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EUROPEAN EMPLOYMENT LAW CASES

OFFICIAL JOURNAL OF THE EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION EELA

2013 | 4

## UK: Court allows covert surveillance

## Austria: Discrimination despite ignoring reason

## Germany: BAG accepts levelling-down

## Netherlands: State liable following Schultz-Hoff

## Luxembourg: Did beauty parlour retain identity?

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**European Employment Law Cases**

**Publishing information**
EELC is published four times a year.
Subscription includes full access to:
www.eelc-online.com.

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Sdu Uitgevers, The Hague (2013)

**ISSN**
1877-9107

Subscription rates: one year, including access to website: € 229,25*

* for Dutch subscribers 6% VAT will be added

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# INTRODUCTION

One of the cases reported in this edition of EELC delves deeper into the issue of State liability for late, incomplete or incorrect transposition of an EU directive. The author compares the criteria the ECJ formulated in its well-known *Francovich* (1991) judgment with those in its *Brasserie du Pêcheur* judgment (1996), in particular the condition that the breach of EU law is 'sufficiently serious', meaning that the Member State *"manifestly and gravely disregarded the limits on its discretion"*.

A British case reported in this issue deals with an issue most employment lawyers are occasionally faced with, namely whether an employer may engage a private investigator to prove unlawful absence from work.

The German *Bundesarbeitsgericht* has struggled with the vexed issue of levelling-up versus levelling-down. For the first time, it has accepted that in certain cases, levelling-down can be an option in the event a contractual provision is discriminatory and therefore void.

The case reports in this issue were contributed by lawyers from:

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MOSATI Rechtanwälte in Austria
Lewis Silkin in UK (2x)
Luther Rechtsanwaltgesellschaft in Germany
Randl Partners in Czech Republic
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Peter Vas Nunes, editor

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## TRANSFER OF UNDERTAKINGS



## DISCRIMINATION



## MISCELLANEOUS

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2013/50

# Did a beauty parlour retain its identity? (LU)

**CONTRIBUTOR** MICHEL MOLITOR*

**Summary**
The owner of a small beauty parlour transferred to another person the lease of the premises, the furniture, equipment and stock, the activities contracts, the right to use the parlour's business name and the obligation to provide existing customers with pre-paid services, but he didn't transfer the staff. Did this transaction trigger a transfer of undertaking? No, said the court of first instance, yes, said the Court of Appeal. The author is critical.

**Facts**
The plaintiff in this case was a beautician. She was employed by a small limited liability company (the "Transferor") that operated a beauty parlour in rented premises. The owner of the company worked there herself along with two or three other beauticians, including the plaintiff. The plaintiff called in sick on 26 April 2010 and remained unable to perform her work until 13 October. During her absence, her employer had entered into a contract with a third party (the "Transferee") under which the Transferee took over:

- the lease of the premises as from 1 September 2010[1];
- the ownership of the furniture, equipment and stock;
- the rights and obligations of the running contracts for electricity, water, telephone and insurance;
- the obligation to provide free treatments to customers who had purchased pre-paid "subscriptions";
- the right to use the beauty parlour's brand name (although the Transferee decided not to use this name, preferring to re-name the beauty parlour).

The contract did not provide for the take-over of the Transferor's staff, who the Transferor therefore retained as its employees[2].
When the plaintiff returned from her sick leave, the Transferor dismissed her. The plaintiff brought legal proceedings against both the Transferor and Transferee, claiming compensation for unfair dismissal. The court of first instance rejected the claim. In the case against the Transferee it reasoned that there had been no transfer of undertaking, given that the Transferee had taken over neither staff nor clientele. In the case against the Transferor, the court reasoned that the plaintiff's sick leave and the inconvenience it had caused were fair grounds for dismissal.

The plaintiff appealed.

**Judgment**
The Court of Appeal recalled the principle laid down in Article L.127-2 of the Labour Code according to which the transfer of an undertaking is defined as the transfer of *"an economic entity which retains its identity, and constitutes an organised grouping of resources, in particular personnel and tangible assets, allowing the pursuit of an economic activity, whether or not that activity is central or ancillary"*. In order to determine whether the conditions relating to a transfer of undertaking were met, the Court of Appeal based its reasoning on the European Court of Justice's guidelines.

European case law has consistently ruled that: *"it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business' tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended"* (Case 24/85 of 18 March 1986, *Spijkers*).

In order to refute the transfer of undertaking, the Transferee held that the identity of the company had changed. First, the Transferee argued that a change of brand and staff had occurred. In fact, the Transferee was a single-member company as it was run by a beautician who wanted to operate alone. Moreover, there was no continuation of the same activity because the clientele had disappeared because of sporadic closing caused by the absence of the two beauticians who had worked for the Transferor.

The Court of Appeal rejected all these arguments. For the Court, if the human resources had changed, this change was only because of a violation of the legal provisions on the transfer of undertaking, in other words, the Transferee's refusal to take over the staff of the Transferor. The rules on transfer of undertakings of undertakings are underpinned by public order concerns and for those reasons the taking over of the employment contracts applies automatically by operation of law. No exception to the rules may be agreed between the Transferor and the Transferee. The change of brand was merely a secondary consideration for the Court and did not set aside the application of the legal provisions on transfer of undertakings. In addition, the transfer of the subscription agreements showed that there was no termination of the activity, so the argument that the activity had stopped could not be accepted.

The Court of Appeal noted that the material assets had been taken over and deduced from this and from the continuation of the subscription agreements with former clients that the Transferee had taken over the same activity at the same place as the Transferor. A transfer of undertaking between the two companies was therefore deemed to have occurred in the present case. Consequently, the Court of Appeal overturned the judgment of the Labour Court of Luxembourg, which had rejected the claim of the employee for unfair dismissal, declared the claim against the Transferee admissible and referred the case back to the first instance court (but with different judges).

**Commentary**
This case illustrates the important but complex issue of how to determine whether an undertaking maintains its identity when no agreement is made to transfer the employees. In this context, the Court of Appeal tried to apply European Court of Justice case law in the field of transfer of undertakings, according to which the national jurisdiction must apply the technique of bundling evidence (*"faisceau d'indices"*) in order to assess whether a transfer occurs. To this end, the judge must identify all the assets or means that have been taken over and then make an overall assessment as to whether there is a transfer. In the present case, the Court of Appeal considered that the transfer

1 It is not known whether the owner of the premises agreed to this transfer.
2 It is not known what happened to the staff other than the plaintiff.

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was mainly characterised by the transfer of the lease agreement, the subscriptions and the material assets. According to the Court, this was sufficient for the rules on transfer of undertakings to apply. This suggests that the Court, in its overall assessment, decided to allow the transfer of the material assets to prevail over the lack of any evident transfer of staff - as, in this case, there had been no intention to take over the staff. But one might question whether the mere fact that the material assets were transferred adds up to a transfer of the undertaking.

It is unfortunate that the Court of Appeal did not examine the question of the transfer of staff in more depth. It is true that the transfer of staff should not depend on any agreement between the Transferor and the Transferee that may be concluded to avoid the application of the rules. However, the judge ought perhaps to have looked at the bigger picture, which involves assessing the relative importance of material assets and human resources and determining which of these means of production was decisive for the business in question.

In our opinion, it is not clear whether material assets are a determining factor for the successful running of a beauty shop. To be a beautician requires technical knowledge and is included in the list of skilled professions in Luxembourg. It is therefore uncertain whether the material assets and/or the premises are more important than the staff for the business of a beauty shop.

In this context, the change of brand could indicate that the clientele were not bound to the brand, as would be the case, for example, with a franchise. This would support the view that personal relations with clients were more important to the business than the location or value of the material assets and consequently that the staff were essential in this particular case. The Court of Appeal unfortunately failed to conduct this kind of market analysis. If it had done so, this could well have led to the conclusion that no transfer had occurred, as the determinant production means - i.e. the staff - had not transferred.

The decision shows the difficulty that national courts have in applying the methodology established by the European Court of Justice for transfer of undertakings. It is perhaps optimistic to expect the employment courts to go through a market analysis of the business in each case. In practice, therefore, the courts limit themselves to what we could call an "*appearance*" of transfer, inspired by analogous cases, instead of looking for legal criteria.

Finally, we need to consider the practical implications of the decision. In this case, the Transferee considered that she had no need to take over the former employees because she wanted to exercise the activity alone and was fully qualified to do so. The precedent set by this case could have a negative effect on the transfer of commercial leases. It is noteable that, on the date of the judgment, the Transferor and the Transferee were both in bankruptcy and represented by their respective liquidators. The failure of both businesses during the proceedings suggests that the Transferee's argument that the Transferor's previous activity had ceased, might have needed more consideration. In the context of the economic downturn, one might argue that applying the transfer of undertaking provisions to small businesses and single-member companies such as in this case is inappropriate.

**Comments from other jurisdictions**

Austria (Daniela Krömer): In general, Austrian Courts can be credited with giving thorough attention to the specifics of the business, the importance of material and immaterial assets and the know-how of personnel, when determining whether or not a transfer has taken place. A good example would be the Supreme Court's judgment on the transfer of a unit in charge of acquiring advertisements for phone books (8 ObA 143/98g), in which the nature of the business and the value of immaterial assets (contact details as know-how) was thoroughly assessed. In that case, specific attention was given to the transferee's intention to take over some of the transferor's employees, as this gave a strong indication that the transferee was interested in taking over the immaterial assets – the contact details – of the undertaking. Had the staff not been partially taken over, no transfer of the undertaking would have taken place. Therefore, it is very likely that Austrian Courts would have assessed the importance of the personnel in a beauty shop in terms of its identity if faced with a similar situation - assuming of course that the lawyers representing the case provide adequate information.

Germany (Paul Schreiner): In Germany a court would probably have ruled the same way as the Luxembourg court did. The reasoning, however, would probably have been different. The German courts tend to differentiate between different types of businesses, taking into account the importance of human resources to the activity in comparison with the material assets.
However, even if a German court found that human resources outweighed the importance of the material assets, this does not mean that the non-take-over of the employees by contract excludes a transfer of undertaking *per se*. The intended transfer of employment is just one of many arguments regarding whether a transfer took place. In the case at hand, I think the decisive criterion might have been the taking over of the client subscriptions. To generate income from the beautician business, one needs specialized human resources on the one hand, but also a connection with clients on the other. The generation of income depends on both aspects and so the contractual transfer of one of these constitutes a transfer of the undertaking.

Slovenia (Petra Smolnikar / Nives Slemenjak): With the transposition of Directive 2001/23/EC into Slovenian legislation, the automatic transfer of employment relationships from transferor to transferee is deemed to occur as a result of a legal transfer of an undertaking or a part thereof taking place. This includes, *inter alia*, any transfer based on a sale and purchase agreement, a lease agreement, an agreement on the transfer of rendering services, etc., including a transfer not based on a (written) contractual relationship. Slovenian courts frequently consider the criteria set in the *Spijkers* case when ascertaining the rights of employees following a (legal) transfer.

As the ECJ's case law aims at giving greater importance to the broader "economic entity" aspect of a transfer (including the importance of transferring staff) as compared to the mere "conduct of the same activity" aspect (where performance of the same or a similar activity suffices for the conclusion of an automatic transfer), we agree with the view that in cases such as the present one, the human resources impact on the economic independence of a business activity should be assessed in relation to the overall transfer that took place.

In Slovenia beauticians need to attain a certain level of technical education to enable them to work or operate a beauty shop, meaning that this kind of business activity cannot survive without adequate personnel propelling it. However, in our view, the mere transfer of staff should very rarely be the decisive factor as to whether a transfer occurs or not, as this might very well subvert the aims of the Directive.

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The staff factor should play an even lesser role where there is a clear transfer of business components, indicating that an economic unit as a whole has been transferred. In this case the relevant factors included: (i) the subscription agreements connecting the existing clients to the beauty shop; (ii) the premises, which must have been known in the neighbourhood as a beauty shop, connecting existing and potentially new clientele to the beauty shop; (iii) the tools, furniture and equipment necessary for the immediate commencement and continuation of the business; (iv) infrastructure related to the premises and the activity; and (v) the brand – despite it being changed afterwards, which is a future business decision of the Transferee.

In addition, the Transferee in this case apparently held the necessary beautician licences and technical knowledge to enable it to operate after the transfer. Thus, the transferred unit was clearly able to operate independently, despite lacking the Transferor's staff. The fact that the staff did not transfer was only because of the terms of the agreement between the Transferor and Transferee, which, we believe, represents a clear violation of employee's rights under the Slovenian Employment Relationship Act.

United Kingdom (Bethan Carney): The Employment Appeal Tribunal in the UK has held that the question of whether there has been a transfer should be split into two parts and the tribunal should first consider whether or not there is an undertaking and, then, whether that undertaking has transferred (*Cheesman and Ors - v - R Brewer Contracts Ltd* 2001 IRLR 144). For there to be an undertaking there must be 'a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective'. There is little doubt that in the present case a UK court would have found that there was an undertaking comprising employees, premises, tools, furniture, equipment, stock, utilities, goodwill and clients. For there to be a transfer, this economic entity must retain its identity in the hands of the transferee. This question is one of fact for the tribunal, which must consider all the circumstances. In *Cheesman*, the EAT reiterated the European law position that 'the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed'. In the UK, as in Luxembourg, the type of business should be considered when trying to determine whether or not the non-transfer of the employees was determinative. However, in practice, UK courts have generally been willing to find that there has been a transfer and in these circumstances, where there is essentially the transfer of a business (premises, stock, utilities, tools and equipment all transferred and the type of activity carried out by transferor and transferee was the same), it is likely that UK courts would also have deemed it to be a transfer of an undertaking. There is no exemption for small businesses in the UK.

**Subject:** Transfer of undertaking
**Parties:** Unknown
**Court:** Luxembourg Court of Appeal
**Date:** 13 June 2013
**Case number:** 38327
**Internet publication:** Not available

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2013/51

# Transfer of employees on re-outsourcing? The employee follows the work... or not? (ARTICLE)

**CONTRIBUTOR** ANITA A. DE JONG*

The business case for outsourcing is determined in part by whether the supplier will take over employees with the work. In second and further generations of outsourcing contracts this can – at least in a number of European countries - cause difficult discussions - over the heads of the employees - between the old and the new supplier. When does the employee follow the work - and particularly when not?

When a party first out-sources some activities there is usually hardly any discussion as to whether this constitutes a Transfer of an Undertaking, or a Part of an Enterprise within the meaning of the Directive on transfer of undertaking ("TUPE"). In a first generation outsourcing the Request for Proposals often explicitly requires the service provider to take over the employees involved and/or it is assumed by all parties that this transfer will qualify as a TUPE. In that case as per the transfer date the workers automatically transfer to the service provider and in principle can claim a continuation of their employment conditions. Some local laws may provide for exceptions, such as an opt out for pension rights in the event the new employer already has its own pension scheme.

In a succeeding generation of outsourcing the client usually no longer requires that the new service provider takes over the personnel from its predecessor. On the contrary, by taking on a new service provider the client often intends to obtain an improvement in quality and/or a reduction of costs by a smarter use of fewer or at least less expensive employees. These objectives could be put at risk if the new service provider were obliged to take over all its predecessor's personnel.

**When is there a Transfer of Undertaking?**

The laws on TUPE are based on the European (Acquired Rights) Directive on transfer of undertakings, which was intended for classic takeovers of assets. The European Court of Justice rules on questions of how provisions from this Directive, which are implemented in the national laws of the EU Member States, are to be interpreted. In 1992 (in the *Watson Rask*[1] case) the European Court of Justice ruled that the Directive on transfer of undertaking can also apply to outsourcing (!). But also in outsourcing situations the European Court of Justice confirmed that the question of whether there is a TUPE must be answered based on the criterion of whether the undertaking has retained its *identity* after a change of entrepreneur[2].

