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INTRODUCTION

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2012/45

Employee who refuses to go across to transferee loses job (GR)

CONTRIBUTOR EFFIE MITSOPOULOU*

Summary
Greek law has no provision entitling employees to refuse automatic transfer into the employment of the transferee in the event of a transfer of undertaking.

Facts
The defendant in this case was the Greek company 'C S.A.', a subsidiary of the American company 'C Ltd', a business in the field of medical products and supplies. The plaintiff was employed by C S.A. in 2006 as a sales representative in the surgical material sales department. In June 2010 the defendant decided to cease operations in Greece due to unpaid debts of millions of Euros owed by its Greek customers. The defendant informed its employees, including the plaintiff, of this decision. It did, however, manage to find another Greek company, 'St M. Prod.', that was willing to take over its surgical material sales department. On 12 July 2010 the defendant informed the employees that they would transfer into the employment of St M. Prod. and that their existing employment terms and conditions would remain unaffected. On the day of the transfer, new employment contracts were drafted and signed by the transferred employees (with the exception of the plaintiff). Besides retaining the employees' existing terms of employment, St M. Prod. agreed that if any dismissal took place during the 12 months following the date of the transfer, it would pay the affected employees statutory severance compensation plus an amount equal to seven months' salary.

The plaintiff refused to sign a contract with St M. Prod., claiming that her job was not secure. She also said her excellent previous service and high level of qualifications meant that her professional future was at stake, given that the managing director of St M. Prod. had been recently convicted in connection with fraudulent commission-taking. The plaintiff sent the defendant a letter to this effect on 20 July 20 2010, though the transfer had been completed on 15 July. The defendant replied that it had fulfilled all its obligations for the safeguarding of her employment terms and that it could not continue to employ her given that, as of 15 July, it was no longer her employer.

The employee responded on 26 July that she considered this reply to be a termination of her employment agreement. She claimed payment of (i) statutory severance compensation; (ii) unpaid allowances; (iii) compensation for unused paid leave; (iv) compensation for non-compliance with the obligation to inform and consult personnel in respect of a transfer of undertaking; and (v) compensation for moral damages based on the insult to her personally.

Judgment
The Court found in favour of the defendant. It emphasized that Greek legislation transposed Directive 2001/23 (and its predecessors) through Presidential Decrees 572/1988 and 178/2002. According to these decrees, in the case of transfer of an undertaking (provided that the conditions for transfer are met), the transfer of the employment agreement is compulsory both for the employer and the employee. The Court referred expressly to ECJ case law, which has accepted that an employee can refuse to transfer into the employment of the transferee, but in such a case (where the employee decides freely not to maintain the employment relationship with the transferor) it rests with the Member States to define the consequences. Member States can provide that in such a case the employment relationship may be terminated, either on the initiative of the employer or on the initiative of the employee, or that it is maintained by the transferee (ECJ, C-171/94 and C-172/94 *Merckx and Neuhuys*, at § 39).

Greek law does not provide employees, as a more favourable treatment, with the right to refuse transfer of their employment agreements in the event of a transfer of undertaking. The Court cites the ECJ's 1991 decision in the *D'Urso* case (C-362/89 at § 20) on the nature of automatic (*ipso jure*) assignment to the transferee of the rights and obligations of the transferor. The Court also notes that the non-recognition of a right for employees to refuse to transfer does not violate any constitutional right, nor does it violate any of the rights protected by the European Convention on Human Rights, regarding freedom to work, free development of personality and protection of dignity.

The Court took into account the fact that the defendant twice (on 20 and 22 July 2010) asked the employee to present herself at the offices of St M. Prod. and that she failed to appear, as well as the fact that St M. Prod. informed the employee that if she did not appear in its office on 22 July, that would be construed as voluntary resignation, leading to the end of their employment relationship. The employee never turned up, and St M. Prod. informed the labour authorities of her resignation on 28 July, a fact that was not contested by the plaintiff.

Accordingly, the Court concluded that the plaintiff was not entitled to oppose the transfer of her employment agreement, which had taken place automatically by operation of law on 15 July 2010.

Commentary
What makes this case interesting from a Greek perspective is that it is the first time a court has interpreted in detail the refusal of an employee to transfer in the case of the transfer of an undertaking. It makes clear that Greek law does not only not provide employees with the right to oppose a transfer, but also that the transferee succeeds automatically to the rights and obligations of the original transferor, as far as the terms and conditions of the employment agreement are concerned. The refusal of the transferee to accept the employee's offer of work after the transfer has taken place, does not constitute a termination by the transferor, but rather a resignation by the employee.

Finally, it is worth noting that the Court made reference not only to the Greek Constitution but to the European Convention on Human Rights, saying that the lack of provision to enable employees to oppose transfers is not contrary to either.

Comments from other jurisdictions
Czech Republic (Nataša Randlová): Pursuant to Directive 2001/23/EC the transfer of rights and duties is automatic, affects all of the relevant employees and cannot be excluded by agreement or by objections by the employees involved. The employees retain their existing terms of employment. In the past, the only legal recourse open to employees whose existing terms of employment were not respected by the transferee was to bring a claim for damages. Now, however, employees may demand continuation of their terms of employment. Since 2012, an employee may, alternatively, give notice within two

months of the transfer or terminate their employment relationships by mutual agreement, on grounds of significant deterioration in working conditions. In such a case, the employee can apply to the court for a redundancy payment. However, he or she is only entitled to a payment if the court finds that there has been a significant deterioration in the working conditions.

Finland (Johanna Ellonen)**:** It is unlikely that a similar case would have been brought in Finland since, unlike in Greece, under Finnish law employees are entitled to object to transfer by terminating their employment contracts within a special notice period. If the employees do not terminate their employment contracts, the rights and obligations relating to the employment relationships belonging to the entity to be transferred, transfer automatically to the transferee by operation of law. Employees are not entitled to unilaterally elect to remain in the service of the transferor.
As regards the special notice period, employees may terminate their employment contracts to expire, as a rule, on the date of transfer. However, if the employees have been informed of the transfer less than one month prior to the transfer (as in the case at hand), they are entitled to terminate their employment contract to expire on the date of transfer or on a date not later than one month after having been informed of the transfer.
The practice of the Finnish Court of Appeal is to consider the actions of employees when evaluating whether the employee has resigned or not, and, for example, an undisputed refusal to transfer can be interpreted as a resignation. Further, under Finnish law the employment may be considered terminated where the employee is absent from work for at least seven days without justified grounds.

The Netherlands (Peter Vas Nunes): Where an employee declines to follow the business in which he works, there are two relevant issues: (i) does his contract with the transferor terminate automatically? and (ii) does he become an employee of the transferee? Although in the case reported above, in which only the transferor was the defendant, only issue (i) was litigated, the judgment indicates that the plaintiff not only ceased to be an employee of the transferor but also never became an employee of the transferee, except perhaps for the brief period between 15 and 28 July 2010.

The plaintiff in this case claimed, *inter alia*, statutory severance pay, alleging that the transferee's Managing Director had recently been convicted of fraud. Is this not a situation covered by Article 4(2) of the Acquired Rights Directive: *"If the contract of employment [...] is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment [...]"?*

The author comments as follows: The Court ruled that no such substantial change took place in the employee's working conditions. However, we agree that this could be seen as a rather strict interpretation, and that by a broader interpretation one say that the conviction of the MD (as representative of the legal entity) influences the reputation of the company itself, which could in the long term harm the employee.

Subject: Transfer of undertaking
Parties: Employee - v - C S.A.
Court: Μονομελές Πρωτοδικείο Βόλου (First Instance Court of Volos)
Date: Not known
Case number: 60/2012
Hard Copy publication: Not yet available, but can be found in DEN 1610/2012, page 1194
Internet publication: Not yet available

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2012/46

Incorrect information by employer may indicate discrimination (GER)

CONTRIBUTORS PAUL SCHREINER AND DAGMAR HELLENKEMPER*

Summary
The employer decided not to extend a Turkish employee's fixed-term (temporary) contract. When the employee ask it to disclose the reason for the non-renewal, the employer offered a variety of explanations, including low quality of work, a company merger, a drop in volume of work and lack of vacancies. The employee sued successfully for damages, claiming that the real reason for the non-renewal of her contract was her ethnic origin. The court explored the difference between nationality and ethnic origin.

Facts
The plaintiff was a 32-year old employee of a governmental organisation charged with administering the German mandatory accident insurance scheme. The organisation operates through eleven regional Accident Insurance Boards (*Bezirksverwaltungen*). The plaintiff was hired by one of the regional boards (the "Employer"), initially for an 11 month fixed term. This initial contract was extended for a second term, from January 2009 to January 2010. The plaintiff was a Turkish national.

In March 2009, i.e. just after the start of the plaintiff's second fixed term, the Employer hired two German nationals, Ms B and Ms F, in similar positions as the plaintiff. They were also given fixed term contracts.

In September 2009, the plaintiff was informed that her contract would not be renewed and that she would therefore lose her job on 31 January 2010. The reasons she was given were that the Employer was merging with another regional board and that the workload was declining. Then in the same month, all employees with permanent contracts who were employed to do the same job as the plaintiff were informed that they could apply for a certain vacancy. As the plaintiff was not on a permanent contract she was not invited to apply. Ms B and Ms F were invited. It appeared that their contracts had been converted from fixed term to permanent in order to make them eligible to apply for the vacancy.

In November 2009, the plaintiff sought legal advice. Her lawyer wrote to the Employer pointing out that the plaintiff was the only non-German who had been hired by the Employer during her entire period of employment. Given that the ten other regional boards each had employees of many nationalities, this was a statistically relevant indication that the plaintiff's religion or nationality had played a role in the decision not to renew her contract. The Employer replied that it was not under an obligation to give a reason for its decision, but that the decision had nothing to do with the plaintiff's ethnicity.

On 31 January 2010, the last day of her employment, the plaintiff was given a testimonial which stated that she had performed her work "independently, reliably, within the required timeframes and to our full satisfaction".

The plaintiff did not find another job until 16 May 2010, which meant that she was unemployed for a period of 3½ months. A few days later, she brought legal proceedings. She claimed (i) the balance of her last salary and her unemployment benefits for 3½ months plus (ii) compensation for discrimination in the amount of € 5,000.

In its defence, the Employer alleged that the reason for the non-extension of the plaintiff's contract was underperformance.

The court of first instance dismissed the plaintiff's claim, but on appeal the appellate court (LAG) ruled partially in her favour, awarding her compensation in the amount of € 2,500. The plaintiff appealed to the *Bundesarbeitsgericht* (BAG).

Judgment
The BAG held that the plaintiff's appeal was well-founded and referred the case back to the Regional Labour Court for further clarification of the facts. It ruled that the incorrect information regarding the reason for the non-extension of the plaintiff's contract given by the Employer may constitute *prima facie* evidence of discrimination within the meaning of section 22 of the General Act on Equal Treatment (the 'AGG'), the German transposition of Directives 2000/43 (race) and 2000/78 (other strands).[1] It determined that the plaintiff had been treated differently from other employees in the same situation.[2]

According to the definition in Section 3 AGG, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Section 1 AGG, which provides that the purpose of the AGG is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. Note that nationality is not listed as a prohibited ground for less favourable treatment.

The employee had been treated differently because her contract was not renewed, whereas the contracts of two of her colleagues had been converted into permanent contracts in order to offer them the opportunity to apply for the advertised position. The issue was whether this difference in treatment was based on the plaintiff's ethnic origin.

The court found that this unequal treatment was based on the ethnic origin of the employee although, in its opinion, the fact that the plaintiff was the only foreign national in the district administration did not necessarily indicate that the non-renewal of the contract was discriminatory.

The fact that the plaintiff was a Turkish national was not enough in itself to show that the plaintiff had been subject to discrimination based on her ethnic origin. The plaintiff made the argument that other district administrations had several foreign employees, whereas she was the only one in this particular district administration. The BAG clarified that there is nothing to stop statistics being used to show that discrimination has occurred. However, in doing so, the plaintiff needed to demonstrate that the number of employees of her ethnic origin within the employing organisation was disproportionate to the number of employees within the same region and branch of industry. In the case at hand, the plaintiff had failed to demonstrate this.

The plaintiff had further argued that the Employer did not satisfy her right to information concerning the non-renewal of the contract, and that this was also evidence that discrimination had occurred. The supposed low quality of her work had not been proved by the Employer and seemed to contrast sharply with the testimonial she received on her last day.

The BAG held that if the Employer had simply not renewed her contract without comment, there would have been no evidence of discrimination, but the incorrect information given by the Employer in its reasoning might indicate discrimination. Therefore, the Court made a presumption that the employee had been subject to discrimination on grounds of ethnic origin. The discrimination was not based on her nationality, but on ethnic origin. According to Directive 2000/43/EC a person's nationality is not indicative of 'ethnic origin', Article 3(2) providing that the Directive *"does not cover difference of treatment based on nationality".*

Nonetheless, the BAG explained that discrimination that appeared to be related to her Turkish origin (nationality) could be considered as discrimination on the grounds of ethnic origin, given that the source of the discrimination was not affiliation to a nation but rather to a cultural community. The court held that a foreign people or people with a foreign culture are included in the meaning of 'ethnic origin', even if the members of the relevant group do not have uniform characteristics.

From the BAG´s point of view the employee had advanced sufficient indication of discrimination for it to be presumed in this case. By Section 22 of the AGG, the burden of proof lay with the Employer. As the Employer had claimed that the real reason for the non-extension of her contract was a fall in the volume of work and the merger with another company, the LAG will be required to examine whether any of these reasons can be proved by the Employer.

Commentary
This decision is not surprising given the recent ECJ- judgments *Meister* and *Kelly*. The ECJ ruled that in general a rejected applicant has no right to inspect the applications of others, but that refusal to disclose any information about the process could indicate discrimination on the grounds of ethnic origin. The ECJ held that a court can take into account all the circumstances in order to decide whether there is sufficient evidence for a finding that discrimination can be presumed (ECJ 19 April 2012, case C-415/10, *Galina Meister*). As part of this, it may take into account that the employer did not disclose any information.

In addition, the BAG now also held that the content of the information must be closely scrutinised, because incorrect facts might also lead to a presumption of discrimination. German employers are therefore well advised to treat complaints regarding discrimination ever more carefully.

Subject: Ethnic discrimination, burden of proof
Parties: Unknown
Court: Federal Labour Court (BAG)
Date: 21 June 2012
Case number: 8 AZR 364/11
Hardcopy publication: BB 2012, 1727-1728 (shortend)
Internet-publication:http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=16258

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(Footnotes)
1 **AGG Section 22 Burden of Proof**
Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.
2 **AGG Section 7 Prohibition of Discrimination**
(1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under Section 1; this shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds referred to under Section 1.
(2) Any provisions of an agreement which violate the prohibition of discrimination under Subsection (1) shall be ineffective.
(3) Any discrimination within the meaning of Subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations.

2012/47

Protection against dismissal of an employee who discloses pay discrimination (PL)

CONTRIBUTOR BEATA BARAN*

Summary
An employer may not use any labour law sanctions against an employee who discloses breaches of the principle of equal treatment in employment or pay discrimination.

Facts
The Plaintiff was a commercial specialist in the Polish company K-T (the 'Company'). There was an unwritten rule in the Company that employees' pay should not be disclosed and some employees signed a confidentiality clause in respect of their pay. The Plaintiff did not sign any such clause but it appears he was aware that information about pay was confidential and he should not disclose it.

In January 2007, the Plaintiff asked the manager of the sales department (his immediate superior) how his bonus was calculated and how much he would be paid for the fourth quarter of 2006. The manager sent him an email with the required information, but he forgot to delete information about the pay and bonuses of other employees in the sales departments of branch offices of the Company. This meant that the Plaintiff found out about the pay of other employees. Since the differences were significant he forwarded the information to his colleagues from other sales departments. The Plaintiff and his colleagues then asked to meet with the manager so that he could explain the differences in pay between individual employees.

In the meeting the manager was unable to provide an adequate explanation for the differences and promised to organise a meeting with the managing director of one of the branch offices. The meeting was scheduled for a given date but did not take place. Instead, on that date, the managing director called the Plaintiff's manager and punished the manager with a written reprimand. He then called the Plaintiff to his office. The Plaintiff explained to him that he was aware of what he had done. The managing director punished him with a written

reprimand and asked him if he would do the same again. The Plaintiff replied that he would, whereupon the managing director handed him written notice of termination of his employment for gross misconduct. The Plaintiff refused to accept it and said that, in fact, he was on sick leave that day. Later, on the instructions of his manager, the Plaintiff took his belongings, returned the electronic equipment he had used, announced that it was his last day at work and said goodbye to his colleagues.

On the same day, the employer sent the Plaintiff by post a statement of termination of employment for gross misconduct. The statement described the flow of emails revealing the information about pay and gave as the reason for the termination that he had breached rules of the Company by spreading confidential information amongst third parties, and that this had resulted in a loss of confidence in him.

The Plaintiff referred the case to the labour court, demanding compensation for unjust termination of the contract and separate compensation for discrimination in employment.

After several procedural turns that are not relevant here, the court of second instance decided that termination of the Plaintiff's contract was on justified grounds and was not discriminatory. The Plaintiff had been aware that he should not reveal the information to anyone, and by doing so he had jeopardized the employer's interests.

The Plaintiff challenged the decision before the Supreme Court.

Judgment

The Supreme Court overturned the decision of the second instance court and ordered it to hear the case once more and to grant the Plaintiff compensation.

The Supreme Court stated that the Plaintiff had acted legitimately and had not overstepped his rights. For example, he had met with his manager to discuss his concerns about the information he had received. According to Polish law, if an employee makes use of the principle of equal treatment in employment, by making efforts to obtain an explanation of the issues or by providing any form of support to other employees who want to prevent pay discrimination, this cannot be a reason for termination of an employment contract for gross misconduct or for termination with notice. It does not matter how the employee obtained the information that demonstrates the breach of the principle of equal treatment in employment or pay discrimination.

In other words, an employer may not use labour law sanctions against an employee who takes action in relation to a breach of the principle of equal treatment in employment or pay discrimination. If employers were able to punish employees for this, it would render the mandatory provisions on equal treatment in employment ineffective.

Employers are entitled to protect their interests and can legitimately expect employees to keep information confidential if its disclosure could jeopardize essential interests of the employer (e.g. its competitiveness). However, the Company in this case could not abuse this right to confidentiality to conceal the fact that it was in breach of the principle of equal treatment in employment and had a discriminatory pay policy. As the Company was not shown to have had a legitimate reason to require non-disclosure, the transfer of the information from the Plaintiff to other employees was not a reason to terminate his employment contract.

Commentary

The general protection mechanism established e.g. in Article 24 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 (recast) and in Article 11 of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation applied here, although it would seem that none of the grounds for discrimination enumerated in these directives occurred in this case. The directives apply to overt or disguised discrepancies in the treatment of men and women or to discrimination on grounds of religion or belief, disability, age or sexual orientation.

Interestingly, in Poland protection against pay discrimination applies to *all* employees who perform similar work or work of equal value. Therefore, equal pay law does not solely apply to disputes about pay between, for example, men and women or between homosexual and heterosexual employees. The national mechanisms of employee protection specified under sex discrimination law can equally be applied to discrimination not based on gender. The judgment does not specify whether the employees affected by this case were male or female or had different religions or beliefs.

National rules protecting employees who exercise their rights in relation to the principle of equal treatment in employment are contained in Article 18^{3e} of the Polish Labour Code. This provision indeed implements EU law, but at the same it goes further by protecting *all* employees against pay discrimination. This provides a general prohibition against employers' victimising or otherwise acting negatively towards employees who exercise their rights. In particular, termination of employment is prohibited. The law protects not only the whistleblower, but also those who lend their support to the whistleblower.

The Supreme Court mentioned this provision in its judgment. It reasoned that an employee cannot be said to have infringed the employer's interests and cannot be guilty of gross misconduct if he or she has revealed confidential information for the purpose of benefiting other employees who were suffering discrimination. In this way, the Court gave priority to the principle of equality over the employee's duty to not to disclose confidential information.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): The outcome of a similar case in Germany would largely depend on the reasons for the unequal payment of the employees. There is no general equal pay principle applicable to all employees. The employee is free to negotiate an individual pay package with his or her employer. That being said, discrimination on the grounds of gender, race or ethnic origin, religion or belief, disability, age or sexual orientation is prohibited by Section 1 of the AGG (the German transposition of Directives 2000/43 and 2000/78/EC). The employee would have to demonstrate that employees who are paid differently fulfil exactly the same duties and have the same qualifications to prove discriminatory behaviour by the employer on the grounds discussed.

Employees who disclose violations of those provisions to fellow employees or superiors cannot be terminated on the grounds of gross misconduct. The termination would be declared void.

On the other hand, the violation of a signed confidentiality agreement or the disclosure of internal company information to the public could be grounds for termination, even if the intent was to prevent pay discrimination within a group of co-workers.

In Germany there is no separate law to protect whistleblowers or to serve as an incentive for whistleblowing. Efforts to introduce a Whistleblowing Law in Germany *(Hinweisgeberschutzgesetz)* have not been successful as yet. Nonetheless, 'whistleblowing hotlines' are increasingly popular. These allow employees to air grievances and point out violations of policies or duties. The effects of this remain to be seen.

Subject: Non-specific discrimination (victimisation)
Parties: Bartłomiej S. – v – K – T Company
Court: Sąd Najwyższy (Supreme Court)
Date: 26 May 2011
Case Number: II PK 304/10

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2012/48

Czech Supreme Court introduces concept of constructive dismissal (CZ)

CONTRIBUTOR NATAŠA RANDLOVÁ*

Summary
An employee was bullied and discriminated against by his superior for several weeks on account of his medical condition. As a result of this unbearable situation, the employee requested termination of his employment by agreement. The employer admitted the discriminatory behaviour and apologised. The issue before the court was whether the employee was entitled to compensation for lost earnings resulting from the loss of his job.

Facts
The plaintiff, a surgeon, had worked for the Trauma Hospital of Brno (the Hospital) since 1984. Since 1991 he held the position of Deputy Director for Science and Research. Beginning in June 2003, the plaintiff was increasingly exposed to bullying by the Hospital's Director, his superior. The bullying consisted of ridicule in front of other employees, disparagement of his expertise, unjust reduction of his salary, a prohibition against performing surgery and a ban on attending management meetings.

The situation escalated when the plaintiff was removed from his position and offered a job that did not match his qualifications. He was also confronted with threats of further bullying. Because of this situation the plaintiff requested the Hospital to enter into an agreement terminating his employment with effect from 20 August 2003. The Hospital agreed and the plaintiff's employment terminated on that date.

Afterwards, the Hospital admitted that the plaintiff had indeed been bullied and discriminated against on account of his medical condition. The Hospital subsequently sent the plaintiff a written apology.

The plaintiff brought legal action against the Hospital. He demanded CZK 1,400,000 (€ 55,000) in compensation for loss of income due to the termination of his employment. The plaintiff was not able to find a new job after the termination and, as a result, his only income became, initially, social support benefits and, following his retirement, the state pension. The amount claimed was equal to the income he would have earned (up to a certain date), had his employment not been terminated, minus the social support benefits and state pension he had received.

The Court of First Instance rejected the plaintiff's claim. It accepted that the plaintiff had been discriminated against, but it considered the Hospital's apology to be sufficient compensation for the moral harm he suffered. The Court of First Instance based its decision on the absence of a provision in Czech law enabling damages to be awarded to a former employee who has consented to voluntary termination of his employment.

The Court of Appeal confirmed the first court's decision. However, in its reasoning, the court emphasized that the plaintiff's claim was solely compensation of pecuniary damage, defined as the balance between the income he would have received for further employment at the Hospital and the income he received after termination. The Court held that the plaintiff had suffered harm in terms of loss of income and that the Hospital had breached its duty as an employer because of the (admitted) discriminatory behaviour. However, the Court of Appeal found no causal relationship between the Hospital's breach of duty and the harm suffered, because the plaintiff had offered to terminate the employment relationship by agreement, and he was the one who initiated that termination. The plaintiff's reasons for agreeing to terminate were not found to be relevant by the Court of Appeal.

Judgment
The Supreme Court annulled the decisions of both lower courts. According to the Supreme Court there was a causal relationship between the breach of duties by the Hospital and the harm suffered by the plaintiff. The Supreme Court stated that, when considering a causal relationship, it is important to take into account, not only the manner of the termination of the employment, but also the reasons for it.

The Supreme Court further stated that, if the plaintiff had acted as the Court of Appeal suggested, that would have meant he had to passively endure the continuing discriminatory behaviour of the Hospital with no opportunity to take action.

The Supreme Court remanded the case back to the Court of First Instance.

Commentary
The Supreme Court decided that, on considering damages in cases of termination of employment contracts by agreement owing to discrimination against the employee, the court must take into account not only the isolated fact that the employment was terminated by agreement but also the reasons which led to it.

This decision of the Supreme Court should serve to prevent extreme formalism being applied by the lower courts. An employee who is discriminated against must have the right to compensation for harm suffered in connection with the termination of employment owing to the discrimination. Otherwise, the employee is left with no option but to endure the discrimination until the employer decides either to terminate his or her employment or ceases the discriminative behaviour – and such a situation is unacceptable.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the employee could - in a case like the one described above - file a claim for damages whether or not he signed a mutual termination agreement. The problem rather arises from the fact that most mutual termination agreements include exclusion clauses that require the employee to waive all further entitlement. This relates mostly to the violation of contractual obligations, namely the employers' obligation to protect his employees. However, intentional tort cannot be excluded by agreement and so, if the employee can prove an intentional wrongful violation of his personal rights, the exclusion clause would not apply and the employee would be entitled to damages.

The Netherlands (Peter Vas Nunes): The Dutch civil code, of which one chapter deals with employment law, does not recognise the concept of 'constructive dismissal', a concept that, I believe, the English courts developed long ago. Sections 95 (1) (c) and 136 (1) (c) of the English Employment Rights Act 1996 provide that, for the purpose of redundancy payments and unfair dismissal, respectively, *"an employee is dismissed by his employer if [……] the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*. In other words, it is the employee who resigns, but in those circumstances, he is deemed to have been dismissed.

