Flash Reports on Labour Law November 2018

Summary and country reports

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

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Executive Summary

1 National level developments

In November 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:

Minimum wage

In the **Czech Republic**, the government issued a decree to increase the minimum wage as of 1 January 2019. Furthermore, the eight categories of higher guaranteed wages, which are set according to the specific type of work being performed, will also be adjusted. In **Estonia**, the monthly minimum wage will be set at EUR 540 gross from 1 January 2019. This is an increase of 8 per cent. In **Luxembourg**, the coalition agreement plans to increase the social minimum wage by 100 EUR per month, one-third of which shall be paid by the undertaking and two-thirds by the State. In **Romania**, an Emergency Ordinance modifies the Labour Code to the effect that an increase in the minimum gross national wage, differentiated according to education and seniority levels, can be established by a Government Decision. This change is not yet applicable; it will come into force on the occasion of the next increase in minimum wage to be announced by the government at the beginning of 2019. In **Slovenia**, a draft act on amendments to the minimum wage has been presented in Parliament. The draft aims to increase the minimum wage for the years 2019 and 2020, introducing a new formula to calculate it and excluding additional payments such as night work, work on Sundays, on holidays and on statutory free days which at present are included in the minimum wage.

Dismissal law

In **Estonia**, the Supreme Court has ruled that the employer must offer any available vacancy to the employee who has been made redundant. This means that any available vacancy type, even temporary ones, which the redundant employee can potentially fill, must be offered to him or her. If such vacancies are not offered, the redundancy and termination of the employment contract is null and void. In **France**, the Social Division of the State Council has annulled the job protection plan of a company that, forming part of a group, ceased its activity and dismissed all its employees. The reason is that the plan did not take into account the possibilities and resources of a leading company of the group as should have been the case, even if this company is a holding company. In **Germany**, the draft of a so-called Brexit Tax Accompanying Act envisages an amendment to the Banking Act that makes it easier (and legally secure) to terminate certain employees in the banking sector. In **Italy**, the Constitutional Court has declared part of Legislative Decree 23/2015 unconstitutional. The compensation the employer is ordered to pay in case of unlawful dismissal on economic grounds shall not be automatically calculated based on the dismissed employee's seniority only, i.e. the judge shall take the particularities of the case into account. In **Latvia**, an amendment to the Labour Code has been introduced providing that an employer may give an employee who is a member of a trade union notice of dismissal without the trade union's consent if her membership has been less than six months.

Working time

In **France**, the Labour Division of the Court of Cassation has ruled that the quality of the managerial staff and the existence of freedom of organisation in work are not sufficient to exclude the payment of overtime work. Managers and non-managers are subject to the regulations on overtime work, which are a public policy. Only managers who have signed a fixed price agreement in days, and senior managers who are not subject to working time legislation, can opt out of the applicable regulations. In **Hungary**, a

proposal to amend the Labour Code suggesting the modification of the duration of the reference period and of overtime work per year has been submitted to Parliament. In **Lithuania**, the Supreme Court has ruled that the time a driver spent during breaks between assignments, after leaving her vehicle and without the obligation to carry out any auxiliary work related to vehicle and/or passenger servicing and without the obligation to remain at the workplace, shall not be considered working time and should therefore not be paid. In **Poland,** a draft proposal to amend the law on limiting trade on Sundays has been presented to Parliament. The draft's proposal is to reduce the current possibilities of carrying out commercial activities on Sundays.

2 Implications of CJEU and EFTA Court rulings

CJEU case C-596/16 of 06 November 2018, *Bauer*

The CJEU has ruled that a national regulation that considers the right to annual leave acquired by a worker to extinguish when the employment relationship ends because the worker has passed away, without raising a right to an allowance in lieu of that leave which is transferable to the employee's legal beneficiaries by inheritance is contrary to EU law.

In **Croatia**, this ruling will not have any implications, since Croatian law regulates allowance in lieu of annual leave in such a way that does not prevent the courts from developing an interpretation in accordance with the CJEU's findings. In **Denmark**, the current Holiday Act states that in the event of the worker's death, the allowance in lieu of annual leave not taken will be paid to the worker's estate. This includes any allowance accumulated in the current year of accrual as well as the preceding year of accrual. The same situation will continue to apply when the new Holiday Act enters into force. In **Latvia**, labour law does not explicitly regulate the rights of the beneficiaries of a deceased employee, however, it restricts the right of the worker's beneficiaries to claim pay as well as any related compensations from the employer. In **Portugal**, the employee's legal beneficiaries are entitled to all employment benefits that had been accrued at the time of the employee's death, but not to any compensation related to the termination of the employment contract. In **Spain**, labour law does not provide for any rules on this issue. However, according to civil law, if a worker becomes deceased, her employment contract terminates, but any benefits the worker had with the employer do not automatically expire. Therefore, unpaid wages can be claimed by the worker's beneficiaries.

CJEU case C-684/16 of 06 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*

In this case, the CJEU ruled that a national legislation that stipulates the automatic extinction of the right to annual leave (and therefore, to any allowance in lieu) if the worker had not requested taking annual leave before the end of the employment relationship, is contrary to EU law.

In **Belgium**, this judgment may also have an impact on annual leave days not taken by the end of the year. When the employee him-/herself chooses to not take all of her annual leave, the unused leave days are lost and the employer is not required to pay them. In **Latvia**, the judgment will not have any impact, since Article 149 (5) of the Labour Code explicitly provides that a worker is entitled to compensation for any unused annual leave without an imposed time lapse following the termination of her employment relationship. In **Spain**, this ruling will not have an impact, because annual leave cannot be renounced or financially compensated. The worker cannot waive this right. If the employer does not allow the worker to take annual leave, she will be held liable according to the rules on administrative sanctions. However, this ruling seems to allow the worker to surrender her annual leave,

which would be highly problematic under Spanish law.

CJEU case C-147/17, of 20 November 2018, *Sindicatul Familia Constanţa u.a.*

In this case, the CJEU ruled on the qualification of the activities of certain persons acting as foster parents as working time. In its conclusions, the Court found that the work performed by foster parents under the circumstances of the present case and under an employment contract are not covered by Directive 2003/88/EC on working time.

In **Latvia**, the decision in case C-147/17 does not have any implications. Latvian law regulating working time - the Labour Code – neither explicitly includes nor excludes foster parents from its scope of application. In **Romania**, the issue of working time in the case of professional foster parents has been problematic. The main problem is that although the foster parents are employees under an employment contract concluded with the local child protection department or with an accredited private body, they are required to ensure the continuity of the childcare activity, including during their weekly rest period or statutory annual leave. As a result, a large number of disputes throughout the country have been triggered by claims brought before the courts by foster parents to recognise their additional working time as overtime and the entitlement to a compensatory allowance. The problem was all the more controversial since Article 7 (2) of Directive 2003/88/EC on working time expressly prohibits any compensation for leave with an equivalent allowance. Immediately after the CJEU decision, the High Court of Cassation stated that the legal provisions on the continuity of foster parents' activity do not derogate from the rule concerning the obligation to take in-kind leave; therefore, he or she is not entitled to compensation equivalent to leave allowance. In **Spain**, foster parents can be workers, but this is not a situation explicitly covered by labour law. Such contracts fall under the scope of the general rules of the Labour Code. This is a new reality and problems have not yet arisen.

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

Topic	Countries
Minimum wage	CZ, EE, LU, RO, SI
Dismissal law	EE, FR, DE, IT, LV
Working time	FR, HU, LT, PL
Collective bargaining	AT, DE, SI
Part-time work	AT, LU, UK
Severance payment	BE, ES
Annual leave	FI, LU
Vocational training/education	BG, FR
Strike	DE, ES
Holidays	LU, PL
Sex discrimination	RO, SE
Training leave	BE
International mobility	BE
Telework	BE
Worker's benefits	BE
Student's work	HR
Wages	HR
Surveillance	CZ
Employee status	FR
Social and Economic Committee	FR
Fixed-term contracts	EL
Temporary Agency Work	HU
Bogus self-employment	IE
Posting of workers	LV
Mobile workers	LT
Parental leave	NL
Transfer of Undertakings	PT
Apprenticeship	RO
Definition of worker	UK

Austria

Summary

No new labour law legislation has been passed and no cases of relevance from an EU labour law perspective published in November. Railway workers went on strike and a proposal to amend the Law on Employment of Civil Servants has been submitted.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR rulings

Nothing to report.

4 Other relevant information

4.1 Railway strikes

The Austrian Transport and Services Union (vida) and the railway employers' association could not agree on a collective bargaining agreement for the railway sector. The various forms of compensation times, an issue that has gained in relevance since the recent changes in the working time law (see also June 2018 and September 2018 Flash Reports), as well as pay raises. On Monday, 26 November 2018, train services were interrupted for two hours, affecting roughly 100 000 travellers. In the Austrian context, which has not seen strikes in the past three years and has a tradition of measuring strikes per minute, this conflict attracted public attention.

A collective bargaining agreement has been concluded in the meantime, including a pay raise of 3.4 per cent (as opposed to 2.1 per cent in 2017 and 1.6 per cent in 2016) as well as higher starting salaries for certain railway-specific jobs. Compensation time regulations for employees working primarily night shifts have been extended, a reduction in weekly working time is now possible by way of work agreements.

Sources:

Statistics on strikes in Austria can be found here.

Some newspaper artivles are provided in de following links:

Die Presse, 26 November 2018: Streik: ÖBB stoppten gesamten Bahnverkehr.

Der Standard, 02 December 2018: Streik abgewendet: Eisenbahner erhalten 3,4 Prozent mehr Lohn.

Kleine Zeitung, 02 December 2018: Bahn-KV: ÖBB begrüßen Einigung.

4.2 Proposed amendment to the Law on Employment of Civil Servants

The government has proposed an initiative to amend legislation on civil servants. One interesting feature is the introduction of the reintegration of a part-time scheme for civil servants, a scheme that was introduced in general employment law in July 2017. The scheme aims to facilitate and partially fund the reintegration of employees in their workplace, who have been afflicted by severe illness. The initiative was submitted to Parliament on 14 November 2018.

Belgium

Summary

(I) A new decree of the Flemish Parliament implements the Flemish education leave regulations, which entitles workers who meet specific conditions to be absent from work with pay to attend training, courses or to take examinations.

(II) A new law repeals Belgian provisions to fight abuse in the context of international mobility following a judgment of the Court of Justice in case C-356/15, 11 July 2018, *Commission v Belgium*, finding that these provisions are contrary to Union law. In addition, this law will also fill a number of gaps relating to accidents at work in the field of teleworking.

(III) A new collective bargaining agreement introduces the possibility of using an e-bonus from 01 January 2019 and aims to simplify the procedure for awarding a non-recurring results-related bonus.

(IV) Recent CJEU case law on annual leave is analysed.

1 National Legislation

1.1 Training leave

Since 01 July 2014, the Regions have assumed responsibility for the system of paid education leave. This system, at least in Flanders, has been transformed into the 'Flemish education leave' system (see 'Moniteur Belge' of 13 November 2018).

The aim of the Flemish education leave system is to encourage employees to participate in labour market and career-oriented training. An employee has the right to be absent from work while retaining her maximum salary that must be regularly paid, to participate in training, to study or to take examinations.

Only private sector employees working in an undertaking established in the Flemish Region are eligible to take education leave. A clear definition of the private sector is included by referring to the Collective Bargaining Agreement Law of 05 December 1968. Employees who work full-time or part-time are eligible. In addition, only labour market-oriented (sustainable career reinforcement or facilitation of labour market transitions) and career-oriented training (within the framework of career guidance and laid down in a personal development plan) can be completed. The Flemish government may attach specific conditions to such training. These include conditions on the minimum duration, the form, quality of the service provider and the content of the training. All labour market-oriented training courses are registered in a training database. In addition to the courses listed in the decree, two authorities may also decide whether a course qualifies for Flemish education leave: the Flemish Training Commission and the joint committees can also decide on the withdrawal of a course if the training no longer meets the necessary conditions.

In addition, a committee is established with the task of deciding on appeals lodged against the decision of the study programme committee and the joint committees. In certain cases, the committee can withdraw the right to Flemish education leave from a study programme, for example, if the training is contrary to public order. Moreover, an annual evaluation report is used to check whether the programmes still meet the necessary conditions.

A maximum number of hours (quota of hours of education leave) is determined for each employee to participate in labour market and career-oriented training, which the employee can complete within a certain period. The Flemish government shall determine

that number, the start and end date of that period, and shall lay down the modalities for granting such training. The Flemish education leave is only granted to an employee who proves commitment to participation in the training. In this regard, the Flemish government has to work out a number of aspects in more detail.

Employers can receive an annual lump-sum refund of the hours granted within the scope of the Flemish education leave. The Flemish government will have to determine the period and procedure. An employer can thereby submit an application.

The Decree of 12 October 2018 represents the foundation of the Flemish education leave system, but as has already been mentioned, further implementing measures are necessary. The above immediately explains why most of the provisions of this text will only enter into force on a date to be determined by the Flemish government.

1.2 International mobility and telework

A new law adopted on 22 November 2018 but not yet published will modify some aspects of the regulation of international mobility as well as some other rules related to telework.