In making this overall assessment, all facts and circumstances of the case play a role, such as the nature of the undertaking, whether tangible and/or intangible assets are transferred, whether a (substantial) part of the personnel are transferred, whether a customer base is transferred, and whether there is a continuation or a resumption of the same or similar activities.

1 ECJ, 12 November 1992, Case C-209/91.
2 ECJ in the Spijkers-case of 18 March 1986, Case 24/85.

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**Labour Intensive Activities**

In 1997, in the *Süzen*[3] case, the European Court of Justice ruled that a re-outsourcing certainly will not always constitute a TUPE. The mere loss of a service contract to a competitor that carries out similar business activities constitutes insufficient evidence for a TUPE. The retention of identity must also be evident from other factors. Furthermore, the European Court of Justice elaborated that the weight of the factors that play a role in the question of whether there is a retention of identity will differ depending on the *nature* of the activities performed, the manner of production, etc.

Within the services sector, where *labour* is the main factor in production, a transfer could especially be qualified as a TUPE if the new service provider not only continues the activities (which alone is not enough), but also takes over a major portion – in terms of their numbers and skills - of the workforce assigned by his predecessor to perform the contract.

In a decision of the European Court of Justice in the *CLECE*[4] case in 2011, it was once more confirmed that precisely for those activities in which labour is the main factor - in this case it was the cleaning industry - there will not be a TUPE if the acquirer merely continues the activity but does not take over the employees who previously carried out the work for the customer from the previous service provider. In this case the party that was re-insourcing had taken on new workers itself and consequently the European Court of Justice found that there was no transfer of a commercial entity that had retained its identity.

**Capital Intensive Activities**

On the other hand, if labour is not the main factor of production - as the European Court of Justice concluded in 2001[5] for bus transport, since this requires a significant deployment of tangible assets - then even taking over the majority of personnel involved was insufficient to conclude that there was a TUPE.

**Mixed Activities**

In 2003, in the *Sodexho*[6] case, the European Court of Justice gave further (more detailed) rules and argued that catering activities that required a great deal of equipment in the kitchen on site, in a particular case, in fact had a *mixed* character, because of their both labour and capital intensiveness. In that case the new service provider had also taken over the on-site kitchen equipment and continued to make use of the customer base on location, so on these grounds and some other less relevant circumstances the European Court ruled that the commercial entity in this case had retained its identity. Consequently, in principle all employees would automatically transfer to the acquirer of the activities, whilst being entitled to their existing terms and conditions.

**ICT Services are Labour Intensive?**

The European Court of Justice has not given any decisions on the outsourcing of ICT services, but in my view - at least in many cases - ICT services will be (more) labour intensive. This means that if after the termination of an outsourcing contract the majority of the employees of a service provider transfer to the new service provider it would easily be deduced from this that the undertaking has retained its identity.

If, however, the new service provider wishes the activities to be carried out (in large part) by its own employees, it would not be concluded as easily for ICT services that such transfer will constitute a TUPE, certainly if the new service provider also has a different procedure and organization of the work and/or the activities will be performed out of a new location. Consequently, in that case it would not easily be assumed that there is a TUPE. In case the transfer cannot be qualified as a TUPE, the employees would not automatically follow the work, let alone be able to demand a continuation of their terms and conditions.

**Can ICT services be of a Mixed Nature?**

In the legal literature and case law the decision of the European Court of Justice in the *Ferrotron*[7] case of 2009 is also mentioned . In this case the European Court ruled that activities may also retain their identity if the functional link between the various elements of production transferred is preserved and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity. However, in such case it will still be necessary to prove other facts and circumstances, such as that the new service provider is taking over employees and/or significant tangible assets from its predecessor, and/or carries out the work from the same location, and/or on the basis of comparable working methods etc.

In a recent interlocutory judgment by a Dutch District Court in 2013[8] two ICT companies – as letting and acquiring supplier of ICT services - fought out a conflict who was the employer of one of the employees concerned. The new service provider had no work for the predecessor's employees, but this employer argued that, also due to a months-long transition phase, the employee had transferred to the new service supplier on the basis of a TUPE. The judge found that ICT services in general have a labour intensive character but that these can also be mixed (both labour and capital intensive) in nature. But in this case, the new service provider had not taken over any essential intangible or tangible assets, such as servers. Furthermore, after the transfer the activities would be carried out at two other locations. Since labour was deemed to be the main factor of the activities and the new supplier wished to deploy its own workers, this part of an undertaking had not maintained its identity after the date of transfer, according to the judge. In the absence of any TUPE the employees did not transfer and continued to be employees of the supplier who had lost the work.

**Conclusion**

In brief, specialized legal knowledge of European and local laws, as well as specific European and local case law is required to answer the question whether in a particular case there is a TUPE in case of outsourcing of services, or not, because certainly not all transfers can be qualified as a TUPE. Every argument counts!

In case the employees do not transfer, which will happen more often in case of 2nd and further generation outsourcing, this does not necessarily mean that those employees are not protected. A transfer may not be advantageous to the employee if for instance the new service provider does not have any work for the employee or has fewer financial resources to pay severance payment etc.

The employer that loses a contract (contrary to classic takeovers) will usually continue to have some remaining activities as a part of

3 ECJ, 11 March 1997, Case C-13/95.
4 ECJ, 20 January 2011, Case C-463/09.
5 ECJ, 25 January 2001, Case C-172/99.
6 ECJ, 20 November 2003, Case C-340/01.
7 ECJ, 12 February 2009, Case C-466/07.
8 Judgment of the Court of Justice of Utrecht in summary proceedings, JAR 2013/84.

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its undertaking, within which there may be other appropriate jobs available. That employer may also be able to acquire new work which would safeguard jobs for the employees. If not, employees will usually be able to claim reasonable compensation on termination of their employment.

It follows that the old supplier can certainly be faced with considerable costs from this. Especially now that 2nd and further outsourcing contracts may not constitute a TUPE, suppliers are therefore advised to provide for financial exit provisions in their outsourcing contracts.

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2013/52

# Dismissal discriminatory even if HR department was unaware of real reason for dismissal (AT)

**CONTRIBUTOR** ANDREAS TINHOFER*

**Summary**
An Austrian woman with a Polish background was dismissed following taunts about her ethnicity, even though the HR department was given a different reason to dismiss her (sickness absence) and said it would not have dismissed her had it known the real reason. The Court found against the employer, demonstrating that it was responsible for the employee's discrimination by her manager despite the manager having deceived the employer into dismissing the employee.

**Facts**
In 2009, the plaintiff, who was an Austrian woman with Polish roots, started to work for the defendant restaurant as a cook's assistant. During her employment she and other work colleagues had to tolerate a number of unreasonable practices by the production manager, her direct supervisor. She was subject to unfair work allocation, high work pressure and degrading and insulting comments, which referred to her Polish roots. As a result of this treatment the plaintiff suffered psychological stress and this was one of several factors that led to her taking extended sick leave.

The plaintiff and several other employees complained about the behaviour of the production manager in a meeting with the production manager's superior (the kitchen manager). The plaintiff stated in particular that she had been insulted and badly treated because of her Polish origins. As a result, the production manager was transferred to another position for a period of three months.

A few weeks before the production manager was supposed to return to his old workplace, the plaintiff was given notice of termination by the defendant at the request of the kitchen manager. The reason the kitchen manager had given to the human resources department for his request was the plaintiff's long and frequent sickness absence. However, in reality it seems the kitchen manager believed that no further co-operation between the plaintiff and the production manager was possible because of the plaintiff's complaint. It was later established that if the human resources department had been informed about the real reason for the kitchen manager's request, the employer would not have terminated the contract.
The plaintiff then sued the defendant for workplace discrimination.

The court of first instance and the Court of Appeal (*Oberlandesgericht Wien*) both found in favour of the employee. They declared the termination ineffective because it was based on discrimination on grounds of ethnicity. The defendant appealed against the decision.

**Judgment**
The Civil Servant Act 1995 (*Vertragsbedienstetenordnung1995, the 'VBO'*), a local act applying to civil servants in Vienna, as a Federal State of Austria, which implements Directives 2000/43/EC and 2000/78/EC, applied. Section 4a of the VBO provides that a person must not be discriminated against, either directly or indirectly based on a protected characteristic, such as ethnic origin. Harassment and victimisation are considered to be forms of discrimination. Harassment occurs where there is negative behaviour in relation to a person's ethnic origin that qualifies as offensive or inappropriate and creates a hostile, degrading or humiliating environment for the person. Victimisation includes cases where an employee has made a disclosure relating to equal treatment and is dismissed as a result.

The Supreme Court (*Oberster Gerichtshof*) upheld the Court of Appeal's decision. The judge pointed out that a broad view must be taken when considering whether harassment is related to a protected characteristic (e.g. ethnic origin) and so the harassment did not need to be based exclusively on the actual ethnic origin of the employee.

The Supreme Court had the opportunity to examine the notion of 'ethnic origin' as it is used in Directive 2000/43, s4a of the VBO and s17 of the Equal Treatment Act. The Court first noted that the Directive speaks of "racial or ethnic origin", whereas the Equal Treatment Act only refers to "ethic origin". The Court's interpretation was that people may be discriminated against because they are considered to be 'aliens' and not members of a given social group. Therefore, in assessing ethnic origin, a person's cultural background can be taken into account. In this case, the plaintiff could be seen to have immigrant roots, which falls within the ambit of the law.

The Court also affirmed that the plaintiff's employment was terminated for discriminatory reasons. As the true reason for the dismissal was the employee's complaint about her superior, she had been victimised in violation of equal treatment law. The fact that the human resources department would not have terminated the contract if they had known the real circumstances was held to be irrelevant, as the employer had to accept responsibility for the actions of its managers. The Court therefore found that the reason for termination of the employment was unlawful victimisation.

**Commentary**
The case demonstrates that employers are liable for the discriminatory practices of their managers even if their managers deceive them. In this case, the Court established that the employee would not have been dismissed if the human resources department had known the true motivation for the kitchen manager's request. It is unclear from the facts of the case, however, why it was that the human resources department was unaware of the employee's complaint about harassment by her superior. Further, it seems to me that even the employee's sick leave could not constitute a non-discriminatory reason for the termination of employment - as this was caused, at least in part, by harassment on ethnic grounds.

Nevertheless, the reality for the employee was that she was dismissed as a result of her complaint about discriminatory harassment by her superior and was a subject of victimisation.

The case shows very clearly that the concept of 'ethnic origin' applies to anyone with a migration background, irrespective of their skin colour or country of origin. According to the legislative materials relating to the Equal Treatment Act, the crucial question is whether a person is *considered* to belong to a different social group by reason of a factor that cannot be easily changed. Possible factors include skin colour, but others might be language, religion, culture and customs. In this way the Court took a 'constructivist' approach in coming to its view.

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**Comments from other jurisdictions**
Germany (Dagmar Hellenkemper): It is very likely that a German court would have applied the same reasoning given that it demonstrated the relevant principles in a recent decision (see *Schreiner/Hellenkemper*, Incorrect information by employer may indicate discrimination, EELC 2012-4, p. 6 ff). In this decision, the court had ruled that it was clear that the employee might have been treated differently because of her ethnic origin (Turkish), at least the employer had failed to establish that the different treatment was for other reasons. Although other employees in the above-cited OGH-case had also complained about the kitchen manager's behaviour, the plaintiff in this case could establish that discrimination on grounds of ethnic origin had led to her contract being terminated, as she had suffered insulting comments referring to her Polish origin. A German Court therefore would have reasoned that her ethnic origin would have been at least part of the 'bundle of motives' (*Motivbündel*) that led to her termination.

**Subject:** Ethnic discrimination
**Parties:** L K (worker) – v – S (employer)
**Court:** *Oberster Gerichtshof* (Austrian Supreme Court)
**Date:** 24 July 2013
**Case number:** 9 ObA 40/13t
**Hard Copy publication:** ARD 6353/5/2013
**Internet publication:** http://www.ris.bka.gv.at/Jus/

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2013/53

# Dismissal after making multiple complaints of discrimination was victimisation (UK)

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**Summary**
The Employment Appeal Tribunal (EAT) has held that an employee who brought a series of grievances and employment tribunal claims against his employer over a five-year period was victimised under the Equality Act 2010 (EqA) when he was subsequently dismissed. The tribunal had wrongly decided that the employer's reasons for dismissing him – primarily the breakdown in the employment relationship – were 'genuinely separable' from the protected acts of raising complaints.

**Background**
Under the EqA, an employer who dismisses an employee or otherwise subjects them to a detriment because of a 'protected act' commits unlawful victimisation. Under s27(1) EqA, protected acts include alleging or bringing proceedings for discrimination. However:

*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. (s27(3))*

There must be a genuine belief in the truthfulness of the allegation. This is a marked simplification from the previously applicable Race Relations Act 1976 ('RRA'), which required tribunals to establish 'less favourable treatment' or 'a comparator' in finding victimisation.

In the 2010 case of Martin v Devonshires Solicitors the EAT held that a mentally ill employee who had in good faith brought multiple false grievances based on supposed discrimination, and who had been dismissed as a result, had not been victimised. The EAT found that the reasons for the employee's dismissal (including her failure to accept that her grievances were false, and the time and resources taken up in dealing with them) were "sufficiently separable" from the protected acts themselves so as to amount to grounds for a fair termination.

**Facts**
Over a period of five years from 2005, Mr Woodhouse, a black project manager at West North West Homes Leeds (WNW Homes), submitted ten internal grievances and nine employment tribunal claims alleging racial harassment and discrimination by his employer. These included alleged racist comments, complaints about sick pay, the refusal of a phased return to work following sickness, the allocation of staff and duties and the treatment and management of his grievances. After proper investigation into each grievance, almost all of those complaints were found to be "empty allegations without any proper evidential basis or grounds for his suspicion".

Perhaps unsurprisingly, after five years of this conduct, WNW Homes decided that mutual trust and confidence had broken down so "irretrievably" that it was no longer feasible for Mr Woodhouse to continue in his employment with them. In 2011, WNW Homes decided to dismiss Mr Woodhouse, citing his loss of trust and confidence in the company as the prime cause. Mr Woodhouse then brought employment tribunal proceedings for race discrimination, harassment and victimisation.

The tribunal accepted that Mr Woodhouse had made his allegations and had brought his claims in good faith, but it rejected his claim, finding that:
- there was a pattern of grievances that had been objectively demonstrated to be false;
- this pattern enabled the Employment Tribunal to say that this was not a case of victimisation;
- the Appellant had become obsessed;
- the rejection of one complaint would be bound to lead to another in the future;
- the Respondent was no longer prepared to run the risk of further damaging and time-consuming allegations.

Following the 'comparator' requirements of the superseded RRA, the tribunal found that WNW Homes would have treated a comparable employee who demonstrated "a long-standing lack of faith by submitting ill-founded grievances but without any racial connotation" in exactly the same manner – by way of dismissal. It was decided that Mr Woodhouse was dismissed not because of the series of protected acts he had made in the form of repeated grievances and tribunal claims, but for "*some other substantial reason*".
Mr Woodhouse appealed this decision to the EAT.

**Judgment**
The EAT found that the tribunal had incorrectly approached the legal test for victimisation. Unlike the RRA, s27(1) of the EqA does not require

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a comparative approach to determine if victimisation has occurred. The proper test is causative and the tribunal should have considered whether or not Mr Woodhouse's dismissal was due to the fact that he had made complaints and brought claims of race discrimination. The tribunal was wrong to find that there was no act of victimisation because the company would have treated any other person who had raised different complaints in the same way.