Given that Dutch statute does not recognise this doctrine, employees who resign or enter into a termination agreement as a result of harassment, bullying, discrimination or for other reasons for which the employer is accountable, must rely on general contract law in combination with the provision in the Civil Code that employers have a duty to behave as a 'good employer'. In 1989, in its ground-breaking but nevertheless not well-known judgment in *Deuss – v – Motel Maatschappij Holland,* the Supreme Court held that where an employee has applied to the court to have his employment contract terminated, and the court terminates the contract for a serious reason attributable to the employer (in *Ms Deuss'* case, the reason being bullying), the employee is entitled to compensation for lost earnings - which can be an enormous claim. Whether employees can extend the scope of this doctrine to situations where they unilaterally resign for such reasons, rather than court-ordered termination situations, is a subject of debate.

Poland (Marek Wandzel): In Poland 'simple' compensation for bullying at work is not limited (although usually it is not high) and its aim is to deter the employer. Bullying may constitute grounds for an employee to terminate the employment relationship. The law requires however that such termination is made in writing and indicates bullying as its grounds. In most cases however, employees ask for or propose termination by mutal agreement – the fastest way to change employers or to escape an employer's discriminatory behaviour. In such a case, usually no grounds for termination are indicated in the agreement (it is unlikely that an employer will admit bullying) and therefore the courts refuse to grant ‚simple' compensation.

In my opinion, this requirement for an admission that bullying is the reason for the termination is disproportionate. If bullying did occur – it should be compensated for, no matter who terminated employment or how. It is worth mentioning that if the bullying leads to health problems for the employee, he or she may claim a different kind of compensation - irrespective of who terminated the relationship and how.

Subject: Termination of employment
Parties: MUDr. J. P. CSc. – v – Trauma Hospital of Brno, contributory organization
Court: Nejvyšši soud Ceské republiky (Supreme Court)
Date: 10 September 2012
Case number: 21 Cdo 2204/2011
Internet publication: www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/699407907FFA0F20C1257A990026B087?openDocument&Highlight=0,

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2012/49

UK protection against dismissal on grounds of political opinions inadequate (UK)

CONTRIBUTOR KATIE HONEYFIELD*

Summary The European Court of Human Rights (ECtHR) has ruled that an employee dismissed for being a member of the far-right British National Party (BNP) did not have adequate redress under United Kingdom law. The relevant legislation was incompatible with the European Convention on the Protection of Human Rights and Fundamental Freedoms (the 'Convention') because it did not provide sufficient protection against dismissal on grounds of their political opinions or affiliations, including extreme views that "offend, shock or disturb".

Facts

The case involved Mr Redfearn, a white British man, who was a bus driver employed by Serco Ltd ('Serco'). The company provided transport to local authorities, including Bradford City Council (the 'Council').

Mr Redfearn was responsible for transporting children and adults with disabilities within the Bradford area. Seventy to eighty per cent of Serco's customer base and 35 per cent of its workforce were of Asian origin. There were no complaints about Mr Redfearn's work and his supervisor, who was of Asian origin, had nominated him for a "first-class employee" award.

In May 2004, a local newspaper identified Mr Redfearn as a candidate for the BNP in the local elections. At this time, membership of the BNP was limited to white nationals. The public sector workers' trade union Unison wrote to Serco, stating that many of its members found Mr Redfearn *"a significant concern, bearing in mind the BNP's overt and racist/fascist agenda"*. Unison requested that Serco take immediate

action to ensure that its members were not subjected to racial abuse.
The following month, Mr Redfearn was elected as a local BNP councillor. Serco decided to dismiss him without notice, stating that the reason was the potential health and safety risk to his passengers and their carers, given the considerable anxiety they were likely to feel. Serco also expressed concern that Mr Redfearn's continuing employment could severely prejudice its reputation and result in the loss of its contract with the Council.
Mr Redfearn was unable to bring a claim for unfair dismissal as he did not have the one year's service which was at that time required under the Employment Rights Act (the 'ERA') (the qualifying period has since been increased to two years). Instead, he submitted a claim to the Employment Tribunal ('ET') for race discrimination.
Mr Redfearn alleged that his dismissal constituted less favourable treatment (i.e. direct discrimination) on racial grounds, because, owing to his views on race, he had been dismissed from a job working with people of Asian origin. He also asserted that he had suffered indirect racial discrimination, on the basis that the BNP was a 'whites-only' party.

The Employment Tribunal's Decision
The ET appreciated that Mr Redfearn's employment might lead to problems with other employees and attacks on Serco's minibuses, which could put staff, passengers and Mr Redfearn himself in danger and cause considerable anxiety among passengers and their carers. The ET also accepted the argument that his presence might damage Serco's reputation, putting existing contracts and future tenders at risk. Accordingly, the ET dismissed the claim for direct race discrimination as Mr Redfearn's dismissal was for legitimate health and safety reasons and not on racial grounds. The ET also rejected the claim of indirect discrimination as dismissal was a proportionate means of achieving a legitimate aim, namely, ensuring the health and safety of everyone involved. Mr Redfearn appealed to the Employment Appeal Tribunal ('EAT').

The Employment Appeal Tribunal's Decision
The EAT upheld the appeal, finding that the ET had erred failing to interpret the term "on racial grounds" broadly. With regard to indirect discrimination, the ET had not explained how it came to the conclusion that dismissal was a proportionate means of maintaining health and safety, because it had not considered any alternatives to dismissal. Serco appealed to the Court of Appeal.

The Court of Appeal's Decision
The Court of Appeal allowed Serco's appeal and reinstated the ET's decision. Rejecting Mr Redfearn's claim of direct discrimination, the Court said he was treated less favourably on the ground of a particular non-racial characteristic shared with him by a tiny proportion of the white population, that is, membership of a political party such as the BNP. The Court reasoned that Serco would apply the same approach to a member of a similar political party, regardless of whether its membership was confined to white or black people.
The Court also rejected the claim for indirect discrimination, on the basis that this required Mr Redfearn to identify a provision, criterion or practice which Serco had applied or would apply irrespective of race or colour, and he had failed to do so. The Court noted that the ET had suggested the relevant criterion was membership of the BNP, but that could not be applied to a person who was not the same colour or race as Mr Redfearn because only white nationals were eligible for membership.
Mr Redfearn also relied on the UK's Human Rights Act 1998 ('HRA'), asserting that less favourable treatment arising from membership of a political party contravened various of his rights under the Convention – Article 9 (freedom of thought, conscience and religion); Article 10 (freedom of expression); Article 11 (freedom of assembly and association); and Article 14 (prohibition of discrimination).
However, the Court ruled that he was not entitled to claim under the HRA because Serco was a private sector company and not a public authority. Furthermore, the provision in the HRA which requires UK law to be read and given effect in a way that is compatible with Convention rights did not assist Mr Redfearn, because the relevant race discrimination legislative provisions were compatible with the Convention.
The Court concluded that *"properly analysed, Mr Redfearn's complaint was of discrimination on political grounds, which falls outside the anti-discrimination laws"*.
Mr Redfearn then focused his attention on human rights law and brought a claim against the UK Government in the ECtHR.

The European Court of Human Rights' Decision
Mr Redfearn submitted that losing his job for exercising his right to freedom of association under Article 11 struck at the "very substance" of that right. He contended that the UK Government had a positive obligation to enact legislation which would have afforded him protection, as he did not comply with the one-year qualifying period required to claim unfair dismissal.
In reply, the UK argued that if an employee was dismissed for manifesting certain political beliefs, it did not necessarily mean that there would be an interference which struck at the very substance of the right under Article 11. In the alternative, if there was a positive obligation on the UK, this was satisfied by the right to claim unfair dismissal under the ERA. The UK submitted that where the one-year qualifying period has accrued, employees are generally protected against dismissal on grounds of political involvement, unless the involvement affected the capacity of the employee or amounted to a "substantial reason" for dismissal. The UK also claimed that the qualifying period pursued the legitimate aim of encouraging employers to recruit staff.
The ECtHR observed that the one-year qualifying period did not apply to all employees: various exceptions had been created to offer additional protection to employees dismissed on certain prohibited grounds, such as race, sex and religion. However, no additional protection had been provided to those dismissed on account of their political opinion or affiliation.
The ECtHR held that association with political parties is essential to the proper functioning of democracy and Article 11 is applicable not only to persons whose views are favourably received, but also to those whose views offend, shock or disturb. An employee's Article 11 right should be balanced against the employer's interests in each particular case, regardless of his or her length of service, but currently, employment tribunals are not required to do this when the employee has less than one year's service.
As a result, the ECtHR concluded (by a majority of four to three judges) that UK legislation was incompatible with the Convention. The UK needed to adopt "reasonable and appropriate measures" to protect employees from dismissal on grounds of political opinion or affiliation, including those with less than one year's service). The ECtHR offered two suggestions as to how this could be done: the creation of a further exception to the one-year unfair dismissal qualifying period, or by a free-standing claim for discrimination on the grounds of political opinion or affiliation.

Commentary
It remains to be seen whether the UK will appeal to the Grand Chamber of the ECtHR, which would allow the decision to be reconsidered by a full panel of 17 judges. If the UK chooses not to appeal, or the decision

is not overturned, the UK Government will have to consider whether and how to comply.

One option might be to include political beliefs within the definition of "religion or belief" under UK's Equality Act 2010. However, the Government has previously commented that political views are not akin to religious or philosophical beliefs and it was not the intention of the Equality Act to protect such beliefs. It is also interesting that the ECtHR did not regard Mr Redfearn's case as engaging the right to freedom of thought, conscience and religion.

Another problem with this approach would be how to implement appropriate protection within the UK's anti-discrimination laws. The ECtHR recognised that an employer should be able to dismiss employees for their political views in appropriate cases – it is a matter of balancing the employee's rights against the employer's interests. However, discrimination law is more of a blunt instrument: there is generally no scope or potential for employers to justify direct (as opposed to indirect) discrimination under the Equality Act.

The idea that the Government must change the law to protect employees whose political opinions or affiliations "offend, shock or disturb" has some worrying implications. Does the ECtHR really intend to protect members of extreme and even violent organisations? Perhaps the answer is provided by the ECtHR's important observation that the BNP is not an illegal party under domestic law, nor are its activities illegal. Proscribed parties and organisations are therefore probably outside the scope of the ruling.

One part of the UK already affords employees protection against political discrimination. In Northern Ireland, it is unlawful to discriminate against employees on the grounds of their political opinion, which does not include an opinion that condones the use of violence for political ends. It remains to be seen how, if at all, the Government will respond to the ECtHR's ruling, but the Northern Ireland legislation may provide a useful starting point.

Unless or until UK law is changed, those employed by private-sector employers will not be directly affected by the ruling. However, it may encourage members of the BNP and other extremist parties to bring discrimination claims on the grounds of religion or belief, asserting that the Equality Act should be interpreted consistently with the ECtHR's approach.

In contrast, if public sector employees are dismissed for manifesting certain political beliefs, they can now bring civil claims directly under the HRA citing Article 11, even if they do not qualify for the right to claim unfair dismissal. This is because the HRA stipulates that public authorities must act in a way which is compatible with Convention rights.

The increase in the unfair dismissal qualifying period from one to two years (with effect from April 2012) has exacerbated the problem for the UK because it means that a greater number of employees' rights under the Convention are potentially breached. Also, it may mean that more employees, if they do not qualify for the right to claim unfair dismissal, will instead seek to bring discrimination claims if they are dismissed for being associated with extremist political groups.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): German case law will not be influenced by the ECtHR's decision. Membership of a political party cannot be grounds for a termination of the employment relationship in the private or even in the public sector. For the public sector however, it has been decided by the Federal Labour Court that membership of a political party with extreme views can be grounds for termination if those views collide with the allegiance to the Law and Constitution which state officials must swear on entering an employment contract. In the private sector, an employment contract could only be terminated summarily if criminal offences were committed as a result of membership of an extreme-right party. Possible offences include the use of propaganda or symbols of unconstitutional institutions (e.g. use of the Hitler swastika, SS-Letters, or Heil-Hitler), incitement to hatred or dissemination of material depicting violence.

Subject: Human rights; discrimination on grounds of political opinion
Parties: Redfearn – v - United Kingdom
Court: European Court of Human Rights
Date: 6 November 2012
Case number: [2012] ECHR 1878
Hard copy publication: Not yet reported
Internet publication: www.bailii.org/eu/cases/ECHR/2012/1878.html

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2012/50

Unlawful dismissal of foreigner with temporary residence permit: employer to pay compensation for unemployment (BU)

CONTRIBUTOR KALINA TCHAKAROVA*

Summary

This case concerns the dismissal of a foreign national and payment of compensation for unlawful dismissal. One of the questions raised before the Supreme Court was whether the employer was required to pay compensation for unemployment following the unlawful dismissal of a foreign national whose temporary residence permit[1] was withdrawn because his work permit had expired.

Facts

The Bulgarian company Litasko Bulgaria EOOD[2] obtained a 12-month work permit from the Bulgarian Employment Agency, expiring on 14 December 2005, for Alexander Olegovich Gribchenkov, a citizen of the Russian Federation. It appointed him as its full time "Administrative Manager". Initially, the employment agreement was concluded for a fixed term. It was later changed to an indefinite term by virtue of a written annex. Under the annex, the employer undertook to compensate the employee in the event of unilateral termination, initiated by the employer, in the amount of five times his gross monthly remuneration. On 1 October 2005, before the work permit expired, the employment agreement was terminated. The employer claimed that the termination was by mutual consent and stopped paying salary to the employee.

The employee brought a claim before Sofia Regional Court, acting as court of first instance, against the employer, requesting the court to declare his dismissal unlawful, i.e. without good grounds. Further, the employee requested to be awarded (i) compensation for unemployment for the maximum statutory six-month term and (ii) compensation for unilateral termination of the employment agreement as per the annex to his employment agreement, in the amount of five times his gross monthly remuneration.

The employer, who carried the burden of proof that the employee had consented to the termination, failed to furnish proof of this and, as a result, the court found that the law had not been complied with and the employee had been dismissed illegally.

The employer objected to the claim for compensation as per the annex to the Agreement, maintaining that the work permit was granted for a 12-month term, thus disallowing the conversion of the employment agreement into an agreement of indefinite duration, and therefore rendering the annex invalid in its entirety. The court, however, established that the employment agreement, as amended by the annex, was only partially invalid, namely only in respect of its term, i.e. that the employment agreement was only invalid from the date on which the work permit expired. Accordingly, the court awarded the employee the requested compensation for unilateral termination of the employment agreement.

As for the claim for compensation for unemployment, the court found this claim to be well-founded, given that the employee was dismissed illegally and had sustained harm (loss of salary) as a direct result of the illegal dismissal. However, the court found that the claimant was entitled to compensation solely for the period from his dismissal until the date on which his work permit expired, namely from 1 October 2005 until 14 December 2005, and not for the maximum statutory six-month term.

The second instance Sofia City Court reviewed the decision of the court of first instance, which was appealed by both parties. It confirmed that the employee had been dismissed illegally, that the employment agreement became invalid as of the date on which the work permit expired, and that the employee was due both unemployment compensation from 1 October 2005 until 14 December 2005 and compensation under the annex to the Agreement.

The employer appealed to the Supreme Court.

Judgment

Under Bulgarian civil procedure, court decisions are subject to review ('cassation') by the Supreme Court if the court of appeal decided on a material issue of substantive or procedural law in a manner that is (i) at odds with the Supreme Court's case law, (ii) self-contradictory or (iii) at odds with the accurate application or the correct development of the law. In the case at hand, the Supreme Court admitted the appeal on the last of these. It formulated the material issue, relevant to the accurate application and development of the law, as: *"Is a foreign citizen who holds a permit for temporary residence entitled to compensation for unemployment and is a clause for payment of termination compensation valid regardless of the ground on which the employment was terminated?"*.

The Supreme Court stated that, further to Article 225(1) of the Bulgarian Labour Code, in the event that an employee's dismissal is illegal, compensation of his or her gross monthly pay for the period of the employee's unemployment shall be paid for up to six months. Pursuant to Article 73(1) of the Law on the Encouragement of Employment, the employment and social security relations with foreign nationals employed in Bulgaria by local employers shall be governed by Bulgarian employment and social security legislation, i.e. in the event of unlawful dismissal of a foreign national, the employer shall be obliged to pay him or her compensation in compliance with Article 225(1) of the Labour Code.

Notwithstanding the citizenship of the employee, the period for which the compensation is due would depend on the period of his or her actual unemployment within the statutory time-frame of six months following the dismissal. It does not depend on the term of the work permit, as that depends on the actions of the employer. The employer could, for example, decide to apply for an extension of the permit pursuant to Article 70(2) and Article 72(2) of the Law on the Encouragement of Employment. Therefore, the Supreme Court ruled that a foreign national who has been unlawfully dismissed should receive compensation under Article 225(1) of the Bulgarian Labour Code from the employer for the entire period of his or her unemployment up to the statutory maximum of six months.

The Supreme Court further held that a clause in the employment agreement relating to compensation for termination regardless of the ground on which the employment was terminated is valid, as this is not contrary to a mandatory provision of law.

Subject: Unlawful dismissal
Court: Supreme Court of Cassation
Date: 25 September 2012
Case Number: 773/2011
Hard copy publication: Not yet published
Online pblication: http://legalacts.justice.bg

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(Footnotes)
1 Foreign citizens holding a work permit are entitled to apply for a permit for temporary residence in the country, with a maximum one-year term.
2 The company was later succeeded by Lukoil Neftochim Burgas AD.

2012/51

Reasons for selecting pregnant employee for redundancy insufficient (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
An employer failed to discharge the burden of disproving that the reason for dismissing a pregnant employee was her pregnancy. Thus, the dismissal was in conflict with the Danish Act on Equal Treatment of Men and Women and the Danish Eastern High Court granted the employee nine months' pay in compensation.

Facts
It follows from the Danish Act on Equal Treatment of Men and Women that an employer is prohibited from dismissing an employee on grounds of pregnancy. It further follows from the Act that if an employer dismisses a pregnant employee, the employer must prove that the pregnancy had nothing to do with this decision. In this case, there were several reasons why the pregnant employee was dismissed, but that did not mean that the employer was able to discharge the burden of proof.

The case concerned a metal worker who was given notice of termination while she was pregnant. She had worked at the company, which was a small metal company with only five employees, for ten years.

Since the employee was pregnant at the time of the dismissal, she believed that her pregnancy was the reason for the dismissal. She therefore turned to her trade union, which issued proceedings against the employer. The trade union claimed compensation of 15 months' pay.

The company explained that the reason for the dismissal was the company's financial problems. When a major order did not go through as expected, the company had to dismiss one of its employees. The employer chose the pregnant employee because she would not be able to carry out the work performed by her colleagues without retraining. Moreover, there had been cooperation issues and a situation where the employee had left the workplace without permission.

It was undisputed that the employee was pregnant at the time of the dismissal and that the employer knew she was pregnant.

The district court found in favour of the employee and ordered the employer to pay compensation of 12 months' pay. It was a decisive factor for the district court that the employee had never received a warning or reprimand in relation to the alleged cooperation issues.

Judgment
On appeal, the Danish Eastern High Court did not find that the employer had succeeded in disproving that the employee had been dismissed because of, or partly because of, her pregnancy.

The High Court agreed that the company's financial problems made it necessary to reduce the number of employees. However, since there were four other employees in the company, the employer – in order to satisfy the burden of proof – had to demonstrate what reasons, other than pregnancy, made it necessary to dismiss the pregnant employee rather than one of the four other employees.

When assessing the employer's reasons for dismissing the pregnant employee, one factor was that the cooperation issues had not resulted in a warning or reprimand being issued to the employee. Another factor was that the High Court found that the pregnant employee would have been able to carry out the work performed by her colleagues after a certain amount of retraining – and on comparing the pregnant employee's qualifications with the other employees' qualifications, the High Court did not find it had been necessary to dismiss the pregnant employee in preference to one of her colleagues.
Contrary to the district court, the High Court awarded the employee compensation equal to nine months' pay. The High Court's decision to reduce the compensation awarded by the district court by the equivalent of three months' was based on the employee's length of service and the company's financial problems, which shortly after the dismissal of the pregnant employee resulted in three additional dismissals.

Commentary
The judgment reinforces the principle that if a pregnant employee is dismissed, the employer must prove that the dismissal is not based on the employee's pregnancy in whole or in part.

The judgment further shows that – independently of the circumstances of each individual case – it may be a challenge for the employer to discharge the burden of proof if the employee is able to carry out other duties and responsibilities within the same technical area in the department where the employee works. In such a case, it is practically impossible to prove it was necessary to dismiss a employee who enjoys special protection under the Danish Act on Equal Treatment of Men and Women. The judgment also demonstrates the importance of issuing written warnings if an employer is dissatisfied with an employee's work or behaviour.

As regards the size of the compensation, it is also interesting that the High Court reduced it from 12 to 9 months' pay based on the employee's length of service and the company's financial problems. The fact that the company had to dismiss three additional employees shortly after

dismissing the pregnant employee shows that it was in fact having financial problems, and since it was a small company there were few employees to choose from.

In this case, the employee was awarded compensation for unfair dismissal. The Danish Act on Equal Treatment of Men and Women does provide for the opportunity of reinstatement, but in this case the employee did not claim reinstatement.

Comments from other jurisdictions

Austria (Martin Risak): This case would definitely have resulted in a different ruling in Austria as a result of the special protection against dismissal granted to pregnant workers. A female employee cannot be given notice during pregnancy without the consent of the court. The condition is that the pregnancy was known to the employer at the time of giving notice, or it was notified of the pregnancy within five days of notice being given. The court can only assent if the employment relationship cannot be maintained without losses to the establishment because of downsizing or (intended) closing down of the establishment or closing down of individual departments. In the absence of consent by the court, a dismissal is void. It is long-established court practice however that a pregnant worker may accept termination and ask for compensation. The amount of the compensation will be the equivalent of the employee's pay between the termination and the moment when the employee could have been dismissed without the consent of the court, i.e. several months after the birth plus the notice period.

Germany (Klaus Thönißen): Even though the outcome is the same as under German law, the reasoning would be different and this case would be unlikely to have ended up before a Labour Court. Section 9 of the Maternity Protection Act (*"Mutterschutzgesetz"*) provides the rule under which an employer is precluded from dismissing a pregnant worker, save in exceptional cases. This rule is in accordance with the Directive 92/85. The Directive states in Article 10:

"Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent."

In addition, Germany is one of the member states in which employers are only allowed to dismiss a pregnant employee after having received written consent from the competent authority. Without that consent a German employer cannot lawfully dismiss a pregnant employee. Under German law the competent authority will consider whether there are exceptional circumstances and only give its written consent in situations where it would be utterly untenable for the employer to be bound to the particular employment contract with a pregnant employee. In 1991 the German Constitutional Court (*"Bundesverfassungsgericht"*) stated that, even when a company is facing a very difficult economic situation, a pregnant employee should keep her job where at all possible.

My view is that the company's financial problems in this case, which appear to have forced the employer to dismiss (initially, at least) only one employee, would not constitute exceptional circumstances under German employment law. The competent authority would not have given its written consent in such a case and therefore the case would probably not have come to court. If an employer wishes to challenge the competent authority's refusal, it can file a complaint with the Administrative Court (*"Verwaltungsgericht"*).

The reason why a German employer cannot normally dismiss a pregnant employee based on financial hardship, is that the financial burden on the employer of retaining a pregnant employee is not particularly great. In Germany an employer has to pay the employees 'salary' (i.e. maternity allowances) for eight weeks after the employee has given birth (12 weeks in cases of premature childbirth). After that – when the employee is on maternity leave – the employer is not obliged to pay anything at all and therefore the employee is not a financial burden on the employer.

Netherlands (Peter Vas Nunes): The contributor of this case report seems to present this judgment as evidence that Danish law goes a long way to protect pregnant employees against dismissal. However, I continue to wonder (see EELC 2011/41) whether Danish law goes far enough, given Article 10(1) of the Maternity Directive 92/85, which provides:

"Member States shall take the necessary measures to *prohibit* the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of the maternity leave [...], save in *exeptional* cases not connected with their condition [...]" [emphases added].

It would seem that the High Court in this matter would have accepted as valid and fair the dismissal of this pregnant employee had the employer been able to demonstrate that there were good business reasons ("cooperation issues" and a need for retraining) for selecting her for redundancy rather than any of her colleagues. This strikes me as a rather broad interpretation of "exceptional cases".

Subject: Discrimination
Parties: Company (A) - v - The Danish Metal Workers' Union for Employee (B)
Court: The Danish Eastern High Court
Date: 7 June 2012
Case number: B-2009-11
Hard Copy publication: Not yet available
Internet publication: Please contact info@norrbomvinding.com

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2012/52

Investment fund to compensate employees for mismanagement (FR)

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Summary

This judgment offers a further illustration of the different actions that employees of French companies in financial difficulties can take against their employers' shareholders. Not only can employees who have been laid off bring a claim, their non-redundant colleagues can claim compensation for moral damages suffered as a result of restructuring.

Facts

In 2007, the German investment fund Aurelius AG, which specialised in the restructuring of firms in difficulty, took over the French postal order group Quelle La Source ('QLS'), which at the time was facing financial difficulties, through a German holding company ('EDS Group'). The purchase price was one token Euro. Aurelius had promised QLS's works council that it would expand QLS, bring in fresh capital and honour QLS's existing recovery plan.

In 2009, three of the QLS group's French companies (the 'French subsidiaries') became insolvent and 170 employees were laid off. Over 500 employees, including many of those who had not been made redundant, filed claims totalling over € 12.5 million. One of these claims, against Aurelius, was brought before the Commercial Court of Orléans. The plaintiffs argued that Aurelius had knowingly caused the insolvency of the French subsidiaries and had deliberately fostered its own interests at the expense of the employees. The claim was based on the doctrine of tort, provided in Section 1382 of the French Civil Code. The plaintiffs asked the court to order Aurelius to compensate them for both financial and moral harm, caused by its wrongful conduct, and - in the case of those plaintiffs who had lost their job - for their redundancy.

Judgment

The Court held that Aurelius was liable for having committed serious mistakes entailing significant economic difficulties for the French companies it had taken over and distress for the employees.