1.2.1 International mobility

Numerous abuses occur in the context of international mobility. They consist of circumventing the European Coordination Regulations in order to make an employment relationship subject to social security legislation other than the system under which the employee should be covered in accordance with the rules of those coordination regulations. Such practices thus make it possible to exclude an employment relationship from the application of Belgian social security legislation which should apply if the regulations are properly applied. To fight such abuses, Belgium adopted an anti-abuse measure in 2012. This anti-abuse measure allows the national judge, the social inspector, a federal public service or a public social security institution to subject an employee or self-employed person to Belgian social security if they consider that there has been an abuse of European designation rules.

Employees and self-employed persons who are seconded within the European Economic Area must have an A1 form showing in which country they pay social security contributions. The A1 form is issued by the national social security institutions in the Member State from which an employee or self-employed person is posted. Under the Belgian anti-abuse provisions, a Belgian judge, the National Social Security Office, the National Institute for the Social Security of the Self-employed (NISSE) or the social inspectorate may unilaterally decide to overrule an A1 form issued by a foreign authority if they consider that fraud is involved.

In case C-356/15, 11 July 2018, *Commission v Belgium*, the Court of Justice ruled that the Belgian anti-abuse provisions are contrary to EU law because they do not respect the European dialogue and mediation procedure based on loyal cooperation between the competent bodies of the Member States.

The repeal of the Belgian anti-abuse provisions does not mean that the Belgian courts can no longer take action against a fraudulent A1 declaration. In its judgment, the Court of Justice clarified how cases of fraud and abuse should be approached in future. The national court of the Member State to which an employee or self-employed person is posted may disregard an A1 declaration if it finds that the A1 declaration was fraudulently obtained and the sending State, in the context of the European dialogue and conciliation procedure, has failed to revise the A1 declaration within a reasonable period of time. The Court thus confirmed its case law in case C-359/16, 06 February 2018, *Altun*.

1.2.2 Telework

Teleworking allows companies to organise their work in a more modern way. This type of work allows employees to better reconcile their work and private life and to be more autonomous in the performance of their tasks. Teleworking is currently on the rise.

A distinction is made between teleworking carried out on a regular basis (e.g. the employee works from home every Wednesday), so-called structural teleworking and teleworking carried out occasionally and not on a regular basis. In the private sector, structural teleworking is covered by Collective Bargaining Agreement No. 85 concluded in the National Labour Council on 09 November 2005. Occasional teleworking is governed by the rules laid down in the Law of 05 March 2017 on workable and flexible work.

This Law supplements the legislation on accidents at work with a definition of teleworker and telework. The definition refers to the two possible forms of teleworking (structural or occasional). An accident is an accident at work when it occurred through and during the execution of the employment contract. In the legislation on accidents at work, a legal presumption is registered on the basis of which an accident that happened to a teleworker is deemed to have happened during the execution of the employment contract under certain conditions.

The Law adapts the presumption so that it applies not only to the structural teleworker but also to the occasional teleworker. Unless evidence to the contrary is provided, the accident will be deemed to have happened to the teleworker during the execution of the employment contract:

- If the accident occurs at the place or places mentioned in writing as the place at which she performs work, in a telework agreement or any other document that allows telework to be carried out generically or punctually, collectively or individually. If the place(s) are not mentioned, the presumption will apply to the place(s) where the teleworking is usually carried out;
- If the accident occurs during the period of the day mentioned in one of the above documents as a period during which work can be carried out. In the absence of such mention in the written agreement, the presumption shall apply during the working hours that the teleworker would have to perform if she were employed on the premises of the employer.

The mandatory occupational accident insurance also applies when an employee is the victim of an accident on route to work (= the way to and from work). At present, however, there is an unjustified difference in treatment between employees who perform their services on the premises of the employer or at a satellite office, for whom the detour to bring or pick up their child(ren) to or from a child care centre or school is covered by occupational accident insurance, and teleworkers who have the same family obligations but perform their services in their place of residence and for whom the same route is not covered by the occupational accident insurance. The law eliminates this inequality by equating the route from the teleworker's place of residence to the school or location of her children and vice versa, with the route of employment if the telework is carried out in the place of the employee's residence. The Law also equates the work route, the route from the place of residence of the teleworker (if the telework is carried out at the place of residence) to the place where she takes her meal or purchases it, and vice versa

1.3 Participation in benefits

The social partners in the National Labour Council have amended Collective Bargaining Agreement (hereinafter: CBA) No. 90 to allow the introduction of the e-bonus (wage bonus, non-recurring results-related benefits).

The non-recurring results-related benefits system allows employers to grant their employees a bonus based on collective results (predetermined and uncertain). CBA No. 90 and a Law of 21 December 2007 (see chapter II of this law) represent the legal framework.

These bonuses are subject to a favourable regime, provided that the maximum amount is not exceeded. In social security, they are excluded from the wage concept. The employer pays a special contribution and the employee a solidarity contribution. A tax exemption applies. For the employer, the benefits (and the special contribution) are deductible as professional expenses. However, this favourable regime is linked to the conditions of CLB No. 90 and the Law of 2007. The employer must draw up an allocation plan. This plan is included in a separate CLB or attached to an act of accession, after first having undergone a special procedure. The benefits are introduced by a CBA concluded at company level or for employees who do not have trade union representation, at the employer's choice, by means of a collective agreement or an act of accession.

According to Collective Agreement No. 90/3, it will be possible (in a first phase) to use a model of (electronic) act of accession (and allocation plan) and a model of (electronic) collective agreement introducing the benefits (in a second phase). In time, the paper models will disappear. In concrete terms, this means that the new collective agreement will replace the provision with the compulsory mentions in the act of accession in order to make the electronic signing of that act possible. The existing annexes will be replaced. The documents will be deposited with the Federal Ministry of Labour. In time, the e-bonuses (acts of accession and collective bargaining agreements) will be integrated in a digital platform for social consultation.

The original CBA No. 90 of 20 December 2007 amended by the CBA of 21 December 2010 is available here.

2 Court Rulings

2.1 Severance payment

Cour de Cassation, No. S.14.0006.N-S.14.0059.N, 08 October 2018

Under Belgian labour law, severance payment in accordance with the provisions of the Employment Contracts Act of 03 July 1978 must be calculated on the basis of 'the current salary and benefits acquired under the contract'. Other termination benefits are also calculated on the basis of this broad wage concept.

In practice, the question often arises on the valuation of benefits in kind. The rule is that benefits that do not consist of a sum of money must be valued at their actual value. It is indeed the value that the benefit has for the employee, not its cost to the employer. But what happens when the value of the benefit in kind cannot be determined with accuracy, as is the case, for example, with a stock option? In this case, the court may take the tax valuation into account if it needs to approximate the actual value as closely as possible, according to the Court of Cassation.

3 Implications of CJEU rulings and ECHR

3.1 Annual leave

CJEU case C-684/16, 06 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften and CJEU case C-619/16, 06 November 2018, Kreuziger

On 06 November 2018, the CJEU ruled on the German labour law on unused leave. According to German labour law, the employee automatically loses her rights to leave

not taken and it can no longer be converted into compensation. The former employee claimed compensation for unused leave at the end of the employment contract.

The CJEU found that the irrevocable loss of unused leave is not in conformity with the Working Time Directive 2003/88/EC and the Charter of Fundamental Rights of the European Union, if it is not first verified whether the worker was even effectively enabled to take her leave and whether she was well aware of the consequences of surrendering her leave.

According to the Court, the weaker position of the employee within the employment relationship may prevent the employee from explicitly asserting her rights against her employer. Incentives that may induce workers to surrender their leave are incompatible with effective rest in the interests of protection of their health and safety. According to the Court, any act or omission on the part of an employer which is liable to deter a worker from taking annual leave is incompatible with the purpose of entitlement to paid annual leave. It must be avoided that the responsibility for actually exercising the right to annual leave lies entirely with the worker, otherwise, the employer would be allowed to evade its obligations on the pretext that the worker has not applied for paid annual leave.

Nevertheless, the employer's obligation cannot go so far as to require its employees to actually exercise their right to paid annual leave. However, the employer is expected to inform her employees in good time and in a precise manner of their entitlement to paid annual leave.

4 Other relevant information

Nothing to report.

Bulgaria

Summary

(I) A new Law on Vocational Education and Training has introduced changes in the programmes of secondary schools.

(II) An Act on Enterprises for Social and Solidarity Economics has been adopted by Parliament.

1 National Legislation

1.1 Dual Education

A Law on Amendments of the Vocational Education and Training Act has introduced some new rules on vocational education and training at secondary schools (see: State Gazette No. 92 of 06 November 2018). They involve professions for which dual education may be organised, stipulate the obligations of employers and of teachers, regulations on licenses of the enterprises and the activities of the National Agency for Vocational Education and Training.

1.2 Social and Solidarity Economics

The Act on Enterprises for Social and Solidarity Economics has been adopted by the Parliament (see: State Gazette No. 91 of 02 November 2018). It regulates issues associated with solidarity economics, the register of solidarity enterprises and forms of promotion of social and solidarity economics.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) The Act on Student Work has been adopted.

(II) The judgments of the CJEU in cases C-619/16, 06 November 2018, *Kreuziger v Land Berlin* and C-570/16, 06 November 2018, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* will not have any implications for Croatian law.

(III) The Croatian Bureau for Statistics has published data on the average gross and net salaries in Croatia for the period January to August 2018.

1 National Legislation

1.1 Act on Student Work

The Act on Student Work (Official Gazette No. 96/2018) has been adopted. Compared to previous regulations (Regulation on mediation in employment of full-time students, Official Gazette No. 16/1996, 125/1997, 37/2006, 59/2007, 30/2008), the personal scope of application has been broadened in a way that—apart from full-time students—covers part-time students who are not in an employment relationship. According to the previous regulations, part-time students were not allowed to perform such work.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Annual leave

CJEU case C-619/16, 06 November 2018, Kreuziger

According to German legislation, an employee who did not request to exercise her right to paid annual leave prior to the termination of her employment relationship, loses the days of paid annual leave on the date of the termination of that relationship and, accordingly, her right to an allowance in lieu of paid annual leave not taken. The CJEU has found that such national legislation is contrary to Article 7 of Directive 2003/88/EC on certain aspects of the organisation of working time.

This ruling will not have implications for Croatian law. Article 82 of the Labour Act of 2014 (as amended in 2017) regulates allowance in lieu of annual leave not taken. It states:

> *"(1) In case of termination of the employment contract, the employer shall be required to pay the employee who did not use his annual leave an allowance in lieu of that leave.*
>
> *(2) The allowance referred to in paragraph 1 of this Article shall be determined in proportion to the number of days of unused annual leave."*

CJEU joined cases C-569/16 and C-570/16, 06 November 2018, Bauer

The CJEU ruled in this case:

> 1. *"Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.*
>
> 2. *Where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual."*

This ruling will not have any implications for Croatian law. Article 82 of the Labour Act of 2014 (as amended in 2017) regulates allowance in lieu of annual leave. It states:

> *"(1) In case of termination of the employment contract, the employer shall be required to pay the employee who did not use his annual leave an allowance in lieu of that leave.*
>
> *(2) The allowance referred to in paragraph 1 of this Article shall be determined in proportion to the number of days of unused annual leave."*

The wording of this provision is not contrary to the ruling in this case and should be read in line with the ruling in this case.

4 Other relevant information

4.1 Statistics on salary

The Croatian Bureau for Statistics has published data on the average gross and net salaries in Croatia for the period from January to August 2018 (Official Gazette No. 98/2018). The average net salary amounts to HRK 6 237 (about EUR 842) and the average gross salary amounts to HRK 8 448 (about EUR 1 140).

More information is available here.

Czech Republic

Summary

(I) The government has issued a decree increasing the minimum wage and minimum guaranteed wage.

(II) The possibility of using voice recording of an employee as a piece of evidence.

1 National Legislation

1.1 Minimum Wage

A Government Decree amending Government Decree No. 567/2006 Coll., on minimum wage, the lowest level of guaranteed wage, determination of hazardous working environment and the amount of allowance for performance of work in hazardous working environments has been issued by the government.

As of 01 January 2019, the minimum wage will be increased again. The Government Decree has already been approved and is expected to be published in the official collection in a matter of days. It sets the monthly minimum wage at CZK 13 350 and the hourly minimum wage at CZK 79.80 (it is CZK 12 200 and CZK 73.20 in 2018).

The minimum wage applies to employees performing work both under an employment contract, as well as under an agreement to perform work and an agreement to complete a task.

