temporary reduction of working hours. Moreover, it will become easier for part-time workers to return to full-time work.

Source:

The draft is available here.

2 Court Rulings

2.1 Capacity to bargain collectively

Federal Labour Court, No. 1 ABR 37/16, 26 June 2018

For a long time, the trade union *DHV – Die Berufsgewerkschaft e.V.* – represented employees in segments mainly characterised by commercial and managerial occupations. More recently, however, as a result of multiple amendments to its articles of association, the trade union has extended its competence to employees in various other fields, including private banks and construction firms, retail outlets, domestic wholesaling, rescue services, workers welfare, the German Red Cross, the meat

products industry, tour operators and IT service companies for tax consultants, accountants and lawyers.

In 2016, the State Labour Court Hamburg (No. 5 TaBV 8/15, 04 May 2016) ruled that the union enjoyed the capacity to bargain collectively although its membership base was fairly small. The Court acknowledged that a certain "power of assertiveness" was required, but was of the opinion that the criteria to be applied in this regard had to be seen in the light of recent amendments to the law, namely the Act on Collective Bargaining Unity (*Tarifeinheitsgesetz*) of 03 July 2015 and the Minimum Wage Act (*Mindestlohngesetz*) of 11 August 2014. In the Court's view, both Acts resulted in a situation in which a judicial examination of the 'power of assertiveness' was less urgent than previously. Under the former Act, in case of concurring collective agreements, only that agreement will apply, which the majority of employees in the undertaking is bound to (section 4a(2) of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*)). In the view of the State Labour Court, this impacts the possibility of smaller unions to attract members, which should lead to a relaxation of judicial control of their assertiveness and organisational capacity. Moreover, the Minimum Wage Act had resulted in the fixing of a specific amount of minimum pay which, in the view of the Court, made it less urgent to ensure fair working conditions by closely examining the assertiveness and organisational capacity of a trade union.

This reasoning has now been rejected by the Federal Labour Court. According to traditional case law, trade unions can only enter into viable collective agreements if they have a certain power of assertiveness vis-à-vis the employer (and dispose of sufficiently strong organisational means). In this regard, the number of members in the area of competence plays a decisive role. Moreover, the courts have been of the opinion that assertiveness and organisational capacity are, in principle, presumed to exist if a trade union has a considerable 'history' of collective bargaining. In the view of the Federal Labour Court, neither the Minimum Wage Act nor the Act on Collective Bargaining Unity changed any of these requirements.

Source:

The Press Release of the Federal Labour Court is available here.

2.2 Fixed-term contracts

Federal Constitutional Court, No. 1 BvR 1375/14 u.a, 06 June 2018

According to section 14(1) of the Act on Part-time and Fixed-term Contracts (*Teilzeit- und Befristungsgesetz*), the fixing of a term of a contract of employment requires the existence of an objective ground. Section 14(2) contains an exception to this principle. Under section 14(2) sentence 1, the fixing of a term according to the calendar is admissible without the existence of an objective ground, if the duration of the contract does not exceed two years. Within this period of time, a contract may be extended three times at most. In the view of the Federal Labour Court, this is in line with EU law and Article 30 of the Charter of Fundamental Rights of the EU, in particular. Section 14(2) sentence 2 enshrines the so-called 'prohibition of follow-up' ('*Anschlussverbot*'). According to a grammatical interpretation of this provision, the fixing of the term of a contract without objective grounds is not admissible if an employment contract existed between the two parties at some point in the past. However, in 2011, the Federal Labour Court limited the application of this provision to contracts that had been concluded three years ago or less (Federal Labour Court, No. 7 AZR 716/09, 06 April 2011). In the view of the court, to hold otherwise would breach the freedom of profession of employees as enshrined in Article 12 of the German Constitution, as employers would face

unreasonable obstacles to offer former employees employment. Many State Labour Courts have expressed dissent.

The Federal Constitutional Court has now decided that section 14(2) sentence 2 is in line with the Constitution and that the Federal Labour Court was wrong when limiting the application of this provision to contracts that had been concluded three years ago or less. In this regard, the press release of the Court (Press Release No. 47/2018, 13 June 2018) reads as follows:

> *"The Senate (...) clarified that an interpretation of § 14(2) second sentence TzBfG – undertaken by the Federal Labour Court (*Bundesarbeitsgericht*) – to the effect that successive fixed-term contracts not justified by an objective reason concluded between the same parties are always permissible if they are separated by a period of more than three years - is not compatible with Basic Law (*Grundgesetz – GG*). Judicial development of the law must not override the clearly recognisable intent of the legislature and replace it with its own regulatory concept. Here, the legislature had clearly decided against a time limit like the three-year rule."*

Source:

The press release of the Constitutional Court of 13 June 2018 is available here.

2.3 Right to strike of civil servants

Federal Constitutional Court, No. 2 BvR 646/15, 12 June 2018

According to a recent judgment of the Federal Constitutional Court, the ban on strike action for civil servants is in conformity with the Constitution. In the view of the Court, though that ban impairs the freedom of association as guaranteed by Article 9(3) of the Constitution, the ban on strike action for civil servants is an independent and traditional principle of the career civil service system within the meaning of Article 33(5) of the Constitution. As the ban on strike action is part of the institutional guarantee under Article 33(5), the legislature must take it into consideration.

According to the Court, a

> *"right to strike, even for some groups of civil servants only, would interfere with the core structural principles guaranteed by Basic Law and would fundamentally reshape the understanding and regulations of the civil service. It would erode the principles of alimentation, of lifetime employment, of the duty of loyalty and the principle that material rights and duties, including remuneration, must be regulated by legislature. At the very least, it would require fundamental changes to these principles, which are essential for the functioning of civil service. If a right to strike was granted, there would be no scope, for instance, to regulate remuneration by law. If civil servants' remuneration or parts thereof could be negotiated by means of labour disputes, the existing possibility for civil servants to enforce alimentation—as guaranteed by the Constitution—before the courts could no longer be justified. Yet the alimentation principle, in combination with the principle of lifetime employment, serves to ensure the independent exercise of duty and guarantees civil servants the means necessary to fulfil their obligation to fully dedicate themselves to their office"*

(Press Release No. 46/2018, 12 June 2018).

Moreover, the Court stated that "regardless of the question whether the ban on strike action for civil servants constitutes an interference with Article 11(1) ECHR", it was "in

any case justified under Article 11(2) first sentence or Article 11(2) second sentence ECHR based on the particularities of the German system of the career civil service".

In the view of the Court,

> *"granting a right to strike to civil servants would be incompatible with upholding fundamental principles of civil service law. This would mainly concern civil servants' duty of loyalty, the principle of lifetime employment and the principle of alimentation, which includes remuneration regulated by law. Granting a right to strike to civil servants would fundamentally change, and thus call into question, the system of German civil service law, a particular feature of the Federal Republic of Germany"*

(Press Release No. 46/2018, 12 June 2018).

Source:

The press release of the Constitutional Court of 12 June 2018 is available here.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Greece

Summary

The Organisation of Mediation and Arbitration was established by Law 1876/1990. Its main purpose is to help social partners arrive at a solution (agreement) through mediation in case the negotiations fail to lead to a solution between the parties. When the mediation process does not lead to a desirable effect (agreement), the next step of the regulation procedure is the arbitration process.

1 National Legislation

1.1 Settlement of collective labour disputes and arbitration

The Organisation of Mediation and Arbitration was established by Law 1876/1990. Its main purpose is to help social partners arrive at a solution (agreement) through mediation, in case the negotiations between the two parties fail to lead to such a solution. When the mediation process does not lead to a desirable effect (agreement), the next step of the regulation procedure is the arbitration process.

Pursuant to the original provisions (Law 1876/1990), arbitration is initiated by the parties (a) by mutual consent of the parties, at any stage of the collective bargaining process; (b) unilaterally on the initiative of one of the parties, if the other party has refused mediation; (c) unilaterally on the initiative of the organisation that accepts a mediation proposal rejected by the other party.

Pursuant to a Law of 2014 (Law 4303/2014), arbitration could be initiated by either party, even if it has not accepted the mediation proposal.

The new Law (Law 4549/2018) returns to the original solution: the party that wishes to unilaterally initiate arbitration must have previously accepted the mediation proposal as an act of good faith, demonstrating sincere willingness to find a solution to the collective labour dispute.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

According to a judgment issued by the *Kúria*, the principle of equal pay for equal work does not mean that all employers must pay the same wages without regard to objective circumstances. This is based on the differentiation between employers who have initiated bankruptcy procedures and 'normal' employer.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Equal treatment

Kúria, Mfv. I10.371/2017

Factual part

The employee (the plaintiff) had been employed with the employer (the defendant) since 02 July 2012. The plaintiff and his colleague had acquired their qualification within the framework of the National Training System. The plaintiff had a basic qualification from the management degree programme. The other employee had a higher vocational qualification on the same management programme and his salary was HUF 400 000. The other employee had been employed since 15 July 2005.

The plaintiff terminated his employment relationship by extraordinary dismissal on 15 April 2015. The employee stated in the justification of dismissal that the defendant had infringed the requirement of equal treatment because the employer had not adjust his pay to the other employee's wage. It should be remarked that the plaintiff was male while his colleague was female.

The plaintiff in his application referred to section 8a and section 19(1) in the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. Section 8a states that provisions that result in a person or a group being treated less favourably than another person or group in a comparable situation because of her gender is inadmissible. According to section 19(1), in procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to assert claims of public interest must prove that

a) the injured person or group has suffered a disadvantage, and

b) the injured party or group possesses characteristics defined in Article 8.

Section 19(2) regulates that if the case described in paragraph (1) has been proven, the other party shall demonstrate that

a) it has observed or

b) in respect of the relevant relationship was not required to observe

the principle of equal treatment.