In a detailed decision of one hundred pages, the Court found that Aurelius had intervened in the management of its three French subsidiaries and that this involvement was reprehensible, as Aurelius had disregarded their restructuring commitments, had maintained a cash-pooling arrangement that deprived the French subsidiaries of urgently needed capital and had failed to support them as the insolvency procedure became inevitable.

The Court characterised Aurelius' conduct as *"financial drift, contradicting the very notion of what an enterprise should be and the respect due to the workforce"*. The Court went on to describe the harm suffered by the employees.

In particular, the Court noted that various commitments had been made by the President of Aurelius towards staff at works council meetings: *"Staff, already affected by the 2006 restructuring, which had entailed 297 redundancies, could believe that their future was assured and that they could trust the Purchaser."* In sum, Aurelius had breached the confidence which the employees had placed in it.

The Court also held that each employee *"has suffered for a long time in an environment of unfulfilled commitments, stress caused by the loss of an opportunity for recovery of the company, the risk of job loss and uncertainty about his future career"*.

Aurelius was ordered to pay each employee an indemnity of € 3,000 covering the harm resulting from stress. As for the employees who were actually made redundant, they were afforded the equivalent of four months' wages as additional compensation (they had initially requested two years' wages per employee).

The judgment has been appealed and is currently pending before the Court of Appeal of Orléans.

Commentary

This case provides further illustration of the actions that employees can take to hold their employer's parent company to account, on the basis that the restructuring decision taken by the parent company was negligent.

A previous issue of EELC reported a 2011 decision of the French Supreme Court regarding a parent company (Novoceram) that was held liable towards the employees of its subsidiary (BSA) who had lost their jobs following the subsidiary's bankruptcy (EELC 2012/6). The reasoning in that case was that the parent company had intervened actively and intensively in the running of the subsidiary's business. It had become the subsidiary's sole client, had set the price of the subsidiary's products, had created a situation where assets and staff were shared and had, in brief, made the subsidiary totally dependent on itself. In view of these and other facts, the Supreme Court concluded *"that there was a confluence of interests, activities and management between the two companies manifested by the involvement of Novoceram in the management of BSA, which was sufficient to give it the status of co-employer"*. Thus, the legal basis for the parent company's liability in that 2011 case was "co-employership". In the case reported here, the employees brought the action before the Commercial Court on a different basis, relying on Article 1382 of the French Civil Code, according to which *"any act whatever, which causes damage to another, obliges the party through whose fault it occurred, to compensate it"*.[1]

The Court in this case had to answer two decisive questions: (i) was the claim against Aurelius admissible given the insolvency of the subsidiaries in question and, if so, (ii) had the plaintiffs suffered loss that was eligible for compensation?

When a company is declared insolvent, the court appoints a receiver (*mandataire judiciaire)*. Only the receiver has the power to act on behalf of the company's collective creditors. The QLS employees in this case claimed to have a case against their (former) employers, i.e. against the receiver, and, if Aurelius had mismanaged its three French subsidiaries tortiously, then it was the receiver and not the plaintiffs who had a claim against Aurelius. The first question was therefore, could the plaintiffs bypass the receiver and claim directly against Aurelius?

The Supreme Court answered this question affirmatively. For an individual action, it is necessary to prove the existence of a personal interest distinct from that of the creditors. Previous case law had acknowledged that employees who have lost their jobs can have a personal interest distinct from that of the creditors.[2]

What was novel in this case was the answer to the second question. The Supreme Court had already held that the loss incurred to employees through redundancy, where a subsidiary is sold off, qualifies as loss for which a parent company can be liable.[3] The Orleans Commercial Court in this case followed this precedent. However, it also went further, in agreeing to entertain claims filed by employees who had not been made redundant. In order to do so, it found, for the first time, that loss arising from *'stress'* and *'uncertainty'* can qualify as loss for which a parent company is liable.

Although the Court recognised that such stress and uncertainty *"may vary for each employee based not only on age, training, qualifications and career prospects* (...)*"*, it declined to calculate each person's loss individually and instead awarded each employee € 3,000 to compensate for his or her distress. Without doubt, this was a punitive award. As for the employees who were actually made redundant, they were afforded extra compensation as a result of the loss of employment, but, as already noted, this was not novel.

This decision by the Orleans Commercial Court must be seen as turning a new page in the law insofar as staff who have not in fact been made redundant are concerned. It is also a new development in the recent trend towards recognising 'anxiety' as a distinct form of harm. This follows from a Supreme Court decision of 2010, in relation to employees working in a plant classified by the French authorities as eligible for early decommissioning owing to the presence of asbestos. According to the Supreme Court, the employees in that case were, *"because of the employer, in a permanent state of anxiety as a result of the risk that an asbestos-related disease could be discovered at any time and because they had to undergo periodic medical examinations, which could reactivate this anxiety"*.[4]

That being said, the Commercial Court decision opens a Pandora's box, as in that case, the management by the shareholder of its subsidiaries was at stake.

Although the Commercial Court has apparently taken care to emphasise the exceptional mismanagement by this particular parent company, one might wonder whether its strong signal will not have a broader discouraging effect on foreign investment in France, at a time when French businesses and their employees need their support.

What is certain is that potential investors in loss-making subsidiaries in France will henceforth be well-advised to exercise greater caution than in the past and will need to be confident that their plan to restructure the business will succeed.

Subject: Parent company liability
Parties: (Former) employees - v - Aurelius AG
Court: Tribunal de commerce d'Orléans (Commercial Court of Orleans)
Date: 1 June 2012
Case number: 2010-11170
Publication: not yet published

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(Footnotes)

1 For another example of the application of this provision in the context of insolvency and redundancies, see Court of Appeals of Pau, 10 May 2012, 11/02325.
2 Supreme Court, social chamber, 11 November 1994, n°90-16.309.
3 Supreme Court, social chamber, 14 November 2007, n°05-21.239.
4 Cass. soc. 11 mai 2010 n° 09-42.241, Sté Ahlstrom Labelpack c/ Ardilley.

2012/53

Refusal to take drug test is just cause for dismissal (MT)

CONTRIBUTOR MATTHEW BRINCAT*

Facts

The plaintiff in this case, Mr Marco Cassar, was employed by the co-operative association Kooperattiva All 4 One (the 'Cooperative'). This Cooperative's business included transporting the staff of another company, Malta Freeport, to and from their work. The plaintiff's job was to drive a bus carrying Malta Freeport employees. At a certain point in time, the Cooperative received complaints from Malta Freeport's management that the plaintiff was driving under the influence of illegal substances. Malta Freeport threatened to terminate the outsourcing agreement, if no disciplinary action was taken by the Cooperative.

The Cooperative decided to run 'random' drug tests on a number of employees, including the plaintiff. However, both he and one other employee refused to give a urine sample for the test.

The Cooperative dismissed the plaintiff for not taking the drug test, on the same day as his refusal. The plaintiff filed proceedings before the Industrial Tribunal, claiming compensation because the termination of his employment was not for a good and sufficient cause.

The plaintiff said he had refused to take the drug test, on the advice of his family doctor because he was taking prescribed medicine at the time. However, Cooperative officials testified that the plaintiff did not mention any medicines or doctors prior to dismissal.

The family doctor testified that he had not advised against taking a drug test, but had merely told the plaintiff that the drug test would reveal that he was taking medication to counteract substance abuse. The tribunal noted that the plaintiff did not release his doctor from professional secrecy obligations to confirm whether that medication was related to drug abuse.

Judgment

As a preliminary plea, the Cooperative argued that the plaintiff was actually engaged on a self-employed basis and not employed. The Industrial Tribunal hastily dismissed this argument. It opted for a 'substance-over-form' approach and saw that the contract included clauses more akin to a contract of employment, than one of services. These clauses regulated the number of hours worked, including overtime, an hourly rate of pay, leave, and subordination to management directives. The termination of the working relationship was, therefore to be regulated by Maltese employment law and not by simple contract law.

The Industrial Tribunal reached the conclusion that the Cooperative had no other option than to terminate the plaintiff's employment for good and sufficient cause under Maltese employment law. The Tribunal remarked that the Cooperative had a moral and legal obligation to safeguard the health and safety of Malta Freeport's employees during transportation. Moreover, the Cooperative risked losing its contract with Malta Freeport if it did not take any action. This would have meant other employees having been laid off. The Tribunal also took into consideration the plaintiff's refusal to produce a urine sample and to release his personal doctor from his professional secrecy obligation.

Finally, the Tribunal expressed dissatisfaction with the way the plaintiff's dismissal had been handled from a procedural point of view and it handed down a pecuniary penalty of € 750 to be paid to the plaintiff.

Commentary

There are a number of interesting aspects to this recent decision by the Industrial Tribunal, but the most interesting is the reasoning of the Tribunal that the employee could be dismissed for refusing to submit to a drug test.

Under Maltese law, there are two modes of termination of the employment relationship by the employer: (1) termination by reason of redundancy and (2) termination without prior notice for a good and sufficient cause. Although the law provides a non-exhaustive list of reasons that do not constitute a good and sufficient cause, there is no definition as such. The Tribunal is therefore required to assess each case according to its particular circumstances.

Employers may welcome the fact that the Tribunal is prepared, at least in principle, to find that refusal to submit to a drug test may constitute a good and sufficient cause for termination. Unfortunately, the Tribunal overlooked a potential conflict with the plaintiff's fundamental right to privacy. Clearly, an employee may refuse to take a drug test, given the right to respect for private life enshrined in the Maltese Constitution and Article 7 ECHR and, more particularly, the right to physical integrity provided in Article 3 of the Charter of Fundamental Rights of the EU. The beckoning question, however, is whether an employer may infer that an employee is under the influence of an illegal substance simply because he refused to produce a urine sample. For some employees, being given the choice between undergoing a drug test and losing one's job is equivalent to being forced to undergo the test. Thus, the plaintiff was in effect being forced to agree to a violation of his physical integrity. Certainly, this is a matter to be determined on a case-by-case basis, but we submit that it would be in the best interests of both parties for the employer to require the employee to provide justification for his or her refusal prior to dismissal, and if need be, an employer should refer the case to the appropriate competent authorities prior to making any hasty decisions about a person's employment.

In this case the Tribunal has taken the view that the economic needs and interests of the employer may, in certain circumstances, override the individual interests of the employee. It is uncertain whether the Tribunal would take this approach even if the business of the employer was not in jeopardy, or there were no risks associated with the job.

Comments from other jurisdictions

Austria (Martin Risak): From an Austrian perspective the questions raised in the decision have not yet been resolved by the courts. The legal literature, which mostly deals with the issue of alcohol abuse, tries to balance the employer's interest in getting full and uninhibited performance from the employee and the employee's constitutionally protected right to privacy and physical integrity. It argues that without explicit legal provisions (which only exist for driving under influence) an absolute prohibition on all forms of control of the physical state of a person prevails, even if these do not infringe directly the physical integrity of the individual (as in the case of a urine test). Of course, an employee may submit him- or herself to such a control voluntarily, but refusal must not result in summary dismissal. The frequently suggested solution is a clause in the employment contract allowing an employer to suspend an employee without pay from working if there are indications of intoxication and the employee does not agree to an alcohol or drug test.

A second question in this context concerns the co-determination rights of the works council. Measures of control that affect the personal dignity of an employee may only be undertaken – even in cases where the employee consents - if a works agreement (i.e. a written agreement between the employer and the works council) provides for them. As drug tests are considered to fall into this category, in businesses where a works council has been established, if they are not included in a works agreement they will be illegal.

Germany (Klaus Thönißen, LL.M.): Generally speaking, a German employer is not allowed to impose random drug tests on employees if the purpose of the tests is merely preventive. In such a case, the employees' personal rights will outweigh the employer's interests.

On the one hand, an employee's obligation to participate in a drug test might arise out of his or her duty of loyalty to the employer. Therefore, before imposing such a test, the employer must have reasonable belief that the employee is working under the influence of drugs or alcohol. Therefore, as in the case at hand, a German employer would have the right to ask an employee for a urine sample, if the employer received information concerning the employee's behaviour.

On the other hand, the Regional Labour Court of Hamm found in 2006 that an employer can lawfully establish random drug tests within the company if this is necessary to assess the employees' ability to work, provided this is based on a collective bargaining or an employer/workers council agreement.

If one of the two aforementioned situations imposes a duty on the employee to take a drug test, the employer would be able to dismiss the employee if he or she refused.

Netherlands (Peter Vas Nunes): In 2007 the Dutch Supreme Court handed down its controversial judgment in the *Dirksz – v – Hyatt Aruba* case. The Hyatt hotel chain had a "drug-free workplace policy" that included random urine testing for substance abuse. The staff were informed that anyone who tested positive for a drug test would be summarily dismissed. One day, Ms Dirksz, a casino beverage server in a Hyatt hotel on the Caribbean island of Aruba, was selected for a drug test. She consented to the test, which turned out positive for cocaine. Ms Dirksz was given the choice of participating in a rehab programme, being fired or resigning. She refused to enter the rehab programme and did not resign, so she was dismissed. She claimed that her dismissal was invalid. One of her arguments was that cocaine use yields a positive test result for up to 72 hours (3 x 24 hours) after the use has ceased, as was widely known on Aruba. Thus Hyatt's policy effectively meant that its employees could never use cocaine, even in their free time, regardless whether such private use long before starting work could influence work performance. The Supreme Court accepted that this was a violation of Ms Dirksz's private life, but it found the violation to be justified by a legitimate aim and the strict drug-free workplace policy to be a proportionate measure to achieve that aim.

One question that arose after the *Dirksz – v – Hyatt* judgment was what the court would have done had Ms Dirksz refused to undergo a drug test and had Hyatt dismissed her for that reason. At least one author has opined that such a dismissal would likely have been declared invalid. Although this author does not explain the opinion, the context of her statement indicates that it has to do with the Dutch law transposing the 'Privacy Directive', Directive 95/46. Data concerning health are 'special' data within the meaning of Article 8 of the Directive, which may not be processed except (*inter alia*) where the data subject (Ms Dirksz in this case) *"has given his explicit consent"*, which Article 2(h) defines as *"any freely given specific and informed indication of his wishes"*. How freely given and how specific is consent that is given on pain of dismissal?

A recent judgment by an appellate court (18 September 2012, LJN: BX 8354) held that refusal to undergo a drugs test could, in the circumstances of the case (oil refinery, zero tolerance policy), lead to a summary dismissal, given that the (random) test served a legitimate aim (safety) and that the means to achieve that aim were proportionate.

In a sense, the fact that the *Dirksz – v- Hyatt* judgment caused a stir among lawyers is surprising, given that the ECtHR had previously given its blessing to similar drug-free work policies in its 2002 ruling in *Madsen* (appl.nr. 58341/00) and in its 2004 ruling in *Wretlund* (appl. nr. 46210/99).

United Kingdom (Richard Lister) In the UK, compulsory drug testing in the workplace would engage the employee's right to privacy under the Human Rights Act 1998 and also fall within the Data Protection Act 1998. A drug testing policy can still be justified, but only where it is genuinely necessary and carried out proportionately. It is much easier for an employer to justify drug testing in a safety-critical job, such as in this case.
Testing positive for drugs can be a fair reason for dismissal in the UK, depending on the nature of the employee's job. In relation to whether it would be fair to dismiss an employee for refusing to take a drug test, it would certainly be unlawful to force someone to take such a test. This would breach their privacy rights and also their data protection rights because they would not have given genuine consent.
However, where a drug testing policy is justified in a particular workplace, the employer could include a provision in the contract stating that refusal to take a drugs test is a misconduct offence. The employee could then be disciplined for the refusal. Whether any consequent dismissal is fair will depend on whether the drugs testing policy is justified, the importance of a clear drug test for that particular employee's role and the employee's reasons for the refusal. The employment tribunal would take account of the employee's privacy and data protection rights in reaching its decision.

Subject: Privacy
Parties: Cassar Marco - v - Koperattiva All 4 One
Court: Industrial Tribunal, Malta
Date: 4 June 2012
Case Number: 2766/GBC
Publication: http://industrialrelations.gov.mt/download.aspx?id=1911

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2012/54

Economic woes justify 20% salary cut (GR)

CONTRIBUTOR EFFIE MITSOPOULOU*

Summary
The employer's unilateral reduction of the employee's salary was considered lawful and not abusive, since it was done in the context of the exercise of the employer's managerial rights, by reason of the economic difficulties the company faced.

Facts
The defendant in this case was a manufacturer of doors, aluminium windows and similar products. The plaintiff was an employee who had been employed since March 1995 as an IT programmer. Until June 2010 his salary had been € 2,687.75 per month. On 23 June 2010 the company requested him in writing to consent to a 20% reduction in his salary. The plaintiff protested. The next day he confirmed his protest in a letter in which he expressly stated that he considered the proposal to constitute a unilateral detrimental amendment to his terms of employment. Despite this protest, the employer proceeded to reduce the plaintiff's salary, with retroactive effect from May 2010.

The employee filed a claim before the First Instance Court of Thessaloniki, requesting the court to declare that the unilateral reduction of his salary constituted a detrimental amendment to his employment terms; that the company should be required to accept his services on the basis of the initial terms of his employment agreement (as far as the level of his salary was concerned); and finally that the company should be obliged to pay to him the difference between his old and new salary.

Judgment
The court found in favour of the employer. It ruled that the reduction of the plaintiff's salary took place for specific economic and technical reasons, namely the decline in the employer's business, and that the employer had exercised its statutory 'managerial right' without abusing that right.

In particular, the court emphasized that the company's turnover had been declining steadily ever since 2003. In 2010, its turnover was no more than 53.41% of what it had been in 2007. Since that year the profits had continued to decrease and the losses had continued to increase. In the last three years (2009, 2010 and 2011), the company had not distributed any dividends to its shareholders.

The court finally noted that the employee's salary was higher than the statutory minimum wage.

Commentary
This case has been heavily criticized in the legal literature, as well as by legal practitioners, since it violates the principle of freedom of contract, according to which whatever has been agreed should be respected *("pacta sunt servanda")*.

The principle that no amendment of the terms and conditions of an employment relationship, leading to a deterioration of the employee's terms, can take place without express consent, is a rule always strictly respected by the Courts. However, the Court in this case accepted that an employer has the authority to impose salary reductions unilaterally using the legal notion of 'managerial right', in order to safeguard its business. This reverses the established rule that management has no right to interfere unilaterally to amend what had been agreed on salary.

The criticism focuses on the fact that the decision erroneously reversed the hierarchical relationship between employment contract and managerial right. It is argued that the employer had other options. For example, it could have treated the refusal of the employee to accept the amendment to the terms of his employment agreement as a reason for dismissal and then terminated the contract, in which case the employee could have made a claim for constructive dismissal.[1]

Finally, the decision was also criticized on the basis that the company's economic problems were not recent, but dated from 2003 and that in 2008 the employer had granted a salary increase to the employee.

It is worth noting that the employee was finally dismissed and that he contested the validity of his termination by means of a second lawsuit.

Academic comment by Professor Constantinos Bakopoulos**
Not every decision is correct but few decisions are as boldly wrong as this. The court said that the managerial authority entitled the employer to unilaterally change a core employment term. This was a clear mistake. The traditional understanding is that, unless otherwise agreed, the managerial authority stops where the contract begins. Moreover, the managerial authority refers to the employee's, not the employer's obligations. (It is of course possible, under certain conditions and constraints, to contractually extend the scope of the managerial authority by stipulating the employer's right to unilaterally change certain employment terms, including a part of the remuneration. This, however, was not the case here.)

The court found further that, in consideration of the financial difficulties the company was facing, the "managerial right" had been exercised in conformity with the principle of good faith (not abusively - Article 281 of the Greek Civil Code). This was irrelevant since such a right did not exist. Financial difficulties cannot derogate from the principle *pacta sunt servanda*.

The proper tool to reduce the agreed salary (or to change any other essential employment term) would be constructive dismissal, i.e. the proposal of a contract amendment accompanied by its termination in case of non-acceptance. In Greece however, constructive dismissals in that formal sense are rather rare. The Greek method is that the employer either proposes to the employee the new terms (and terminates the contract if the employee declines the offer), or directly applies them into the contract. The latter is called a unilateral detrimental amendment of the terms of employment. The employee has then three options: either accept the new terms, in which case the contract is consensually amended; or reject, in which case the employer will be forced to terminate the contract (and pay the statutory dismissal severance) in order not to be in breach of contract. The law gives the employee a third option which is practically a shortcut of what would happen if he took the second option: Article 7 of Law 2112/1920 provides that a unilateral detrimental amendment of the employment terms can be deemed by the employee to constitute dismissal and to trigger his statutory right to termination severance. In other words: *Pacta sunt servanda*: the employer cannot unilaterally achieve the continuation of the contract on modified terms; nevertheless, he can be freed at the cost of the dismissal severance. The court decision reported above allowed him to do so at no cost. Hopefully, this judgment will remain a unique case.

It is worth mentioning that the "crisis legislation" which in the course of the last three years has overhauled important institutions of Greek employment law (such as the system of collective agreements, arbitration, minimum wages, notice periods and severance amounts, flexible employment forms, retirement conditions, etc.) did not touch the above basic rules of individual contractual freedom.

Comments from other jurisdictions
Austria (Martin Risak): The critique reported in the author's Commentary would have been raised in the same way in Austria. Here it is an almost sacrosanct principle that a unilateral change of employment conditions may only take place if the employment contract provides for such a right. Whilst a managerial right is implied in the contract, this concerns the work to be delivered, in particular, what, where and how exactly the work is to be done. By contrast, the right to alter remuneration must be ageed explicitly. Even if such a right is found to exist, the courts may review in each case whether the employer acted in a just and fair way. In the absence of a contractual provision the employer may resort to dismissing the employee with notice, with the option of a new contract incorporating the new remuneration.

Germany (Paul Schreiner): Under German employment law an employer generally cannot unilaterally reduce an employee's salary based on managerial rights, since this would be a violation of the principle *"pacta sunt servanda"*.

If the employer wishes to change the contract, it needs to issue a notice of termination in which it offers changed conditions of employment – in this case different pay. If the Dismissal Protection Act applies, such notice of termination must be supported by a valid reason.

There is one exception to this general rule regarding pay: if the parties to the employment contract agree, pay can be reduced by up to 25% if working time is changed accordingly. Further exceptions might occur with regard to one-time benefits such as a "13th month salary" (i.e. a bonus), which can also be withdrawn under certain conditions.

The Netherlands (Peter Vas Nunes): The situation in The Netherlands is not very different from that in Austria (see Martin Risak's commentary above). Very recently (7 January 2012), the Dutch software company Cap Gemini caused a stir by requesting certain senior IT staff, whom it claims are being overpaid, to agree "voluntarily" to a reduction of salary by up to 10%, thereby addressing the delicate topic of demotion for long-serving and therefore older staff whose salary has risen beyond (new) market levels as a result of more or less automatic salary raises.

Subject: Unilateral reduction of the salary without the employee's consent
Parties: Employee – v - Company "D"
Court: First Instance Court of Thessaloniki
Case number: 8561/2012
Hard Copy publication: Not yet available, but can be found in DEN 1610/2012, page 1201 and EED 13/2012 page 922
Internet publication: Not yet available

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(Footnotes)
1 For more detail see Professor Koukiadis-Zerdelis' "Legal Opinion" DEN 2011/1553 and Gavalas' article "Pacta non sunt servanda?" EED 2012/71/917.

2012/55

Facebook posting not covered by right to free speech (NL)

CONTRIBUTOR LOTTE VAN HECK*

Summary
A Facebook message to one's 'friends' can lead to dismissal.

Facts
This case concerns a 37 year old employee of the "Blokker" supermarket chain. He worked in a warehouse on a fixed-term contract. On 13 January 2012, he asked his boss for an advance on his salary. His request was turned down, whereupon he posted a message on his Facebook account in which he criticised his employer. His employer found out about this and warned him not to repeat his behaviour.

On 2 February 2012, the employee again posted a message on Facebook. It was extremely insulting both for his employer and for his boss in particular. Although the message had been posted on the employee's private Facebook account and could only be read by his 'friends', his employer found out the same day, having been informed by one of those 'friends', a colleague. The employee was dismissed summarily.

Blokker was unsure whether, if challenged, the dismissal would stand up in court. It therefore applied to the court for conditional termination of the parties' employment agreement. [1]

Judgment
The employee invoked his constitutional right to free speech. He said he had removed the posting from his Facebook page soon after his dismissal.

The court held that the employee had insulted his employer in a manner that had nothing to do with free speech. The court added that employees' right to free speech is limited by their duty of care towards their employer.

The court went on to note that the private nature of Facebook and of a person's Facebook 'friends' is relative. In this instance, one of those 'friends' had informed the employer. Moreover, any of the individuals who received the posting could have forwarded it to others.

In view of the fact that the original warning was given less than three weeks before, the court found the summary dismissal to be justified and granted the employer's application for conditional termination.

Commentary
In the early days of Internet, the Data Protection Agency used to advise employers and employees *"to treat online the same as offline"*. In other words, if you need to assess the privacy-law aspects of an online event, you should compare it to the nearest equivalent offline situation. For example, if an employee is caught watching pornography on his computer during working hours, that should be compared to reading Playboy. Similarly, if an employer intercepts incoming email, that should be compared to the employer opening a letter addressed to the employee.

Clearly, this advice is no longer very helpful. One cannot compare a Facebook posting or other message on the Internet to, for example, a remark made by someone to his friends in a pub. Had the employee in the case reported above said the same things about his employer and his boss verbally to a group of friends, rather than expressing his feelings in writing on Facebook, the outcome of the case may not have been the same.

The right balance between an employee's right to free speech and his duty to refrain from making harmful public pronouncements on his employer depends on a number of variables, such as (a) the degree of harmfulness; (b) the (potential) size of his audience; (c) the method of communication; and (d) the relationship between the employee and his audience.

Taking the following offline examples:
1° Employee moans about his work load (variable (a)) to one colleague (variable (b)), verbally (variable (c)), the colleague being someone he trusts to keep the information confidential (variable (d)). If the colleague passes the information on to another colleague, who informs management, that clearly would not be a cause for dismissal.
2° During a dinner party (c), employee informs three (b) of his friends, not being co-employees (d), that his boss is ruining the company (a); if one of these friends tips off a local journalist, that could possibly be a more serious situation than in the previous example.
3° Employee types an unfounded and inflammatory notice (a), which he pins on the notice board in the staff canteen (c), where all employees (b) as well as visitors (d) can read it. This situation comes close to that in the ECtHR's judgments in *Fuentes Bobo* (ECtHR 29 February 2000 appl. No. 39293/98) and *Palomo Sanchez* (ECtHR 12 September 2011 appl. No. 28955/06).