In addition to the basic minimum wage, there are eight categories of higher guaranteed wages which are set according to the specific type of work being performed. Guaranteed wage applies to employees who only carry out work under an employment contract. Guaranteed wage is always determined by taking into account the complexity, level of responsibility and strenuousness of the work being performed so that a maximum increase in the wage equals at least twice the lowest level of guaranteed wage. Naturally, the lowest level of the guaranteed wage cannot be lower than the amount determined as the basic minimum wage. As of 01 January 2019, the amount of guaranteed wages will be adjusted by the same Government Decree as follows:

Work category	Guaranteed hourly minimum wage in CZK (based on 40 regular weekly working hours)		Guaranteed monthly minimum wage in CZK	
	2018	2019	2018	2019
1. (e.g. washing dishes, needlework)	73.20	**79.80**	12 200	**13 350**
2. (e.g. digging, animal care, medical orderly, garbage collection, driving a vehicle under 3.5 metric tonnes)	80.80	**88.10**	13 500	**14 740**

3. (e.g. driving a vehicle over 3.5 metric tonnes, cashier, walling partitions, preparing difficult meals as a chef)	89.20	**97.30**	14 900	**16 280**
4. (e.g. independent accounting, professional hairdresser)	98.50	**107.40**	16 400	**17 970**
5. (e.g. wage and personnel agenda)	108.80	**118.60**	18 100	**19 850**
6. (e.g. preparation of accounting methodology)	120.10	**130.90**	20 000	**21 900**
7. (e.g. independent solution of research problems)	132.60	**144.50**	22 100	**24 180**
8. (e.g. setting the strategy of a firm)	146.40	**159.60**	24 400	**26 700**

2 Court Rulings

2.1 Secret voice recording of employee used as evidence in court

Supreme Court, No. 21 Cdo 1267/2018, 14 August 2018

The Supreme Court has ruled that:

> *"The Court should always be the body to decide which interest should prevail in a specific situation and a specific case. Circumstances under which a recording was made notwithstanding, the predominant criteria should include the importance of the legally protected or respected interest which is the focus of the actual legal proceeding and the possibilities the party had at his or her disposal to obtain information in a different manner, which would not constitute a breach of the other party's privacy."*

An employee was dismissed on the grounds of redundancy. During a following meeting, the employee asked his employer to provide him with a different job while threatening to dispute the validity of his dismissal as well as to prevent his employer from acquiring subsidies crucial for his business. This meeting was secretly recorded by the employer. Equipped with the recording, the employer decided to respond to the threat by terminating the employment relationship with immediate effect. However, the employee decided to bring an action against his employer questioning the validity of this immediate termination.

To substantiate his claims in court, the employer asked whether he could use a secret voice recording of the employee's threat as evidence. The Supreme Court held that the existing testimony of the two witnesses sufficed as evidence, and laid down certain rules on the permissibility of a secret recording as evidence in court (see above). The right to a fair judicial hearing may thus prevail in the future in cases in which no other evidence is available, while the interest in question is of greater significance than the issue of the breach of one's privacy.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Denmark

Summary

The Danish law is in line with the CJEU ruling in the joined cases C-569/16, 06 November 2018, *Bauer* and C-570/16, *Willmeroth*.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Annual leave

CJEU joined cases C-569/16 and C-570/16, 06 November 2018, Bauer

The question concerned a deceased worker's right to an allowance in lieu of leave not taken, and whether this right to the allowance could be passed on to the worker's beneficiaries.

The Court ruled that under EU law, a worker's right to paid annual leave does not lapse upon his death. In addition, it states that a deceased worker's beneficiaries may claim an allowance in lieu of the paid annual leave not taken by the worker.

This ruling is in line with the current Danish Holiday Act, in which the accrual and taking of paid leave is asymmetric. The Holiday Act in section 30 subsection 5 states that in the event of the worker's death, the allowance in lieu for annual leave not taken will be paid out to the worker's estate. This covers any allowance accrued in the current year of accrual and the preceding year of accrual.

The ruling is also in line with the forthcoming Danish Holiday Act, in which the accrual and taking of paid leave will be simultaneous. The new Holiday Act comes into force from 01 January 2020. Section 26 subsection 6 of the new Holiday Act states that annual allowance in lieu of leave not taken will be paid out to the worker's estate.

4 Other relevant information

Nothing to report.

Estonia

Summary

In situations of redundancy before terminating employment contract the employer has to offer every possible vacancy that is available.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Redundancy and obligations of an employer

Supreme Court, No. 2-16-708, 21 November 2018

Estonian Employment Contracts Act (hereinafter: ECA) foresees general rules for redundancy. One of the tasks for the employer is to offer a new job, before the employment contract will be terminated. The termination of the employment contract in cases of redundancy is the 'ultima ratio'. Therefore, the employer has to do everything in order to maintain the employment relationship. The ECA does not clarify what jobs has an employer to offer. The case law of the Estonian Supreme Court has stated, the employer has to offer every vacancy that an employee is able to fulfil. Recently the Estonian Supreme Court also has stated, that every vacancy should be offered. Even in case the vacancy is existing only temporality (e.g. substitution due to the pregnancy etc.), this kind of vacancy should also be offered. If such vacancy is not offered, the redundancy and the termination of the employment contract is null and void.

The judgment is available here.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 New monthly average wage in third quarter

In the third quarter 2018 the monthly average wage has steadily increased. The average wage in Estonia, in the third quarter was EUR 1 291 gross. In July the average wage was EUR 1 296, in August EUR 1 286 and in September EUR 1 292. Comparing to the third quarter of 2017, the average wage has increased 7.5 per cent.

The average wage per hour was EUR 7.51 gross.

The highest average wage was in state agencies and enterprises – EUR 1 562 gross.

The monthly minimum wage is EUR 500 gross, since 01 January 2019 it will be EUR 540 gross.

A press release relating to this topic is available here.

Finland

Summary

The government has presented a proposal in Parliament to amend the Annual Holidays Act.

1 National Legislation

1.1 Annual leave

The government has presented Proposal 210/2018 for Amending Annual Holidays Act (162/2005) in Parliament.

The purpose of the amendment is to harmonise the current Annual Holidays Act with CJEU case law concerning certain minimum requirements of the Working Time Directive 2003/88/EC, i.e. the employee's right to four weeks of paid annual leave independently from sickness leave, injury, or rehabilitation or other relevant absence and leave.

The Proposal refers to CJEU rulings C-350/06 and C-520/06, *Schultz-Hoff* and *Stringer et al.*, C-282/10, *Dominguez*, C-229/11 and C-230/11, *Heimann* and *Toltschin*, C-178/15, *Sobczyszyn* and C-78/11, *Anged*.

The ILO Convention on paid annual leave (No. 132) Article 5 section 4 is also referred to, i.e. absences that are independent of the employee should be taken into account when the employee's right to paid leave is defined.

The amendment will enter into force on 01 April 2019.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

France

Summary

(I) The provisions of the law for the freedom to choose one's professional future are analysed.

(II) Two decrees concerning the Social and Economic Committee are discussed.

(III) Some of the most recent case law of the Court of Cassation and the Social Council in social matters are analysed.

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1 National Legislation

1.1 Work-sharing

Work-sharing, created by Law No. 2005-882 of 02 August 2005, is a form of profit-making labour loan: its purpose is to make an employee available through a work-sharing company to a user client to carry out a task (Labour Code, Article L. 1252-1). The validity of the use of work-sharing implies that the user company needs qualified personnel that it cannot recruit itself due to its size or resources (Labour Code, Article L. 1252-2).

Article 115 of future Law No. 2018-771 of 05 September 2018, on an experimental basis, provided for the use of this form of work organisation under more flexible conditions to promote the employment of persons facing particular difficulties in finding employment (see JORF n°0205, text n°1).

1.1.1 Target audience

A work-sharing company may conclude a work-sharing contract between 07 September 2018 and 31 December 2021 with persons that face particular difficulties in finding employment:

- Who have been registered at Pole emploi for at least 6 months;
- Beneficiaries of minimum social benefits;
- Disabled persons;
- Persons aged 50 years and up;
- Training levels V (CAP or BEP level), V bis or VI (before the 3rd or before the end of the CAP or BEP).

The target audience is very broad, which will make it possible to offer an open-ended contract to as many people as possible, particularly precarious employees generally working under a temporary or fixed-term contract, but also to anyone wishing to participate in a career path to develop their employability, provided they belong to one of the 5 categories listed above.

1.1.2 Employee's status

An employee hired by a work-sharing company as part of this experiment benefits from several guarantees:

- She holds a permanent contract;

- The last basic hourly wage she earned is guaranteed during intermission periods;
- She can participate in training measures offered by the timeshare company during her working time and authorised on the basis of a professional certification or through the acquisition of a set of skills;
- The CPF ('*compte personnel de formation*') is doubled: the employer, in fact, contributes an additional EUR 500 to the CPF for a full time employee and for each year of employment. The employer contribution is pro-rated if the employee works part time.

1.1.3 Purpose of this measure

The principle of this experiment is to 'reconcile' the economic and the social aspects:

- By integrating employees who are in precarious situations by concluding an open-ended contract with them for assignments that may last several years at user companies while guaranteeing extensive training opportunities (doubling of the CPF);
- By offering user companies trained staff that meet their structural need for manpower and by offering them an alternative to temporary work and fixed-term contracts with employees secured by permanent contracts and therefore likely to be more present, more motivated and more committed.

1.2 Social and Economic Committee

Decree No. 2018-920 of 26 October 2018 on the Social and Economic Committee and pooled funding of professional employer's organisations and trade unions of employees, and Decree No. 2018-921 of 26 October 2018 amending certain provisions of the Labour Code relating to the Social and Economic Committee will modify some rules in the regulation of the Social and Economic Committee.

1.2.1 Operating budget to SEC

One of the major innovations resulting from the establishment of the '*Comité social et économique*' (hereinafter: SEC) was the possibility of using part of the remaining operating budget for social and cultural activities (C. trav., Article L. 2315-61) and *vice versa*. The limit within which this transfer was possible was still pending. Only the SEC has the possibility of transferring residues. Works councils, for example, are not permitted to transfer any residues. These provisions came into force on 29 October 2018, hence it appears that the SEC can transfer residues to ASCs following the next closure of the accounts showing the balance.

The new Article R. 2315-31-1 specifies that: "*The annual surplus of the operating budget may be transferred to the budget intended for social and cultural activities in accordance with Article L. 2315-61 of the Labour Code, within the limit of 10% of this surplus*".

The separation between the two SEC budgets therefore remains relatively tight. This is already the ceiling used by the Labour Orders for the transfer of the remainder in the opposite direction, i.e. from the SEC budget to the operating account provided for in Article L. 2312-84 (C. trav., Article R. 2312-51).

It should be noted that this 10 per cent ceiling must be calculated in relation to the annual surplus and not the subsidy initially paid.

1.2.2 Entry on the CSE's accounting documents

The second paragraph of Article R. 2315-31-1 of the Labour Code incorporates the provisions of Article L. 2315-61, which requires the amount to result from the transfer and its terms of use to be recorded, on the one hand, in the annual accounts of the Social and Economic Committee or, where applicable, in the documents mentioned in Article L. 2315-65 (i.e. in the simplified accounting documents of small ESCs) and, on the other hand, in the report referred to in Article L. 2315-69 (i.e. in the activity and management report).

It should be recalled that the SEC, which can decide to transfer part of the annual operating budget surplus, may no longer require the employer to cover expertise costs that cannot be covered by the operating budget for three years (Labour Code, Article L. 2315-80). In addition, the SEC, which requests the employer to bear the cost for the expertise that the operating budget cannot cover, may not decide to transfer any surpluses from the operating budget to the SEC's funding for the following three years (Labour Code, Article L. 2315-61).

1.2.3 Derogation from the limitation of the number of mandates: by default, for an indefinite period

Another major innovation of the SEC is the limitation to 3 successive mandates in companies with 50 or more employees (C. trav., Art. L. 2314-33). For companies with between 50 and 300 employees, an exception is possible if the pre-electoral memorandum of understanding waives the limitation rule. This derogation is in the absence of contrary stipulations for an indefinite period, as specified in the new Article R. 2314-26. In other words, if the issue of term limits is not addressed in the preparation of the next elections, it must be deemed that the measure continues to apply.

This presumption of the derogation from the limitation of mandates to the SEC only applies to pre-electoral memoranda of understanding that are concluded from 01 January 2019. Thus, for protocols concluded before that date, it seems that the derogation is possible but only applies until the subsequent protocol for the next election. It also seems possible that this exclusion is applied later during the negotiation of the subsequent pre-electoral protocols. In this respect, and even when not expressly stated, ending this exclusion could only be valid in the future. It, however, seems contrary to good faith to take previous mandates into account, which had been obtained when the pre-electoral protocol set aside the rule of the limitation of mandates. It will be years before a decision by the Court of Cassation on this issue is published.

1.2.4 Group Committee: exclusion of 'small' SECs

A second decree specifies the scope of the SEC to be taken into account in the composition of the group committee. It should be recalled that the Labour Code sets maximum limits for determining the number of employee representatives to be appointed for the establishment or renewal of the group committee. Specifically, when the number of companies in the group with a SEC is less than 15, the number of group committee members may not be more than twice the number of these companies.

Article D. 2332-2 of the Labour Code is amended to specify that in order to determine the maximum number of group committee members, only those SECs exercising extended powers, i.e. SECs set up in companies with at least 50 employees, are covered. "*Indeed, in companies with fewer than 50 employees, since the SEC has no powers of information and consultation, their presence on the group committee seems less justified*", explained the DGT in September.

