



Flash Reports on Labour Law October 2019

Summary and country reports

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Flash Report 10/2019



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Executive Summary

National level developments

In September 2019, important developments in labour law took place in several Member States and European Economic Area (EEA) countries (see Table 1). **EU law** was particularly relevant for the following legislative initiatives and judicial decisions:

Minimum wage

In **Estonia**, the Estonian Trade Union Confederation and Estonian Employers' Association will continue negotiations on the monthly minimum wage. The agreement reached in August has been rejected by the trade unions. In case of no agreement by the end of the year, the new monthly minimum wage will be decided by the government, i.e. not by the social partners. In **Germany**, Parliament has adopted a bill to modernise and strengthen vocational education and training. A key aspect of this bill is that it establishes a minimum salary for trainees. This minimum salary will enter into force gradually. In **Slovakia**, the social partners did not reach an agreement on the minimum wage for 2020, therefore, the government adopted the new minimum wage for 2020, with an increase of 11.54 per cent.

Annual Leave

In **Austria**, the Supreme Court has ruled in a case of unused annual leave. The claimant, formally under a service contract, claimed to be working under an employment contract and asked for compensation for unused annual leave. In its resolution, although the existence of an employment relationship was admitted, compensation was only granted for the leave that had not been forfeited. This decision may be at odds with CJEU case law. In **Slovakia**, a legal reform on the length of annual leave has been approved. It will extend the length of the basic holiday to five weeks for employees who have not yet reached the age of 33 years,

but who permanently take care of a child. It will also introduce an extension of the basic duration of annual leave for several categories of workers in the sector of education.

Collective bargaining

In **France**, the Court of Cassation has ruled that the regularity of a trade union's request to organise an employee referendum is not subject to notification of the other representative trade union organisations. This constitutes a clarification of the new rules for collective bargaining that entered into force on 1 May 2018. In **Greece**, according to the new Law 4635/2019, branch collective agreements will be able to exclude from their scope of application workers employed in certain categories of companies facing economic difficulties. It will also be possible for company-level agreements, under particular circumstances linked to the company's financial situation, to establish less advantageous terms than the relevant branch collective agreements. Finally, it will also be possible to lay down less advantageous terms in local branch agreements than stipulated in national branch collective agreements.

Collective redundancies

In **Norway**, the Supreme Court found a collective dismissal invalid in which the company had established a selection pool, grounded on objective criteria such as division and geography, which will have consequences, setting aside the criteria of length of service. In **Spain**, the Supreme Court has ruled that it is not possible for an employer to follow the procedures for collective dismissal of his/her own accord, even if the legal requirements are not met. Additionally, it has considered that it is neither possible to do so by collective agreement.



Working time

In **Ireland**, a Workplace Relations Commission adjudication office has dealt with a case in which a retained firefighter claimed that a local authority did not comply with its obligations on working time, relying on CJEU case C-518/15, *Ville de Nivelles v. Matzak*, asserting that his on-call time had to be considered 'working time'. In its decision, the Commission found the claim unfounded because the restrictive elements pertaining to the decision in *Matzak* could not be applied to the complainant, as he was not required to remain at a physical place determined by the employer for the on-call period. In **Spain**, a collective agreement for the education sector establishing that companies can freely determine the recording system of the working day after consultation with the workers' representatives has been signed. The agreement also imposes some mandatory requirements or guidelines, such as the need to record telecommuting, or cases in which the work is carried out with hours of entry and exit other than those generally established or in a place other than the usual workplace. The agreement also requires taking into account those cases in which the workers carry out their activity outside the usual place of work on behalf of the company, or situations in which the working day is reduced because the worker enjoyed rights aimed at reconciling work and family life.

Implications of CJEU or EFTA-Court rulings and ECHR

Three cases decided by the CJEU have been analysed by the national experts in their October Flash Reports: joined cases CJEU C-64/18, *Maksimovic*, of 12 September 2019; CJEU case C-366/18, *Ortiz Mesonero*, of 18 September 2019 and CJEU case C-274/18, *Schuch-Ghannadan*, of 03 October 2019.

Posting of workers

Joined Cases C-64/18 and others, Maksimovic, of 12 September 2019

In **Austria** the impact of the case is not clear. The CJEU held that various criteria for the determination of administrative sanctions/fines in Austria are, in the context of posting of workers, contrary to the Freedom to Provide Services in the context of posting of workers, as they may lead to disproportionate outcomes. Three of these criteria are core features components for the calculation of administrative fines in Austria. The High Administrative Court has now set guidelines for the national judiciary on how to deal with the CJEU's findings. It stated that minimum fines as regulated by law are to be disregarded, and that there should be one overall fine for the total offense in its entirety, and not a fine *per* worker concerned. In **Belgium**, the system of sanctions seems to be more flexible than the Austrian one and gives the criminal court a larger margin of appreciation. In Belgian case law, there are no penalties as severe as those in Austria. Nevertheless, the judgment of the CJEU is important because the proportionality test of the CJEU's ruling has never been seriously carried out by a Belgian court. Several countries like **Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Iceland, Latvia, Liechtenstein, Luxembourg, Poland, Portugal, Romania and Spain**, reported that the case would not have a major impact and no modification of national law is needed, either because there is no comparable system or because the system is likely to be considered proportional under CJEU parameters. In **Cyprus**, the case is of some relevance for Cyprus and may inform the debate amongst the social partners and authorities. It must, however, be noted that Cypriot law does not impose sanctions on workers; instead it offers them protection. Currently, there is draft legislation on the topic. In **France**, Administrative fines that may be imposed on employers who do not comply with the rules on posting (failure to make a prior declaration, appointment of a correspondent in France, etc.) or the labour regulations applicable to posted



workers. The maximum amount is, however, lower than in Austria. In **Italy**, legislation does not comply with the first condition of the Court decision (the fine cannot be less than a predefined amount). On the other hand, administrative and criminal law determine the range within which the court can decide the fine. In the **Netherlands**, the ruling relates to two sanctioning mechanisms in Dutch law that might not be able to stand the proportionality test as applied by the CJEU, since some aspects of the applicable penalty schemes for administrative offences might be considered disproportionate.

Parental leave

Case C-366/18, Ortiz Mesonero, of 18 September 2019

This case, due to the specific circumstances of the relevant Spanish legislation, will not likely have any impact in other countries, either because the question would not have arisen or will be irrelevant, or because the findings of the court would not demand any amendment of the legislation. In **Denmark**, the ruling may have some minor implications, Danish legislation does not contain a provision similar to the Spanish one granting a general right to a reduction of working hours for employees with minors or dependent family members. However, in some collective agreements there is a right to take leave—fully or partially—to care for a sick child. However, following the judgment of the CJEU, it is clear that a dispute concerning the right to a change in working patterns based on the right to take leave for a sick child would fall outside the scope of EU law on parental leave, if it is not apparent that the employee is returning from parental leave. In **Estonia**, the Court's decision clarifies when and how the principle of equal treatment can be applied in case of family responsibilities. In **Spain** itself labour law does not need to be amended. However, although the ruling did not deem that indirect discrimination on grounds of sex (the applicant was a male worker) had arisen, this could be a way of raising a new

preliminary ruling in the future if the applicant is a woman.

Part-time work

Case C-274/18, Schuch-Ghannadan, of 3 de October 2019

The CJEU's ruling concerned a special provision in the Austrian University Act on consecutive fixed-term contracts and stated that the Directive 97/81/EC precludes national legislation that lays down a longer maximum permissible duration of the employment relationship of fixed-term workers who work part time compared to similar full-time employment relationships, unless the difference in treatment is justified on objective grounds and is proportionate to those grounds.

The assessment of these specific circumstance is left to the national Courts. In **Austria** it may prove difficult, since there are no comparable positions for most of junior positions in the Universities, although the aspect of what data is necessary to provide prima facie evidence for indirect sex discrimination may open possibilities to challenge current legislation in grounds of the relevant provisions of Equal Treatment Act. In **Belgium**, this CJEU judgment may be more important for the principle of equal treatment for men and women in the Belgian Sex Equality Law than in terms of part-time work regulations. In **Cyprus**, the case may be relevant in two aspects. First, the decision is of relevance for the legislation on part-time and fixed-term work preventing the abuse of consecutive contracts; particularly for researchers and teaching members at universities and other tertiary institutions in Cyprus. Second, it is of relevance with regard to the imperfect state of data and the use of statistics to substantiate the reversal of the burden of proof in discrimination cases when alleging indirect discrimination. Also in **Denmark** the judgment may have implications, probably no such as to demand a modification of legislation, but most likely it will influence future case law. The issues discussed in the CJEU case have been controversial and very much disputed in Denmark. In **Estonia**, the

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CJEU's judgment clarifies the approach to burden of proof and provides guidelines of how a person who feels he/she has been discriminated against can bring evidence of the potential discrimination.



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

Topic	Countries
Minimum wage	EE, DE, SK
Annual leave	AT, SK
Collective bargaining	FR, EL
Collective redundancies	NO, ES
Working time	IE, ES
Disciplinary power of the employer	FR
Discrimination	FR
Dismissal protection	FR
Employer liability	HU
Equal treatment (sex)	ES
Functional mobility	LU
Harassment	FR
Health and safety	LV
Illegal employment	ES
Parental leave	LU
Part-time work	EL
Platform work	IT
Posting of workers	DK
Social security	CZ
Strike	EL
Subcontracting	DE
Third country nationals	ES
Training	PT
Wage	DE
Workers' representatives	FR



Austria

Summary

(I) No legislation of interest was passed or initiated in October 2019.

(II) A decision of the Austrian Supreme Court published in October 2019 is of interest from an EU labour law perspective and deals with the question of forfeiture of unused leave in case of bogus self-employment.

(III) Assessments of CJEU decisions in case C-64/18 and others on the posting of workers, case C-366/18 on parental leave and case C-274/18 on part-time work are presented in this report.

1 National Legislation

No new labour laws have been passed. Following the recent election on 29 September, Parliament held its first inaugural assembly on 23 October but has not yet passed any new legislation. As coalition talks are still ongoing and will very likely last for some time, no new initiatives are expected in the near future.

2 Court Rulings

2.1 Forfeiture of compensation for unused annual leave in case of bogus self-employment

Supreme Court, No. 8 ObA 62/18b, 29 September 2019

Factual Part

The plaintiff in the present [case](#) was employed as a call-centre agent from 14 January 2014 until 31 March 2017. He was considered to be working under a so called 'free service contract'. Following his dismissal, he claimed that his contract had been falsely qualified and that he had actually worked under an employment contract and that he therefore was entitled to compensation for unused annual leave. At a later stage of the procedure, it was no longer disputed that he was an employee; the Court of Appeals, however, only granted compensation for the leave that had not been forfeited, i.e. dismissed the claim for the leave accrued in 2014.

The relevant provision in the [Act on Annual Leave](#) ('*Urlaubsgesetz*', hereinafter *UrlG*) reads as follows (unofficial translation by the author):

"§ 4 (5) The entitlement to annual leave shall expire two years after the end of the year in which it arose."

Notably, this provision does not take into account the jurisprudence of the CJEU in case C-214/16 – King, where the Court ruled that Article 7 of the Working Time Directive 2003/88/EC must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating until the termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave. This was followed up by cases C-619/16 – Kreuzinger and C-684/16 – Max-Planck-Gesellschaft, where the CJEU ruled that Article 7 of the Working Time Directive must be interpreted as precluding national legislation under which, in the event that the worker did not request to exercise his/her right to paid annual leave during the reference period concerned, that worker, at the end of that period, automatically and without prior verification of whether the employer had in fact enabled him/her to exercise that right, in particular through the provision of sufficient



information, loses the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his/her right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated.

Interestingly, the Supreme Court only briefly mentioned the CJEU cases *Kreuzinger und Max-Planck* and extensively referred to the CJEU ruling in the *King* case only, and considered whether the employee had an effective remedy available to him to enforce his entitlement to paid annual leave within a reasonable period to be crucial. The court ruled that an employee who is employed as a bogus self-employed person, even though the essential characteristics of his employment correspond to an employment contract, has an efficient remedy available to him with a declaratory action, which enables him to clarify in court whether his contractual relationship is subject to the provisions of labour law, in particular the *UrlG*. The CJEU ruling in the *King* case therefore did not apply and parts of the annual leave, i.e. the weeks accrued in 2014, were forfeited.

Analytical Part

In the reporter's view, the Supreme Court did not properly take the CJEU rulings in the cases C-619/16 – *Kreuzinger* and C-684/16 – *Max-Planck-Gesellschaft* into account. It considered the fact that the employee did not bring an action for reclassification of the 'free service contract' to apply the provision on the forfeiture of annual leave. The CJEU in the two decisions mentioned ruled that this effect can only arise if the employer has in fact enabled the employee to exercise that right, in particular through the provision of sufficient information. This also applies to the right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. The decision does not at all mention that the employer had in fact enabled the employee to exercise his right to paid annual leave. Therefore, the case should have been referred back to the court to establish the relevant facts, taking into account that the *Kreuzinger* and *Max-Planck-Gesellschaft* decisions were only passed on 06 November 2018. The case should not have been decided in favour of the employer without establishing whether he had in fact enabled the employee to exercise his right to paid annual leave.

3 Implications of CJEU rulings and ECHR rulings

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Even though the joined cases C-64/18 and others were Austrian cases, the implications of those judgements were quite unclear initially. The CJEU held that various criteria for the determination of administrative sanctions/fines are contrary to the Freedom to Provide Services in the context of posting of workers, as they may lead to disproportionate outcomes. Three of these criteria are core components for the calculation of administrative fines in Austria, namely 1) the principle that a fine is issued per worker concerned (principle of cumulation), 2) that a custodial sentence is imposed in case the fines are not paid and 3) that 20 per cent of the imposed fines are added to the total sum of fines as procedural costs in case the complaint is rejected in its entirety.

Courts of first instance dealt with the CJEU's judgment in a different number of ways, some issued no fines at all, while others tried to adapt the general legislation on the imposition of fines to the CJEU's findings. However, the High Administrative Court (*'Verwaltungsgerichtshof'*) [reacted promptly](#), i.e. within a month, and has set guidelines for the national judiciary (VwGH, 15 October, Ra 2019/11/0033 bis 0034-6) on how to deal with the CJEU's findings. It stated that minimum fines as regulated by law are to be disregarded, and that there should be one overall fine for the offence in its entirety, and not per worker concerned. Hence, instead of imposing fines between EUR 1 000 and EUR 10 000 per worker, one fine ranging from EUR 0 to EUR 10 000 should be



imposed for each offence. Provisions on the imposition of custodial sentences may not be applied, either. As regards procedural costs, the High Administrative Court concluded that these costs are disproportionate and contrary to EU law, if the fines themselves are disproportionate. As the High Administrative Court's ruling now ensures that the fines are proportionate, the Court feels that the CJEU does not require refraining from applying the provision on procedural costs.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

According to the CJEU, Parental Leave Directive 2010/18/EU and the underlying framework social partner agreement must be interpreted as not applying to national legislation, which provides for a worker's right to take direct care of minors or dependent family members, to reduce his/her ordinary working hours, with a proportionate reduction in his/her salary, without being able, when his/her regular work schedule is allocated in shifts in a variable work schedule, to benefit from a fixed working schedule while maintaining his/her ordinary working hours.

Although not required by EU law, the Austrian legislation on parental leave, i.e. the [Act on the Protection of Mothers](#) ('*Mutterschutzgesetz*', hereinafter MSchG) and the Act on Fathers' Leave ('*Väter-Karenzgesetz*', hereinafter VKG) not only provides for a right to reduce working hours but also to allocate them differently to accommodate care duties. The relevant provision in the MSchG (the provision in the VKG has the same wording) reads as follows (unofficial translation by the author):

"§ 15p MSchG - Change in the allocation of working time

§§ 15h to 15o shall also apply to a change in the allocation of working time intended by the employee, with the proviso that the extent of the working time shall not be taken into account."

Therefore, the question raised by the Spanish courts would not have arisen under Austrian law.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

1. The CJEU's ruling concerned a special provision in the Austrian University Act ('*Universitätsgesetz*' 2002, hereinafter UG) on consecutive fixed-term contracts and stated that the Directive 97/81/EC and the underlying social partner framework agreement preclude national legislation that lays down a longer maximum permissible duration of the employment relationship of fixed-term workers who work part time compared to similar full-time employment relationships, unless the difference in treatment is justified on objective grounds and is proportionate to those grounds. This is a matter for the national court to determine.

Based on the European Commission's observations and in particular the opinion of Attorney General Pitruzzella, it was expected that the court might deem the entire provision on consecutive fixed-term contracts in the UG to be contrary to EU prerequisites. The CJEU did not deal with the fixed-term provision but focussed instead on the different maximum time limits for full-time and part-time employees. This was seen by the Ministry as a confirmation of the general provision that the courts should evaluate whether objective grounds exist for the longer time limits for part-time employees. It stated, however, that future amendments to the provision on fixed-term contracts are planned.



This might prove not that easy as to our knowledge, nearly all positions for junior scientist, so called *prae-doc* positions, as such individuals have not yet been awarded a PhD degree, are advertised as part-time positions with a working time of 30 hours per week. It is assumed that such individuals also spend time writing their PhD thesis and the reduced working hours thus reflect their personal interest in the particular job because they are also working 'for themselves'. It might be difficult to prove that they do not acquire a lot of work experience as no comparable full-time employees exist at that career stage.

2. The aspect of what data is necessary to provide *prima facie* evidence for indirect sex discrimination (Point 2 of the ruling of the CJEU) is also of relevance, as it will lead to an interpretation that is more favourable for persons claiming they are being discriminated against based on the relevant legislation in the [Equal Treatment Act](#) ('*Gleichbehandlungsgesetz*', hereinafter GIBG). It reads as follows (official translation of the 2014 version, this provision has not been amended):

"§ 12 (12) GIBG

(12) In so far as the person concerned invokes a fact of discrimination within the meaning of Sections 3, 4, 6 or 7 in a legal dispute, he/she shall substantiate this credibly. If Sections 3 or 4 are invoked, it shall be for the respondent to prove that when considering all facts and circumstances it appears more probable that another motive substantiated credibly by the respondent has resulted in unequal treatment, or that the other sex was an indispensable requirement for exercising the activity, or that there is another justification within the meaning of Section 5, paragraph 2. (...)"

As the Equal Treatment Act does not explain in detail how "credibility" is to be substantiated, no legislative action is needed and it is for the courts to interpret this and similar provisions in line with the jurisprudence of the CJEU.

Sources:

A press article of 'Der Standard' from 03 October 2019 is available [here](#).

An article on the science page of the Austrian Press Agency (APA) from 03 October 2019 is available [here](#).

4 Other relevant information

Nothing to report.



Belgium

Summary

(I) The heavy sanctions imposed for non-compliance of the obligation to maintain payroll documents and their translation for cross-border workers who have been posted to the employer may constitute a restriction of freedom to provide services. Such restrictions may be justified by overriding reasons relating to the public interest, but only if they are appropriate and proportionate to the attainment of those objectives. The severity of the sanctions must correspond to the gravity of the infringement.

(II) Directive 2010/18/EU of 08 March 2010 implementing the revised Framework Agreement on Parental Leave does not apply to national legislation which provides for employees' right to reduce their ordinary working hours to take care of minors, with a proportional reduction in his/her salary, without being entitled to benefit from a fixed working schedule while maintaining his/her ordinary working hours when his/her standard working hours are performed in shifts with a variable schedule.

(III) Clause 4(1) of the Framework Agreement on Part-time Work annexed to Directive 97/81/EC concerning the Framework Agreement on Part-time Work is to be interpreted as precluding national legislation which, in the case of part-time work, sets down a longer maximum permissible duration of employment relationships for fixed-term workers to whom it applies compared with comparable full-time work. The situation is different where the difference in treatment is justified on objective grounds and proportionate to those grounds. Clause 4(2) of the Framework Agreement on the 'pro rata temporis' principle must be interpreted as meaning that the pro rata temporis principle under that provision does not apply to such legislation.

1 National Legislation

Nothing to report.

The federal government has resigned and Parliament is not very active, i.e. there was very little legislative activity in the month September 2019. There is no new federal government yet.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

On 23 March 2014, there was an explosion at the 'Zellstoff Pöls AG' plant in Pöls (Austria), during which a large part of a leachate boiler was destroyed. Based on an agreement of 11 July 2014, Zellstoff Pöls commissioned 'Andritz AG', an Austrian-based company, to restore the boiler system. On 27 August 2014, Andritz engaged 'Bilfinger Duro Dakovic Montaza d.o.o.' (hereinafter Bilfinger), a company based in Croatia, to dismantle and re-assemble the boiler. To carry out this work, Bilfinger posted workers



to Austria, for whom posting certificates had been issued by the competent Austrian authorities.

Since Bilfinger was unable to meet the planned completion date of 25 August 2015, Bilfinger and Andritz agreed that the work would be completed by 'Brodmont', a company based in Croatia. An agreement to this effect was concluded on 11 September 2015. Between 14 September 2015 and 30 October 2015, 217 employees were posted to the construction site by Brodmont; the company took over all of Bilfinger's employees who had been working on that site.

On 27 September 2015, 13 October 2015 and 28 October 2015, the Austrian 'Finanzpolizei' (financial police) carried out checks on the construction site, which refused to provide the full payroll documents of all 217 employees to the authorities. On the basis of the findings of the tax investigation service during those inspections, the 'Bezirkshauptmannschaft Murtal' (district authority) imposed administrative penalties on each of Andritz's four managers, the applicants in the main proceedings. According to Bezirkshauptmannschaft, the relationship between Brodmont and Andritz was not a question of posting of workers, but of cross-border posting of workers. On the other hand, they were **not** accused of having failed to fulfil their obligations to pay the workers minimum wage.

On 19 April 2017, the Bezirkshauptmannschaft Murtal imposed a fine totalling EUR 3 255 000 on Maksimovic, the manager of Brodmont. The Bezirkshauptmannschaft Murtal held that Brodmont, as an undertaking that had posted the 217 employees, had failed to fulfil its obligations under the 'Arbeitsvertragsrechts-Anpassungsgesetz' (AVRAG) by not making those employees' salary documents available to the user company Andritz AG.

On April and May 2017, the district authority imposed fines of EUR 2 604 000 and EUR 2 400 000 on each of Andritz's four managers, respectively, for failure to comply with certain obligations under AVRAG and the 'Ausländerbeschäftigungsgesetz' (AuslBG) in relation to recording of wage documents by Andritz as the user company of those workers and in relation to obtaining of permits for the 200 Croatian, Serbian and Bosnian workers. The referring court stated that in the event of non-payment, those fines would be converted into an imprisonment of 1 736 days and 1 600 days, respectively.

The referring 'Landesverwaltungsgericht' had reservations about the compatibility of the fines with the European Union law principle of the proportionality of penalties such as that at issue in the main proceedings. The referring court thus, in essence, asked whether Article 56 TFEU, Articles 47 and 49 of the Charter of Fundamental Rights, the Directive 96/71/EC on the Posting of Workers and Directive 2014/67/EU on the Enforcement of Directive 96/71/EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for the imposition of fines in the event of failure to comply with labour law obligations relating to the obtaining of licences and the maintenance of payroll records:

- which may not be less than a predetermined minimum amount;
- which are imposed cumulatively per worker concerned and without a ceiling;
- in addition, a contribution to the costs of proceedings of 20 per cent of the fines imposed if the appeal against the decision imposing the fines is dismissed, and
- which, in the event of non-payment, are converted into substitute imprisonment.

The CJEU reiterated that it should be noted that social protection for workers, the fight against social fraud and the prevention of abuse are overriding reasons in the public interest capable of justifying a restriction on the freedom to provide services (see CJEU case C-33/17, 13 November 2018, *Čepelnik*).



However, the high fines imposed to punish the breach of those obligations and the unlimited cumulation of those fines with the involvement of multiple employees leads to the imposition of substantial fines, which can amount to millions of euros, such as in the present case. Moreover, the fact that those fines must under no circumstances be lower than a predetermined minimum amount may make it possible to impose such penalties in cases where it has not been established that the alleged facts are particularly serious. Thirdly, the referring court states that the national legislation at issue in the main proceedings provides that the addressee of a decision imposing such a penalty should, in the event of the dismissal of the appeal against that decision, contribute to the legal costs in the amount of 20 per cent of that penalty. Fourthly, the legislation at issue in the main proceedings provides that in the event of non-payment of the fine imposed, imprisonment is imposed as a substitute, which, in the light of the resulting consequences for the individual concerned, constitutes a particularly serious penalty.

Based on the above facts, the CJEU concluded that the Austrian legislation was disproportionate with regard to the gravity of the infringements, i.e., the breach of employment obligations with regard to the acquisition of permits and maintenance of pay documents did not warrant such a high penalty .

Analytical part

Belgian social criminal law bears some similarities with Austrian law. The Programme Law I of 27 December introduced an obligation of prior electronic notification for cross-border posting. In the context of cross-border posting of workers, Belgium introduced the so-called LIMOSA project (*'Landoverschrijdende Informatiesysteem ten behoeve van MigratieOnderzoek bij de Sociale Administratie'*: translated Cross-Country Information on Behalf of Migration Research in the Social Administration'). This is a mandatory prior notification system for employees posted to Belgium from any country in the world. Failure to comply with the LIMOSA declaration obligation is subject to severe penalties in accordance with the provisions of the current Social Criminal Code. An employer who does not report a posted worker is punished with a level 4 penalty, i.e. a prison sentence of 6 months to 3 years and a criminal fine of EUR 4 800 to EUR 48 000 or to either penalty, or an administrative fine of EUR 2 400 to EUR 24 000. For the negligent end user who did not comply with the regulations on the notification system because the employer who posted the workers did not comply with this obligation, a level 3 penalty applies, which is either a criminal fine of EUR 800 to EUR 8 000 or an administrative fine of EUR 400 to EUR 4 000 (Articles 182 & 183 of Social Criminal Code). The criminal and the administrative fine must be imposed for every employee affected by the infringement (Article 102 of the Social Penal Code). There is a significant difference between this Belgian provision in the Belgian Social Criminal Code and the Austrian legislation. The fines can be multiplied by a maximum of 100, i.e. to amount to a maximum of EUR 480 000 and EUR 240 000.

(ii) The Social Criminal Code punishes the failure to transfer social documents in the case of cross-border posting separately. Employers must, upon request, provide the labour inspectorate officials with a translation of the social documents, either in one of the national languages of Belgium or in English. Failure to transmit the social law documents requested in case of posting of workers, including proof of payment of their wages, is punishable by a penalty of level 2. Cross-border posting of workers is governed by the Law of 05 March 2002 on the conditions of work, wages and employment in the case of posting of workers to Belgium. A level 2 penalty punishes the employer who does not forward the requested documents to the labour inspectorate. The infringement is penalised with either a criminal fine of EUR 400 to EUR 4 000 or an administrative fine of EUR 200 to EUR 2 000. In case of infringement, the fine is multiplied by the number of employees affected (Article 188/2 Social Criminal Code).