The court of first instance (Administrative and Labour Court) evaluated the application and ordered the defendant to pay the difference in wage to the defendant. The court of second instance (Tribunal) changed the judgment of the administrative and labour court. The employee claimed a review request against this decision to the *Kúria*.

The *Kúria* decided that the review of request is not justified.

The *Kúria* explained the following grounds for its decision. Under Section 19(1) of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, the injured party must prove that the injured person has suffered a disadvantage and that the injured person possesses the characteristics defined in Section 8. The plaintiff complied with this obligation. However, in accordance with consistent case law, the employer was able to prove the missing causal link between the disadvantage and the protected characteristic.

In this context the *Kúria* referred to Directive 2006/54/EC of the European Parliament and of the Council of 05 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Under Article 4 of this Directive, direct and indirect discrimination on grounds of gender shall be eliminated for the same work or for work to which equal value is attributed with regard to all aspects and conditions of remuneration.

However, the *Kúria* took the case law of the CJEU into account. The *Kúria* referred to the CJEU case C-17/05, 03 October 2006, *Cadman*. Under this judgment:

> *"Article 141 EC is to be interpreted as meaning that, where recourse to the criterion of length of service as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison:*
>
> *— since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;*
>
> *— where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better."*

The *Kúria* emphasised that rewarding an employee's experience is a legitimate goal. Consequently, a longer service period is equal to longer experience. For this reason, the employer may reward the greater experience.

Analytical part

This judgment is important in terms of the simplified interpretation of equal treatment. The principle of equal pay for equal work must be interpreted within the framework of equal treatment. The principle of equal pay for equal work does not mean that all employers have to pay the same wages without regard of objective circumstances. This is decided in respect to the differentiation between employers under bankruptcy proceedings and 'normal' employers (see 126/B/1991 AB decision). AB is the Constitutional Court. This statement also applies to differences between employees. The judgment of the *Kúria* clarifies the distinction between the discrimination and justified unequal treatment.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Iceland

Summary

(I) Act No. 75/2018 has been passed, aiming to implement Directive 2014/67/EU.

(II) Act No. 86/2018, on equal treatment in the labour market has been passed, intending to fight discrimination as well as to establish and sustain equal treatment of individuals in the labour market. It has been complemented by Act No. 85/2018, on equal treatment regardless of race and ethnicity, intending to fight discrimination in all areas of society in addition to the labour market.

(III) The Supreme Court ruled that if the weekly rest day, cf. Article 54 of Act No. 46/1980, working environment, hygiene and safety at work, and Article 2.4.3 of the collective agreement between Business Iceland and the Federation of General and Special workers in Iceland, is not respected by the employer, the employer is required to pay the employee extra remuneration for each instance of violation of the rule on the weekly rest day.

1 National Legislation

Two notable acts on the labour market were passed by *Alþingi* in June 2018.

1.1 Posting of workers

Act No. 75/2018, on amending the Act on the Rights and Obligations of Foreign Companies that temporarily post employees to Iceland and their working conditions is the first of these acts. The Act amends several acts, amongst them Act No. 45/2007, on the rights and obligations of foreign companies that temporarily post employees to Iceland and their working conditions, Act No. 139/2005, on employment agencies, Act No. 42/2010, on workplace certificates and workplace surveillance, and Act No. 97/2002, on employment rights of foreigners. The objective of the Act is to strengthen the supervision of the labour market and to ensure that the rights of foreign workers are respected in addition to giving Icelandic authorities a better overview of the status of the labour market.

The Act aims to implement Directive 2014/67/EU, on the enforcement of Directive 96/71/EC concerning the posting of workers within the framework of the provision of services, amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

1.2 Equal treatment

Act No. 86/2018, on equal treatment in the labour market, intends to fight discrimination as well as to establish and sustain equal treatment of individuals in the labour market, regardless of race, ethnicity, religion, beliefs, disability, reduced ability to work, age, sexual orientation, sexual awareness, gender, and sexual expression, cf. Art. 2 and 1(1) of the Act. At the same time, Act No. 85/2018, on equal treatment regardless of race and ethnicity, was implemented to fight discrimination in all areas of society in addition to the labour market.

Both Acts No. 85/2018 and No. 86/2018 were introduced on the basis of Directive 2000/43/EC implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

2 Court Rulings

2.1 Working time

Supreme Court, No. 594/2017, 14 June 2018

On 14 June 2018, the Supreme Court ruled in case No. 594/2017 that if the weekly rest day, cf. Article 54 of Act No. 46/1980, working environment, hygiene and safety at work, and Article 2.4.3 of the collective agreement between Business Iceland and the Federation of General and Special workers in Iceland, is not respected by the employer, the employer is required to pay the employee additional remuneration for each instance in which the rule on the weekly rest day is violated. The rules on the weekly rest day implement Article 5 of Directive 2003/88/EC, concerning certain aspects of the organisation of working time.

The Court stated that although the collective agreement does not state that the weekly rest day should be remunerated, the employer is still responsible for respecting and organising the employees' working time in line with the provisions. Since the employer did not respect the provisions, the employer was required to pay the employee his salary on top of the one he had already earned for his work for the days during which the employee should have enjoyed his weekly rest day.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

(I) The Department of Defence has settled a case brought by a member of the Defence Forces in which a declaration of incompatibility with the Working Time Directive was sought.

(II) The Minister for Justice and Equality has announced details of a new regime for international protection applicants who seek to work pending determination of their application.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Annual leave

High Court, No. 2016/5444P, 14 June 2018, Susan O'Donnell v Minister for Defence

Directive 2003/88/EC (the Working Time Directive) was implemented in Ireland by the Organisation of Working Time Act 1997, section 3(1) which provides that the Act does not apply to a member of the Defence Forces. Defence Force Regulations only permit the carryover of 19 days of annual leave and a female member of the Defence Forces, who was unable to take her annual leave due to a combination of sick leave and maternity leave, instituted High Court proceedings seeking various declarations concerning Ireland's failure to adequately implement the Directive. Those proceedings were settled on 14 June 2018 when the Minister for Defence consented to declarations that the plaintiff was entitled to the benefit of Article 7 of the Working Time Directive insofar as it related to the carryover of her annual leave and that she was entitled to the annual leave she lost in 2015 due to her absence on maternity leave and sick leave during that year. It is understood that there are at least nine similar cases pending before the High Court. In the defence to the claim filed by the Minister, it was asserted that he has committed to liaise with the Minister for Employment Affairs and Social Protection to expedite the introduction of a bill to amend the 1997 Act so as to bring members of the Defence Forces within its scope, subject to the exclusions and derogations permitted by the Directive and necessitated by the characteristics peculiar to the activities of the Defence Forces.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Labour market access of international protection applicants

The Minister for Justice and Equality has announced a new regime for asylum seekers who wish to enter the labour market following the Supreme Court's decision in May 2017 that the absolute prohibition of the seeking of employment was contrary to the Constitution: *NVH v Minister for Justice and Equality* [2017] IESC 35. Asylum seekers will now have access to the labour market nine months from the date when their

protection application was lodged, if they have yet to receive a first instance decision from the International Protection Office and if they have cooperated with the process. Permission will be granted to eligible applicants for six months and will be renewable until there is a final decision on their protection application. Eligible applicants will have access to all sectors of employment with the exception of the civil and public service, An Garda Síochána (the Irish Police force) and the Defence Forces.

Italy

Summary

(I) By Legislative Decree of 18 May 2018, No. 61, Italy has transposed, with delay (see Infringement Procedure 2017/0532), Directive 2015/1794/EU amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, on seafarers.

(II) By Legislative Decree of 18 May 2018, No. 72, financial support and unemployment benefits for workers formerly employed by impounded mafia undertakings, who do not fulfil the requirements for ordinary grants, have been introduced .

(III) The Constitutional Court has ruled that Article 1475(2) Legislative Decree of 15 March 2010, No. 66 (Military Code) is unconstitutional because it violates the freedom of association of members of the Armed Forces.

1 National Legislation

1.1 Seafarers

By Legislative Decree of 18 May 2018, No. 61, Italy has transposed, with delay (see Infringement Procedure 2017/0532), Directive 2015/1794/EU amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, on seafarers.

1.1.1 Amendments to Directive 2009/38/EC

Article 1(1)(a) Legislative Decree of 18 May 2018, No. 61, transposing Article 2 Directive 2015/1794/EU providing "Amendments to Directive 2009/38/EC", deletes Article 1(5) Legislative Decree No. 113 of 2012 transposing Directive 2009/38/EC, which has excluded maritime workers from its scope of application.

By way of consequence, maritime workers are now included and, according to Article 2(1) Legislative Decree No. 113 of 2012, as modified by Article 1(b) Legislative Decree of 18 May 2018, No. 61, for the purposes of Legislative Decree No. 113 of 2012 the following applies:

- 'Establishment' means the productive unit or the seagoing vessel (Article 2(1)(a));
- 'Community-scale undertaking' means any undertaking with at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States or a maritime undertaking with at least 1 000 maritime workers on board of seagoing vessels flying Community flags and at least 150 maritime workers on two seagoing vessels flying Community flags (Article 2(1)(b));
- 'Community-scale group of undertakings' means a group of undertakings, maritime included, with the following characteristics:
    a. at least 1 000 employees within the Member States or at least 1 000 maritime workers on seagoing vessels flying Community flags,
    b. at least two group undertakings in different Member States,
    c. at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150

employees in another Member State or, in case of maritime undertakings, at least one group maritime undertaking with at least 150 maritime workers on seagoing vessels flying a Community flag and at least another group maritime undertaking with at least 150 maritime workers on seagoing vessels flying a different Community flag (Article 2(1)(d)).