2 Court Rulings

2.1 Employee dismissal

Social Division of Council of State, No. 397900, 27 October 2018

In the present case, an economic and social unit (hereinafter: ESU) decided to cease its activity, close its establishments and dismiss all staff due to the loss of major contracts. The ESU was composed of a parent company and two subsidiaries. The parent company was wholly owned by a holding company whose registered office was located abroad.

The ESU unilaterally drew up a job protection plan (hereinafter: PSE) which was approved by the administration but contested by the employees. The latter were heard by the administrative court, which cancelled the decision due to the insufficiency of the reclassification measures.

The assessment of the economic reason as well as the search for reclassification were assessed at the group level (Labour Code, Article L. 1233-3 and L. 1233-4). Likewise, the administration must assess the sufficiency of the measures in the employment protection plan on the basis of the group's resources (Labour Code, Article L. 1233-57-3).

The notion is defined as follows in the first two cases: "*the notion of group refers to the group formed by an undertaking called a dominant undertaking and the undertakings it controls under the conditions defined in Article L. 233-1, I and II of Article L. 233-5 of the Commercial Code and Article L. 233-16 of the Commercial Code*" and 'located on national territory'. On the other hand, however, the texts are silent with regard to the definition of the group that should be used for the proportionality control of PES measures.

Considering that the question of whether the holding company should be considered dominant had not been discussed before the judges on the merits, the Council of State stayed the proceedings and reopened the investigation to allow the parties to put forward their arguments.

To exclude the consideration of the holding company's resources and its qualification as a dominant company, the ESU maintained that the latter could not be regarded as a dominant company under Article L. 2331-4 of the Labour Code, which excluded companies whose purpose was limited to acquiring holdings in other companies without interference in their management from the group committee.

The argument was rejected by the Council of State in its decision of 24 October. The group of companies to which Article L. 1233-57-3 refers for the assessment of the relevance of PES measures was not necessarily identical to the those of Article L. 2331-1 of the Labour Code which provides for the establishment of a group committee.

Consequently, the provisions of the aforementioned Article L. 2331-4 cannot be invoked to limit the scope of the group to be taken into account when assessing the sufficiency of the PSE, particularly since in this case, the links between the holding company and the companies of the SEU were insofar that it held 100 per cent of the SEU's parent company and they were both managed by the same person.

Since the holding company had the characteristics of a dominant company, its resources, particularly its financial resourced, should have been taken into account by the Directorate in its assessment of the proportionality of the PES. The EPS registration decision was therefore annulled.

2.2 Overtime hours

Labour Division of the Court of Cassation, No. 17-20.691, 24 October 2018

The quality of the managerial staff and the existence of freedom of organisation in work are not sufficient to exclude the payment of overtime work. This is usefully recalled by the Court of Cassation in a judgment of 24 October 2018.

Indeed, both managers and non-managers are subject to the rules on overtime work, which are a public policy (Labour Code, L. 3121-28). Only managers who have signed a fixed price agreement in days, and senior managers who are not subject to working time legislation, can opt out of it.

The Limoges Court of Appeal could therefore only accept that 'the recognition of the status of manager and the impact this can have on the assertion of overtime work in the absence of clocking in, for autonomous employees who are likely to travel' made it possible to exclude the payment of overtime.

2.3 Sunday work

Labour Division of the Court of Cassation, No. 17-18.259, 14 November 2018

The employee of a furniture store contested the opening on Sunday of his employer based on the entry into force of the above-mentioned law. Specifically, the applicant argued that the opening of the establishment on Sunday was not justified under Article 7(1) of ILO Convention No. 106, which makes the introduction of such a derogation subject to the dual condition that the nature of the services provided by the establishment, the size of the population to be served or the number of persons employed do not allow Sunday rest to be applied, and that this is justified by relevant social and economic considerations. In its ruling, the Court of Cassation rejected the employee's arguments.

First, the High Court reiterated the report of the ILO Committee examining the complaint and alleging France's failure to comply with ILO Convention No. 106, which was invoked by the employee in support of his claim.

Indeed, the report noted that the commission of experts, after a full and detailed analysis of the legislation in question, did not consider that the provisions of Act No. 2008-3 of 03 January 2008, which granted the furniture sector a permanent derogation from the principle of Sunday rest, were contrary to the Convention's provisions.

Moreover, the Court of Cassation noted that derogations from Sunday rest "*were justified by the nature of the work, the nature of the services provided by the establishment, the size of the population to be served and the number of persons employed, and were based on economic and social considerations meeting a public need, in that the layout of the house in which the furniture is provided is an activity practised more particularly outside the working week*".

2.4 Internal regulations

Labour division of the Court of Cassation, No. 17-16.465, 17 October 2018

On 01 January 2008, DHL International Express France took over the business and employees of one of DHL Express's five business units. It applied the internal rules of procedure drawn up by the latter in 2007. The CGT union deemed that the employer could not impose disciplinary sanctions on the basis of these internal regulations which, in its opinion, were not enforceable against employees whose employment contracts had been transferred. He referred the matter to the judge for interim measures, considering that the application of the internal rules created a manifestly unlawful disturbance.

First, the Court of Appeal agreed with the union. It prohibited any disciplinary measure, subject to a penalty of EUR 1,000 for each infringement committed after the delivery of

the judgment, until the host company had complied with the legal and regulatory formalities for amending or adopting new internal regulations (consultation of IORPs, sending to the labour inspectorate, etc.).

The company contested this decision before the Court of Cassation. In its view, the rules of procedure should be treated as a unilateral commitment binding it in the event of a transfer of employment contracts. It considered that it was even obligated to continue to apply the internal regulations to employees whose employment contracts had been taken over.

The CGT union maintained that the old internal regulations were no longer enforceable against employees after the de-merger of the company. The buyer had to therefore adopt new internal regulations or amend the old ones in accordance with the applicable legal and regulatory formalities.

The Court of Cassation agreed with the opinion of the judges on the merits:

> *"The Court of Appeal held that the internal rules applicable to employees before the automatic transfer of their employment contracts (...) to a newly created company were not transferred with these employment contracts, since this regulation constitutes a regulatory act of private law whose conditions are regulated by law and since Article R. 1321-5 of the Labour Code requires such a new company to draw up internal rules within three months of its opening".*

It concludes that the disciplinary application of the old internal rules by the new international express company DHL constituted a manifestly unlawful disorder which the judge hearing the application for interim measures could bring to an end.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) The competent Ministry presented a draft law that would modify dismissal protection of certain bankers.

(II) The Federal Parliament passed a law that will modify both the Works Constitution Act and the Act on Collective Bargaining Agreements.

(III) The Federal Labour Court held that the right to strike includes the right of a union to address the workers.

1 National Legislation

1.1 Modification of the Dismissal Protection Act

The Federal Ministry of Finance has presented the draft of a so-called Brexit Tax Accompanying Act ('*Referentenentwurf des Bundesministeriums der Finanzen - Gesetz zur Ergänzung des Gesetzes über steuerliche Begleitregelungen zum Austritt des Vereinigten Königreichs Großbritannien und Nordirland aus der Europäischen Union*' ('*Brexit-Steuerbegleitgesetz – Brexit-StBG*') of 20 November 2018). Among other things, the draft provides for an amendment to the Banking Act ('*Kreditwesengesetz*'). The most important provision is that aiming to amend section 25a (5a) of the Banking Act. The new section 25(5a) would then read as follows:

> "*Section 9 (1) sentence 2 of the Dismissal Protection Act applies to risk carriers of major institutions whose annual fixed remuneration exceeds three times the income threshold for contributions to the general pension insurance scheme within the meaning of section 159 SGB VI [Social Code VI] and who are not managing directors, plant managers or similar executives who are entitled to hire or dismiss employees on their own, with the proviso that the employer's application for termination of the employment relationship does not require justification. Section 14(1) of the Dismissal Protection Act shall remain unaffected.*"

Section 9(1) of the Dismissal Protection Act ('*Kündigungsschutzgesetz*') reads as follows:

> "*If the court finds that the employment relationship has not been terminated as a result of the termination, but the employee cannot reasonably be expected to continue the employment relationship, the court shall, at the employee's request, terminate the employment relationship and order the employer to pay appropriate compensation. The court shall make the same decision at the employer's request if there are grounds that give reason to not expect further cooperation between the employer and the employee for the purposes of the enterprise. Employees and employers may file an application for termination of the employment relationship until the end of the last oral hearing in the appeal court.*"

While dismissal protection basically aims to protect jobs (see section 1(1) sentence 1 of the Dismissal Protection Act according to which "*termination of an employment relationship with an employee whose employment relationship in the same establishment or enterprise has lasted without interruption for more than six months is invalid if it is socially unjustified*", section 9(1) opens the door to terminating the employment relationship by submitting a 'simple' application for termination of the employment relationship that does not require justification and, moreover, by paying compensation.

More information on the draft is available on the homepage of the Federal Ministry of Finance.

1.2 Modification of the Works Constitution Act

On 30 November 2018, the Federal Parliament passed a law that, among other things, amends the Works Constitution Act (‘*Betriebsverfassungsgesetz*’). Section 117 of the Works Constitution Act (‘*Bertriebsverfassungsgesetz*’) reads currently as follows:

> “*(1) This Act shall apply to air carrier land operations. (2) A representation may be established by collective agreement for employees of air carriers employed in flight operations. The collective agreement may provide for provisions deviating from this Act concerning the cooperation of this representation with the representations of the employees of the air carrier’s land operations to be established in accordance with this Act.*”

This provision will be amended. First, the following sentence will be added to paragraph 1: “*This Act shall apply to air carrier employees engaged in flight operations if no representation has been established by collective agreement in accordance with paragraph 2, first sentence.*” Second, the following sentence will be added to paragraph 2: “*Section 4(5) of the Act on Collective Bargaining Agreements (‘Tarifvertragsgesetz’) shall apply to a collective agreement in accordance with sentences 1 and 2*”.

The addition of a further sentence to 117(1) clarifies that the BetrVG also applies to the employees employed in flight operations, if no representation for them has been established in accordance with a collective agreement pursuant to paragraph 2 sentence 1 of § 117 BetrVG. The new sentence 3, which is added to Article 117(2), aims to clarify that collective agreements on the representation of employees in flight operations are subject to the so-called after-effects of collective agreements.

The DGB, in particular, had argued before that the current law did not comply with Directive 2002/14/EC and that the exclusion of consultation and information rights also infringed Directives 2001/23/EC and 98/59/EC (‘*BT-Ausschussdrucksache zu 19(11) 218*’) of 26 November 2018).

More information on the legislative process is available here.

1.3 Modification of the Act on Collective Bargaining Agreements

The law that was passed on 30 November 2018 also contains a provision amending the Act on Collective Bargaining Agreements (‘*Tarifvertragsgesetz*’).

Section 4(2) sentences 1 and 2 of the Act currently read as follows:

> “*Pursuant to section 3, the employer may be bound by several collective agreements of different trade unions. Insofar as the scope of unidentical collective agreements of different trade unions overlap (conflicting collective agreements), only the legal provisions of the collective agreement of the trade union which has the most members in an employment relationship in the enterprise at the time of the conclusion of the last conflicting collective agreement shall apply in the enterprise.*”

Under the new law, the provision will read as follows:

> “*Pursuant to section 3, the employer may be bound by several collective agreements of different trade unions. Insofar as the scope of unidentical collective agreements of different trade unions overlap (conflicting collective agreements), only the legal provisions of the collective agreement of the trade union which has the most members in an employment relationship in the*

enterprise at the time of the conclusion of the last conflicting collective agreement shall apply in the enterprise (majority collective agreement); if the interests of employee groups, which are also covered by the collective agreement that is not applicable under the first half of the sentence, are not seriously and effectively taken into account when the majority collective agreement is concluded, the legal provisions of this collective agreement are also applicable."

This provision serves to fulfil the mandate of the Federal Constitutional Court in its judgment of 11 July 2017. The Federal Constitutional Court had instructed the legislature to create a new provision in the event that the interests of a professional or employee group represented by the minority trade union have not been seriously and effectively taken into account by the parties to the majority collective agreement.

More information on the legislative process is available here.

2 Court Rulings

2.1 Right to strike

Federal Labour Court, No. 1 AZR 189/17, 20 November 2018

In the present case, the employer operated a dispatch and logistics centre in a business park. The premises included a company building, which was accessible via a central entrance, and a car park that was intended for use by the employees.

According to the Court, the right to strike includes the right of a union to address the workers called upon to strike immediately before entering the workplace in order to persuade them to take part in the strike. Depending on the specific local circumstances and in the absence of other means of mobilisation, such action may also be permitted on a company car park located in front of the employer's premises. In the Court's view, the weighing of the employer's conflicting fundamental rights and the striking trade union results in the employer having to accept a short-term, situational impairment of its property, as in the present case, the union could only communicate with the workers called upon to strike in the company car park in front of the main entrance.