(iii) The Belgian system of sanctions seems to be more flexible than the Austrian one and gives the criminal court a larger margin of appreciation. If attenuating circumstances are present, the criminal or administrative fine may be reduced to an amount that is below the legal minimum, but may not be less than 40 per cent of the prescribed minimum amount. If attenuating circumstances are present, the imprisonment sentence can be reduced in accordance with Article 85 of the Penal Code (Articles 110 & 115 of Social Criminal Code).

Contrary to Austria, no legal provision exists in Belgium that provides that the party to which a criminal penalty has been imposed must, in the event of dismissal of the appeal against that decision, contribute 20 per cent of that financial penalty to the procedural costs.

(iv) In Belgian case law, there are no penalties as severe as those imposed by the Austrian Landesverwaltungsgericht. Nevertheless, the judgment of the CJEU is important because the proportionality test of the CJEU's ruling has never been seriously carried out by a Belgian court. Due to the flexibility of Belgian legislation, disapproval of Belgian legislation as in the present case seems less likely.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

Mr Ortiz Mesonero concluded an employment contract with UTE Luz Madrid Centro, active in the Madrid metallurgical industry.

The CJEU noted that Clause 6(1) of the Framework Agreement on Parental Leave is the only provision that relates to the adjustment of working time according to which Member States and/or social partners must take the necessary measures to ensure that workers, may, when 'returning from parental leave', request changes to their working hours and/or patterns for a set period of time (point 46). The worker in the present case was not in a situation of having returned from parental leave within the meaning of Clause 6(1) of that Framework Agreement (point 47). Neither Directive 2010/18/EU nor the Framework Agreement on parental leave contain any provision requiring Member States to grant the worker the right to work for fixed working hours in the context of a request for parental leave, if he/she usually works in shifts with variable hours (point 48).

The CJEU decided that Directive 2010/18/EU of 08 March 2010 implementing the revised Framework Agreement on Parental Leave must be interpreted as not applying to national legislation that provides for the worker's right to take care of minors, to reduce his/her ordinary hours of work, with a proportional reduction to his/her salary, without being able to benefit from a fixed working schedule while maintaining his regular working hours when his/her usual work pattern is shift work with a variable schedule.

Analytical part

In Belgium, the Recovery Law of 22 January 1985 laying down social provisions and the Royal Decree of 29 October 1997 establishing a right to parental leave in the context of a career break provide workers the right to parental leave, with a proportional reduction of their salary. As is the case in Spain, the Belgian legislation does not grant a worker who has parental duties the right to a fixed work schedule when his/her usual work pattern is shift work with variable hours.

Directive 2010/18/EU of 08 March 2010, implementing the revised Framework Agreement on Parental Leave, does not confer the right of the worker to benefit from a fixed working schedule to Belgian legislation on parental leave, while maintaining his/her



regular working hours, if his/her regular work schedule is shift work with a variable schedule.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

Austrian law provides that a series of successive fixed-term contracts may be concluded with workers employed under externally funded projects or research projects and to staff that is exclusively used for educational purposes, as well as to replacement staff. The total duration of a worker's or a worker's successive contracts may not exceed six years in total, or eight years in case of part-time work. A one-off extension up to a maximum duration of 10 years, and up to 12 years in the case of part-time work, may be granted if there is an objective justification for it, in particular, the continuation or completion of research projects and publications.

Mrs Schuch-Ghannadan had been working as a part-time researcher for eight years, after which she claimed the conversion of her contract into one of indefinite duration. She argued that the provisions on part-time contracts discriminate against part-time workers and penalise women in particular. In the absence of any objective justification, such unequal treatment constitutes indirect discrimination on grounds of sex contrary to European Union law.

The Austrian government submits that the difference in treatment is objectively justified, since part-time workers may, in the context of their employment relationships, necessarily acquire less knowledge and experience than comparable full-time workers. The Court of Justice has held that this is too general a justification. It is for the Austrian court to examine the link between the nature of the duties performed, on the one hand, and the experience the performance of those duties entails, on the other, in terms of the number of hours worked. The time taken to complete the examination and to ensure publication of the results may provide an indication of the link between the nature of the post performed and the experience acquired in relation to the number of hours worked. If a strong link is found to exist, the court must then examine whether that legislation is proportionate to the objective invoked.

Finally, the CJEU found that the Austrian legislation is contrary to the principle of equal treatment for men and women in Directive 2006/54/EC Sex Equality Directive of 05 July 2006, if it is found to affect a significantly higher percentage of female than male workers and if that legislation is not objectively justified by a legitimate aim or if the means of achieving that aim are not appropriate and necessary. The party that claims it is being discriminated against shall not bear the full burden of proof in submitting targeted statistics or facts if that party has no or only limited access to such statistics or facts.

Analytical part

Belgian employment law does not make a distinction in the legislation contained in Articles 10 and 10a of the Employment Contracts Law of 03 July 1978 concerning the restriction on the conclusion of successive fixed-term employment contracts between full-time and part-time employment contracts. Consequently, this CJEU judgment is much less relevant for Belgian employment law than for Austrian employment law.

The ruling is more important for the principle of equal treatment for men and women in the Belgian Sex Equality Law of 10 May 2007, more precisely, with regard to the burden of proof in case of indirect gender discrimination. Article 33,§ 1 of the Law 10 May 2017 stipulates:

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“When a person who considers himself a victim of discrimination (...) establishes facts that may give rise to a presumption of the existence of discrimination on the grounds of sex, the defendant must prove that there has been no discrimination. (...) § (3) Facts from which it may be presumed that there has been indirect discrimination on the grounds of sex include, but are not limited to: 1) general statistics on the situation of the group to which the victim of discrimination belongs or facts of common knowledge; or 2) the use of an intrinsically suspicious criterion of distinction; or 3) elementary statistical material showing unfavourable treatment”.

Belgian legislation is in line with Article 19 of the Sex Equality Directive of 05 July 2006 on the burden of proof as interpreted in the CJEU ruling in case C-274/18, 03 October 2019 *Schuch-Ghannadan*.

4 Other relevant information

Nothing to report.



Bulgaria

Summary

An analysis of CJEU rulings C-64/18 and others, C-366/18 and C-274/18 is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Administrative liability for violations of labour laws is regulated by Chapter XIX, Division II of the Labour Code (hereinafter LC). The relevant provision that applies to the subject matter of cases C-64/18, C-140/18, C-146/18, C-148/18 is Article 414 LC on violations of the provisions of labour legislation other than the rules for provision of health and safety at work. The pecuniary penalty or fine for the employer is BGN 1 500, but may exceed this amount to a maximum of BGN 15 000, unless subject to a more severe sanction. In the public sector, the fine amounts to BGN 1 000, but may exceed this amount to a maximum of BGN 10 000, unless subject to a more severe sanction. This means that there is a legally established minimum amount. For any violation that can be immediately eliminated based on the procedure established by the Labour Code and that has not adversely affected any employees, the employer shall be liable for a pecuniary penalty or fine of BGN 100 and a maximum of BGN 300. The minimum fine in the public sector is BGN 50 and maximum BGN 100 (Article 415c (1) LC). This amount is very low, but if necessary, this provision can be amended to correspond with the CJEU's jurisprudence.

As mentioned above, the maximum penalty (BGN 15 000 for the employer and 10 000 for a public sector employer). The exact sum is determined on the basis of the violation's gravity and the circumstances of the violation.

According to Bulgarian procedural legislation, the court costs in all cases must be carried by the losing party. This is not only valid for employees, i.e. the parties of individual labour disputes. There is no preliminarily defined rate. There is no necessity to amend the current provision.

The administrative penalty may not be commuted to criminal liability.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Bulgarian legislation does not include a regulation that provides for a worker's right as that at issue in the proceedings in case C-366/18 of the CJEU.



3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

The term of a fixed-term employment contract in Bulgaria does not depend on working time. Such contracts are regulated in Article 68 of the Labour Code (LC). A fixed-term employment contract shall be concluded for a definite period which may not be longer than three years, insofar as a law or an act of the Council of Ministers does not provide otherwise; for the completion of a specific task; for the temporary replacement of a worker or employee who is absent from work; for a position that is to be occupied following the completion of a competitive examination; for a certain term of office, where such has been specified for the respective body. A fixed-term employment contract for a definite period shall be concluded for the execution of casual, seasonal or short-term work and activities, as well as with newly hired employees in enterprises that have been adjudicated bankrupt or are in liquidation. As an exception, such employment contracts may be concluded for a period of not less than one year and for work and activities that are not of a casual, seasonal or short-term nature. Such an employment contract may also be concluded for a shorter period upon request in writing by the employee.

4 Other relevant information

Nothing to report.



Croatia

Summary

- (I) The Amendment to the Labour Act has been adopted.
- (II) There are no implications of the CJEU rulings in cases C-64/18, C-366/18 and C-274/18 for Croatian law.
- (III) The Croatian Bureau of Statistics has published data on the average gross and net salary in Croatia for the period January – August 2019.

1 National Legislation

1.1 The Amendment to the Labour Act (Official Gazette No. 98/2019)

The [Amendment](#) refers solely to the competent administrative body for labour affairs. It is no longer 'the county public administration office or the City of Zagreb office responsible for labour', but 'the administrative body of the county/the city of Zagreb that is in charge of state administration affairs related to labour'.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

In the case *Maksimovic v Bezirkshauptmannschaft Murtal and Finanzpolizei*, the administrative body imposed extremely high fines (EUR 2 400 000) on four different directors for violating the regulations on payroll documents of posted workers. In case of non-payment of the fines, Austrian law provides for imprisonment. According to the ruling of the CJEU in this case, such provisions of the Austrian law are not in line with Article 56 of the TFEU.

In Croatian law, fines for violations related to posted workers are regulated in the Aliens Act.

According to Article 228(7) of the Aliens Act, the fines amount between HRK 31 000.00 (approximately EUR 4 155) and HRK 50 000.00 (approximately EUR 6 702) for violating the regulations on payroll documents of posted workers. Fines are imposed on the responsible persons (managers) amounting to HRK 5 000.00 (approximately EUR 670) to HRK 10 000.00 (approximately EUR 1 340). Since Croatian legislation provides for minimum and maximum amounts that are proportionate to the offence and does not provide for imprisonment, it can be concluded that it is in line with EU law.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In the case *Mesonero v UTE Luz Madrid Cento*, a father who was working in shifts, including night shifts, asked his employer to work exclusively in the mornings, without reducing his working hours and without a reduction in pay to take care of his children.



His employer rejected this request. Spanish law only provides for the right of the employee to reduce his/her ordinary working hours for a proportionate reduction in pay to reconcile family and professional life. Such a provision, according to the CJEU, is not contrary to the Parental Leave Directive. The Parental Leave Directive only regulates the right of working parents to request changes to the working hours and/or patterns for a set period of time upon returning from parental leave.

In Croatian law, two Acts are relevant in this context. When regulating working time, the Labour Act provides for a certain level of protection for working parents, but only for parents of young children (children under the age of three). Such working parents can only work overtime if they have given prior written consent or in case of force majeure (Article 65(6) of the Labour Act). Similarly, as in Spanish law, full-time employees have the right to request to work part time with a reduction in pay (Article 62(7) of the Labour Act). Art. 72(6) of the Labour Act provides for the right of employees who have health problems to not work the night shift. The legislator does not mention a right of the working parent to request the same. The Act on Maternity and Parental Benefits regulates, among others, a right to maternity leave, parental leave and half-time work. However, this Act does not regulate a right of working parents to modify their working time to reconcile family and professional life.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In the case *Minoo Schuh-Ghannadan v Medizinische Universität Wien*, the female researcher at the Medizinische Universität Wien was employed on successive part-time and full-time employment contracts. The Austrian law differentiates between the maximum duration of successive employment contracts based on working time. The maximum duration of successive part-time contracts is eight years, while the maximum duration of successive full-time contracts is six years. This provision has the potential to discriminate indirectly based on sex. According to the CJEU's ruling, such a provision is not in line with Article 4(2) of the Framework Agreement on part-time work contained in the Annex of Directive 97/81/EC.

Croatian law is in line with the CJEU's ruling in this case. The Act on Scientific Activity and Higher Education as well as the Labour Act (which is the *lex generalis* for employment relationships) regulate the maximum duration of successive employment contracts and do not differentiate between employment contracts based on working time. The Labour Act provides for a maximum duration of successive employment contracts of three years but allows for a longer maximum duration in separate Acts or collective agreements when this is objectively justified (Article 12(3) of the Labour Act). The separate Act that provides for a longer maximum duration of successive employment contracts is the Act on Scientific Activity and Higher Education. According to Article 42(6) of the Act on Scientific Activity and Higher Education, the maximum duration of successive fixed-term contracts is six years and whether they are part-time or full-time contracts is of no relevance.

4 Other relevant information

4.1 Average gross and net salary in Croatia for the period January – August 2019

The Croatian Bureau of Statistics has published data on the [average gross and net salary in Croatia for the period January – August 2019](#). The average net salary amounts to HRK 6 434.00 (EUR 862) while the average gross salary amounts to HRK 8 742.00 (EUR 1 172).



Cyprus

Summary

The report reviews three European Court decisions and their impact on Cypriot legislation.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Joined Cases C-64/18 and others, on posting of workers, is of some relevance for Cyprus and may inform the debate amongst the social partners and authorities. It must, however, be noted that Cypriot law does not impose sanctions on workers; instead it offers them protection. The issue of the posting of workers has been a long-standing issue of disagreement between the social partners. Currently, there is draft legislation, both the draft bill and the draft Regulations, which have been presented and discussed in the Labour Advisory Board and were then submitted before Parliament to be passed as national legislation. The Ministry of Labour and Social Insurance has issued national regulations as subsidiary legislation derived from the transposition of law. The Republic of Cyprus has transposed Directive 2014/67/EU. The directive aims at establishing a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules and which is without prejudice to the scope of Directive 96/71/EC. The preamble of the transposition law 63(I)/2017 stipulates that the aim of the law is to transpose Directive 2014/67/EU. With the implementation of transposition law 63(I)/2017, the original law on the posting of workers, Law 137(I)/2002, was abolished.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Case C-366/18 on parental leave is of some relevance for Cyprus. In Cyprus, Law 47(I)/2012 was introduced purporting to transpose Directives 2010/18/EC and 97/80/EC and is applicable to both the public and the private sector. Both male and female employees, who have worked for the same employer for at least six months (including part-time and with fixed-term employees as well as temporary employees), are entitled to take parental leave (Article 3 of Law 47(I)/2012). Each working parent (in both the public and the private sector) has the right to a period of unpaid parental leave of a total of 18 weeks on the grounds of the birth or adoption of a child or to care for and raise a child. Every eligible employee, male or female, has the right to take unpaid parental leave of up to 18 weeks for each child. The right is an individual one



and is non-transferable. However, in case one parent has taken parental leave of a minimum of two weeks, he/she is allowed to transfer two weeks of the remainder of the total duration of his/her leave to the other parent. Parental leave is taken for a minimum duration of one week and a maximum duration of five weeks per calendar year (Article 7 of Law 47(I)/2012). After consultations between the employer and the employee, the starting date of parental leave can be postponed for reasons related to the effective operation of the company, e.g. when the employee's duties are of a specific nature and it is not possible to find a replacement, and where a significant number of workers request to take parental leave at the same time. An employee who plans to exercise his/her right to parental leave is required to notify the employer in writing three weeks before the start of parental leave, informing the employer about the duration and dates of the parental leave (Article 6 of Law 47(I)/2012).

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

The decision of the European Court may have implications for Cyprus. Two areas are particularly relevant for Cypriot legislation:

First, the decision is of relevance for the legislation on part-time and fixed-term work preventing the abuse of consecutive contracts; this is particularly relevant for researchers and teaching members at universities and other tertiary institutions in Cyprus. Second, it is of relevance with regard to the imperfect state of data and the use of statistics to substantiate the reversal of the burden of proof in discrimination cases when alleging indirect discrimination.

The legislation introduced the principles of non-discrimination for part-time workers, as well as other new concepts such as 'pro rata temporis' and 'comparable full-time worker'. No case has been brought before the courts in Cyprus on the Directive on Part-time Work. There has been a dramatic increase in part-time work since the financial crisis and the austerity programme in Cyprus.

Casual, insecure and precarious labour uses part-time and fixed-term contract workers, and is quite widespread: in total, 17.1 per cent of the workforce is made up of employees with a temporary contract in 2016. The major increase was registered during the crisis, i.e. 3.5 per cent from 2010 onwards. 95.1 per cent of temporary employees claim that the reason they concluded a temporary work contract is because they could not find a permanent job: this is the highest percentage in Europe. For women working in temporary jobs, the percentage of those reporting that they have no other option is even higher, at 95.8 per cent (N Trimikliniotis, S Stavrou and C Demetriou, *The reality of free movement for young European citizens migrating in times of crisis, Cyprus National Report, ON-THE-MOVE, Grant Agreement JUST/2014/RCIT/AG/CITI/7269, December 2016*). The expansion of tertiary education, has increased the precariousness of employment relationships of junior lecturers and other academic staff. There are various 'special teaching staff' and 'visiting lecturers', both in public and private universities and colleges; however, the percentage of this type of staff is restricted by law and may not exceed 30 per cent of the school's total staff (The rules governing public universities and other tertiary education institutions provide for such restrictions. Also, Article 34(1) of the Private Universities Law 109(I)/2005 requires for a maximum of not more than 30 per cent of such employees). In addition, there is an increasing number of 'other flexible staff', who are often given different academic titles and with whom the employer concludes an individual contractual agreement which states that the employer is not required to provide him/her with stable employment but only with casual work if and when it arises. Often, retired persons who have no recourse to the Law on Terminations of Employment are employed.



The use of fixed-term contracts has been dealt with by the courts. In 2011, an amendment (Amendment 26(I)/2011) to the public service law introduced 'employees with indefinite duration contracts' as a distinct category of employees. In 2016, another amendment aimed to regulate the employment of fixed-term and permanent employees in the public service (Cyprus, Law regulating the employment of fixed-term and permanent employees in the public service of 2016 (Ο περί ρύθμισης της απασχόλησης εργοδοτούμενων αορίστου και εργοδοτούμενων ορισμένου χρόνου στη δημόσια υπηρεσία νόμος του 2016) No. 70(I)/2016, 28 April 2016). The law provides that the hiring of persons on fixed-term contracts is allowed in specific situations (Article 4.2 of the law regulating the employment of fixed-term and permanent employees in the public service of 2016). Fixed-term contracts are converted into contracts of indefinite duration after 30 months of work in the public service, irrespective of whether the contracts were successive or not.

Case C-274/18 is particularly relevant for two categories of workers: part-time and fixed-term contract lecturers in the private and in the public sector.

Fixed-term and part-time lecturers in the public sector:

- In one case, the Labour Court decided that the contract of a research assistant in the Statistics Services, who had been employed under successive fixed-term contracts since 2007, was automatically converted into a contract of indefinite duration based on the Cypriot law transposing the FT Law. Decisions of the Labour Court are not binding on superior courts; however, it is noteworthy that the government decided to not appeal against the decision, which confirms the basic principle that transposes the fixed-term directive. This is a practice extensively used both in the public and in the private sector. This issue was taken up by many other trade unions representing groups of workers in the public sector, arguing that the practice of renewing consecutive fixed-term contracts continues in the public sector without these contracts being converted into contracts of indefinite duration.
- The three public universities of Cyprus take different approaches. Many researchers are in precarious contracts in various projects based on external or internal funding without any allowance of time: their contract expires when the funding ceases. The Open University employs tens, if not hundreds of employees under part-time and fixed-term contracts, without giving them any rights to convert their contracts into contracts of indefinite duration. The Technological University of Cyprus has over 50 lecturers who were on fixed-term contracts and became permanent employees after 30 months. The University of Cyprus (UCY) has tens of lecturers on part-time contracts and many others on fixed-term research contracts: they have no right become permanent employees, nor are they entitled to any allowance of time. The UCY authorities imposed a rule that would cap the renewal of contracts of part-time, fixed-term contracts at a time before they acquired any rights by completing the 30-month period provided by the law. Lecturers in tertiary education, i.e. academics under part-time and fixed-term contracts at the University of Cyprus organised a work stoppage in 2018: As a result of this, the rule imposing a cap was removed but the trade union agreed that the departments could change 20 per cent to 30 per cent of their part-time fixed term lecturers per year.

Fixed-term workers in the private sector: there have been a number of Labour Court decisions affirming the right of employees to have their fixed-term contract converted into one of indefinite duration. The Court ruled in favour of a plaintiff who sued his private sector former employer, a private university (hereinafter 'the University'), for unfair dismissal. The plaintiff had been hired by the University in 2008 as an Associate Professor on the basis of a fixed-term contract that was renewed year after year. In May 2012, the University informed the plaintiff that his services were no longer needed and his employment relationship with the University would end on 31 August 2012. The



plaintiff argued that under the FT Law at the time of his dismissal, his fixed-term contract should have been converted into a contract of indefinite duration, as he had already completed 30 months of service. The University argued that the plaintiff's fixed-term contract was justified by objective reasons, namely the specific circumstances surrounding the operation and nature of services offered by private universities. The University claimed that the course for which the plaintiff had been hired did not attract a reasonable number of students, despite the efforts undertaken to increase that number. Following the relevant provision in the Termination of Employment Law, the court reversed the burden of proof and called on the University to prove the reasons rendering the dismissal lawful and thus not generating any right to compensation. The witness for the University claimed that the number of students enrolled for the course taught by the plaintiff were below the minimum number set by University policy. However, upon cross examination, the defendant admitted that the employment contract signed with the plaintiff did not mention that he was specifically being recruited to teach a particular course. The court found that the circumstances invoked by the University did not meet the 'objective reasons' foreseen in the law to justify the use of repeated fixed-term contracts, because the needs for which the plaintiff had been hired continued to be present four years after his initial recruitment, his position was not abolished and the course continued being taught following his dismissal. The court emphasised that the risk of business activity is borne by the employer and cannot be transferred to the employee by concluding successive fixed-term contracts, pointing out that the plaintiff's correct form of employment was a contract of indefinite duration. The court awarded the plaintiff damages equal to eight weeks of pay, plus interest. The ruling touches upon a sensitive national matter as there has been a massive expansion of the use fixed-term contracts in the public sector. There has been a rise in private sector employees on fixed-term contracts, whose rights are hardly equivalent to those with contracts of indefinite duration. Only a tiny minority take legal action, mostly by individuals who have been dismissed or have little to lose.

4 Other relevant information

Nothing to report.



Czech Republic

Summary

(I) An amendment to the reduction limits adjusting the daily assessment basis for sickness insurance has been introduced in Czech Republic

(II) An analysis of the CJEU rulings C-64/18 and others; C-366/18 and C-274/18 is provided.

1 National Legislation

1.1 Reduction limits to sickness insurance

Factual part

The [announcement](#) of the Ministry of Labour and Social Affairs No. 270/2019 Coll., on the amount of the reduction limits to adjust the daily assessment basis for sickness insurance purposes in 2020 (No. 270/2019) was published on 29 October 2019.

The Ministry of Labour and Social Affairs has issued new reduction limits for the purpose of calculating sickness insurance contributions in 2020. The first reduction limit is CZK 1 162 (CZK 1 090 in 2019), the second reduction limit is CZK 1 742 (CZK 1 635 in 2019), and the third reduction limit is CZK 3 484 (CZK 3 270 in 2019).

The maximum amount of daily sickness insurance contribution paid by the Czech Social Security Administration in 2020 will be CZK 1 151 (CZK 1 080 in 2019) for the 15th – 30th days of the employee's sick leave, CZK 1 266 for the 31st – 60th day of his/her sick leave and CZK 1 381 from the 61st day of sick leave onwards.

These limits will also affect the salary compensation paid by the employer, who is required to pay the employee salary compensation from the 1st – 14th day of sick leave. The reduction limits for the purpose of calculating salary compensation (calculated on an hourly basis) in 2020, will be as follows: the first reduction limit will be CZK 203.35, the second reduction limit will be CZK 304.85 and the third CZK 609.70.

Announcement No. 270/2019 Coll., was published on 29 October 2019 and will come into effect on 01 January 2020.

Analytical part

This is not an important development in Czech Republic. There are no likely implications in the legal or political area. This development seems to be in line with the EU *acquis*. There are no likely implications.

1.2 Increase of pensions 2020

Factual part

Government Regulation No. 260/2019 Coll. on the [amount of the general assessment basis for the year 2018, the recalculation of the coefficient for the amendment of the general assessment basis for the year 2018, the reduction limit for determining the calculation basis for the year 2020 and the basic assessment for pensions for the year 2020 and on the increase of pensions in the year 2020](#) was published on 14 October 2019.

The government has set new parameters for the calculation of pensions in 2020. The general assessment basis for 2018 increased to CZK 32 510. The recalculation rate for



its adjustment for 2018 was CZK 10 715. The first reduction limit determining the calculation basis in 2020 will be CZK 15 328 and the second reduction limit will be CZK 139 340.

The amount of the basic assessment of the above-mentioned pensions (i.e. the amount of old-age, invalidity, widow's, widower's and orphan's pension that all recipients are entitled to at the same amount, regardless of income) will rise to CZK 3 490 per month. In addition, the percentage assessment of pensions will also increase, namely by 5.2 per cent (by CZK 151).

Government Regulation No. 260/2019 Coll., was published on 14 October 2019 with the effective date set to 01 January 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

CJEU ruled that

"Article 56 SFEU is to be interpreted as precluding any legislation, such as that at issue in the main proceedings, which sets forth sanctions for violation of obligations in the area of labour law relating to acquiring of administrative permits and keeping of payroll documents, where sanctions:

- cannot be lower than a certain amount set in advance;*
- are imposed cumulatively for each employee concerned and without an upper limit;*
- are to be increased in the event of dismissal of the action brought against the decision imposing sanctions by a 20% contribution to the costs of proceedings; and*
- are to be converted into imprisonment in the event of non-payment".*

National law sets forth penalties that generally specify an upper limit only; e.g. for not having the relevant documents at the workplace, a fine in the amount of up to EUR 20 000 can be imposed pursuant to Sec 139(3)(d) of Act No. 435/2004 Coll. the Employment Act (hereinafter 'Employment Act'). In cases of more serious offences, national law may set forth a minimum amount of sanctions as well [e.g. for allowing illegal employment, a fine with a minimum amount of EUR 2 000 and a maximum of EUR 390 000 can be imposed pursuant to Sec 140(1)(c), (e) or (g) of the Employment Act]. Courts and other administrative bodies, however, have extensive discretion (within the bounds set by law) when deciding on the amount of the fine to be imposed. Sanctions are not imposed cumulatively for each individual employee affected (although the severity and extent of violations can be considered). Sanctions are not increased by 20 per cent to include the costs of the proceedings in cases of actions brought against decisions imposing sanctions. Non-payment of administrative penalties does not result in imprisonment.