The EAT also found that the Tribunal had erroneously treated the instant case as being analogous with Martin - v - Devonshires Solicitors. That case was exceptional because the grievances raised by the individual were almost certainly based on her own paranoid delusions about events which had never occurred; very few cases would involve this type of behaviour. A key finding in Martin v Devonshires Solicitors had been that the employer's reasons for dismissal were "genuinely separable" from the individual's protected acts themselves. In contrast, the protected acts made by Mr Woodhouse were inseparable from WNW Homes' reasons for termination of his employment.
The EAT found that cases such as this, in which grievances multiply and lead to tribunal claims, are not uncommon. Martin - v - Devonshires should not be used as a 'template' into which cases of victimisation should be fitted. His Honour Judge Hand QC said obiter: "It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a matter of routine, to the case being placed outside the scope of section 27 of the EqA."
The EAT upheld the appeal and substituted a finding of victimisation.

**Commentary**
The EAT's decision rests largely upon the proper reading of the EqA. Unlike the old law on race relations, no comparator is required under s.27 EqA and so victimisation on the part of WNW Homes was made out upon a direct construction of that section.

Whilst sound, however, the decision does provoke some sympathy for WNW Homes. The pattern of an individual raising repeated complaints and their escalation to tribunal claims may be very familiar to employers. There is always concern about the cost and time involvement in dealing with complaints of this nature and it is easy to see how WNW Homes would have wished to end the prolonged sequence of "grievances about grievances" in this case.

The EAT's judgment does not provide practical guidance for employers on best practice in dealing with difficult employees. However, it does make clear that, in the absence of bad faith, an employer cannot simply dismiss an individual purely because of his or her misguided grievances and claims. Employers faced with a sequence of behaviour such as this must therefore carefully consider how to manage the situation fairly and effectively. Although retaining the employee and investigating each new complaint in the series might impact negatively on the business and other employees, dismissing this individual for raising complaints is almost certain to be unlawful. Where performance management or disciplinary procedures are found to be inappropriate, workplace mediation might be the least taxing way of resolving such issues. Alternatively, employers might seek a "clean break" through a settlement agreement (formerly called compromise agreement) under which the employee waives claims in return for compensation. Settlement agreements must fulfil certain statutory criteria, the most significant of which is that the individual must get independent legal advice on the agreement. However, the amount of the settlement sum would need to be negotiated with the employee and it may prove impossible to reach an agreement.

**Comments from other jurisdictions**
Austria (Martin Risak): Under Austrian law it is unlawful to dismiss an employee who has raised a "not obviously-unjustified claim", a concept that is not limited to equality law but to all employee rights. Thus, the test is causative (*sine qua non*) – if the dismissal was based on the fact that the worker made complaints then it is only lawful if there would be no doubt in most people's minds that the complaints were entirely baseless.

**Subject:** Race discrimination; victimisation
**Parties:** Woodhouse – v – West North West Homes Leeds Ltd.
**Court:** Employment Appeal Tribunal
**Date:** 25 October 2012
**Case Number:** [2013] IRLR 773; UKEAT/0007/12
**Internet publication:** http://www.bailii.org/uk/cases/UKEAT/2013/0007_12_0506.html

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2013/54

# BAG accepts levelling-down in age discrimination case (GE)

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**Summary**
Provisions in a collective agreement that grant employees of different ages different terms of service are discriminatory and violate section 7 of the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* (AGG), the German transposition of Directive 2000/78/EC) and are therefore invalid and void. In consequence, younger employees are not entitled to equal beneficial entitlements and the provision is disapplied in respect of the initial beneficiaries.

**Facts**
The plaintiff was born in 1969. He had been employed since 1995 as a flight attendant with the defendant airline company. Since 1995, he formed part of the 'IK' group. The IK group comprised the personnel serving only on long-distance, intercontinental flights, which are apparently preferred by flight attendants. Due to a change in the organisation, the IK group was dissolved in 2009. From that time on, all flight attendants were required to serve both on long-distance and on short-distance flights. Accompanying this change, the defendant and the works council concluded a social plan that included the following provision (the 'Contested Provision'):

*"Older employees with considerable seniority are entitled to an 'additional request continental'[1]. They will be allowed to limit their service on short-distance flights to five days per period of three months. This provision applies to all employees who have reached the age of 43 on 31 December 2009 and have been in the service of the company for over 15 years."*

1 An 'additional request continental' was a request to be deployed on a specific short-distance flight, to be chosen by the flight attendant.

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The plaintiff satisfied the 15-year service requirement but not the age requirement, being aged 40 on 31 December 2009. He argued that the Contested Provision discriminated against younger employees. He demanded to be accorded the same beneficial treatment as his older colleagues with 15 years of service who benefited from the Contested Provision (the 'privileged group'). The airline company argued that it would not be possible to organise its flight schedules if the Contested Provision was applied to all employees. It admitted the unequal treatment, but claimed that the Contested Provision was justified by section 10 AGG[2]. This section provides that a difference in treatment on grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and the means to achieve that aim are appropriate and necessary. The airline company based its justification defence on the argument that older flight attendants who are not accustomed to frequent short-distance flights have more difficulty than others in adjusting to an increased frequency of take-offs and landings.

The Labour Court and, on appeal, the Regional Labour Court ('LAG') in Frankfurt both rejected the plaintiff's claim. The plaintiff then appealed to the Federal Labour Court ('BAG').

**Judgment**

The BAG held that the provision in the social plan was void, because it violated the AGG, and that the provision could therefore not be applied. In its opinion, the Contested Provision did not only discriminate indirectly between the employees of different age groups, but actually constituted direct discrimination within the meaning of section 3(1) AGG[3]. This section provides that direct discrimination occurs 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 in section 1 AGG (here: age). Since the AGG also applies to provisions in a collective agreement such as a social plan, the unequal treatment of employees on the basis of age needs to be justified in order to be valid.

The court held that the Contested Provision was likely to help older employees in the IK group to adjust to the disadvantages of an increased number of take-offs and landings. This, however, was not a sufficient justification for the unequal treatment, for two reasons. The first was that the Contested Provision did not differentiate between employees who had always served in the IK group and other employees who had only recently transferred to this group and would therefore not need a long time to readjust to short-distance flights. For example, a 42-year old flight attendant who had been in the IK-group during his entire career of 15 or more years, and who would therefore need a long time to adjust to frequent take-offs and landings, was treated less favourably than a 43-year old colleague, also with 15 years of service, who had spent 14 of those years on short-distance flights and had only recently transferred to the IK group, and who would therefore need less time to adjust to more frequent take-offs and landings. In the second place, the defendant had not argued that older flight attendants who were not accustomed to frequent short-distance flights were unable to adjust; it had merely argued that older employees needed a longer adjustment period. Thus, the beneficial treatment would have been required only temporarily to help with the adjustment. There is no evidence that older employees would not be able to adjust to the new schedule permanently. Hence, the BAG held that the provision's aim was legitimate, but it found that the measure adopted was not necessarily suitable to achieving that aim.

According to the BAG, the unequal treatment could be equalized, if the older employees did simply not receive any beneficial treatment.

Contrary to its previous decisions where favourable holiday entitlements or pay for older employees could not be equalized for the past, the BAG opted for a levelling-down, reasoning that levelling-up would make flight scheduling impossible for the defendant. The fact that this outcome did nothing to undo the benefit that the advantaged group had wrongly enjoyed in the preceding years, was insufficient to lead to a different result, given that this benefit was not of a monetary nature.

Thus, the plaintiff was right that he had been discriminated against, but his demand to fly no more than five short-distance flights per quarter was turned down and he lost the case in three instances.

**Commentary**

Whereas in previous decisions concerning payment and holiday entitlements (see *Schreiner/Hellenkemper*: Extra paid leave for older employees discriminatory; levelling-up, EELC 2012-3 Nr. 37) the BAG had decided in favour of a levelling-up solution, the above decision makes it clear that levelling-up is not the only legal solution when

2 AGG section 10: Permissible Difference of Treatment On Grounds of Age
Notwithstanding section 8, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include, among others:
1. the setting of special conditions for access to employment and vocational training, as well as particular employment and working conditions, including remuneration and dismissal conditions, to ensure the vocational integration of young people, older workers and persons with caring responsibilities and to ensure their protection;
2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
3. the fixing of a maximum age for recruitment which is based on specific training requirements of the post in question or the need for a reasonable period of employment before retirement;
4. the fixing of upper age limits in company social security systems as a precondition for membership of or the drawing of an old-age pension or for invalidity benefits, including fixing different age limits within the context of these systems for certain employees or categories of employees and the use of criteria regarding age within the context of these systems for the purposes of actuarial calculations;
5. agreements providing for the termination of the employment relationship without dismissal at a point in time when the employee may apply for payment of an old-age pension; section 41 Social Code, Book VI shall remain unaffected;
6. differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognizably been taken into consideration by means of emphasizing age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit.

3 AGG Section 3 Definitions
(1) 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. [...].

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addressing the consequences of discrimination in Germany.
Unfortunately, the BAG was not entirely clear when levelling-up is appropriate and when levelling-down is the correct solution. In the decision reported above, the BAG seems to allow this to depend on whether or not in the past the privileged group received material benefits that could or could not be claimed back. In such cases, levelling-up is the only possible solution to treat both groups equally. In situations in which there is no material disadvantage, it is not possible to correct the disadvantage retroactively, therefore there is no need for a levelling-up solution.

However, the BAG seems to have some doubts as to whether it really is so simple. Without any apparent reason, it discussed in its reasoning the possibility for the defendant to maintain its flight schedule. From our perspective the question of whether or not the flight schedule was operable was not relevant. This seems to address the feasibility of the levelling-up - which can only be relevant if levelling-up is necessary to reverse the effect of the unequal treatment. Maybe the BAG wanted to indicate that levelling-up has limitations if its consequences seem inappropriate.

**Comments from other jurisdictions**

The Netherlands (Peter Vas Nunes): What was the Contested Provision's aim? Clearly, it was to protect a category of flight attendants against the detrimental impact of a sudden change from relatively relaxed long-distance work to more strenuous short-distance work. Apparently it takes time to adjust to such a change, but the case does not make clear to me what makes adjustment hard: is it age (the older one becomes the longer it takes to adjust) or is it the duration of the pre-change situation (the longer one has worked mainly on intercontinental flights the harder it becomes to adjust to short-haul work)? Or perhaps a mix?

The issue of levelling-up versus levelling-down is complex. In The Netherlands this has come up in (at least) two types of cases (see EELC 2010/66): extra paid leave for older employees (direct age discrimination) or on the basis of length of service (indirect age discrimination) and, in particular, social plans that offer older employees different benefits than younger employees (for older employees, e.g. topping-up of employment benefits until retirement and for younger ones lump-sum severance compensation). For a comparable Polish case, see EELC 2009/29.

In principle, one would think that the solution is black or white: either the privileged group loses their undeserved advantage or the disadvantaged group gains a windfall. The former solution hurts, the latter solution can be expensive. However, in *Hennigs* (C-297/10), the ECJ allowed a gradual levelling-down, which softened the impact of levelling-down.

**Subject:** Age discrimination
**Parties:** Unknown
**Court:** *Bundesarbeitsgericht* (Federal Labour Court)
**Date:** 20 March 2012
**Case number:** 1 AZR 44/12
**Hardcopy publication:** NZA 2013, 1160
**Internet-publication:** www.bundesarbeitsgericht.de → Entscheidungen → type case number in "Aktenzeichen"

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2013/55

# "Uncertain funding" can make work "special", thus justifying the renewal of fixed term contracts (CZ)

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**Summary**
If there are serious operational reasons for the employer or reasons related to the special nature of the work to be performed by the employee, the rules restricting the conclusion or renewal of fixed term contracts need not be applied. The reasons for invoking the 'special nature of the work' do not have to be based directly on the work itself, but may also be based on external factors that determine conditions under which the employment contract is concluded and the work is performed. These can include how the work is funded.

**Facts**
The employer in this case was a research institute and the employee was a scientist. The research was funded by grants made for a fixed period. The employer concluded an agreement with trade unions by which 'uncertain funding' for research was accepted as a valid reason for qualifying the work performed by the employer's scientists as "work of a special nature" within the meaning of Czech law. On this basis the employer concluded roughly eight separate fixed term contracts with the employee between 2000 and 2008.

By Czech law, the restrictions on concluding and renewing fixed term employment relationships do not apply in cases where an employee performs work of a special nature and the employer has concluded an agreement with trade unions in which the special nature of the work is specified for these purposes. In the case of employers where no trade unions operate, the agreement may be substituted by an internal regulation issued by the employer.

In 2008, when the employee's eighth employment contract was not renewed, the employee notified the employer that in his view fixed term employment had not been lawful in his case and his contract should have been for an indefinite term. The employer maintained that the employment relationship had terminated as agreed and therefore the employee's union O.P.O.R.A. brought a claim in court. The employee claimed that the fact that the work is funded by grants does not mean that the work performed by the employee could be considered as work of a special nature.

The court of first instance and the appeal court both decided in favour of the employee. The appeal court's view was that if employers could consider uncertain funding as meaning that the work was of a special nature, this would exceed the scope of the statutory rules enabling employers to specify work of a special nature. The court held that the funding of work is an organisational issue and does not concern the nature of the work.

**Judgment**
The Supreme Court ruled that the relevant legal regulation does not specify any conditions as to how the 'special nature of the work that is to be performed by the employee' should be defined in the agreement concluded between an employer and trade unions. (Note that the agreement between the employer and trade unions must be considered as a source of law, in a wider sense.)

Therefore, the Court reasoned, the agreement may include not only reasons relating to the nature of the work of one particular employee but also the nature of work of many other employees. Further, the reasons may, according to the Supreme Court, be based not only directly on particular work performed by employees but may also be based on the wider conditions which affect the conclusion of employment contracts and work performance within the organisation. The Supreme Court felt that the funding of the work was important in this wider context.

For the above reasons, the Supreme Court annulled the decisions of the lower courts and returned the whole case to the court of first instance for fresh proceedings.

**Commentary**
The decision concerns the definition of the 'special nature of the work that is to be performed by the employee'. According to the Supreme Court, the definition can be drawn quite widely and include, for example, the funding of employer activities. This means that there will be many cases where employers may get around the statutory limitation on fixed term employment.

Where there are trade unions operating at the employer, the employer must agree on what is meant by the 'special nature of the work'. This represents a natural restriction on employers, as trade unions are unlikely to agree to define this very extensively. However, where there is no trade union operating at the employer, the employer is entitled to define what is meant by the 'special nature of the work' in its internal regulations. Such an employer would only be limited by what the Supreme Court calls the wider conditions affecting the conclusion of employment contracts and work performance within the organisation. Without further judicial guidance, this could potentially include almost anything.

Directive 99/70 brought into effect the framework agreement on fixed term work. The framework agreement states that in order to prevent abuse arising from the use of successive fixed term employment contracts or relationships, member states must introduce one or more of the following: (i) objective reasons justifying the renewal of fixed term employment; (ii) the maximum total duration of successive fixed term employment; and (iii) the number of permitted renewals.

In my view, the legal regulation in the Czech Republic does not entirely meet these requirements, because it enables there to be an unending succession of fixed term employment contracts under certain circumstances, contrary to (ii) and (iii) above. Nevertheless, the Czech regulation is not irrational and for some types of work (e.g. seasonal work) it can be useful. However, I believe the Supreme Court should have ensured that usage of the rules was strictly limited and should not have interpreted them as widely as it did in this case. It is also unfortunate that the Supreme Court did not consider EU law in making this ruling.

Despite the ruling, my view is that employers should act cautiously in defining the 'special nature of the work'. It seems to me that the courts are likely to make adjustments over time, and so meanwhile, employers must take care to avoid any abuse.

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**Comments from other jurisdictions**

Austria (Andreas Tinhofer): Even before Directive 99/70 was enacted, the renewal of a fixed term employment contract was lawful in Austria only in very limited situations. Although there is no explicit statutory rule for that purpose, the courts require employers to demonstrate a legitimate reason for such a renewal. On the basis of this longstanding case law it is generally assumed that no specific statutory measures are needed in order to implement the Directive.