A press release relating to the judgment is available here.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Greece

Summary

The Supreme Court of Greece has modified its previous case law on equal payment between fixed-term and permanent public sector employees.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Greek Supreme Court, No. 963/2018, 22 May 2018

The legal regime on fixed-term contracts in the public sector was regulated by the provisions of P.D. 164/2004 which transposed Directive 1999/70/EC in the public sector. Directive 1999/70/EC provides for equal treatment between fixed-term and permanent employees. According to the provisions of Article 103 of the Greek Constitution, it is unlawful to hire fixed-term or permanent employees in the public sector without applying a specific administrative procedure.

The case brought before the Supreme Court concerned the equal payment between employees with fixed-term contracts, hired without recourse to the specific administrative procedure ('ASEP') applicable to their posts, and employees with contracts of indefinite period, hired regularly under 'ASEP'.

The Court, contrary to its previous position (Decision No. 1643/2017), stated that the recruitment procedure may be considered a reason justifying inequality in pay.

The homepage of the Greek Supreme Court is available here.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

Legislation on the organisation of working time, the duration of the reference period, overtime work, work schedules and the regulation of certain elements of temporary agency work was passed.

1 National Legislation

1.1 Working time

This proposal was submitted to Parliament by two of its members. The objective of the proposal is to amend Act I of 2012 on the Labour Code (hereinafter: LC) with reference to the duration of the reference period and overtime work.

As far as the organisation of working time is concerned, the proposal suggests modifying the duration of the reference period and of overtime work per year.

The proposal contains the following provision:

> *"The maximum duration of working time banking set in the collective agreement is thirty-six months if justified by technical reasons or reasons related to work organisation."*

The current regulation of the LC is as follows (Section 94 Sub 3):

> *"The maximum duration of working time banking set in the collective agreement is twelve months or fifty-two weeks if justified by technical reasons or reasons related to work organisation."*

The Section 109 Sub 1 regulates overtime work. Under the current provision:

> *"For full-time jobs, two hundred and fifty hours of overtime work can be ordered within a given calendar year."*

The proposal contains the following provision:

> *"For full-time jobs, four hundred hours of overtime work can be ordered within a given calendar year."*

The proposal highlights that the aim of the LC is the improvement of the market economy and supressing state intervention. These objectives are only partially achieved. The role of collective agreements is limited. The establishment of certain working conditions can be determined by the parties. For this reason, it is indispensable that the parties come to an agreement. This proposal aims to support this effort of the parties.

The amendment of the rules on the organisation of working time aims to strengthen the supply side of the labour market, and it is therefore necessary to elaborate a flexible solution. This amendment seeks to reinforce flexibility of the organisation of working time. The proposal also takes account of the 6-7 year old product cycle of enterprises. This amendment further aims to adapt production to demand. The limitation of a 12-month reference period is too narrow.

It is highlighted that the above mentioned text is a proposal. The detailed discussion will take place in Parliament on 11 December.

1.2 Temporary agency work

In addition, the abovementioned proposal contains a regulation on the minimum worker leasing fee in case of temporary agency work. This fee can be determined by government edict.

Section 298 Sub 5 states that the government is thereby authorised to issue detailed regulations and conditions for using temporary agency work and the registration of temporary work agencies, including the conditions for the public benefit of temporary work agencies, regulations relating to the services they provide to temporary agency workers, and the conditions for entering into relationships for the performance of work, including the provision of financial security in connection therewith.

The proposal recommends the following rule:

> *"The government is hereby authorised to declare the minimum sum of the minimum fee for leasing a worker, the detailed regulations and conditions for using temporary agency work and the registration of temporary work agencies, including the conditions for the public benefit of temporary work agencies, the regulations relating to the services they provide to temporary agency workers, and the conditions for entering into relationships for the performance of work, including the provision of financial security in connection therewith."*

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

The *Oireachtas* Joint Committee on Employment Affairs and Social Protection has commenced hearings on the issue of bogus self-employment.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Bogus self-employment

On 08 November 2018, the *Oireachtas* Joint Committee on Employment Affairs and Social Protection began hearings into the issue of bogus self-employment. The issue is being pressed hard by trade unions and opposition parties with two private members' bills having been introduced in recent months – the Protection of Employment Bill 2018 (Measures to Counter False Self-Employment Bill 2018) and the Prohibition of Bogus Self-Employment Bill 2018.

At the hearing (find the debate video here), departmental officials highlighted the one-month radio and online awareness campaign around false self-employment with instructions on how to pursue a claim for employee status through the Department's SCOPE section. The campaign sought to inform workers on what constitutes genuine self-employment and how it is distinguished from bogus or false self-employment. The officials admitted, however, that, although the False Self-Employment Information webpage had 10 500 visits, the level of direct contact was low. The Department only received 50 telephone calls and 30 emails from individuals who had become aware of the SCOPE section's services as a result of the campaign. Only 15 formal applications, however, were submitted which included couriers, van drivers, home tutors and construction workers. The estimated cost of the campaign was EUR 167 000.

Italy

Summary

On 08 November 2018, the Constitutional Court delivered Decision No. 194 of 2018 on Article 3 para. 1 Legislative Decree No. 23 of 2015, declaring this provision against Article 3 Constitution (with reference to the equality and reasonableness principle), Article 4 para. 1 and 35 para. 1 (the right to work and the protection of work in all its forms and expressions) and Article 76 and 117 para. 1 (in connection with Article 24 RESC).

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal law

Constitutional court, Nr. 194/2018, 08 November 2018

On 08 November 2018, the Constitutional Court delivered Decision No. 194 of 2018 on Article 3 para. 1 Legislative Decree No. 23 of 2015, declaring the latter against Article 3 Constitution (with reference to the equality and reasonableness principle), Article 4 para. 1 and 35 para. 1 (the right to work and the protection of work in all its forms and expressions) and Article 76 and 117 para. 1 (respect of international obligations, with reference to Article 24 RESC).

In particular, according to the Court, the compensation the employer is ordered to pay in case of unlawful economic dismissal shall not be automatically calculated only according to the seniority of the dismissed employee, as stipulated in Article 3 para. 1 Legislative Decree No. 23 of 2015. Within the minimum and maximum amount set by law, the judge shall take into account the particularities of the case.

Moreover, the minimum amount, which is set at six months of the last wage according to the law, seems to the Court to be ineffective (unreasonable) with regard to compensation for the damage caused to the worker as a result of the (unlawful) dismissal and to deter the employer from (unlawful) terminations of the employment relationship in the absence of the alleged economic ground.

In its statement, the Court referred to Article 24 para. 1(b) RESC according to which "*the right of workers whose employment relationship is terminated without a valid reason for adequate compensation or other appropriate aid*".

By contrast, the Court excluded the application of Article 30 CFREU on the ground that Article 3 para. 1 Legislative Decree No. 23 of 2015 does not fall within the scope of EU law or within its scope of implementation. In its statement, the Court, quoting the case law of the CJEU, affirms that there is no EU law that refers to individual dismissal, without taking into account Article 10 of Directive 92/85/EEC (as interpreted in CJEU case C-103/16 *Porras Guisado*).

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Latvia

Summary

(I) A newly adopted law provides for the transposition of measures of Directive 2014/67/EU on cooperation in the enforcement of administrative fines with EEA states.

(II) Parliament has adopted several amendments to national labour law on job offers, linguistic requirements in employment; dismissal law and overtime.

(III) The decisions of the CJEU in case C-245/17, case C-684/16, joined cases C-569/16 and C-570/16, case C-147/17 will likely have no implications on Latvian law.

(IV) The President has returned amendments to the level of overtime pay in generally applicable sectoral agreements to Parliament for a second review.

1 National Legislation

1.1 Posting of Workers

On 25 October 2018, Parliament adopted a new legislative act – the Administrative Liability Law (the Administrative Liability Law '*Administratīvās atbildības likums'* is available here). This law is intended to amend legal regulations in the field of administrative violations and make them more efficient and clear. To date, both substantive and procedural provisions of administrative violations are regulated in the Administrative Violations Code (the Administrative Violations Code '*Latvijas Administratīvo pārkāpumu kodekss'* is available here).

The new system envisages the substantive provisions on specific administrative violations to be regulated by the Administrative Violations Code, but the procedure (competent authorities for the application of administrative fines, the system of appeal, etc.) shall be regulated by a separate law, the Administrative Liability Law.

This amendment also relates to EU labour law, specifically, cross-border cooperation between competent authorities of the EEA Member States in case of breach of the provisions on the posting of the workers. In particular, Article 274 provides that the Latvian State Labour Inspectorate shall submit its decision to the competent institution of the EEA Member State regarding the application of an administrative fine to an employer from another EEA Member State for violating the law on the posting of workers in Latvia in case the employer does not voluntarily comply with the decision. Article 275, in principle, provides for the same regulation; however, with regard to obligations to enforce the decision adopted by the EEA Member State's competent authority with regard to the Latvian employer. These regulations transpose Directive 2014/67/EU.

1.2 Job offers and dismissal of trade unionists

On 01 November 2018, Parliament adopted amendments to the Labour Code, the main statutory act regulating employment and labour relationships. One set of amendments relates to job advertisements and dismissal procedures for employees who are trade union members (the new amendments are available here). According to the amendments, the employer must provide additional information in job advertisements, namely the name, registration number, or if it is a recruitment agency, its name and registration number. In addition, the job advertisement must mention the monthly or annual gross salary (or a range from the lowest to the highest possible salary for the post). Furthermore, the amendments provide that an employer may give a notice of

dismissal to an employee who is a member of a trade union without consent of that trade union if her membership has been less than six months. There was previously no condition on the duration of trade union membership. This led to the practice that employees who were to be dismissed suddenly joined a trade union to protract the dismissal procedure.

1.3 Linguistic requirements in employment

The second set of amendments relates to linguistic requirements in employment. The Labour Law was amended with the introduction of specific measures targeting unjustified requirements on knowledge of a foreign language in employment. That is, an employer is only permitted to require knowledge of a foreign language if it is objectively necessary for the post in question. The amendments also provide for a reverse shift of the burden of proof—as in the case of discrimination and unfair dismissal claims—if an employer does not comply with this requirement. The reason behind this provision is the difficulty of younger Latvians to find employment because of the requirement of knowledge of Russian applied in practice by a majority of employers. The requirement of knowledge of Russian is widespread, taking into account that in Latvia, around 40 per cent of the population is Russian speaking (and consider Russian to be their native language). The amendments are based on the notion that permanent residents of Latvia should be able to communicate in Latvian and cannot be expected to provide goods and services in Russian. Such amendments might be highly disputable and controversial – on the one hand, such norms represent a restriction to the use of a particular language (Russian), i.e. restricting the possibility of the local Russian speaking residents from using their language in everyday life. On the other hand, in practice, those (young) Latvians who cannot find employment because of their lack of knowledge of Russian emigrate to Western Europe for employment and Latvia is losing workforce.

1.4 Overtime

The third set of amendments adopted on 01 November 2018 was resubmitted to Parliament by the President of the Republic of Latvia (Information from the President of the State 'On passing back law for second review' is available here). The respective amendments envisage that generally applicable sectoral collective agreements may provide for no less than a 50 per cent increase of pay for overtime work if a substantial increase of the minimum wage in the sector is introduced in comparison to the statutory minimum salary (the legislative proposal is available here). The Labour Code provides that an employee is entitled to 100 per cent increase of pay for overtime work. The President considered that an amendment allowing a decrease of pay for overtime work does not correspond to the equal treatment principle among all workers.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU case C-245/17, Viejobueno Ibánez and de la Vara González

The CJEU decision in case C-245/17 has no impact on Article 45 (1) of the labour law (the Latvian Labour Code '*Darba likums*' is available here), which provides that an employment agreement is not to be considered a prolongation of a previous fixed-term

employment agreement if a successive fixed-term agreement is concluded not sooner than 60 days after the expiration of the previous fixed-term employment agreement. A similar practice as that reviewed in the present decision is applied in academic education in Latvia.

3.2 Annual leave

CJEU joined cases C-569/16 and C-570/16, Bauer

The decision of the CJEU in joined cases C-569/16 and C-570/16 dos not have any implications on Latvian law.

Latvian labour law does not explicitly regulate the rights of the beneficiaries of a deceased employee, however, it restricts the right of the worker's beneficiaries to claim pay as well as all related compensations from an employer. According to civil law (the Latvian Civil Code *'Civillikums'* is available here), beneficiaries have a right to claim any property rights of a deceased person. Moreover, civil procedure law (the Latvian Law on Civil Procedure '*Civilprocesa likums'* is available here), in principle, allows a person to bring any claim before the court involving the rights prescribed by law.

CJEU case C-684/16, 06 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften

The decision in case C-684/16 does not have any implication on Latvian labour law. Article 149 (5) of the Labour Code explicitly provides that a worker following the termination of her employment relationship is entitled to compensation for the entire period of unused paid annual leave without imposing a time lapse. The respective legal regulation has been in force since 01 January 2015 (the amendments to the Labour Code '*Grozījumi Darba likumā'* are available here). It was adopted due to the widespread practice of the employer not granting paid annual leave within the foreseen period (Article 31 – two years). Latvian law does not provide any time limitation for the use of the right to paid annual leave and compensation for unused annual leave in case of termination of the employment relationship.