Sanctions related to labour law imposed in the Czech Republic are not disproportionate within the meaning of the CJEU ruling. Czech penalties for labour law violations do not



constitute unjustified and disproportionate restrictions on the free movement of services.

The CJEU ruling has no implications for national legislation.

Analytical part

This ruling has no implications for national laws. Amendments of national law are not necessary.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

The CJEU ruled that

"Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC must be interpreted as not applying to national legislation, such as that at issue in the main proceedings, which provides for a worker's right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work".

The issues considered in the CJEU ruling are regulated in Sec 241 of Act No. 262/2006 Coll. the Labour Code (hereinafter 'Labour Code'):

"(1) In assigning employees to shifts, employers shall also be required to take into consideration the needs of female and male employees taking care of children.

(2) If a female or male employee taking care of a child under fifteen years of age, a pregnant employee or an employee who demonstrates that he/she is predominantly on his/her own taking care of a person considered to be a person dependent on the assistance of another natural person requests reduced working hours or some other suitable modification of the full-time weekly working hours, the employer shall be required to meet that request, unless this is prevented by serious operational reasons.

(3) Employers may not employ pregnant employees to work overtime. Female and male employees who are taking care of a child under the age of one year may not be required by the employer to work overtime."

The definition of 'serious operational reasons' is to be interpreted restrictively by the courts (to strengthen the position of employees and to facilitate their access to part-time work).

Serious operational reasons are the only criterion that the employer needs to evaluate when assessing the employee's request.

According to the Decision of the Supreme Court of the Czech Republic No. 21 Cdo 612/2006, the existence of serious operational reasons must be reviewed in the light of the circumstances present at time at which the assessment of the merits of the request for reduced working hours or their adjustment takes place.



Further, according to the Decision of the Supreme Court No. 21 Cdo 1561/2003, as regards the assessment of the seriousness of the operational reasons, how significant the impact on the employer's operation would be if the employee were granted the adjustment requested as opposed to the employee working for the initially agreed upon time must also be evaluated. Serious operational reasons implies that the adjustment requested by the employee will impede the employer's operations in such a way as to prevent the company from effectively performing its tasks and carrying out its activities.

According to the Decision of the Supreme Court No. 21 Cdo 1821/2013, the nature of the employer's operations and its organisational and technical conditions must be assessed, as well as the total number of employees employed, the possibility of their mutual replacement and their remuneration. The general rule is that the more employees the employer has, the easier it is to comply with the request for an adjustment of working hours.

The employer must also assess the employee's request in compliance with the principle of equality and non-discrimination.

Even though Council Directive 2010/18/EU does not apply to the issue dealt with in the CJEU proceedings (under Spanish law, employees are not entitled to adjustments of their working hours), employees in the Czech Republic—under the conditions set out above—have the right to request adjustments of their working hours. To exercise the right to reconcile family life and working life to be able to care for children or family members they are responsible for, employees' regular working hours (and salary) do not always have to be reduced – e.g. under Czech law, employees would have the right to request (and for the request to be fulfilled, under certain conditions) for their shifts to be switched to accommodate their needs, as was the request in the proceedings before the CJEU.

As Czech legislation is more beneficial for employees who have parental duties in comparison to the Spanish legislation at issue and to the standards set forth in Council Directive 2010/18/EU, the CJEU ruling has no implications in the context of national legislation.

Analytical part

The CJEU ruling has no implications for national law. No amendments of the national law are necessary.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

CJEU ruled that

"Clause 4 point 1 of the Framework agreement on part-time work concluded on 6 June 1997 annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that maximum duration of fixed-term employment of part-time employees is longer than that of comparable full-time employees, unless such difference in treatment is justified by objective reasons and is proportionate with regard to such reasons which is for the referring court to verify. Clause 4 point 2 of the Framework agreement on part-time work must be interpreted as meaning that the „pro rata temporis“ principle does not apply to such legislation“.



CJEU further ruled that

"Article 2 para. 1 b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation is to be interpreted as precluding legislation from setting longer maximum duration of fixed-term employment for part-time employees as opposed to comparable full-time employees if it is proven that such legislation adversely affects a significantly greater percentage of female workers than of male workers, unless such legislation is objectively justified by a legitimate aim and means to achieve that aim are proportionate and necessary. Article 19 para. 1 of the Directive must be interpreted as not requiring from party to the proceeding who feels impacted by discrimination to submit specific statistics or facts relating to employees covered by relevant national legislation in question in order to prove the facts suggesting discrimination where party does not have such information or where such information is difficult to access".

To prevent abuse arising from the use of successive fixed-term employment contracts or relationships (and to meet its obligations under EU law), Czech national law (especially Sec 39 of the Labour Code) sets a maximum duration of fixed-term employment contracts (3 years) and a maximum number of renewals of such contracts (they can be renewed twice). If a fixed-term contract is concluded contrary to these conditions and if the employee notifies the employer of this fact before the end of the employment contract, the fixed-term employment contract is automatically converted into an employment relationship of indefinite duration. The number of possible renewals is reset after three years from the end of the last fixed-term employment relationship (between the same two parties).

According to Section 39(4) of the Labour Code, the applicable restrictions to fixed-term contracts do not apply in cases of 'serious operational reasons' on the part of the employer (given that certain requirements are met). Czech legislation does not provide a list of objective reasons justifying the renewal of fixed-term contracts. Furthermore, very little case law is available in connection with this issue.

However, an unequal treatment of part-time employees with regard to the regulation of fixed-term contracts is generally not permitted, unless this is justified by objective operational reasons. Unjustified unequal treatment between men and women in this respect is also prohibited.

Furthermore, although national legislation does not explicitly regulate the possibility of establishing prima facie indirect discrimination based on statistical evidence, this is not at variance with EU law.

The CJEU ruling, therefore, has no implications for national legislation.

Analytical part

This CJEU ruling has no implications for national law. No amendments of national law are necessary.

4 Other relevant information

Nothing to report.



Denmark

Summary

(I) Two industrial arbitration cases concern the payment of posted workers with regard to two different obligations. The first case reiterates earlier case law on underpayment of non-unionised workers. The second case concerns an obligation to pay workers a salary that is not substantially disproportionate with the general average salary in the same field of work and geographical area. The aim of this provision is to avoid social dumping. The industrial arbitration panel, while interpreting the provision's conformity with EU law, found that social security contributions paid in the home member state can be included in the calculation of the hourly wage.

(II) An analysis of CJEU rulings C-64/18 and others, C-366/18 and C-274/18 is provided

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers, underpayment

Industrial Arbitration Ruling, No. FV 2019.0056, 15 October 2019, 3F v Dansk Byggeri on behalf of Spaliukai IVS

Factual part

The Lithuanian posting entity 'Spaliukai IVS' is a member of the Danish construction industry's employers' association, 'Dansk Byggeri', and as such is required to pay posted workers the salaries set out in the collective agreements of Dansk Byggeri.

Spaliukai IVS carried out work at a construction site in Denmark as a subcontractor from 06 August – 15 December 2018. Eight Lithuanian non-unionised employees were employed at the site.

The industrial arbitrator [found](#) that the company had not paid the workers holiday allowance, special holiday allowance ('*SH/FF-godtgørelse*') and pension contributions as required by the collective agreement.

The underpayment resulted in an overall outstanding amount of approx. DKK 220 000 (EUR 30 000).

Analytical part

The ruling in itself is not important, but is relevant because it is part of the enforcement structure protecting the mandatory rights of workers posted to Denmark.

The ruling is in line with earlier case law stating that the penalty for underpayment of non-unionised workers amounts to the accrued underpayments.

The ruling is in line with the EU aquis.



2.2 Posting of workers, prohibition on general disproportion between salaries, social security contributions in home member state

Industrial Arbitration Ruling, No. FV 2018.0165, 14 October 2019, 3F v Dansk Byggeri on behalf of K2 Leseni s.r.o.

Factual part

K2 Leseni is a Czech company that carried out scaffolding work in Copenhagen in 2017-2019. The company employed a number of workers posted from Czechia during this period.

As a member of Dansk Byggeri, the company was required to comply with the collective agreement of the employers' association.

This agreement requires the employer to pay a salary that is not substantially disproportionate in comparison with the general average salary in the same field of work and geographical area. The aim is to prevent social dumping.

The parties disagreed on the calculation of the workers' hourly wage.

K2 Leseni argued that the hourly wage paid was DKK 325 (EUR 43.50). Including the expenses to, inter alia, the social security contributions, the hourly wage was DKK 52 .

The industrial arbitration panel [found](#) that the dispute required an interpretation of the collective agreement, which was to be understood in conformity with relevant EU law, notwithstanding that EU law does not directly regulate the question of how to calculate the salary level.

As for the social security contributions, the posting entity was required by law to pay these to the Czech state. The contributions which covered unemployment, health, pension and sickness insurance were payments that were financed through taxation in Denmark and thus indirectly represented part of the Danish salary level.

The industrial arbitration panel found that in the light of the provision's aim, the social security contributions should be included in the calculation of the employees' hourly wage.

In conclusion, the posting entity had paid its workers an hourly wage of approx. DKK 236 (EUR 32), which was not deemed disproportionate to wages paid by other similar scaffolding companies.

Analytical part

The dispute did *not* concern the concept of minimum wage in the Posted Workers Directive, but instead, the interpretation of a specific provision in a collective agreement prohibiting substantial disproportions in wage levels.

The judgment is, however, in line with existing Danish case law that deals with the question of which payments can be considered remuneration within the meaning of the Posted Workers Directive (in particular, Industrial Arbitration ruling, No. FV2009.0093, 26 February 2010).

The judgment is important, as similar provisions on disproportions in wage levels are found in multiple collective agreements in Denmark, and it is of relevance as part of the regulatory mechanisms to fight social dumping.

The industrial arbitration panel interpreted the provision in conformity with relevant EU regulations, even though they did not directly deal with the question.



3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

A Croatian company performed services in Austria in 2015. During an inspection, the payroll documents of 217 employees were missing.

The Croatian employer was fined EUR 3 255 000 for failure to make payroll documents available to the Austrian interim employer. The four managers of the Austrian company were fined EUR 2 604 000 and EUR 2 400 000, respectively, for, inter alia, not being able to present the payroll documents.

Austrian law punished the breach with a minimum amount for each fine for each affected employee, without a maximum ceiling. In case of dismissal of the appeal, a contribution to the legal costs amounting to 20 per cent of that fine was added. Moreover, the fine could be turned into an imprisonment sentence in case of non-payment of the fine.

The Court found that the Austrian sanctions represented restrictions to the freedom to provide services (Article 56 TFEU). The objective of the rules, namely social protection of workers, fighting fraud and preventing abuse, belong to overriding reasons in the public interest and may justify a restriction to the freedom to provide services.

However, the Court did not find that the relevant legislation was adjusted to the severity of the breaches in question, i.e. the lack of sufficient work permits and payroll documentation. In conclusion, the Austrian sanctions were deemed to be excessive.

Analytical part

The ruling will presumably not have any implications for Danish law.

In Denmark, posting entities are required to register in the Register of Foreign Service Providers (hereinafter RUT) and provide specific information upon registering. The required information includes the period of work, the working place and the identity of the posted workers. Payroll documentation is not required.

The issue of appropriate fines—and the collection of fines—related to the posted workers has attracted much political attention in Denmark.

Fines can be imposed if the posting entity fails to register or gives wrongful or inadequate information upon registration, as well as if it fails to provide documentation to the receiving entity. Fines may be imposed on the receiving entity if it fails to report that a posting entity has not provided proof of registration.

The fine level is left to the discretion of the courts. Legislation does not set out a minimum amount. So far, fines for breaches of these duties have been around DKK 10 000 (EUR 1 300). The fine can be set at a higher or lesser amount depending on the specific circumstances of the case. Intent or gross negligence will, inter alia, be considered an aggravating circumstance.

Unpaid fines may result in imprisonment. This, however, is rarely the case, as the police (as a starting point) will try to collect the outstanding amount through distraint or withholding of salary.

Legal costs in civil suits are—as a general rule—calculated on the basis of the economic value of the relevant case. The regulations may be deviated from in case of a particularly complicated or simple case.

In conclusion, the sanctions and fine levels in Denmark differ considerably from those in Austria and are most likely in accordance with the EU principle of proportionality.



3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

An employee, with children born in 2010 and 2014, requested a change to his work patterns (from shift work to a fixed schedule) in 2018. His employer rejected his request.

National legislation in Spain provides for the right to a reduction of working hours, without being able to change from shift work to a fixed schedule.

The question was whether Directive 2010/18 and Articles 23 and 33(2) of the Charter must be interpreted as precluding such national legislation.

Clause 6(1) of the Framework Agreement (annexed to Directive 2010/18) was the only relevant provision. It concerns the right of the worker to request a change to his/her working conditions when returning from parental leave.

The Court, however, found that the employee was not in a situation of returning from parental leave within the meaning of Clause 6(1). Thus, Directive 2010/18 did not apply to the relevant national legislation.

The employee could not rely on Article 23 and Article 33(2) of the Charter, as the dispute fell outside the scope of Union law.

Analytical part

The judgment may have (minor) implications for Danish law.

Danish legislation does not contain a provision similar to the Spanish one granting a general right to a reduction of working hours for employees with minors or dependent family members.

However, in some collective agreements there is a right to take leave—fully or partially—to care for a sick child.

Outside the scope of collective agreements, an employee may only take leave if he/she can reach an agreement with his/her employer.

It is not apparent that the relevant provisions in Danish collective agreements have been made subject to EU-conform interpretation in light of the rules on parental leave. There is no case law on this.

However, following the judgment of the CJEU, it is clear that a dispute concerning the right to a change in working patterns based on the right to take leave for a sick child would fall outside the scope of EU law on parental leave, if it is not apparent that the employee is returning from parental leave.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

An employee had been employed as a researcher at an Austrian university from 2002 to 2014 on a number of successive fixed-term contracts as both a full-time and part-time employee.

The question whether Article 4 of the Framework Agreement on Part-time Work precluded the Austrian provision (in the Law on Universities), which entailed that the



maximum duration of employment of employees with a fixed-term contract was longer for part-time employees than for comparable full-time employees.

The Court found—with a reservation about the national court’s assessment—that the provision treated part-time employees less favourably, as the possibility of concluding a permanent contract was diminished or postponed.

It was for the national court to assess whether the differentiated treatment could be justified on objective grounds and whether it was proportionate with the stated objective. It depends on all of the circumstances of each specific case whether seniority can be classified as being an objective reason.

The question whether the Austrian provision entailed indirect discrimination on the grounds of sex and the related burden of proof was also discussed in the light of Directive 2006/54/EC.

The Court reiterated its previous case law, stating that it is for the national court to assess the facts, e.g. statistics, according to which it may be presumed that there has been discrimination.

To guarantee the *effet utile* of Article 19(1), this provision shall be interpreted as meaning that an employee may be able to establish (apparent) discrimination with reference to general statistics on the employment market in the Member State, where more specific information on the relevant group of employees is difficult or impossible to obtain.

Analytical part

Part-time work

The judgment may have implications for Danish law.

The use of successive fixed-term contracts at universities has regularly given rise to disputes, the latest in a Supreme Court [ruling](#) (No. 303/2016, 17 April 2018). In 2012, the auditors of public accounts stated that the rules were often not being properly complied with. The subject has, however, not spurred much public debate.

Clause 5 has been implemented in both the statutory Act and in various implementing collective agreements, requiring *objective reasons* to justify the renewal of a fixed-term contract. The fact that it can be difficult to specify objective reasons for renewals in academic employment was addressed with reference to the implementation of Directive 1999/70/EC.

Thus, in particular for teaching and research positions at e.g. universities, the renewal of successive fixed-term employment contracts is limited to *two times*.

The [Executive Order on the employment structure at universities](#) lays down a maximum duration for certain employment positions. Part-time employment is generally allowed. However, neither the Act nor the Order states that the maximum duration of employment is extended in case of part-time employment.

Thus, Danish law does not differentiate between part-time and full-time workers in case of fixed-term employment at universities.

There is no indication in the preliminary works nor in case law that part-time workers are treated differently than full-time workers when assessing renewals of fixed-term contracts. No case law within (or outside of) the universities indicates this. The presumption thus is that the assessment does not make any distinctions in this regard. The fixed-term character and the renewal refers to the contract per se, not to the employee’s working hours or the rate of employment in relation to full-time work. Whether the employment relationship of academics who work part time under a fixed-term employment is extended in practice is assumed to not play a role in the assessment



of renewals of contracts for fixed-term employees at universities. There is, however, no Danish case law addressing this. With the CJEU ruling, the argument would be expected to include reference to CJEU case law and prefer the interpretation of the Danish provisions, which brings the Danish state of law in line with the EU acquis. This includes an assessment whether objective reasons for differentiated treatment are present and whether it is proportionate.

In conclusion, on the face of it, the Danish implementation of Directive 1999/70/EC, Clause 5, differs from the Austrian legislation and the judgment of the Court has no implications for any existing laws, but is expected to influence future cases.

Discrimination on grounds of sex – burden of proof

The judgment may have implications for Danish law.

The shared burden of proof has been implemented in the [Danish Act on Equal Treatment](#), Article 16a.

When an employee has lifted his/her part of the burden of proof, that is, has established that differentiated treatment occurred, the court must assess all facts of each case. In Denmark, the assessment of evidence is subject to free evaluations by the courts.

The [preparatory works to the Danish Act on Equal Treatment](#) state that an unsubstantiated claim is not sufficient to demonstrate 'circumstances that indicate discrimination'. The claim must be substantiated by e.g. written material, witnesses or similar.

In existing case law, statistics have been used in this regard, however, it is unclear from case law whether statistics for the labour market in general suffice to establish such circumstances in situations where more specific information is difficult or impossible to obtain. The Court's judgment clarifies this.

The judgment is in line with rulings from the Board of Equal Treatment ('Ligebehandlingsnævnet'). Example: statistics indicating how many men and women took up leave to care for a sick child according to the Danish Social Act was sufficient for the employee to lift the part of the shared burden of proof in an equal treatment dispute, cf. [ruling No. 25000013-10, 24 June 2011](#).

4 Other relevant information

Nothing to report.



Estonia

Summary

(I) CJEU case C-274/18 addresses the nature and possibilities of fixed-term contracts at universities and clarifies when the principle of pro rata is to be applied.

(II) CJEU joined cases C-64/8 and others clarify the enforcement mechanisms in relation to the posting of workers.

(III) CJEU case C-366/18 explains to what extent an employer can apply the principle of equal treatment to employees with family responsibilities.

(IV) Trade unions and employers' associations turned to the public conciliator to reach an agreement on the monthly minimum wage.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

The case concerned the legal position of fixed-term and part-time workers at higher education institutions. The question about the burden of proof was analysed as well. The outcome of the case has a double impact on Estonia's legal system. The employment conditions of academic workers in Estonia are regulated in the Higher Education Act. According to Article 34 of the Higher Education Act, academic staff are usually employed under open-ended contracts. When objective reasons exist, fixed-term contracts can be concluded as well. Fixed-term contracts can be concluded for the following two objective reasons:

- a competition to fill the academic position has failed, and a fixed-term worker can be employed until the position is filled by way of competition, or
- the work to be performed is of a fixed-term nature.

A fixed-term contract can be concluded for a maximum period of five years and can be extended for an additional five years. Thereafter, the fixed-term contract will be deemed to be an open-ended contract. The principle of pro-rata will not be applied. Part-time and full-time employees are treated equally.

The principle of burden of proof is determined in the Gender Equality Act. According to Section 4 (2), it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. If the respondent refuses to provide proof, this refusal shall be deemed to be equal to an acknowledgement of discrimination .

The CJEU's judgment clarifies the approach to burden of proof and provides guidelines of how a person who feels he/she has been discriminated against can bring evidence of the potential discrimination. This interpretation is particularly important for judges but also for other institutions responsible for safeguarding the principle of equal treatment.



3.2 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

The case concerned posted workers and the enforcement mechanisms when the requirements of a posting have been violated. The impact of this judgment on Estonian labour law is minimal. It underlines the importance of enforcement mechanisms and the idea of the proportionality of such enforcement mechanisms.

The enforcement mechanisms in Estonia are determined in the Working Conditions of Employees Posted to Estonia Act (hereinafter Posted Workers' Act). According to the Posted Workers' Act, if the employer (legal person) violates the obligation to provide the necessary information on the posted workers, the fine will amount up to EUR 32 000. There is no rule according to which the fine can be cumulative on the basis of the number of employees. The amount of the fine is the same (regardless of the number of employees affected) and the upper limit is determined in law.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

The case concerns possible discrimination due to family responsibilities. The main question was whether an employee, who has family responsibilities, can request to change his/her work schedule to more suitable working hours.

The impact of this decision on Estonian labour law is limited. The conditions of working time for all employees are determined in the Estonian Employment Contracts' Act (hereinafter ECA). The ECA does not foresee the right to demand more suitable working hours for employees who have families and who have to take care of dependents. The question how working time is divided and whether an employee will work part time or full time is based on the agreement between the employer and employee. The employer must comply with the principle of equal treatment.

The Court's decision clarifies when and how the principle of equal treatment can be applied in case of family responsibilities.

4 Other relevant information

4.1 Negotiations on monthly minimum wage continue

The Estonian Trade Union Confederation and the Estonian Employers' Association will continue negotiations on the monthly minimum wage. Although an agreement was reached in August 2019 that the monthly minimum wage would increase from EUR 540 to EUR 578, the board of the Estonian Trade Unions' Confederation did not accept the agreement. The trade unions call for the monthly minimum wage to be at least EUR 600. This amount would represent approximately 40 per cent of the average monthly salary. The Estonian Trade Unions' Confederation turned to the public conciliator to reach an agreement. The public conciliator is an impartial expert appointed by joint agreement between the Government of the Republic, the Ministry of Social Affairs, the employers' associations and trade unions, and stands in to help the disputing parties reach an agreement. The conciliator is entitled to ask to join the conciliation proceedings.

In case no agreement is reached by the end of the year, the new monthly minimum wage will be decided by the government, but not by the social partners.



Finland

Summary

An analysis of CJEU rulings C-64/18 and others, C-366/18 and C-274/18 is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

In Finland there is no legislation described in the Rulings.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In Finland there is no legislation described in the Ruling.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In Finland there is no legislation described in the Ruling. No maximum length of fixed-term contract is included to the [Employment Contract Act](#). There must be as justified reason for agreeing on a fixed-term contract (ECA 1:3).

In Finland there is no legislation described in the Ruling. According to the [Act on Equality between Women and Men](#), If a person considers that they have been a victim of discrimination under the provisions of this Act and presents a matter referred to in this Act to a court of law or to a competent authority and the facts give cause to believe that the matter is one of gender discrimination, the defendant must prove that there has been no violation of gender equality but that the action was for an acceptable reason and not due to gender. This provision does not apply to the consideration of criminal cases (Equality Act 9a §).

4 Other relevant information

Nothing to report.



France

Summary

(I) Several national court rulings on disciplinary powers of the employer, dismissal, reemployment of an employee, collective bargaining, harassment, employees' representatives and discrimination are analysed.

(II) An analysis of CJEU rulings C-64/18 and others, C-366/18 and C-274/18 is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Disciplinary procedure

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-15.029, 09 October 2019

Factual part

An employee challenged a warning he was given by his employer.

Analytical part

An employer who issues a warning to an employee is not usually required to comply with the disciplinary procedure laid down in Article L. 1332-2 of the Labour Code which requires a preliminary meeting to take place before the employee is notified of an impending penalty. This Article only concerns serious sanctions such as disciplinary dismissal. A warning does not fall within the scope of this Article.

Nevertheless, in the present case, the Court of Cassation considered that if the employer voluntarily applied the disciplinary procedure established in Article L.1332-2 of the Labour Code by inviting the employee to a preliminary meeting, the employer would consequently be required to respect the entire procedure prescribed by this Article and, in particular, respect the maximum period of one month following the preliminary meeting to notify the employee of the impending sanction. Otherwise, the warning is void.

« Attendu cependant que, dès lors qu'il a choisi de convoquer le salarié selon les modalités de l'article L. 1332-2 du code du travail, l'employeur est tenu d'en respecter tous les termes, quelle que soit la sanction finalement infligée ; que, selon ce texte, la sanction ne peut intervenir plus d'un mois après le jour fixé pour l'entretien ;

Qu'en se déterminant comme elle l'a fait, sans rechercher, comme elle y était invitée, si l'avertissement n'avait pas été délivré plus d'un mois après le jour fixé pour l'entretien préalable, la cour d'appel a privé sa décision de base légale ; »

2.2 Reemployment of an employee

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-28.150, 09 October 2019



Factual part

In France, procedural requirements in case of collective dismissals for economic reasons require the employer to search for reemployment opportunities for the dismissed employees.

In this regard, Article L.1233-4-1 of the Labour Code states that when the company or the group of which the company is a part of has establishments outside the national territory, the employee whose dismissal is being considered may request the employer to receive offers of reemployment in those establishments. In his/her request, he/she shall specify any restrictions regarding the nature of the jobs offered, in particular with regard to remuneration and geographic location. The employer sends the corresponding offers to the employee who has expressed an interest. These offers are made in writing and are very precise.

Article L. 1233-4-1 of the Labour Code provides that the employee must express agreement to receive offers of reemployment abroad within six working days of receipt of the proposal. Absence of a reply might be considered a refusal.

In the present case No. 17-28.150, although the employees had been asked whether they wanted to receive offers of reemployment in Belgium, the questionnaire submitted to them did not contain any information about the reflection period, i.e. by when they were to express agreement to receiving offers for posts abroad.

Consequently, the Court of Appeal determined that there was an absence of a real and serious cause for dismissal.

Analytical part

The Court of Cassation quashed the Court of Appeal's decision and recalled that in accordance with Article L.1233-4-1 of the Labour Code, employers who did not inform the employee that he/she had six working days to express agreement to receive offers of reemployment outside the national territory and that the absence of a reply would constitute refusal to take another post, cannot rely on the employee's silence and remain obligated to make offers of reemployment outside the national territory.