The courts take a rather strict approach as to what can be a legitimate reason. The standards being applied are getting stricter the more often an employment contract is renewed. Uncertainty about the economic future of a company and about the need for personnel is part of normal business risk and can therefore not be a reason for the renewal of a fixed term contract. It is safe to say that it is generally very hard for employers to justify the renewal of a fixed term employment contract.

Seasonal businesses that are closed for a longer period of time (e.g. a hotel in a summer resort) are generally exempted from the prohibition against renewing fixed term employment contracts. In one case, the Supreme Court held that musicians of an orchestra going on tour with a circus could be employed on the basis of such repetitive 'chain-contracts' (*Kettenarbeitsverträgen*). The same was decided regarding professional soccer players, the rationale being that chain contracts are standard in this area, allowing employers and employees to remain flexible and able to adapt to "the requirements of the competition". However, it was not accepted that a theatre would not employ ushers during the summer break of two months (in July and August), offering the employment contracts only from September to June each year.

As can be seen from the above examples, it can be hard to predict the outcome of a court case when the business is interrupted. The Czech case reported above may well have been decided in the same way in Austria. Some scholars do argue that if employment is dependent on funding by a third party, the renewal of a fixed term employment contract could be justified.

Germany (Elisabeth Höller): In Germany every limitation of employment must comply with the regulations of the Act on Part-time Work and Fixed-term Employment Contracts ('Teilzeit- und Befristungsgesetz', or 'TzBfG').

According to s14 TzBfG a limitation on an employment contract is valid if justified by an objective reason. Section 14 TzBfG gives special examples where such justification is possible. In relation to the Czech case, the following examples could be considered:

- there is an objective reason if the operational demand for the job to be performed is only temporary (s14,(1) (1) TzBfG);
- the special nature of the work justifies the limitation of the employment contract (s14,(1) (4) TzBfG); and
- the remuneration of the employee is based on a public budget (s14, paragraph 1 no 7 TzBfG).

As long as an objective reason is given, there is no temporal limitation on fixed-term contracts.

In terms of the Czech case, the limitations on the employment contracts could be justified by s14(1) (1) TzBfG if the employer predicts at the time the fixed term employment contract is concluded that there will not be an operational need for the job after the end of the fixed term. In Germany, the objective reason of 'special nature of work' (s14(1) (4) TzBfG) is mainly used by companies such as public broadcasting institutions, universities and public research centres. The special nature of work may also justify a limitation to the employment if it is reasonable to expect the employee will show signs of wear and tear after a time and the nature of the work means that the employee is only required when he or she is on best form, for example, elite sports coaches. However, s14(1) (7) TzBfG only refers to public employers, such as the federal government, states or local authorities and other legal persons governed by public law.

In the scientific sector, particularly universities and other public academy institutions, the special conditions of the Act on Temporary Science Employment Law ('Wissenschaftszeitvertragsgesetz', the 'WissZeitVG') apply. According to s2(1) WissZeitVG, limitations on employment contracts with employees without a doctorate are valid for six years and for those with a doctorate for a further six years. By s2(2) WissZeitVG, a limitation is even valid if the employment is predominantly funded by third parties; the funding is granted for a specific project and time period; and the employee is employed in accordance with the purposes of the funding.

Hungary (Gabriella Ormai**): Under Hungarian law, the parties may only extend a fixed term contract or only conclude a new fixed term employment within six months of the expiry of the previous fixed term if there is 'legally valid interest' on the employer's side.

Since the wording of the statute is vague, it falls to the courts to interpret it. Based on court practice the employer needs to prove, for example, that there was a business or service-related circumstance that provided an occasional or cyclic demand for the employment and was directly connected to the job. In a specific case, the court argued that the general business requirement to operate at the lowest cost possible is too inspecific and is likely to apply to the whole business of the employer. Therefore, it cannot serve as legally justified interest on the employer's side such as to enable it to extend a specific fixed term contract.

Court practice has also highlighted that the employer's legally valid interest needs to be objective and independent of the parties. In consequence, in one case the local Labour Court rejected the employer's argument, finding that a position involving strong physical work cannot justify the conclusion of fixed term employments repeatedly just because the employer would not be able to periodically assess the employee's fitness. The court highlighted that the employer is able to assess the employee's physical abilities at the very beginning. In the given case after permanent employment, the parties had repeatedly (four times) concluded fixed term employment contracts.

Normally, the courts accept an extension if the reason of the extension is the same as the conclusion of the initial fixed term contract, i.e. if an employee is contracted to temporarily fill a post as maternity cover and the term has to be extended since the employee has decided to stay longer at home, this can be a valid reason to extend the contract.

Based on the above, in Hungary although the law fulfils the requirements of Directive 99/70, due to its vague wording and some still-uncertain court practice, it is difficult to judge which circumstances may serve as legally valid interests, particularly in the changing economic environment. Therefore, a more flexible approach, similar to the Czech example above, would be welcome.

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The Netherlands (Peter Vas Nunes): The issue of whether and to what extent fixed term contracts should be allowed is a highly political one. The basic principle is that employment contracts should be permanent, i.e. for an indefinite period. However, Dutch dismissal law is so protective of permanent employees that employers, ever since the 1950s, have sought ways to hire staff without the risk of not being able to dismiss them should the need arise. One method is to hire staff for a fixed term. Until 1999, this was only allowed once unless a collective agreement concluded with one or more unions allowed for more than one consecutive fixed term. For example, an employee could be hired for one year and at the end of that year the employer would have to choose between letting the employee go and offering him or her a permanent contract (or waiting at least one month and then offering another fixed-term contract). In 1999 the law was relaxed slightly. Employers may now hire staff for three fixed-term contracts in a row, (the 'chain' may have a maximum of three 'links', as the saying goes), provided the total duration of the three contracts does not exceed three years (again, unless a collective agreement allows for more than three consecutive contracts and/or a total duration exceeding three years). Since 1999, the percentage of employees on a fixed-term contract has increased. What is more, employees on insecure temporary contracts are disproportionately young, female, poorly educated and/or ethnic minorities, many of whom may never in their lifetime manage to secure a 'real' job allowing them, for example, to obtain a mortgage. In brief, there is an 'insider/outsider' issue: the insiders with permanent jobs and hence strong dismissal protection live in a different legal world from the outsiders, who move from one temporary low-paid job to another. At this moment a Bill is pending in Parliament that aims to reform the system. One of the proposals is to limit the number of consecutive fixed-term contracts to three with a maximum overall duration of two years, with a new series of fixed-term contracts not being allowed until after a period of at least six months during which the employee performs no work for the employer. It is hoped that this will encourage employers to offer permanent employment after two years, but many commentators fear that employees will now lose their job after two instead of three years.

Poland (Marek Wandzel): Out of three possible tools to combat abuse arising from the use of successive fixed-term contracts under the Directive 99/70 (objective reasons for renewal; maximum total duration; and the number of permitted renewals), Poland has used the last two, but on different occasions. As a general rule, a second renewal automatically leads to the conclusion of a contract for an indefinite period unless the break between the contracts exceeds one month. (In 2009, Poland temporarily modified this rule and allowed (but only until the end of 2012) for an unlimited number of renewals, provided that the duration of the fixed term contracts did not exceed 24 months in total. This provision - aimed at combatting the economic crisis - is not in force anymore.)

The result of the application of the general rule that a second renewal will automatically lead to a contract for an indefinite term, is that employers tend to conclude fixed term contracts for several (often five or even ten) years each, with the option to terminate upon only two weeks' notice and without need to give reasons for termination - whereas the termination of an indefinite contract needs to be with reasons and generally three months' notice needs to be observed. However, the courts accept such long fixed term contracts only if there are reasons to conclude them (e.g. the employer invested in a special economic zone or there is an infrastructural or medical project financed for a fixed period only). Normally such contracts should be indefinite ones.

Slovakia (Beáta Kartíková): Compared to the Czech Labour Code, the Slovak legislator gave more detail when implementing the provisions of Council Directive 1999/70/EC concerning exemptions from measures to prevent the abuse of successive fixed employment contracts. The Slovak Labour Code stipulates that further extension or re-agreement of employment for a definite period less than or in excess of two years is permitted only on specific statutory grounds, being: (i) the substitution of an employee during maternity or parental leave, temporary sickness, or during the discharge of a public or trade union function: (ii) the execution of work that requires a material increase in the workforce for a maximum of eight months in one calendar year; (iii) the execution of seasonal work for a maximum of eight months within a calendar year; and (iv) other execution of work, as agreed in a collective agreement.

University teachers and scientists are regulated separately. Under the relevant provisions of the Slovak Labour Code, the further extension of employment for a definite period within two years or in excess of two years of a university teacher or creative employee engaged in science, research and development is possible also in cases for which there is an objective reason resulting from the nature of the work.

Whereas in Czech law the term 'special nature of the work' is not further defined, the Slovak Labour Code states that any "objective reason arising from the nature of work" will be "set out in special regulations". This implies that according to Slovak law there is no place for interpretation and that the objective reasons for the renewal of fixed term contracts will be provided for regulations for that purposes – as they are in relation to universities.

Slovenia (Petra Smolnikar): In Slovenia, the two permitted reasons for concluding fixed-term employment contracts that are most similar to the Czech 'special nature of work' reason are 'temporary increased volume of work' and 'project work'. Contrary to Czech law, employers and unions cannot influence the existence of either of these reasons by entering into a case-by-case agreement that effectively circumvents the restrictions on concluding and renewing fixed-term contracts. Under Slovenian law there is a two-year restriction on concluding or renewing fixed-term contracts for the same work. This maximum period may be exceeded in cases of project work where a collective bargaining agreement applying to a whole branch of industry or commerce sets out the scope and (branch-related) nature of the project that does not fall within the statutory limitation of two years.

Contrary to the Czech decision, by Slovenian case law, the fact that business operations are unclear or uncertain because they are, dependent on orders being placed by business partners, cannot be a substantiated reason for the conclusion or renewal of fixed term contracts. This is because the law does not permit employers to conclude fixed term contracts solely because the volume of work may reduce in future. Further, according to leading labour law experts, the external financing or the manner of funding of a particular activity, in particular where it is temporary, or seasonal, is not a sufficient reason to deny employees their right to full time employment. The temporary nature of the work or a temporary increase in volume should be sufficiently predictable at the time the fixed term contract is concluded or renewed that the employer should be fairly certain when the end of the temporary work increase will be (*Katarina Kresal Šoltes: ZDR s komentarjem, GV Založba, Ljubljana 2008, page 240*).

Therefore, generally, the Slovenian courts are more likely to hold that where there is uncertainty about on-going funding, the conclusion

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or renewal of fixed-term contracts for the same work, exceeding the statutory limit, is not lawful. However, if the funding of work was deemed to be so important in the respective branch of industry that it is covered in a collective bargaining agreement as a permitted reason for the conclusion of fixed term contracts for project work, the court could consider it lawful. As project work may last two or more years, in our opinion the Slovenian courts could permit multiple renewals (exceeding the two-year time limit) but only if an end-point for the project could be envisaged in the (near) future.

**Subject:** Fixed-term work
**Parties:** O.P.O.R.A. – v – National Heritage Institute
**Court:** Nejvyšší soud Ceské republiky (Supreme Court)
**Date:** 26 August 2013
**Case number:** 21 Cdo 1611/2012
**Hard copy publication:** Not available
**Internet publication:** http://www.nsoud.cz/

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2013/56

# Termination during maternity leave was self-inflicted (DK)

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**Summary**
It was not in conflict with the Danish Act on Equal Treatment of Men and Women when the employers of two employees regarded the employees' failure to fulfil their conditions of employment during childbirth-related leave as resignation.

**Facts**
The case concerned two women who were both employed by their local municipalities as child-minders.

It was a fundamental condition of their employment that they performed the work in their own homes and that the employers had inspected and approved the homes.

Following the birth of the employees' children, the employees went on maternity leave; one for about 12 months, the other for about 15 months. While on leave, they both decided to move house. One of the employees relocated to another municipality close to the municipality where she used to live, whilst the other moved to an entirely different part of the country. The employees then informed their employers of the relocation.

The employers had the opinion that by relocating from their approved homes to new homes in other towns, the employees had to accept that this resulted in their employers considering the employment relationships as terminated.
The employees disputed that their employment had been terminated. They filed complaints to the Danish Board of Equal Treatment, arguing that their employers had dismissed them and that their dismissals were in conflict with the Danish Act of Equal Treatment of Men and Women which prohibits dismissal based on pregnancy and/or childbirth-related leave. The employees claimed that they were entitled to monetary compensation and that their employment continued at least until the end of their maternity leave. This was relevant because during the leave the employers were under an obligation to pay the amount in salary and pension contributions which exceeded the state maternity benefits.

The central issue in the case before the Board was whether or not the resignations or dismissals, as the case may be, were linked to the employees' maternity leave. The employers argued that the termination of the employment relationships had nothing to do with the fact that the employees were on maternity leave – only the employees' relocation. The employees stressed that if they wanted to do so, they were entitled to leave the country during their maternity leave and, thus, they were not required to keep their homes open for child-care during their leave. Consequently, it was not relevant if they lived in homes approved by their employers during the leave.

**Judgment**
As the termination of the employment relationships was effected while the employees were on childbirth-related leave, the burden of proving that the termination was not influenced by the employees' leave rested with the employers.

Even so, the Board decided in favour of the employers. The Board stated that the employees' decision to move from the municipalities where they were employed and the homes that their employers had approved constituted notice of resignation.

Accordingly, the employers were entitled to consider the employees as having terminated their employment themselves, and for this reason the employees' childbirth-related leave could not have been a factor in the termination. Thus, the termination of the employment relationships was not in conflict with the Danish Act on Equal Treatment of Men and Women.

**Commentary**
The Board's decision shows that employees must fulfil their conditions of employment even during childbirth-related leave. If an employee chooses to act in such a way that there is no possible way that he or she can resume work after the leave has ended, it is not in conflict with the Danish Act on Equal Treatment of Men and Women if the employer considers the employment as terminated.

The Board did not, however, answer the question of when the termination took effect.

To decide whether the termination would be effective from the date when the employees moved house, the date when the employees notified the employers of the relocation or the date when the employees were supposed to resume work was beyond the jurisdiction of the Board.

In order for this issue to be decided, the cases must be brought before either an industrial arbitration tribunal or the ordinary courts, and it is not yet clear whether this will happen.

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It should be noted that the scope of the Board's decision is very limited as it only applies to employees in a similar situation with similar conditions of employment.

**Comments from other jurisdictions**

Austria (Andreas Tinhofer): The implicit termination of an employment contract by a certain action or omission is possible also in Austria, but the requirements applied by the courts are very strict. It must be crystal clear that the employer or employee wanted to terminate the employment relationship. It is rather unlikely that the Austrian courts would have regarded the relocation of the child-minders during their maternity leave as an implicit resignation. The fact that during their active employment the employees were obliged to perform their work in their homes and those had to be approved by their employer would not have made any difference.

Germany (Dagmar Hellenkemper): Germany has strict laws concerning the dismissal of pregnant employees. First of all, the employer could not simply 'consider the employment relationship as having been terminated by the employees. Section 623 of the German Civil Code provides that termination of an employment contract is required to be in writing. The fact that the two employees moved to different cities could therefore not have been considered to be a termination on their part. That said, the dismissal of a pregnant employee is not entirely impossible under German Law, if we consider Section 9 Maternity Protection Act. The employer needs the consent of the competent regional authority before proceeding with the dismissal. Consent will only be given if the termination of the employment is based on a 'special case' (*besonderer Fall*) and only if this special case is in no way connected to the pregnancy.