Article 1(1)(c)(1) Legislative Decree of 18 May 2018, No. 61, by adding a further period to Article 12(1) Legislative Decree No. 113 of 2012, confirms that maritime workers, members of the European Works Councils (EWC), of the Special Negotiation Body (SNB) or involved in the information and consultation procedure, enjoy the right to leave for the purpose of their office within the limit provided by sectoral collective agreements (Article 35(3) Act No. 300 of 1970 is recalled).

Article 1(1)(c)(2) Legislative Decree of 18 May 2018, No. 61, literally transposing Article 2 Directive 2015/1794/EU, adds, as paragraph 4-*bis*, the following to Article 12 Legislative Decree No. 113 of 2012:

> "*A member of a special negotiating body or of a European works council or such a member's alternate, who is a member of the crew of a seagoing vessel, shall be entitled to participate in a meeting of the special negotiating body or of the European works council, or in any other meeting under any information and consultation procedures, where that member or alternate is not at sea or in a port in a country other than that in which the shipping company is domiciled, when the meeting takes place.*
>
> *Meetings shall, where practicable, be scheduled to facilitate the participation of members or alternates, who are members of the crews of seagoing vessels.*
>
> *In cases where a member of a special negotiating body or of a European works council, or such a member's alternate, who is a member of the crew of a seagoing vessel, is unable to attend a meeting, the use, where possible, of new information and communication technologies shall be considered.*".

1.1.2 Amendments to Directive 98/59/EC

Article 2 Legislative Decree of 18 May 2018, No. 61, transposing Article 4 Directive 2015/1794/EU providing "Amendments to Directive 98/59/EC", adds a further period to Article 4 Act No. 223 of 1991, stating that:

> "*Where the projected collective redundancy concerns members of the crew of a seagoing vessel, the employer shall notify the Italian competent authority if the procedure refers to members of the crew of Italian nationality or whose employment relationship is regulated by Italian law, and to the competent authority of the foreign State in case the procedure involves a member of the crew of a vessel flying the flag other than the Italian.*"

1.1.3 Amendments to Directive 2001/23/EC

Article 2 Legislative Decree of 18 May 2018, No. 61, almost literally transposes Article 5 Directive 2015/1794/EU providing 'Amendments to Directive 2001/23/EC', and adds Article 347-*bis* on 'Maintenance of maritime workers' rights in the event of transfer of undertaking' to the Italian Navigation Code.

According to Article 347-*bis*, Article 2112 Civil Code on upholding maritime workers' rights in the event of transfers of undertaking, shall apply to a transfer of a seagoing vessel that is part of a transfer of undertaking, business or part thereof or business within the meaning of Article 2112(5) Civil Code, provided that the transferee is located, or the transferred undertaking, business, or part thereof or business remains within the

territorial scope of the TFEU. Article 2112 Civil Code shall not apply where the object of transfer consists exclusively of one or more seagoing vessels.

1.1.4 Amendment to Directive 2008/94/EC

As far as Article 1 Directive 2015/1794/EU providing for an 'Amendment to Directive 2008/94/EC' is concerned, no transposition was needed in Italy due to the fact that domestic workers already fall within the scope of Directive 2008/94/EC.

1.1.5 Amendment to Directive 2002/14/EC

As far as Article 4 Directive 2015/1794/EU providing for an 'Amendment to Directive 2002/14/EC' is concerned, no transposition was needed in Italy due to the fact that crews of vessels plying the high seas were not excluded from the scope of application of Directive 2002/14/EC.

1.2 Financial support and unemployment benefits for workers formerly employed by impounded mafia undertakings

According to Legislative Decree 6 September 2011, No. 159 (so-called Anti-Mafia Code), mafia-owned companies can be impounded on request of the police authority under court order. Within the impound order, the court shall appoint a judge to the case and one or more judicial administrator(s) (Article 35).

Within three/six months after the appointment, the judicial administrator shall report to the judge of the case on the possibility to continue or to resume the activity of the undertaking, taking into account:

- the degree of connection of the activity with the criminal entity or person that had exercised it,
- the nature of the activity,
- its modalities and the environment in which it has been carried out,
- the labour force employed and that necessary for the normal exercise of the activity,
- the productive capacity and the position on the market as well as the costs to be carried to make the undertaking compliant with the law.

In case the continuation or the resumption of the activity are proposed, the judicial administrator shall produce a programme providing an analytical description of the modalities and the timing of the accomplishment of the proposal. If authorised by the judge of the case, the programme shall be accompanied by a report of a certified professional, attesting the truthfulness of the information provided by the judicial administrator and the feasibility of the proposal (Article 41(1)(c)).

The judicial administrator shall enclose a list of persons who are or have been active within the undertaking in the proposal, specifying the nature of their work relationship as well as a list of those who are necessary for the continuation of the activity. The judicial administrator shall also report on the presence of trade unions within the undertaking and shall gather their proposals on the continuation or resumption of the activity to be transmitted, accompanied by administrator's remarks, to the judge of the case (Article 41(1-*ter*)).

If authorised by the judge of the case, the judicial administrator may hire the undertaking or the business or part thereof. Priority shall be given to NGOs committed to the fight against mafias (Article 41(2-*bis*) and (2-*ter*)).

In case a continuation or resumption of the activity is deemed impossible by the judge of the case, the court, having heard the prosecuting attorney, the parties in the procedure and the judicial administrator shall initiate liquidation proceedings (Article 41(5)).

According to Legislative Decree of 18 May 2018, No. 72, on written request of the judicial administrator, if authorised by the judge of the case, the Ministry of Labour and Social Affairs, for the years 2018, 2019 and 2020, shall recognise a grant in the same amount of the extraordinary earning integration fund grant for 12 months within a three-year period for workers employed by the above mentioned undertaking, who are suspended from work or who are affected by a reduction in regular working time without fulfilling the conditions required to be entitled to the ordinary income support measures, as foreseen by Legislative Decree No. 148 of 2015 (Article 1(1) to (4)).

That grant shall not be granted to workers under investigation, accused or convicted for mafia crimes as well as to people responsible and their partners and relatives, if proven that their employment relationship is fake or that they were involved in the management of the undertaking (Article 1(5)).

Furthermore, upon written request of the judicial administrator, if authorised by the judge of the case, *Istituto Nazionale della Previdenza Sociale* (INPS) shall, for the years 2018, 2019 and 2020, recognise a four-month grant amounting to half of the ordinary unemployment grant to workers of the above-mentioned undertakings whose employment relationship has been terminated and who do not meet the conditions required for entitlement to the ordinary unemployment grant as foreseen by Legislative Decree No. 148 of 2015 (Article 2).

That grant shall not be granted to workers under investigation, accused or convicted for mafia crimes as well as to persons responsible and their partners and relatives, if proven that their employment relationship is fake or that they were involved in the management of the undertaking (Article 2(2)).

As far as compliance with social security provisions is concerned, social security bodies shall refer to the period after the decision on the continuation or resumption of the activity for the above-mentioned undertakings. The past shall not be taken into account for the issuance of the Unified Contribution Compliance Certificate (DURC) (Article 4).

Sanctions grounded on violations of labour and social security law that occurred before the impounding of the undertaking, cannot be enforced against the judicial administrator of the undertaking (Article 5).

The Local Representative of the Government (‘*Prefetto*’) and INPS shall be informed about the above-mentioned request for grants by the judicial administrator. In turn, the Local Representative of the Government shall activate an information and consultation procedure with the local trade unions (Article 6).

2 Court Rulings

2.1 Trade unions of Armed Forces

Constitutional Court, No. 120, 11 April – 13 June 2018

The Constitutional Court has declared Article 1475(2) Legislative Decree of 15 March 2010, No. 66 (Military Code) unconstitutional as it foresees that “*Members of the Armed Forces cannot establish professional organisations of a trade union nature or join other trade unions*” instead of “*Members of the Armed Forces can establish professional organisations of a trade union nature under the conditions and within the limits determined by the law; they cannot join other trade unions.*”

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Upcoming reform of fixed-term work

The new government is working on a comprehensive reform of fixed-term work. More information will be available in the Flash Reports to come.

European Commission

Latvia

Summary

(I) The decisions of the CJEU in cases C-574/16 and C-57/17 have no impact on Latvian law. Under Latvian law, there is no right to severance pay in case a fixed-term contract comes to an end/expires. Severance pay is considered an element of the 'pay' guaranteed by the guarantee institution.

(II) The Law on Protection of Employees in the Event of Insolvency of the Employer explicitly provides that severance pay, among other elements of 'pay', must be provided by the guarantee institution (Article 4(1)(4)). It follows that Latvian law complies with the finding of the CJEU in case C-57/17.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Fixed-term work

CJEU case C-574/16, 05 June 2018, Grupo Norte Facility

The right to severance pay is provided in Article 112 of the Labour Law (*Darba likums*, Official Gazette No.105, 6 July 2001). A worker is only entitled to severance pay in certain cases: first, only if the employment relationship is terminated on the grounds of an employer's notice, and, second, if specific grounds for dismissal are applicable, in particular, only if the reason of dismissal is the worker's capacity related to insufficient skills for the performance of a task (Article 101(1)(6)), inability to perform work due to a health condition (Article 101(1)(7)), the worker's continuous absence due to illness for six months or one year within a three-year period with interruptions (except absence due to pregnancy or maternity leave or accident at work or occupational disease) (Article 101(1)(11) - or for business-related reasons based on economic, organisational, technological considerations and particularly only in case of reinstatement of an employee who has previously performed specific work (Article 101(1)(8)), reduction of a number of employees (Article 101(1)(9), and liquidation of an employer (Article 101(1)(10)). There is only one case in which an employee is entitled to severance pay in case the termination of the employment contract has occurred upon the employee's request for morality and righteousness reasons (Article 100(5)).

It follows that under Latvian law, severance pay is not in principle envisaged in case a fixed-term contract comes to an end/expires.