Moreover, according to the Court of Cassation, the Court of Appeal should have reviewed the seriousness of the reemployment measures taken by the employer and not deducted the absence of a real and serious cause for the dismissals based on the absence in the mobility questionnaire, but focus on whether the reflection period and the consequences of a non-response are mentioned in the questionnaire.

« Attendu cependant, que selon l'article L. 1233-4-1 du code du travail, lorsque l'entreprise ou le groupe auquel elle appartient est implanté hors du territoire national, l'employeur demande au salarié, préalablement au licenciement, s'il accepte de recevoir des offres de reclassement hors de ce territoire, dans chacune des implantations en cause, et sous quelles restrictions éventuelles quant aux caractéristiques des emplois offerts, notamment en matière de rémunération et de localisation ; que le salarié manifeste son accord, assorti le cas échéant des restrictions susmentionnées, pour recevoir de telles offres dans un délai de six jours ouvrables à compter de la réception de la proposition de l'employeur, l'absence de réponse valant refus ; que les offres de reclassement hors du territoire national, qui sont écrites et précises, ne sont adressées qu'au salarié ayant accepté d'en recevoir et compte tenu des restrictions qu'il a pu exprimer ; qu'il résulte de ce texte que l'employeur, qui n'a pas informé le salarié de ce qu'il disposait d'un délai de six jours ouvrables pour manifester son accord et que l'absence de réponse vaudrait refus, ne peut se prévaloir du silence du salarié et reste tenu de formuler des offres de reclassement hors du territoire national ;



Qu'en statuant comme elle l'a fait, en déduisant l'absence de cause réelle et sérieuse des licenciements du défaut, dans le questionnaire de mobilité, de mentions relatives au délai de réflexion et à la portée d'une absence de réponse, alors qu'il lui appartenait d'apprécier le caractère sérieux des recherches de reclassement menées par le liquidateur, sur et hors le territoire national, la cour d'appel a violé le texte susvisé ; »

2.3 Collective bargaining

Labour Division (Chambre sociale) of the Court of Cassation, No. 19-10.816, 09 October 2019

Factual part

Since 01 May 2018, the validity of a company-level agreement is subject to its signature by, on the one hand, the employer or its representative and, on the other hand, one or more representative trade union organisations that have collected more than 50 per cent of the votes cast in favour of the representative organisations in the first round of the last professional elections (Labour Code, Article L. 2232-12, para. 1).

To prevent the 50 per cent threshold from leading to too many blockages, the legislator has introduced the possibility of validating the company-level agreement by referendum. Thus, if the necessary majority is not met but the agreement is signed by representative trade union organisations which received more than 30 per cent of the votes cast in favour of the representative trade union organisations, one or more of these organisations may request a referendum to validate the agreement (Labour Code, Article L. 2232-12, paragraph 2).

More precisely, according to Article D.2232-6 of the Labour Code, they "shall notify in writing their request to the employer and the other representative trade union organisations within one month of the date of signature of the agreement".

The present Decision No. 19-10.816 provides a clarification of this notification.

In this case, the CGT union, having obtained 30 per cent of the votes cast and seeking to hold a referendum, had notified the employer but not the CFDT union of its plan. It was the employer who informed the CFDT union of the CGT's request to organise a referendum.

At the end of the referendum, the CFDT called for the cancellation of the referendum on the basis of Article D. 2232-6 of the Labour Code. According to the union, the CGT should have notified them and the fact that the employer had made up for this failure is a breach of its obligation of neutrality and constitutes an irregularity, thus invalidating the referendum.

Analytical part

The Court of Cassation did not share this view and ruled that the regularity of a trade union's request for the organisation of a referendum "shall not be subject to notifying the other representative trade union organisations, which shall only have the effect of extending the time limits provided by the following paragraph".

In addition, the Court stated that "in the absence of notification by the union making the request, the information given by the employer of this request to the other representative trade union organisations does not constitute a breach of the employer's obligation of neutrality".

Thus, the employer may notify other representative trade union organisations of the request to organise a referendum.



"Mais attendu que la régularité de la demande formée, en application de l'article L. 2232-12 al. 2 du code du travail, par un ou plusieurs syndicats ayant recueilli plus de 30 % des suffrages exprimés, aux fins d'organisation d'une consultation des salariés pour valider un accord signé par les organisations syndicales représentatives représentant plus de 30 % des suffrages exprimés n'est pas subordonnée à sa notification aux autres organisations syndicales représentatives, laquelle a seulement pour effet de faire courir les délais prévus à l'alinéa suivant ;

qu'en l'absence de notification par le syndicat à l'origine de la demande, l'information donnée par l'employeur de cette demande aux autres organisations syndicales représentatives ne constitue pas un manquement à l'obligation de neutralité de l'employeur ; qu'il en résulte que le tribunal d'instance a statué à bon droit ; que le moyen n'est pas fondé"

2.4 Harassment

2.4.1 Moral harassment

Labour Division (Chambre sociale) of the Court of Cassation, No. 18-14.069, 09 October 2019

Factual part

In France, moral harassment manifests itself in repeated malicious acts that lead to a serious deterioration of the victim's working conditions, and can affect his/her rights and dignity, alter his/her physical or mental health, or compromise his/her professional future (Article L.1152-1 of the Labour Code).

Article L.1154-1 of the Labour Code states that when disputes arise involving moral harassment, the employee must present factual elements suggesting the existence of harassment. It is thus for the defendant to prove that these acts do not constitute such harassment and that its decision is justified by objective elements unrelated to any form of harassment.

In this case No. 18-14.069, the Court of Appeal held that the deterioration of the employee's physical and psychological state of health was undeniable and not contested by the employer, that it was also established that after an interview with her manager, the employee met her doctor, who immediately placed her on sick leave, the various doctors who met the employee all noted a severe state of anxiety and depression preventing her from returning to work, that the medical certificates also established a formal link between the employee's incapacity and a situation of moral harassment suffered in her professional environment.

Analytical part

However, the Court of Cassation ruled in accordance with the two Articles L.1154-1 and L.1152-1 of the Labour Code that the recognition of the deterioration of the employee's state of health was not on its own likely to give rise to a presumption of psychological harassment. The Court of Appeal should have investigated whether the employee had established the necessary facts allowing for such a presumption.

" Qu'en se déterminant ainsi, alors que la constatation d'une altération de l'état de santé de la salariée n'est pas à elle seule de nature à laisser présumer l'existence d'un harcèlement moral, sans rechercher si celle-ci établissait des faits permettant une telle présomption, la cour d'appel n'a pas donné de base légale à sa décision."



2.4.2 Sexual harassment

Labour Division (Chambre sociale) of the Court of Cassation, No. 09-72.672, 09 October 2019

Factual part

In this case No. 09-72.672, a manager repeatedly and persistently sent inappropriate and pornographic messages to one of his subordinates between 2011 and 2013. Several witnesses mentioned the ambiguous attitude adopted by the subordinate involved. As a result of these incidents, the employer dismissed the manager for serious misconduct. The manager contested this decision.

The Court of Appeal partly agreed with the manager by excluding the recognition of sexual harassment on the basis of the employee's ambiguous attitude. Nevertheless, the judges considered that the dismissal was justified but reclassified the serious misconduct allegation into a real and serious ground for termination and ordered the employer to pay various indemnities.

Analytical part

The Court of Cassation shared the view of the Court of Appeal: in the absence of any serious pressure or intimidation, hostile or offensive situation involving the employee, the ambiguous attitude of the subordinate involved, who had thus voluntarily participated in a game of mutual seduction, excluded that the alleged facts could be qualified as sexual harassment.

According to Article L.1153-1 of the Labour Code, sexual harassment occurs when such acts are suffered by the victim, which implies absence of consent. In the present case, this element was missing and could therefore not be characterised as harassment. The judges highlighted that there was no evidence that the employee wanted to end this game of seduction. If, on the other hand, she had expressed her determination to put an end to her supervisor's conduct, the behaviour would have probably been classified as harassment.

2.5 Employee representative - pre-election agreement

Labour Division (Chambre sociale) of the Court of Cassation, No. 19-10.780, 09 October 2019

Factual part

The employer is required to conduct fair negotiations involving a pre-electoral agreement, in particular by making available the necessary/essential information to the organisations participating in the negotiations.

Failure to comply with the obligation to negotiate fairly constitutes a ground for nullity of an agreement, regardless whether it was signed under the conditions of validity laid down in Article L.2314-6 of the Labour Code.

In this case No. 19-10.780, the employer refused to submit information on the identity of his employees and their classification level to the trade union on the basis that he did not wish to "disclose nominative and confidential information to persons outside the company".

Analytical part

The Court of Cassation agreed with the District Court, which found that the employer had refused to share information with the trade union and that the union had therefore not had access to essential information. The Court concluded that the employer had



breached its duty of loyalty and considered that the pre-election agreement was void, as were the elections held on the basis of that agreement.

In this case, the Court of Cassation specified under which conditions failure to comply with the obligation of fair negotiation can be successfully challenged. In this regard, the challenge of the pre-election agreement must have been judicially introduced before the first round of elections or subsequently by a trade union that has not signed the agreement and has expressed explicit reservations before presenting candidates.

"Mais attendu que l'employeur est tenu de mener loyalement les négociations d'un accord préélectoral notamment en mettant à disposition des organisations participant à la négociation les éléments d'information indispensables à celle-ci ; que, dès lors que la contestation du protocole préélectoral a été introduite judiciairement avant le premier tour des élections, ou postérieurement par un syndicat n'ayant pas signé le protocole et ayant émis des réserves expresses avant de présenter des candidats, le manquement à l'obligation de négociation loyale constitue une cause de nullité de l'accord, peu important que celui-ci ait été signé aux conditions de validité prévues par l'article L. 2314-6 du code du travail ;

Et attendu que le tribunal d'instance, qui a constaté que l'employeur avait refusé à l'union locale CGT la communication d'éléments sur l'identité des salariés et leur niveau de classification, au motif qu'il ne souhaitait pas "communiquer des éléments nominatifs et confidentiels à des personnes extérieures à l'entreprise", et qu'ainsi le syndicat n'avait pas eu accès aux informations nécessaires à un contrôle réel de la répartition du personnel et des sièges dans les collèges, a pu retenir que l'employeur avait manqué à son obligation de loyauté et en a exactement déduit que le protocole préélectoral signé le 11 juillet 2018 était nul, ainsi que les élections organisées sur la base de ce protocole ;"

2.6 Discrimination

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-16.642, 09 October 2019

Factual part

It should be recalled that in 2015, the Court of Cassation established a presumption of justification for differences in treatment instituted by collective bargaining agreements (Cass. Soc., n°13-14.773, 27 January 2015).

In the present case No. 17-16.642, a collective agreement was signed on 24 January 2011 to set out new procedures to grant bonuses linked to the awarding of the Medal of Honour. In this regard, transitional provisions in the form of a specific payment for employees had been made, who, under the new procedure and on the date of entry into force of the agreement, should have received a bonus during the previous five years, under the condition that they will not receive any bonus within the next five years.

An employee argued that these transitional provisions discriminated on the basis of age, because it deprived older employees in the company of one of the bonuses while the youngest employees would receive all of them. Indeed, having been awarded the medal in 2011 for 35 years of service in 2010, she did not receive the "gold" bonus provided by the new agreement. The condition of no bonus paid within five years of the agreement was missing since she was to receive the "great gold" bonus in 2015 for her 40 years of service.

The Court of Appeal rejected the employee's claim and decided that since it was a question of the application of a collective agreement, the difference in treatment was presumed justified. It was therefore up to the employee to demonstrate that the



difference in treatment was unrelated to any professional consideration, which she had not done.

Analytical part

The Court of Cassation ruled that it was not on the ground of equal treatment that the judges should have focussed on, but on the ground of discrimination.

Consequently, even where the difference in treatment results from the provisions of a collective bargaining agreement negotiated and signed by representative trade union organisations, the provisions concerned cannot be presumed justified in the light of the principle of non-discrimination.

3 Implications of CJEU Rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Article 2 of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, provides a definition for posted worker: "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works."

The posting of workers places the employee in a unique employment position for a limited period. EU law defines a set of mandatory rules on the terms and conditions of employment to be applied to posted workers.

France has established legal measures to prevent fraud related to the posting of workers, mainly through three laws adopted in 2014 (Law No. 2014-790 of 10 July 2014), 2015 (Law No. 2015-990 of 06 August 2015) and 2016 (Law No. 2016-1088 of 08 August 2016).

In addition, the Social Security Financing Law of 2017 requires posted workers to produce a form certifying their affiliation with the social security system in their country of origin.

Finally, the Law of 05 September 2018 (No. 2018-771) doubled the ceiling of the fine incurred for failure to make a prior declaration.

The Laws of 10 July 2014 and 06 August 2015 drastically increased the administrative burdens for transnational companies wishing to post their employees to France, such as:

- Pre-posting of workers' declaration,
- Appointment/designation of a representative on French territory,
- Translation of documentation into French, etc.

The 2018 reform now allows the competent administrative authority (i.e. the Direcct) to adjust these obligations for the benefit of one or more foreign employers posting their workers to France. Thus, all foreign companies, responding to specific cases, are no longer subject to the substantial reporting obligations in the context of posting.

Although the 2018 law reduces administrative formalities in specific situations, it penalises fraud more severely.

Administrative fines that may be imposed on employers who do not comply with the rules on posting (failure to make a prior declaration, appointment of a correspondent in France, etc.) or the labour regulations applicable to posted workers, will be doubled



from EUR 2 000 to EUR 4 000 per worker affected by the breach and from EUR 4 000 to EUR 8 000 in the event of a repeat offence within a period extending from one to two years. However, the total amount of the fine may not exceed EUR 500 000.

The toughening of sanctions also affects French prime contractors or main contractors. The obligation of due diligence of the prime contractor or main contractor who contracts posted workers is extended to the payment of sums due in respect of the above-mentioned administrative fines. Thus, principals registered in France and contracting a service provider that posts employees to France shall now have to verify at the time of the conclusion of the service contract, whether the service provider has paid all administrative fines for which it may be liable.

Moreover, in the event of non-payment of an administrative fine imposed on an employer or prime contractor for non-compliance with the rules of posting workers, or the labour regulations applicable to workers posted to France, the Direccte may prohibit the provision of services. In addition, in the event of non-compliance with the Direccte's prohibition decision, the employer will be liable to a further fine of up to EUR 10 000 per posted worker concerned.

Finally, the legislator has also acknowledged a new criminal offence of undeclared work. According to Article L.8221-1, 3° of the Labour Code, a situation of concealment of a business activity is established when a foreign employer wishing to avail himself of the provisions relating to posting only carries out internal or administrative management activities in France, even though he/she regularly carries out these activities in France. This situation is commonly referred to as 'establishment fraud'.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In the present case, the employee requested to perform work only in the morning in order to be able to take care of his children.

The Court of Cassation deemed that the change from night work to day work (and vice versa) constitutes a modification of the employment contract and requires the agreement of both the employee/employer (Cass. soc., No. 07-40.092, 14 Oct. 2008).

Today, Article L.3122-12 of the Labour Code declares that "when night work is incompatible with compelling family obligations, in particular, the care of a child, refusal to work the night shift shall not constitute misconduct or grounds for dismissal and the night worker may request to be moved to a day shift."

In addition, the Labour Code states in its Article L.3122-13 that

"night workers who wish to occupy or return to a day job and employees in a day job, who wish to occupy or return to a night job in the same establishment or, failing that, in the same company shall have priority for the assignment of a job in their professional category or an equivalent job. The employer shall inform these employees of the list of corresponding available jobs."

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In this CJEU case, the applicant submitted that, as a general rule, measures that negatively affect part-time workers compared to full-time ones are likely to disadvantage women in particular. To support this argument, she submitted statistics to the court statistics relating to the Austrian labour market in general, from which it



appears that a considerably larger number of women than men are employed on a part-time basis.

French courts have already condemned disadvantages linked to an unequal distribution of working time between the sexes.

For instance, in a judgment of 06 June 2012 (Cass. Soc., No. 10-21.489, 06 June 2012), the employees had been employed as social service assistants, who were predominantly women, were refused membership of the executive pension fund. However, membership of the pension fund was permitted for workers employed as controllers and inspectors, mainly male. In this case, the Paris Court of Appeal found indirect discrimination on the grounds of sex by referring to European Union law. The Court of Cassation approved the solution and ruled that unless such a provision, criterion or practice is objectively justified by a legitimate objective and the means of achieving that objective are appropriate and necessary, a difference of treatment is not possible.

Furthermore, the Court of Cassation gave rise to the recognition of indirect discrimination affecting women employed part-time in two decisions: 01 December 2009 (Cass. Soc., No. 07-42.801, 01 December 2009) and 03 July 2012 (Cass. Soc., No. 10-23.013, 03 July 2012).

In these cases, the Court of Cassation approved the solutions adopted by the Douai Court of Appeal on 13 April 2007 and the Paris Court of Appeal on 11 June 2010, which ruled that the disadvantages suffered by part-time employees compared to full-time employees constitute indirect discrimination on the grounds of sex, as women more often hold part-time jobs than male employees. In the first case, indirect discrimination consisted of provisions refusing part-time workers to recover their leave days. In the second case, the indirect discrimination resulted from the refusal of a part-time employee to receive a supplementary retirement allowance because she had not worked a minimum number of hours for 15 years.

In both cases, judges found, on the basis of statistical evidence, indirect discrimination.

In general, the recognition of discrimination is favoured by the particular burden of proof. When a dispute arises on the ground of discrimination, the burden of proof is adjusted. Indeed, Article L.1134-1 of the Labour Code describes two phases of the trial:

First, the employee, with the evidence at his/her disposal, must prove that his/her allegations are plausible; it is not yet a question of proving that discrimination is established in all its components, but only that certain facts may lead him/her to believe it. The employee only has to "present factual elements suggesting the existence of discrimination". At this stage, the employer can, of course, contest the relevance of these facts and fight them by opposing other elements. The judge may use his powers of investigation here to compel the employer to provide all documents necessary to establish the truth.

Secondly, the employer must, on the basis of the disputed elements, prove that the difference in treatment is based on one or more grounds unrelated to any discrimination. At this stage, the employee's benefit of the doubt, and the employer who fails to convince the judge of his/her good faith risks losing the case.

Despite the adjustment of the burden of proof, presenting the factual elements that are likely to suggest the existence of discrimination is difficult.

In a decision of the Court of Cassation (Cass. Soc., No. 13-16.936, 22 October 2014), an employee of La Poste, alleged indirect discrimination on the grounds of sex, as she was unable to benefit from certain pension contributions because she was employed on a fixed-term employment contract.

She argued that as a share of the total workforce, precarious contracts concerned a much higher proportion of women than men. However, according to the Court of Appeal,

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such a comparison should not be made. The Court of Cassation agreed with the Court of Appeal and ruled that only employees governed by private law and not employees employed as civil servants should be taken into account. It therefore appeared that the percentage of women recruited on permanent employment contracts was not lower than that of women hired on precarious contracts.

In other words, to characterise discrimination, it is necessary to compare situations that can be compared. The examination of such comparability must be carried out not in a global and abstract manner, as was the case in this judgment of 2014, but in a specific and concrete manner with regard to the advantage concerned.

4 Other relevant information

Nothing to report.



Germany

Summary

(I) Parliament has passed a law to introduce subcontractor liability for parcel service providers.

(II) It has also passed a law on higher wages in the nursing sector and a law establishing a minimum wage for trainees.

(III) The Federal Labour Court handed down a ruling on the application of the principle of equal pay for temporary agency workers.

(IV) In 2018, 70 per cent of all employees had a standard employment contract in Germany.

(V) The report of the National Standards Control Council contains some critical comments on EU law.

(VI) In the legal literature, a discussion has started on the need to transpose Directive 2019/1152/EU.

1 National Legislation

1.1 Law on subcontractor liability for parcel service providers

On 24 October 2019, the German Parliament passed a law to introduce subcontractor liability in the courier, express and parcel industry to protect employees ('Parcel Courier Protection Act') in [the version recommended by the Committee for Labour and Social Affairs of the German Bundestag](#) (see also September 2019 Flash Report). Compared to the government draft, the law contains, among other things, an amendment suspending the extended recording obligations stipulated in Section 28f (1a) of the Social Code ('Sozialgesetzbuch') IV for entrepreneurs in the forwarding, transport and related logistics industry, who are engaged in the courier, express and parcel sector, as long as he/she can submit a pre-qualification or clearance certificate.

1.2 Law on higher wages in the nursing sector

On 24 October 2019, the Bundestag passed the law for higher wages in the nursing sector (see also September 2019 Flash Report).

1.3 Minimum wage for trainees

On 24 October 2019, the German Parliament adopted a bill to modernise and strengthen vocational education and training (19/10815, 19/12798, 19/13175 No. 16).

The key points of the bill are a minimum salary for trainees, internationally comparable qualifications and a wider range of options for part-time training. The minimum remuneration is to apply to new training contracts that are outside the scope of the collective agreement from 01 January 2020 onwards. Initially, the minimum wage in the first year of training will be EUR 515 per month. In 2021, it will increase to EUR 550, in 2022 to EUR 585 and in 2023 to EUR 620. In the further course of the training, the minimum wage will increase by 18 per cent in the second year, by 35 per cent in the third and 40 per cent in the fourth year.

After the Bundestag, the Bundesrat now still needs to approve the bill. The new regulations will enter into force on 01 January 2020.



Additional information on this issue is available [here](#).

2 Court Rulings

2.1 Equal pay for temporary agency workers

Federal Labour Court, No. 4 AZR 66/18, 16 October 2019

Temporary work agencies that assign workers to a user undertaking can only deviate from the principle of equal treatment by virtue of an employment contract agreement pursuant to Section 9 (2) of the Act on Temporary Agency Work (*'Arbeitnehmerüberlassungsgesetz'*), if the relevant collective agreement for the temporary agency workers is fully and not only partially applicable during the assignment period. If the employer deviates from this approach to the detriment of the employee, the temporary worker can claim equal payment as the permanent staff.

Section 9 (2) (former version) reads as follows:

"Agreements are null and void which, for the duration of the assignment of a temporary agency worker, provide for worse working conditions, including remuneration for the temporary agency worker, than those applicable in the user undertaking's business for a comparable employee of the user undertaking; a collective agreement may permit deviating provisions provided that it does not fall below the minimum hourly remuneration laid down in a statutory order in accordance with Article 3a(3)(2) of the Act; within the scope of such a collective agreement, employers and employees who are not bound by collective agreements and employees may agree to apply a collective agreements (...).

The Federal Labour Court applied the former version of the Act on Temporary Agency Work. The decision is, however, also relevant for the now updated version of the Act, as Section 8 (2) also allows for a permanent deviation from the principle of equal pay by means of a collective agreement or a corresponding individual contractual reference (whereby the setting aside of the principle is limited by Section 8 (4) to a period of nine months).

A press release on the ruling is available [here](#).

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Percentage of employees with standard employment contracts

In 2018, 70 per cent of all employees had a standard employment contract, meaning that they did not work part time (20 or fewer hours per week), and were not in a 'normal' part-time or fixed-term employment relationship or in a temporary employment relationship. This is apparent from the [answers provided by the Federal Government to a question submitted by the parliamentary group 'Die Linke'](#). Twenty per cent of employees, on the other hand, work in atypical employment relationships. According to the government, 71.8 per cent of employees subject to social security contributions worked full time and 28.2 per cent worked part time. The share of temporary agency workers (excluding trainees and volunteers) was 2.5 per cent last year.



4.2 Report of the National Standards Control Council

At its mid-term review conference on 22 October 2019, the National Standards Control Council ('*Nationaler Normenkontrollrat*') presented its [2019 Annual Report](#) to the Chancellor. The report is entitled "Less bureaucracy, better laws - thinking along with practice, making results tangible, calling for progress".

The report contains some critical comments on EU law. It states, for example:

"(...) the EU Commission's impact assessments, which generally serve as the basis for the departments' own impact cost assessments, continue to give cause for complaint. Since the introduction of the Regulatory Scrutiny Board, the EU Commission's monitoring body for better regulation introduced in 2015, there has been an overall positive trend in the quality of impact assessments. Nevertheless, in many cases it is still difficult for the ministries to understand the assumptions underlying the EU Commission's impact assessments in order to be able to make their own estimates for Germany on the basis of these assumptions".

Elsewhere it states: "Unnecessary consequential costs resulting from EU legal acts could be systematically reduced or completely avoided if the EU Commission, which has the sole right of initiative for new regulations at EU level, decided to introduce a 'one in, one out' rule or a reduction target".

4.3 Discussion on the implementation of Directive 2019/1152/EU on Transparent and Predictable Working Conditions

In the legal literature, a discussion has commenced on the need to transpose Directive 2019/1152/EU. There is a need for implementation not only of the employer's duty to provide information, but also with regard to the existing provisions on probation periods. With regard to information obligations, changes are necessary in the sphere of dismissal protection. Information on the formal requirements for dismissal and information on the time limit for bringing an action for dismissal protection have the potential to improve the enforcement of existing employee rights (see *Maul-Sartori*, Die neue Arbeitsbedingungenrichtlinie, in: *Neue Zeitschrift für Arbeitsrecht* 2019, p. 1161).



Greece

Summary

A new law promotes a series of changes to laws relating to part-time employment, to labour unions and to collective labour agreements.

1 National Legislation

1.1 Part-time work

In the event that a part-time worker worked more hours than is provided for in his/her individual employment contract, he/she was only entitled to his/her standard hourly rate without eligibility for a wage increase. The new law 4635/31.10.2019 (Article 59) establishes a 12 per cent wage increase when a part-time worker performs overtime work.

1.2 Collective agreements

According to the currently applicable provisions, branch and occupational collective agreements are binding on all signatories and their members. Company-level agreements and local branch collective agreements may not lay down less advantageous terms than established in the relevant national branch collective agreements.

According to the new law 4635/2019, branch collective agreements will be able to exclude workers from their application, who are employed in certain categories of companies facing economic difficulties (Article 53). Company-level agreements will also be able to introduce less advantageous terms than those established in the relevant branch collective agreements (Article 55) under particular circumstances linked to the company's financial situation. Finally, local branch agreements will be able to lay down less advantageous terms than those stipulated in national branch collective agreements (Article 55).

1.3 Strike decisions

For a decision to strike to be legal, a secret ballot involving the general assembly of the trade union's members must have been taken. The new law (4635/2019) for the first time provides for electronic balloting (e-balloting) for decisions on industrial action (Article 54).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.



Hungary

Summary

(I) The Supreme Court has stated that an employee's conduct was not wrongful, if he/she does not choose the best solution in a sudden situation.