The Netherlands (Peter Vas Nunes): In reply to a question I asked the author of this case report, she informed me that there is no prohibition in Danish law against dismissing a pregnant employee or against dismissing an employee for a non-discriminatory reason during maternity leave. This may have to do with the manner in which the Danish legislator transposed the Maternity Directive 92/85 and the directives on equal treatment of men and women (currently, Directive 2006/54). The right to maternity leave, as provided in Article 8 of the Maternity Directive, was implemented in Denmark in the Act on Entitlement to Leave and Benefits in the Event of Childbirth, whereas the right to be protected against dismissal, as provided in Article 10 of the Maternity Directive, was implemented in the Act on Equal Treatment of Men and Women. Apparently, the legislator saw the prohibition against dismissal during pregnancy or shortly thereafter as exclusively a non-discrimination issue, not also as a health and safety issue. This may be the reason that in Denmark there is no prohibition against dismissing a pregnant employee or an employee shortly after childbirth if the dismissal is for a non-discriminatory reason. Dutch law is more protective of pregnant employees and those on maternity leave.

United Kingdom (Bethan Carney): This is a very interesting case that would throw up some difficult issues under UK law too. In the UK, the employees' relocation would not amount to a resignation but it would be possible for the employer to terminate employment, if employment was conditional upon the employees living in approved homes. It is possible to dismiss an employee on maternity leave although such a dismissal could give rise to sex discrimination and unfair dismissal claims if the reason for it is childbirth or pregnancy. In this case, however, the reason for the termination was purely the relocation and so would not give grounds for a discrimination claim. The employees might still have unfair dismissal claims (provided they had two years' service) if the reason was not a fair one or the employer did not act fairly in all the circumstances of the case. If it is a statutory requirement for employment that the employee lives in an approved house, this would be a sufficient reason for dismissal.

However, in most circumstances, a fair procedure would involve consulting with the employee before dismissal and this might be more difficult whilst the employee is on maternity leave. The employer might be able to do the consultation by telephone or at a location near the employee's home. Alternatively it might choose to wait until the end of maternity leave to try to dismiss. Even if the employee is dismissed before the end of maternity leave, she remains entitled to any remaining statutory maternity pay. However, the position on any enhanced maternity pay would be more complicated. (Because statutory maternity pay is not generous, some employers offer an additional amount of 'enhanced' maternity pay. Local authorities and public sector employers are particularly likely to offer additional 'enhanced' maternity pay.) If the right to enhanced maternity pay was contractual, the contract would have to be construed to determine whether the right continued for what would be the remainder of maternity leave if the employee was dismissed before its expiry. It seems likely that in most circumstances, enhanced maternity pay would be deemed to end when employment ended. However, if the scheme mirrored the statutory scheme in other respects, the employee might be able to argue that the contractual scheme should mirror the statutory scheme in continuing to be paid for the duration of what would have been the entitlement if employment had continued. If the enhanced maternity pay was discretionary, the employer could choose whether or not to continue to pay it after termination. It can be seen that, if this scenario arose in the UK, it would throw up a number of possibilities depending upon the facts and would have to be analysed carefully.

**Subject:** Gender discrimination
**Parties:** FOA on behalf of A and B -v- employers C and D respectively
**Court:** The Danish Board of Equal Treatment
**Date:** 28 August 2013
**Case number:** ref. nos. 7100654-12 and 7100661-12
**Hard Copy publication:** Not yet available
**Internet publication:** Case summaries are available at www.ligebehandlingsnaevnet.dk → "Afgørelser" → "Søg i afgørelser" → fourth horizontal box type ref. nos. 7100654-12 and 7100661-12, respectively

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2013/57

# Covert surveillance to prove unlawful absence from work allowed (UK)

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**Summary**
The UK Employment Appeal Tribunal ('EAT') has decided that covert surveillance of an employee by a private detective did not breach the employee's right of privacy. Article 8 of the European Convention on Human Rights ('ECHR'), which governs the right to a private life, was not engaged, meaning that the employee's dismissal based on the surveillance evidence was not unfair. Further, the employer's ignorance of the requirements of the Data Protection Act 1998 ('DPA'), the UK's transposition of EU Data Protection Directive 95/46/EEC, and Information Commissioner's Codes of Practice did not render the employer's investigation unreasonable or the employee's dismissal unfair.

**Facts**
Mr Gayle was employed by City and County of Swansea (the 'Council'). In the summer of 2010 he was seen twice at a sports centre when he was supposed to be at work. On the first occasion he was seen by a colleague playing squash during working hours. On the second occasion, also during working hours, he contacted the office fifteen minutes after he was seen, leaving a message for his manager to say that he was at work and was just finishing.

As a result, the Council engaged a private investigator to monitor and covertly film Mr Gayle's activities. The private investigator filmed Mr Gayle outside the sports centre during working hours on a further five occasions. Mr Gayle had not 'clocked out' during these times. He was therefore at the sports centre during times that the Council paid him to work. As a result, Mr Gayle was dismissed. He brought claims for unfair dismissal, arrears of holiday pay and direct discrimination on the ground of race in the Employment Tribunal.

**Employment Tribunal Decision**
The employment tribunal found that Mr Gayle's dismissal was unfair. This was on the basis that the Council's investigation involved an "unjustified interference" with his right to a private life under Article 8. The Council had breached Mr Gayle's right to privacy by using covert surveillance, particularly when it already had other evidence it could rely on (the oral evidence from colleagues who had seen him at the sports centre during working hours). It had been "too thorough" in its investigation. The Tribunal decided that the Council, as a public body, had a positive obligation to safeguard Mr Gayle's Article 8 rights and interfering in these was disproportionate and unnecessary.

The Council was also criticised for showing "inexcusable ignorance" of the DPA (which lays down when data can be lawfully processed) and the relevant Information Commissioner's Code of Practice. The Information Commissioner is the UK's independent authority set up to uphold information rights in the public interest, in particular data privacy for individuals. It has published a four-part Code of Practice known as the Employment Practices Code which give guidance on an employer's obligations under the DPA. In particular, the Tribunal flagged the fact that the Council had failed to carry out any impact assessment before going ahead with the covert surveillance, as provided by the Code.

Whilst Mr Gayle's dismissal was held to be unfair, he was awarded no compensation because of his contributory conduct.

**Employment Appeal Tribunal Decision**
The Council appealed the tribunal decision. The key question before the EAT was whether an employee has a right to privacy when carrying out acts which are defrauding his employer.
The EAT overturned the Tribunal's decision, deciding that the Tribunal's criticisms of the covert surveillance were not sufficient to render Mr Gayle's dismissal unfair. In reaching its decision, the EAT asserted that Mr Gayle's right to privacy under Article 8 was not engaged as he was filmed outside the sports centre, which was a public place. Mr Gayle could not have an expectation of privacy in a public place, nor could he have one as he was committing fraud at the time.

The EAT also considered the relevance of the context of an investigation like this, emphasising that it could not be looked at in a "vacuum". The important context here was that Mr Gayle was being filmed during his working hours, not in his private time. The EAT went on to say that employers have a right to know where their employees are and what they are doing during working hours. In relation to the Tribunal's comments that the Council's use of the surveillance was unreasonable for being "too thorough", the EAT found that it was not likely that an investigation could be held unreasonable for being too thorough.
The EAT went on to say that, even if Mr Gayle could make out that the right to privacy was engaged, the Council could still justify its conduct by relying on two potential legitimate aims under Article 8: the protection of the Council's own rights and freedoms and the prevention of crime. The crime here was defrauding the Council.

When addressing the DPA-points put forward by the Tribunal, the EAT held that the Council did not breach its data protection obligations by filming Mr Gayle in a public place. Further, the matters the Tribunal referred to from the relevant Code (carrying out an impact assessment before proceeding with covert surveillance) are not requirements of the law but guidance only. In its judgment, the Tribunal had over-emphasised the role of the Code and its effect.

**Commentary**
This decision is certainly a useful one for employers in the UK who want to use covert surveillance in order to catch out employees suspected of misconduct. This is particularly true where the surveillance is carried out in a public place. This is not particularly surprising on the facts and I believe that it is the right decision. However, it does not give employers *carte blanche* to use covert surveillance. It should serve as an important reminder that this method can be a breach of Article 8 and due consideration should be given to whether the particular circumstances are appropriate for it from the outset.

Employers should always be mindful of the context of the investigation and that, whilst a failure to follow data protection best practice will not necessarily make a dismissal unfair, the DPA and Code of Practice should be borne in mind and considered prior to instigating any surveillance of this kind. In particular, even if choosing not to follow the Code of Practice to the letter, employers should always ensure they do not breach the DPA itself. Whilst the EAT has made clear that not following the Code will not render a dismissal unfair, that does not

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mean that a breach of the DPA will be treated in the same manner.

Whilst the EAT did say that an employee committing fraud during working hours has no expectation of privacy it does not follow that any covert surveillance will then be permissible. Where surveillance is not in a public place, extra thought should be given as to whether the circumstances are appropriate. Employers should consider whether an impact assessment should be carried out in advance, balancing the importance of carrying out the surveillance with the level of intrusion into the employee's privacy.

**Comments from other jurisdictions**

Austria (Martin Risak): In Austria the topic of covert surveillance outside the workplace is mostly discussed in connection with the conduct of workers during sick leave. In principle it is seen as an unlawful infringement of the employee's private life that requires justification (usually the interest of an employer that the employee does not act in a way that prolongs sick leave). Additionally, covert surveillance needs to be an appropriate measure due to the lack of other less-interfering measures producing the same evidence. If there is enough evidence for the employee to presume misconduct by the worker the courts have not only admitted evidence provided by covert surveillance and deemd a dismissal based on it lawful but have also ordered the employee to compensate the employer for the costs of these measures. Note that if the covert surveillance is not an *ad hoc* measure but employed systematically, it also requires the consent of the works council.

In this context is has to be stressed that the Austrian courts as well as most of the legal literature does not accept the notion that evidence acquired unlawfully should not be admissible in employment law cases. Therefore the discussion reported on above would only have limited effect in practice.

Germany (Elisabeth Höller): In Germany a debate is ongoing as to the circumstances under which an employer may survey its employees, or one specific employee, with the aid of a video camera or a private detective. In my opinion the UK case concentrates on the issue of which surveillance measures an employer may use against an individual suspected of significant contract breaches.

In most cases in which the employer has a suspicion against one of his employees, it will hope to dismiss the employee as soon as possible. For the dismissal it is necessary, according to established case law of the German Federal Labour Court, for the employer to have taken all reasonable steps necessary to establish the facts behind its suspicion.

In terms of assessing the effectiveness of surveillance under German law, the following statutory protections of the employee must be considered:

- the employee's general right to personal freedom pursuant to Articles 1(1) and 2(1) of the German Constitution;
- the participation rights of the works council;
- the German Data Protection Act ('Bundesdatenschutzgesetz', or 'BDSG') if a public access area is observed.

In Germany an employee is not free to leave the arranged workplace during his or her working hours without the consent of the employer. The employee is contractually bound to perform the work at the arranged workplace and this must be considered as part of a balancing of the interests of the employer and employee.

However, the secret surveillance of an employee is permitted and therefore may be used as evidence of a contractual breach by the employee if:

- a specific suspicion of a criminal act or another grave misconduct at the expense of the employer is provided;
- no less radical measures can be used to clarify the facts;
- the surveillance is practically the only way of clarifying the matter:
- and the surveillance is not disproportionate.

In the view of the Federal Labour Court an employer is allowed to use detective surveillance in order to verify correct job performance by a particular employee if the detective's instructions are within a very tight timeframe and refer exclusively to the employee's professional conduct. As soon as the employer has solid evidence of breach or misconduct at the expense of the employer, it may take labour law measures, particularly dismissal.

The Netherlands (Peter Vas Nunes): The courts in this case applied two tests that resemble one another, but are distinct:

- was Article 8 ECHR, i.e. the right to privacy, engaged?
- did the Council violate the Data Protection Act, i.e. Mr Gayle's right to protection of his personal data?

The right to privacy, which is enshrined at the pan-European level in the ECHR, is not the same as the right to data protection, which is governed at the EU level by Directive 95/46 (to be replaced by an EU Regulation), although both rights clearly overlap.

The outcome of this case is satisfactory. However, I would like to make two observations from a Dutch perspective. The first relates to Article 8 ECHR. The EAT seems to reason: (i) that anyone who is in a public place can have no expectation of privacy; (ii) that an employee who is unlawfully absent from work has no expectation of privacy vis-a-vis his employer during that absence and, possibly also (the case report does not make this clear); (iii) that employees have no expectation of privacy during working hours. This strikes me as a rather sweeping finding.

As for the data protection argument raised by Mr Gayle, the text of the EAT's judgment does not make clear whether the EAT's sole reason for holding that there was no breach of the DPA was that Mr Gayle was filmed in a public place. I assume that the Council relied on (the UK's transposition of) Article 7(f) of Directive 95/46, which allows personal data to be processed "if processing is necessary for the purposes of the legitimate interests pursued by the controller". The Council had a legitimate interest in being able to prove that Mr Gayle was unlawfully absent from his work, but was the processing of his personal data necessary for that purpose?

An interesting difference between Mr Gayle's approach and the way a Dutch employee would be likely to have argued his case is the following. Mr Gayle argued that his dismissal was unfair because the Council had violated his rights to privacy and data protection. A Dutch employee in similar circumstances may have argued that the evidence of his wrongdoing was collected illegally, that that evidence is therefore not admissible and that therefore he must be deemed not to have been unlawfully absent from work. Although most Dutch courts reject such (rather artificial) reasoning, a few have accepted it.

Slovakia (Beáta Kartíková): Pursuant to Slovak law the interefernce of an employer into employees´ privacy at workplace is explicitly regulated. Employers must not infringe employees' privacy at his or

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her workstation or in shared areas by monitoring employees, recording phone calls made by means of technical devices or by checking work email without justified reasons based on the specific nature of the employers' activities and without notifying employees about the monitoring beforehand.

When employers set up a 'control mechanism' they are obliged to negotiate with the employee representatives about the scope of of the mechanism, the way it will be done and its duration. They are also obliged to inform their employees about these aspects. The Slovak Labour Code refers to the right to privacy guaranteed by Article 8 of the European Convention on Human Rights and the Slovak Constitution. The Labour Code, however, does not explain what "justified reasons based on the specific nature of the employers' activities" means in practice, but for example, the monitoring of employees to prevent theft is generally accepted. It is therefore advisable to put details of any surveillance of employees in the work rules and ensure that all employees are made aware of it.

Even though the Slovak Labour Code only governs monitoring at workstations or employer's shared areas, this does not imply that monitoring beyond these places is allowed.

We agree that the priority of the employee´s right to privacy over the employer´s right to control its employees during working hours in this case was rather questionable. We are not aware of any similar cases in the Slovak jusrisdiction, which may be because the provision in the Labour Code regarding the employees´ rights to privacy and the employer's ability to monitor are relatively new, coming into force on 1 January 2013.

The covert monitoring of employees will no doubt lead to questions about the balance of interests between employers and employees and the Slovak courts would be likely to consider the principle of proportionality and whether this has been observed by the employer. In general terms, the surveillance of employees is reasonable and appropriate provided employers ensure to monitor in a way that does not interfere excessively into employees´ privacy. This might mean inspecting the suspected employee in the workplace first, using the normal means and only later monitoring outside the workplace.

**Subject:** Privacy and data protection
**Parties:** City and Council of Swansea - v - Gayle
**Court:** Employment Appeal Tribunal
**Date:** 16 April 2013
**Case Number:** UKEAT/0501/12/RN
**Internet publication:** http://www.bailii.org/uk/cases/UKEAT/2013/0501_12_1604.html
**Information Commissioner Website:** http://www.ico.org.uk/for_organisations/data_protection/topic_guides/employment

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2013/58

# Netherlands liable for inadequate transposition of Working Time Directive 2003/88 following BECTU and Schultz-Hoff (NL)

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**Summary**
Until 2012, Dutch law provided that an employee who is absent from work for a medical reason for longer than six months does not accrue paid leave beyond that period.[1] This provision had to be amended following the ECJ's judgment in *Schultz-Hoff*. Three employees who lost paid leave without compensation as a result of the old legislation successfully claimed compensation from the State.