Taking this into account, the CJEU decision in case C-574/16 has no impact on Latvian law.

3.2 Termination of employment

CJEU case C-57/17, 28 June 2018, Checa Honrado

The Law on the Protection of Employees in the Event of Insolvency of the Employer

(*Likums "Par darbnieku azisardzību darba devēja maksātnespējas gadījumā"*, Official Gazette No.188, 28) explicitly provides that severance pay, among other elements of 'pay', must be provided by the guarantee institution (Article 4(1)(4)).

It follows that Latvian law complies with the finding of the CJEU in case C-57/17.

4 Other relevant information

Nothing to report.

European Commission

Lithuania

Summary

(I) Lithuanian administrative courts have refused to grant multiply entry visa for the posting of third-country temporary workers, whereas such a visa may be issued if the third-country company posts permanent workers to provide services in Lithuania.

(II) The Tripartite Council has received a proposal from a Member of Parliament to consider amendments to the Labour Code 2016 to implement the CJEU's ruling in case C-518/15, *Matzak*.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Third-country nationals

Higher Administrative Court, No. eA-4360-438/2018, 30 May 2018

The Higher Administrative Court upheld the decision of the lower administrative court to support the decision of the Migration Department to refuse the granting of national Schengen visas (D) to posted Ukrainian employees. The group of Ukrainian citizens had just recently been recruited by the Ukrainian company that had concluded a contract with a Lithuanian company to provide services related to the production of furniture. Ukrainian employees were refused Lithuanian visas on the ground that their posting did not *de facto* meet the criteria defined in Article 58 No. 12 of the Law on Aliens (State Gazette, 2004, No. 73-2539). The courts have established important conditions, such as:

- The Ukrainian workers were exclusively recruited for work in Lithuania and did not have long lasting employment relationships with the Ukrainian company;
- the Ukrainian company's main activities related to recruitment services and not of furniture production;
- the Lithuanian company's main activities basically related to intermediation and the supply of various types of workers to other Lithuanian companies and not to furniture production.

The courts established that the Ukrainian workers would actually be working as furniture specialists for other Lithuanian companies, neither for the Lithuanian company nor for the Ukrainian company, which both entered into a contract for the transnational provision of services. The courts decided that the actual aim of the posting was the provision of services via temporary workers and not furniture production and related services.

The temporary posting of permanent workers from third countries to provide services in accordance with a service contract is permitted under the Law on Aliens, but the posting of temporary workers differs. The Court made a clear distinction between those two types of posting and in thus formulated the guidelines for authorities and lower courts.

3 Implications of CJEU rulings and ECHR

3.1 Working time

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

The Tripartite Council received a proposal from a Member of Parliament (MP) to consider changes to the Labour Code 2016. The proposal from the MP also contains rules on the 'strict' form of implementation of the CJEU ruling in case C-518/15, *Matzak*. It is proposed to implement the main principle of the judgment by amending the rules on stand-by time at home (Article 118 (4) of the Labour Code). All types of stand-by time at home, regardless of the sector, type of activity or the scope of the employee's obligations shall be regarded as working time. The proposal will be discussed in the Tripartite Council. The Ministry has remained silent on how it plans to implement the judgment.

4 Other relevant information

Nothing to report.

European Commission

Luxembourg

Summary

(I) Three bills have been deposited. The first bill extends the maximum duration of sick leave pay and formalises part-time work on health grounds. The second bill aims to reorganise the labour inspectorate and exempts certain cases of posting of workers from administrative declaration. The third bill implements time-saving accounts for employees.

(II) The Court of Appeal issued a ruling in a case concerned with dismissal due to economic difficulties and the related requirement to negotiate a social plan.

1 National Legislation

Multiple bills have been deposited. They must pass the legislative procedure quickly to be adopted before the elections in October 2018. Three bills relate to labour law.

1.1 Bill on sick leave

Bill No. 7311 (*Projet de loi o. 7311 modifiant 1. Le Code du travail; 2. le Code de la sécurité sociale*) aims to introduce two changes on sick leave.

Current situation

Currently, the Social Security Code states that sick leave pay (‘*indemnité pécuniaire de maladie*’) is only due for a maximum of 52 weeks over a period of 104 weeks. The Labour Code (Article L. 125-4 pt. 2) states that the employment contract automatically ends when the employee is no longer entitled to sick leave pay. That is, after 52 weeks of sick leave (over a reference period of 104 weeks), the employee loses her job. This was strongly criticised, especially by trade unions, which argued that this duration is not always sufficient to find a suitable solution for the employee (such as professional reintegration into another job, invalidity pension, etc.).

First change

According to an agreement found with the majority of social partners, the bill raises the duration of sick leave pay to a total of 78 weeks, while maintaining the reference period of 104 weeks. The burden of sick pay is normally divided between three different actors, i.e. the employer, a mandatory employer’s mutual insurance (‘*Mutualité des employeurs*’) and health insurance (‘*Caisse Nationale de Santé*’). It was decided to not add any additional burden on employers, hence the costs of this extended sick pay will be borne by health insurance. Furthermore, the employer’s mutual insurance will have less expenses, so the employer’s contribution was reduced from 1.95 per cent to 1.85 per cent of the employee’s salary.

Second change

The second change concerns part-time work on health grounds (‘*mi-temps thérapeutique*’). To date, this system was used in some cases without any specific legal basis: the employer remunerated an employee for part-time work and health insurance paid part-time sick leave pay. The bill will not only give a legal basis to this system but it will be subject to specific conditions:

- 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 by the social security institutions determines whether the part-time work on health grounds shall be granted or not.

If these criteria are met, the amount of part-time working hours can be determined. A major difference with the current system is that the part-time work can in some cases (if the employee was on sick leave for several weeks) be entirely at the expense of health insurance, both for the time the employee is at work and the time she is not.

Furthermore, it seems that during this period of part-time work, the employee is still considered to be on sick leave. This implies that she is protected against any type of dismissal. This could, however, prove problematic, as all types of dismissals, including dismissals on serious grounds ('*licenciement avec effet immédiat pour faute grave*') are excluded.

Both amendments do not only strengthen employee's protection but are also financially favourable to employers at the expense of public funds.

1.2 Bill on posting of workers and labour inspection

Bill No. 7319 (*Projet de loi No. 7319 portant modification : 1. du Code du travail 2. du Code de la loi du 21 décembre 2007 portant réforme de l'Inspection du travail et des mines*) implements three amendments that are not directly interconnected.

First change

A first change will affect the posting of workers ('*détachement de salariés*'). It is known that in the past, Luxembourg always implemented the European legislation in a restrictive, and even too restrictive way (see CJEU case C-319/06, 19 June 2008). This bill goes into a different direction and facilitates the posting of workers to Luxembourg. The parliamentary documents do not provide any further explanation than the principle of proportionality (as mentioned in Article 9 of the Enforcement Directive). Any administrative obligation to notify the posting of workers in the following cases has been removed:

- Specialised and qualified employees carrying out machinery servicing, maintenance or repair tasks ('*travaux d'entretien, de maintenance ou de réparation sur des machines*');
- Employees posted to Luxembourg to act as instructors, lecturers or speakers ('*formateur, conférencier ou oprateur*') or to attend a training course;
- Both exceptions only apply if the posting does not exceed five calendar days per month. They are not applicable in the construction sector.

The maximum administrative fine in case of violation of the administrative obligations has been increased from EUR 50 000 to EUR 75 000 (Article L. 143-2 of the Labour Code).

Second change

The second change is an institutional reform of the labour inspectorate ('*Inspection du travail et des mines*'). This institution has been reformed several times, most recently in 2007, and is still considered to lack efficiency. The main purpose is to grant inspectors

more time to perform their primary job, i.e. on-site inspections of undertakings. The main modifications are as follows:

- The position of the director and the two assistant directors will be clarified and strengthened. The director will have full and direct authority over all services and divisions of the inspectorate;
- The current provision stating that the inspection reports can only be kept for 2 years has been modified, because it appears necessary to keep the records for 10 years in order to gain a better overview of a company's past;
- The regional agencies will be replaced by simple local offices with less staff;
- The division of the labour inspectorate into different branches (labour law/ occupational health and safety) will be abolished to foster permeability between the files.

The labour inspectorate also has competence over public employers, but only of employers who have employees working under a civil law contract (thus excluding civil servants for which separate authorities exist).

An entire formal set of rules on accreditation of experts and control bodies has been introduced to specify the external competences the labour inspectorate can rely on.

An additional change that affects substantive labour law is that the declaration of accidents at work ('*déclaration d'accident de travail*') of temporary agency workers will no longer be reported by the user undertaking and countersigned by the temporary work agency, but vice versa. The temporary work agency is the official employer of the temporary worker.

Third change

A third change concerns an overdue response to a decision of the Constitutional Court (No. 117/15, 26 March 2015). According to Luxembourg's Constitution, some subjects must be regulated by a formal law and cannot be entirely delegated to executive decrees ('*réserve de la loi*'). Therefore, the provision delegating the definition of the required competences and qualifications of health and safety coordinators ('*coordinateur en matière de sécurité et de santé*') was declared unconstitutional. The bill directly implements a complex set of rules on required diplomas and experience in the Labour Code (which has the status of a formal law). Three levels of coordinators are defined according to the level of risk of the sites, which is defined by the expected volume of working hours.

1.3 Bill of time-saving accounts

Bill No. 7324 (*Projet de loi No. 7324 portant introduction d'un compte épargne-temps et modifiant : 1. le Code du travail ; 2. le Code civil ; 3. la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu*) implements time-saving accounts ('*compte épargne-temps*') for employees, i.e. those who have concluded a contract of private law. A bill on time-saving accounts for civil servants has already been deposited (see also September 2017 Flash Report). In the private sector, however, the discussions appeared to be more complicated. The Economic and Social Council elaborated an opinion in 2004, a bill had already been deposited in 2011 but was withdrawn, and the social partners were invited to negotiate an agreement, but after several years, these discussions ended without results, so the government decided to deposit this bill in a second attempt to implement time-saving accounts and to promote work-life balance.