(II) The Hungarian provisions comply with an approach elaborated by the European Court on administrative fines, and do not restrict the right to free movement of services.

(III) Hungarian labour law also contains a similar contradiction on working time measures and reconciliation of work and family life as is the case in Spanish law.

(IV) There is no difference between fixed-term full-time and fixed-term part-time employment contracts in the Hungarian Labour Code.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Employee liability

Supreme Court, No. 25/2019

Factual part

The case dealt with the question whether the liability for damages can be shared by the employer and the employee. The employee suffered an accident when opening a grinding machine that was not properly functioning. The accident was a consequence of the poor condition of the machine and the recklessness of the employee.

Analytical part

According to Section 167(2) of the Labour Code, no liability of the employer shall apply to any damage resulting from the employee's wrongful conduct or damage that was incurred due to the employee's failure to carry out his/her obligations in relation to the mitigation of damage. According to the Supreme Court's ruling, the sharing of damages between the employer and the injured employee can be established in the judgment, if the damages resulted from the employee's wrongful conduct. However, the employee's conduct is not wrongful, if he/she does not choose the best solution in a sudden situation.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

The case dealt with the question whether the administrative fines and other related financial regulations are in line with the Posting of Workers Directive. The Court found that Article 56 of the Treaty excludes national measures that restrict the right to free movement of services. Penalties might be justified by public interest, but the measures



in the present case were excessive for achieving the stated aim. It was thus deemed that Article 56 precluded the sanctions, namely that the fine cannot be lower than a given statutory amount; that the sanction is issued for each individual employee affected; that the court fee is 20 per cent of the fine; and that in case of non-payment of the fine, to the sentence will be transformed into imprisonment.

Analytical part

The penalties for violations of Hungarian administrative rules, such as those in the above-mentioned case, are regulated in Act 75 of 1996 on Labour Inspection. Articles 3 and 7 of this Act contain the possibility of issuing a labour fine in case of violations of provisions on the posting of workers. At the same time, violations of the rules on authorising third-country nationals to work in Hungary may also be fined. The amount of the fine is minimum HUF 30 000 (approximately EUR 100) and maximum HUF 10 000 000 (approximately EUR 30 000). Lower amounts apply to smaller employers. The general rules on fines must be applied in such cases. Therefore, the Hungarian provisions comply with the approach elaborated by the European Court and do not restrict the right to free movement of services (Article 56 of the Treaty).

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

The Court stated that Directive 2010/18/EU must be interpreted as not applying to national legislation that provides for a worker's right to reduce his/her regular working hours, with a proportional reduction of his/her salary in order to take care of minors or dependents without the possibility of being offered a fixed working schedule if his/her usual work pattern is shift work, while at the same time maintaining his/her regular working hours.

Analytical part

The Hungarian Labour Code does not provide for such a worker's right to reduce his/her regular working hours with a proportional reduction in salary to take care of minors or dependents. The only exception is Article 61(3) of the Labour Code:

"(3) Employers shall amend the employment contract based on the employee's request to work part time for half of the daily working time until the child reaches the age of three."

Otherwise, the employer may freely determine the scheduling and distribution of working time (Article 96.1 of the Labour Code):

"(1) The rules relating to work schedules (working arrangements) shall be laid down by the employer."

Thus, Hungarian labour law—just like the Spanish legislation—also contains a similar contradiction regarding working time measures and reconciliation of work and family life.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

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The Court stated that Article 4.1 of the Framework Agreement on Part-time Work excludes rules such as the one dealt with in the main proceedings, which provides for a higher maximum amount of fixed-term contracts concluded for part-time work than for comparable full-time work, except when such a difference in treatment is objectively justified. Moreover, the pro rata temporis principle does not apply to this situation. This measure may also constitute indirect sex discrimination, if statistics indicate differences between the treatment of men and women.

Analytical part

The Hungarian Labour Code sets five years as the maximum for extended and successive fixed-term contracts. There is no difference between full-time and part-time contracts in this respect, thus, the Hungarian Labour Code complies with the findings in this judgment.

4 Other relevant information

Nothing to report.



Iceland

Summary

There were no new developments in labour law in October. The CJEU's judgments will have no implications on Icelandic legislation.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

This case does not have an impact on Icelandic legislation, since no comparable rule exists in Iceland.

3.2 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

This case has no implications for Icelandic legislation as no comparable rule exists in Iceland.

[Act No. 45/2007, on posted workers and obligations of foreign service providers](#) envisages fines if certain articles are violated. Article 15 a states, among other things, that the Directorate of Labour can impose daily fines up to ISK 1 million per day and in determining the fines, the institution shall, inter alia, take into account the number of workers and the scope of the employer's economic activity. The Directorate can also impose administrative fines as stipulated in Article 15 b of the Act. The fine can be up to ISK 5 million and in determining the amount of the fine, the institution shall, inter alia, assess the seriousness of the violation, how long the violation has been ongoing, whether the violation is repetitive, the offender's cooperativeness and finally, whether the violation was committed in the interest of the undertaking or of the self-employed person.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

This case will not have any implications on Icelandic legislation, as a comparable rule does not exist in Iceland.

[Act No. 139/2003, on fixed-term employment](#) and [Act No. 10/2004, on part-time workers](#), specify the rules on part-time work. Legislation does not differentiate between the length of the maximum amount of fixed-term employment contracts for full-time and part-time workers. Fixed-term employment may not exceed two consecutive years as stipulated in Art. 5(1) of Act No. 139/2003, unless otherwise stated in law.

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Furthermore, Article 4(1) of Act No. 10/2004 prohibits discrimination of employees who work part time. Finally, [Act. No. 86/2018, on equal treatment in the labour market](#) prohibits discrimination on the basis of, amongst others, sex (Article 1(1) of the Act) as stated in Article 7(1) of the Act.

4 Other relevant information

Nothing to report.



Ireland

Summary

(I) The Workplace Relations Commission has again ruled that a firefighter's on-call time is not working time.

(II) An analysis of CJEU rulings C-64/18 and others, C-366/18 and C-274/18 is provided.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Workplace Relations Commission, No. ADJ-00019895, 07 October 2019, Retained Firefighter v. Local Authority

In [A Retained Firefighter v. A Local Authority ADJ-00019895](#), a Workplace Relations Commission adjudication officer was considering complaints under the [Organisation of Working Time Act 1997](#) that the respondent local authority had not complied with its obligations as regards to his rest periods, breaks and weekly/night-work maximum hours under Sections 11, 12, 13, 14, 15, 16, 17, 20 and 21 of the Act.

The complainant was a retained firefighter who, when not attending a fire or other call-out or drill, was on-call for incidents; although he could declare himself unavailable to attend up to 30 per cent of alerts. He relied on the CJEU decision in case C-518/15, *Ville de Nivelles v. Matzak* to the effect that the entirety of his on-call time had to be considered 'working time'. The respondent accepted that, whilst on-call, their retained firefighters were not required to attend at the fire station, they had to be able to report for duty at the fire station within five minutes of receiving the alert. The respondent submitted, however, that *Matzak* could be distinguished on the basis that the firefighter in that case was required to spend his on-call time at the premises whereas the complainant in this case was free to engage in other employment or activities as long as he could respond within the stipulated time.

The adjudication officer accepted that it was the fact that the firefighter in *Matzak* could not choose the place he had to remain at during his on-call periods that provided the restraint that consequently led the CJEU to decide that such periods must be classified as 'working time'. Because the restrictive elements pertaining to the decision in *Matzak* could not be applied to the complainant as he was not required to remain at a physical place determined by the employer for the on-call period, the adjudication officer found all of his complaints to be unfounded.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Failure to keep, maintain and retain records and documentation required by legislation such as the Organisation of Working Time Act 1997, the [National Minimum Wage Act](#)

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[2000](#) and the [Employment Permits Act 2006](#) is a criminal offence in Ireland, punishable by a fine varying between EUR 2 500 and EUR 5 000 depending on the statute.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In Ireland, there is no right to adapt one's hours of work and/or one's work schedule to take care of children or dependent family members. Section 15A of the Parental Leave Act 1998 (as inserted by reg. 6 of the [European Union \(Parental Leave\) Regulations 2013](#) (S.I. No. 81 of 2013)) merely provides that an employee on parental leave may request changes to his/her working hours or patterns for a set period of time following his/her return to work. Although employers must consider any such request, they are not required to grant it nor are employers required to provide a reason for its refusal.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

This decision has no relevance for Ireland as the relevant legislation – the [Protection of Employees \(Fixed-Term Work\) Act 2003](#) – does not set a longer fixed-term employment term for part-time employees.

4 Other relevant information

Nothing to report.



Italy

Summary

(I) On 31 October 2019, the Italian Parliament ratified Decree Law 03 September 2019, No. 101, introducing urgent measures on work protection. The Act has not yet been published in the Italian Official Journal. Therefore, the numbering of the Act is still unknown. The most relevant provisions are presented here. Further details and some background information will be provided in the November Flash Report.

(II) Comments on CJEU decisions *Maksimovic and Others*, *Ortiz Mesonero* and *Schuch-Ghannadan* are also presented in this report.

1 National Legislation

1.1 Work protection

On 31 October 2019, the Italian Parliament ratified Decree Law 03 September 2019, No. 101, introducing urgent measures on work protection. The Act has not yet been published in the Italian Official Journal. The numbering of the Act is, however, still unknown.

The new Act modifies Article 2(1) Legislative Decree 15 June 2015, No. 81, which defines and regulates the collaborations organised by the client. The provisions on subordinate work also apply to collaborations in which work is primarily performed personally for a certain period of time (continuously) and organised by the client. This also applies to how the work is being performed and whether it is organised through platforms, including digital platforms.

The new Act adds Article 2-*bis* of Legislative Decree provides for an extension of the daily sickness and hospitalisation grant as well as pregnancy and parental leave to coordinated autonomous workers insured by the relevant INPS scheme, who have contributed to the scheme for at least one month within the 12 preceding months.

The new Act regulates certain aspects of goods delivery in urban areas organised through platforms, including digital platforms. It also covers so-called riders, providing for minimum standards of protection.

Such work contracts shall be made in writing *ad probationem*; collective agreements may provide for wage setting criteria without prejudice to the prohibition of piecework; work at night, on weekends and bank holidays or under adverse weather conditions shall be remunerated with an additional bonus. Antidiscrimination law and personal data protection shall apply to those workers. They shall be insured against work accidents and occupational diseases. The client platform shall respect health and safety provisions.

An Observatory monitoring the application of these new provisions will be established at the Ministry of Labour and Social Affairs.

The provisions on platform work, including digital platforms, will enter into force after 12 months from their publication in the Italian Official Journal.

2 Court Rulings

Nothing to report.



3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

The questions referred to the CJEU related to fines exceeding EUR 13 million in total (and increased by 20 per cent), imposed by the Austrian legislation, for failure to comply with obligations in connection with the posting of workers, notably its compatibility with Article 56 TFEU (freedom to provide services), Directive 96/71/EC, Directive 2014/67/EU, and/or with the Charter of Fundamental Rights of the European Union.

In case of non-payment of the fines, the penalty shall be converted into 1 600 to 1 736 days imprisonment.

Ruling out the relevance of the Posting of Workers Directive, Directive 2014/67/EU, and Directive 2006/123/EC, the CJEU examined the provisions of Austrian law in the light of Article 56 TFEU.

The Court found that the provisions establishing the fines vary depending on the number of workers affected do not seem to be disproportionate, in principle.

According to the Court, Article 56 TFEU must be interpreted as precluding national legislation from providing for fines in the event of non-compliance with the requirements on administrative authorisations and the maintenance of salary documents:

- that cannot be less than a predefined amount
- that are imposed cumulatively for each worker affected and with no upper limit
- supplemented by a contribution to the costs of proceedings of up to 20 per cent (in the event of rejection of the appeal against the decision imposing such fines), and
- that are converted into several years' imprisonment, in case of non-payment

According to Italian legislation (Article 12 of Legislative Decree 17 July 2016 No. 136), the violation of the duty to maintain documents is punished with an administrative sanction from EUR 500 up to EUR 3 000 for every affected worker. The fine may not exceed a maximum of EUR 150 000.

Italian legislation thus does not comply with the first condition of the Court decision (the fine cannot be less than a predefined amount). On the other hand, administrative and criminal law determine the range within which the court can decide the fine.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

According to the Court, Directive 2010/18/EU on parental leave must be interpreted as not applying to national legislation which provides for a worker's right to reduce his/her regular working hours to take care of minors or dependents, with a proportional reduction of his/her salary, without being able, to benefit from a fixed working schedule while maintaining his ordinary hours of work when his/her usual work pattern is shift work with a variable schedule.

This is a judgment that only relates to EU law in the sense that, according to the CJEU, the substance of the case does not fall within the scope of EU law.

Under the new Directive 2019/1158/EU on work-life balance for parents and carers, repealing Council Directive 2010/18/EU, reference can be made to Article 5(6), according to which:



"Member States shall take the necessary measures to ensure that workers have the right to request that they take parental leave in flexible ways. Member States may specify the modalities of application thereof. The employer shall consider and respond to such requests, taking into account the needs of both the employer and the worker. The employer shall provide reasons for any refusal to accede to such a request in writing within a reasonable period after the request."

Hence, according to Article 5(6), Member States may specify the modalities of application of the necessary measures to ensure that workers have the right to request taking parental leave in flexible ways.

For now, Italian legislation on parental leave does not regulate such cases, allowing workers to take leave in a very flexible way, even down to the hour (Article 32 Legislative Decree No. 151 of 2001).

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

According to the Court, the possibility of providing for a longer overall duration of fixed-term relationships in case of part-time workers in comparison with comparable full-time workers is against the equal treatment principle between part-time and full-time workers as laid down in Directive 97/81/EC, as well as the prohibition of indirect discrimination on the ground of sex in accordance with Directive 2006/54/EC in case it is proven that the part-time workers are mostly women.

Italian legislation does not allow for any differences between part-time and full-time workers as far as the overall maximum duration of fixed-term employment relationships is concerned.

4 Other relevant information

Nothing to report.



Latvia

Summary

(I) New amendments to the Labour Protection Law will introduce legal regulations on health and safety measures for home workers.

(II) The decisions of the CJEU in cases C-274/18, C-64/18 and C-366/18 are analysed.

1 National Legislation

1.1 Health and safety regulation for domestic workers

On 03 October 2019, Parliament adopted amendments to the Labour Protection Law – the principal law regulating the health and safety of workers (*‘Grozījumi Darba aizsardzības likumā’*, Official Gazette No. 212, 18 October 2019, available in Latvian [here](#)). The amendments provide legal regulation on health and safety measures for home workers. These legal regulations have been well received as an increasing number of employers, including the public sector, have introduced the option of working from home on certain days of the week or under certain circumstances. The regulations seek to bolster the balance between the employer’s duty to ensure the health and safety of workers who work from home and the protection of privacy. The new amendments will enter into force on 01 July 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

The CJEU decision in CJEU case, C-274/18, 03 October 2019, Schuch-Ghannadan, does not have any implications for Latvian law. First, there is no relevant national legal regulation distinguishing between full-time and part-time employees with regard to their entitlement to convert their contract into one of indefinite duration. Secondly, Latvian labour law does not apply the *pro rata temporis* principle to part-time employees. Thirdly, the CJEU in case C-385/17, 13 December 2018, Hein—just like in the present case—already discussed the temporal effects of the interpretation of EU law. The Senate of the Supreme Court took note of the CJEU’s findings in case C-385/17 and in the subsequent [decision](#) in case SKC-62/2019, adopted on 29 March 2019, ruled accordingly, i.e. the Senate took the new interpretation issued by the CJEU into account, namely that there should not be any temporal restriction.

3.2 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

The CJEU’s decision in the joined cases has no implications for Latvian law. The fines applicable in situations like those dealt with in the present cases are the same for all breaches of obligations under Latvian labour law. Administrative sanctions are stipulated in Article 41 of the [Administrative Violations Code](#) (*‘Latvijas administratīvo pārkāpumu kodekss’*, Official Gazette No. 51, 20 December 1984). Article 41(1) provides that in



case of established non-compliance with labour law regulations (by the State Labour Inspectorate), a warning or fine shall be imposed. If the employer is a natural person, the fine shall range from EUR 35 to EUR 350; if the employer is a legal person, the fine shall range from EUR 70 to EUR 1 100. If the same administrative violation is committed by the employer within a year from the initial breach, the fine to be imposed on an employer who is a natural person shall range from EUR 350 to EUR 700, and from EUR 1 100 to EUR 2 900 on an employer who is a legal person. There is currently no system in place envisaging the payment of an administrative fine for each employee affected. The fine is imposed on a 'case basis'. There is also no criminal liability for breaching the rules on the posting of workers.

It follows that administrative fines under Latvian law for the violation of labour laws are proportionate. Their amount may vary depending on the gravity of the violation.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

The decision of the CJEU has no direct implications for Latvian labour law. The decision reaffirms that under Clause 6(1) of the Framework Agreement (Directive 2010/18/EC), the Member States and/or social partners must provide the right to a person who returns from parental leave to request changes in his/her working hours and/or patterns.

Latvian [Labour Law](#) (*Darba likums*, Official Gazette No.105, 06 July 2001) provides for the right to reduce working hours (switching from full-time to part-time employment until the child reaches the age of 14 or in case of a disabled child, until he/she reaches the age of 18 [see Article 134(2)]), and the right to change his/her working time patterns (an employee who has a child below the age of 3 years may only be employed in night work with his/her consent [see Article 138 (7)]). Therefore, Latvian law complies with the obligations under Clause 6(1) of the Framework Agreement (Directive 2010/18/EC)

4 Other relevant information

Nothing to report.



Liechtenstein

Summary

This report deals with three judgments of the Court of Justice of the European Union, namely C-64/18 and others; C-366/18 and C-274/18

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

In case C-64/18, C-140/18, C-146/18 and C-148/18, the CJEU (Sixth Chamber) ruled as follows:

“Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, in the event of failure to comply with obligations under labour law relating to the obtaining of administrative authorisations and the keeping available of payroll documents, for the imposition of fines

- not less than an amount fixed in advance,*
- imposed cumulatively and without restriction for each worker concerned,*
- to which must be added procedural costs of 20% of the penalty imposed in the event of the rejection of a complaint lodged against the decision imposing the penalty,*
- which, in the event of uncollectibility, are commuted to a custodial sentence as a substitute.”*

This regulation according to the CJEU is considered disproportionate.

The case concerns Austrian law.

Article 9 of the [Liechtenstein Posting of Workers Act](#) (*‘Gesetz über die Entsendung von Arbeitnehmern, Entsendegesetz’*, LR 823.21) also provides for fines, which may not be less than a certain minimum amount and which must be applied cumulatively for each worker affected. However, in case of minor violations, a simple warning can be issued or a time limit set for the fulfilment of the statutory duty before the penalty is imposed. The procedural costs are calculated as a percentage of the imposed fines, but only a maximum, not a minimum limit is envisaged in the law. Finally, the fines cannot be commuted into a custodial sentence as a substitute in the event of uncollectibility. Liechtenstein law is therefore not disproportionate *a priori*. However, it cannot be completely ruled out that a disproportionate result could arise in an individual case. A general assessment in advance is not possible.

Article 35 of the [Act on Employment Service and Temporary Agency Work](#) (*‘Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsgesetz’*, AVG, LR

Kommentiert [FF1]: I decided to keep the citation as the expert refers to it.



823.10) also provides for penalties. However, only maximum and no minimum penalties are laid down; furthermore, it is possible to dispense with penalties in case of minor breaches; finally, no penalties are imposed cumulatively for each worker affected. Therefore, this regulation is proportionate in accordance with the ruling of the CJEU.

The penalties provided for in Article 83 et seq. of the [Foreigners Act](#) (*'Gesetz über die Ausländer, Ausländergesetz'*, AuG, LR 152.20) are also not imposed cumulatively for each worker affected and are therefore unproblematic with regard to the CJEU ruling.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

The case concerns Spanish law. Under the first subparagraph of Article 37(6) of the Spanish Workers' Statute, any person who, for reasons of legal custody, is taking care of a child that is under the age of 12 years or of a person with a disability who does not carry out a gainful activity, is entitled to a reduction of his/her working hours, with a proportionate reduction in salary of a minimum of one-eighth and a maximum of one-half of the duration of those hours.

In the present case, the worker whose usual work pattern was shift work with variable hours, requested for an adjustment of his work schedule to have fixed working hours. It was not apparent, however, that he was in a situation of returning from parental leave within the meaning of Clause 6(1) of the Framework Agreement on Parental Leave. In those circumstances, neither Directive 2010/18 nor the Framework Agreement contain any provision that requires Member States to grant the applicant the right to work on the basis of a fixed schedule in the context of a request for parental leave, when his/her usual work pattern entails shift work with variable hours (C-366/18 no. 47–48).

Liechtenstein law cannot contravene the CJEU ruling. The law in Liechtenstein does not contain a corresponding provision such as that in the Spanish law, which was decisive in the main proceedings before the CJEU.

The Liechtenstein [Civil Code](#) (*'Allgemeines bürgerliches Gesetzbuch'*, LR 210) contains a provision that is only distantly connected with the present case. The provision, laid down in Section 1173a Article 29(5) of the Civil Code states: in the event of illness or accident of family members living in the same household, the employee shall be granted up to three days of leave per case upon presenting a medical certificate, provided that the immediate presence of the employee is urgently required and care cannot be organised elsewhere.

Furthermore, Section 1173a Article 34c(2) of the Civil Code provides: after parental leave, the employee may request a change to his/her working hours for a period to be determined by the employer in agreement with the employee. When examining and responding to such a request, the employer must also take the employee's legitimate interests into account. However, this provision is not affected by the CJEU ruling either, since the worker in the main proceedings was not in a situation of returning from parental leave.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

The case concerns Austrian law. Under Section 109(2) of the University Act, multiple, directly successive limitations of the duration of contracts is permissible for employees, who are employed within the framework of third party-funded projects or research projects, and for staff exclusively employed in teaching. The total duration of such directly successive employment relationships may not exceed six years in total, and in



the case of part-time employees, for a total of eight years. A one-time extension up to a total of ten years is possible for full-time employees under a fixed-term contract, and in the case of part-time employees, the total duration may be extended up to a total of 12 years, if objectively justified, in particular to continue or complete ongoing research projects and publications.

According to Liechtenstein law, the [Act on the University of Liechtenstein](#) must be observed (*'Gesetz über die Universität Liechtenstein'*, LUG, LR 414.2). According to Article 21(2) of this Act, the University Council shall issue a service and salary regulation.

Based on this provision, the University Council adopted the [Service and Salary Regulation for the University of Liechtenstein](#). The relevant provisions are as follows: as a rule, employment relationships at the university that do not involve scientific posts are concluded for an indefinite period (Article 7 of the Regulation). A fixed-term employment relationship is, in principle, concluded for a period of three years. In justified cases, the employer may extend the fixed-term employment contract by a maximum of two additional years. After the expiry of the maximum time limit, the employment relationship may, in exceptional cases, be converted into a permanent employment relationship (Article 8 of the Regulation). The employment relationship can be concluded for full-time or part-time employment (Article 9 (1) of the Regulation). Employees whose employment is financed by third party funds are subject to the same provisions as all other employees. The following exception must be noted: the duration of the post's financing must be taken into account in the employment contract; the employment relationship ends when the funding expires, whereby the statutory notice periods must be observed (Article 10 of the Regulation). Assistant professors are generally limited to three years; extensions for a maximum of two years are possible (Article 81 (4) of the Regulation).

It follows from these provisions that the duration of the time limit does not depend on whether the employment relationship is a fixed-term or an open-ended one. None of these provisions is comparable with the relevant provision in Austrian law dealt with in the Court's main proceedings. The aforementioned provisions in Liechtenstein law thus do not violate the CJEU ruling.

4 Other relevant information

Nothing to report.



Lithuania

Summary

This report offers an analysis of three judgments of the Court of Justice of the European Union, namely C-64/18 and others; C-366/18 and C-274/18

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

There is no analogous rule in Lithuanian legal system. In accordance with Labour Code, the employee who is willing to reduce a working time on family related purpose would be seen as an employee who is willing to initiate a part-time work (Article 40 of the Labour code). The part-time work means the reduction of working time together with the reduction of salary. Employee who is willing to enter into family related part-time will receive to right to change the number of working hours but not the work pattern, i.e. the work regime will remain the same.

3.2 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In Lithuania there is no difference in employment conditions and, consequently, in possibilities to conclude the fixed-term agreement depending on the fact that employee is employed part-time or full-time. The professors at the universities are employed for the period of up to 2 years, and the number of hours does not have an impact on the term of the agreement.

3.3 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

In Lithuania, there are no rules on similar fines for the breach of the transposing legislation. The Code of the Administrative Offences stipulates the sanctions for the breach of the legal provisions with regard to posted workers:

- The failure to provide information to the Territorial Division of the State Labor Inspectorate on the Terms and Conditions imposes a fine of between EUR 120 and EUR 220 on employers. The repeated administrative offense imposes the fine of EUR 240 – EUR 440.
- The failure to provide the minimum standard employment conditions for posted workers imposes a fine of EUR 140 – EUR 300. The repeated administrative offense imposes the fine of EUR 300 – EUR 560.

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4 Other relevant information

Nothing to report.



Luxembourg

Summary

(I) A new bill implements minor changes to family leave granted in case of sickness of a child.

(II) The decisions of the CJEU in cases C-274/18, C-64/18 and C-366/18 are analysed.

1 National Legislation

1.1 New bill on family leave

A new bill implements some minor changes to the special 'family leave' ('*congé pour raisons familiales*') in case of sickness of the employee's child, an issue that has been subject to an important amendment in 2018 (Law of 15 December 2017; see also February 2018 Flash Report). According to this law, such leave was only granted for children aged between 13 and 18 if they were hospitalised; furthermore, both parents were not entitled to benefit from this leave at the same time. Practice showed that these restrictions led to some unfair situations. According to the bill, the requirement of hospitalisation and of separate leave for both parents should not apply, either, if the child is disabled or if it is suffering from a serious disease.

Reference : Projet de loi n° 7489 portant modification des articles L. 234-51, L. 234-52, L-551-2, L. 551-5 et L. 552-1 du Code du Travail

2 Court Rulings

2.1 Reassignment of employees

CSJ, n° CAL-2018-00660, 04 October 2019

In the present case, an employee worked as a 'media designer' for different periodicals and was moved to work for a television magazine. The employee argued that he was subject to an unjustified modification of his employment contract. As he had been elected as an employees' delegate, he had the possibility to use a special accelerated procedure to be reinstated in his previous position. The Court noted that the employment contract contained a flexibility clause, allowing the employer to reassign the employee to other tasks. Furthermore, the judges considered that the employer had extensive freedom to organise the undertaking's work and to take economic decisions, a power which is only limited in case of abuse of rights.