**Facts**
The issue discussed in this case report was litigated in three separate lawsuits. In all three, the Kingdom of The Netherlands (the 'State') was the defendant. In one case Sandra van der Putten was the plaintiff. In another case a cleaning lady, whose name is not known, was the plaintiff. No facts are known regarding the plaintiff in the third case.

Sandra van der Putten was employed by M. van Happen Transport B.V. She called in sick on 27 February 2008 and remained fully unfit for work until her contract terminated on 26 February 2010, exactly two years after her first day of absence from work. Upon termination of her contract she was paid the value of 12 unused days of paid leave. This was in conformity with Dutch law as it stood at the time. That law provided that an employee who is fully unfit for work accrues paid leave for a maximum of six months. As Ms Van der Putten's contract entitled her to 24 days of paid leave per full year, she accrued not 2 x 24 = 48 days during the two year period of her sick leave, but only 24 x 6/12 = 12 days and was paid accordingly. As this was in line with Dutch law, she could not claim anything against her former employer. However, by the time her contract ended, the ECJ had delivered its judgment in the well-publicised *Schultz-Hoff* case (ECJ 20 January 2009, case C-350/06), in which it was held - briefly stated - that an employee who is absent from work for a medical reason and who is not in a position to take leave during his or her absence, continues to accrue paid leave the same way that an employee does who is on the job. That judgment prompted Ms Van der Putten to claim from the State the balance between 48 and 12 days, being € 3,107. She based her claim on the doctrine of tort, arguing that the State had acted unlawfully by not transposing Directive 2003/88 properly.

The case of the cleaning lady was similar to that of Ms Van der Putten. She called in sick on 23 January 2007 and her employment contract ended on 15 November 2010, following almost four years of sick leave. Upon termination, she was paid the value of 75 hours of paid leave whereas, if Dutch law had been in conformity with *Schultz-Hoff*, she would have been paid for 275 hours.

1 To be precise, the employee accrued paid leave during the last six months of his absence.

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Only the first instance judgment in the case of Ms Van der Putten was published and the only judgment on appeal that was published was that in the case of the cleaning lady.

**Lower court's judgment**

The State's first defence was to deny that the conditions had been satisfied under which a right arises to reparation of loss or damage caused to individuals by a Member State's breach of EU law. Those conditions are:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious;
- there must be a direct causal link between the breach and the damage.

The State argued that, in particular, the second condition had not been met, given that the State could not have known it was in breach of Directive 2003/88 until the *Schultz-Hoff* ruling. Moreover, Article 7(1) of that directive, on which the plaintiff's claim rested ("Member States shall take the measure necessary to ensure ...."), bestows on the Member States a margin of discretion that the State had not "manifestly and gravely disregarded". Following *Schultz-Hoff*, the State needed a reasonable period of time to adapt Dutch legislation to the new situation. The government introduced the Bill of Parliament that led to the change of law on 27 August 2010, which was not long after *Schultz-Hoff*.

The court reasoned, first, that the State's negligence did not consist of untimely transposition of the directive, but of an incorrect transposition. The court then observed that the question of whether the State had disregarded its margin of discretion "manifestly and gravely" depends on the extent to which the directive's relevant provision is clear and precise. Thus, it must be examined whether the State could reasonably have interpreted Article 7 of the directive to mean that employees on sick leave exceeding six months could be excluded from the obligation to grant every employee at least four weeks of paid leave per year. The court found this not to be the case, because the ECJ had already ruled otherwise on 26 June 2001, in the *BECTU* case (C-173/99). This means that if the State required a reasonable period of time to adjust Dutch legislation to the correct interpretation of Directive 2003/88, that period started to run in 2001, and not doing anything until 2010 was inexcusable.

The court also rejected the State's other arguments. As a result, the State was ordered to pay Ms Van der Putten € 3,107 plus interest and legal expenses. The State appealed.

**Appeal Court's judgment**

The Court of Appeal began by addressing the State's argument that its inadequate transposition of Directive 2003/88 was not a "sufficiently serious" breach of Community law, within the meaning of the ECJ's case law, for the inadequate transposition to create liability. The court rejected this argument, holding that under Dutch law, the mere fact that the State adopts and lets stand law that is contrary to law at a higher international level, such as an EU directive, is sufficient to create liability of the State under the domestic doctrine of tort.

The court proceeded to address four arguments submitted by the State, in which it disputed that the plaintiff's loss was caused by the State's negligence. These arguments had to do with the fact that Dutch law was amended with effect from 1 January 2012. The new law, which purports to reflect an accurate transposition of Directive 2003/88, provides that all statutory paid leave accrued before 1 January of any year is automatically lost if it has not been taken within six months, i.e. before 1 July next, unless and to the extent that it was reasonably impossible for the employee to go on holiday, for example because of serious sickness. The State argued that if it had transposed Directive 2003/88 properly before the plaintiff became ill, the same rules would have been in place at that time as were enacted in 2012, in which case the plaintiff would not have accrued more paid leave than she did under the old law, given that her sickness was not so serious that it made it impossible for her to go on holiday. The court rejected this argument for a number of reasons, one being that it found the argument too speculative.

Finally, the court dealt with the amount of the claim. It overturned the court of first instance's judgment partially, namely insofar as that court had awarded compensation for all unused paid leave (200 hours) rather than only the statutory part thereof (145 hours).

The State has announced that it will appeal the judgment to the Supreme Court.

**Commentary**

This case provides an excuse to make some observations on state liability for untimely or incorrect transposition of directives, a not uncommon occurrence. In Dutch practice, claims against the State based on such liability are frequently referred to as "*Francovich* claims", but personally I feel "*Brasserie* claims" may be a better way to describe them, for the following reason.

In *Francovich* (ECJ 19 November 1991, joined cases C-6/90 and C-9/90) the ECJ held that:

- it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible (§ 37);
- the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (§ 38);
- where a Member State fails to fulfil its obligation to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled (§ 39);
- the first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals (§ 40, I);
- the second is that it should be possible to identify the content of those rights on the basis of the provisions of the directive (§ 40, II);
- the third is the existence of a causal link between the breach of the State's obligations and the loss and damages suffered by the injured parties (§ 40, III).

The issue of state liability for untimely or incorrect transposition of a directive came up again in *Brasserie du Pêcheur* (ECJ 5 March 1996, joined cases C-46/93 and C-48/93). In this judgment, the ECJ held that:

- the system of rules which the Court has worked out [...] in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or in interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in

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question (§ 43);

- Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (§ 51);
- as to the second condition [...], the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State [...] concerned manifestly and gravely disregarded the limits on its discretion (§ 55);
- the factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national [...] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law (§ 56);
- on any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted as infringement (§ 57).

The first and third conditions, as formulated in *Francovich*, are more or less identical to the first and third conditions as formulated in *Brasserie du Pêcheur*. The second condition is totally different. In *Francovich*, this condition was that the rights granted by a directive are identifiable; in *Brasserie du Pêcheur*, the condition was that the breach of Community law is sufficiently serious, meaning that the Member State concerned *"manifestly and gravely disregarded the limits on its discretion"*.

It is a mystery to me what caused the ECJ to quietly drop the "identifiable" condition and to replace it by the completely different "sufficiently serious" condition without any explanation. Be this at it may, *Brasserie du Pêcheur* has made it clear that a Member State is not liable to private individuals for failure to transpose an EU directive on time and correctly unless it has manifestly and gravely disregarded the limits on its discretion.

In the case reported above, an important and possibly decisive difference between the judgment by the court of first instance and the judgment on appeal was the level of judicial scrutiny. The court of first instance applied the "sufficiently serious/manifestly and gravely" test, whereas the Court of Appeal applied a lighter test, based on the domestic doctrine of unlawful legislation. The Court of Appeal did this by referring to a 1986 judgment by the Dutch Supreme Court in the *Van Gelder Papier* case. That case concerned a company that was obligated to pay a certain tax that was based on a governmental regulation. That regulation was found to be incompatible with the statute (an Act of Parliament, i.e. legislation of a higher order) on which it was purportedly based. This meant that the government had not had the right to issue the regulation and that, by doing so and by maintaining and applying it, the government had committed a tort against the plaintiff company. The Supreme Court held that the mere fact of this unlawful exercise of legislative authority gave rise to an obligation by the State to compensate anyone who had been forced to pay the tax in question.

In the case reported here, the Court of Appeal reasoned that Directive 2003/88 is legislation of a higher order than the Dutch law on entitlement to paid leave as it stood before 2012 and that this mere fact was sufficient to establish the State's liability, as per the *Van Gelder Papier* doctrine. In my opinion, the Court of Appeal erred. Surely an EU directive does not constitute legislation of a higher order than Dutch statute in the same way that a statute is of a higher order than a governmental regulation? In my view, the Court of Appeal should have applied the more rigorous *"sufficiently serious/manifestly and gravely"* test, as per *Brasserie du Pêcheur*. Whether that would have made a difference for the outcome of the case is another matter, which brings me to the following observation.

The court of first instance did apply the *sufficiently serious/manifestly and gravely* test, but nevertheless found in favour of the plaintiff. It argued that the ECJ's ruling in *BECTU* was sufficiently clear that it should have alerted the State to the incompatibility of Dutch legislation on paid leave with the Directive. I take issue with this reasoning. The *BECTU* case concerned (former) UK legislation that provided that entitlement to paid leave "does not arise until a worker has been continuously employed for 13 weeks". The question before the ECJ was whether this provision of UK law was compatible with Article 7(1) of Directive 93/104 (which was identical to Article 7(1) of Directive 2003/88 that replaced Directive 93/104 in 2004):
*"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."*

In *BECTU*, the ECJ distinguished between, on the one hand, the rights of Member Sates to prescribe the specific circumstances in which workers may exercise their right to paid leave (conditions) and, on the other hand, the prohibition for Member States to make the existence of the right subject to preconditions.

Was the Court of first instance in the case reported here justified in reasoning that following *BECTU*, the Dutch State, by not amending its legislation on paid leave, "manifestly and gravely disregarded the limits on its discretion"? I doubt it. Unlike the UK legislation at issue in *BECTU*, the domestic Dutch legislation in question did not deny employees on long-term sick leave all entitlement to paid leave. It merely limited the accrual of paid leave in certain circumstances. Arguably, the State could have seen this is a condition for being able to exercise the right to paid leave rather than as a precondition for the existence of that right. In this line of thinking, the State could be forgiven for not amended its legislation until *Schultz-Hoff*. That judgment finally made it manifestly clear that the Dutch rules on paid leave were incompatible with Directive 2003/88.

It will be interesting - for employment practitioners all over Europe - to see what the Supreme Court does with the arguments of both the court of first instance (*BECTU* - v - *Schultz-Hoff*) and the Court of Appeal (domestic law of tort - v- *Brasserie*).

**Comments from other jurisdictions**

Germany (Dr. Henning Seel, AMEOS Gruppe): The German Federal Vacation Act (Bundesurlaubsgesetz, "BUrlG") stipulates the basic principle that vacation is to be granted and taken in each calendar year and will – as a rule – lapse if not taken during this period. Under certain circumstances, however, a carry-over of unused vacation

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to the next quarter is possible. This requires "urgent operational reasons or reasons concerning the person of the employee" (see s7 paragraph 3, sentence 2 BUrlG). "Reasons concerning the person of the employee" are usually health issues. If the three-month carry-over period has expired, the vacation lapses unless a further exception occurs. Following the recent rulings of the European Court of Justice, the minimum vacation entitlement according to s3 paragraph 2 BUrlG (= 20 days per year on the basis of five working-days per week) does not lapse in the event the incapacity to work extends beyond the transfer period. This lingering vacation entitlement lapses, however, 15 months after the end of the calendar year in which the entitlement has become due. If the employee is entitled to more vacation than the minimum provided by law in his employment agreement, a provision in the employment agreement ruling that this "additional vacation entitlement" will lapse in any case at the end of each calendar year is valid. The ruling of the ECJ stipulating the period of 15 months only covers the statutory minimum vacation entitlement.

A further provision (s7 paragraph 4 BUrlG) rules that if vacation cannot be taken due to the employee's termination, financial compensation is to be paid. In the past, the German Federal Labour Court has treated the compensation payment as a "surrogate" of the actual grant of vacation. As a consequence, the court has based its expiration on the same time periods that apply to the expiration of the actual vacation claim. The court has changed its ruling recently (judgment dated 19 June 2012, 9 AZR 652/10). The court has stated that the statutory vacation claim is a "purely pecuniary claim" that is not subject to the time limits of the BUrlG. The consequence for employers is that for vacation that has not lapsed but cannot be taken due to termination of the employment agreement an employee can – as a rule – claim for compensation even after 31 December of the vacation year and/or 31 March of the subsequent year. The claim for compensation will be forfeited according to a cut-off period agreed on in the employment agreement or stipulated in an applicable collective bargaining agreement or – in any case – according to s195 German Civil Code.

The German Federal Labour Court has also ruled (judgment dated 9 August 2011, 9 AZR 425/10) that an employee who recovers early enough in the calendar year to take all his accumulated vacation days – during the period of sickness – within that year must do so. Otherwise, the claim for accrued vacation time will lapse.

As for the question of the transferability of vacation claims by succession, the Federal Labour Court has ruled that a vacation claim lapses with the death of the employee and hence is not transformed into a claim for payment according to s7 paragraph 4 BUrlG (judgment dated 20 September 2011, 9 AZR 416/10).

**Subject:** Paid leave
**Parties:** Kingdom of The Netherlands - v - unnamed employee
**Court:** *Gerechtshof Den Haag* (Court of Appeal in The Hague)
**Date:** 15 October 2013
**Case number:** 200.106.073/01
**Hard Copy publication:** JAR 2013/279
**Internet publication:** www.rechtspraak.nl → zoeken in uitspraken→ ECLI:NL:GHDHA:2013:3792

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# ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

## RULINGS

**ECJ 30 May 2013, case C-342/12** *(Worten – Equipamentos para o Lar SA – v – Autoridade para es Condições de Trabalho (ACT))* **("Worten")**, Portuguese case (DATA PROTECTION)

### Facts

Portuguese law requires every employer to keep a record of hours worked by each of their employees in a location that is accessible and in such a way that it can be consulted immediately. The record must set out the times when the working hours begin and end, as well as breaks, so as to allow calculation of the number of hours worked by each employee. The law gives ACT inspectors the right to demand immediate examination of all relevant documents. ACT is the Portuguese Authority for Working Conditions.

On 9 March 2010, ACT carried out an inspection at Worten's establishment in Viseu, following which it produced a report stating that:

- Worten employed four workers in that establishment working on a rotating shift;
- the record of working time, setting out the daily work periods, the daily and weekly rest periods and the calculation of the daily and weekly working hours of the workers was not accessible for immediate consultation;
- the workers recorded their working hours by inserting a magnetic card into a time clock installed in the premises of a store located beside the inspected premises;
- not only was the record of working time not accessible to any worker, but it could also be consulted only by the person who had computerised access to it, namely the regional manager of Worten, who was not present at the time of the inspection; in such a case, only Worten's central human resources department could provide the data in that register.

On 15 March 2010, in response to a notice to present documents, the record of working time, setting out the legally required data, was submitted to ACT.

By a decision of 14 March 2012, ACT found that Worten had committed a serious administrative offence since it had not permitted ACT to carry out an immediate consultation, in the establishment concerned, of the record of the working time of the workers employed in that establishment. The serious nature of the offence was stated to arise from the fact that the record of working time allows quick and direct verification of whether the organisation of an undertaking's activities complies with the regulations concerning working hours. Consequently, ACT imposed a fine of € 2,000 on Worten.