The three examples above are all offline examples. They pose problems that are difficult enough, but modern media add an extra dimension because (i) the audience is unlimited in size, (ii) that audience is easily reached (a simple posting, typed in a matter of minutes in the privacy of one's home, can 'go viral') and (iii) in many cases the posting cannot be removed and goes on existing uncontrollably for ever, in contrast to the spoken word, that is fleeting. Moreover, where in a verbal conversation a remark is made within a context and with a certain tone of voice (sarcasm, for example), a message posted on Facebook can easily be taken out of context and/or lose relevant nuance. It is artificial to argue that a Facebook message that is sent only to 'friends' reaches no more than a select group, in a similar way to offline example 2 above. A Facebook posting, however limited the list of addressees, almost by definition risks creating a situation similar to offline example 3.

Comments from other jurisdictions
Denmark (Mariann Norrbom): In Denmark, we have seen a few cases regarding Facebook postings. Case law has already established that an employee's duty of loyalty (and perhaps also duty of confidentiality) imposes some restrictions on the freedom of speech, but contrary to this case from The Netherlands freedom of speech has not been used as an argument in these Danish cases.

It was, however, argued that a Facebook posting can be limited in such a way that only the employee's friends are able to see the posting and, consequently, that Facebook postings are not covered by the duty of loyalty.

In one of the cases - which is somewhat similar to the Dutch case - the employee was dissatisfied with the employer, so she posted on Facebook that she "declared war" against her employer and that she looked forward to getting value for her union membership. The court found that these postings, which were clearly phrased in a negative way, could damage the employer's reputation. Based on the employee's duty of loyalty, the court held that the employee was not entitled to post these statements and, accordingly, that the employer was justified in dismissing her. In this case, it was a decisive factor that the employee knew that some of her Facebook friends were customers, business partners and competitors of the employer. This is in line with the Dutch case.

The court also emphasized that the language on Facebook is very similar to spoken language, and this is the reason why it may easily be understood to be more offensive than intended. This is also in line with the Dutch commentary, stating that written text loses the nuance of the spoken word, which makes it almost impossible for the reader to interpret the meaning of the text.

Careless Facebook postings have recently resulted in a PR worker having to resign from her position with a governmental body. The PR worker posted that she loved the new tax reform in Denmark and that personally she was happy about the reform even though it was bad news for the poor. This is a good example of how something that was probably intended to be a private posting with an ironic undertone reflects back on the employer in a negative way.

There is no doubt that we will see more cases regarding the use of Facebook in the future, since many people do not realise that postings on Facebook are not considered private from a labour point of view.

Germany (Klaus Thönißen): In Germany several cases of this kind have come up as well. Obviously, it has become very popular to defame either an employer or co-worker via social networks.

Insults may justify dismissal under German employment law. The judicial opinions in Germany are very close to the one in the case at hand. The German courts also argue about the difference between insulting one's boss by telling a friend/co-worker or by posting it on Facebook. It seems that defamation on Facebook weighs heavier than insulting someone verbally. The reason for this is that "the internet doesn't forget", i.e. a Facebook post is permanent.

In October 2012 the Regional Labour Court of Hamm found that an insulting post on Facebook justified a dismissal without notice. In that case, the employee stated in the "about" section on his Facebook profile "works for oppressor of people and exploiter". Similarly, a District Labour Court in Duisburg found a dismissal without notice to have been lawful because an employee insulted his co-workers on Facebook. In that case the insults included expressions such as "ass-kissers" and "smart-asses".

Luxembourg (Michel Molitor): The question of whether malicious or insulting Facebook posts are covered by employees' right to free speech has not been yet come before the Luxembourg courts as far as we are aware. However, freedom of speech is not an absolute right also in Luxembourg and does not prevent employers from taking disciplinary action against employees who have breached the mutual trust governing each working relationship. In any event, in the present case, the Luxembourg Labour Courts would probably have followed French case law, pursuant to which messages posted on a private Facebook account are considered as private correspondence and they would have declared the dismissal invalid.

United Kingdom (Richard Lister): The trend in the UK is also to regard Facebook communications as somewhat different from other forms of communication with friends. This is largely due to the ease with which a message can be sent to a large group of people, and the fact that the message can then be copied and passed on to others, meaning the author loses control over the information and it can quickly go "viral".

An employee's rights under the Human Rights Act 1998 do need to be taken into account in deciding whether a dismissal for Facebook activity is fair. A Facebook posting may engage an employee's right to free speech, but an employer's rights to protect both others' and its own reputation may override this right. An employee will only have privacy rights if he or she has a "reasonable expectation of privacy" in relation to use of Facebook, which is difficult to establish if the employee's page is publicly accessible and/or open to a wide range of 'friends'.

There have been a number of recent employment tribunal decisions which have found that dismissals of employees for inappropriate Facebook postings were fair. As in the case above, in some of these cases it was one of the employee's "friends" who had informed the employer about the posting. However, the fairness of such dismissals will still depend on the employer having clear rules about the use of social media, which have been communicated to employees. It will also depend on the seriousness of the comments for the employer and the likelihood of the information being seen by others: there have been cases where dismissals for use of social media have been found to be unfair for these reasons.

Subject: Free speech
Parties: Blokker B.V. - v - X
Court: *Rechtbank sector kanton* (Lower Court), Arnhem
Date: 19 March 2012
Case Number: 800536 HA VERZ 12-1032
Hardcopy publication: JAR 2012/97 and Prg 2012, 125
Internet publication: www.rechtspraak.nl → LJN: BV 9483

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(Footnotes)

1 A 'conditional' application for dismissal is a request to the court to terminate the employment in case it still exists despite the summary dismissal, i.e. in case the dismissal was invalid and therefore non-existent.

2012/56

Annual leave untaken due to illness carried over automatically (UK)

CONTRIBUTOR ELIZABETH GORING*

Summary

A worker, who had not taken statutory annual leave because of long-term sickness absence, was entitled to carry the untaken leave forward to the next holiday year without making a prior request to do so. She could therefore claim payment in lieu for any unused statutory holiday on the termination of her employment.

Facts

Mrs Larner was a part time clerical officer for NHS Leeds, a public healthcare trust. She went on sick leave in January 2009 and was later diagnosed with chronic fatigue syndrome (ME) and depression. On commencing her sick leave, she had no pre-arranged annual leave. The employer's holiday year ran from 1 April to 31 March and Mrs Larner was absent throughout the entire 2009/2010 leave period. Her conditions of employment stated that annual leave would accrue during paid and unpaid sick leave, but a 2006 bulletin issued by NHS Leeds confirmed that annual leave could not be carried into the following year *"unless in exceptional circumstances and a written request has been submitted and approved".*

Whilst absent during the 2009/10 leave year, Mrs Larner made no request to take paid annual leave or to carry forward her untaken leave into the next year. She did not return to work, and NHS Leeds terminated her employment in April 2010 on grounds of incapability due to her continuing ill health. Following her dismissal, Mrs Larner received payment for the proportion of her untaken holiday due for the 2010/2011 leave year, but not for that which accrued during 2009/2010. Mrs Larner brought a claim in the Employment Tribunal (ET) for unlawful deduction of wages, seeking payment for her full unused statutory holiday entitlement. She contended that article 7 of the European Working Time Directive ("the Directive") entitles a worker who is unable to take paid annual leave because of sickness to take that leave at another time, if necessary in a subsequent leave year. This was on the basis, in particular, of the rulings of the European Court of Justice (ECJ) in *Stringer and others v HM Revenue & Customs* [2009] IRLR 214 and *Pereda v Madrid Movilidad SA* [2009] IRLR 959.

The right to paid annual leave is implemented in the UK by the Working Time Regulations 1998 ("the Regulations"), which provide workers with the right to take 5.6 weeks paid holiday in each leave year (i.e 1.6 weeks more than required by the Directive). Mrs Larner claimed payment in lieu of her entire 5.6 weeks' statutory leave accrued during 2009/2010. Both regulation 15 of the Regulations, and NHS Leeds' own policy, specify that employees' must provide advance notice of any request to take annual leave. In addition, under regulation 13 of the Regulations, the four-week minimum entitlement under the Directive must be taken in the leave year to which it relates, or else it is lost, and the additional 1.6 weeks' leave can only be carried forward into the next leave year by agreement.

NHS Leeds submitted that, as Mrs Larner had made no request to take or carry forward leave, her entitlement to it lapsed at the end of the leave year. Any carry over right under the ECJ's interpretation of the Directive was not effective in this case as no request to do so had been made.

The Employment Tribunal's Decision

The ET found in Mrs Larner's favour, deciding that in light of recent ECJ rulings, workers on sick leave carry over statutory holiday automatically whether a request has been made or not. It was also not necessary for an employee to have taken annual leave but not been paid in respect of it, or to have attempted to take it, in order to be entitled to payment for it on termination of employment.

The Employment Appeal Tribunal's Decision

Upholding the Employment Tribunal's decision, the Employment Appeal Tribunal (EAT) held that the result of the ECJ decisions in *Stringer* and *Pereda* was that Mrs Larner was presumed not to have been well enough to exercise her "right to enjoy a period of relaxation and leisure" whilst signed off sick. It followed, as a matter of law, that she did not have the opportunity at any time during 2009/2010 to take her annual leave.

Accordingly, the EAT concluded that Mrs Larner had the right to have her leave entitlement under the Regulations carried over to the following year without having to make a formal request to do so. The right to be paid for that annual leave then crystallised on the termination of her employment.

The Court of Appeal's Decision

NHS Leeds submitted a further appeal to the Court of Appeal, on the ground that Mrs Larner could have taken paid leave during the course of her sickness absence and had clear opportunity to do so. Moreover, she did not comply with the notice requirements imposed by both NHS Leeds and the Regulations and made no request for paid annual leave, which would have been granted had she made it. Finally, the employer said, she could also have made a request that her untaken paid leave be carried forward, but she did not do so

In view of those missed opportunities - and relying in particular on the ECJ's judgment in *Pereda* which referred to an employee's right to carry over leave *on their request* – NHS Leeds argued that Mrs Larner was not entitled to payment for her 2009/2010 annual leave entitlement. She had lost it by neither using it at the time nor requesting its deferral. It was argued, in the alternative, that if Mrs Larner's leave was automatically carried forward, this applied only to the four weeks' annual leave afforded by the Directive and not to the additional 1.6 weeks under the Regulations.

The Court of Appeal upheld the judgments of the ET and the EAT and in doing so clarified the position as follows:

- The right to annual leave under article 7 of the Directive is directly effective against an emanation of the state, such as an NHS trust.
- Under article 7, if a worker is unable or unwilling to take leave owing to sickness, they must be allowed to take it at another time, if necessary in a later leave year.
- It is not a requirement of article 7 that a worker must make a request to take or carry forward annual leave.
- Furthermore, it is possible to interpret the Regulations so as to comply with article 7, by reading in additional words (in italics) into regulation 13: «leave to which a worker is entitled under this regulation may be taken in instalments, but it may only be taken in the leave year in respect of which it is due, *save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave.*" As a result, public and private sector employers are in the same position and must both allow statutory leave to be carried over in these circumstances.

Commentary
There have been various conflicting UK decisions on the question of carrying over holiday entitlement for workers on sick leave, largely due to the apparent contradiction between the Regulations' prohibition on carrying leave over and the recent ECJ decisions requiring this to happen in certain circumstances.
In recognition of the problem, the UK Government has been consulting on a proposed amendment to the Regulations to state expressly that, where a worker has been unable to take annual leave due to sickness absence (or falls sick during scheduled annual leave), and it is not possible to reschedule the leave in the current leave year, he or she will be able to carry over the first four weeks of statutory leave into the following leave year. The outcome of the consultation is still awaited.
In the meantime, the Court of Appeal's latest ruling does not resolve all outstanding issues, but it does give a clear answer on whether employers can operate a "use it or lose it" holiday policy in relation to sick workers - the short answer being "no".
Unfortunately, the Court of Appeal did not decide the current position in relation to the additional 1.6 period of leave conferred by the Regulations. It did however refer (apparently with approval) to the recent case of *Neidel v Stadt Frankfurt am Main* [2012] IRLR 607, in which the ECJ decided that national law could prevent carrying over of any period of domestic leave over and above the basic four weeks, even where a worker had been unable to take this extra leave due to sickness. However, as this point had been raised late in the day in Mrs Larner's case, the Court declined to make a ruling on it.

Comments from other jurisdictions
Austria (Martin Risak): The Austrian legal situation is somewhat different. Holiday entitlements should be used in the year in which they arise but automatically taken into the next year if unused. In fact, they may be used within the next two years, before they become time barred. An employee therefore has three years to use his or her annual holiday entitlements – in the light of such provisions it is no surprise that disputes such as the one reported on do not occupy the Austrian labour courts.

Subject: Working time (annual leave)
Parties: NHS Leeds – v - Larner
Court: Court of Appeal
Date: 25 July 2012
Case number: [2012] EWCA Civ 1034
Hard copy publication: [2012] IRLR 825
Internet publication: http://www.bailii.org/ew/cases/EWCA/Civ/2012/1034.html

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2012/57

Paid leave does not accrue during parental leave (AT)

CONTRIBUTOR CHRISTINA HIESSL*

Summary
Under Austrian law, no entitlement to paid annual leave accrues during (unpaid) parental leave. The Supreme Court applies this law strictly, unfortunately without addressing potential friction with EU law.

Facts
The plaintiff in this case was a civil servant employed by the municipality of Vienna. He applied for full-time parental leave for the duration of one year. His request was granted on 12 January 2009. His parental leave lasted from 14 April 2009 to 13 April 2010. In accordance with the applicable regulations, the parental leave was unpaid and the plaintiff accrued no annual paid leave during said period of 12 months. Given that he was entitled to 29 days of paid annual leave, he accrued:
- in 2009: 3 ½ months x 29:12 = 9 days of paid leave
- in 2010: 8 ½ months x 29:12 = 21 days of paid leave

Despite the fact that he was entitled to no more than nine days of paid leave in 2009, he took 21 days off in the period between 12 January and 14 April 2009, i.e. 12 days more than the number of days to which he was entitled. Upon his return to work in April 2010, he was informed of the fact that for the remainder of 2010 he was entitled to no more than nine days, calculated as follows:

• accrual in 2010 (8.5 months)	21
• excess taken in 2009	12
• remainder for 2010	9

The plaintiff objected, arguing that the applicable provisions of law did not allow the deduction of 12 days. He brought legal proceedings.

The court of first instance dismissed his claim. On appeal, this judgment was overturned. The Court of Appeal found that the municipality, by allowing the plaintiff to take 21 days off knowing that he was not eligible to more than nine days, had lost its right to deduct the balance of 12 days. The municipality appealed to the Supreme Court.

Judgment
The municipality's action proved successful: the Supreme Court overturned the second instance judgment and re-established the conclusions of the judge of first instance. It held that the law clearly envisages a reduction *pro rata temporis* of the annual leave entitlement in a year in which the employee is temporarily absent for reasons of childcare. In the case at hand, the Court could see no indication that the public employer intended, contrary to the applicable law, to deviate from this rule. Even in the absence of an explicit agreement on an advance of annual leave, the employee must have been aware that this was precisely the intention of the employer when agreeing to grant extra leave.

Commentary
The Supreme Court's ruling does not contain any reference to provisions of EU law. And indeed, the question whether the behaviour of the parties must be seen as a tacit agreement to allow an advance on

leave entitlement to be accrued in later years, does not seem to touch on European law. Arguably, an advance on future leave entitlement can lead to a situation in which the employee does not dispose of the minimum of four weeks of annual leave, as required by Article 7 of the Working Time Directive, in the year that follows. However, provided that this happens only at the explicit request of the employee, that constellation seems similar to others which the ECJ has already confirmed to be permissible, e.g. that the employee may carry over leave entitlement and use it at a later date[1], or may even decide (voluntarily) to take annual leave during a period of sickness.[2]

Having said that, the judgment reported above was rendered on 28 February 2012, about one month after the ECJ had delivered its decision in the *Dominguez* case[3]. That judgment provides an interpretation of the Working Time Directive regarding the accrual of annual leave entitlement, which seems to raise questions on the compatibility of the Austrian provisions on which the Supreme Court's decision was based with EU law. In *Dominguez,* the ECJ issued a clear statement on the accrual of annual leave entitlement for a period of *sick leave*: in line with the principles the Court had already established in the *Schultz-Hoff* case[4], the ECJ found that new entitlements to annual leave must accrue during the entire leave period, as if the employee had been working during that time. This finding was not compromised by the fact that sickness had triggered the employee's absence for over one year, during which her entitlement to pay from the employer stopped.

In fact, the ECJ had already issued a similar statement in relation to *maternity leave* in the case of *Boyle*[5]*:* statutory periods of maternity leave must be taken into account in calculating the employee's annual leave entitlement. The special feature of sick leave, however, is that there is currently no provision in European law comparable to Article 11 of the Maternity Directive, on which the *Boyle* judgment was based, that would prescribe any financial or other entitlements of the employee during sickness-related absence. Rather, the decision in *Dominguez* was based exclusively on the Working Time Directive, and on the ECJ's laconic reasoning that *"the right to paid annual leave conferred by that directive on all workers cannot be made subject by a Member State to a condition that the worker has actually worked during the reference period laid down by that State"*. This was complemented by a reference to earlier case law, which established that annual leave already acquired before a sick spell must not be lost even after sickness absence for more than one year, because *"the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill."*[6]

In November 2012, the ECJ softened its stance on the prohibition of any condition that the worker has actually worked during a given period for accruing annual leave entitlement. In the *Heimann* case, it stated that a redundant employee who is simply exempt from his duty to work, but allowed to retain his employed status for one more year in order to receive social benefits, need not acquire rights to annual leave during that year. The ECJ stressed that, contrary to sick leave, the period at issue was foreseeable for the employee and *"the latter [was] free to rest or to devote himself to recreational and leisure activities"*.[7] Hence, this decision clarifies that the decisive question for determining whether or not annual leave entitlements must accrue over a specific period ultimately does not depend on whether its *purpose* is different from that of annual leave, but whether it realistically enables the employee to use it for relaxation and leisure.
What are the implications of *Heinemann* on the Austrian judgment reported above, in which the Supreme Court has shown that it will not readily accept exceptions to the rule preventing accrual of annual leave during *parental leave*? Needless to say, opinions will diverge on the question just how relaxing or recreational the activity of caring for small children is in practice. On the other hand, arguably, it could hardly be disputed that, for a parent, childcare should be precisely the activity to which they are most likely to devote their ordinary annual leave.

An argument against simply equating parental leave with times that are at the employee's free disposal could be deduced from the ECJ's ruling in the *Zentralbetriebsrat der LKH Tirols* case, rendered in 2010.[8] In that case, the employees concerned had acquired annual leave entitlement before taking parental leave for the maximum period of two years. The ECJ held that Austrian legislation violated the Parental Leave Directive by providing that these "old" rights were lost during parental leave.[9] Although no reference was made to the Working Time Directive, this indicates that, in the Court's view, even long periods spent on childcare cannot be seen as a substitute for annual leave by reason of their value in terms of relaxation and leisure. Conversely, an argument in favour of considering the non-accrual of leave entitlement in line with European law could be derived from the decision in *Heimann*, in which the ECJ ascribes importance to the fact that *"the employer's obligation to pay for paid annual leave during the period of the formal extension, for purely social reasons, of the employment contract, would be liable to make the employer reluctant to agree to such a social plan"*.[10] *Mutatis mutandis*, mandatory accrual of annual leave during parental leave would naturally have the potential to make employers less inclined to voluntarily grant it for a period exceeding the legally prescribed minimum. In my opinion, there is a certain likelihood that the ECJ would rely precisely on this kind of reasoning in order to declare a rule such as the Austrian rule to be admissible in the end – since it would avoid sensitive statements implying that the judges in Luxembourg view caring for children as "mere recreation". Obviously, much uncertainty remains.

One final aspect of importance to be found in the *Dominguez* judgment is that the ECJ expressly declared it admissible to establish additional conditions for annual leave entitlement in excess of the four-week minimum period established by the Directive – providing for the exceeding part to accrue only during periods of work or specifically enumerated forms of leave.[11] This implies that the Austrian rule may breach European law only insofar as it results in reducing the entitlement for one year to less than 20 days (as was the case for the employee at issue in the year 2009).

At any rate, it is regrettable that the Supreme Court did not use the opportunity to confront the ECJ with a preliminary request in the case reported here. It thereby denied the Court of Justice the opportunity to shed some light on a question which may be of relevance for a number of Member States that currently regulate parental leave in a similar way as does Austria.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the employee would retain her right to paid holidays during maternity protection since, under German law, the employee is not allowed to work. During the period of parental leave (mother or father) however, the work relationship between employer and employee becomes inactive. The law on parental allowance and parental leave (the 'BEEG') provides in section 17 that the employee has a right to paid holiday even during parental leave.

However, the employer has the right to reduce the annual paid leave by 1/12 for every month the employee is on parental leave.

Annual leave that the employee accrued before his parental leave must be granted to him when he returns to work. If the employment relationship ends before the employee can take his paid leave, he must be compensated for this.

The Netherlands (Peter Vas Nunes): Apparently, Austrian law makes the accrual of paid leave conditional on the employee having worked. Dutch law makes it conditional on having been entitled to salary. Barring very limited exceptions, an employee who earns no salary, for example because he is on unpaid leave, accrues no paid leave. On the other hand, an employee who is paid salary accrues paid leave even if he does not work, for example because he is on garden leave (which can last many months). Is this compatible with Directive 2003/88 as interpreted (in its previous form, as Directive 93/104) in *BECTU*? In that ruling (C-173/99), the ECJ had interpreted the Directive *"as precluding Member States from unilaterally limiting the entitlement to paid annual leave [...] by applying a precondition for such entitlement [...]"*. In *Dominquez* the ECJ reiterated this finding, adding that *"Although Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid leave, they are not entitled to make the very existence of that right subject to* ***any preconditions whatsoever****" [emphasis added, PVN]*. At first glance, this would bring into question the validity of the Austrian law (no work, no paid leave) and the Dutch law (no salary, no paid leave). However, as Ms Hießl points out in her commentary above, the ECJ's recent *Heimann* ruling (summarised in the ECJ Court Watch section of this issue) allows national legislation or practice that provides for no accrual of paid leave during periods where the employee does not work and is not paid salary. The ECJ's principal reason for distinguishing such a period from sickness is that the employee is able to rest and relax. Would this mean that, for example, an employee on involuntary garden leave accrues no paid leave? I doubt it, even though such an employee is able to rest and relax during his garden leave. Conversely, an employee who does not work because he is in prison, should not, I feel, accrue paid leave while doing time. I would argue that any involuntary absence from work that is outside the employee's sphere of responsibility should accrue paid leave.

Subject: Paid leave
Parties: F.B. (civil servant) v Municipality of Vienna
Court: *Oberster Gerichtshof* (Supreme Court)
Date: 28 February 2012
Case Number: 8ObA79/11t
Internet publication: https://www.ris.bka.gv.at → Judikatur → Justiz(OGH) and tick Entscheidungstexte → case number

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(Footnotes)

1 For example, Case Federatie Nederlandse Vakbeweging (ECJ, 6 April 2006, Case C-124/05), par. 30 et seq.
2 Case Stringer (ECJ, 20 January 2009, Case Joined Cases C-350/06 and C-520/06.), par. 31.
3 ECJ, 24 January 2012, Case C-282/10, par. 15 et seq.
4 ECJ, 20 January 2009, Case Joined Cases C-350/06 and C-520/06, par. 41.
5 ECJ, 27 October 1998, Case C-411/96, par. 67 et seq.
6 See par. 25 of the judgment in Schultz-Hoff/Stringer.
7 ECJ, 8 November 2012, Joined Cases C-229/11 and C-230/11, par. 29.
8 ECJ, 22 April 2010, Case C-486/08, par. 48 et seq.
9 It needs to be stressed that the Parental Leave Directive could not be invoked in the present case, because it only provides for the maintenance of "rights acquired or in the process of being acquired", and remains silent about the accrual of new rights during parental leave.
10 Paragraph 30 of the judgment.
11 See paragraph 45 et seq of the judgment.

2012/58

Employer cannot assign claim against employee to third party (CZ)

CONTRIBUTOR VERONIKA ODROBINOVÁ*

Summary
An employer may not and cannot assign to a third party a claim it has against one of its employees. This prohibition does not apply to a member of the Board of Directors of a joint stock company, as he or she lacks the status of an employee.

Facts
The defendants in this case (the 'Defendants') were the Managing Director and the CFO of a joint stock company (the 'Company')[1]. They were responsible for a decision by the Company to loan approximately € 800,000 to another company. That other company failed to repay the loan. The Company held the Defendants liable for the loss to the Company. The Defendants denied liability, whereupon the Company - represented by a new Board of Directors - brought proceedings in which it claimed the maximum sums for which under Czech law employees can be held liable for damages caused to their employer, which is 4.5 times their average monthly salary. In the case of the Managing Director this was € 32,650 and in the case of the CFO this was € 11,384. The claim was based on the contention that the Defendants had breached their duty of care towards the Company, in particular by failing to investigate the debtor's creditworthiness and by accepting as security for the loan a pledge that proved to be invalid.

The courts of first and second instance ordered the Defendants to pay, but on further appeal the Supreme Court reversed their judgments and remanded the case back to the court of first instance.

While the case was pending (again) in the court of first instance, the Company assigned its claim against the Defendants to a third party (the 'Assignee'). The Defendants argued that such an assignment was not possible. The court of first instance dismissed this argument. On appeal, however, the assignment was held to be invalid (and, as a result, the court did not allow a change of plaintiff) on the ground *(inter alia)* that Czech employment law does not allow an employment-related claim to be assigned. The Company appealed to the Supreme Court.

Judgment
The Supreme Court held that rights and duties arising out of an

employment relationship cannot be transferred unless the law explicitly allows such a transfer, such as in the case of the transfer of an undertaking. An agreement between an employer and a third party is an insufficient basis for the transfer of a claim. This meant that the assignment of the claims vis-à-vis the CFO was invalid.