Even if a television magazine might be less interesting and gratifying, the nature of the employee's task had not changed. There was thus no substantial and unfavourable change in the employee's employment conditions, and the employee's claim was therefore rejected.

2.2 Private use of internet connection

CSJ, n° CAL-2018-00369, 11 July 2019

In the context of private life at the workplace, there are some court decisions in Luxembourg that state that employers must, to a reasonable extent, tolerate the private use of internet and phone connections. In the present case, however, it was proven that the employee visited pornographic websites at work several times. The Court considered that this misconduct was sufficiently serious to justify a dismissal with notice. The



employer's claim for reimbursement of expert fees paid to establish that the employee had visited the alleged websites was rejected.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

This decision does not seem to be of relevance for Luxembourg.

As far as posting of workers is concerned, Article L. 143-2 of the Labour Code entitles the labour inspectorate to impose administrative fines ranging from EUR 1 000 to EUR 5 000 per employee. The total amount of the fines may not exceed EUR 50 000. Thus, there is no risk that high fines amounting to millions of euros could be imposed. The amounts of administrative fines do not appear to be disproportionate in Luxembourg and the range of possible fines seems to be sufficiently flexible to adapt the fine to the seriousness of the breach.

The same applies to sanctions in general labour law. Labour inspectors can impose various types of administrative fines, ranging from EUR 25 to EUR 25 000 (Article L. 614-13 of the Labour Code). Many provisions of the Labour Code furthermore provide for criminal sanctions, including fines from EUR 5 000, EUR 10 000, EUR 15 000 and EUR 20 000, and exceptionally EUR 50 000 (Article L. 232-13, work on public holidays) or even EUR 125 000 (L. 261-2, data protection at work). In some cases, imprisonment is also envisaged. The fine can be converted into a sentence of imprisonment in case of non-payment of the fine (Article 30 of the Criminal Code, 1 day per EUR 100), whereas it can be doubled for legal persons (Article 36 of the Criminal Code). The minimum amount of the fine, depending on the individual case, may range from EUR 251 to EUR 500. Furthermore, according to the general rules on the accumulation of offences, the fact that multiple employees are involved only allows a doubling of the fine; criminal fines are not simply added up for each employee affected. Thus, there is no risk that fines will sum up to millions of euros, and—as the minimum fine is low—it is always possible to adapt the sanction to the seriousness of the breach.

There is no fixed rate of contribution to the costs of proceedings.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

This case does not seem to have any implications for Luxembourg. The decision only issues a negative statement, i.e. that the European directive is not applicable because the worker was not returning from parental leave.

Luxembourg's law complies with the Directive's requirement that workers, when returning from parental leave, may request changes to their working hours and/or pattern of work for a set period of time (Clause 6). Indeed, Article L. 234-57 (11) of the Labour Code states that an employee who returns from parental leave is entitled to a meeting with the employer to discuss an arrangement concerning working time or working pace during a limited period of no more than one year. The employer is required to take the employee's request into consideration and to provide an answer that takes both the undertaking's and the employee's needs into consideration. Any negative answer must be specially motivated. The employee is entitled to damages if the employer fails to comply with this provision.

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3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

This decision has no implications for Luxembourg, as no differentiation is made between full-time and part-time contracts concerning the maximum duration of fixed-term contracts.

4 Other relevant information

Nothing to report.



Malta

Summary

(I) The decisions of the CJEU in cases C-274/18, C-64/18 and C-366/18 are analysed.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Maltese law ([Posting of Workers in Malta Regulations SL 452.82](#)) in this regard makes it very clear that:

- Fines imposed in Malta are stipulated in Article 12 of the Posting of Workers in Malta Regulations. This Article specifies the minimum and maximum fines that may be imposed.
- The fines imposed are not cumulative and do not include each worker affected, though different offences will lead to separate charges and the possibility of separate fines.
- There is no such requirement under Maltese law – and since the proceedings were also of a criminal nature, there are (generally speaking) no legal expenses that are payable by the employer (and neither by the aggrieved employee); and
- Under Maltese law, all multa convert into imprisonment if not paid on time.

These provisions regulate the breach by a Maltese employer of the provisions of these Regulations.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

There is no Maltese law that provides the right of a worker to request modification of his/her work schedule (from shift work to a fixed work schedule); he/she must accept a reduction in salary if the number of hours worked remains the same. However, since shift workers may, in accordance with either the applicable Wage Regulations (For instance, [Electronics Industry Wages Council Wage Regulation Order S.L. 452.46](#)) or their individual agreement, be granted an allowance or premium simply for working on a shift cycle. Allowances are not defined as being part of the employee's 'wages' (Chapter 452, Article 2(1) of the Employment and Industrial Relations Act, 2002 defines 'wages' as "remuneration or earnings, payable by an employer to an employee and includes any bonus payable under article 23 other than any bonus or allowance related to performance or production"), hence the implication of this judgment on Maltese law is that whilst 'wages' cannot be modified for workers who change from shift work to a

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fixed work schedule, the reality is that the worker's wages will be reduced if he/she loses the allowance he/she earns for working on a shift cycle.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

There is no Maltese law that differentiates between part-time and full-time workers in relation to the maximum duration of their fixed-term contracts. Both full-time and part-time workers cannot be employed under a fixed-term contract for a period that exceeds four years in total ([Contracts of Service for a Fixed-term Regulations, 2007 \(SL 452.81\)](#)).

This ruling has no implications for Maltese law, given that no such law exists in Malta, i.e. no differentiation is made between full-time and part-time employees.

4 Other relevant information

Nothing to report.



Netherlands

Summary

The Dutch penalty system on notification of foreign workers posted in the Netherlands might be considered disproportionate in some aspects based on the CJEU ruling of 12 September 2019, case C-64/18 (*Maksimovic*).

1 National Legislation

1.1 Fixed tariffs for independent contractors

The July Flash Report reported on the announcement of the Dutch government to introduce fixed tariffs for the lower end of the labour market and the possibility of the higher end of the labour market to opt out. On 28 October 2019, the Ministry of Social Affairs and Employment opened an internet consultation on a draft legislative proposal. The draft legislative proposal will be up for consultation until 09 December 2019 and after the consultation phase closes, the legislative process will begin.

More information on the legislative process is available [here](#).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

In the present case, the CJEU ruled on Austrian legislation which allows universities to conclude several successive temporary contracts with specific employees. The Austrian law differentiates between part-time and full-time employees, i.e. the maximum duration of successive fixed-term contracts for part-time employees may exceed the total duration of fixed-term employment of full-time employees by two years. The CJEU ruled that Directive 1999/70/EC precludes national legislation that differentiates between part-time and full-time employees without objective justification. The principle of pro rata temporis is not applicable, because the clause applies to all part-time employees and this does not meet the requirements of the principle of proportionality.

Analytical part

There are no implications nor any need to amend national law. The Dutch implementation of Directive 1999/70/EC entails a stipulation that consecutive fixed-term employment contracts shall be converted into employment contracts of indefinite duration if the contracts exceed a period of 24 months or if more than three consecutive contracts are concluded ([Article 7:668a Civil Code](#)). There is no distinction between part-time and full-time employees in the Netherlands. Dutch law furthermore prohibits discrimination based on working hours or based on temporary contracts ([Article 7:648](#) and [7:649 Civil Code](#)).

The ruling has thus far not garnered any attention in academic literature, nor in public debate.



3.2 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

In the present case, the CJEU ruled that the sanctions imposed by Austrian law on employers who breach certain administrative obligations with respect to posted workers constitute an infringement of the free movement of services as laid down in Article 56 TFEU.

The CJEU, referring to earlier rulings, first established that control measures do not fall within the scope of Directive 96/71/EC. Furthermore, it stated that Directive 2014/67/EU is not applicable given the temporal scope of that directive. Since the sanctions in this case aimed to enforce compliance with labour law, Directive 2006/123/EC is not relevant in this case, either, as established by the CJEU based on its previous decisions. The Austrian sanctions are thus assessed in view of Article 56 TFEU only.

In terms of substance, the CJEU concluded that Article 56 TFEU precludes national legislation that, in the event of non-compliance with the administrative obligations related to permits and the keeping of wage details, imposes penalties on the employer involved if the system of penalties:

- does not allow for a lower fine than a prescribed minimum;
- allows imposition of cumulative penalties for each employee involved, without an absolute statutory cap;
- includes a provision to increase the penalty by 20 per cent of the amount of the penalty as a contribution to the legal costs, in the event that the appeal against the penalty is rejected;
- includes a provision that, in the event of non-payment of the fine, a sentence of imprisonment can be imposed as a substitute.

The CJEU referred to its decision of 13 November 2018, C-33/17 (*Cepelnik*), in which it concluded that national measures that restrict or make the exercise of the fundamental freedoms guaranteed by the EU Treaty less attractive, may be justified if they serve overriding reasons in the public interest, are appropriate for attaining their objective and do not exceed what is necessary to attain that objective. The Austrian sanction system is not in compliance with the last criterion: the sanctions are considered disproportionate.

Analytical part

This ruling relates to two sanctioning mechanisms in Dutch law that might not be able to stand the proportionality test as applied by the CJEU in this ruling.

1. Foreign Nationals Employment Act (hereinafter FNEA)

Article 2a FNEA imposes an obligation to notify UWV (Employee Insurance Agency) at the latest two days before the commencement of the activities to be carried out by third-country nationals within the scope of cross-border service provisions. Non-compliance results in a fine of EUR 1 500 per employee involved. Cumulating fines per employee are unlimited, although there is no statutory minimum. According to the Policy Rules for Fines under the FNEA, a mitigation of fines is possible, but not in case of non-compliance with Article 2a FNEA. Case law is divided on the question whether this element is disproportional. Detention as a substitute penalty is not included in this sanction mechanism, nor is a contribution in legal costs calculated as a percentage of the penalty.



The sanction system, however, does provide for an increase of the fine by 100 per cent or 200 per cent in case of recidivism.

2. Terms of Employment Posted Workers in the EU Act (implementation of Directive 96/71/EC).

Articles 8 and 12 (2) sub b of this Act transpose Directive 2014/67/EU but have not entered into force yet. The provision imposes a duty to notify of any cross-border service provisions involving EU citizens. The obligation to notify applies to the service provider, the recipient of the service and the independent contractor. The penalty is EUR 12 000 per posted worker in case of violation, mitigation is possible, if necessary, to relate the amount of the fine to the gravity of the offence. For instance, mitigation is suggested if only few of the required documents are missing. Detention as a substitute penalty is not allowed.

It is noteworthy that this penalty for administrative offences exceeds the penalty for underpayment.

Some aspects of the applicable penalty schemes for administrative offences might be considered disproportionate. The CJEU, however, considers the combination of the elements of the Austrian system disproportional and the Dutch system does not feature all elements that were under scrutiny in this case.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

In this Spanish case, the employee worked rotating shifts. He requested to work exclusively in the mornings from Monday to Friday, maintaining the same number of working hours and without a reduction in pay, so he could take care of his children. The referring court asked whether Directive 2010/18/EU (parental leave) precludes national legislation which provides for a worker's right to take care of minors or dependent family members, to reduce his/her regular working hours with a proportional reduction in salary, without being able to benefit from a fixed working schedule when his/her regular work pattern is shift work with a variable schedule, while maintaining his/her regular working hours.

The CJEU asserts that Directive 2010/18/EU (or more precisely, the framework agreement) only contains one provision that relates to the right to adjustment of the working schedule: Clause 6 (1) instructs Member States or social partners to take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or work pattern for a set period of time. In this particular case, there were no indications that the employee was in a situation of returning from parental leave within the meaning of Clause 6 (1) of the Framework Agreement. Neither Directive 2010/18/EU nor the Framework Agreement contain a provision that imposes on Member States to acknowledge the right of an employee to work based on a fixed working schedule when he/she normally works based on a variable shift schedule. From the CJEU's consistent case law it follows that where a legal situation does not fall within the scope of EU law, the court has no jurisdiction to rule on it. The CJEU decided that Directive 2010/18/EU was not applicable to the Spanish legislation at issue.

Analytical part

This ruling has not likely implications. Every Dutch employee (parent or not) is entitled to an adjustment of his/her working hour schedule, unless it is contrary to the

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employer's interest ([Clause 2 \(7\) Flexible Work Act](#) and [Clause 4:1a Act on Working Time](#)).

4 Other relevant information

Nothing to report.



Norway

Summary

(I) The Supreme Court has published a ruling on the selection criteria and selection pool in case of downsizing.

(II) A welfare scandal has stunned Norway.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancies

Supreme Court, No. HR-2019-1986-A, 29 October 2019

On 29 October 2019, the Supreme Court [ruled](#) in a case concerning the application of selection criteria in a situation of downsizing (HR-2019-1986-A). The majority of Norwegian collective agreements contain a provision stating that in redundancy processes, the length of service may be deviated from if there is reasonable cause to do so. The application of the length of service principle has been addressed by the Supreme Court in a number of recent rulings, among others, HR-2019-424-A (see also March 2019 Flash Report). In the October ruling, an employee with 32 years of service in the company had been terminated. In the redundancy process, the employer had followed its year-long practice of limiting the selection pool by division and geography. The selection pool thus consisted of 11 employees.

The employee argued that by limiting the selection pool in this way, the length of service principle was effectively set aside, and that the termination was therefore invalid. The Supreme Court agreed with this view, emphasising the Labour Court's understanding of the principle and its application. Specifically, the Supreme Court stated the following (unofficial translation):

"Even if a division is a reasonable and natural criterion of limitation in general, it cannot be ruled out that this criterion must be deviated from after a concrete assessment [...]."

In my view, this was a situation in which the employer should, in its assessment of whether there was warranted cause for termination, have taken into account which or how many employees were part of the selection pool. The disadvantages that this approach would inflict on Telenor Norge does not, in my view, exceed what could reasonably be demanded from a company of Telenor Norge's size and resources.[...]

From a general assessment of the number of employees and the composition of the positions that are included in the selection pool, the principle of length of service must, in my view, be said to be considerably weakened".

3 Implications of CJEU rulings and ECHR

Nothing to report.



4 Other relevant information

4.1 Welfare scandal

A huge welfare scandal has stunned Norway in recent weeks. A high number of citizens have been incarcerated and/or sentenced to pay large amounts of money for travelling to and staying outside of Norway (but within the EEA) while receiving benefits from the National Insurance system. The Ministry of Labour and Social Affairs has ordered an external inquiry into the matter, but it already appears to be clear that one root cause for this is the fact that the National Labour and Welfare Administration (NAV) has misinterpreted the relevant EU legislation, and that the police, lawyers and courts have failed to notice the glitch while the cases moved through the criminal justice system.



Poland

Summary

(I) National sanctions for violations of provisions on posting of workers do not constitute unjustified restrictions for the posting of workers (case C-64/18).

(II) The rulings in cases C- 274/18 (part-time employment) and C-366/18 (parental leave) do not imply a need to amend national legislation.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

In Poland, Directives 96/71/EC and 2014/67/EU have been transposed by the [Law of 10 June 2016 on the posting of workers in the framework of the provision of services](#) (consolidated text Journal of Laws 2018, item 2206).

Article 27(1) of the above-mentioned Law provides that an employer who posts workers to Poland, or any person acting on his/her behalf:

- fails to indicate a contact person;
- fails to register with the State Labour Inspectorate (hereinafter: SLI) and submit a statement on the posting of workers to Poland prior to the provision of service;
- fails to notify, within a proper time frame, of any changes concerning the posting;
- fails to store documents related to the posting in Poland within the posting period;
- fails to provide, upon SLI's request, the relevant documents and their translation, within the period of posting of workers in Poland;
- fails to provide, upon SLI's request, the relevant documents and their translation, within a period of two years after the posting has been completed.

shall be subject to a fine ranging between PLN 1 000 and PLN 30 000.

An employer who posts a worker to Poland or a person acting on his/her behalf is subject to the same fine, if SLI finds that a given worker cannot be considered a worker who has been legally posted to Poland (Article 27(2) of the Law). In addition, Article 28 of the Law provides that an employer or entrepreneur who posts a worker to Poland, or any person acting on their behalf, fails to provide information upon SLI's request, shall be subject to a fine between PLN 1 000 and PLN 30 000.



Thus, under Polish law, in case of infringement of the provisions on the posting of workers, a pecuniary fine will be imposed. It amounts to approximately EUR 250 – EUR 7 500. There are no further sanctions.

Analytical part

The above-mentioned provisions do not explicitly regulate whether it would be admissible to impose a fine for each individually posted worker (there is no reported case law of Polish courts on this issue). In the reporter's view, this option cannot be excluded, although it seems more probable that in case of violation of provisions on the posting of workers, a single 'universal' fine would be imposed.

It should be emphasised that the same type of sanctions (and the same limits of the fine's amount) are provided in the Labour Code (Article 281 and following) for violations of employee rights.

The fines for breaches of employee rights and violations of rights of posted workers are relatively low. It is doubtful whether they can effectively discourage employers from violating labour law provisions and formalities concerning the posting of workers, especially for large companies. In the present reporter's view, the sanctions provided by Polish law do not constitute an infringement of the freedom to provide services (Article 56 TFUE), as interpreted by the CJEU in case C-64/18.

3.2 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

Fixed-term and part-time employment contracts are regulated in the [Labour Code](#) of 24 June 1974 (consolidated text: Journal of Laws 2019, item 1040).

Protection against abuses of fixed-term employment contracts is provided in Article 25¹ LC. The Code states that the period of employment under a fixed-term contract(s) cannot exceed 33 months, and the total number of such contracts may not exceed three in total (Paragraph 1). If the parties agree on a longer period of work performance, it is deemed that the parties have concluded a successive fixed-term contract (Paragraph 2). When the period of employment exceeds 33 months or the number of employment contracts is higher than three, it is deemed that the employee is employed under a contract of indefinite duration (Paragraph 3).

The above-mentioned provision does not apply where (Article 25¹ Paragraph 4):

- an employee is employed under a fixed-term contract for the purpose of substituting another employee during his/her justified absence;
- for the purpose of completing occasional or seasonal work;
- for the purpose of performing work during a period of office;
- if the employer indicates objective reasons that justify fixed-term employment for temporary needs.

Article 29² LC refers to part-time employment. According to Paragraph 1, the conclusion of a contract for part-time employment cannot result in less favourable conditions in terms of work and pay, subject to the proportionality principle.

In other words, under Article 25¹ Paragraph 1 LC, after 33 months, a fixed-term employment contract converts ex lege into a contract of indefinite duration (subject to exceptions introduced by Article 25¹ Paragraph 4 LC). This provision does not refer to



part-time employment, i.e. both full-time and part-time workers are treated equally, as far as the conversion of their contracts into contracts of indefinite duration is concerned.

Analytical part

Under Polish law, seniority is calculated in the same way for both full-time and part-time workers. Consequently, the statutory regulations on the fight against abuse of fixed-term employment (Article 25¹ LC) concern both full-time and part-time workers. As far as the conversion of fixed-term contracts into open-ended ones is concerned, no extended seniority period for part-time workers is required.

In the reporter's view, it seems that the problem analysed in case C-274/18 would not arise in Poland. Consequently, there is no reason to introduce any amendments to the Labour Code.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

In Poland, parental leave is subject to the Labour Code of 24 June 1974 (Article 128^{1a} - 128^{1g}) (consolidated text: Journal of Laws 2019, item 1040).

Article 182^{1a} LC provides that after having taken maternity leave, an employee is entitled to parental leave that amounts to a period of up to 32 or 34 weeks, depending on the number of children delivered at one time.

Article 182^{1e} LC Paragraph 1 states that an employee may combine parental leave and work for the employer who may grant this leave on no more than a half-time basis. In such a situation, parental leave shall be granted for the remaining part of the amount of working time. Under Paragraph 2, part-time work shall be granted upon the employee's written request submitted no later than 21 days in advance of the commencement of half-time work (accompanied by relevant documents). The employer shall grant the employee's request, except where it is not possible due to work organisation reasons or the type of work performed by the employee. The employee shall be informed in writing about the reason for the refusal.

Polish law thus grants parental leave, as required by Directive 2010/18/EC, and the employee may also alternatively request a reduction of working time for that period (with an appropriate reduction of remuneration, supplemented by maternity benefits).

Analytical part

In Poland, an employee entitled to parental leave can also request a reduction of working time during that period in order to take care of a child. In principle, an employer is required to accept such a request, unless it is not possible due to operational reasons. At the same time, the above-mentioned Article 182^{1e} LC does not refer to the pattern of work performance. Therefore, the employer is obligated to reduce the amount of working time, but he/she is not required to grant the applicant the right to work fixed working hours when his/her usual work pattern is shift work with variable hours.

In the reporter's view, Polish law is compatible with Directive 2010/18/EU, as interpreted by the CJEU in case C-366/18. There is no need to modify the regulations that are currently in force.

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4 Other relevant information

Nothing to report.



Portugal

Summary

(I) Decree-law No. 166/2019, of 31 October, establishes the legal regime applicable to seafarers' professional activity.

(II) Analysis of the implications in Portugal of the recent CJEU rulings issued in cases C-64/18 and others, on fines for non-compliance with obligations related to posted workers; case C-366/18 on parental leave; case C-274/18 on part-time work.

1 National Legislation

1.1 Regime applicable to seafarers' professional activity

[Decree-law No. 166/2019, of 31 October](#), establishes the legal regime of seafarers' professional activity, which transposed Directive 2008/106/EC, of 19 November 2008, amended by Directive 2012/35/EU, of 21 November 2012, on the minimum level of training of seafarers, and Directive 2019/1159/EU, of 20 June 2019, which amended the said Directive 2008/106/EC, and repealed Directive 2005/45/EC, on the mutual recognition of seafarers' certificates issued by the Member States.

This Decree-law applies to seafarers serving on board of commercial, fishing, local-traffic, auxiliary, towing and investment vessels or offshore platforms flying the national flag. However, this regime does not apply to vessels registered with the International Shipping Registry in Madeira (MAR) as well as to Portuguese seafarers working on board of vessels with a foreign flag.

The regime foreseen in this Decree-law includes rules on the registration of seafarers, the requirements for the performance of their professional activity, their training and certification as well as the rules on conditions for the performance of activity on board.

This Decree-law will enter into force on 01 January 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

In cases C-64/18 and others, the Court of Justice of the European Union (CJEU) analysed whether:

- Article 56 of Treaty on the Functioning of the European Union (hereinafter TFEU),
- Directive 96/71/EC, concerning the posting of workers in the framework of the provision of services, and
- Directive 2014/67/EU, on the enforcement of Directive 96/71/EC,

must be interpreted as precluding a national provision, such as the Austrian legislation related to posted workers, according to which, in case of infringement of formal obligations related to administrative authorisations and payroll documentation storage, the national authorities may apply very high fines, in particular high minimum penalties,



which are imposed cumulatively in respect of each employee concerned and without any maximum limit.

In this case, the CJEU ruled that a national legislation that foresees fines whose amounts vary in accordance with the number of employees affected by the infraction of labour obligations is not disproportionate in itself. However, the combination of the principle of cumulative penalties with the non-existence of a maximum limit of the cumulative amount can result in disproportionately excessive administrative fines, taking into account the seriousness of the offences. According to the CJEU, the Austrian legislation at issue goes beyond what is necessary to ensure compliance with the labour obligations related to administrative authorisations and documentation storage and, therefore, contradicts the free movement of services envisaged in Article 56 TFEU.

According to Portuguese labour law, a fine corresponds to each degree of seriousness of the labour law infraction (minor, serious and very serious infractions), the amount of which varies between a minimum and a maximum limit in accordance with the company's annual turnover and the degree of culpability ([Portuguese Labour Code](#), Article 554).

It should be noted that under Portuguese law, when the infringement of law affects several employees individually, the number of infractions shall correspond to the number of employees specifically affected (Portuguese Labour Code, Article 558/1). However, multiple equal individual infractions give rise to a single proceeding and are sanctioned with a single fine, which cannot exceed twice the maximum fine applicable to such infractions (Portuguese Labour Code, Article 558/3).

As a result, Portuguese legislation on the applicable penalties in case of infraction of labour obligations seems to respect the principle of free movement of services established in European law, namely in Article 56 TFEU, taking into account that a maximum limit to the applicable fine is imposed in case of multiple infractions resulting from the infringement of the same rule, which affects several employees.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In case C-366/18, the CJEU analysed rules contained in the '*Estatuto de los Trabajadores*' which envisages the right of employees to reduce their working time to reconcile family and professional life, with a proportionate reduction in salary. Such legislation does not provide the possibility for employees to request a different arrangement of working hours, without their working time and salary being reduced.

In the present case, Mr. Ortiz Mesonero, who worked on a rotating shift, asked his employer (UTE Luz Madrid Centro) to work exclusively in the mornings, from Monday to Friday, maintaining the same number of working hours and without a reduction of his salary so he could take care of his children. However, this request was rejected by his employer.

According to the CJEU, it should be noted that neither Directive 2010/18/EU of 08 March 2010, nor the Framework Agreement on Parental Leave, concluded on 18 June 2009 (hereinafter Framework Agreement), contain any provision that requires Member States, in the context of a request for parental leave, to grant the applicant the right to work on the basis of a fixed work schedule when his/her usual pattern of work is shift work with variable hours.

Therefore, the CJEU ruled that Directive 2010/18/EU, implementing the Framework Agreement, "*must be interpreted as not applying to national legislation, such as that at issue in the main proceedings, which provides for a worker's right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with*



a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work”.

Note that under Portuguese law, an employee with a child under the age of 12 years old or, regardless of age, a child with a disability or chronic illness living him/her is entitled to work flexible hours (*i.e.* the employee can choose, within certain limits, the hours of his/her starting and end time of his/her daily regular working hours) [Article 56 of the Portuguese Labour Code]. The employee shall request to work part time or to arrange for a flexible work schedule in writing, since he/she must provide the employer with the required information (Article 57 (1) of the Portuguese Labour Code). According to Portuguese law, the employer may only reject such a request in case of existence of overriding operational needs or impossibility of replacing the employee if he/she is indispensable (Article 57 (2) of the Portuguese Labour Code). The employer must submit the necessary documentation to the Commission for Equality in Labour and Employment (CITE) for an opinion to be issued (Article 57 (5) of the Portuguese Labour Code). It should be noted that if CITE’s opinion is not favourable for the employer, the company will only be able to refuse the request for part-time work or flexible schedule after a judicial decision, which would analyse the motives invoked (Article 57 (7) of the Portuguese Labour Code).