3.3 Working time

CJEU case C-147/17, 20 November 2018, Sindicatul Familia Constanţa et al

The decision in case C-147/17 does not have implications on Latvian law. First, Latvian law regulating working time, i.e. the Labour Code, neither explicitly includes nor excludes foster parents from its scope of application. However, according to the CJEU findings, Latvian foster parents are to be considered workers within the meaning of Directive 2003/88/EC since in practice, they have the same factual relationship (subordination to competent state authorities in return for remuneration) as those analysed in the case in question (the Orphans' Courts Law '*Bāriņitiesu likums*' is available here).

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

The EEA experts from Liechtenstein, Iceland and Norway recently met in the capital of Liechtenstein (Vaduz) to discuss the current challenges of incorporating EU legislation into the EEA Agreement.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Meeting of the EEA member states

The EEA experts from Liechtenstein, Iceland and Norway recently met in the capital of Liechtenstein (Vaduz) to discuss the current challenges of incorporating EU legislation into the EEA Agreement. On average, 250 new EU Acts are incorporated into the EEA Agreement each year.

The meeting was also an opportunity to exchange views with representatives of the EU, the EFTA Secretariat and the EFTA Surveillance Authority on other important issues relevant to the EEA.

More information is available here.

Lithuania

Summary

The Supreme Court upheld the rulings of the lower court in which an interpretation on the notion of working time was issued. The Court noted that if the employer cannot reach the local public bus driver who is on a break between assignments and who may spend the break time at her leisure, these breaks shall not be considered as working time.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working Time

Supreme Court, Nr. e3K-3-402-403/2018 of 05 November 2018

The Supreme Court of Lithuania examined two similar cases in which the notion of 'working time' of bus drivers was examined.

Both cases were brought before the court by drivers of local busses in the public transport company of a small city. The drivers contested that breaks between the assignments ought to be recognised as working time and paid accordingly. Despite the fact that breaks between routes during the working day were common practice, the courts dismissed the argument of drivers by citing the well-established case law of the CJEU.

The Court concluded that if the time spent by a driver after leaving her vehicle and without the obligation to carry out any auxiliary work related to vehicle and passenger servicing and without the obligation to stay at the workplace, it shall not considered working time and should not be paid. The Court underlined the fact that drivers were allowed to leave the bus and the employer's premises. During that time, the applicants were not required to be reached and could spend the on-call time at home. The work shifts and the mobile form of work was also taken into account by the courts in concluding that the interruptions between the routes could not amount to paid standby time. The fact that at a given time, the employee may carry the money collected from the passengers cannot be considered a sufficient argument to prove otherwise.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

No important new laws, bills or court decisions have been issued. However, the new coalition agreement announces multiples changes.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Social Court, No. 211/15, 19 June 2018

The only case that can be mentioned is a social security case ('*Conseil arbitral de la sécurité sociale'*, first instance social court, 19 June 2018, case 211/15) which clarified that an employee whose fixed-term employment relationship has been cancelled with notice by the employer (which as such is illegal), is an involuntarily unemployed person ('*chômeur involontaire*') and thus entitled to unemployment benefits.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Coalition agreement

Numerous changes were announced in the coalition agreement ('*accord de coalition 2018-2023*') which was recently published.

As regards employment policy, it contains a number of fairly vague political declarations. In some cases, employees who resign should be entitled to unemployment benefits. Furthermore, initial and lifelong training should be fostered to fight unemployment and to keep workers in employment. More specifically:

An 'individual training account' ('*compte individual de formation*') will be implemented and free training vouchers ('*chèque formation*') will be delivered to workers, especially for digital skills.

As far as individual labour law is concerned, the coalition agreement clearly states that the level of protection should not be reduced. Nevertheless, atypical employment should be taken into consideration, flexible working time schemes should be reviewed, telework shall be fostered and bogus self-employment ('*fausse indépendance*') shall be tackled. The scope of interim work and fixed-term contracts shall be reviewed. No specifics, however have been announced on these points.

The fiscal regime for stock options will expire and a new legislation will be elaborated to foster profit-sharing among employees.

On the level of collective labour law, it was announced that the rules on collective agreements may be reviewed. By negotiation, a 'right of disconnection' ('*principe de la déconnexion*') should be implemented. Furthermore, the legislation on collective

dismissal and social plans should be strengthened, as in many cases, companies succeed in circumventing them.

As regards the posting of workers, the government's intention is to provide more resources to the labour inspectorate ('*Inspection du travail et des mines*') to implement additional controls and increased penalties to fight social dumping due to undeclared posted workers.

As regards all ongoing bills mentioned in the former Flash Reports, the coalition agreement confirms the political intention to promulgate them; this is not a surprise, as the same political parties will enter government. In addition, a bill on moral harassment has been announced.

On a few points, the three coalition partners have agreed on specific changes:

- Instead of a reduction in working time (advocated by the socialist party), there will be two extra days off, i.e. an additional day of annual leave (26 days instead of 25), and a new public holiday on 09 May to celebrate Europe Day;
- A raise in the social minimum wage by EUR 100 per month will be introduced. The increase needs to be supported by one-third of the undertakings and two-thirds of the State (especially by fiscal means);
- In companies with 50 employees or more, a temporary right to part-time employment will be implemented in specific situations (child care, care for relatives), including a right to return to a full-time position.

From a fiscal perspective, the mileage allowance will be reformed (and become probably less attractive), whereas all public transport shall become free of costs by 2020.

Netherlands

Summary

(I) On 13 November 2018, the Senate adopted the bill on the Introduction of Extra Birth Leave ('WIEG').

(II) On 07 November, the Minister of Social Affairs and Employment submitted a proposal for the Balanced Labour Market Act ('Wab') to Parliament.

1 National Legislation

1.1 Parental leave

On 13 November 2018, the Senate approved the bill on the Introduction of Extra Birth Leave (*Wet invoering extra geboorteverlof*, 'WIEG'). This means that as of 01 January 2019, the (new) birth leave act and as of 01 July 2010 the additional birth leave act will take effect.

The 'WIEG' states that the leave of the partner is extended from two to five days (if she works on a full-time basis); the wages are paid by the employer. In addition, the partner can take an additional 5 weeks of supplementary leave, paid by the '*Uitvoeringsinsituut Werknemersverzekeringen*' (hereinafter: UWV) (the Employee Insurance Agency) at 70 per cent of her daily wage. These five weeks may be taken in the first six months after the birth of the child. The WIEG Act also modifies adoption and foster care leave.

The changes are found under section 1.1: the partner's leave is extended from two to five days and partners can take an additional 5 weeks of supplementary leave.

1.2 The Balanced Labour Market Act ('Wab') submitted to Parliament

On 07 November, the Minister of Social Affairs and Employment submitted the Balanced Labour Market Act ('*Wetsvoorstel Wet Arbeidsmarkt in balans*', hereinafter: 'Wab') to Parliament. This set of measures reduces the differences between permanent and temporary contracts (and flexible employment in general). The underlying idea is for these new measures to make it more attractive for employers to offer employees a permanent contract. The 'Wab' still needs to be approved, but the intention is for the new law to come into force in January 2020. Parts of it may even be introduced in 2019.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

(I) On 07 November 2018, the draft law on establishing a one-time additional formal holiday on 12 November 2018 was enacted by Parliament.

(II) The draft to amend the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days was submitted to Parliament. The underlying idea of the draft is to make the statutory provisions more specific and to reduce the exceptions to the ban on Sunday work.

1 National Legislation

1.1 Additional public holiday

On 07 November 2018, the Law on establishing the National Holiday on the Occasion of the Hundredth Anniversary of the Republic of Poland Regaining its Independence was enacted by Parliament (see Journal of Laws 2018, item 2117). 11 November is Poland's Independence Day, which commemorates the end of World War I and the reestablishment of Poland. Since 11 November fell on a Sunday this year, the public holiday (and free day) was moved to Monday, 12 November. For an analysis of the draft, see also October 2018 Flash Report.

The abovementioned legal act constitutes a 'one-time law', i.e. it introduces an additional free day in 2018 only. In practice, the amount of working time in November was lower.

1.2 Working time

On 20 November 2018, the draft to amend the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (see Journal of Laws 2018, item 305) was submitted to the *Sejm* by the ruling party 'Law and Justice' ('*Prawo I Sprawiedliwość*').

The abovementioned Law took effect on 01 March 2018. The underlying idea is to prohibit trade activities on Sundays. In 2018, shops have been closed every second Sunday. As of 01 January 2019, shops will only be opened on a single Sunday per month. As of 01 January 2020, a general prohibition of trade activities on Sundays will apply. For further references, see also January 2018 Flash Report.

Practice has demonstrated that the Law has several shortcomings that may lead to abuse. Moreover, the wording of the Law was subject to interpretative difficulties and disputes. Therefore, the new draft proposes specific exceptions (i.e. cases in which trade on Sundays is permitted). The basic idea of the draft is to reduce the current possibilities of carrying out commercial activities on Sundays.

The draft suggests the following amendments:

- Trade on Sunday will not be permitted in shops in which tobacco products are sold. Currently, according to Article 6 point 1 item 6, the ban does not apply to shops that predominantly sell newspapers, ground communication tickets or tobacco products. Consequently, shopkeepers cannot keep their shop open on Sundays if they sell tobacco products, even if such products represent only a marginal part of their turnover;
- Trade on Sundays will only be permitted in those postal facilities where postal services represent the prevalent part of activities (Article 6 point 1 item

7). At present, shops provide postal services in addition to other services (e.g. the possibility to pick up a parcel), and on this basis, carry out a full range of other trade activities;

- Currently, the Law allows trade activities on Sundays in shops in which the work is performed by entrepreneurs who are natural persons, and who carry out activities on their own account (Article 6 point 1 item 27). In practice, trade activities can be carried out by self–employed persons in small family shops. The draft clarifies that such persons may take recourse to unpaid assistance from certain family members, i.e. the spouse, children, parents and foster parents. The law also clarifies that the abovementioned family members cannot be employed by such an entrepreneur (new Article 3 points 3 and 4). This new provision may resolve some interpretation disputes.

The Law of 10 January 2018 introduced a major change in Poland, since there had previously been no obstacle to open shops on Sundays. It was common practice for all shops to be open 7 days a week. Currently, trade activities on Sundays should constitute an exception only.

The draft does not change the main idea of the Law, i.e. prohibition of trade activities on Sundays. Instead, the drafters intend to eliminate abuses that were the result of shortcomings of the original version of the law.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

(I) A judgment of the Lisbon Court of Appeal on a transfer of undertaking is analysed.

(II) The impact of CJEU joined cases C-569/15 and C-570/16 on Portuguese legislation is addressed.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Court of Appeal, No. 223 / 14.5TTFUNC.L1-4, 07 November 2018

The Lisbon Court of Appeal held (see judgment here) that the transfer of undertaking regulations (Articles 285 et seq. of the Labour Code, which transposed Directive 2001/23/EC) is applicable to a case where the economic unit (hotel) is assumed and managed by a depositary appointed within the scope of a judicial procedure, which has entered into an assignment of the contractual position of the employer with the employees. This regime is also applicable to an employee allocated to the economic unit, even though she had not signed the assignment of the employer's contractual position. This decision is in line with the case law of the CJEU.

3 Implications of CJEU rulings and ECHR

3.1 Annual leave

CJEU joined cases C-569/15 and C-570/16, 06 November 2018, Bauer

The Portuguese system is in line with the case Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn (see ruling here). In fact, the employee's legal beneficiaries are entitled to all employment benefits that accumulated at the time of the employee's death, but not to any compensation based on the termination of the employment contract.

4 Other relevant information

4.1 Status of several draft laws

Draft Law No. 136/XIII (see Draft Law here) and 1025/XIII (see Draft Law here) are still under discussion in the Portuguese Parliament.

Romania

Summary

(I) The Labour Code has been amended, *inter alia*, to equalise the termination of the employment contract due to retirement of women and men, to modify the Apprenticeship Law and to establish and increase the minimum wage.

(II) The Court of Justice of the European Union has ruled that the Working Time Directive is not applicable to professional foster parents.

1 National Legislation

By Government Emergency Ordinance No. 96/2018 (see here, published in the Official Gazette of Romania No. 963 of 14 November 2018) on the extension of certain periods, as well as for the modification and completion of some normative acts, a series of amendments to labour legislation have been issued. They include:

1.1 Retirement and gender discrimination

In Romania, the Pensions Law No. 263/2010 (see here, published in the Official Gazette of Romania No. 852 of 20 December 2010, subsequently amended) provides for different retirement ages for women and men, the standard retirement age being 65 for men and 63 for women. Simultaneously, on the date of fulfilment of the conditions of age and retirement contribution, the employee's contract ceases by law. She may only remain in the same job by concluding another employment contract.

Decision No. 387/2018 (find judgment here, published in the Official Gazette of Romania No. 642 of 24 July 2018) of the Constitutional Court states that the provisions of the pension law (the difference in age at which women and men become entitled to the right to retirement) are constitutional. However, the legal termination of women's employment due to retirement at a different age than men is discriminatory, affecting their right to work. The Constitutional Court ruled that women should have the opportunity to request continuation of their employment contract under identical conditions with men, i.e. until the age of 65. In other words, the Constitutional Court ruled that women have the possibility: (1) either to cease their activity at the time of cumulative fulfilment of the standard age conditions (i.e. have reached the age of 63) and have provided the minimum retirement contribution or (2) continue working under the same employment contract until the age of 65.