As for the Managing Director, the question was whether he qualified as an employee and, hence, whether the rules of employment law applied to his situation. The Defendant in question had two distinct capacities: that of employee and that of chairman of the Board of Directors (i.e. a corporate capacity). Under Czech law, however, a member of a Board of Directors cannot simultaneously be an employee to the extent that his work as an employee is of a managerial nature (business management).

The Supreme Court remanded the case back to the court of first instance, which was instructed to decide (for the third time!) on the liability issue and on that of the Managing Director's employment status.

Commentary

Czech law on transfer of undertakings is based on Directive 2001/23. However, Czech law has gone further than required by the Directive, by providing that any transfer of an employer's tasks and activities (or a part thereof) qualifies as a transfer of undertaking and therefore leads to the assignment of rights and obligations. Under the Labour Code, a transfer of rights or obligations arising out of an employment relationship is possible only if the conditions for a transfer of undertaking are met. In other words, the rights and obligations between an employer and employee can only be assigned within the framework of a transfer of undertaking and in that event, they must all be assigned - individual rights cannot be transferred.

It may be noted that, as regards the assignment, this judgment was based on the law in force as of 20 November 2007 (the date on which the assignment agreement was concluded). The Labour Code was amended on 1 January 2012 and now provides explicitly that employment-related claims cannot be assigned.

The Supreme Court's judgment also deals with a classic issue under Czech law, namely whether a person can simultaneously be an employee and a board member (or an executive in a limited liability company). The Supreme Court has repeatedly held that this is not possible to the extent that the directorship duties overlap with the job description under the employment agreement, and that therefore an employment agreement in such a situation is invalid (unless a special procedure, introduced in 2012 and not relevant here, is followed).

An example of a situation where there is no overlap would be where a board member is also a cleaner in the company. An example where there is overlap would be where a board member is also the company's CEO or CFO. Clearly, there is a grey area in between these extreme examples. The rationale for not allowing overlap has to do with liability. A board member is liable for breach of his or her obligations without limitation, whereas the liability of an employee for such a breach is limited (with certain exceptions, such as intentionally caused damage). In addition, in certain situations a board member may be held personally liable for company liabilities.

In the event the courts in the pending case hold that the Managing Director was not validly employed, (i) the assignment of the claim against him was valid; (ii) his potential liability is not limited to 4.5 times his average monthly salary[2]; and (iii) he will need to prove that, as a board member, he acted with the required level of care.

Comments from other jurisdictions

Austria (Martin Risak): The decision touches on two questions which I shall answer briefly against the Austrian background. The first concerns the employee status of directors. The prevailing opinion in Austria holds that one has to distinguish between the two different types of capital companies. Members of the managing board *(Vorstand)* of a joint stock company *(Aktiengesellschaft)* are not considered to be employees, as the relevant Act provides that they are not subject to directives of the supervisory board *(Aufsichtsrat)*, and have only to act in the best interest of the company. As being subject to the employer's direction and orders is an essential element of the status of an employee, members of the managing board are not considered as employees but as working under a free service contract. On the other hand, directors of a limited liability company *(Gesellschaft mit beschränkter Haftung)* are deemed to be employees, as the relevant statutory provisions make them subject to directives of the shareholders. The only exception is where they are shareholders themselves and have the power to influence decisions made in shareholders' meetings (i.e. if they hold a majority of the shares or have a vetoing minority). In such a case, they are not subject to any directives, other than those given by themselves.
The second question raised regards the legality of assigning a claim against an employee to a third party. As there are no special rules in this area, the general rules of contract law apply. The assignment does not need the consent of the debtor as his or her situation does not change at all except for a change to the identity of the creditor. He or she may use all the objections used against the claim of the former creditor.

Finland (Johanna Ellonen): The question of whether a person can be simultaneously an employee and a member of the board has not caused particular concern in Finland as such persons are, as a rule, considered employees and covered by employment legislation. However, it is likely that not all employment legislation applies to them, e.g. the Finnish Working Hours Act (1996/605) and collective bargaining agreements often exclude corporate management from their scope. In their duties as board members they must act according to the Finnish Companies Act (2006/624). However, the status of managing directors of limited liability companies has been subject to some debate, although currently it is clear from case law that managing directors of limited liability companies are not considered to be employees but as statutory corporate organs to whom employment legislation does not apply.
However, if an employee acts simultaneously as an employee and a board member, this could be problematic, for example in relation to liability for damages. Both the Finnish Companies Act and the Employment Contracts Act contain provisions regarding liability for harm caused, the liability under Employment Contracts Act being more restricted. Legal scholars generally consider that employees can be held liable under the Companies Act for damages caused in their duties as board members, although there are no explicit provisions in the Act about this. Evaluating whether the harm has been caused by the individual in his or her role as a board member or an employee may, however, prove difficult in practice.
As regards the issue of assigning/selling employment-related claims to third parties, the Finnish Employment Contracts Act expressly prohibits the assignment of obligations arising from employment relationships to third parties without the other party's consent, unless the claim has fallen due. Even if such assignments were possible (e.g. with the

managing director), they are not typical in Finland in employment or service relationship-related matters.

Luxembourg (Michel Molitor): Under Luxembourg law, an assignment can involve the transfer of any actions or rights subject to terms or conditions or related to a future right. Thus, there is no obstacle to assigning a claim about the misconduct of a managing director. Nor is there any to prevent the assignment of claims relating to an employment contract and to the best of our knowledge, there is no particular case law in Luxembourg preventing an employer from assigning a claim against one of its employees to a third party. However, we can imagine that the Luxembourg Courts could be against such an assignment, as in the present case. It is uncertain whether the Labour Courts would accept jurisdiction over such an assignment and it is even harder to imagine another court accepting jurisdiction.
However, the assignment of a claim from an employment contract is only conceivable in cases in which there has been an intentional tort or gross negligence pursuant to Article L.121-9 of the Labour Code. In terms of a claim against a managing director, there is no restriction, since a managing director is liable towards the company for harm arising from any infringement of the Law of 1915 on commercial companies and for any misconduct in the management of the company's affairs, in other words, any kind of fault.
Therefore, in the matter at issue, the solution in Luxembourg law would depend on whether the fault related to the functions of the managing director or to employment activities. In Luxembourg it is possible to be both a managing director and employee, but only on condition that the positions are kept separate.

Netherlands (Peter Vas Nunes): The legal status of an employee who is also a member of his employer's Board of Directors (an 'Employee-Director') has been the subject of considerable debate among Dutch scholars and in case law, such an employee having two capacities simultaneously: (i) he or she is an employee, to whom the normal rules of employment law apply, with one major exception, namely that, in contrast to all other employees, an Employee-Director can be dismissed without the employer needing to obtain a dismissal permit and (ii) he has a corporate capacity, with power to represent the company, to whom the rules of company law apply, including the rule that a Director can be dismissed 'at any time'. Until 1992, it was widely held that the corporate capacity overruled the employment capacity and that, therefore, the principle that a Director can be dismissed at any time trumped, for example, the rule of employment law that an employee cannot be dismissed during (the first two years of) sickness. In that year, in the *Levison* case, the Supreme Court held that an Employee-Director who is dismissed during sickness loses his corporate capacity but not his capacity as an employee. In 2005, the Supreme Court, while retaining this doctrine, stressed that the two capacities of an Employee-Director cannot be separated except in two cases: (i) where such an individual is dismissed during sickness (and similar situations where a dismissal prohibition applies) and (ii) where the parties have agreed explicitly to separate the two capacities. The status of an Employee-Director remains complicated.
An ironic detail is that, as from 1 January 2013, Directors of companies listed on a stock exchange will no longer have the status of an employee, but it is anticipated that some of these Directors may negotiate contracts that are governed by the rules of employment law.
I know of only one instance (District Court of Rotterdam 12 February 2008, LJN:BC6356) where an employer assigned to a third party a claim it had against one of its employees. The case concerned an employee who had defrauded one of his employer's clients. The client had a claim against the employee. The employer purchased this claim and proceeded to sue the employee. The issue of whether such a purchase (resulting in an assignment) was legally possible on employment-related grounds was not even raised and the court awarded the claim. It is very rare for an employer to have a claim against an employee. Employees are almost never liable for damage they cause to their employer with the possible exception of speeding and parking tickets charged to the employer (usually via the car lease company). Employees are occasionally ordered to repay salary that was paid erroneously. But why would an employer want to sell or assign such a claim to a third party? In brief, there is almost no legal precedent on this subject in The Netherlands.

Subject: Employee liability and director status
Parties: CEPRO, a.s. - v – Ing. K.F. and Ing. H.D.
Court: *Nejvyšší soud Ceské republiky* (Supreme Court)
Date: 6 September 2012
Case Number: 21 Cdo 786/2011
Publication: www.nsoud.cz → http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/8CA60E1D8A96D795C1257A79004629E1?openDocument&Highlight=0,

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(Footnotes)
1 Czech company law distinguishes two types of corporation: a joint stock company, which is comparable to a German AG, a British Plc or a French SA, and a limited liability company, that is comparable to a German GmbH, a British Ltd or a French Sàrl. A joint stock company is managed by a Board of Directors. A limited liability company is managed by one or more 'executives'.
2 The Company could only claim damages by extending the claim filed with the court or by filing a new claim; yet, as the events date back to 1998, a claim in excess of 4.5 times his average monthly salary would be statute-barred.

2012/59

A foreign-national is denied protection under Irish employment legislation on the basis that his employment was unlawful, as he did not have a work permit (IR)

CONTRIBUTOR GEORGINA KABEMBA*

Summary
In this case, the High Court, on appeal by the employer, quashed a € 92,000 award made by the Labour Court to a foreign national in relation to employment law breaches because his employment was unlawful, as he did not have a work permit.

Facts

The applicant, Mr Hussein and the notice party, Mr Younis, were Pakistani nationals and cousins. Mr Younis originally spoke no English when he arrived in Ireland in 2002. He had a work permit for only his first year in Ireland. Mr Younis claimed that for a further six years he worked for Mr Hussein eleven hour days, seven days a week with no holidays, was paid merely pocket money, and that Mr Hussein failed to legitimise his position with the authorities.

In 2009, Mr Younis obtained information from the Migrants Rights Centre regarding his rights and entitlements and thereafter made formal complaints against Mr Hussein under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997 and the National Minimum Wage Act 2000. In 2011, a Rights Commissioner[1] found in favour of Mr Younis under all three complaints. Mr Younis referred the complaints to the Labour Court, which upheld the Commissioner's findings. The Labour Court ordered that Mr Hussein pay € 1,500 under the Terms of Employment Information Act 1994; € 5,000 for various breaches of the Organisation of Working Time Act 1997 and € 86,132.42 in respect of back pay in accordance with the National Minimum Wage Act 2000.

Mr Hussein sought and was granted a judicial review[2] of the Labour Court's decision on the grounds that Mr Younis had no legal standing to invoke the protection of Irish employment legislation as his contract of employment, in the absence of an employment permit, was illegal.

High Court Judgment

In deciding the case, the High Court stated that section 2(1) to section 2(4) of the Employment Permits Act 2003 prohibits a non-national from being employed without the appropriate employment permit, and that this prohibition applies to both employer and employee. However, while an employer can defend criminal proceedings on grounds that it took all reasonable steps to comply with the 2003 Act under section 2(4), no such defence is available to the employee as section 2(1) creates an absolute offence for an employee.

The High Court held that neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract that was illegal as a result of the employee to whom it related not holding a work permit. The decision of the Labour Court could therefore not be allowed to stand. Notwithstanding the decision it felt obliged to make, the High Court accepted that were Mr Younis' version of events correct, he had been the victim of appalling exploitation in respect of which he had no effective recourse.

The Court made it clear that, while it felt compelled to apply the 2003 Act, there must be concern that this law creates unintended consequences, including that undocumented workers be deprived of the benefit of the protection afforded to workers by Irish employment law. Accordingly, the Court felt it appropriate to send a copy of its decision to the Oireachtas (Irish Parliament) and the Minister for Jobs, Enterprise and Innovation for consideration of the policy implications of the 2003 Act.

Commentary

Under the separation of powers of the judiciary and the executive, it is not common in Ireland for judges to put the Government on notice of their rulings. However there is now such a glaring lacuna in Irish employment law that means undocumented migrant workers are unable to benefit from employment legislation, even where they are not responsible for their unlawful status, the judge felt compelled to do so. The Government has confirmed that it will review the decision and determine what action is to be taken. As it happens, an employment permits bill has been in the pipeline for some time. Its publication is expected in early 2013. The purpose of the bill is to consolidate existing employment permits legislation and cater for future accessions to the EU. The drafting of the bill will also take into account evolving case law, with the requirement to deal with the outcome of this case at the forefront of legislators' considerations.

Comments from other Jurisdictions

Germany (Dagmar Hellenkemper): As previously mentioned concerning the case of Ms Hounga (EELC 2012/32, UK), the German employment contract would be considered void, due to the fact that as a non-national without a work permit, an employee's ability to work would be considered legally impossible according to Section 275 of the German Civil Code that provides: *"A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person."* An employee without work permit cannot enter into a legally binding contract. Nevertheless, the courts have decided in numerous cases that the employee must be paid for services performed, even if both parties to the employment contract know of its invalidity.

The Netherlands (Peter Vas Nunes): This is the third judgment reported in EELC where a worker is denied elementary employment rights solely on the ground that he is an illegal alien. See EELC 2010/82 (Austria) and EELC 2012/32 (UK).

Subject: Employment of non-nationals
Parties: Hussein – v - The Labour Court and Younis
Court: High Court
Date: 31 August 2012
Determination Number: [2012] IEHC 364
Hardcopy Publication: Not yet available
Internet Publication: www.courts.ie

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(Footnotes)

1 Rights Commissioners are appointed by the Minister for Jobs Enterprise and Innovation. They operate as part of the Labour Relations Commission and are independent in their functions. Rights Commissioners investigate disputes, grievances and claims that individuals or small groups of workers refer under employment legislation.

2 Judicial Review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary.

2012/60

Works council may withhold approval to hire temps for permanent positions (GE)

CONTRIBUTORS PAUL SCHREINER AND KLAUS THÖNIßEN*

Summary

Since the revised version of the German Temporary Employment Code (*Arbeitnehmerüberlassungsgesetz*, the *'AÜG'*) came into effect on 20 December 2011, the permanent use of borrowed workers for commercial activities has become unlawful. The AÜG was revised based on Directive 2008/104 and now includes in Section 1 the following sentence: *"The use of borrowed workers is temporary"*.

Facts

The employer in this case was a newspaper publishing company. In 2006, it entered into an agreement with a temporary employment agency (the 'Agency'). In this contract, the employer agreed to fill all future vacancies exclusively with staff hired from the Agency. The advantage of hiring temps rather than regular employees was that whenever there was no longer a need for a temp, he or she could be returned to the Agency, pursuant to a "return clause" in the contract, without formality or cost.

Five years later, in 2011, the employer asked its works council, pursuant to Article 99 of the Works Constitution Act (*Betriebsverfassungsgesetz)*, for permission to fill a permanent vacancy in the HR department with a temp hired from the Agency. The works council withheld the requested permission, arguing that the use of a temp to fill a permanent position was contrary to the AÜG.

The employer applied to the local Labour Court for permission to carry out its intention to fill the HR vacancy with a temp. The court granted permission. The works council appealed to the *Landesarbeitsgericht* (Court of Appeal).

Judgment

The Court of Appeal overturned the Labour Court's judgment and ruled in favour of the appellant. It held that hiring a temporary worker for a permanent position violates the AÜG and that therefore the works council was within its rights to withhold permission for the proposed recruitment. The court based its decision on four arguments.

The court's first argument rested on the literal meaning of the word "temporary". In relation to the use of hired labour, this word can only be understood as meaning *"during a certain period of time"*. Therefore it is unlawful for an employer to enter into an indefinite term contract in respect of a temporary worker.

Secondly, the court stated that the "return clause", on which the employer and the Agency had agreed, was not relevant in the case at hand. The fact that a position may disappear at some unpredictable future time does not make the use of a temporary worker "temporary" within the meaning of the AÜG. Even within a regular employment relationship the need for a certain position may disappear one day.

Thirdly, the Court of Appeal held that, although the AÜG does not explicitly prohibit employing a temporary worker permanently, national law must be construed in the light of European Directive 2008/104. The rationale of this Directive is not to squeeze out regular employees by using agency workers. Having said that, the works council's right to oppose hiring agency personnel is a proper and lawful punitive instrument aimed at avoiding the hiring temporary of workers permanently. Without the benefit of specific rules preventing such recruitment, this is the only way to follow the Directive's rationale.

Last but not least, the court commented that the employer, by hiring temporary workers for all vacant positions in the firm, had breached the law. One of the main purposes of Directive 2008/104 is to protect temporary workers and to give them the opportunity to obtain regular employment. This opportunity does not exist where a temporary worker is used in a company permanently. The only way to avoid contradicting the Directive's purpose is to prohibit the permanent recruitment of temporary workers.

Commentary

The sticking point in this case was the courts' understanding of the word "temporary", especially in light of Parliament's intention when it enacted the AÜG.

Going back in time, we can see that the German lawmaker was concerned to impose a time limit for the deployment of agency workers under the AÜG. When the first version of the AÜG came into effect in 1972, a three month time limit was imposed on the recruitment of temporary workers. Later on, the German legislator increased this time limit to six months, then to nine months, after that to 12 months and finally to 24 months. Eventually, in 2002, the legislature abandoned time limits under the AÜG.

When the 24-month time limit was removed from the AÜG in 2002, many cases came up in which the issue was whether or not a temporary worker could be recruited permanently. In a fundamental decision in 2005, the BAG held that *"from now on a temporary worker can be hired permanently."* Apparently, before the revision of the AÜG in December 2011, the legal situation was perfectly clear. There was no doubt that an employer could hire a temporary worker permanently.

Therefore, the question arose - and has yet to be answered by the BAG – as to whether today the use of borrowed workers for an unlimited period of time remains lawful.

The lawmaker stated in the recitals to the Act revising the AÜG that the incorporation of the word "temporary" was no more than a clarification to ensure that the AÜG complied with Directive 2008/104. Therefore, the word "temporary" needs to be considered flexibly, not as a fixed restriction in time.

The federal government confirmed this in Parliament when the "Die Linke" party asked the Government about the meaning of the word "temporary". The Parliamentary State Secretary of the German Federal Ministry of Labour and Social Affairs, Dr Ralf Brauksiepe, replied in Parliament as follows: *"The word temporary must be considered as a flexible element, without determining an exact time limit."* This clarification indicates that it was not the legislature's intention to change the existing legal situation. Therefore - from the lawmaker's perspective - it is still possible *"to hire a temporary worker without setting a fixed time limit from the start."*

It seems that the decision of the Court of Appeal deviates from the intention of the lawmakers. Nevertheless, precisely how the permanent lease of employees should be treated and whether the works council really does have the right to oppose the permanent use of agency workers is still in dispute. Quite recently a different chamber of the Hannover Court of Appeal held that there was no right of the works council to oppose the permanent use of borrowed workers.

From our point of view, the decision of the Court of Appeal that the permanent use of borrowed workforce was unlawful should not be followed, given that the lawmaker appears to have had a different intention when enacting the AÜG.

Indeed, even if one were to take it that the permanent use of agency workers is in breach of the AÜG, the fact that the meaning of "temporary" is unclear would still cause difficulties . The use of an agency worker until retirement could theoretically be a form of temporary use of agency personnel, on the basis that there is a beginning and an end to the employment. However, this could not be what the Court of Appeal had in mind in interpreting the AÜG. It surely cannot be correct that the works council should have an open-ended right to oppose the employment of agency workers – which is exercisable whenever it believes that the employment has ceased to be temporary.

Subject: Temporary employment
Parties: Newspaper publishing company - v - Works Council
Court: *Landesarbeitsgericht Niedersachsen* (Regional Labour Court of Niedersachsen)
Date: 19 September 2012
Case number: 17 TaBV 124/11
Publication: -

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 19 July 2012, case C-522/10 *(Doris Reichel-Albert - v - Deutsche Rentenversicherung Nordbayern)* **("Reichel-Albert")**, German case (SOCIAL INSURANCE - FREE MOVEMENT)

Facts

Mrs Reichel-Albert lived and worked in Germany until 30 June 1980. She then moved with her husband to Belgium, where she lived without working until 1 July 1986. At that point, she returned to Germany. While in Belgium she gave birth to two children, the first in 1981, the second in 1984. In 2008 she applied to the *Deutsche Rentenversicherung Nordbayern* (DRN) to have her six years of residence in Belgium taken into account and credited for the purpose of calculating her state old-age retirement benefits. Had she remained a resident of Germany in 1980-1986 rather than moving to Belgium, these six years would have counted towards her retirement benefits given that "child-raising periods" (defined as periods spent raising a child during the first three years of its life) count. However, Mrs Reichel-Albert's application was turned down because German law limits the crediting of periods of childcare to childcare that takes place in Germany or where it *"can be treated as having taken place there"*. According to Article 56(3) of Book VI of the *Socialgesetzbuch* ('Article 56(3)'), a childcare period that took place abroad is treated as having taken place in Germany *"where the child-rearing parent has habitually resided abroad with his or her child and during the period devoted to childcare or immediately before the birth of the child has completed periods of compulsory contribution by virtue of an activity carried on there as an employed or self-employed person"*. Given that Mrs Reichel-Albert did not work while in Belgium (and that her husband did not make compulsory contributions during that period), she did not satisfy the criteria of Article 56(3).

National proceedings

Mrs Reichel-Albert brought proceedings before the local *Sozialgericht*, which referred two questions to the ECJ regarding the interpretation of Regulation 987/2009, which lays down procedures for implementing Regulation 883/2004. The latter replaced Regulation 1408/71 as from 1 May 2010.

ECJ's findings

1. At the time the DRN decided not to take Mrs Reichel-Albert's period of Belgian residence into account (2008), Regulations 883/2004 and 987/2009 had not yet come into force. Therefore the questions need to be addressed under Regulation 1408/71 (§ 24-29).

2. Since Regulation 1408/71 does not lay down specific rules regarding the crediting of periods of childcare, the questions asked by the referring court must be understood as being whether, in a situation such as that of Mrs Reichel-Albert, Article 21 TFEU on the right of every EU citizen to move and reside freely within the EU must be interpreted as requiring periods of childcare completed in one Member State as though they had been completed in another Member State (§ 30).

3. Which legislation is to determine this question: German or Belgian legislation? The fact that Mrs Reichel-Albert worked and contributed in only one Member State (Germany), both before and after temporarily transferring her place of residence, solely on family-related grounds, to another Member State (Belgium) where she never worked or contributed, allows a sufficiently close link to be established between her child-rearing periods and her periods of insurance completed by virtue of a gainful occupation in the first Member State (Germany). Consequently, German legislation is applicable in a situation such as that of Mrs Reichel-Albert (§ 31-36).

4. This narrows down the issue to the compatibility with Article 21 TFEU of Article 56(3), pursuant to which, for the purposes of granting an old-age pension, periods of childcare completed outside Germany, unlike those completed inside Germany, are not taken into account unless *(inter alia)* the child-rearing parent was (self-)employed during the residence abroad (§ 37).

5. In a situation such as Mrs Reichel-Albert's, Article 56(3) leads to that result that carers of children who have not completed periods of compulsory contribution by virtue of an activity carried on as a (self-)employed person during the child-rearing are not entitled to have their childcare taken into account solely because they temporarily established their residence abroad. In so doing, they are awarded, in the Member State of which they are nationals (in this case, Germany), treatment that is less favourable than that which they would have enjoyed had they not availed themselves of their right of free movement. This is contrary to the principles which underpin the status of an EU citizen, that is, a guarantee of same treatment in law in the exercise of the citizen's freedom to move (§ 38-42).

6. It has not been established or even argued that Article 56(3) can be justified where it is based on objective considerations and is proportionate to the legitimate objective of that national provision (§ 43).

Ruling

In a situation such as that at issue in the main proceedings, Article 21 TFEU must be interpreted as meaning that it requires the competent institution of a first Member State, for the purpose of granting an old-age pension, to take account of child-rearing periods completed in a second Member State as though those periods had been completed on its national territory by a person who pursued employed or self-employed activity only in that first Member State and who, at the time of the birth of his or her child, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

ECJ 27 September 2012, case C-137/11 *(Partena ASBL - v - Les Tartes de Chaumont-Gistoux SA)* **("Partena")**, Belgian case (SOCIAL INSURANCE – FREE MOVEMENT)

Facts

Belgian Royal Degree 38 provides that self-employed persons are covered by a compulsory social insurance scheme that is administered by 'Partena'. A self-employed person within the meaning of Royal Degree 38 is someone who pursues an occupational activity in Belgium. Paragraph 4 of Article 3(1) of the Royal Degree ('Paragraph 4') provides, *"Persons designated as agents of a company or association which is liable to pay Belgian corporation tax [...] shall be irrebuttably presumed to pursue in Belgium a professional activity as self-employed persons"*. This irrebuttable presumption was the subject matter of a dispute involving

Mr Rombouts and a company of which he was a 50% shareholder and a director. According to Royal Degree 38, this company, called Les Tartes de Chaumont-Gistoux SA ('Tartes de Chaumont'), was jointly liable for the payment of the social insurance contributions in question.

In 1999, Mr Rombouts emigrated to Portugal. In 2001, he found a job there but in 1999 and 2000 he was not employed. In May 2008, Partena served an order on Mr Rombouts and Tartes de Chaumont. Initially, Partena demanded payment of over € 125,000 by way of social insurance contributions covering the period 1999-2007, but later this was reduced to about € 68,000.

National proceedings

Tartes de Chaumont disputed the payment order and brought legal proceedings. The court where he brought the proceedings referred questions to the ECJ. Essentially, the questions were whether Paragraph 4 complies with Article 18 EC *[Editor: this is now, Article 21 TFEU]* on free movement, as detailed in Regulation 1408/71 *(now, Regulation 883/2004, Editor)*. Article 13(1) of Regulation 1408/71 provides that persons to whom the Regulation apply shall be subject to the social insurance legislation of a single Member State only. Article 13(2)(b) states that *"a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State"*. Under this main rule, Mr Rombouts would be subject to Portuguese social insurance law only, and would therefore not need to pay Partena contributions. However, there are exceptions to the main rule. One such exception is *"where a person is self-employed in Belgium and gainfully employed in another Member State"*. Partena claimed that this was the case, as Mr Rombouts was irrebuttably presumed to be self-employed in Belgium and was gainfully employed in Portugal.