### National proceedings

Worten brought an action for annulment against that decision before the *Tribunal do trabalho de Viseu*. It decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling:

"1. Is Article 2 of Directive 95/46 to be interpreted as meaning that the record of working time is included within the concept of 'personal data'?
2. If so, is the Portuguese State obliged, under Article 17(1) of Directive 95/46, to provide for appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network?
3. Likewise, if Question 2 is answered in the affirmative, when the Member State does not adopt any measure pursuant to Article 17(1) of Directive 95/46 and when an employer, as a controller of such data, adopts a system of restricted access to those data which does not allow automatic access by the national authority responsible for monitoring working conditions, is the principle of the primacy of European law to be interpreted as meaning that the Member State cannot penalise that employer for such behaviour?"

### ECJ's findings

1. A record of working time constitutes 'personal data' within the meaning of Directive 95/46 (§ 18-22).
2. Contrary to the premise on which the second and third question are based, Article 17(1) of Directive 95/46 does not require Member States to adopt technical and organisational measures to protect personal data against unauthorised disclosure etc., except where a Member State is itself the 'controller' as defined in the Directive. In the present case, Worten was the 'controller', not the Portuguese State (§ 23-26).
3. Worten argues that the obligation to make available the record of working time so as to allow its immediate consultation is, in practice, incompatible with the obligation to establish an adequate system of protection of the personal data contained in that record. The ECJ rejects this argument. The obligation of an employer (as a 'controller' of personal data) to provide the national authority responsible for monitoring working conditions immediate access to the record of working time in no way implies that the personal data contained in that record must necessarily, on that ground alone, be made available to unauthorised persons. Accordingly, it does not appear that Article 17(1) of Directive 95/46 is relevant for the purposes of resolving the dispute in the main proceedings (§ 27-29).
4. Under Article 7(c) and (e) of the directive, the processing of personal data is permissible only if it is "necessary for compliance with a legal obligation to which the controller is subject". According to the European Commission, although Directive 2003/88 does not expressly require Member States to adopt legislation such as that at issue in the main proceedings, the monitoring of compliance with the obligations imposed by that directive pursues the establishment of surveillance measures. In the Commission's view, the employer's obligation to allow immediate consultation of the record of working time ensures that data are not altered during the interval between the inspection visit carried out by the competent national authorities and the actual verification of those data by those authorities (§ 30-41).
5. Worten claims, by contrast, that this obligation is excessive, given the interference it entails in workers' private lives. First, the record of working time is intended to provide workers with a means of proving the hours they have actually worked. The authenticity of that record has not been contested in the main proceedings. Secondly, that record allows the assessment of average working times, for the purposes of monitoring, *inter alia*, working hours exemptions. For that purpose, the immediate availability of those records does not, according to Worten, provide any added value. Moreover, the information in that record could be submitted subsequently (§ 42).

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6. In the present case, it is for the referring court to examine whether the employer's obligation to provide the competent national authority access to the record of working time so as to allow its immediate consultation can be considered necessary for the purposes of the performance by that authority of its monitoring task, by contributing to the more effective application of the legislation relating to working conditions, in particular as regards working time (§ 43).
7. In that respect, it must also be noted that, in any case, if such an obligation is considered necessary to achieving that objective, the penalties imposed with a view to ensuring the effective application of the requirements laid down by Directive 2003/88 must also respect the principle of proportionality, which it is also for the referring court to verify in the main proceedings (§ 44).

**Ruling (judgment)**

Article 2(a) of Directive 95/46 [...] is to be interpreted as meaning that a record of working time, such as that at issue in the main proceedings, which indicates, in relation to each worker, the times when working hours begin and end, as well as the corresponding breaks and intervals, is included within the concept of 'personal data', within the meaning of that provision.

Article 6(1)(b) and (c) and (e) of Directive 95/46 do not preclude national legislation, such as that at issue in the main proceedings, which requires an employer to make the record of working time available to the national authority responsible for monitoring working conditions, so as to allow its immediate consultation, provided that this obligation is necessary for the purposes of the performance by that authority of its task of monitoring the application of the legislation relating to working conditions, in particular as regards working time.

**ECJ 28 November 2013, case C-309/12** *(Maria Albertina Gomes Viana Novo and 17 others – v – v Fundo de Garantia Salarial IP)* **("Gomes Viana Novo")**, Portuguese case (INSOLVENCY)

**Facts**

Ms Gomes Viana Novo and 17 of her fellow employees stopped receiving salary in April 2003. On 15 September 2003 they resigned. In February 2004 they brought an action before the local labour court, seeking a judicial determination of the amount of their wage claims and an enforcement order to recover those sums. Their action was upheld and their employer was ordered to pay them salary for the period April - 15 September 2003. As the employer's assets were insufficient to cover their claims, the plaintiffs brought an action before the Commercial Court, seeking a declaration that the employer was insolvent. They did this on 28 November 2005. In July 2006 they applied to the Portuguese Wage Guarantee Fund (FGS) for payment of their claims. Their application was denied on the ground that their claims had fallen due more than six months before 28 November 2005. This denial was in line with Article 319(1) of Law 35/2004.

**National proceedings**

The plaintiffs applied for annulment of the said denial, initially without success. They appealed. The appellate court referred a question to the ECJ regarding the interpretation of Article 4 of Directive 80/987 as amended by Directive 2002/74 *[Editor's note: this Directive was repealed and replaced by Directive 2008/94]*, which read:

"1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.
2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering pay for the last three months of the employment relationship prior to and/or after the date referred to in Article 3 *"[in Portugal, being the date on which the application for insolvency is filed, Editor]"*.

**ECJ's findings**

1. Directive 80/987, as amended, does not preclude a Member State from fixing the date from which the reference period must be calculated as the date on which the action for a declaration of an employer's insolvency is commenced. Likewise, where a Member State decides to exercise the option to limit the guarantee by setting a reference period, it may choose to limit that reference period to six months provided that it guarantees pay for the last three months of the employment relationship. Given that Portuguese law guarantees pay for those last three months, its national legislature could exercise said option (§ 27-28).
2. The cases in which it is permitted to limit the guarantee institutions' payment obligation must be interpreted strictly. However, a restrictive interpretation cannot deprive of its effectiveness the option expressly conferred on Member States to limit that obligation (§ 31-32).
3. The Directive requires there to be a link between the insolvency and the outstanding claims. In the dispute in the main proceedings there is no such link, given that other workers employed by the same employer as Ms Gomes Viana Novo et al continued to receive their wages until May 2006 (§ 34-36).

**Ruling (judgment)**

Council Directive 80/98 [...], as amended by Directive 2002/74 [...], must be interpreted as meaning that it does not preclude national legislation which does not guarantee wage claims falling due more than six months before the commencement of an action seeking a declaration that the employer is insolvent, even where the workers initiated legal proceedings against their employer prior to the start of that period with a view to obtaining a determination of the amount of those claims and an enforcement order to recover those sums.

**ECJ 5 December 2013, case C-514/12** *(Zentralsbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH - v - Land Salzburg)* **("Salzburger Landeskliniken")**, Austrian case (NATIONALITY DISCRIMINATION)

**Facts**

Gemeinnützigen Salzburger Landeskliniken Betriebs GmbH ("SALK") is a holding company for three hospitals and a number of other health care providers in the province of Salzburg. The province is the sole shareholder. On the relevant date, SALK employed 716 doctors, of whom 113 came from other EU/EEA countries, and 2,850 other healthcare professionals, of whom 340 came from other EU/EEA countries. The provincial laws provided that SALK staff were placed on a step within their salary grade, and periodically advanced to the next step, depending on their "reference date". In determining this date, the provincial law drew a distinction with respect to prior service in the period before being hired by SALK. If the prior service was in the province of Salzburg, it was taken fully into account. Prior service elsewhere only counted for 60%.

**National proceedings**

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SALK's central works council (*Zentralbetriebsrat*) applied to the local court, the *Landesgericht Salzburg*. It sought a declaration that all employees coming from anywhere within the EU/EEA be entitled to have 100% of their prior service taken into account for the purpose of calculating the "reference date". The *Landesgericht* found that the provincial law did not constitute direct discrimination or grounds of nationality, as it applied without distinction to Austrian and other EU nationals. However, the court was uncertain as to whether the provincial law was compatible with Article 45 TFEU (free movement of workers and abolition of discrimination based on nationality as regards employment) and Article 7(1) of Regulation 492/2011 (non-discrimination by reason of nationality as regards employment). It therefore referred a question to the ECJ.

**ECJ's findings**

1. Unless objectively justified and proportionate to the aim pursued, a provision of national law - even if it applies regardless of nationality - must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. The provincial law at issue in this case is liable to affect migrant workers more than national workers as they will in all likelihood have accrued professional experience elsewhere before entering employment within Salzburg province. In addition, the law in question has a similar impact on employees re-entering employment within Salzburg province who, after initially working in that province, have gone to work elsewhere. This constitutes an obstacle to freedom of movement (§ 26-32).
2. The ECJ rejects the argument that the legislation at issue has only a random impact on a migrant worker's decision to join SALK. The possibility of exercising a freedom so fundamental as the freedom of movement cannot be limited by subjective considerations such as the reasons why a migrant worker chooses to make use of his freedom of movement within the EU. Any restriction on the free movement of goods, persons, services and capital, however minor, is prohibited (§ 33-35).
3. Even if the provincial law at issue introduces a "loyalty reward" for workers who spend their entire career with SALK (a disputed point), the obstacle which it entails is not such as to ensure achievement of that objective, given that all prior service with Salzburg province, and not only that with SALK, counts fully towards determining salary (§ 36-40).
4. The ECJ also rejects the argument that the provincial law in question creates administrative simplification and transparency (§ 41-44).

**Ruling (judgment)**

Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 [...] must be interpreted as precluding national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service.

**ECJ 12 December 2013, case C-267/12** *(Frédéric Hay - v - Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres)* **("Hay")**, French case (SEX DISCRIMINATION)

**Facts**

In 2007, Mr Hay concluded a civil solidarity pact ('PACS') with another man. A PACS is a contract entered into by two persons, of different sex or of the same sex, to organise their life together. It is often used in same-sex relationships because French law limits marriage to persons of different sex.
Following the execution of his PACS, Mr Hay applied to his employer for 10 days of special leave and for a marriage bonus equal (in his case) to ¼ of a month's salary. Had his partner been a woman, he would have been entitled to these benefits under the relevant collective agreement. His employer refused him these benefits because, under the terms of the collective agreement, they were only granted upon marriage.

**National proceedings**

Mr Hay brought an action before the *Conseil de prud' hommes de Saintes*. It denied his claim. The judgment was upheld on appeal, whereupon Mr Hay appealed to the *Cour de cassation*. It stayed the proceedings and asked the ECJ whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement applies that restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a PACS.

**ECJ's findings**

1. Although legislation on marital status falls within the competence of the Member States, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the grounds of sexual orientation. Thus, the directive is applicable to a situation such as that of Mr Hay (§ 26-29).
2. The existence of direct discrimination presupposes that the situations being weighed up are comparable. The comparability assessment must be carried out in a specific and concrete manner in the light of the benefit concerned. Applied to the present case, it must be noted that, although a PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and PACS, the latter was, at the time of the facts at issue, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties. Thus, as regards benefits such as marriage leave and marriage bonuses, persons of the same sex who cannot marry and therefore conclude a PACS are in a situation which is comparable to that of couples who marry (§ 30-37).
3. The fact that in 2011, the *Conseil constitutionel* held that married couples and couples in a PACS arrangement were not in a comparable situation for the purposes of a survivor's pension, does not rule out the comparability of married employees and homosexual employees in a PACS arrangement for the purposes of marriage leave and marriage bonuses. Similarly, the differences between marriage and the PACS noted by the Court of Appeal in the main proceedings, are irrelevant to the assessment of an employee's right to benefits such as those at issue (§ 38-39).
4. The fact that the difference in treatment at issue is based on the employees' marital status and not expressly on their sexual orientation does not make the discrimination indirect. It is direct discrimination, because only persons of different sexes may marry and homosexual employees are therefore unable to meet

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the condition required for obtaining the benefit claimed (§ 40-44).
5. Direct discrimination on the grounds of sexual orientation cannot be justified except on the grounds of public security, maintenance of public order and prevention of criminal offences, protection of health and protection of the rights and freedoms of others. None of these grounds have been relied on in the dispute at issue (§ 45-46).

**Ruling (judgment)**

Article 2(2)(a) of Council Directive 2000/78 [...] must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees upon marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry and given the objective of and the conditions relating to those benefits, the employee is in a comparable situation to an employee who marries.

**ECJ 12 December 2013, case C-361/12** *(Carmela Carratù - v - Poste Italine SpA)* **("Carratù")**, Italian case (FIXED-TERM WORK)

**Facts**

The Italian law transposing Directive 1999/70 provides that a fixed-term clause is ineffective unless it results from a document specifying one or more of the following reasons for not offering permanent employment: technical, production or organisational reasons or the replacement of another worker. Where a fixed-term contract has been concluded without any of these conditions having been satisfied, the court can convert the fixed-term contract into a permanent contract. In 2010 a new law came into force which, in Article 32(5), provides that, "In cases in which a fixed-term contract is converted, the court shall order the employer to compensate the employee by setting comprehensive compensation ranging from a minimum of 2.5 to a maximum of 12 months' actual overall pay, having regard to *[the employer's size, length of service, conduct of the parties and terms of employment]*". In other words, the penalty for unlawfully inserting a fixed-term clause in an employment contract is capped at 12 months' salary, regardless of the employee's actual loss compared to a situation in which he or she had had a permanent contract.

Ms Carratù was hired by Poste Italiane under a fixed term contract for the period 4 June - 15 September 2004. The contract stated that the use of a fixed-term clause was justified by the need to provide for the replacement of staff absent during the summer holiday period. After her contract had expired, Ms Carratù claimed that this fixed-term clause was too broadly worded, in that it failed to identify the employees to be replaced or to indicate the duration of or reasons for their absence.

**National proceedings**

Ms Carratù brought proceedings before the *Tribunale di Napoli* seeking (i) conversion of her fixed term contract into a permanent contract, (ii) reinstatement and (iii) payment of the remuneration which she had accrued in the meantime.

In a part-judgment of 25 January 2012 *[eight years later, Editor]*, the *Tribunale di Napoli* found that a permanent contract had indeed arisen. However, being unsure about the consequences, in particular in view of the cap provided in said Article 32(5), it referred seven questions to the ECJ.

**ECJ's findings**

1. The ECJ rejected a request by Ms Carratù to reopen the oral proceedings following the Advocate-General's opinion and rejected a submission by Poste Italiane requesting that it declare the questions inadmissible (§ 17-26).
2. A directive has direct effect against any body which, whatever its legal form, has been made responsible, pursuant to a measure adopted by a public authority, for providing a service in the public interest subject to the control of that public authority and, for that purpose, enjoys exceptional powers. Poste Italiane is such a body (§ 27-31).
3. Clause 4(1) of the Framework Agreement on fixed-term work annexed to Directive 1999/70 provides that, in respect of employment conditions, fixed-term workers shall not be treated less favourably than comparable permanent workers solely because they have a fixed-term contract, unless the different treatment is objectively justified. Does the concept of 'employment conditions' in this clause 4(1) cover the compensation to be paid on account of the unlawful insertion of a fixed-term clause into an employment contract? The ECJ, referring by analogy to *Bruno* (C-395/08), replied affirmatively (§ 32-38).
4. Italian law provides for a more favourable remedy for permanent employees who have been unlawfully dismissed than for fixed-term employees who have wrongfully been denied continued employment. The compensation that courts can order in such cases is not capped at 2.5 - 12 months' salary. Is this difference in treatment objectively justified? Clause 4 of the Framework Agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer from using fixed-term contracts to deny those workers rights which are recognised for permanent workers. However, as is clear from its wording, the principle of equal treatment does not apply to workers with a fixed-term contract and non-comparable permanent workers. Therefore, whether the persons concerned can be regarded as being in a comparable situation must be examined (§ 39-43).
5. The compensation paid in respect of the unlawful insertion of a fixed-term clause into an employment relationship is less than that paid in respect of the unlawful termination of a permanent contract. However, these situations are significantly different (§ 44-45).
6. The Member States may maintain or introduce provisions that are more favourable for fixed-term workers than those provided in the Framework Agreement (§ 46-47).