Time-saving accounts should only be implemented and credited on a voluntary basis, i.e. if the employer and the employee agree.

There are two possibilities to implement them:

- The collective agreement can implement time-saving accounts. Collective agreements can apply either to an individual undertaking or to an economic sector. Currently, some collective agreements already implement time-saving accounts (e.g. in the banking sector) and these schemes can be maintained;
- Alternatively, sectorial or national agreements between social partners (*accords sectoriels ou nationaux en matière de dialogue social interprofessionnel*) can set up a general framework for time-saving accounts. The employer will then have to implement the time-saving accounts in the company by mutual agreement with the employee delegates (*délégation du personnel*), and this agreement must be approved by the Minister of Labour after consultation with the social partners. This requirement implies that time-saving accounts cannot be implemented in companies with less than 15 employees, because there are no employee delegates.

If a time-saving scheme has been put in place, the employees are free to decide whether they want to credit their account or not. In order to be entitled to credit the time-saving account, the employee must have a seniority of at least two years. The following can be credited to the account:

Days off that are due in exchange for flexible work schemes (see also December 2016 Flash Report):

- Positive balance of flexitime or work plans at the end of the reference period;
- Compensatory rest for overtime work;
- Compensatory rest for work on Sundays;
- Compensatory days off for public holidays falling on Sundays;
- Annual leave exceeding the legal minimum of 25 days;
- A maximum of 5 days of the legal annual leave that could not be taken because of sick leave, maternity leave or parental leave.

A major issue among the social partners was whether the time-saving account should be credited in hours or in monetary value. It was decided that it will be credited and used in hours. The upper limit of the account is set to 1 800 hours (an approximate equivalent of one full year).

The time-saving account is used up in a similar way as the regular annual leave. Hence, the employee has to submit a request and the employer can reject it on the grounds of operational requirements or on the employee's other requests. The credit can be used for full-time or a part-time leave (but the remaining weekly working time must be at least 10 hours). In case of sickness leave or extraordinary events entitling the employee to special leave (marriage, birth & death of relatives, etc.), the leave is suspended, i.e. the time-saving account is not debited.

The credit on the account can only be paid out in case the contract is terminated, either by the effect of law, by mutual agreement, by unilateral termination/dismissal or by death. It must be paid out at the hourly rate at the time of payment. According to the

author, this list is incomplete; for example, cases of transfers of undertaking to a company without a time-saving scheme is not mentioned.

The employer is required to keep a detailed record of the accounts and to issue monthly statements. The employee delegates have competence to monitor the implementation and application of the time-saving accounts.

Another major issue of discussion was how the saved credit is granted in case of bankruptcy. It was decided that the time-saving accounts shall benefit from a so-called 'super-privilege', meaning that the employees are paid out by preference over all other creditors. Furthermore, in the context of protection of employees in the event of employer insolvency, an additional guarantee paid by the Employment Fund has been implemented for time-saving accounts; it is, however, limited to two social minimum wages (currently ca. EUR 4 000) and may thus only partially cover the amounts due.

1.4. Existing bills

Concerning existing bills, two final reports of the parliamentary commission have been issued, i.e. these laws can be expected to be voted quickly:

- Bill No. 7188 implementing Directive 2016/801 concerning the conditions of entry and residence of third-country nationals (see also October 2017 Flash Report), which only marginally affects labour law;

- Bill No. 7119 on supplementary pension rights, which implements Directive 2014/50/EU.

2 Court Rulings

2.1 Dismissal law

Court of Appeal, No. 44476, 19 April 2018

Factual part

In a recent case (CSJ, 19 April 2018, No. 44476), a company faced economic difficulties and set up a social plan signed on 10 August 2010 "for all employees who are dismissed for economic reasons within the next 12 months". Twenty-four employees were dismissed and benefitted from the social plan. Shortly thereafter, on 10 October 2010, the company was declared bankrupt. One of the employees filed a claim of EUR 10 000 based on the social plan. This claim was rejected by the administrator of the bankruptcy procedure ('*curateur de faillite*'), who argued that according to Article L. 125-1 (1) of the Labour Code, the contract had automatically ended and the employees were only entitled to some specific indemnities.

The judges of the Court of Appeal highlighted CJEU cases C-235/10 to C-239/10, 03 March 2011, *Claes et al*. stating that Directive 98/59/EC applies to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency. Although in this case a special procedure of liquidation by a bank was initiated, the Court of Appeal clearly stated that the same solution had to apply to standard bankruptcy proceedings of a commercial company.

As the threshold for collective redundancies had been met (13 employees added to the 24 employees already dismissed within less than 90 days), the bankruptcy administrator should have entered negotiations for a social plan and could not assert that the contracts had ended automatically.

In this specific case, however, the negotiation of a social plan was not required, as such a plan had recently been negotiated and applied for 12 months, so the employee was entitled to its benefits.

Analytical part

In the author's opinion, the most important element of this case is that the Court clearly states that the procedure for collective redundancies applies in case of bankruptcy. In practice, many bankruptcy administrators have difficulties applying this procedure, either because there are no assets to distribute or because the remaining assets do not exclusively benefit the employees but are distributed among all creditors.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

European Commission

Norway

Summary

Two Supreme Court rulings were issued on the definition of working time and on the application of the equal treatment principle for temporary agency workers.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Supreme Court, No. HR-2018-1036-A, 04 June 2018

In HR-2018-1036-A, the Norwegian Supreme Court ruled in a case concerning working time. The EFTA case E-19/16 was previously commented (See also November 2017 Flash Report). A policeman had performed work during three trips to and from a workplace different from his usual one and outside his regular working hours. The Supreme Court unanimously found that the disputed travel time was to be counted as working time. A majority of four judges found that two of the trips should count as working time pursuant to the main rule on compensation for domestic travel in the applicable collective bargaining agreement, while the third trip, which the policeman had been ordered to make when he was off duty, entitled him to overtime pay pursuant to a special provision in the collective bargaining agreement on overtime work.

2.2 Temporary agency work

Supreme Court, No. HR-2018-1037-A, 04 June 2018

In HR-2018-1037-A, the Norwegian Supreme Court ruled in a case concerning the application of the equal treatment principle in relation to temporary agency workers. Norway has implemented the Temporary Agency Work Directive 2008/104/EC in section 14-12a through c in the Working Environment Act and section 3A through C in the Civil Servants Act (replaced by the State Employee Act). According to section 14-12a (1)/3A, the temporary work agency shall ensure that the workers enjoy at least the conditions that would apply if they had been directly recruited by the user undertaking to perform the same work with regard to inter alia 'pay and coverage of expenses'. The requirement of equal treatment as regards the coverage of expenses goes beyond the requirements of the TAW Directive.

The question before the Court was whether a temporary agency worker was entitled to the same compensation for travel time as employees directly employed with the user undertaking. The Supreme Court placed significant emphasis on the purpose of the provisions, which is to ensure equal treatment. Against this background, the Supreme Court found that the temporary agency worker was indeed entitled to the same compensation.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

(I) The draft of the amendment to the Labour Code concerning on–call time and remuneration of employees managing the establishment in the name of the employer was subject to the preliminary stage of the legislative process in Parliament.

(II) The government submitted a proposal on the amount of minimum wage in 2019 to the Social Dialogue Council.

1 National Legislation

1.1 Working time

Factual part

On 05 June 2018, the draft of the amendment to the Labour Code (LC) concerning on–call time as well as the remuneration of employees managing the establishment in the name of the employer was submitted to the legislative procedure. The draft was submitted by the '*Kukiz 15*' political party.

The draft intends to amend Article 132 LC, Article 151^4 LC and Article 151^5 LC, which relate to rest periods and on–call time. The aim of the draft is to change the concept of on–call time and to introduce new provisions on the status of employees who occupy managerial position within the undertaking.

Under current regulations, Article 132 LC provides that the 11-hour period of uninterrupted rest within each 24-hour period does not refer i.a. to employees managing the establishment in the name of the employer. According to Article 151^4 LC, those employees perform overtime work, if necessary, without the right to overtime bonus. Article 151^5 LC states that the employer may require the employee to be on-call outside the standard working hours stipulated in the contract of employment at the employing establishment or at any other location designated by the employer (on–call time) (§ 1). The on–call time shall not be included in the working time if an employee did not perform any work while on duty. The on–call time must not breach the employee's right to rest as referred to in Articles 132 and 133 (i.e. daily and weekly rest periods) (§ 2). For on–call time, except for on–call time spent at home, the employee shall be entitled to time off in the amount corresponding to the duration of her on-call duty, and if granting time off proves impossible, she shall be entitled to her individual hourly or monthly rate of pay and if such part of remuneration has not been separately identified in the specification of the terms of remuneration, she shall be entitled to 60 per cent of remuneration (§ 3). The provisions of § 2 sentence 2 and § 3 do not apply to employees who manage the establishment in the name of the employer (§ 4). Thus, in practice, employees who occupy managerial posts are not entitled to uninterrupted daily and weekly rest periods. They do not have the right to additional remuneration for on–call time, either.

The draft intends to remove the rule that employees who manage the establishment in the name of the employer are not entitled to the right to uninterrupted daily rest periods (Article 132 LC). It also provides that those employees, in case of overtime work, should be entitled to an overtime bonus, if they are not granted a day off in exchange for work on that day (Article 151^4 LC).

The amended Article 151^5 § 1 LC provides that the employer cannot oblige the employee to be on-call outside her standard working hours stipulated in the contract of employment at the employing establishment or at any other location designated by the employer (on–call time), unless this time is regarded as working time. Moreover,

Article 151[5] § 4 LC would be deleted. It would imply that § 2 (on uninterrupted rest periods) and § 3 (on the right to remuneration) would apply to employees in managerial posts.