ECJ's findings

1. The ECJ begins by rejecting the Belgian government's inadmissibility defence (§ 28-41).

2. The question at issue is how far a Member State may, for the purpose of cover by its social security scheme for self-employed persons, determine the location where the activity of the workers in question is deemed to take place. In this instance, can a director of a Belgian company, who manages that company from his home in Portugal, be said to be self-employed in Belgium? (§ 43-44).

3. The provisions of Regulation 1408/71 must be interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers (§ 46).

4. The first step is to determine the location of a person's professional activity. It is not until this location has been determined that that activity can be qualified as 'employed' or 'self-employed'. It is not for the Member State to determine said location; this is to be determined exclusively on the basis of EU law. If a Member State could determine where a person carries out his professional activity, that could lead to the cumulative application of different legislation to the same activity, which is precisely what Regulation 1408/71 aims to prevent (§ 52-54).

5. The meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of those rules of which they are part. Thus, the concept of the 'location' of an activity is the place where the person concerned carries out the actions connected with that activity (§ 56-57).

6. By making the irrebuttable presumption that persons designated as agents of a company liable to pay Belgium corporation tax pursue a professional activity in Belgium, Paragraph 4 is liable to lead to a definition of 'location' that is contrary to EU law (§ 58).

7. It is true that the presumption at issue may prevent social security fraud by artificially relocating the activity of agents of Belgian companies. However, by making that presumption irrebuttably, Paragraph 4 goes further than is strictly necessary for attaining the legitimate objective of combatting fraud, since it acts as a general impediment to those persons' ability to prove that the location of their activity is actually in another Member State (§ 60).

Ruling

EU law, in particular Articles 13(2)(b) and 14c(b) of Council Regulation (EEC) No 1408/71 [...] precludes national legislation such as that at issue in the main proceedings insofar as it allows a Member State to presume irrebuttably that management from another Member State of a company subject to tax in the first Member State has taken place in that first Member State.

ECJ 18 October 2012, case 498/10 *(X - v - Staatssecretaris van Financiën)*, Dutch case (FREEDOM OF SERVICE PROVISION)

Facts

In 2002 and again in 2004, English football clubs came over to the Netherlands to play friendly matches against the Dutch football club X. The latter paid the English clubs € 133,000 and € 50,000 respectively. Under Dutch tax law and a tax convention between the Netherlands and the UK, the Dutch club should have withheld 20% as income tax and paid this 20% to the Dutch revenue. It did not do so and was fined.

National proceedings

X appealed to the courts and the case ended up in the Dutch Supreme Court. The latter referred questions to the ECJ. These questions related to the fact that the obligation to deduct wage income at source from a fee paid to the provider of sporting services applies only where that provider is a non-resident. In other words, had the friendly matches been played against another Dutch club rather than against English clubs, there would have been no obligation to make an income tax deduction. The issue was whether this distinction between domestic and foreign service providers was compatible with Article 56 TFEU that prohibits restrictions on freedom to provide services within the EU.

ECJ's findings

1. The obligation to withhold tax, inasmuch as it entails an additional administrative burden as well as the related risks concerning liability, is liable to render cross-border services less attractive than services provided by local service providers and to deter recipients of services from having recourse to non-resident service providers. This finding is not invalidated by the fact that the impact of the additional administrative burden is offset by the reduction of the administrative burden on the non-resident service provider, who in this case will not have to submit a tax return in the Netherlands. Therefore, the rule of Dutch tax law at issue constitutes a restriction

on the freedom to provide services within the meaning of Article 56 TFEU (§ 20-34).

2. Can that restriction be justified by the need to ensure the effective collection of tax without going beyond what is necessary to achieve that objective? The ECJ notes that, in the case of service providers who provide occasional services in a foreign Member State, and where they remain only a short period of time, a withholding tax at source constitutes an appropriate means of ensuring the effective collection of the tax due (§ 36-42).

3. The measure does not go beyond what is necessary to achieve the effective collection of the tax due (§ 43-53).

4. It is irrelevant whether the non-resident service provider may deduct the tax withheld in the Netherlands from its home country tax (§ 54-57).

Ruling

Article 56 TFEU must be interpreted as meaning that the obligation imposed under the legislation of a Member State, on the service recipient to withhold income tax at source on the remuneration paid to service providers established in another Member State, whereas such an obligation does not exist in relation to remuneration paid to service providers established in the Member State at issue, constitutes a restriction on the freedom to provide services, within the meaning of that provision, in that it entails an additional administrative burden and related liability risks.

Insofar as the restriction on the freedom to provide services arising from national legislation, such as that at issue in the main proceedings, results from the obligation to withhold tax at source, in that it entails an additional administrative burden and related liability risks, that restriction can be justified by the need to ensure the effective collection of tax and does not go beyond what is necessary to achieve that purpose [...] In order to determine whether the obligation on the service recipient to withhold tax at source, in that it entails an additional administrative burden and related liability risks, constitutes a restriction on the freedom to provide services prohibited by Article 56 TFEU, it is irrelevant whether the non-resident service provider may deduct the tax withheld in The Netherlands from the tax for which he is liable in the Member State in which he is established.

ECJ 18 October 2012, case C-583/10 *(United States of America - v - Christine Nolan)* **("Nolan"),** UK case (COLLECTIVE REDUNDANCIES)

Facts

Christine Nolan was one of about 200 civilian employees of the US government who worked on the 'RSA Hythe' US Army base near Southampton, UK. On or before 13 March 2006, the Secretary of the US Army decided to close down the base at the end of September 2006. On 21 April 2006 the decision was reported in the media and three days later the commanding officer of the base called a meeting of the workforce in order to explain the decision to close the base and to apologise for the way in which the news about the closure had been made public. On 9 May 2006, the UK government was formally notified of the closure. On 5 June 2006, the US authorities gave the representatives of the civilian workforce at the military basis a memorandum stating that all civilian personnel would be made redundant. On 14 June 2006 the US authorities met with the representatives of the civilian personnel, who were informed that the US government considered 5 June 2006 as the starting date for the consultations provided in the Trade Union and Labour Relations (Consolidation) Act 1992, which transposed the Collective Redundancies Directive 98/59. On 30 June 2006, dismissal notices were issued specifying termination of employment on 30 September 2006.

Ms Nolan, who was one of the personnel representatives, brought liability proceedings against the US government, arguing that the US government had neglected to consult the workers' representatives in good time. The Employment Tribunal upheld Ms Nolan's claim. The Employment Appeal Tribunal dismissed the appeal brought by the US government, which then appealed to the Court of Appeal.

National proceedings

The US government, although not claiming state immunity, argued that there was an implied exemption from the consultation obligation for a sovereign foreign power carrying out an act such as the closure of a military base. While the case was ongoing, the ECJ delivered its September 2009 judgment in the *Akava - v - Fujitsu* case (case C-44/08).

The Court of Appeal rejected the US government's argument in respect of an implied exemption, but it felt that *Akava [Editor: a judgment which it described, diplomatically, as not being "straightforward"]* raised certain issues regarding the interpretation of Directive 98/59. It therefore referred the following questions to the ECJ for a preliminary ruling: Does the employer's obligation to consult about collective redundancies, pursuant to Directive 98/59/EC, arise (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (iii) only when that decision has actually been made and he is then proposing consequential redundancies?

ECJ's findings

1. By virtue of Article 1(2)(b) of Directive 98/59, the latter does not apply to workers employed by public administrative bodies or by establishments governed by public law. On the face of it, a dismissal by a State does not therefore fall within the scope of the Directive. However, Ms Nolan considered that the ECJ has jurisdiction to interpret the Directive, even if her situation is not directly governed by EU law, given that the UK legislature, when it transposed the directive into national law, chose to align its domestic legislation with EU law. The US government, on the other hand, invoked the principle of ius imperii (§ 20-25).

2. Directive 98/59 forms part of the legislation concerning the internal market. Whilst the size and functioning of the armed forces does have an influence on the employment situation in a given Member State, considerations concerning the internal market or competition between undertakings do not apply to it. Therefore, it must be held that, by virtue of the exclusion laid down by Article 1(2)(b) of Directive 98/59, the dismissal of staff of a military base does not fall within the scope of that directive (§ 32-43).

3. The ECJ has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning EU provisions in situations where the facts of the case being considered by the national courts were outside the scope of EU law but where those provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions. However, this is only the case where EU provisions have been made applicable in a direct and conditional way. This is not the case here (§ 44-56).

Ruling
The ECJ lacks jurisdiction.

ECJ 18 October 2012, joined cases C-302/11 - C-305/11 (*Rosanna Valenza et al - v - Autorità* Garante della Concorrenza e del Mercato) **("Valenza")**, Italian case (FIXED-TERM WORK)

Facts
In 2006, Italy adopted Law No 296/2006. It provides for the "stabilisation" of non-managerial staff employed by public bodies on the basis of a private-law fixed-term contract. In many cases these contracts were unlawful and the workers concerned should have been employed permanently. Law 296/2006 allowed workers who had been employed for no less than three years, to apply to become permanent civil servants. Following their appointment as civil servants, their remuneration was set at the starting rate, no account being taken of the length of service accrued under their previous fixed-term contracts.

The five plaintiffs in this case had worked for the AGCM, a public body, under successive fixed-term contracts. They applied to become civil servants. Their applications were accepted and they were placed at the starting level of the pay scale category that applied to them at the time their fixed-term contracts were terminated (with certain compensation for the pay differential). They objected to the fact that their prior service with the AGCM was disregarded.

National proceedings
The plaintiffs brought proceedings against the AGCM before an administrative court and, on appeal, with the Council of State. This judicial body noted three things. First, Law 296/2006 makes it possible to recruit certain fixed-term workers directly, without them having to compete with other applicants, as is the normal rule. The national legislature had not intended retroactively to validate unlawful fixed-term recruitment by converting a series of fixed-term contracts into a permanent contract. Instead, it had viewed the length of service accrued in fixed-term employment as a qualification justifying conversion to a permanent employment relationship without the need for the employees to go through the general competitive process for joining the public authority's permanent staff. The fact that length of service is set at nought is justified by the need to avoid reverse discrimination against workers who are already on the permanent staff and who were recruited based on an open competition.

The second point noted by the Council of State is that within the public administration there is a rule (deemed lawful by the ECJ in its *Affatato* ruling, case C-3/10) *[Editor: see EELC 2010-1]*, prohibiting the conversion of a fixed-term contract into one of indefinite duration.

Thirdly, the Council of State noted that it had previously held Law 296/2006 to be compatible with the Framework Agreement annexed to Directive 1999/70 on the ground that the Framework Agreement only prohibits less favourable treatment of a fixed-term worker during the fixed-term employment relationship, not afterwards. The Framework Agreement does not prevent termination of a fixed-term contract followed by a new employment relationship in which no account is taken of previous length of service.

However, the Council of State also noted that the Labour Court of Turin took a different approach. It therefore decided to refer questions to the ECJ.

ECJ's findings
1. The ECJ summarised the questions as being whether Clause 4 of the Framework Agreement, read in conjunction with Clause 5, precludes national legislation which prohibits periods of service completed by a fixed-term worker for a public authority being taken into account in order to determine the length of service of that worker upon recruitment on a permanent basis by that authority as a civil servant under a "stabilisation" procedure (§ 29).

2. Clause 4 provides that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Clause 4 also provides that period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers, except where different length-of-service qualifications are justified on objective grounds. Clause 5 provides that Member States shall introduce measures to combat abuse of successive fixed-term contracts.

3. The Italian government disputed the applicability of Clause 4. In its opinion, the previous fixed-term contracts merely constitute a condition for admission to the stabilisation procedure. That procedure has the effect not of transforming or converting fixed-term contracts into permanent contracts, but of establishing a new employment relationship which includes an obligation to complete a period of training. In other words, the difference in treatment invoked by the plaintiffs is a difference between two groups of permanent employees. The ECJ rejects this line of argument. To exclude application of the Framework Agreement automatically in cases such as at issue in the main proceedings would effectively reduce the scope of the protection against discrimination, contrary to the ECJ's case law, including Rosado Santana (C-177/10, para § 44) [Editor: see EELC 2011-3] (§ 30-38).

4. It is, in principle, for the national court to determine whether the plaintiffs, when they were working under fixed-term contracts, were in a situation comparable to that of career civil servants employed on a permanent basis by the AGCM, having regard to the nature of the work, training requirements and working conditions (§ 39-43).

5. The fact that the plaintiffs have not passed the general competition for obtaining a post in the public sector does not mean that they are in a different situation compared to career civil servants, given that the conditions for stabilisation (i.e. minimum duration of fixed-term employment and recruitment through a selection procedure) are specifically intended to enable the stabilisation of only those fixed-term workers whose situation may be viewed in the same way as that of career servants (§ 44-45).

6. The duties performed by the plaintiffs as career civil servants following their stabilisation seem to be the same as those they performed previously under their fixed-term contracts. Should, however, the national court find that this is not the case, the alleged difference in treatment would not be contrary to Clause 4, as that difference in treatment would relate to different situations. By contrast, if the duties performed before and after the stabilisation correspond, the difference in treatment would need to be justified (§ 44-49).

7. A difference in treatment between fixed-term and permanent workers may not be justified on the basis that the difference is provided for by a general, abstract national norm such as a law or a collective agreement. Justification requires the existence of precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result from the specific nature of the tasks for which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, alternatively, from the pursuit of a legitimate social-policy objective of a Member State (§ 50-51).

8. Reliance on the temporary nature of the employment of staff of the public authorities, does not meet those requirements and is therefore not capable of constituting an objective ground within the meaning of Clause 4(1) and 4(4) (§ 52).

9. Some of the differences between career civil servants and former fixed-term workers recruited as civil servants under the stabilisation programme, such as the method of recruiting (with or without an open competition) and the nature of their duties, could, in principle, justify different treatment. The Member States enjoy discretion as regards the organisation of their own public administration and may therefore lay down conditions for people to become career civil servants, along with conditions for their employment, provided such conditions are applied in a transparent way and are open to review (§ 53-61).

10. Although preventing reverse discrimination against career civil servants recruited after passing a general competition may constitute an 'objective ground', it cannot justify disproportionate national legislation which completely and in all circumstances prohibits all periods of service completed by workers under fixed-term employment contracts from being taken into account, in order to determine their length of service upon their recruitment on a permanent basis and, thus, their level of remuneration. The principle of non-discrimination set out in Clause 4 would be devoid of all content if, under national law, the new nature alone of an employment relationship were able to constitute an 'objective ground'. By contrast, it is important to have regard to the specific nature of the duties performed (§ 62-65).

11. There is no need to interpret Clause 5 (§ 69).

12. Clause 4 is unconditional and sufficiently precise for individuals to be able to rely on it as against the State.

Ruling

Clause 4 of the framework agreement on fixed-term work [...] which is annexed to Council Directive 1999/70 [...] must be understood as precluding national legislation, such as that at issue in the main proceedings, which prohibits periods of service completed by a fixed-term worker for a public authority being taken into account in order to determine the length of service of that worker upon his recruitment as a career civil servant on a permanent basis by that same authority under a stabilisation procedure specific to his employment relationship, unless that prohibition is justified on 'objective grounds' for the purpose of clause 4(1) and/or (4). The mere fact that the fixed-term worker completed those periods of service on the basis of a fixed-term employment contract or relationship does not constitute such an objective ground.

ECJ 25 October 2012, case C-367/11 *(Déborah Prete - v - Office national de l'emploi)* **("Prete")**, Belgian case (FREE MOVEMENT)

Facts

Belgian legislation provides for the grant of an allowance known as a "tide-over allowance" to young people who have completed their studies and are looking for their first job. This allowance is designed to facilitate the transition from education to the labour market. In order to qualify for the tide-over allowance, the young worker must have completed at least six years' study at a Belgian educational establishment (or at an establishment elsewhere in the EU if the worker is the dependent child of a migrant worker living in Belgium).

Ms Prete, a French national, completed her secondary studies in France. She married a Belgian national with whom she settled in Belgium. She registered as a job seeker there and applied for a tide-over allowance. Her application was rejected.

National proceedings

Ms Prete sought judicial relief, was successful at first, but lost on appeal. She appealed to the Supreme Court, which referred questions to the ECJ. In essence, the question was whether Articles 12, 17, 18 and 39 EC on non-discrimination on the ground of nationality; EU citizenship; free movement of citizens and free movement of workers; respectively, preclude a provision which makes a tide-over allowance conditional upon having completed at least six years' study in the host Member State.

ECJ's findings

1. Ms Prete is justified in relying on Article 39 to claim that she cannot be discriminated against on the basis of nationality as far as the grant of a tide-over allowance is concerned (§ 16-28).

2. A condition relating to the obligation to have studied in the host Member State can more easily be met by nationals of that Member State and therefore may well place nationals of other Member States at a disadvantage. Thus, it discriminates indirectly on the basis of nationality and needs to be justified. The condition can only be justified if it is based on objective considerations independent of the nationality of the persons concerned and if it is proportionate to the legitimate aim of the national provision (§ 29-32).

3. The ECJ has previously held that it is legitimate for the national legislature to wish to ensure that there is a real link between an applicant for a tide-over allowance and the geographic employment market concerned (§ 33).

4. This case concerns a national of a Member State (France) who resided for about two years in the host Member State (Belgium) following her marriage to a Belgian national and who was registered for 16 months as a job seeker in Belgium, whilst at the same time actively looking for work there. Circumstances such as these appear to be capable of establishing the existence of a real connection with the Belgian labour market. The ECJ rejects the Belgian government's argument that Ms Prete was more likely to enter the labour market in France, where

she completed her studies. The knowledge acquired by a student in the course of his or her higher education does not generally assign him or her to a particular geographic labour market. Furthermore, the existence of a real link with the labour market of a Member State can be determined by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. Moreover, residence within a Member State is also capable of ensuring a real connection with the labour market of the host Member State. Finally, the family circumstances of a claimant for tide-over allowance are capable of demonstrating the existence of a real link between the applicant and the host Member State. In view of the foregoing, the condition at issue of six' years study in Belgium goes beyond what is necessary to achieve the said aims (§ 40-50).

Ruling
Article 39 EC precludes a national provision such as that at issue in the main proceedings, which makes the right to a tide-over allowance for the benefit of young people looking for their first job subject to the condition that the person concerned has completed at least six years' study in an educational establishment of the host Member State, insofar as that condition prevents other representative factors liable to establish the existence of a real link between the person claiming the allowance and the geographic labour market concerned being taken into account. Accordingly, this goes beyond what is necessary to attain the aim pursued by that provision, which is to ensure that such a link exists.

ECJ 8 November 2012, joined cases C-229/11 and 230/11 (*Alexander Heimann – v – Kaiser GmbH)* **and C-230/11** *(Konstantin Toltschin – v – Kaiser GmbH)* **("Heimann")**, German case (PAID LEAVE)

Facts
In 2009, Kaiser, a sub-contracting business in the motor industry, was in financial difficulties. It agreed with its works council, in a social plan, to make use of the German *Kurzarbeit* agreement, under which employees get a temporary reduction in working time with a corresponding reduction in salary in exchange for an allowance *(Kurzarbeitgeld)* granted by the Federal Employment Agency, but paid by the employer. This case concerns two of Kaiser's employees, Messrs Heimann and Toltschin, whose working time and salary were reduced to nil (*"Kurzarbeit Null"*) for a one year period. At the end of that year they were dismissed. Kaiser took the position that Messrs Heimann and Toltschin had not acquired paid annual leave during the year in which they had been employed without performing any work.

National proceedings
Messrs Heimann and Toltschin applied to the local *Arbeitsgericht*. This court referred two questions to the ECJ on the interpretation of Article 31(2) of the Charter of Fundamental Rights of the EU (*"Every worker has the right to [...] an annual period of paid leave"*) and Article 7(1) of Directive 2003/88 (*"Member States shall take the measures necessary to ensure that every worker is entitled to paid leave ..."*). The first question was whether a worker whose working week is reduced may acquire no more than a proportionately reduced entitlement to paid leave. The second question related specifically to the situation where the working week is reduced to nil.

ECJ's findings
1. The Schultz-Hoff doctrine cannot be applied to Kurzarbeit, because the situation of a worker who is unable to work as a result of an illness and that of a worker on a short-time working arrangement are fundamentally different. First, the short-time working at issue was based on a social plan. Secondly, workers on Kurzarbeit Null are free to rest and relax. Thirdly, the purpose of Kurzarbeit is to reduce the need for dismissals and, if employers had to pay for annual leave, that might make them reluctant to agree to a social plan such as the one in question (§ 26-30).

2. The situation of a worker on short-time working is comparable to that of a part-time worker. In the Landeskrankenhäuser Tirols case (C-486/08), the ECJ applied to the grant of annual leave the pro rata temporis principle enshrined in the Framework Agreement on Part-time Work annexed to Directive 97/81 (§ 31-34).

3. In the light of the foregoing it is not necessary to reply to the second question.

Ruling
Article 31(2) of the Charter and Article 7(1) of Directive 2003/88 do not preclude national legislation or practice, such as a social plan agreed between an undertaking and its works council, under which the paid annual leave of a worker on short-time working is calculated according to the rule of *pro rata temporis*.

ECJ 8 November 2012, case C-268/11 (*Atilla Gülbahce - v - Freie und Hansestadt Hamburg*) (**"Gühlbahce"**), German case (FREE MOVEMENT)

Facts
Mr Gühlbahce, a Turkish national, married a German woman in June 1997. One year later, he was granted a temporary residence permit on the basis of matrimonial cohabitation and a work permit of unlimited duration. The residence permit was extended in June 1999, in August 2001 and again in January 2004.

In July 2005, the German authorities learned that Mr Gülbahce's wife had been living apart from him since 1 October 1999. In February 2006, the municipality of Hamburg withdrew, with retroactive effect, the extensions to Mr Gülbahce's residence permit, as granted in 2001 and 2004. The withdrawal was based on two grounds. The first ground was that, under German law, a resident permit granted on the basis of matrimonial cohabitation loses its validity upon termination of that cohabitation unless the cohabitation on German territory had lasted for at least two years. In the case of Mr Gülbahce and his wife, their cohabitation within Germany had lasted less than two years (June 1998 - September 1999). The second ground was based on the EU-Turkey Association Agreement and Decision 1/80 of the Council of Association under that Agreement. Article 6(1) of Decision 1/80 provides that *"a Turkish worker duly registered as belonging to the labour force of a Member State shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available"*. Although Mr Gülbahce had satisfied this requirement, because he had had over one year's legal employment for the same employer at the time his residence permit was withdrawn retroactively (February 2006), this was not the case at the time of the extension of the permit in August 2001. Therefore, according to the Hamburg municipality, the periods of work completed by Mr Gülbahce after August 2001 should not be taken into account for the purpose of acquiring rights under Article 6(1) of Decision 1/80.

National proceedings
Mr Gülbahce brought proceedings before the local administrative court. It dismissed his claim. On appeal, the regional administrative

court found in his favour. The municipality appealed to the Federal Administrative Court, which overturned the regional court's judgment and remanded the case back to the regional court. That court referred five questions to the ECJ.

ECJ's findings

1. The ECJ reformulated the referring court's five questions into one single question, namely whether Article 6(1) of Decision 1/80 precludes a Member State from withdrawing a Turkish worker's residence permit with retroactive effect from the point at which the worker ceased to comply with the conditions to his residence permit if the withdrawal occurs after the completion of one year's legal employment with one employer (§ 31 – 35).

2. The right to continue in paid employment with the same employer after one year's legal employment, in order to be effective, necessarily implies a concomitant right of residence (§ 36 – 39).

3. In 2011, after the reference for a preliminary ruling in this case, in its judgment in the Unal case (C-187/10), the ECJ held that, where a Turkish national may legitimately rely on rights pursuant to Decision 1/80, those rights are no longer dependent on the continuing existence of the circumstances which gave rise to them. Thus, a Turkish worker who has been employed for more than one year under a valid work permit fulfils the conditions of Decision 1/80, even though his residence permit had initially been granted for a purpose other than that of engaging in paid employment (§ 43 – 46).

Ruling

The first indent of Article 6(1) of Decision 1/80 [...] must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point when there was no longer compliance with the ground on which it had been issued under national law, provided there is no question of fraudulent conduct on the part of the worker and the withdrawal occurs after the completion of one year of lawful employment under the first indent of Article 6(1) of Decision 1/80.

ECJ 8 November 2012, case C-461/11 (*Ulf Kazimierz Radziejewski – v – Kronofogdemyndigheten i Stockholm)* (**"Radziejewski**"), Swedish case (FREE MOVEMENT)

Facts

Mr Radziejewski is a Swedish national. He lived and worked in Sweden until 2001, when he moved to Belgium, where he worked for a Swedish charitable organisation. Five years prior to his emigration, in 1996, he and his wife had been declared insolvent in Sweden. In 2011 they were still subject to an earnings attachment order, issued by the agency that is responsible for debt administration in the Stockholm area, the 'KFM'.

Mr Radziejewski applied to the KFM for cancellation of his remaining debts pursuant to the Swedish law on debt relief. Paragraph 4 of this law ('Paragraph 4') provides:

"Complete or partial debt relief may be granted to a debtor who is resident in Sweden and a natural person if:

the debtor is insolvent and so indebted that he or she cannot be presumed to have the means to pay his or her debts within a foreseeable period; and it is reasonable, having regard to the debtor's personal and financial situation, that he or she should be granted debt relief.

A person who is registered in the population register in Sweden shall be regarded as being resident in Sweden for the purposes of application of subparagraph 1.

For the purposes of the application of subparagraph 2, particular attention shall be paid to the circumstances in which the debts arose, the efforts made by the debtor to meet his or her obligations and the manner in which the debtor has cooperated in the handling of the case for debt relief."

The KFM rejected the application for debt relief on the ground that Mr Radziejewski was not resident in Sweden. Mr Radziejewski appealed to the Stockholm District Court.