As a result, Government Emergency Ordinance No. 96/2018 amended the text of Article 56 (1) c) of the Labour Code to integrate the Constitutional Court's decision. According to the new text, a female employee who meets the age and retirement contribution period must opt in writing for the continuation of her individual employment contract 60 calendar days before fulfilling the retirement conditions. Furthermore, a new paragraph was added to Article 56 of the Labour Code, according to which the employer cannot prevent or limit the employee's right to continue her activity.

1.2 Apprenticeship

The abovementioned Emergency Ordinance No. 96/2018 also modified the Apprenticeship Law No. 279/2005 (find modification here, republished in the Official Gazette of Romania No. 498 of 07 August 2013). The apprenticeship contract, which according to Romanian Law is a type of employment contract, cannot be less than six months.

1.3 Minimum wage

Finally, the Emergency Ordinance also modifies the Labour Code to the effect that an increase in minimum gross national wage, differentiated according to the level of education and seniority, can be established by Government Decision.

This latter change is not yet applicable; it will come into force on the occasion of the next increase in the minimum wage to be announced by the government (find press article here) at the beginning of 2019.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-147/17, 20 November 2018, Sindicatul Familia Constanţa et al

The issue of working time of professional foster parents has preoccupied the debate in Romania, generating non-unitary practices for a long period. The main problem is that although the foster parents are employees under an employment contract concluded with the local child protection department or with an accredited private body, they are required to ensure the continuity of child care, including during weekly rest or statutory annual leave.

Indeed, Government Decision No. 679/2003 (find government decision here) on the conditions for obtaining authorisation, the certification procedures and the regulations for professional foster parents (republished in in the Official Gazette of Romania No. 443 of 23 June 2003) provide in Article 10 (1) f) that the professional foster parent has a number of obligations towards the foster or entrusted children, among which is to ensure the continuity of their activity during statutory leave, unless separation from the minors in foster or other care is authorised for that period by the employer.

Similarly, Law No. 272/2004 on the protection and promotion of the rights of minors (find law here, republished in the Official Gazette of Romania No. 159 of 05 March 2014) provides in Article 122 (3) that the activity of a person certified as a foster parent under the law, is carried out on the basis of a special contract related to child protection, concluded with the child protection department or with an accredited private body, having the following characteristic features: "*(...) d) the continuity of the work performed shall be guaranteed during the statutory leave period, unless during that period the separation from the minor taken in by the family is authorised by the Directorate-General*".

As a result, a large number of disputes throughout the country have been triggered by actions introduced by foster parents for the recognition of the additional working time as overtime and the entitlement to a compensatory allowance. The problem was all the more controversial since Article 7 (2) of Directive 2003/88/EC on working time expressly prohibits any compensation for leave by an equivalent allowance.

To remove the non-unitary practice, an appeal was filed in the interest of the law by the Constanţa Court of Appeal, which also referred a preliminary question on this issue to the Court of Justice of the European Union.

Thus, in case C-147/17 (find CJEU judgment here), the Court of Justice of the European Union ruled on 20 November 2018 that Article 1(3) of Directive 2003/88/EC concerning

certain aspects of the organisation of working time, read in conjunction with Article 2(2) of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists of taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not fall within the scope of Directive 2003/88/EC.

Immediately thereafter, on 26 November 2018, taking into account the decision of the Court of Justice of the European Union, the High Court of Cassation and Justice upheld the appeal in the interest of the law and by Decision No. 25/2018 (find judgment here), stated that the legal provisions on the continuity of the foster parent's activity do not derogate from the rule concerning the obligation to take in-kind leave, therefore he or she is not entitled to compensation equivalent to the leave allowance.

4 Other relevant information

Nothing to report.

Slovakia

Summary

On 23 October 2018, the Slovak National Council (Slovak Parliament) adopted an amendment of Act No. 91/2010 Coll. on promotion of tourism. The President of the SR did not sign the approved amendment and returned it to Parliament. On 27 November 2018, Parliament again approved the amendment of the Act in its original wording.

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1 National Legislation

1.1 Contribution for recreation (holiday) of employees

On 23 October 2018, the Slovak National Council (Slovak Parliament) adopted an amendment of Act No. 91/2010 Coll. on promotion of tourism as amended, and on amendments of certain acts (see also October 2018 Flash Report). Within the scope of this new Act, the Labour Code (Act No. 311/2001 Coll.) was amended as well. The adopted amendment introduced a new measure into the Labour Code - a contribution to the recreation of employees.

The President of the Slovak Republic did not sign the approved Act and returned it to Parliament. The President, inter alia, pointed out that the approved act created three different groups of employees in relation to the entitlement to this allowance and is therefore discriminatory.

The Slovak National Council, however, rejected the President's comments and suggestions and on 27 November 2018 again approved the Act in its original wording.

The adopted Act has not yet been published in the Collection of Laws. It will enter into force on 01 January 2019.

Further information and documents are 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.

Slovenia

Summary

(I) The main labour law-related topic in November was wages. A draft Act on Amendments to the Minimum Wage Act entered to the legislative procedure. Collective bargaining in the public sector has been concluded by initialling the agreement—which mostly deals with wages—by the government and trade unions involved in the bargaining process. The agreement is expected to be signed on 03 December 2018.

(II) The state of the art of the process of collective bargaining in the public sector is discussed.

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1 National Legislation

1.1 Minimum Wage

A group of Members of Parliament (belonging to coalition and opposition parties in Parliament) presented the Draft Act on Amendments to the Minimum Wage Act (Official Gazette of the RS, No. 13/10, 92/15) on 07 November 2018. The objectives of the proposed amendments are:

- to raise the minimum wage and thereby ensure the decent living of workers in the country;
- to introduce a new formula for determining the amount of minimum wage; and
- to exclude all additional payments (the increased rates of remuneration) which at present are still included in the minimum wage.

It is proposed to raise the present net amount of EUR 638.42 net (EUR 842.79 gross) to net EUR 667.11 net (EUR 886.63 gross) on 01 January 2019 and to EUR 700 net (EUR 940.58 gross) on 01 January 2020. The final objective of such a gradual increase is to determine the minimum wage in accordance with the newly proposed formula in January 2012. According to this formula, the amount of minimum wage should always be at least 20 per cent above the lowest living costs.

The additional payments that should be excluded from the minimum wage are additional payments for night work, for work on Sundays and on holidays and on statutory free days.

The first reading of the draft Act took place on 29 November 2018 and showed that the majority of parliamentarians as well as the government support the increase of the minimum wage. The opinions differ on how soon to introduce the increase (STA, '*Večina poslancev za višjo minimalno plačo*', Dnevnik, 30.11.2018, p.3.). Some also oppose the exclusion of additional payments from the amount of the minimum wage.

The trade unions welcome the proposed changes. Nevertheless, some of them insist that the increase in minimum wage does not suffice as a general overhaul of the remuneration system is urgently needed (See: M.M., '*ZSSS pozdravlja dvig minimalne plače*', Delavska enotnost, Št. 21, Let. 77, Ljubljana, 8.11.2018; M.M., '*Probleme so vse plače*', Delavska enotnost,Št. 22, Ljubljana, 22.11. 2018.). Employers and representatives of the Chamber of Commerce strongly oppose the proposed amendments maintaining that changes should not be introduced overnight and that they endanger existing jobs.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Collective bargaining in the public sector

Collective bargaining in the public sector, which initially began in spring and focused on increasing the wages in the public sector, was restored in October 2018 (see also October 2018 Flash Report). At the same time, several trade unions called a strike for 05 December 2018. Policemen have been on strike since the beginning of October 2018. To prevent a strike wave in the public sector (strikes of nurses and other medical staff, teachers and workers in social protection institutes), the government entered into collective bargaining with trade unions representing workers in the mentioned activities separately. Agreement on the requirements, mostly related to an increase of wages in the public sector in general and in the mentioned activities separately were agreed and initialled on 27 November 2018. Initials were also given by the coordination of trade unions of public servants, which did not take part in the collective bargaining process. It is expected that the agreements will be signed on 03 December 2018. This means that there is no reason to initiate strike(s) on 05 December 2018.

Items included in the agreement shall be transposed into the collective agreement of the public sector (issues related to all civil servants) and/or into the collective agreements for individual activities (specific issues related to persons employed in health care, schooling and social protection). There is no information about the continuation of the strike of policemen.

Spain

Summary

(I) A judgment of the Spanish Supreme Court on the right to strike is analysed.

(II) Several CJEU judgments are analysed, including the second ruling of De Diego Porras, which has been long awaited.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Right to strike

Supreme Court judgment 3659/2018, 03 October 2018

In the context of a workforce restructuring, a group of media companies agreed with worker representatives to establish a new undertaking for the relocation of the affected workers and for the task of printing the group's newspapers. A few years later, this undertaking was to be closed down, and the workers called for an indefinite strike. During the strike, the newspaper's publisher commissioned the printing to other companies of the same group.

The Supreme Court ruled that this decision violated the workers' right to strike because the strikers' objective, namely to prevent the newspaper from being published and reaching the public had not been achieved. In the opinion of the Supreme Court, the company altered the operating criteria and the productive processes of the group of companies in response to the call for strike, and that a fundamental right became meaningless and without substance through this action.

Spanish legislation does not regulate such situations. It only prevents companies from hiring substitute workers during a strike, both directly and through temporary employment agencies. However, Spanish courts have elaborated more rigid criteria and do not allow other means to minimise the natural consequences of a strike, such as the alteration of the normal organisation of the business or the replacement of workers through electronic or technical means.

The same interpretive criterion applied in another Supreme Court ruling of 03 October 2018, which examined a similar case, although with a different circumstance, namely the printing of the newspaper was entrusted to an undertaking external to the group.

The judgment is available here.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU case C-245/17, 21 November 2018, Viejobueno Ibánez and de la Vara González

According to the CJEU in the *Viejobueno Ibáñez* ruling (21 November 2018, case C-245/17):

> "*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 allows an employer to terminate, at the end of the teaching period, the employment relationship of fixed-term teachers recruited as interim civil servants for one academic year, on the ground that the conditions of necessity and urgency attached to their recruitment have ceased to apply on that date, whereas the employment relationship of indefinite duration of teachers who are established civil servants is maintained*".

It also stated that:

> "*Article 7(2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national legislation which allows termination, at the end of the teaching period, of the fixed-term employment relationship of teachers recruited for one academic year as interim civil servants, even if this deprives those teachers of days of paid annual leave which correspond to that academic year, provided that such teachers receive an allowance on that account*".

This ruling does not have a significant impact on Spanish labour law, because the Court deems Spanish law to be consistent with EU law. As mentioned in a previous Flash Report (see September 2016 Flash Report), several types of personnel coexist in Spanish public administrations. On the one hand, are workers and on the other are civil servants. All of them are 'public employees', but labour law does not apply to civil servants. However, they all fall under the scope of application of EU Directives on 'employees' according to CJEU case law. This situation has caused many problems (see comment on next ruling).

As an initial warning, we must insist that the case is not related to Spanish labour law. The people concerned have administrative relationships, so labour law does not apply to them. From a Spanish point of view, this is not labour law. However, CJEU rulings have extended the scope of the Directive, as is evident in the rulings *Martínez Andrés* (14 September 2016, joined cases C-184/15 and C-197/15), *Pérez López* (14 September 2016, case C-16/15) or *Gaviero* (22 December 2010, joined cases C-444/09 and C-456/09), among others. Administrative law in Spain does not always assume that the scope of the framework agreement covers these types of relationships. From a Spanish perspective, fixed-term employment contracts and temporary administrative relationships have a very different nature and different regulations apply to them. The claims of civil servants must be resolved by the courts of the administrative order, and not by the labour courts.

It is important to note that there is no legal provision that derogates the principle of equal treatment between career civil servants and interim ones. Administrative law is mainly aimed at career civil servants. In most cases, the rules do not refer to interim civil servants (fixed-term employees is not an accurate term, because they are not employees according to Spanish law), and they do not intend to provide for less favourable treatment. They address career civil servants and simply ignore other staff.

According to the Spanish Constitution the selection process to become a career civil servant must be governed by the principles of equality, merit and ability. This leads to a special regime for career civil servants and makes them incomparable with interim personnel and fixed-term employees. The objective reason for the difference in treatment is the way they earn their job. Career civil servants are the most characteristic personnel of Public Administrations, and the rules are usually designed for them and do not always correspond well to other types of staff. The CJEU seems to have accepted that configuration.

3.2 Fixed-term work

CJEU case C-619/17, 21 November 2018, de Diego Porras

According to the CJEU ruling *de Diego Porras II* (21 November 2018, C-619/17), Clause 4 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex 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 that does not provide for severance payment to workers with fixed-term contracts concluded to replace a worker entitled to return to her job, such as the interim contract, when these contracts come to an end, while compensation is granted to permanent workers due to the termination of their employment contract for an objective reason.