Analytical part

The draft proposes three changes. First, that the exception to the 11-hour uninterrupted rest period for employees managing the establishment in the name of the employer would be abrogated. Second, those employees would receive an overtime bonus, if it is not possible to grant them equivalent time off. Third, with regard to all employees, on–call time outside regular working hours would be regarded as working time, while the right to rest would be respected. The employee would be entitled to time off which corresponds to the duration of her on–call time, and if it proves impossible, she would receive the appropriate remuneration.

The amendment to the concept of on–call time is intended to prevent the abuse of this institution by employers (as indicated by the drafters of the proposal, but without any empirical data or evidence). As a result of the amendment, any on–call time (including on–call time spent at home) would be equivalent to regular working time.

Another major change would be dedicated to employees in managerial posts. They would be entitled to an overtime bonus. Moreover, those employees would be covered by the provisions on on–call time, as is the case for 'regular' employees. Thus, the status of this group would be improved by granting them uninterrupted daily rest periods, as well as the right to an overtime bonus.

Sources:

The Labour Code of 26 June 1974 (consolidated text, Journal of Laws 2019, item 917) is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Minimum wage for 2019

On 14 June 2018, the government submitted the proposal to raise the statutory minimum wage for 2019 to the Social Dialogue Council. According to the proposal, the monthly minimum wage for employees would amount to PLN 2 220 (about EUR 530) in comparison to PLN 2 100 in 2018. Thus, the increase in the minimum wage would amount to 5.7 percent. At the same time, the minimum hourly rate for certain groups of civil law contractors would amount to PLN 14.50 in 2019 in comparison to PLN 13.70 in 2018.

In a next step, the proposal will be the subject of negotiations between the government and the social partners, which should be completed within 30 days. If no agreement on the minimum wage is found in the Social Dialogue Council, the government will be required to settle the minimum wage on its own motion by ordinance by mid-September.

Sources:

Further information is available here.

Portugal

Summary

(I) Amendments to the technical details based on eight European directives and the execution of a European Regulation have been introduced.

(II) Draft Law No. 136/XIII introduces a new social agreement providing amendments to the existing rules on fixed-term work.

1 National Legislation

1.1 Health and safety at work

Decree Law No. 41/2018 of 11 June 2018 amends the technical details based on eight European directives, namely:

- Directive 2018/484/EU on avoiding the spread of the red palm beetle;
- Directive 2017/1920/EU on the circulation of true potato seeds produced in the European Union;
- Directive 2018/217/EU on land transport of dangerous goods;
- Directive 2018/597/EU on procedures to combat Newcastle disease, a viral disease affecting birds;
- Directive 2017/164/EU on the limits of exposure of people to chemical agents;
- Directive 2017/1975/EU on the use of cadmium in the production of light emitting diodes (LEDs);
- Directive 2014/28/EU on the identification of wicks, fuses and percussion caps used in explosives for non-military purposes;
- Directive 2018/100/EU on the examination of certain species of plants used in agriculture.

Besides, it also amends the execution of Regulation (EU) 98/2013 on the sale and use of explosives precursors that are now subject to closer scrutiny. In particular, this Decree Law entails the protection of workers exposed to chemicals.

1.2 Fixed-term work

Draft Law No. 136/XIII implements the new social agreement signed on 18 June 2018 by the Portuguese government and agreed to by the majority of social partners (UGT, CIP, CCP, CAP and CTP – only CGTP (a confederation of trade unions) did not sign it). This Draft Law introduces, among others, the following amendments:

- elimination of a special fixed-term contract for workers looking for a first job opportunity or long-term unemployed persons and, as compensation, the application of a probation period of 180 days for permanent employment contracts signed with such workers (Article 112 (1) (b) of the Labour Code);
- a strong restriction to regulate fixed-term contracts through collective labour instruments (e.g. collective labour agreements) (Article 139 of the Labour Code);
- a limitation to sign fixed-term contracts based on the launch of a new company or activity to companies with less than 250 workers (Article 140 (4) (a) of the Labour Code);

- the broadening of the scope of the fixed-term employment contract for a very short duration (which does not need to observe any specific justification) (Article 142 of the Labour Code);
- a reduction of the maximum duration of fixed-term contracts from three to two years (certain term) and six to four years (uncertain term) (Article 148 (1) and (5) of the Labour Code);
- an elimination of the bank of hours established by an individual agreement signed between the employer and the worker (Article 10 (a) of Draft Law No. 136/XIII).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Romania

Summary

(I) A draft law on internships has passed the first Chamber of Parliament.

(II) Some national rules on personal data protection have been adopted.

(III) The Constitutional Court has ruled that women reaching retirement age will be able to request to continue working, thus postponing the termination of their contract up to the retirement age of men.

1 National Legislation

1.1 Internships

The draft law on internships forwarded by the government last summer (see also June 2017 Flash Report) was adopted by the Chamber of Deputies. According to the draft law, young people aged 16 and older will be able to participate in paid internships at private companies or public institutions for periods of up to six months. In the course of a calendar year, the host organisation may simultaneously conclude internship contracts for a number of interns constituting a maximum of five percent of the total number of its employees.

As payment, the intern will receive a net monthly internship allowance from the host organisation of at least equal to 50 percent of the national minimum wage for an activity that may not exceed six hours/day and 30 hours/week.

At the end of the programme, the intern will receive an internship certificate.

Hiring former interns upon completion of the internship programme is encouraged by payment from the unemployment insurance fund of an employment promotion award equivalent to approximately EUR 1 000 per employee, if the employment relationship is maintained for at least 24 months.

1.2 Protection of personal data

The entry into force of (EU) Regulation 2016/679 has already generated some practical difficulties, including in terms of employment relationships, especially since only few regulations existed in this regard at the national level. As a result, a new piece of legislation has been adopted: Law No. 129 of 15 June 2018 amending and supplementing Law No. 102/2005 on the establishment, organisation and functioning of the National Supervisory Authority for Personal Data Processing, as well as for repealing Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, published in the Official Gazette of Romania No. 503 of 19 June 2018.

The law extends the controlling powers of the National Supervisory Authority for Personal Data Processing as well as the procedure for resolving complaints filed by persons who consider that the processing of their personal data violates the legal provisions in force. If, following the exercise of its legal powers the National Supervisory Authority considers that any of the subject's data rights under the legal provisions in the field of personal data protection have been violated, it may refer the matter to the court. If the subject agrees to the court action, the National Supervisory Authority shall cease its capacity to pursue proceedings. If the subject does not take over the action brought by the National Supervisory Authority, the court shall cancel the application in accordance with the Code of Civil Procedure.

2 Court Rulings

2.1 Termination of employment at retirement age

Constitutional Court, 05 June 2018

Factual part

According to Article 56 (1) c) sentence I of the Labour Code, the individual employment contract ends 'de jure' (automatically) on the date of fulfilment of the cumulative conditions on the standard retirement age and the minimum retirement contribution. Retired persons may then conclude another employment contract and cumulate the salary and their pension, but the initial employment is terminated by effect of law. The standard retirement age is stipulated in Pensions Act No. 263/2010; for men, the standard retirement age is 65 and for women it is 63. The standard retirement ages are gradually being increased in accordance with a schedule set out in the Annex to the law.

On 05 June 2018, the Constitutional Court, by a majority vote, accepted the objection of unconstitutionality of the provision of the Labour Code and found that it is constitutional only insofar as the phrase 'standard age conditions' does not exclude the possibility for women to request continuation of their individual employment contract under the same terms as men up to the age of 65.

We note that the equalisation of the retirement age between women and men has been unsuccessfully attempted before, including by way of legislation, and a draft amendment to the pension law has been put forward. In addition, the National Anti-Discrimination Council ruled on the discriminatory nature of the provision on different retirement ages in 2014.

Today, based on the decision of the Constitutional Court, the retirement age is still not equal, but the Court has only held that women who have expressed an intention to remain in work cannot have their employment contract terminated 'de jure'. In other words, women will either be able to terminate their employment relationship earlier, starting with the cumulative fulfilment of the standard age conditions and the minimum retirement contribution, or to remain in employment upon request until the age at which men can retire.

In its decision, the Court argued that the termination of the employment contract for women at a lower age than men may be considered gender discrimination and may violate women's right to work as long as they do not have the option to continue the employment relationship until they reach the standard retirement age provided for men.

Therefore, at the age of 63, female employees should have the right to opt for the continuation of their employment relationship until the retirement age provided in law for men, namely 65, according to Article 56 (1) c) sentence I of Labour Code.

Analytical part

In the view of the Constitutional Court, providing different standard retirement ages for women and men is constitutional, but terminating the employment contract of women at a different age than men is not constitutional. They should be able to continue to work upon request. The Court's solution may, however, generate new problems and difficulties for terminating the employment contract; new rules will be needed on the periods in which the employee may request to remain employed so that the automatic termination of employment is prevented. On the other hand, the question can be raised whether a discriminatory regime exists from the point of view of men, who have no option with regard to retirement age, i.e. the age at which they wish to terminate their employment contract.

Source:

The decision has not yet been published in the Official Gazette, only the press release of the Constitutional Court is available.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) The Supreme Court has issued rulings relating to equality and non-discrimination, collective dismissals, transfers of undertakings and dismissal law.

(II) The CJEU ruling *Checa Honrado* will have a notable impact in Spain. The CJEU rulings *Montero Mateos* and *Grupo Norte Facility* are perceived to rectify the judgment in *De Diego Porras*.