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In case C-274/18, the CJEU analysed an Austrian legislation which states that the total duration of successive fixed-term employment contracts cannot exceed six years or, in the case of part-time workers, eight years. An extension of this duration to 10 years in case of full-time employees and to 12 years in case of part-time employees is also possible.

This ruling assessed the compatibility of such national legislation with Clause 4 of the Framework Agreement on Part-time Work entered into on 06 June 1997 (hereinafter Framework Agreement), which is set out in the Annex to Directive 97/81/EC of 15 December 1997, as well as with Articles 2 (1) (b) and 19 (1) of Directive 2006/54/EC, of 05 July 2006, concerning the application of the principle of equal opportunities and treatment between men and women at work.

The CJEU ruled that:

- *“Clause 4 of the Framework Agreement must be interpreted as precluding national rules which state a longer maximum period of duration of term employment contracts entered into with part-time employees than the one applicable to full-time employees, unless such difference in treatment is justified by objective reasons; and*
- *Article 2 (1) (b) of Directive 2006/54/EC must be interpreted as precluding a national legislation, such as the one at issue in this case, if such regulation negatively affects a significantly higher percentage of female employees than male employees and if the same is not objectively justified by a legitimate aim or the means used to achieve such aim are not appropriate and necessary.”*

Under Portuguese labour law, the maximum duration of fixed-term employment contracts applies equally to both full-time and part-time employees (see Article 148 of the Portuguese Labour Code). According to Article 154 (2) of the Portuguese Labour Code, the part-time employee cannot be subject to less favourable treatment than the full-time employee in a comparable situation, unless such difference in treatment is justified by objective reasons, which may be defined by a collective bargaining agreement. Therefore, a similar rule to the Austrian one analysed by the CJEU in this

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case would not be considered admissible under Portuguese law, unless it can be justified by objective reasons.

4 Other relevant information

Nothing to report.



Romania

Summary

(I) The High Court of Cassation and Justice has ruled when precisely the period of limitation for actions in recovering amounts paid without a legal basis to employees in the public sector begins.

(II) Romanian legislation is consistent with the interpretations of the Court of Justice of the European Union recently issued.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Undue payments

High Court of Cassation and Justice, No. 19/2019, 24 October 2019

The Romanian courts had a non-unitary practice on the calculation of the period of limitation for the right to action in recovering amounts unlawfully paid to employees. Such cases involve situations in which a public institution made payments to employees beyond the imposed budgetary limits. According to the Labour Code, these amounts can be recovered within three years from the date when the employer knew or should have known the damage and the person responsible for it. Since 2011, the Law of Social Dialogue No. 62/2011 provides a new point in time from which the period of limitation commences, i.e. at the time the damage was actually caused.

The problem arises when the Court of Accounts, performing an audit, ascertains the illegality of past payments made to budgetary employees and orders the recovery of the damage. Some courts have considered that by receiving the control document, the employer becomes aware of the damage. As a result, this is the subjective moment that initiates the period of limitation, i.e. it commences with the communication of the control report, and the employer has three years to recover the amounts paid.

Noting the existence of a non-unitary practice in this matter, the High Court of Cassation and Justice recently ruled on an appeal in the interest of the law (mandatory for all courts in the country) by Decision No. 19/2019, published in the Official Gazette No. 860 of 24 October 2019. The High Court of Cassation and Justice ruled that the control activity carried out by the Court of Accounts, establishing the illegality of payments made to an employee does not mark the commencement of the term of limitation for the court proceedings to recover such payments.

Therefore, the amounts granted without a legal basis can be recovered from budgetary employees based on an action brought within three years from the date on which they were paid, regardless of whether any control by the fiscal control body (i.e. the Court of Accounts) has taken place.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic



Romanian legislation envisages financial penalties in case of non-observance of the legal obligations related to administrative authorisations and the keeping of wage documents. Thus, for example, according to Article 36 of [Ordinance No. 25/2014](#) on the employment and posting of foreigners on the territory of Romania, published in the Official Gazette No. 640 of 30 August 2014, allowing a foreigner to work on the territory of Romania without an employment authorisation or a posting authorisation is sanctioned with a fine ranging from LEI 10 000 to LEI 20 000 (approximately EUR 2 100 – 4 200), for each employee involved. The applicable sanctions cannot be transformed into imprisonment in case of non-payment.

In addition, in the case of hiring foreigners illegally residing in Romania, one or more of the following complementary sanctions may be applied:

- the total or partial loss of the right of the employer to receive benefits, aids or public subsidies, including EU funds managed by the Romanian authorities, for a period of up to 5 years;
- the ban on participation in the awarding of public procurement contracts for a period of up to 5 years;
- full or partial recovery of public benefits, aids or subsidies, including European Union funds managed by the Romanian authorities, assigned to the employer for a period of up to 12 months before the violation was established;
- temporary or definitive closure of the workplace(s) where the contravention took place or temporary or definitive withdrawal of the license to carry out the professional activity in question, if this is justified by the seriousness of the violation.

As a consequence, the penalties provided by Romanian labour law, which have an exclusively administrative content, and not a criminal one, can be considered proportional to the conduct in breach of the law.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

According to Romanian legislation, employees have a right to child-rearing leave until the child turns 2 years old, respectively 3 years old in the case of a disabled child. The compensation corresponding to this period is paid from the State budget. At least one month of this leave shall be granted to the other parent, who has not benefited from the child-rearing leave ([Government Emergency Ordinance No. 111/2010](#), published in Official Gazette No. 830 of 10 December 2010, as subsequently amended).

In addition, employees have the right to take leave to care for their sick child up to the age of 7 years, and in the case of a disabled child or for recurrent conditions, until the age of 18 years. This leave is granted for a maximum period of 45 days per year (with the possibility of extension, for certain conditions), during which the employment is suspended and the employee has the right to an indemnity paid from the budget of the National Health Insurance Fund ([Ordinance of emergency No. 158/2005](#) regarding leave and social health insurance allowances, published in the Official Gazette No. 1074 of 29 November 2005, as subsequently amended).

Employees may request leave without pay to resolve some personal problems under the terms of the applicable collective labour agreement or the internal rules (Article 153 of the Labour Code).

Apart from these leaves, there is no provision for the right of employees to reduce their working time with a corresponding decrease in their salary in order to care for minors

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or members of their family who are under their care, even less to change their regular working pattern.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In Romania, the maximum duration of fixed-time contracts is established in Article 84 (1) of the Labour Code (36 months). The regulation applies to both full-time and part-time employees, without any derogatory legal regime for the latter.

Therefore, Romanian legislation is in line with the interpretation given by the Court of Justice of the European Union on the provisions of Directive 97/81/EC and of Directive 2006/54/EC.

4 Other relevant information

Nothing to report.



Slovakia

Summary

(I) The Slovak government has adopted a Decree on Minimum Wage for the year 2020.

(II) The National Council of the Slovak Republic (Slovak Parliament) in its 51st session (15 -29 October 2019) adopted two proposals to amend the Labour Code and one proposal to amend Act No. 663/2007 Coll. on the minimum wage. One proposal to amend the Labour Code was rejected.

(III) No important court decisions were published.

1 National Legislation

1.1 Minimum wage

1.1.1 Government of the Slovak Republic

The discussion on the minimum wage for the year 2020 started in line with Act No. 663/2007 Coll. on the minimum wage with negotiations between the social partners at the national level, but they were unable to reach an agreement (the same situation as in the last ten years plus) (see also September 2019 Flash Report).

On 02 October 2019, in accordance with Act No. 663/2007 Coll. on the minimum wage, the Slovak government adopted a Decree on minimum wage for the year 2020 (published in the Collection of Laws – No. 324/2019), which has been in force since 01 January 2020.

The minimum wage for the year 2020:

- the gross monthly minimum wage - EUR 580,
- the gross hourly minimum wage - EUR 3 33.

[increase of minimum wage - + 11.54 per cent].

The minimum wage for the year 2019:

- the gross monthly minimum wage - EUR 520,
- the gross hourly minimum wage - EUR 2 98.

Further information is available [here](#).

1.1.2 National Council of the Slovak Republic (Parliament)

On 16 October 2019, the National Council of the Slovak Republic adopted a [proposal](#) by the deputies of the National Council of the Slovak Republic Erik Tomáš and Robert Fico to amend Act No. 663/2007 Coll. on minimum wage and Act No. 311/2001 Coll. Labour Code.

The new wording of Act No. 663/2007 Coll. provides autonomy for the employer and employee representatives with regard to the negotiation and agreement on the amount of monthly minimum wage for the following calendar year. If the agreement between the employer and employee representatives is reached by 15 July or at the meeting of the Economic and Social Council of the Slovak Republic by 31 August, the monthly minimum wage for the following calendar year is determined on the basis of their agreement (Article 7 of the Act).



If no agreement under Article 7 is reached, the amount of monthly minimum wage for the following calendar year is 60 per cent of the average monthly nominal wage of an employee on the labour market of the Slovak Republic published by the Statistical Office of the Slovak Republic per calendar year in the two preceding years of the calendar year based on which the monthly minimum wage is determined (Article 8 of the Act).

As regards the Labour Code in Article 119 paragraph 1, the words "established by a special regulation" are replaced with the words "pursuant to a special regulation".

The amendment will take effect from 01 January 2020. For the first time, the minimum wage under the new rules will be set for 2021.

1.2 The basic length of paid holiday

On 16 October 2019, the National Council of the Slovak Republic adopted a [proposal](#) by two deputies of the National Council amending Article 103 of the Labour Code as regards the basic length of paid holidays.

Under the current wording of Article 103 of the Labour Code, the basic length of paid holidays shall be at least four weeks (paragraph 1). The paid holiday of an employee who at the end of the relevant calendar year is at least 33 years of age, has claim to paid holidays of at least five weeks (paragraph 2).

This amendment of the Labour Code also increases the length of the basic holiday to five weeks for employees who have not yet reached the age of 33 years, but who permanently take care of a child (paragraph 2).

In the second reading, a proposal to amend the legislation on the minimum length of holidays for researchers was also adopted and approved by Parliament. Originally, according to Article 103 paragraph 3 of the Labour Code, the paid holidays of the headmaster of a school, the director of a school and education facility, the director of special educational facilities and their deputies, teachers, teaching assistants, vocational training instructors and an educators shall be at least eight weeks per calendar year.

According to the new wording of Article 103 paragraph 3

"Holidays shall be at least eight weeks in any calendar year for

a) a teaching employee and professional employee according to a special regulation,

b) a university teacher,

c) a researcher and an artist of a public higher education institution or a state higher education institution;

d) an employee with at least a second degree of higher education who carries out research-teaching or scientific, research and development activities at a research institute of the Slovak Academy of Sciences, a public research institution or a state budget organisation or state contributory organisation established by the central state administration body. "

This amendment shall enter into force on the day of its declaration, except for Article 103 paragraph 1, which shall enter into force on 01 January 2020.

1.3 Recreational voucher

The September 2019 Flash Report reported that a group of deputies of the National Council of the Slovak Republic submitted a proposal to the National Council to adopt an Act amending Article 152a of the Labour Code. The aim of the proposed Act was to extend the obligation to provide a contribution to the recreation of employees under



Article 152a of the Labour Code to all employers, not only those who employ more than 49 employees.

On 23 October 2019, the National Council rejected this proposal.

Further information is available [here](#).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

As regards fines (penalties) in the labour law, the main legal source in Slovakia is Act No. 125/2006 Coll. on Labour Inspection and on amendment of Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and on amendment of certain acts. In principle, this Act does not contradict the conclusions of the judgments.

Act No. 125/2006 Coll. on Labour Inspection regulates a broad range of possible sanctions for violations of labour laws (Article 7 of the Act). The Act also differentially regulates the possibility to impose fines on employers for violations of labour laws. The labour inspectorate is also responsible for monitoring whether the employer complies with the rules on posting (Article 2 paragraph 1 letter a/ point 7 of Act No. 125/2006 Coll. on Labour Inspection).

(According to Article 2 letter c/ of Act No. 351/2015 Coll. on cross-border co-operation in the posting of workers for the performance of work in the provision of services and on the amendment of certain acts for the purposes of this Act, the penalty shall be an administrative sanction including its accessories, for violations of posting rules imposed on the home employer in another Member State or imposed on the host employer in the Slovak Republic.)

On the basis of the results of the labour inspection and depending on the seriousness of the breaches discovered, the labour inspector is also authorised to order the removal of the discovered defects either immediately or within a timeframe determined by the labour inspector (Article 12 paragraph 2 letter b/ of the Act No. 125/2006 Coll. on Labour Inspection). In case of administrative offences, the labour inspectorate is authorised to impose a fine (Article 19) and can also impose order fines (Article 20).

The labour inspectorate is entitled to impose a fine on an employer:

- for breach of obligations implied by this Act, by the regulations specified in Article 2 paragraph 1 letter a/ in points 1 to 3 and points 6 and 7, and for breach of obligations implied by collective agreements up to the amount of EUR 100 000, and if the breach resulted in a work accident causing death or severe damage to one's health, at least EUR 33 000 (Article 19 paragraph 1 letter a/ of the Act),
- for infringement of the prohibition of illegal employment from EUR 2 000 to EUR 200 000, and in the case of illegal employment of two or more natural persons at the same time, at least EUR 5 000 (Article 19 paragraph 2 letter a/ point 1 of the Act),
- for serious breach of the obligations arising from the regulations mentioned in Article 2 paragraph 1 letter a/ (e.g. breach of labour law regulations including Act No. 351/2015 Coll.) from EUR 1 000 to EUR 200 000 (Article 19 paragraph 2 letter b/ point 1 of the Act),



- for failure to fulfil the obligation imposed by the measure pursuant to Article 12 paragraph 2 letters b/ to i/ - e.g. failure to comply with specific regulations and prohibitions imposed by the labour inspector - from EUR 300 to EUR 100 000 (Article 19 paragraph 2 letter b/ point 2 of the Act).

According to Article 19 paragraph 6 of Act No. 125/2006 Coll. on Labour Inspection, when imposing fines under Article 19 paragraphs 1 and 2, the labour inspectorate reflects the preventive effect of fines, and when determining the amount of the fine, considers

- a) the seriousness of the discovered breach of obligations and the seriousness of the results thereof,
- b) the number of employees of the employer and the risks that arise in the activities of the employer,
- c) the number of illegally employed natural persons in case of fines under paragraph 2 letter a/ point 1,
- d) whether the discovered breach of obligation is a result of an ineffective system of labour protection management of the employer, or if it is an isolated occurrence of a defect,
- e) repeated discovery of the same defect.

As regards order fines according to Article 20 paragraph 1 of Act No. 125/2006 Coll. on Labour Inspection, the employer's employees and persons empowered to perform legal acts on behalf of the employer may be subject to a disciplinary fine of between EUR 100 and EUR 1 000 in the cases provided here (e.g. who obstruct the performance of labour inspections), even repeatedly if the obligation has not been fulfilled in the new term.

The process of imposing sanctions is governed by Act No. 71/1967 Coll. on administrative proceedings (Administrative Procedure Code), as amended unless otherwise provided in Act No. 125/2006 Coll. on Labour Inspection (Article 21 paragraph 3).

The principle that requires penalties to be effective, proportionate and dissuasive in labour law is not explicitly regulated in Slovak labour law. The legal regulation, however, generally provides for the possibility of the sanctioning authority to determine the appropriate penalty.

3.2 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In the Slovak Republic, the regulation of fixed-term contracts does not distinguish between part-time and full-time employees in terms of the length of working time.

The Labour Code is the main legal source for the regulation of fixed-term work. For public service and civil service, special acts apply. Act No. 552/2003 Coll. on the performance of work in the public interest does not regulate fixed-time work of these employees. They are fully regulated by the Labour Code. There are six separate acts for civil service. Provisions of the Labour Code on fixed-term work do not apply to the employment of civil servants, however, given the specific conditions under which such staff carry out their work, there is no risk of abusive use of fixed-term contracts.

The Labour Code defines a fixed-term employment relationship as an employment relationship that is concluded for a specific period. According to Article 48 paragraph 1, an employment relationship shall be agreed for an indefinite period, if the duration of employment is not defined explicitly in the employment contract or if the legal conditions for the conclusion of the employment relationship for a certain period were not fulfilled



in the employment contract or upon its modification. An employment relationship shall also be of indefinite duration if a fixed-term employment relationship was not agreed in writing.

According to Article 48 paragraph 2 of the Labour Code, a fixed-term employment relationship may be agreed for a maximum of two years. A fixed-term employment relationship may be extended or renewed at most twice within a two-year period. The length of working time according to which the length of the fixed-term contracts should be differentiated is not mentioned in the Labour Code.

As regards the intervals between successive contracts according to Article 48 paragraph 3 of the Labour Code, a successive fixed-term employment relationship is an employment relationship that begins less than six months after the end of the previous fixed-term employment relationship between the same parties.

To prevent abuse arising from the use of successive fixed-term contracts, Article 48 paragraphs 4 and 6 of the Labour Code specifies objective reasons for successive fixed-term contracts.

According to Article 48 paragraph 4 of the Labour Code, a further extension or renewal of the fixed-term employment relationship to two years or more than two years can only be agreed in the following cases:

- substitution of an employee during maternity leave, parental leave, leave immediately linked to maternity leave or parental leave, temporary incapacity for work or an employee who has been given long-term leave to perform a public function or trade union function (these successive contracts are restricted by the length of such obstacles to work in the relevant special laws governing them),
- the performance of work in which it is necessary to increase the number of employees significantly for a temporary period not exceeding eight months of the calendar year,
- the performance of work that is linked to the seasonal cycle, which repeats every year and does not exceed eight months in the calendar year (seasonal work),
- the performance of work agreed in a collective agreement.

The maximum number of renewals is not defined. The reason for extensions or renewals of a fixed-term employment relationship under paragraph 4 shall be stated in the employment contract (Article 48 paragraph 5 of the LC).

In connection with the judgment, Act No. 131/2002 Coll. on Higher Education shall also be mentioned. According to Article 48 paragraph 6 of the Labour Code, a further extension or renewal of an employment relationship for a fixed-term of up to two years or more than two years can be agreed with a teacher in higher education or a creative employee in science, research or development if there are objective reasons relating to the character of the activities of the teacher in higher education or creative employee in science, research or development as stipulated in special regulations. According to Article 77 of Act. No. 131/2002 Coll. on Higher Education, an employee having no scientific-pedagogical degree of professor or associate professor may be employed as an academic teacher based on a competition for a period of no longer than five years. The employment of academic teachers terminates at the end of the academic year in which they reach 70 years of age, unless their employment has terminated earlier by special regulation (Labour Code). The rector or dean may accept an employee for part-time employment for a position of academic teacher without competition for one year at most or to conclude agreements on work performed outside an employment relationship (Article 77 paragraph 8 of the Act).

The limitations established in Article 48 paragraphs 2 to 7 shall not apply to employment in a temporary employment agency (Article 48 paragraph 9 of the LC). But according to



Article 58 paragraph 9 of the Labour Code, working conditions, including wage conditions and the conditions of employment of temporarily assigned employees must be at least as favourable as those of a comparable employee of the user employer.

As regards the principle of non-discrimination, fixed-time workers are also covered by the general provisions of the Labour Code on the prohibition of discrimination.

Article 1 of the fundamental principles of the Labour Code on the principle of equal treatment is of relevance here. According to Article 13 paragraph 2 of the Labour Code, in labour law relations, discrimination shall be prohibited on the grounds of sex, marital and family status, sexual orientation, race, colour of skin, language, age, unfavourable health state or health disability, genetic traits, belief or religion, political or other conviction, trade union activity, national or social origin, national or ethnic group affiliation, property, lineage or other status or for reporting crime or other anti-social activity.

As regards fixed-term work in particular, according to Article 48 paragraph 7 of the Labour Code, an employee in a fixed-term employment relationship cannot be advantaged or constrained in respect of working and employment conditions under this Act and working conditions related to occupational safety and health under a special regulation in comparison to a comparable employee. For the purposes of the Labour Code, a comparable employee shall be an employee who has concluded an employment relationship for an indefinite period and has a determined weekly working time with the same employer or an employer according to Article 58 (temporary assignment), who carries out or would carry out the same type of work or similar type of work, taking into consideration qualifications and experience in a relevant field (Article 40 paragraph 9 of the Labour Code).

According to Article 13 paragraph 1 of the Labour Code, the employer shall be required to treat employees in labour law relations in accordance with the principle of equal treatment stipulated for labour law relations by separate Act on Equal Treatment in Certain Areas and on the Protection against Discrimination and on Amending and Supplementing Certain Acts (Act No. 365/2004 Coll. - Antidiscrimination Act).

In case of discrimination according to Article 13 paragraph 7 of the Labour Code, an employee who considers that his/her rights or legitimately protected interests are affected by failure to observe the principle of equal treatment or failure to comply with paragraph 3 may apply to the court and seek legal protection provided for by the special law on equal treatment in certain areas and on protection against discrimination and amendments to certain laws (Anti-Discrimination Act). According to Article 11 paragraph 2 of Act No. 365/2004 Coll. (Antidiscrimination Act), the defendant is required to prove that he/she has not breached the principle of equal treatment if the plaintiff notifies the court of the fact of which it can reasonably be held that there has been a breach of the principle of equal treatment.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In principle, the legislation does not entail explicit details on the issue at hand. In general, the employer may agree with the employee to modify his/her weekly working time to a shorter weekly working time and modify the shorter weekly working time to a higher one (Article 49 paragraph 2 of the Labour Code).

The legislation (Labour Code) guarantees certain rights to the employee in this context, although in a more general form. If the employer's operations so permit, the employer shall be required to allow the employee, upon his/her request, for medical reasons or for other serious reasons to appropriately adjust his/her weekly working time or to agree

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on it in the employment contract under the same conditions (Article 90 paragraph 11 of the Labour Code).

As regards working time in relation to child care, a special regulation applies. According to Article 164 paragraph 1 of the Labour Code, the employer is required to take the needs of pregnant women and women and men taking care of children into account when assigning employees to work shifts. If a pregnant woman and a woman or man permanently caring for a child under the age of 15 request shorter working hours or any other appropriate adjustment of the set weekly working time, the employer shall be required to comply with their request, if it is not prevented by serious operational reasons (Article 164 paragraph 2).

The provision of Article 164 paragraph 2 of the Labour Code shall also apply to an employee who personally cares for a close person who is predominantly or wholly incapacitated and who is not provided with care in a social service care facility or institutional care in a health-care facility (Article 165 of the Labour Code).

The burden of proving the impossibility of adjusting working time for serious operational reasons rests with the employer.

4 Other relevant information

Nothing to report.



Slovenia

Summary

(I) The report examines in more detail the judgment of the Supreme Court of Slovenia in the revision proceeding which followed the judgment of the CJEU in *Dodič*.

(II) Shorter comments/observations are provided on possible implications for Slovenia of the CJEU judgments in cases C-64/18, C-366/18 and C-274/18.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court decision on Dodič case. Follow up of CJEU case C-194/18, 08 May 2019, Dodič

Banka Koper ceased to provide investment services and stock exchange intermediation services which were transferred on the basis of a transfer agreement to another financial company (Alta Invest). Stock-broker jobs were abolished. The plaintiff's employment contract was terminated due to business reasons. He was offered another job, but according to him, it was unsuitable. He argued that his dismissal was unlawful, claiming that Banka Koper had in fact carried out a transfer of its investment activities and stock-exchange intermediation services within the meaning of Article 73 of the Employment Relationships Act (hereinafter ERA) which transposes Article 1(1) of Directive 2001/23/EC, and sought reinstatement.

The Court of First Instance ruled that no transfer of undertaking or part of the undertaking had taken place within the meaning of Article 1(1) of Directive 2001/23/EC, since there was no retention of the undertaking's identity in either economic or functional terms. It also noted that the transfer agreement between the two financial companies had been signed, providing for no property, rights or workers to be transferred. The Court was of the opinion that this agreement should not be deemed a legal basis for a transfer of undertaking.

The Court of Second Instance agreed with the reasoning and legal review of the Court of First Instance.

The Supreme Court rejected the revision of the case, pointing out that the abolishment of the stock-broker activity of Banka Koper, the reorganisation of the process by ceding the activity to another intermediation subject and the absence of the transfer of material resources, workers and the organisational structure do not represent a transfer within the meaning of Article 73 of the ERA and/or Directive 2001/23/EC. The Court also underlined that clients of Bank Koper were free to choose their new financial operator.

The plaintiff brought the case before the Constitutional Court, maintaining that the interpretation of the Directive by the Supreme Court was incorrect and had not offered any factual grounds.

The Constitutional Court set aside the Supreme Court's judgment and referred the case back to the latter, pointing out that the Supreme Court had not given any substantial reasons in its answers to the question whether the case must be deemed a transfer of undertaking within the meaning of Directive 2001/23/EC.



In its second examination, the Supreme Court decided to stay the proceedings and referred the case to the CJEU for a preliminary ruling. In its judgment, the latter made reference to case C-160/14 and repeated which criteria are decisive for establishing the existence of a transfer of undertaking or part of an undertaking within the meaning of Directive 2001/23/EC. The criteria listed in the judgment in case C-160/14 should be taken as individual factors in this assessment. Their significance vary according the activity of the given undertaking. In the present case, the activity carried out by the given entity did not require significant tangible assets in order to operate. The economic activity in question was primarily based on intangible assets which are important for the purpose of classification as a transfer of part of the undertaking. Intangible assets consist of financial instruments and other assets. In the concrete case, the CJEU pointed out that the clients, the fact that their accounts were maintained, other financial and ancillary services and the maintenance of the documentation relating to the investment services contributed to the identity of the economic activity in question. The CJEU stated that the fact that Banka Koper's clients were not bound by the transfer agreement and could freely decide to transfer their securities to the contractual party Alta Invest cannot, in itself, preclude the classification of the transfer as a transfer within the meaning of Article 1(1) of Directive 2001/23/EC. According to the Court, one has to establish that a transfer of clients had taken place in order to be able to reach such a classification. An overall assessment of the facts must be carried out. With respect to such an assessment, the incentives offered to Banka Koper's clients to entrust the management of their securities to Alta Invest must be taken into account. The Court also added that the number of clients actually transferred was not, in itself, decisive for the establishment of the transfer.

After the CJEU judgment was issued, the Supreme Court revisited the pending action and adopted a ruling on 10 September 2019.