National proceedings

The District Court held that the Swedish debt relief procedure does not fall within the scope of Regulation 1346/2000 on insolvency proceedings. However, it was unsure whether Paragraph 4 was compatible with the principle of free movement. It therefore referred the following question to the ECJ: *"Can the requirement for residence in Sweden in Paragraph 4 [...] be regarded as being liable to prevent or deter a worker from leaving Sweden and exercising his right to freedom of movement, and thus be regarded as running counter to the principle of freedom of movement for workers within the Union provided for in Article 45 TFEU?"*

ECJ's findings

1. The Swedish debt relief procedure does not fall within the scope of Regulation 1346/2000. A debt relief decision adopted by a public authority such as the KFM is excluded from the scope of Regulation 44/2001 on the recognition and enforcement of judgments ('Brussels I'). The only issue, therefore, is that of free movement (§ 23-27).

2. Paragraph 4 is capable of dissuading an insolvent worker from exercising his right to free movement because, by moving to another Member State, he is denied the possibility of obtaining debt relief in his Member State of origin. Accordingly, Paragraph 4 is, in principle, unlawful (§ 29-32).

3. A measure which constitutes on obstacle to freedom of movement for workers can be justified by overriding reasons in the public interest if the manner in which the measure is applied does not go beyond what is necessary for that purpose. The Swedish government submits that Paragraph 4 is justified (i) by the legislature's aim to protect debtors from foreign creditors who are not party to the Swedish debt relief procedure and (ii) by the need to establish, satisfactorily, the financial and personal situation of the debtor (§ 33, 34, 44).

4. By contrast, a debtor resident in Sweden can in certain cases be sued before the courts of another Member State without being able to rely on a debt relief measure such as that of the KFM. On the other hand, a debtor who resides in the EU but outside Sweden may in certain cases be sued by his creditors before the Swedish courts, in which case he would be unable to invoke the Swedish debt relief protection rules. It follows that Paragraph 4 goes beyond what is necessary to obtain objective (i). (§ 39-43).

5. In order that a person may benefit from debt relief, Paragraph 4 provides that the KFM must examine not only the initial information provided by the debtor but also be in a position to look into and monitor that information and to follow up the debtor's efforts to comply within his obligations, including the obligation to participate actively. It is legitimate for a Member State to wish to perform such

monitoring before relieving him of all or part of his debts. However, a person who goes to live and work in another Member State, while remaining registered in the Swedish population register, continues to receive debt relief. Moreover, the financial and personal situation of a debtor such as Mr Radziejewski may be established without it being necessary for him to reside in Sweden, given that he is the object of an earnings attachment, that his employer is Swedish and that he is subject to Swedish income tax. In addition, the KFM may call upon Mr Radziejewski to travel to Sweden or to provide the KFM with information in another manner, on pain of suspension or cancellation of the debt relief. Consequently, the condition of residence goes beyond what is necessary to obtain objective (ii) (§ 44-50).

Ruling
Article 45 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the grant of debt relief subject to a condition of residence in the Member State concerned.

ECJ 6 November 2012, case C-286/12 *(European Commission - v - Hungary)* **("Hungary")**, Hungarian case (AGE DISCRIMINATION)

Facts
Until 31 December 2011, Hungarian law allowed judges, prosecutors and notaries to remain in office until age 70. This was an exception to the rule applying to all other public sector employees, who were forced to retire at age 62.

In April 2011, Parliament adopted a law under which judges, prosecutors and notaries would not be allowed to remain in office beyond the 'general retirement age', being the age at which persons are eligible to receive State retirement benefits. This used to be 62, but in 2010 a law entered into force under which the general retirement age is gradually being increased from 62 to 65.

The law reducing the compulsory retirement age for judges, prosecutors and notaries contained transitional provisions pursuant to which officials who reach the general retirement age before 2012 lose their office on 30 June 2012 and officials who reach the general retirement age in the course of 2012 lose their office on 31 December 2012.

In January 2012, the European Commission (EC) notified Hungary that it was in breach of Directive 2000/78. When Hungary denied this, the EC sent Hungary a 'reasoned opinion' requesting Hungary to comply with Directive 2000/78 within one month. Hungary took the position (i) that the retirement age reduction was not discriminatory as it merely redressed a situation where there had been positive discrimination in favour of judges, prosecutors and notaries and (ii) that, even if there was discrimination, it was justified by two objectives: (a) the desire to standardise the age-limit for compulsory retirement in the public sector while ensuring the viability of the pension scheme, a high level of employment and the improvement of the quality and efficiency of the judicial activities involved and (b) the establishment of a "more balanced age structure" facilitating access for young lawyers to the relevant professions and guaranteeing them an accelerated career.

In July 2012 the Constitutional Court repealed the discriminatory provisions retroactively.

ECJ's findings
1. The fact that the Constitutional Court repealed the legislation at issue retroactively does not do away with the need to adjudicate on the action, because that legislation was still in force at the time the deadline laid down in the EC's reasoned opinion expired (§ 40 – 47).

2. Was the legislation at issue discriminatory? Individuals aged 62 and over are in a comparable situation to that of younger individuals, but unlike the latter they are forced to retire at an earlier age. This is not altered by the fact that the legislation aims to redress a situation of positive discrimination (§ 48 – 54).

3. Is the legislation's aim legitimate? The ECJ replies affirmatively. Aims are legitimate within the meaning of Article 6 of Directive 2000/78, if they consist of social policy objectives, such as those related to social policy, the labour market or vocational training. Standardisation can constitute a legitimate employment policy objective. Establishing a more balanced age structure can constitute a legitimate aim of employment and labour market policy, as the ECJ previously held in Fuchs and Köhler (§ 57 – 62).

4. The legislation at issue is an appropriate means of achieving the aim of standardisation, but is it necessary to achieve that aim? The ECJ replies negatively. Judges, prosecutors and notaries previously benefitted from an exception to the general retirement age allowing them to remain in office until age 70. They had a well-founded expectation that they would be able to remain in office, retaining their income, until that age. The legislation at issue abruptly and significantly lowered the age for compulsory retirement without introducing transitional measures to protect this legitimate expectation. Officials born in or before 2012 had a period of at most one year, but in the majority of cases much less, to adjust to lower incomes. Furthermore, Hungary has not explained why it lowered the retirement age of judges, prosecutors and notaries by eight years without providing for a gradual staggering of that amendment, while, on the other hand, the increase of three years in the general retirement age is being introduced from 2014 over a period of eight years and was already enacted in 2010 (64 – 75).

5. Is the legislation at issue an appropriate means to achieve the aim of establishing a more balanced age structure? The ECJ replies in the negative. The short-term effect of vacating numerous posts in favour of younger lawyers will not, in itself, result in a truly balanced age structure in the medium and long term. In 2013, only one age group will have to be replaced and as the retirement age is raised progressively from 62 to 65 and the prospects for young lawyers will actually deteriorate.

Ruling
[...] by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC [...]

ECJ 22 November 2012, case 385/11 *(Isabel Elbal Moreno – v – Instituto Nacional de la Seguridad Social (INSS)* and *Tesorería General de la Seguridad Social (TGSS))* **("Elbal Moreno")**, Spanish Case (GENDER DISCRIMINATION – PAY).

Facts
Ms Elbal Moreno worked as a cleaner for 18 years, mostly for 4 hours per week, which is 10% of the 40-hour statutory working week in Spain. When she was 66, she applied for a State pension. Her application was turned down on the ground that she had failed to contribute to the pension system for a minimum of 15 'contribution years'. This was because, for the purpose of calculating a contribution year, only hours actually worked are taken into account, provided, however, that every five hours count as a whole 'theoretical day', that giving birth to a child yields 112 theoretical days and that days on which a person works part-time are multiplied by 1.5. These rules meant that Ms Elbal Moreno needed a minimum contribution period of 4,931 theoretical 'days'. She needed this to become eligible for a pension that was lower than that of someone who has worked full-time. Having worked for no more than 10% for most of her life she had only accumulated 1,362 'days'.

National proceedings
Ms Elbal Moreno lodged a complaint against the rejection of her pension application and when her complaint was dismissed she brought an action before the local *Juzgado de lo Social*. She submitted that the 15-year requirement entailed a breach of the principle of equality, given that the requirement discriminated against part-time workers, and, indirectly against women workers. The court found that, as long as the 15-year requirement takes into account only the hours worked and not the contribution period (the days worked), this results in the double application of the *pro rata temporis* principle. It requires a proportionally longer contribution period for entitlement to a retirement pension, which will also be proportionally lower in its basis of assessment, owing to the part-time nature of the working day. It follows that, in relation to contributions, a longer qualifying period is required from the part-time worker in inverse proportion to the reduction in his working hours in order to obtain a pension, the amount of which is already directly and proportionately lower, owing to the part-time nature of the work.

The court noted that in the case of Ms Elbal Moreno, the 15-year requirement meant that her 18 years of 10% work were treated as equal to less than three years of contributions. This fact made the court decide to ask the ECJ a number of questions.

ECJ's findings
1. A pension such as the one at issue, which is derived from a statutory scheme to which workers, employers and, possibly, public authorities, contribute in a measure determined less by the employment relationship than by considerations of social policy, does not constitute 'pay' within the meaning of Article 157 TFEU, nor does it fall within the concept of 'employment condition' as provided in the Framework Agreement on part-time work (Annex to Directive 97/81) (§ 19-25).
2. A pension of that nature may fall within the scope of Directive 79/7 on equal treatment for men and women in matters of social security (§ 26).
3. Legislation such as that at issue works to the disadvantage of part-time workers. Because in Spain at least 80% of part-time workers are women, the 15-year requirement is contrary to Directive 79/7 unless it is objectively justified (§ 27-32).
4. The 15-year requirement fails to meet the necessity test, given that if part-time workers who do not satisfy that requirement were to receive a pension, the amount thereof would be reduced in proportion to the time worked and the contributions paid (§ 33-37).

Ruling
Article 4 of Directive 79/7 must, in circumstances such as those of the case before the referring court, be interpreted as precluding legislation of a Member State requiring a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for them qualify for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

OPINIONS

Opinion of Advocate-General Mazák of 13 September 2012, case C-282/11 *(Conceptión Salgado González - v - INSS and TGSS)*, Spanish case (SOCIAL INSURANCE/FREE MOVEMENT)

Facts
Spanish law makes entitlement to a State old-age pension conditional on having paid contributions into the system for at least 15 years (180 months). A person who satisfies this condition is entitled to a pension based on his or her average contribution base *(base reguladora)* divided by 210. The average contribution base is equal to the total of the person's contribution bases during the last 15 years. The number 210 equals the number of contributions made during that same period, being one 'ordinary' contribution every month (= 180) plus on average two 'extraordinary' contributions per year (= 30).

Ms Salgado González contributed to the Spanish pension scheme for self-employed persons from 1 February 1989 to 31 March 1999, a total of just over 10 years. Subsequently, she moved to Portugal, where, following a brief uninsured period, she contributed to a similar Portuguese scheme for almost six years. She retired in 2006 and applied for a Spanish pension.

Regulation 1408/71 provides that, where the legislation of a Member State makes the acquisition of benefits subject to the completion of periods of insurance, the competent institution of that Member State shall take account of insured periods completed under the legislation of any other Member State. Therefore, given that Ms Salgado González had completed 10 + 6 = over 15 years of insurance, she satisfied the requirement of having made contributions for over 15 years and was awarded pension benefits.

However, those benefits of about € 336 per month were less than Ms Salgado González felt justified. The institution(s) that calculated the pension did so by taking as the *base reguladora* her average contribution base, not during the 15 years preceding her retirement (1991-2005), but the 15 years before she stopped contributing to the Spanish scheme (1984-1999). As this included about five years (1984-1989) when she had not contributed at all, this reduced the average.

National proceedings
Ms Salgado González protested against this method of calculating her average contribution base.
It may be noted that Ms Salgado González did not object to the other aspect of the calculation. This was that the pension she would have received had all of her working years been completed in Spain (the theoretical pension) was multiplied, first, by 53% (to account for the fact that she had only contributed for a portion of the 35 years that Spanish law requires for a full pension) and then by 63.86% (to account for the fact that only a portion of her contributing years were completed in Spain). Therefore, the only point of dispute was the way the authorities had calculated the average contribution base.

The court of first instance found against Ms Salgado González, but on appeal the *Tribunal Superior de Justicia de Galicia* referred four questions to the ECJ. All four questions were essentially seeking guidance on the calculation of Ms Salgado González's pension pursuant to Regulation 1408/71.

Opinion
Regulation 1408/71 applies, rather than its successor, Regulation 803/2004, because Ms Salgado González's retirement date preceded the date on which the latter regulation came into force (§ 30).

1. The *base reguladora* should be calculated by taking the average of Ms Salgado González's contribution bases in Spain for the period 1989-1999, during which she contributed in Spain, and divided, not by 210, but by the number of ordinary and extraordinary contributions she made in that period (§ 43-44).

2. The Advocate-General rejects the INSS's argument that such a system would allow workers to manipulate the system (§ 45-46).

3. Failure to adjust the divisor 210 would greatly impede a self-employed worker's right to free movement. Moreover, this would not be compensated by the fact that Ms Salgado González will also receive a Portuguese pension (§ 47).

4. The Advocate-General rejects the INSS's submission that the scope of the free movement of workers is different with regard to employed workers and self-employed workers (§ 48-49).

Proposed reply
Where a self-employed migrant worker has insurance contributions in one or more Member State for a period equal to or in excess of a reference period provided by Spanish legislation, Article 46(2)(a) and Article 47(1)(g) of Council Regulation (EEC) No 1408/71 [...] preclude the calculation of that worker's theoretical Spanish benefit on the basis of his or her actual Spanish contributions during the years immediately preceding payment of his last contribution to the Spanish social security, where the sum thus obtained is divided by a divisor corresponding to the number of ordinary monthly contributions and extraordinary annual contributions payable over the reference period, as this fails to take account of the fact that the worker has exercised his or her right to free movement.

Opinion of Advocate-General Cruz Villalón of 29 November 2012, case C-427/11 (*Margaret Kelly and 13 others - v - Minister for Justice, Equality and Reform, Minister for Finance and Commissioner of An Garda Síochána*) ("**Kelly**"), Irish case (GENDER DISCRIMINATION)

Facts
In July 2000, when this case started, the Irish police force (*Garda*) included 1,114 clerical positions. Of these, based on an agreement between Garda management and Garda representative bodies, 353 were 'designated' or 'reserved' posts, which meant that they were held by police officers, mainly being men (279 men versus 74 women). The remaining 761 clerical positions were held by civil servants employed by the Department of Justice, Equality and Reform and deployed to clerical duties in the police force. These non-police officers were predominantly women. The police force was in the process of reducing the number of reserved posts (a process known as *civilianisation*), so that only those positions that really needed to be held by a trained police officer would remain reserved for police officers.

The two groups of clerical workers - the police officers and the others - were remunerated according to separate pay scales. This resulted in the police officers being paid more than their non-police colleagues.

National proceedings
The plaintiffs in this case were non-police clerical staff. They brought proceedings before the Equality Tribunal, then the Labour Court. They compared themselves to those police officers who occupied positions in which there was no need for a trained police officer. Those comparators were paid more than the plaintiffs. The latter alleged that this was discriminatory. The Labour Court, assuming (without so holding) that the plaintiffs and their chosen comparators carried out 'like' work within the meaning of Irish equal pay law, held that the plaintiffs' claims were properly classified as indirect discrimination and that the proportions of men and women in the relevant groups disclosed *prima facie* indirect pay discrimination.

The issue was whether this discrimination was objectively justified. The Labour Court found that this was the case, holding that deployment of police officers on clerical duties meets either the operational needs of the police or the need to implement the agreement made with the police representative bodies. In particular, paying the police officers assigned to those clerical posts at the rate applicable to police officers addresses this objective. Having regard to the small number of 'designated' posts, maintaining the arrangements agreed with the representative bodies pending completion of the process of civilianisation is proportionate to the operational needs of the police. The plaintiffs appealed to the High Court, which referred the following questions to the ECJ.

Question 1:
In circumstances where there is *prima facie* indirect gender discrimination in pay, in breach of Article 141 EC (now Article 157 TFEU) and Council Directive 75/117/EEC, in order to establish objective justification, does the employer have to provide justification:

in respect of the deployment of the comparators in the posts occupied by them;
- of the payment of a higher rate of pay to the comparators; or
- of the payment of a lower rate of pay to the complainants?

Question 2:
In circumstances where there is *prima facie* indirect gender discrimination in pay, in order to establish objective justification does the employer have to provide justification in respect of:
(a) the specific comparators cited by the complainants; and/or
(b) the generality of comparator posts?

Question 3:
If the answer to question 2(b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen comparators?

Question 4:
Did the Labour Court, as a matter of Community Law, err in accepting that the "interests of good industrial relations" could be taken into account in determining whether the employer could objectively justify the difference in pay?

Question 5:
In circumstances where there is *prima facie* indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the respondent?

Should such concerns have any relevance to an analysis of objective justification?

The High Court asserts that the main proceedings raise important questions of Community Law on which the Court of Justice has not given any specific ruling, notwithstanding the case law established since the *Bilka* case.

Opinion

1. Re question 1:
   It would not make a great deal of sense to provide justification for deployment to posts which in themselves do not entail any difference in pay. Therefore, the justification must relate exclusively to the pay differential. It is that differential, not the deployment, that has to be justified (§ 38-42).

2. Re questions 2 and 3:
   The question is not so much whether the relevant comparators should be the specific comparators cited by the plaintiffs (i.e. those police officers occupying posts not requiring a trained police officer) or whether they should be the generality of comparator posts (in this case, all police officers performing clerical work). The deciding factor is, rather, whether the plaintiffs have been able to show that there is a representative number of workers who, although they do work that is equivalent to the plaintiffs' work, are nevertheless paid at a higher rate. The ECJ took this view in *Brunnhofer* (case C-381/99), stating that it is for the employer to prove that his practice in the matter of wages is not discriminatory *"if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men".* Thus, the plaintiffs must establish that a 'relatively large' number of men, or 'enough' of them, are engaged in equivalent work and are paid at a higher rate than the plaintiffs and, more generally, at a higher rate than a group of individuals predominantly made up of women. They must do so in a way that suggests something systemic or indicative of a pay structure that is intrinsically discriminatory, rather than an accidental or 'short-term' phenomenon (§ 50-54).

3. Re questions 4 and 5:
   The difference in pay complained of by the plaintiffs appears to have come about as a result of a reorganisation within the Garda under which certain clerical posts that had traditionally been held by police officers were now to be held by civilians. The difference in pay derives from the fact that, whereas the latter are paid as civilians, the former have continued to be paid as police officers, so that the difference does not relate to the post but to the category of civil servant who fills it. As objective justification for this difference, the police authority relies on the fact that it was necessary to retain the pay structure for police officers so that those carrying out clerical duties should not perceive themselves to be disadvantaged in comparison with the majority of police officers. Indeed, the agreement reached to that effect with the representative bodies of the police officers seems to have been fundamental to the success of the Garda reorganisation process. (§ 62-63).

4. Matters agreed in the context of negotiations with police representatives cannot, of themselves, constitute a sufficient basis on which to justify differentiating pay on grounds of sex. That does not mean that, together with other factors, this consideration cannot combine to form sufficient grounds for justification. It is for the national court to determine whether in the present case such a combination of grounds for justification is present. It is also for the national court to assess the relative weight to be given to this particular consideration (§ 66-69).

5. The ECJ should not, however, fail to point out that, in the circumstances of the case, such relative weight must depend on time taken by the reorganisation during which the disputed difference in pay arose and continued. Thus, the maintenance of good industrial relations cannot be given the same weight in cases where the reorganisation is sudden and severe and constitutes a serious attack on the rights or expectations of those concerned, and in cases where the reorganisation is spread over time and its impact mitigated by gradual, planned and foreseeable implementation. It is therefore for the Irish courts to assess the importance of such considerations in the context of a reorganisation that started in the last decade of the twentieth century and whose outcome today is apparent from the information provided by the parties in the course of the proceedings (§ 70-72).

Proposed reply

1. In circumstances where there is *prima facie* indirect gender discrimination in pay in breach of Article 141 EC (now Article 157 TFEU) and Council Directive 75/117/EEC, in order to establish objective justification, the employer has to provide justification for the difference in pay as such.

2. In circumstances where there is *prima facie* indirect gender discrimination in pay, the employer has to provide justification in terms of a significant number of men who perform the same work as the appellants.

3. In circumstances where there is *prima facie* indirect gender discrimination in pay, objective justification cannot be established by reliance on the respondent's industrial relations concerns alone. However, such concerns may be relevant to an analysis of objective justification, depending on the context in which such they are raised.

ECtHR COURT WATCH

SUMMARY BY PETER VAS NUNES

RULINGS

ECtHR 2 October 2012, Application no. 5744/05 *(Czaja – v – Poland)*

Facts

Mr Józef Czaja and his former wife had a 12 year old daughter who suffered from epilepsy. In April 2001 Mr Czaja, who was 46 at the time, applied to the local Social Security Board for a so-called 'EWK' pension. This is a pension to which a parent of a child requiring constant healthcare is entitled if he or she retires early in order to care for that child. Mr Czaja's application included a medical certificate, issued by a specialist medical centre, stating that his daughter suffered from epilepsy and was in need of her parent's constant care. On 18 May 2001 the Social Security Board granted Mr Czaja an EWK pension. Mr Czaja resigned from his full-time job in a factory where he had worked since 1982.

In July 2002, just over one year after the EWK pension had been awarded, the local Social Security Board asked the national Social Security Board's doctor to examine whether Mr Czaja's daughter really needed the permanent care of a parent. On 3 September 2012, the doctor stated, on the basis of the medical documents, that the child could not be considered as ever having required such care. On 18 September 2002 the Social Security Board decided to stop payment of the EWK pension with effect from 1 October 2002, but not to demand repayment of the sums already paid.

National proceedings

Mr Czaja appealed this decision. On 1 April 2003 the court of first instance dismissed the appeal. On 22 April 2004 the Court of Appeal upheld this judgment and on 9 July 2004 the Supreme Court refused to entertain Mr Czaja's 'cassation appeal'. This decision was served on Mr Czaja on 26 July 2004.

On 24 January 2005 (i.e. just under six months after 26 July 2004) Mr Czaja applied to the ECtHR, alleging violation of:

- Article 1 of Protocol No. 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms (the 'Convention'), which reads: *"Every [...] person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law [...]"*;
- Article 6(1) of the Convention (right to a fair trial);
- Article 8 of the Convention (respect for private and family life);
- Article 14 of the Convention (prohibition of discrimination).

ECtHR's findings

1. The Court begins by noting that some 130 similar Polish cases are pending before it, the majority of which were brought by members of the Association of Victims of the Social Security Board (§ 23-25).

2. The Polish government made three preliminary objections: (i) Mr Czaja was abusing his right to submit an individual application within the meaning of Article 35(3) of the Convention; (ii) he had failed to exhaust the domestic remedies available to him, given that he could have applied to the Constitutional Court with a reasonable prospect of success, which would have provided him with an effective remedy; and (iii) he had failed to lodge his application with the ECtHR within six months "from the date on which the final decision was taken" as provided in Article 35(1) of the Convention. The court rejected all of these objections and declared Mr Czaja's application to be admissible (§ 37-59).

3. The court points out that the relevant general principles in respect of the complaint of violation of Article 1 of Protocol No. 1 are set out in its 2009 judgment in the case of *Moskal – v – Poland* (No 10373/05). In that judgment the ECtHR held that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (§ 65).

4. It is common ground that the decision to deprive Mr Czaja of his EWK pension amounted to an interference with his possessions within the meaning of Article 1 of Protocol No. 1; that this interference was provided for by law; and that it pursued a legitimate aim. The issue, inasfar as it relates to Article 1 of Protocol No. 1, is therefore limited to that of proportionality (§ 66-67).

5. It must be stressed that the time it took for the authorities to review the applicant's dossier was relatively long. The decision was left in force for sixteen months (18 May 2001 - 3 September 2002) before the authorities became aware of their error. On the other hand, when the error was discovered the decision to discontinue the payment of the benefit was issued relatively quickly and with immediate effect. Even though the applicant had an opportunity to challenge the Social Security Board's decision of 2002 in judicial review proceedings, his right to the pension was determined by the courts more than twenty one months later (18 September 2002 – 9 July 2004) and during that time he was not in receipt of any welfare benefit.

   In examining the conformity of these events with the Convention, the Court reiterates the particular importance of the principle of good governance. It requires that where an issue pertaining to the general interest is at stake, especially when it affects fundamental human rights, including property rights, the public authorities must act promptly and in an appropriate and, above all, consistent manner. It is desirable that public authorities act with the utmost care, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other such rights. In the present case, the Court considers that having discovered their mistake, the authorities failed in their duty to act speedily and in an appropriate and consistent manner.

   In the Court's opinion, the fact that the State did not ask the applicant to return the pension which had been incorrectly paid did not mitigate sufficiently the consequences that flowed for the applicant from the interference in his case. The Court notes in this connection that the applicant had decided to resign from his employment once his right to the EWK pension had been confirmed by the authorities.

   It should be further observed that as a result of the impugned measure, the applicant was faced, without any transitional period enabling him to adjust to the new situation, with the total loss of his early-retirement pension, which constituted his main source of income. Moreover, the Court is aware of the potential risk that, in

view of his age and the economic reality in the country, the applicant might have considerable difficulty in securing new employment. Indeed, the applicant has not yet been able to find a full-time job.

The Government submitted that the applicant's wife owned a farm which had been a source of income for him. However, the Court considers that this fact is not decisive for the matter at hand, namely whether the revocation of the EWK pension placed an excessive burden on the applicant as an individual in his own right - irrespective of third party financial support.

In view of the above considerations, the Court does not see any reason to depart from its ruling in the leading case concerning EWK pensions, *Moskal – v - Poland*, and finds that in the instant case a fair balance has not been struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and that the burden placed on the applicant was excessive.

It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention (§ 69-76).

6. There is no need to examine Mr Czaja's complaints under Articles 6 and 8 of the Convention (§ 77-80).

7. The complaint under Article 14 of the Convention (discrimination) is manifestly ill-founded (§ 81-83).

Ruling
The ECtHR holds by five votes to two that there has been a violation of Article 1 of Protocol No. 1 to the Convention and that Poland must pay Mr Czaja €12,000.