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1 National Legislation

1.1 Employment of foreigners

Factual part

In accordance with the provisions of legislation on the employment of foreigners, this resolution publishes the 'Catalogue of jobs difficult to fill' in Spain for the second quarter of 2018. As follows from its name, this catalogue, every three months, lists the occupations or jobs that do not usually get filled by Spanish workers and the recruitment of foreign workers is therefore allowed.

Analytical part

The 'Catalogue of jobs difficult to fill' must be approved by the government every quarter of the year, so it is not a major development. It is an implementation of the Law on Foreigners. For several years (since the onset of the economic crisis), these occupations have been very few and are currently reduced to the professional sports sectors (both for athletes and for coaches) and to work at sea. This will not entail major implications – neither for Spain nor for the EU.

2 Court Rulings

2.1 Equality and non-discrimination on grounds of gender

Supreme Court, No. 2152/2016, 25 April 2018

Factual part

In the present case, the Supreme Court stated that the 'proceedings remuneration' should at the time of termination of the contract be calculated as though the worker had continued working full-time in cases in which her working day has been reduced due to child care responsibilities.

Analytical part

According to Article 56 of the Labour Code, workers are entitled to severance pay in case of unfair dismissal and are additionally entitled to so-called proceedings remuneration. This is an amount equal to the sum of remuneration that was not paid from the date of dismissal to the date of notice of the judgment declaring the dismissal to be unfair or null and void.

As a general rule, the calculation of proceedings remuneration depends on the worker's salary at the time of dismissal. However, if the worker's working time has been reduced for reasons of work-life balance, the Labour Code and Social Security Law require severance payments and benefits to be calculated as though the worker had continued

working full time. The Supreme Court has extended this rule to include proceedings remuneration, referring to the CJEU ruling in case C-588/12, 27 February 2014, *Lyreco*.

2.2 Collective dismissal

Supreme Court, No.110/2017, 09 May 2018

Factual part

In the present case, an undertaking initiated procedures for collective dismissal. A few days later, the company dismissed a worker claiming low performance (dismissal for misconduct). This dismissal resulted in a transaction between the parties, deeming the dismissal to be unfair.

Analytical part

Dismissals for misconduct are a type of dismissal that are not counted for the purposes of collective dismissal, because the grounds for dismissal are inherent to the worker. However, this dismissal was not inherent to the worker, but to the employer, when the undertaking accepted that the dismissal for misconduct was unfair, even tacitly (when the employer agreed to pay the dismissed worker severance pay). The same applies when the employer terminates a fixed-term contract, claiming that the maximum duration of the fixed-term employment relationship has been reached, but the contract is not a true fixed-term contract, but a permanent one.

2.3 Transfer of undertakings

Supreme Court, No. 4050/2016, 29 May 2018

Factual part

In the present case, a public administration had subcontracted the socio-educational attention service. The administration allowed the use of material means necessary to carry out the activity (facilities, furniture and "other necessary equipment"), with the obligation of the contractor to pay for their conservation and replacement. After the termination of the concession, the administration awarded the service to a new contractor, which used the means under the same conditions. However, the new contractor did not want to keep the workers who had previously performed the activity.

Analytical part

The Supreme Court 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 affecting an economic entity that maintains its identity. According to the Supreme Court, the new contractor carried out the same activity as the previous one and under the same conditions. The particularity of the case lies in the fact that the transfer of means had not taken place between the two contractors, because the material means were owned by a third party. The Court's decision is fully consistent with CJEU case law.

2.4 Dismissal law

Supreme Court, No. 2392/2016, 30 May 2018

Factual part

In the present case, the employer had offered the worker the possibility of converting his full-time contract into a part-time one. The worker rejected the proposal, and the

employer consequently dismissed the employee for organisational and productive reasons in accordance with Article 52.c) of the *Estatuto de los Trabajadores* (ET).

Analytical part

Spanish legislation, in accordance with the corresponding Directive of the European Union, provides that the conversion of a full-time contract into a part-time one shall always be voluntary (Article 12 ET). However, the rejection by the worker could justify the adoption of other measures if the company can prove a valid reason. In the present case, the Supreme Court affirmed that the employer had no other option than to dismiss the employee, and considered the dismissal fair. The hiring of a new part-time worker to perform the corresponding tasks did not imply fraud.

3 Implications of CJEU rulings and ECHR

3.1 Termination of employment

CJEU case C-57/17, 28 June 2018, Checa Honrado

Factual Part

According to the CJEU ruling in *Checa Honrado*, the first paragraph of Article 3 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of insolvency of their employer must be interpreted as meaning that, where, according to the national legislation in question, some forms of statutory compensation payable upon the termination of a contract of employment at the worker's request and that payable in case of dismissal on objective grounds fall within the concept of 'severance pay upon the termination of employment relationships', within the meaning of that provision, statutory compensation payable upon termination of a contract of employment at the worker's request on account of a change in work place by the employer, requiring the worker to change residence, must also fall within that concept.

Analytical part

The judgment will have an impact on Spanish law by increasing the obligations of the Wage Guarantee Fund. Either a legal reform will be approved, or the courts must apply the interpretation of the Court of Justice.

The Court's argument on the equality between the two types of severance pay can be disputed. Severance pay as regulated in Articles 40 and 41 of the Labour Code do not have the same legal nature as the termination of the employment contract for breach by the employer as Article 50 of the Labour Code. Article 50 of the Labour Code comes into play when there is a contractual breach by the employer. The worker must request the termination of the contract before the judge and, if the court accepts it, the employee will receive the same severance pay as that granted for unfair dismissal.

On the other hand, Articles 40 and 41 of the Labour Code apply in a context in which the employer exercises management powers in accordance with the law. The employer takes decisions admitted by law. However, the law allows the worker to terminate the contract for reasons of her own convenience, but at a lower compensation than for unfair dismissal. It is a different situation than that provided in Article 50 and perhaps the difference in treatment provided for in Spanish law was not unreasonable.

3.2 Fixed-term work

CJEU case C-677/16, 05 June 2018, Montero Mateos

Factual Part

According to the CJEU ruling in *Montero Mateos*, clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation which does not provide for any compensation to be paid to workers employed under a fixed-term contract entered into to temporarily cover a post while the selection or promotion procedure to fill the post permanently takes place, such as the temporary replacement contract at issue in the main proceedings, on the expiry of the term for which that contract was concluded, whereas compensation is payable to permanent workers in case their employment contracts are terminated on objective grounds.

This ruling must be connected with the CJEU judgment in case C-574/16, 05 June 2018, *Grupo Norte Facility* ruling.

Analytical part

The CJEU ruling in case C-596/14, 14 September 2016, *De Diego Porras* had a huge impact on the Spanish system. So far, the worker has entitled to a severance pay of 12 days of salary per year at the end of the fixed-term contract, except in case of fixed-term replacement contracts (interim contracts), which do not entitle the employee to severance pay unless otherwise agreed. On the other hand, the termination of the employment contract (permanent or fixed-term) for objective reasons is a type of dismissal, and the worker has the right to a severance pay of 20 days of salary per year. The *De Diego Porras* ruling considered this a differentiation that is prohibited under Article 4 of the framework agreement on fixed-term work.

There are objective reasons for a lack of severance pay for replacement contracts, because they are used less frequently than the other two types of fixed-term employment contracts, and there are fewer cases of fraudulent or abusive use. The severance pay for the other two types of temporary contracts aims to reduce their abusive use, a risk that has not been acknowledged for interim (replacement) contracts, at least in the private sector. In any case, it seems that the framework agreement does not guarantee equality among the different types of temporary contracts, so it is unclear whether the ruling changed this.

Finally, the two rulings of the CJEU in cases *Montero Mateos* and *Grupo Norte Facility* rectify the *De Diego Porras* ruling, and it is stated (paragraph 62) that:

> "*Spanish law does not treat fixed-term workers and comparable permanent workers differently, since Article 53(1)(b) of the Workers' Statute provides for statutory compensation equivalent to twenty days' remuneration per year of service with the employer to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration*".

4 Other relevant information

4.1 Unemployment

Unemployment again decreased in May (by 83 738 people). The total number of unemployed continued at its lowest level in the last nine years, standing at 3 252 130 unemployed.

European Commission

Sweden

Summary

(I) The Swedish government has presented an enquiry which addresses the use of industrial action in work places already covered by binding collective agreements. The proposal in the enquiry offers solutions to problems that have troubled the Port of Gothenburg for a long period of time, resulting in continuous or intermittent industrial action in work places covered by collective agreements.

(II) The ruling of the CJEU in case C-677/16, *Lucia Montero Mateos* does not contravene the Swedish Employment Protection Act.

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1 National Legislation

1.1 Right to strike

The Swedish Social Democrat-Green government recently presented a public enquiry investigating the possibility to limit the right to strike if a collective agreement is already in place at the work place. The enquiry, SOU 2018:40 'Certain issues relating to the industrial peace obligation' ('*Vissa fredspliktsfrågor*') was initiated in response to a long-term and ongoing industrial conflict at the Port of Gothenburg, involving the free-standing Port Workers Trade Union ('*Hamnarbetarförbundet*') which has been engaged in industrial conflict despite the existence of a collective agreement at the work place, signed by another trade union, the LO-organised Transportation Workers Union ('*Transportarbetarförbundet*'). The proposed legislation includes some changes to the Co-Determination Act ('*lagen om medbestämmande i arbetslivet*') and limits the possibilities for trade unions that are not party to a collective agreement at the work place to take industrial action.

The constitutional right to strike (Chapter 2, Section 14 Instrument of Governance, '*Regeringsformen*') can be limited by statutory law or by agreements. A trade union and its members, bound by a collective agreement, must respect the peace obligation and cannot engage in collective action (apart from supportive or secondary action). The collective agreement has 'normative effect' on the working conditions of the employees who are not members of the trade union, or non-members of any trade union. Under the new proposal, if passed by Parliament, some limitations are implemented aiming to reduce strikes and industrial action which are not aimed at concluding a collective agreement. The public enquiry proposes that the limitations to the right to strike should not apply if the existing collective agreement offers less favourable working conditions than normally applied in Sweden.