The first CJEU *de Diego Porras* ruling (14 September 2016, C 596/14) had a considerable impact on the Spanish system. So far, the worker had the right 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 have no right to severance pay unless otherwise agreed. On the other hand, the termination of an 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 an impermissible difference according to Article 4 of framework agreement on fixed-term work.

It does not suffice to compare a dismissal with a termination of a fixed-term employment contract once the deadline has been reached. They are not valid terms of comparison. Permanent workers get a severance pay of 20 days per year worked when they are dismissed for objective reasons. A fixed-term worker who is dismissed for objective reasons also gets severance pay of 20 days per year worked. There is no difference at all whether the point of comparison is the same reason for termination of the contract. However, it seems that the CJEU compared a dismissal and another cause of termination of the contract, and in that context, it is reasonable for the amount of severance pay to not match. The initial De Diego Porras ruling mixed two different issues (and did not provide a clear answer). The first issue was whether severance pay should be the same for all fixed-term contracts. This is—or should be—the key question, because replacement contracts have no severance pay, unlike the other two types of temporary contracts (12 days per year worked), but this does not fall—apparently—into the scope of the Directive. The second issue was whether the severance pay for fixed-term contracts—all of them—must be the same as the severance pay for permanent contracts. The answer should be yes, provided—in the author's opinion—that the reason for the termination of the contract is the same.

There are objective reasons for the lack of severance pay in replacement contracts, because they are less used than the other two fixed-term employment contracts, and there is less fraud or abusive use. The amount of severance pay in the other two temporary contracts aims to reduce their abusive use, a risk that has not been included for interim (replacement) contracts, at least in the private sector.

The CJEU's *Montero Mateos* and *Grupo Norte Facility* rulings rectified the *De Diego Porras* ruling, and state (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*".

The ruling of 21 November 2018 again concerns *de Diego Porras*, and confirms the doctrine of *Montero Mateos*. It seems that this specific problem should be resolved.

However, the Court made some assessments that could lead to different problems. The answers to the second and third questions are somehow unclear, because they apparently extend the scope of the Directive to the comparison between two fixed-term contracts, and not between a fixed-term contract and a permanent one. The severance payment provided at the end of a fixed-term contract is not designed to prevent the abusive use of successive fixed-term employment contracts, but there are other measures with that purpose in Spanish law. For example, Article 15 (5) of the Labour Code sets a limitation for successive employment contracts involving work or services under fixed-term contracts and temporary contracts for circumstances of production. A worker becomes permanent if he or she is hired by a company under this type of contract—only this type of contract—for more than 24 months during a period of 30 months. Article 15 (5) of the Labour Code also refers to collective bargaining to regulate the requirements aimed at preventing the abusive use of fixed-term contracts using different workers to fill the same post. However, we have to wait until the Supreme Court applies this CJEU *de Diego Porras* ruling to understand the ruling's true impact.

3.3 Annual leave

CJEU joined cases C-569/16 and C-570/16, 06 November 2018, Bauer

According to CJEU ruling *Bauer* (6 November 2018, joined Cases C-569/16 and C-570/16),

> "*Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance*".

Even though labour law does not provide any rules. This is governed by civil law. If a worker becomes deceased, her employment contract terminates, but any benefits the worker had with the employer do not automatically expire. Therefore, unpaid wages can be claimed by the worker's beneficiaries.

CJEU cases C-684/16, 06 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften and C-619/16, 06 November 2018, Kreuziger

According to CJEU rulings C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* of 06 November 2018 and C-619/16, *Kreuziger* of 06 November 2018:

> "*Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national legislation such as that at issue in the main proceedings, in so far as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses — automatically and without prior verification of whether the employer had in fact enabled him, in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship — the days of paid annual leave to which he was entitled under EU law on the date of the termination of that relationship, and, accordingly, his right to an allowance in lieu of paid annual leave not taken*".

This ruling may have no impact on Spanish law because annual leave cannot be renounced or financially compensated. The worker cannot waive this right. If the employer does not allow the worker to take annual leave, she will be held liable according to the rules and face administrative sanctions.

3.4 Working time

CJEU case C-147/17, 20 November 2018, Sindicatul Familia Constanţa et al

According to CJEU ruling *Sindicatul Familia Constanţa* (20 November 2018, case C-147/17),

> "*Article 1(3) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in conjunction with Article 2(2) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88*".

The concept of worker used by the Court in this ruling corresponds to the concept of worker in Spanish labour law. Foster parents can be workers in Spain as well, but this is not a situation that is explicitly addressed in labour law. Such contracts fall under the scope of the general rules of the Labour Code. This is a new reality and such problems have not yet arisen. However, the statement of the Court avoids conflict between EU law and the law of Member States.

4 Other relevant information

Nothing to report.

Sweden

Summary

(I) A ruling of the Swedish Labour Court on gender discrimination is analysed.

(I) The CJEU ruling C-619/17 *Ministerio de Defensa v Ana de Diego Porras* has been published. The judgement concerns the application of payments to employees who have concluded (successive) temporary replacement contracts under Spanish law. There are no corresponding Swedish statutory provisions for financial compensation for terminations of temporary replacement contracts.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Gender discrimination

Labour Court, AD 2018 No. 74, 28 November 2018

The Swedish Labour Court has issued a ruling in a case on gender discrimination and equal treatment in relation to parental leave, AD 2018 No. 74. The applicant, a female management consultant, was employed under a probation employment scheme (a six-month probation scheme is allowed under para 6, Employment Protection Act). During the probation period, the management consultant was on partial and eventually full-time sick leave due to health issues associated with her pregnancy and was on parental leave during the last period of employment after giving birth. The employee's side argued that the probation employment was terminated for reasons related to her pregnancy and thus related to her being a woman. This was counter-argued by the employers.

The Labour Court found that the Discrimination Ombudsman, who represented the employee, did not convincingly demonstrate the burden of proof and could not substantiate that the circumstances proved that the management consultant had been discriminated against. Even though the Court found that the women had been treated less favourably, the conclusion was that there was no proven connection to discrimination.

Sources:

Links to other relevant case law on this topic are available here (AD 2011 No. 22) and here (AD 2002 No. 45).

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU case C-619/17, 21 November 2018, de Diego Porras

The CJEU ruled in a Spanish case on successive supplementary or temporary replacement contracts. The employee had been employed under a temporary replacement contract and was asked to terminate the contract upon the (premature) return of the worker she was replacing, who had been on leave for trade union activities. The Spanish court stated that valid temporary replacement contracts could be terminated upon the return of the original employee, with no further statutory payments

to the person employed under the temporary contract. However, other forms of contracts, both permanent and fixed-term, provided for financial compensation for the terminated employee (regardless whether she was employed under a permanent or fixed-term contract) if the termination was due to financial or organisational grounds, as in the current case. Since Ana de Diego Porras had not (only) been employed as a replacement, she was not entitled under Spanish law to these forms of compensation, which amounted to 20 days of salary per year of employment.

The Spanish Supreme Court forwarded the CJEU the following questions:

> *"Must Clause 4 of the Framework Agreement on fixed-term work, contained in the Annex to Directive 1999/70,* [1] *be interpreted as precluding national legislation that does not provide for any compensation for termination of a temporary replacement contract, to replace another worker who has a reserved right to his post, when such termination is due to the reinstatement of the replaced worker, but does provide for compensation when the contract of employment is terminated on other legal grounds?*
>
> *If the answer to Question 1 is in the negative, does Clause 5 of the Framework Agreement cover a measure such as that introduced by the Spanish legislature, consisting of fixing compensation of 12 days' salary for every year of service, to be received by the worker at the end of a temporary contract even if the temporary employment has been limited to a single contract?*
>
> *If the answer to question 2 is in the affirmative, is a legal provision granting fixed-term workers compensation of 12 days' salary for every year of service at the end of the contract, but excluding fixed-term workers from that measure when the contract is a temporary replacement contract to replace a worker who has a reserved right to his post, contrary to Clause 5 of the Framework Agreement?"*

The CJEU concluded that Clause 4 of the framework agreement must be interpreted not to preclude national legislation like the Spanish one, under which the terminated employee was not entitled to compensation, even though such compensation would be provided to other fixed-term employees had they been subject to a termination of their contract. The Court also found that it was for the national court to decide whether the provisions such as the fixed compensation for terminated fixed-term employees was a legitimate measure to combat the use of successive fixed-term contracts. If the national court concluded that the application of such legislation was legitimate or to combat the abuse of successive fixed-term contracts, the national court could also apply such differentiated measures as in the Spanish case, which would result in financial compensation to some fixed-term employees, but not to those who were working under a fixed-term replacement contract.

The application of fixed-term and successive fixed-term employment contracts have been debated in Swedish labour law for several years. This discourse is closely related to the provisions in Directive 1999/70/EC of 28 June 1999 and the Framework Agreement. Since 2016, the current legislation on fixed-term contracts, para 5a Employment Protection Act (*lagen 1982:81 om anställningsskydd*), allows successive fixed-term contracts for up to 24 months (within a five-year period), so called 'ordinary fixed-term contracts' ('*allmän visstidsanställning*', ALVA). Under Swedish statutory law, the number or duration of such fixed-term contracts are of no importance, unless the maximum 24-month period is reached. An ordinary fixed-term contract exceeding this date will result in a conversion into a permanent contract. The application of this provision, in itself, appears to be in compliance with the Directive and clause 5 of the Framework Agreement. However, para 5a of the Employment Protection Act also allows supplementary or temporary replacement employment ('*vikariat*') as well as seasonal employment ('*säsongsanställningar*'), and the combination of these different forms of

fixed-term contracts might result in much longer periods of successive fixed-term contracts.

The application of temporary replacement contracts, currently under para 5 and 5a of the Employment Protection Act, as discussed in the CJEU case, has historically been understood by trade unions and the Labour Court to be closely related to the absence of a particular employee. The temporary replacement contract has been applied to employ another person for a a fixed term during the actual employee's absence (Labour Court decisions AD 1977 No. 186, AD 1984 No. 66), or during the recruitment process. More recent applications of the provision indicate that a number of part-time absentees can be replaced by such a contract and that the strict connection to one particular post that is being replaced has been loosened (AD 2002 No 3). If the replacement contract is closely related to a particular absent employee, the contract can be phrased to be 'until the return of employee X, or, at the longest, date-month-year'. If this is clearly stated, there should be no problem for the employer to terminate the replacement contract upon the return of the absent employee. However, if the replacement contract is less 'stringent' and instead related to a 'pool' of partial and parallel absences, the contract is very likely to last until the agreed maximum duration without any option to prematurely terminate the contract.

There is no statutory payment related to the termination of such replacement contracts, as in the Spanish case. On the contrary, they terminate when the agreed upon duration expires, or—if that has been agreed between the parties—if there is just cause for dismissal.

4 Other relevant information

Nothing to report.

United Kingdom

(I) A ruling of the Employment Appeal Tribunal that addressed the issue of the definition of worker is analysed.

(II) A ruling of the Court of Appeal of a part-time worker is analysed.

(III) The CJEU case C-214/16 is commented.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Definition of Worker

Employment Appeal Tribunal, No. UKEAT/0037/18, 14 November 2018, Addison Lee Ltd v Lange and others

In case UKEAT/0037/18, 14 November 2018, *Addison Lee Ltd v Lange and others*, the Employment Appeal Tribunal (hereinafter: EAT) has upheld an Employment Tribunal's (hereinafter: ET) finding that drivers working for Addison Lee were 'limb (b)' workers under the Employment Rights Act 1996 (ERA 1996), the Working Time Regulations 1998 (WTR 1998) and the National Minimum Wage Act 1998 (NMWA 1998). They were not genuinely self-employed independent contractors.

The EAT agreed with the ET that:

> *"This finding by the ET was of critical importance to its alternative conclusion that, even in the absence of an overarching contract, the drivers were limb (b) workers while they were logged on to the system. We see no error of law in the finding; we think it was plainly correct."*

The ET was therefore entitled to conclude, applying the Supreme Court's ruling in case UKSC 41, 27 July 2011, *Autoclenz*, that the contractual documents which said that the drivers were self-employed contactors, did not properly reflect the true agreement between the parties.

2.2 Part-time work

Court of Appeal, No. [2018] EWCA Civ 2427, 01 November 2018, British Airways plc v Pinaud

In case [2018] EWCA Civ 2427, *British Airways plc v Pinaud*, the Court of Appeal dismissed British Airway's appeal against the Employment Appeal Tribunal's decision that a part-time cabin crew purser had been treated less favourably than her full-time comparator under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Although the part-time worker was paid exactly 50 per cent of a full-time salary, the number of days on which she was required to be available to work each year (130) was 53.5 per cent of the number of days that a full-time worker in the same job was required to be available (243). The case was remitted to the Employment Tribunal to determine whether the less favourable treatment was objectively justified.

3 Implications of CJEU rulings and ECHR

3.1 Working Time

CJEU case C-214/16, 29 November 2017, King v Sash Window Workshop Ltd and another

The CJEU decision in the working time case of *King v Sash Window Workshop Ltd and another* was due to be heard by the Court of Appeal, but the case was settled the day the hearing was due to start.

4 Other relevant information

Nothing to report.

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