Without a doubt, the implications of the CJEU ruling were significant. The CJEU's observations and interpretation of Article 1(1) of Directive 2001/23/EC were taken into consideration. The Supreme Court changed the standpoint it had expressed in the main proceedings before the case was referred to the CJEU for a preliminary ruling. The request for a partial revision against the judgments of the Courts of First and Second Instance was granted. Some breaches of a procedural nature in the previous proceedings were one reason for the revision. In addition to this ground, the Supreme Court took up the CJEU's interpretation, pointing out that the investment services were primarily based on intangible assets, consisting of financial instruments and other assets of clients, the keeping of their accounts, other finance and auxiliary services and the maintenance of documentation relating to investment services. In this context, the transfer of clients was the crucial factor for the assessment whether a transfer or part of the undertaking had taken place. As regards the clients, it was of particular importance to determine whether they were either free to explicitly choose the brokerage company to which their accounts were being transferred to or whether their transfer was automatic, which together with other circumstances, in fact, constituted a transfer within the meaning of Directive 2001/23/EC.

The lower courts' assessments of the circumstances in which the change of the financial companies had been carried out was not precise enough. Such a mistake in the application of substantive national law is the reason why the Supreme Court reversed a part of the judgment of the Court of First Instance and returned the case for a new trial.

The decision on the existence of a transfer of undertaking or a part of the undertaking is relevant for the Court's decision on the legality of the plaintiff's dismissal for business reasons.



3 Implications of CJEU rulings and ECHR

3.1 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

The case is of minor relevance for Slovenian law.

1. Slovenian legislation differs from the Spanish one. The Protection and Family Benefits Act (*'Zakon o starševskem varstvu in družinskih prejemkih'* (hereinafter ZSDP), Official Gazette of the RS, No. 26/14, 90/15, 14/18- ZSDP-1B)), which transposed Directive 2010/18/EU, recognises the right to parental leave in case of care of minors but not in case of care of dependent family members. Parental leave, referred to as child care leave in Slovenia, is leave to which one of the parents is entitled immediately following the expiry of maternity leave, and can be used in the form of full or partial leave (not longer than half of the normal weekly working hours). Parental benefits for partial absence from work amount to the proportional part of full parental benefits, depending on the length of the partial absence from work. The issue of shift and variable work schedules is not covered by the ZSDP. Instead, some provisions of the Employment Relationships Act (ERA-1) can be taken into consideration:

According to Article 65(3) of the ERA-1, a part-time worker is entitled to the same rights as a full-time employee on the basis of the pro rata temporis principle. In exceptional cases, workers covered by Article 67 of the ERA-1 are entitled to holiday benefits (regres) and severance pay for business reasons in the same amount of the benefit of full-time workers.

Article 148(3) of the ERA-1 is also relevant, which provides:

"If a worker proposes a different distribution of working time during his employment relationship for the purpose of reconciliation of professional and family life, the employer must justify his decision in writing, taking into consideration the needs of the company's operations."

The ERA-1 also contains rather general provisions on the protection of workers who have parental obligations. Article 186 reads as follows:

"(1) The employer shall be obligated to guarantee the worker the right to absence from work or to part-time work for the purpose of using parental leave as stipulated by an Act (this Act is ZSDP).

(2) The worker shall be obligated to inform the employer at the beginning and the manner in which he plans to exercise the rights referred to in the preceding paragraph, 30 days prior to exercising those rights unless otherwise provided by the Act regulating parental leave.

(3) Upon completion of parental leave, the employer must enable the worker to start performing work in accordance with the initial conditions of the employment contract.

(4) The worker may enforce the rights he has obtained or the rights that have improved during the worker's absence from work due to parental leave immediately after he starts working, if he could not enforce them during his absence."

2. The legislator emphasised the relevance in the CJEU's decision by highlighting Paragraph 15 of the general considerations of the Framework Agreement on Parental Leave. It indicates that a distinction is needed between parental and maternity leave. In the reporter's view, such a distinction is not made as Slovenian legislation on parental protection uses the general term 'parental leave' for four types of leaves: maternity leave, paternity leave, child-care leave and adoptive parents' leave.



3.2 Posting of workers

CJEU joined cases C-64/18 and others, 12 September 2019, Maksimovic

The cases concerned fines that were imposed by the Austrian administrative authority for various violations of Austrian labour law rules ('*Arbeitsvertragsrechts-Anpassungsgesetz*', BGBl 459/1993, which is simply referred to as 'legislation against dumping') by Croatian companies performing cross-border provision of services in Austria. The CJEU's ruling that the legislation envisages absurdly high fines in case of violations and other severe sanctions does not comply with EU law (Article 56 of TFEU) found widespread approval among many lawyers in Austria as well as Slovenian employers and private entrepreneurs. Those who perform cross-border provisions of services in Austria (especially in the construction sector) were have been warned (some of them have already lodged appeals with the competent Austrian courts) that the fines are disproportional, unacceptable and contradict the freedom of provision of services.

It is expected that the judgment will have far-reaching consequences and/or changes will be introduced to Austrian law as well as to case law.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

According to Slovenian labour law, the worker may conclude either an open-ended full-time or part-time employment contract or a fixed-term or part-time employment contract.

As regards *successive fixed-term contracts*, Para.2 of Article 55 of the ERA-1 provides that "the employer may not conclude one or more successive employment contracts for the same work, the uninterrupted period of which would last longer than two years, except in some cases stated in Article 54." The provision applies generally to all workers in the private and public sector.

Fixed-term employment contracts may exceptionally be concluded for a period longer than two years in case of project-related work, mandate-related work of managers, replacement of a temporarily absent worker or foreign workers who have longer work permits. There is no explicit provision in the Act relating to fixed-term workers who work part time and the duration of such contracts. *The Act also does not address situations in which the employment contracts of fixed-term workers are converted from part-time to full-time work and back to part-time work.* As regards the latter situation, one should, as a rule, presume that work under a full-time and part-time contract differs, its content is not the same, and such employment contracts cannot be deemed successive. Such provisions are found in the regulations applying to universities.

As regards the status of part-time workers, the law stipulates that a worker who has concluded a part-time employment contract shall have the same contractual and other rights and obligations arising from the employment relationship as a worker who works full time, and shall exercise these rights and obligations proportionally to the time for which the contract has been concluded, with the exception that such rights and obligations are otherwise stipulated in an Act. The principle of equal treatment and the principle of proportionality are addressed by the law, but, again, the ERA-1 is rather general.

Bearing in mind the rules described above, it is difficult to envisage that the judgment in the preliminary proceedings will have any implications for Slovenia.

Flash Report 10/2019



4 Other relevant information

Nothing to report.



Spain

Summary

(I) New general elections will be held on 10 November. No relevant news will be expected in the field of labour law until after the elections.

(II) Courts have provided some interesting case law, especially regarding equality and non-discrimination on grounds of sex.

1 National Legislation

1.1 Employment of foreigners

Factual part

In accordance with the provisions of the legislation on employment of foreigners, this [Resolution](#) published the 'Catalogue of jobs difficult to fill' in Spain for the last quarter of 2019. As follows from its name, this catalogue lists those occupations or jobs every three months that do not usually get coverage through Spanish workers, and for that reason, recruitment of foreign workers is allowed.

Analytical part

The Catalogue of 'jobs difficult to fill' must be approved by the government each quarter of the year, so it is not a major development. It is an implementation of the Law on Foreigners. For several years (since the start of the economic crisis in 2008), these occupations are very few, and are currently reduced to professional sports (both for athletes and coaches) and work at sea.

1.2 Fight against illegal work

Factual part

The labour inspectorate and the Canary Islands region will create working groups specialised in the fight against fraud in labour law to plan coordinated actions between the state and regional authorities, elaborate a joint action plan and participation of the labour inspectorate in the monitoring actions designed by the regional authorities. It also provides for the allocation of the corresponding financial resources.

Analytical part

Collaboration agreements have been concluded for several years between the Spanish labour inspectorate and certain public entities involved in labour and social security affairs to improve the control and monitoring of compliance with labour and social legislation. This collaboration has been promoted since approval by the Government of Spain of a Master Plan for Decent Work for the 2018-2020 period and the preparation of several plans of the labour inspectorate to fight against illegal work and the effective compliance of employers with labour and social security obligations. There are similar agreements with other regions.

The agreement is available [here](#).



1.3 Measures to reduce the effects of insolvency of the Thomas Cook group

Factual part

This [Royal Decree-Law](#) (No. 12/2019) introduces reductions in social security contributions and special rules for loans for the companies affected by the insolvency of the Thomas Cook group.

Analytical part

The Thomas Cook group employed over 22 000 workers and organised millions of tourist trips to the Canary and the Balearic Islands through its travel agency and airlines. The bankruptcy of this business group has a major economic impact in those regions.

1.4 Public holidays

Factual part

The Ministry of Labour has published the [list of public holidays for the year 2020](#).

Analytical part

Spanish labour law establishes that workers are entitled to 14 days of public holidays per year (all paid), some are religious and others secular or institutional in nature. Some of these public holidays are common across Spanish territory, and others vary depending on the region or municipality. The Ministry of Employment has the legal mandate (Article 37.2 of the Labour Code) to establish the full public holiday calendar in advance, a task that has been accomplished for 2020 based on this Resolution. The regions can add a 15th day of public holiday (unpaid). Collective agreements can also raise the number of public holidays.

1.5 Working time in the transport sector

Factual part

The government allowed non-compliance with the rules on driving and rest periods in goods and passenger transport operations by road between 14 – 20 October in the territory of Catalonia.

Analytical part

This measure is covered by Article 14.2 of Regulation (EC) 561/2006 and intends to address the exceptional circumstances on those dates in the territorial area of Catalonia, which seriously affected traffic and free movement on certain roads, with negative effects on national supply, economic activity and the mobility of people.

The Resolution is available [here](#).

1.6 Recording of working time

Factual part

This [agreement](#) for the education sector authorises the company to freely choose its recording system of the working day after consulting the workers' representatives, although it imposes some mandatory requirements or guidelines. Among them is the need to cover telecommuting, or cases in which the work is carried out with the hours



of entry and exit other than the generally established hours or in a place other than the usual workplace. The agreement also requires taking those cases into account in which the workers carry out their activity outside the usual place of work on behalf of the company, or situations in which the work day is reduced because the worker is enjoying rights aimed at reconciling work and family life. The privacy of the worker must be respected.

Analytical part

Royal Decree-Law 8/2019 required the employers to record working time. Companies have the obligation to record daily working time, indicating every worker's start and end of the working day. The main purpose is to control compliance with the rules on overtime and to prevent abuse. The terms of compliance with this obligation can be specified through collective bargaining.

2 Court Rulings

2.1 Equality and non-discrimination on grounds of sex

Constitutional Court, No. 108/2019, 30 September 2019

Factual part

A public administration launched a selection procedure to hire an interim worker. A woman obtained the best score, but submitted a letter in which she communicated her inability to start work at that time due to her maternity, but requested the job to be reserved. The public administration replied that the job had to be filled immediately and it was therefore awarded to the next candidate. The woman filed a claim before the courts, claiming discrimination based on sex.

The Constitutional Court concluded that the successful candidate had been discriminated based on sex. The determining factor in her not being hired was her maternity, because the candidate would have otherwise gotten the job. It is not important that the company hired another woman who had also previously been on maternity leave, because the hiring of this second candidate occurred precisely because she was not affected by maternity at the time of hiring.

Analytical part

The Constitutional Court recalled that pregnant women cannot be discriminated and that pejorative treatment and limitations to the legitimate expectations of women in maternity situations are not acceptable. The Court also recalled that a particularly strict and rigorous interpretive canon must be used to assess situations of possible violations of the right to non-discrimination on the grounds of sex, and that canon severely restricts the possibilities of differentiation. The principle of non-discrimination not only aims to prevent differences in treatment but also to achieve a situation of parity that overcomes the inferiority that some social groups have traditionally suffered, and it must therefore be applied not only during the employment relationship but also to stages prior to the conclusion of the contract. The public administration is especially bound by the principles of equality and non-discrimination and the Court emphasised that discrimination does not require an explicit purpose, only a discriminatory result.

2.2 Collective dismissal

Supreme Court, No. 669/2019, 26 September 2019

Factual part



The [Supreme Court assessed](#) whether it is possible to use the collective dismissal procedure when the number of workers affected is less than the number that is deemed a minimum threshold according to the law. That is, if the employer can decide to follow the procedure for a collective dismissal of his/her own accord, even if the legal requirements are not met, or whether a collective agreement can establish that obligation.

Analytical part

The Supreme Court responded in the negative due to the public order nature of the legal rules on dismissal in Spanish legislation. The Supreme Court first stated that collective dismissal may be the result of an agreement between the company and the workers' representatives, which they do not directly participate in. Secondly, that the possible judicial assessment of collective dismissal may be conditioned by the collective action that the workers' representatives carried out for this purpose, which takes priority over the individual actions of the workers. And, thirdly, that the competent judicial body for assessing dismissal is different depending on whether it is an individual dismissal or a collective dismissal.

3 Implications of CJEU rulings and ECHR

3.3 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

According to the CJEU ruling of 12 September (joined cases C-64/18 and others, on posting of workers), the penalties for non-compliance with the regulations on the posting of workers must be effective, but also proportional. Specifically, these sanctions may be contrary to the freedom of establishment when the amount is very high, they have no maximum limit and their lack of payment leads to deprivation of liberty.

Analytical part

This ruling will not have a major impact in Spain, because the penalties in Spanish legislation are not as severe as the Austrian ones. The law that contains them ([Royal Legislative Decree 5/2000](#)) distinguishes between minor, serious and very serious infractions. The penalties are economic fines of between EUR 60 and EUR 187 515, depending on the circumstances. The criminal code only applies to very serious infringements. Therefore, the Spanish penalties system does not share the same features as the Austrian one.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

According to the CJEU ruling of 18 September (case C-366/18), EU law does not require Member States to grant a worker the right to work a fixed working time in the context of parental leave, when his/her usual pattern of work is shift work with variable hours.

Analytical part

Spanish law provides for a worker's right to reduce his/her regular working hours, with a proportionate reduction in salary to take care of a minor or dependent family member,



without being able, when his/her regular work pattern is divided in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his/her regular working hours. EU law requires Member States to guarantee a fixed working time in such situations, hence Spanish labour law does not need to be amended. The ruling did not deem that indirect discrimination on grounds of sex (the applicant was a male worker) had arisen, but this could be a way of raising a new preliminary ruling in the future if the applicant is a woman ("the referring court does not demonstrate...", Paragraph 39).

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

According to the CJEU ruling of 03 October (case C-274/18), EU law does not allow for a longer maximum duration of fixed-term employment relationships for part-time workers compared to full-time workers.

Analytical part

This ruling will not have an impact in Spain, because part-time work is not associated with any special rules on the duration of fixed-term contracts. The rules on duration are the same for part-time and full-time work.

4 Other relevant information

4.1 Unemployment

Unemployment rose in September by 13 907 people. Some economic indicators are pointing to a reduction in growth, which may affect employment.



Sweden

Summary

(I) The CJEU has decided on issues related to the posting of workers and the proportionality of sanctions in relation to negligence to keep proper administrative records on posted workers. The CJEU found that the sanctions applied by Austrian law contrasted EU law.

(II) The CJEU has concluded that the application of different standards for the conversion of fixed-term work into permanent work depending on whether the employee had been working part time or full time could conflict with EU law and might represent indirect discrimination of women.

(III) In another case, the CJEU answered a Spanish question on parental leave negatively. The EU legislation on parental leave and reduced working time to pursue parental duties did not correspond to any right to rearrange working time from rotating shift work to a fixed schedule while maintaining full-time working hours.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

Factual part

The CJEU ruled in a series of Austrian cases on the posting of workers, C-64/18, C-140/18, C-146/18, and C-148/18. The cases concerned an Austrian workplace where in total, almost 300 Croatian workers had been posted. On inspection, the Austrian authorities did not find the relevant documentation for all of the posted workers and subsequently issued sanctions against the management. The penalties were considerable and targeted the individual managers in both the posting company and the host company personally, with accumulated fines between EUR 2 400 000 and EUR 3 225 000. In relation to the fines directed at the managers of the Austrian host company, they could be converted into multiple years of imprisonment (up to 1 736 days) if the defendants were unwilling or unable to pay the fine.

The CJEU found in its ruling that Article 56 TFEU must be interpreted as preventing such national legislation on administrative matters in relation to the posting of workers, as in the present case, if the fines applied in the legislation cannot be determined in advance, and if they apply cumulatively for every worker concerned and with no limitation, an additional legal fee in addition to the fines (20 per cent) was applied, and that the fines can be converted into imprisonment if not paid.

Analytical part



The CJEU decision in C-64/18, C-140/18, C-146/18 and C-148/18 appears to be reasonable and well-balanced. The fines applied under the Austrian legislation for administrative breaches and the conversion of fines to imprisonment for several years seem disproportionate and, indeed, contravene the freedom of movement.

The Swedish legislation transposing the PWD, [Posting of Workers Act](#) (1999:678, 'Utstationeringslagen'), stipulates sanctions or fines in Paragraphs 14-15 in the range of EUR 100 to EUR 10 000 (SEK 1 000-SEK 100 000), but has been further narrowed down to EUR 2 000 (SEK 20 000) through Government [Regulation 2017:319 on Posting of Workers](#), Paragraph 10. An inability to pay the fine cannot be converted into imprisonment.

3.2 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

Factual part

In case C-274/18, the CJEU issued a ruling relating to fixed-term and part-time work under Directive 97/81/EC and the corresponding Framework Agreement, as well as equal opportunities under Directive 2006/54/EC.

The CJEU concluded that the Directives, both the Fixed-Term Directive and the Recast Directive on Equal Treatment between Men and Women, could conflict with the national legislation applied in the present case. To apply a longer period of fixed-term employment for part-time workers violates the FTD. In the present case, a part-time employee would have to be employed on a fixed-term contract for 12 years before the employment contract converts into a permanent one, while a full-time employee's fixed-term contract would be converted into one of indefinite duration after 8 years of consecutive fixed-term work.

The CJEU also concluded that the Austrian provisions might indirectly discriminate women, since they are more likely to work part time, but that it was for the national courts to investigate these circumstances.

Analytical part

The Swedish statutory provisions on fixed-term work do not differentiate between part-time or full-time workers, but accounts for the actual days worked at the workplace, regardless of the hours or percentage of service provided, Paragraph 5, 5a [Employment Protection Act](#) (SFS 1982:80 'Lagen om anställningsskydd'). A similar situation as the one described in the present case could therefore not arise in Sweden.

Fixed-term contracts are very common at Swedish universities, especially in early stages of an academic career. There are some special statutory provisions to regulate 'tenure track' employment, but collective agreements also provide for additional opportunities for fixed-term employment of younger researchers, postdocs, etc. These [collective agreements](#) do not take part-time work as such into account, but parental leave or part-time parental leave in order to not discriminate against parents exercising statutory rights to care for their children.

3.3 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

Factual part

The case concerned a Spanish metal worker who was employed in shift work. Due to parental duties for two minor children, he requested to rearrange his working time to



better accommodate his work-life balance. The case before the Spanish court and subsequently the CJEU dealt with the rotating shift pattern of his work and the possibility to work fixed hours. Spanish legislation explicitly allows workers to reduce their working time, and proportionally their pay to care for minors. The CJEU concluded that the EU legislation (Directive 2010/18/EU) did not apply to the given situation, because the applicant did not want to reduce his working time per se, he wanted to rearrange his working time and work on the basis of a fixed schedule without reducing his working time and pay.

Analytical part

Swedish statutory legislation on parental leave, the [Parental Leave Act](#) (SFS 1995:584, 'Föräldraledighetslagen'), is, very similar to the Spanish legislation, only concerned with the right to take 'leave' to care for minors. The Swedish Act does not envisage a right for employees to rearrange the structure of their working time to more conveniently comply with their family situation. If, however, the employee had asked for reduced working time under the Act, how and when the reduction would be applied would have been subject to negotiations between the employer and the employee, with an emphasis on the wishes of the employee, unless this creates undue problems for the business (Paragraph 14). However, the latter was not the case in the Spanish case before the CJEU, which did not concern a reduction of working time.

4 Other relevant information

4.1 Minimum wage in European legislation

The EU Parliament has adopted a [Resolution](#) (2019/2111 (INI)) suggesting for the Council of Ministers to initiate an EU minimum wage legislation (Article 30 in the Resolution). The Parliament suggests the Commission to develop a legal act to guarantee a fair minimum wage, either in line with national traditions, collective agreements or legal provisions.

Since Swedish labour law is unfamiliar with a statutory minimum wage, and neither side of the industrial partners have advocated the introduction of such legislation, the Swedish perspective could be described as sceptical. A recent Public Inquiry (SOU [2019:5](#) 'Tid för trygghet') is monitoring the current situation.



United Kingdom

Summary

- (I) The Queen speech, allowing some consequences of the Brexit scenario, is analysed
- (II) An analysis of the CJEU rulings C-64/18, C-366/18 and C-274/18 is provided

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Posting of workers

CJEU joined Cases C-64/18 and others, 12 September 2019, Maksimovic

In respect of posted workers, under UK law, all employment rights apply to those working in the territory of the UK, provided the individual falls within the personal scope of the rule (e.g., employee, worker) and the temporal scope of the rule (i.e. have they completed the necessary service). The temporal requirement for a number of employment rights means that many posted workers are in fact excluded from protection due to the short time in which they work in the UK. The UK's express implementation of the PWD was brief. Because the UK takes a territorial approach to labour law (ie all of its labour law rules apply to those working in its territory, regardless of the capacity in which they work), it took the view that, with the exception of some rules relating to discrimination law, it did not need to implement the PWD. The fact that a number of key employment rights in the UK are dependent on a period of service (eg unfair dismissal claims generally require two years' service), means that in practice that protection does not apply to posted workers anyway. However, the result was when the UK implemented the PWD it did not expressly provide that posted workers would enjoy only the rights listed in Article 3(1)(a)-(g) PWD in the Directive. That said, the guidance on the gov.uk website now says that posted workers to the UK will enjoy the rights listed - which are those in Article 3(1)(a)-(g) PWD.

Under UK law there is no requirement on posting companies to produce documents on posting staff to the UK authorities. As a result, rules equivalent to those in Austria are not replicated in the UK.

3.2 Parental leave

CJEU case C-366/18, 18 September 2019, Ortiz Mesonero

In Case C-366/18 *Ortiz Mesonero* the Court ruled:

"In the present case, in so far as it is apparent from paragraphs 40, 42 and 48 of this judgment that neither Directive 2010/18 nor any other provision referred to in the preliminary question is applicable to the main proceedings, it does not appear that that dispute concerns national legislation implementing Union law within the meaning of Article 51(1) of the Charter (see, by analogy, order of



15 May 2019, Corte dei Conti and Others, C-789/18 and C-790/18, not published, EU:C:2019:417, paragraph 29)."

This case therefore has no relevance for the UK.

3.3 Part-time work

CJEU case C-274/18, 03 October 2019, Schuch-Ghannadan

In Case C-274/18 *Schuch-Ghannadan v Medizinische Universität Wien* the Court ruled clause 4, point 1, of the agreement on part-time work, had to be interpreted as precluding national legislation which fixed, for the fixed-term workers to which it referred, a longer maximum period of employment for part-time workers than for comparable full-time workers, unless such difference in treatment could be justified by objective reasons and was proportionate in relation to those reasons, which it is for the national court to verify. The UK does not have such legislation and so the decision does not affect the UK.

4 Other relevant information

4.1 Queens' Speech

In the [Queens' speech](#) which lay out the government's legislative programme for the brief period of the 2019 session of parliament (parliament will have been dissolved on just after midnight at the start of 06 November 2019 in time for elections on 01 December 2019). However, this legislation may be brought back in the new year. The Queens' speech announced that: "My Government will take steps to make work fairer, introducing measures that will support those working hard [Employment (Allocation of Tips) Bill]". The essence of this bill is to require employers to pass on all tips and service charges to workers. The Employment (Allocation of Tips) Bill would also require tips collected by employers to be distributed on a fair and transparent basis. There is to be a statutory Code of Practice setting out the principles for fair distribution. See further the [2016 consultation on tips and service charges](#).

The Queens' speech also announced:

"An immigration bill, ending free movement, will lay the foundation for a fair, modern and global immigration system. My Government remains committed to ensuring that resident European citizens, who have built their lives in, and contributed so much to, the United Kingdom, have the right to remain. The bill will include measures that reinforce this commitment [Immigration and Social Security Co-ordination (EU Withdrawal) Bill]."

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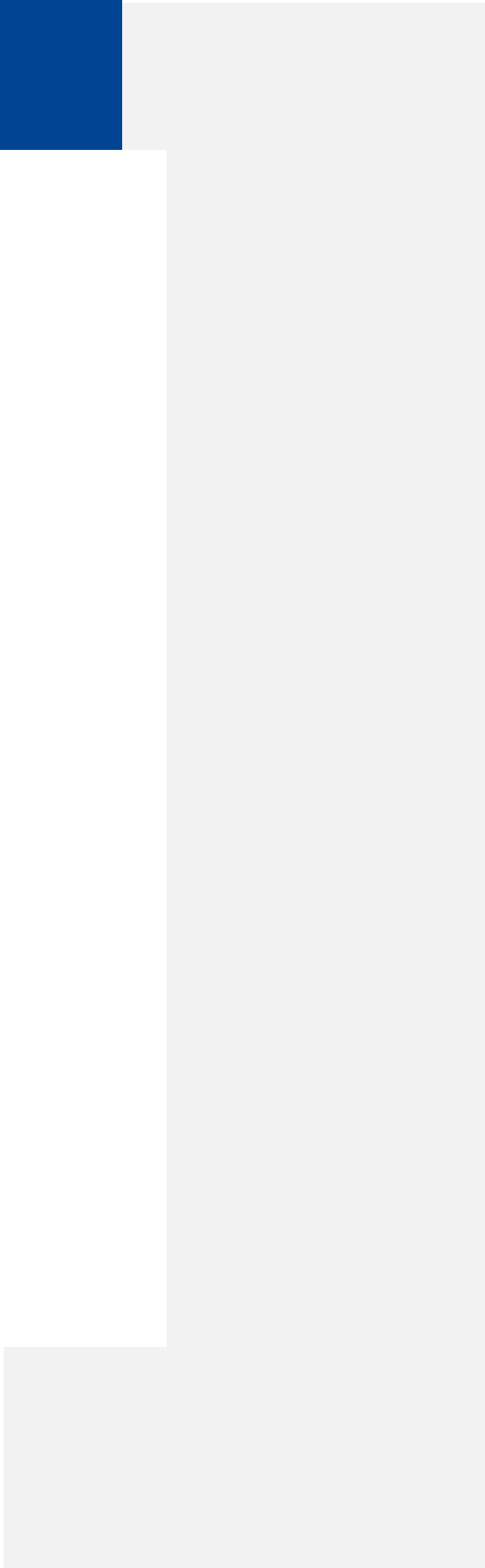
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