The proposal has primarily been initiated as a response to a special long-term industrial conflict in the Port of Gothenburg, but balances the fundamental right to strike with the Posting of Workers Directive as well as the core functions of a peaceful and comprehensive labour market. The main industrial partners of Sweden, LO ('*Landsorganisationen i Sverige*') and SN ('*Svenskt Näringsliv*'; the major private market employers' federation), have engaged in direct negotiations and indicated that they intend to provide solutions with interference from the legislator. Since the most urgent problem relates to autonomous trade unions that are not members of the coordinating employee organisations (such as LO), the implementation and effect of such negotiations might be limited.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU case C-677/16, 05 June 2018, Lucia Montero Mateos

Factual part

CJEU case C-677/16, 05 June 2018, *Lucia Montero Mateos*, a Spanish case, concerns aspects of fixed-term work under Article 4.1 of Directive 1999/70/EG. The employee was employed under a supplementary fixed-term contract which continued during the selection or promotion procedure of another permanent employee. Once the recruitment process had been completed, Lucia Montero Mateos's contract was terminated and she claimed compensation for the dismissal in line with what would have been applicable had she been permanently employed. The CJEU concluded that the Directive should be interpreted as not precluding national legislation, which does not provide for such compensation.

Analytical part

Case C-677/16, *Lucia Montero Mateos* addresses the important discussion of equal treatment between fixed-term and permanent employees. The case focuses on justifiable differences as regards the termination of a contract between a fixed-term (supplementary) contract and a permanent contract. In the present case, the termination of the fixed-term contract was subject to an objectively fair and perfectly rational reason (the need for a supplementary employee expired once the position was filled with a permanent employee following the completion of a recruitment process). The Swedish legislation differs from the Spanish one described in the case as no statutory compensation is paid to the employee if the termination is lawful or fair. This applies to both fixed-term and permanent contracts. The Swedish Employment Protection Act offers a comparatively extensive notice period, between one and six months, but fixed-term contracts expire at the end of the agreed term and the ordinary provisions on notice periods thus do not apply.

4 Other relevant information

Nothing to report.

European Commission

United Kingdom

Summary

(I) The Employment Tribunal helpfully summarised the legal tests as regards worker classification in *Leyland and others v Hermes*.

(II) A Scottish court ruled on a case concerning damages for harassment and discrimination, finding that the fact that the claimant had to bring a separate action for diligence on the dependence in front o the sheriff court did not render the exercise of EU rights practically impossible or excessively difficult.

(III) The Employment Appeal Tribunal held that in the present case, a full-time lecturer was a valid comparator in accordance with the Part-time Work Regulations for a part-time associate lecturer employed on a zero-hours contract.

(IV) The EU (Withdrawal) Act 2018 has now received royal assent. The Home Office has also published its scheme on EU nationals already in the UK acquiring settled status.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Definition of worker

Employment Appeal Tribunal, No. UKEAT/0289/17/LA, 11 May 2018, Addison Lee v Gascoigne

Employment Tribunal, No. 1800575/2017, 03 May 2018, Leyland and others v Hermes Parcelnet Ltd

Supreme Court, No. UKSC 29/2018, 13 June 2018, Pimlico Plumbers Ltd v Smith

There has been a run of cases on the question of whether gig economy staff are workers as opposed to self-employed persons. The leading case concerned Uber and the follow up is considered below. In *Addison Lee v Gascoigne,* the Employment Appeal Tribunal (EAT) confirmed the Employment Tribunal's (ET) judgment that a cycle courier working for Addison Lee was a worker under the Working Time Regulations 1998 and the Employment Rights Act 1996. This month, the ET in *Leyland and others v Hermes Parcelnet Ltd* ET/1800575/2017 held that the couriers were controlled by Hermes and had an obligation to perform services personally. Personal service was a dominant feature of the contract. However, it was possible to decide the case without regard to the Pimlico Plumbers case based on previously stated principles in case law. The tribunal relied heavily on the other key decision in this period, *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, a decision of the Supreme Court which in turn confirmed principles laid down in the Court of Appeal (CA). It helpfully summarised the legal tests as follows:

> *"The question of personal service is a distinct element of the definition, to be considered separately from the question whether the individual is carrying on his or her own business undertaking: see Redrow Homes (Yorkshire) ltd v Wright [2004] ICR 1126, CA.*
>
> *The question turns entirely on the terms of the contract: see Pimlico Plumbers Ltd v Smith [2017] ICR 657, CA at para 73.*

Freedom to do a job oneself or through someone else is inconsistent with a contract of service although a "limited or occasional" power of delegation may not be. An essential feature of a contract of service is the performance of "at least part of the work" by the servant himself: see Pimlico Plumbers SC at para 22. An unfettered right to substitute another person to do the work or perform the services is therefore inconsistent with an undertaking to do so personally: see Pimlico Plumbers CA at para 84.

A conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. This will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution. Put another way, it will depend on the extent to which the right of substitution is limited or occasional. By way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. On the other hand, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance: see Pimlico Plumbers CA at para 84.

In some cases a helpful test to assess the significance of the right to substitute may be to consider whether the "dominant feature" of the contract remains personal performance on the individual's part: Pimlico Plumbers SC at para 32."

2.2 Effective remedies

Court of Session, No. CSOH 54/2018, 01 June 2018

AA v BEIS and another [2018] CSOH 54 concerned an employee who had been awarded substantial damages for harassment and discrimination. The company deliberately declared itself bankrupt to avoid paying the compensation. The question for the (Scottish) court was whether, by the ET failing to make statutory provision for the granting of diligence on the dependence (known as a freezing order in England and Wales), the UK was in breach of its EU law obligations to provide an effective remedy for claims derived from EU equality law. The Court rejected the claim because, it argued, the claimant could have raised a separate action for diligence on the dependence in the sheriff court. The fact that she had to bring a separate action did not render the exercise of EU rights practically impossible or excessively difficult.

2.3 Part-time work

Employment Appeal Tribunal, No. UKEAT/0299/17/DM, Roddis v Sheffield Hallam University

In *Roddis v Sheffield Hallam University*, UKEAT/0299/17/DM the question was raised whether a part-time associate lecturer employed on a zero-hours contract was equivalent to a full-time lecturer. The ET had stated that the full-time lecturer was not a valid comparator, on the basis that the two individuals were not employed under the same type of contract as required by Regulation 2(4)(a)(i) of the Part-time Work Regulations. The EAT rejected this view and adopted a purposive interpretation of the legislation:

"The difference between them being that Mr Leader had what the Tribunal called 'permanent employment as an academic lecturer as opposed to an associate

lecturer'. In his contract (pp74-80) Mr Leader is employed on a full-time post requiring him to work such hours as are reasonably necessary in order to fulfil his duties and responsibilities, whereas the Claimant's hours of work were as defined by the offers of work on the SHU 5a forms issued from time to time. The Tribunal fell into error by failing to look at the broad characteristics of both contracts and identifying that they were both contracts of employment. Both contracts were permanent in the sense that both employees had the protection of notice periods and had acquired statutory protection from unfair dismissal by dint of their length of service and such differences as there were, were not relevant to the type of contract under which they were engaged by reference to the categories in paragraph 2(3).

22. The categories in 2(3) are defined broadly in a way that allows for a wide variety of different terms and conditions within each category to enable a comparison to be made between full and part-time workers. If a part-time worker's hours of work were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the legislation. It cannot be that a zero-hours contract of itself constitutes a different type of contract for the purposes of Regulation 2, since the consequence would be that an employee on a zero-hours contract would never be able to compare him or herself to a full-time worker, when the purpose of the Regulations is to enable comparisons to be made and for unjustified less favourable treatment on grounds of part-time worker status to be prohibited. It would be self-defeating."

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Brexit

The EU (Withdrawal) Act 2018 has now received royal assent. This is the crucial piece of legislation which will take the UK out of the EU at domestic level. It has four main objectives:

- *Repeal* – the European Communities Act 1972 which gives effect to the principles of supremacy and direct effect;
- *Convert* – all EU rules into domestic law as 'retained EU law';
- *Correct* – the UK rule book to ensure a functioning statute book on Brexit day;

It also makes provision for the devolution settlement.

The Home Office has also published its scheme on EU nationals already in the UK acquiring settled status:

"EU citizens living in the UK and their family members will need to apply under the settlement scheme to obtain their new UK immigration status.

Caroline Nokes confirmed that those applying under the scheme will only need to complete 3 key steps. They will need to prove their identity, show that they live in the UK, and declare that they have no serious criminal convictions.

The Minister also announced the planned fee for people applying under the scheme. It is proposed that an application will cost £65 and £32.50 for a child under 16. For those who already have valid permanent residence or indefinite leave to remain documentation, they will be able to exchange it for settled status for free.

The Home Office will check the employment and benefit records held by government which will mean that, for many, their proof of residence will be automatic.

Those who have not yet lived in the UK for five years will be granted pre-settled status and be able to apply for settled status once they reach the five-year point. From April 2019, this second application will be free of charge.

The draft Immigration Rules which have been published today providing details of the scheme, deliver on the citizens' rights agreement with the EU reached in March this year, which also guarantees the rights of UK nationals living in the EU."

Source:

Further information on the settlement scheme for EU citizens is available here.

4.2 Access to tribunals

The effect of the introduction of fees for access to ETs and their abolition following the ruling in 'Unison' has been frequently reported. The number of applications has risen since the abolition of the fees. For the period January to March 2018, in the case of single ET claims receipts, disposals and caseload outstanding, all increased by 118 percent, 43 percent and 89 percent, respectively, compared to the same period in 2017.

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