Dissenting opinion
Two judges referred to the dissenting opinion of three of the seven judges in the said *Moskal* case, which reads as follows:

1. "The case is one of considerable importance, raising as it does an issue common to a number of applications against Poland which are currently pending before the Court. It concerns primarily the compatibility with Article 1 or Protocol No. 1 of the revocation of the grant to the applicant of an early-retirement pension (the 'EWK' pension) on the grounds that her son's health condition was not such as to require permanent care and that accordingly she had not been entitled to the pension at the time it was granted. To our regret, we are unable to join the majority of the Chamber in finding that the revocation of the EWK pension violated the applicant's rights under the Protocol.

2. It is not disputed by the parties, and we accept, that the decision of the Rzeszów Social Security Board of 25 June 2002 which deprived the applicant of the right to receive the EWK pension amounted to an interference with her possessions within the meaning of Article 1 of Protocol No. 1. We also agree that the revocation served a legitimate aim, namely to ensure that the public purse was not required to continue to bear the cost of providing a benefit to which the applicant had never been entitled. Where we part company with the majority of the Chamber is on the question of whether the revocation was, in the circumstances of the case, proportionate to the legitimate aim pursued and, more particularly, whether a fair balance was preserved between the demands of the general interest of the public and the requirement of the protection of the individual's fundamental rights.

3. The factors to be weighed on the applicant's side of the scale are undeniably powerful. In August 2001, the applicant lodged her application for the EWK pension in good faith and attached to it, as required, a medical certificate which was signed by a specialist in allergies and pulmonology and which certified that her son suffered from atopic bronchial asthma, various allergies and recurring sino-pulmonary infections which required his mother's constant care. After examining the application, the Social Security Board granted the applicant the right to an EWK pension [...]. The applicant was subsequently issued with a pensioner's identity card marked 'valid indefinitely' and for the following 10 months continued to receive the pension without interruption. Until payment of the pension was discontinued and the decision to grant it was revoked in July 2002, the applicant had no reason to believe that she was not entitled to the pension and no reason to doubt that she would continue to receive it as long as there was no change in her child's medical condition. It is clear that the loss of the EWK pension had serious financial consequences for the applicant, who appears to have had no other source of income at the time and who is likely to have faced considerable difficulty in finding new employment. It is clear, too, that the blame for what had occurred lay not with the applicant but exclusively with the Social Security authorities who had erroneously approved the grant of the pension on the grounds that her son's health condition qualified the applicant to receive it.

4. We could readily accept that, in these circumstances, it would have been disproportionate had the authorities sought to recover from the applicant the EWK pension sums which they had erroneously paid. But this was not the case. Where we differ from the majority is in their view, which is confirmed by the award of just satisfaction, that a fair balance required that the applicant should continue to be paid the pension which she had mistakenly been awarded but to which she had no legal entitlement until the date of her retirement in 2015, or at least until her son attained the age of majority in 2012. In our view, it would, on the contrary, upset any fair balance if, once having discovered their mistake, the authorities were precluded from ever redressing its effects and were required to perpetuate the error by continuing to pay the pension which had been wrongly granted. This would, as the judgment expressly recognises, not only lead to the unjust enrichment of the recipient but would have an unfair impact on other individuals contributing to the Social Security fund, in particular those who were denied benefits because they failed to meet the statutory requirements; it would also amount to sanctioning an improper allocation of scarce public resources.

5. [...]

6. The majority in the present case place emphasis on the principle of good governance in the context of property rights and criticise the authorities for an alleged failure to act in good time and in an appropriate and consistent manner once having discovered their mistake. While we accept the importance of the principle of good governance, we cannot find that the principle was breached in the present case; the review of the award of the EWK pension took place, in our view, with reasonable promptness and, once having discovered the error, the authorities acted both properly and without any undue delay.

7. It is further argued that where, as here, a mistake has been caused by the authorities themselves without any fault of a third party, a 'different proportionality approach' is called for when determining whether the burden borne by an applicant was excessive. It is unclear to us in what respect the approach to be adopted in such a case is said to differ from that in other cases. However, even accepting that a more stringent test may be required where the national authorities are responsible for the error which resulted in the original grant of the EWK pension, we do not find that the revocation of the grant imposed on the applicant an individual and excessive burden. We are confirmed in this view by four factors. In the first place, although the EWK pension awarded to the applicant was expressed to be valid indefinitely, it was not in any event a benefit which was permanent or immutable: the payment of the pension was subject to periodic review and was liable to be discontinued if, *inter alia*, the medical condition of the applicant's child was found no longer to require permanent care. Moreover, it was, as the domestic courts found, liable to be discontinued where new evidence had been submitted or where relevant circumstances, which pre-existed the initial pension award but which had not been taken into consideration by the authorities, had subsequently come to light. Secondly, the decision of the Social Security Board to revoke the grant of the pension was itself subjected to careful examination at three levels of jurisdiction by the domestic courts, which examined fresh medical evidence concerning the applicant's son before concluding that the applicant had been rightfully divested of the right to a pension under the scheme provided by the 1989 Ordinance, as she did not satisfy the requirement of necessary permanent care. Thirdly, as noted above, despite the fact that the revocation was retrospective, the applicant was never required to repay the sums which had been mistakenly paid to her. Fourthly, when the applicant lost her entitlement to the EWK pension, she qualified for another form of pre-retirement benefit from the State, albeit one of significantly less value than the EWK pension. [...]"

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2011/59 (SP) not adjusting shift pattern discriminates family man
2012/19 (CZ) inviting for job interview by email not discriminatory
2012/22 (UK) disadvantage for being married to a particular person: no marital status discrimination
2012/47 (PL) equal pay for equal work

Sanction

2011/25 (GE) how much compensation for lost income?
2011/38 (UK) liability is joint and several
2011/39 (AT) no damages for discriminatory dismissal
2011/42 (Article) punitive damages
2012/48 (CZ) Supreme Court introduces concept of constructive dismissal
2012/49 (UK) UK protection against dismissal for political opinions inadequate

MISCELLANEOUS

Employment status

2009/37 (FR) participants in TV show deemed "employees"
2012/37 (UK) "self employed" lap dancer was employee

Information and consultation

2009/15 (HU) confidentiality clause may not gag works council member entirely
2009/16 (FR) Chairman foreign parent criminally liable for violating French works council's rights
2009/53 (PL) law giving unions right to appoint works council unconstitutional
2010/18 (GR) unions lose case on information/consultation re change of control over company
2010/19 (GE) works council has limited rights re establishment of complaints committee
2010/38 (BE) EWC member retains protection after losing membership of domestic works council
2010/52 (FI) Finnish company penalised for failure by Dutch parent to apply Finnish rules
2010/72 (FR) management may not close down plant for failure to consult with works council
2011/16 (FR) works council to be informed on foreign parent's merger plan
2011/33 (NL) reimbursement of experts' costs (article)
2012/7 (GE) lex loci labori overrides German works council rules
2012/11 (GE) EWC cannot stop plant closure

Collective redundancy

2009/34 (IT) flawed consultation need not imperil collective redundancy
2010/15 (HU) consensual terminations count towards collective redundancy threshold
2010/20 (IR) first case on what constitutes "exceptional" collective redundancy

Individual termination

Paid leave

Parental leave

Working time

Privacy

Information on terms of employment

Fixed-term contracts

Temporary agency work

Industrial action

Free movement

Conflict of laws

2012/9 (NL)	to which country was contract more closely connected?
2012/28 (AT)	choice of law clause in temp's contract unenforceable

Human rights

2011/30 (IT)	visiting Facebook at work no reason for termination
2011/44 (UK)	dismissal for using social media
2012/55 (NL)	Facebook posting not covered by right to free speech

Miscellaneous

2009/19 (FI)	employer may amend terms unilaterally
2009/38 (SP)	harassed worker cannot sue only employer, must also sue harassing colleague personally
2009/39 (LU)	court defines "moral harassment"
2010/17 (DK)	Football Association's rules trump collective agreement
2010/52 (NL)	employer liable for bicycle accident
2010/54 (AT)	seniority-based pay scheme must reward prior foreign service
2010/88 (HU)	employer not fully liable for traffic fine caused by irresponsible employee
2011/9 (NL)	collective fixing of self-employed fees violates anti-trust law
2011/11 (FI)	no bonus denial for joining strike
2011/47 (PL)	reduction of former secret service members' pensions
2011/49 (LA)	forced absence from work in light of EU principles
2011/64 (IR)	Irish minimum wage rules unconstitutional
2012/6 (FR)	parent company liable as "co-employer"
2012/41 (DK)	summary dismissal, burden of proof
2012/43 (UK)	decision to dismiss not covered by fair trial principle
2012/52 (FR)	shareholder to compensate employees for mismanagement
2012/54 (GR)	economic woes justify 20% salary cut
2012/58 (CZ)	employer cannot assign claim against employee
2012/59 (IR)	illegal foreign employee denied protection

RUNNING INDEX OF ECJ RULINGS SUMMARISED IN EELC

1. Transfer of undertakings

29 July 2010, C-151/09 (*UGT-v-La Línea*): retention of identity to (determine whether there is a TOU) is to be assessed at the time of the transfer, whereas preservation of autonomy (to determine whether an employee representation continues to exist) is to be assessed afterwards (EELC 2010-4).

15 September 2010, C-386/09 (*Briot*): non-renewal of fixed-term contract in light of impending TOU not covered by Directive; non-renewal not a "dismissal" (EELC 2010-5).

21 October 2010, C-242/09 (*Albron*): ECJ distinguishes between "contractual employer" and "non-contractual employer" where the employee actually works. Where the latter's activities are transferred to a third party, the contractual and non-contractual employers are group companies and the employee is assigned permanently, there is a TOU (EELC 2010-4).

20 January 2011, C-463/09 (*Clece*): contracting-in of cleaning not a TOU given that neither assets nor workers transferred (EELC 2011-1).

6 September 2011, C-108/10 (*Scattolon*): does seniority go across? (EELC 2011-3).

2. Gender discrimination, maternity

29 October 2009, C-63/08 (*Pontin*): Luxembourg procedural rules for bringing a claim that a dismissal is invalid by reason of pregnancy are unduly restrictive (EELC 2010-1).

1 July 2010, C-471/08 (*Parviainen*): to which benefits is a stewardess entitled who may not fly because of pregnancy? (EELC 2010-4).

1 July 2010, C-194/08 (*Gassmayr*): to which benefits is a university lecturer entitled who may not perform all of her duties? (EELC 2010-4).

11 November 2010, C-232/09 (*Danosa*): removal of pregnant Board member incompatible with Directive 92/85 (EELC 2010-5).

18 November 2010, C-356/09 (*Kleist*): Directive 76/207 prohibits dismissing employees upon entitlement to pension if women acquire that entitlement sooner than men (EELC 2010-5).

1 March 2011, C-236/09 (*Test-Achats*): Article 5(2) of Directive 2004/113 re unisex insurance premiums invalid (EELC 2011-1).

21 July 2011, C-104/10 (*Kelly*): Directive 97/80 does not entitle job applicant who claims his rejection was discriminatory to information on other applicants, but refusal to disclose relevant information compromises Directive's effectiveness (EELC 2011-3).

20 October 2011, C-123/10 (*Brachner*): indirect sex discrimination by raising pensions by different percentages depending on income, where the lower increases predominantly affected women (EELC 2012-2).

19 April 2012, C-415/10 (*Meister*): Directives 2006/54, 2000/43 and 2000/78 do not entitle a rejected job applicant to information on the successful applicant (EELC 2012-2).

22 November 2012, C-385/11 *(Elbal Moreno)*: Directive 97/7 precludes requiring greater contribution period in pension scheme for part-timers (EELC 2012-4)

3. Age discrimination

12 January 2010, C-229/08 (*Wolf*): German rule limiting applications for a job as fireman to individuals aged under 30 justified (EELC 2010-2).

12 January 2010, C-341/08 (*Petersen*): German age limit of 68 to work as a publicly funded dentist discriminatory but possibly justified (EELC 2010-2).

19 January 2010, C-555/07 (*Kücükdeveci*): principle of equal treatment regardless of age is a "general principle of EU law", to which Directive 2000/78 merely gives expression; German law disregarding service before age 25 for calculating notice period is illegal (EELC 2010-2 and 3).

8 July 2010, C-246/09 *(Bulicke*): German two-month time limit for bringing age discrimination claim probably not incompatible with principles of equivalency and effectiveness; no breach of non-regression clause (EELC 2010-4).

12 October 2010, C-499/08 (*Andersen*): Danish rule exempting early retirees from severance compensation incompatible with Directive 2000/78 (EELC 2010-4).

12 October 2010, C-45/09 (*Rosenbladt*): German collective agreement terminating employment automatically at age 65 justified; automatic termination is basically a form of voluntary termination (EELC 2010-4).

18 November 2010, C-250 and 268/09 (*Georgiev*): compulsory retirement of university lecturer at age 65 followed by a maximum of three one-year contracts may be justified (EELC 2010-5).

21 July 2011, C-159 and 160/10 (*Fuchs and Köhler*): compulsory retirement at age 65 may be justified (EELC 2011-3).

8 September 2011, C-297 and 298/10 (*Hennigs*): age-dependent salary incompatible with principle of non-discrimination, but maintaining discriminatory rules during transitional period in order to prevent loss of income for existing staff is allowed (EELC 2011-3).

13 September 2011, C-447/09 (*Prigge*): automatic termination of pilots' employment at age 60 cannot be justified on grounds of safety (EELC 2011-3).

19 April 2012, C-415/10 (*Meister*): Directives 2000/78, 2000/43 and 2006/54 do not entitle rejected job applicant to information on the successful applicant (EELC 2012-2).

7 June 2012, C-132/11 (*Tyroler Luftfahrt*): Directive 2000/78 allows level of pay to be based on experience gained in the service of current employer to the exclusion of similar experience gained in group company (EELC 2012-2).

5 July 2012, C-141/11 (*Hörnfeldt*): Directive 2000/78 allows contractual forced retirement at age 67 regardless of pension level (EELC 2012-3).

6 November 2012, C-286/12 *(Hungary)*. Hungarian law on compulsory retirement of judges at age 62 non-compliant (EELC 2012-4).

4. Other forms of discrimination

10 May 2011, C-147/08 (*Römer*): German income tax law may be in breach of sexual orientation non-discrimination rules (EELC 2011-2).

7 July 2011, C-310/10 (*Agafitei*): ECJ declines to answer questions re Romanian law providing higher salaries for public prosecutors than for judges (EELC 2011-3).

19 April 2012, C-415/10 (*Meister*): Directives 2000/43 (race), 2000/78 and 2006/54 do not entitle rejected job applicant to information on successful applicant (EELC 2012-2).

28 June 2012, C-172/11 (*Erny*): re differential tax treatment of pre-retirement benefits (EELC 2012-2).

5. Fixed-term work

22 April 2010, C-486/08 (*Landeskrankenhäuser Tirols*): Austrian law disadvantaging temporary and casual workers incompatible with Directive 1999/70 (EELC 2010-3).

24 June 2010, C-98/09 (*Sorge*): Directive 1999/70 applies to initial fixed-term also, but lacks direct effect. Relaxation of Italian law in 2001 probably not a reduction of the general level of protection (EELC 2010-4).

1 October 2010, C-3/10 (*Affatato*): Framework Agreement allows prohibition to convert fixed-term into permanent contracts as long as abuse of successive fixed-term contracts is effectively penalised (EELC 2011-1).

11 November 2010, C-20/10 (*Vino*): Framework Agreement does not preclude new law allowing fixed-term hiring without providing a reason; no breach of non-regression clause (EELC 2011-1).

22 December 2010, C-444/09 and 459/09 (*Gavieiro*): interim civil servants fall within scope of Directive 1999/70 (EELC 2011-1).

18 January 2011, C-272/10 (*Berziki*): Greek time-limit for applying for conversion of fixed-term into permanent contract compatible with Directive (EELC 2011-1).

10 March 2011, C-109/09 (*Lufthansa*): German law exempting workers aged 52 and over from the requirement to justify fixed-term hiring not compatible with Framework Agreement (EELC 2011-1).

18 March 2011, C-273/10 (*Medina*): Spanish law reserving right to *trienios* to professors with permanent contract incompatible with Framework Agreement (EELC 2011-2).

8 September 2011, C-177/10 (*Rosado Santana*): re difference of treatment between career civil servants and interim civil servants and re time limit for challenging decision (EELC 2011-3).

26 January 2012, C-586/10 (*Kücük*): permanent replacement of absent staff does not preclude existence of an objective reason as provided in Clause 5(1)(a) of the Framework Agreement (EELC 2012-1).

8 March 2012, C-251/11 (*Huet*): when a fixed-term contract converts into a permanent contract, the terms thereof need not always be identical to those of the previous fixed-term contracts (EELC 2012-1).

15 March 2012, C-157/11 (*Sibilio*): "socially useful workers" may be excluded from the definition of "employee" (EELC 2012-1).

18 October 2012, C-302 - C-305/11 *(Valenza)*: Clause 4 precludes Italian legislation that fails to take account of fixed-term service to determine seniority, unless objectively justified (EELC 2012-4).

6. Part-time work

22 April 2010, C-486/08 (*Landeskrankenhäuser Tirols*): Austrian law re effect of changed working hours on paid leave incompatible with Working Time Directive (EELC 2010-3).

10 June 2010, C-395/08 (*INPS – v – Bruno*): Italian retirement benefit rules discriminate against vertical cyclical part-time workers (EELC 2010-3).

7 April 2011, C-151/10 (*Dai Cugini*): Belgian rule obligating employers to maintain documentation re part-time workers may be justified (EELC 2011-2).

1 March 2012, C-393/10 (*O'Brien*): may UK law provide that judges are not "employees" within the meaning of the Directive? (EELC 2012-1)

7. Information and consultation

10 September 2009, C-44/08 (*Akavan – v – Fujitsu*): when must employer start consultation procedure when a decision affecting its business is taken at a higher corporate level? (EELC 2009-2).

11 February 2010, C-405/08 (*Holst*): Danish practice regarding dismissal protection of employee representatives not compatible with Directive 2002/14 (EELC 2010-2 and 3).

8. Paid leave

10 September 2009, C-277/08 (*Pereda*): legislation that prevents an employee, who was unable to take up paid leave on account of sickness, from taking it up later is not compatible with Directive 2003/88 (EELC 2009-2).

15 September 2011, C-155/10 (*Williams*): during annual leave an employee is entitled to all components of his remuneration linked to his work or relating to his personal and professional status (EELC 2011-3).

22 November 2011, C-214/10 (*Schulte*): Member States may limit carry-over period for long-term disablement to 15 months (EELC 2011-4).

24 January 2012, C-282/10 (*Dominguez*): French law may not make entitlement to paid leave conditional on a minimum number of days worked in a year (EELC 2012-1).

3 May 2012, C-337/10 (*Neidel*): national law may not restrict a carry-over period to 9 months. Directive 2003/88 does not apply to above-statutory entitlements (EELC 2012-2).

21 June 2012, C-78/11 (*ANGED*): worker who becomes unfit for work during leave entitled to leave in lieu (EELC 2012-2).

8 November 2012, C-229 and 230/11 *(Heimann)*: paid leave during short-time working may be calculated *pro rata temporis* (EELC 2012-4).

9. Health and safety, working time

7 October 2010, C-224/09 (*Nussbaumer*): Italian law exempting the construction of private homes from certain safety requirements not compatible with Directive 92/57 (EELC 2010-4).

14 October 2010, C-243/09 (*Fuss*): Directive 2003/88 precludes changing worker's position because he insists on compliance with working hours rules (EELC 2010-5).

14 October 2010, C-428/09 (*Solidaires Isère*): educators fall within scope of derogation from working time rules provided they are adequately protected (EELC 2010-5).

21 October 2010, C-227/09 (*Accardo*): dispute about weekly day of rest for police officers; was Italian collective agreement a transposition of Directive 2003/88? (EELC 2010-4 and EELC 2011-1).

4 March 2011, C-258/10 (*Grigore*): time during which a worker, even though not actively employed, is responsible qualifies as working time under Directive 2003/88 (EELC 2011-2).

7 April 2011, C-519/09 (*May*): "worker" within meaning of Directive 2003/88 includes employer of public authority in field of social insurance (EELC 2011-2).

7 April 2011, C-305/10 (*Commission - v - Luxembourg*): re failure to transpose Directive 2005/47 on railway services (EELC 2011-4).

19 May 2011, C-256 and 261/10 (*Fernández*): Spanish law re noise protection in breach of Directive 2003/10 (EELC 2011-2).

10. Free movement, social insurance

10 September 2009, C-269/07 (*Commission – v – Germany*): tax advantage exclusively for residents of Germany in breach of Regulation 1612/68 (EELC 2009-2).

1 October 2009, C-3/08 (*Leyman*): Belgian social insurance rules in respect of disability benefits, although in line with Regulation 1408/71, not compatible with principle of free movement (EELC 2009-2).

1 October 2009, C-219/08 (*Commission – v – Belgium*): Belgian work permit requirement for non-EU nationals employed in another Member State not incompatible with the principle of free provision of services (EELC 2009-2).

10 December 2009, C-345/08 (*Peš la*): dealing with German rule requiring foreign legal trainees to have same level of legal knowledge as German nationals (EELC 2010-3).

4 February 2010, C-14/09 (*Hava Genc*): concept of "worker" in Decision 1/80 of the Association Council of the EEC-Turkey Association has autonomous meaning (EELC 2010-2).

16 March 2010, C-325/08 (*Olympique Lyon*): penalty for not signing professional football contract with club that paid for training must be related to cost of training (EELC 2010-3).

15 April 2010, C-542/08 (*Barth*): Austrian time-bar for applying to have foreign service recognised for pension purposes compatible with principle of free movement (EELC 2010-3).

15 July 2010, C-271/08 (*Commission – v – Germany*): the parties to a collective agreement requiring pensions to be insured with approved insurance companies should have issued a European call for tenders (EELC 2010-4).

14 October 2010, C-345/09 (*Van Delft*): re health insurance of pensioners residing abroad (EELC 2010-5).

10 February 2011, C-307-309/09 (*Vicoplus*): Articles 56-57 TFEU allow Member State to require work permit for Polish workers hired out during transitional period (EELC 2011-1).

10 March 2011, C-379/09 (*Casteels*): Article 48 TFEU re social security and free movement lacks horizontal direct effect; pension scheme that fails to take into account service years in different Member States and treats transfer to another State as a voluntary termination of employment not compatible with Article 45 TFEU (EELC 2011-2).

30 June 2011, C-388/09 (*Da Silva Martins*): re German optional care insurance for person who moved to Portugal following retirement from job in Germany (EELC 2011-3).

15 September 2011, C-240/10 (*Schultz*): re tax rate in relation to free movement (EELC 2011-4).

20 October 2011, C-225/10 (*Perez*): re Articles 77 and 78 of Regulation 1408/71 (pension and family allowances for disabled children) (EELC 2012-2).

15 November 2011, C-256/11 (*Dereci*): re the right of third country nationals married to an EU citizen to reside in the EU (EELC 2011-4).

15 December 2011, C-257/10 (*Bergström*): re Swiss family benefits (EELC 2012-1).

7 June 2012, C-106/11 (*Bakker*): Reg. 1408/71 allows exclusion of non-resident working on dredger outside EU (EELC 2012-3).

4 October 2012, C-115/11 (*Format*): a person who according to his contract works in several EU States but in fact worked in one State at a time not covered by Article 14(2)(b) of Reg. 1408/71 (EELC 2012-3).

19 July 2012, C-522/10 *(Reichel-Albert)*: Reg. 1408/71 precludes irrebuttable presumption that management of a company from abroad took place in the Member State where the company is domiciled (EELC 2012-4).

18 October 2012, C-498/10 (X) re deduction of income tax at source from footballers' fees (EELC 2012-4).

25 October 2012, C-367/11 *(Prete)* re tide-over allowance for job seekers (EELC 2012-4).

8 November 2012, C-268/11 *(Gühlbahce)* re residence permit of Turkish husband (EELC 2012-4).

8 November 2012, C-461/11 *(Radziejewski)*: Article 45 TFEU precludes Swedish legislation conditioning debt relief on residence (EELC 2012-4).

11. Parental leave

22 October 2009, C-116/08 (*Meerts*): Framework Agreement precludes Belgian legislation relating severance compensation to temporarily reduced salary (EELC 2010-1).

16 September 2010, C-149/10 (*Chatzi*): Directive 97/75 does not require parents of twins to be awarded double parental leave, but they must receive treatment that takes account of their needs (EELC 2010-4).

12. Collective redundancies, insolvency

10 December 2009, C-323/08 (*Rodríquez Mayor*): Spanish rules on severance compensation in the event of the employer's death not at odds with Directive 98/59 (EELC 2010-2).

10 February 2011, C-30/10 (*Andersson*): Directive 2008/94 allows exclusion of (part-)owner of business (EELC 2011-1).

3 March 2011, C-235-239/10 (*Claes*): Luxembourg law allowing immediate dismissal following judicial winding up without consulting staff etc. not compatible with Directive 98/59 (EELC 2011-1).

10 March 2011, C-477/09 (*Defossez*): which guarantee institution must pay where worker is employed outside his home country? (EELC 2011-1).

17 November 2011, C-435/10 (*Van Ardennen*): Dutch law obligating employees of insolvent employer to register as job seekers not compatible with Directive 80/987 (EELC 2011-4).

18 October 2012, C-583/10 *(Nolan)* re state immunity; ECJ lacks jurisdiction (EELC 2012-4).

13. Applicable law, forum

15 July 2010, C-74/09 (*Bâtiments et Ponts*): Belgian requirement for bidders to register tax clearance with domestic committee not compatible with public procurement Directive 93/37 (EELC 2010-4).

15 March 2011, C-29/10 (*Koelzsch*): where worker works in more than one Member State, the State in which he "habitually" works is that in which he performs the greater part of his duties (EELC 2011-1).

15 December 2011, C-384/10 (*Voogsgeerd*): where does an employee "habitually" carry out his work and what is the place of business through which the employee was engaged? (EELC 2011-4).





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