**Ruling (judgment)**

1. Clause 4(1) of the Framework agreement on fixed-term work, annexed to Council Directive 1999/70 [...] must be interpreted as meaning that it may be relied on directly against a State body such as Poste Italiane SpA.
2. Clause 4(1) of the framework agreement on fixed-term work must be interpreted as meaning that the concept of 'employment conditions' covers the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract.
3. While the Framework agreement does not preclude Member States from granting fixed-term workers more favourable treatment than that provided for by the Framework agreement, clause 4(1) of the Framework agreement must be interpreted as not requiring the compensation paid in respect of the unlawful insertion of a fixed-term clause into an employment relationship to be treated in the same way as that paid in respect of the unlawful termination of a

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permanent employment relationship.

## OPINIONS

**Opinion of Advocate-General Bot of 28 November 2013 in joined cases C-501 through 506/12, C-540/12 and C-541/12** *(Thomas Specht and others - v - Land Berlin and Rena Schmeel and Rolf Schuster - v - Federal Republic of Germany)* **("Specht")**, German case (AGE DISCRIMINATION)

### Facts

The plaintiffs in these cases were civil servants. Some were employed by the federal government of Germany, others by the Berlin provincial government. They complained that, under the pay scales that were in place until 1 August 2011, they earned less than they would have earned had the federal and provincial pay scales not been age discriminatory. 1 August 2011 was the date on which a new pay structure replaced the old structure. In the old structure, when a civil servant was hired, he was placed on a step in the relevant salary scale according to his age. Thereafter, his salary was increased periodically, mainly depending on service time. In the new structure, when a civil servant is hired, he is placed on a step in the relevant salary scale according to the experience required for his position. Thereafter, his salary is adjusted to reflect increased experience. The new rules contain transitional provisions under which civil servants transferring from the old to the new pay scales are classified in the new structure. Basically, this is done according to their salary on 31 July 2011.

### National proceedings

The plaintiffs claimed the balance between what they were paid and what they felt they should have been paid. The *Verwaltungsgericht* referred eight questions to the ECJ regarding the compatibility of the pay scale systems at issue with Directive 2000/78.

### Opinion

1. The first question is whether Article 3(1)() of Directive 2000/78 applies to civil servants and, if so, whether the directive is compatible with primary EU law. Article 3(1)(c) of the directive provides that "within the limits of the areas of competence conferred on the Community, this directive shall apply to all persons [...] in relation to [...] employment and working conditions, including dismissals and pay". The directive was adopted on the basis of Article 19 TFEU, which allows the Council to take appropriate action to combat discrimination within the limits of its powers. Those powers are described, inter alia, in Title X of the TFEU on social policy. The first Article in Title X is Article 151, which describes the EU's objectives in the field of social policy. Article 153 goes on to specify that the European Parliament and the Council may adopt directives. However, paragraph 5 of Article 153 states that "the provisions of this Article shall not apply to pay [...]". Does this exception mean that Directive 2000/78, inasmuch as it relates to civil servants' pay, is in breach of the TFEU? The Advocate-General replies in the negative, because the concepts of 'pay' in Directive 2000/78 and in Article 153(5) TFEU are different. The latter provision was designed to allow the Member States to determine the general level of pay in their jurisdiction without interference by the EU. Directive 2000/78, on the other hand, regulates the conditions under which employees are paid. Therefore, Article 3(1)(c) of the directive is valid and it applies to civil servants (§ 36-51).
2. The second and third questions are essentially whether Directive 2000/78 precludes a national pay scale system under which a civil servant's base salary upon hiring is determined on the basis of his age and, subsequently, increases with seniority. This system, without doubt, constitutes unequal treatment on the basis of age. The issue is whether it is objectively justified (§ 52-61).
3. The Advocate-General rejects the arguments put forward to justify age-dependent remuneration, such as the objectives of rewarding experience, of simplification and of making it attractive to work for the government (§ 62-76).
4. The sixth and seventh questions relate to the provisions with respect to the salaries of civil servants who were already employed at the time the old pay scale system was replaced by a new system in which salary is less dependent on age. For the determination of their salary in the new system, account is taken only of their previous salary. In its judgment in the *Hennings* and *Mai* case (C-297/10), the ECJ held that such a transitional position has the effect of continuing a situation whereby employees received less pay than comparators (§ 77-80).
5. Contrary to the German government's opinion, the age discrimination at issue in this case will not gradually disappear under the new pay scale system. This can be illustrated by an example in which two civil servants, one aged 20 and the other aged 30, are transferred from the former to the new pay scales. The civil servant aged 30 will be placed on a higher step on the pay scale and he will attain the highest step sooner than his younger colleague (§ 81-84).
6. The transitional provisions are not justified, given that the federal and provincial governments could have adopted less discriminatory rules, for example, guaranteeing civil servants their existing salary for as long as they have not yet achieved the experience required under the new rules for a salary increase. The argument that this would have entailed an enormous amount of administrative work is not sufficient to justify the continuing unequal treatment (§ 85-92).
7. The fourth and eighth questions concern the legal consequence of the old pay scale system and the transitional provisions being age discriminatory. The difficulty is that the referring court considers it to be impossible to apply the domestic law in a manner that is compatible with the Directive. Disapplying the discriminatory provisions would mean that the civil servants get no salary at all. Must the court 'level up', as the ECJ required the referring courts to do in the cases of *Terhoeve* (C-18/95) and *Landtová* (C-399/09)? In the present case that would mean adjusting the plaintiffs' salaries upwards retroactively (§ 93-99).
8. Contrary to previous cases, in the present case there are no homogenous groups of persons discriminated against and persons favoured. Nevertheless, it should be possible to apply the *Terhoeve/Landtová* doctrine. Otherwise, the plaintiffs would have to initiate new proceedings seeking compensation on the basis of the *Francovich* doctrine (C-6/90).
9. The fifth question regards the applicable time-bar rules, under which a civil servant who disagrees with his pay scale must file a complaint before the end of the existing accounting year (§ 109-121).

### Proposed reply

1. Article 3(1)(c) of Directive 2000/78 applies to the remuneration of civil servants.
2. The Directive precludes national law under which a civil servant's salary at the time of hiring depends mainly on his age and thereafter rises mainly according to seniority.
3. The Directive precludes transitional provisions according to which

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civil servants who transfer from the old to the new pay scale structure on 1 August 2011 are classed in the new structure on the basis of their last-earned salary and are subsequently given pay increases exclusively on the basis of their experience gained from that date.

4. The only way of rectifying a discriminatory pay structure such as that at issue is to assign the civil servants who have been discriminated against to the same step on their pay scale as an older civil servant with similar experience.
5. EU law does not preclude national rules under which a civil servant who wants to make a claim that is not based directly on the law must file his claim before the end of the existing accounting year provided (i) the conditions for filing a claim that is based on EU law are not less favourable than those for filing a claim based purely on domestic law and (ii) a time-bar rule does not render the exercise of rights under EU law ineffective or unduly difficult.

**Opinion of Advocate-General Bot of 5 December 2013 in case C-539/12** *(Z.J.R. Lock – v – British Gas Trading Ltd and others)* **("Lock")**, UK case, (PAID LEAVE)

**Facts**

Mr Lock was and is employed by British Gas as a Sales Consultant. His job is to sell British Gas's energy products. His remuneration consists of basic pay in the amount of £ 1,222 per month and commission, the amount of which depends on the number and type of sales he achieves. In 2011 the commission averaged £ 1,912 per month. In other words, the commission constituted over 60% of his remuneration. Commission is paid several weeks or months after it has been earned.

Lock was on paid annual leave from 19 December 2011 to 3 January 2012. In December 2011 he was paid his basic pay for that month and an amount of £ 2,350 in respect of commission earned in a previous period. Because he generated no sales during his leave, he was paid less commission in January/February 2012 than he would have been paid had he worked during his leave. He brought a claim for outstanding holiday pay in the period 19 December 2011 – 3 January 2012.

**National proceedings**

The Employment Tribunal in Leicester decided to stay the proceedings and to refer questions to the ECJ regarding the correct interpretation of Article 7 of Directive 2003/88. The doubts entertained by the Employment Tribunal as to the correct interpretation of Article 7 stemmed from a judgment by the Court of Appeal of 27 November 2002 in the *Evans – v – Malley* case, in which the court in a similar situation held that the employee was entitled to be paid only his basic pay in respect of his annual leave period.

**Opinion**

1. The holiday pay required by Article 7(1) of Directive 2003/88 is intended to enable the worker to take the leave to which he is entitled. However, Article 7 makes no specific reference to the remuneration he is entitled to during his annual leave. In *Williams* (C-155/10), the ECJ held that workers must receive their normal remuneration for the duration of their annual leave and that an allowance that is just sufficient to ensure that there is no serious risk that the worker will not take his leave will not satisfy the requirements of EU law (§ 13-20).
2. In *Williams*, the ECJ held that any inconvenient aspect linked intrinsically to the performance of the tasks a worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided that is included in the calculation of the worker's total remuneration, must be taken into account for the purpose of determining normal remuneration. Thus, the various allowances a worker may claim during his paid annual leave must not only be directly linked to the performance of his work but also have a certain degree of permanence. The assessment of the existence of an intrinsic link must be carried out on the basis of an average over a reference period that is judged to be representative (§ 21-29).
3. The commission in question is linked directly to Mr Lock's work. Although it fluctuates from month to month, it is permanent enough for it be regarded as forming part of his normal remuneration. Thus, there is an intrinsic link between the commission Mr Lock receives each month and the performance of his tasks under his contract of employment. The conclusion is that failure to take commission into account in the remuneration payable to a worker in respect of annual paid leave is capable of deterring him from exercising his right to such leave, which is contrary to the objective of Article 7 of Directive 2003/88. Such a deterrent is all the more likely to exist in a situation such as that at issue, in which commission represents an average of more than 60% of Mr Lock's remuneration (§ 30-34).
4. If Mr Lock, being deterred from exercising his right to leave, were to continue working, the commission received during the period in which he would otherwise have been on holiday, would in effect constitute an allowance in lieu of leave, something prohibited by EU law (§ 35).
5. British Gas's argument that Mr Lock did in fact receive commission during his paid leave is misleading. The fact that he stood to lose commission in the period directly after his holiday was a direct result of his having gone on holiday. That fact therefore acted as a deterrent, as if no commission were paid during the holiday period (§ 36-39).
6. British Gas stressed, first, that each worker is set an annual income target, based on predicted sales and, secondly, that the rate of commission paid to workers in respect of sales achieved already takes into account the fact that workers will not be able to generate commission during periods of paid annual leave. Neither of these arguments holds water. As for the first argument, setting an annual target is not equivalent to setting in advance a fixed-rate allowance. As for the second argument, the information available is not sufficient to show that a worker such as Mr Lock has received an increase in the rate of commission designed to cover his holiday pay (§ 40-43).
7. Moreover, in *Robinson-Steele* (C-131/04 and C-257/04), the ECJ held that Article 7 of Directive 93/104 (the predecessor of Directive 2003/88) precludes payment for minimum annual leave from being made in the form of extra salary ('rolled-up holiday pay'), rather than in the form of a payment in respect of a specific period during which the worker actually takes leave (§ 44-45).
8. For all these reasons, the answer to be given to the referring court's first question is that in a situation such as that of Mr Lock, Article 7 of Directive 2003/88 requires commission to be included in the basis for calculating the remuneration payable in respect of paid annual leave (§ 46).
9. It is for the referring tribunal to determine how to meet the objective of Article 7 of Directive 2003/88. To take into account the average amount of commission received over a representative period, 12 months for example, would appear to be an appropriate solution (§ 48).

**Proposed reply**

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In a situation such as that at issue in the main proceedings, in which the remuneration received by a worker comprises, on the one hand basic pay and, on the other commission, the amount of which is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's own work, Article 7 of Directive 2003/88 EC [...] requires such commission to be included in the basis for calculating the remuneration payable to that worker in respect of his paid annual leave.

It is for the referring tribunal to determine what method and rules are appropriate for meeting the objective laid down in Article 7 of Directive 2003/88.

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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).

28 February 2013, C-427/11 *(Kenny)*; work of equal value, role of statistics, justification (EELC 2013-1).

11 April 2013, C-401/11 *(Soukupová)* re different "normal retirement age" for men and women re rural development subsidy (EELC 2013-2).

12 September 2013, C-614/11 *(Kuso)*: in Directive 76/207, "dismissal" also covers non-renewal of fixed-term contract (EELC 2013-3).

19 September 2013, C-5/12 *(Montull)*: Spanish law on transferring right to maternity leave to child's father not in breach of EU law (EELC 2013-3).

12 December 2013, C-267/12 *(Hay)*: employee with civil solidarity pact entitled to same benefits as married employee (EELC 2013-4).

**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).

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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).

26 September 2013, C-476/11 *(Kristensen)*: employer's pension contributions may increase with age provided difference is proportionate and necessary (EELC 2013-3).

26 September 2013, C-546/11 *(Toftgaard)*: Danish law denying availability benefits solely because civil servant is able to receive pension incompatible with EU law (2013-3).

**4. Disability discrimination**

11 April 2013, C-335 and 337/11 *(Ring)*: definition of "disability"; working hours reduction can be accommodation (EELC 2013-2).

**5. 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).

6 December 2012 C-124/11 *(Dittrich)*: medical health subsidy covered by Directive 2000/78 (EELC 2013-1).

25 April 2013, C-81/12 *(ACCEPT)*: football club liable for former owner's homophobic remarks in interview; national law must be effective and dismissive (EELC 2013-2).

5 December 2013, C-514/12 *(Salzburger Landeskliniken)*: periods of service worked abroad must be taken into account for promotion purposes (EELC 2013-4).

**6. 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).

7 March 2013, C-393/11 *(AEEG)*: fixed-term service time for public authority must count towards determining seniority upon becoming civil servant (EELC 2013-2).

12 December 2013, C-361/12 *(Carratù)*: Framework Agreement covers compensation for unlawful fixed-term clause (EELC 2013-4).

**7. 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).

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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).

11 April 2013, C-290/12 *(Della Rocca)*: temporary agency work excluded from scope of Framework Agreement on part-time work (EELC 2013-2).

**8. 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).

20 June 2013, C-635/11 *(Commission - v- Netherlands)*: foreign-based employees of Dutch company resulting from cross-border merger must enjoy same participation rights as their Dutch colleagues (EELC 2013-3).

**9. 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).

21 February 2013, C-194/12 *(Maestre García)*: prohibition to reschedule leave on account of sickness incompatible with Directive 2003/88 (EELC 2013-1).

13 June 2013, C-415/12 *(Brandes)*: how to calculate leave accumulated during full-time employment following move to part-time (EELC 2013-2).

19 September 2013, C-579/12 *(Strack)*; carry-over period of 9 months insufficient, but 15 months is sufficient (EELC 2013-3).

**10. 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).

**11. 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 *(Pesla)*: 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).

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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).
19 December 2012, C-577/10 *(Commission - v - Belgium)*: notification requirement for foreign self-employed service providers incompatible with Article 56 TFEU (EELC 2013-1).

21 February 2013, C-282/11 *(Salgado González)*: Spanish method of calculating pension incompatible with Article 48 TFEU and Reg. 1408/71 (EELC 2013-3).

7 March 2013, C-127/11 *(Van den Booren)*: Reg. 1408/71 allows survivor's pension to be reduced by increase in old-age pension from other Member State (EELC 2013-2).

16 April 2013, C-202/11 *(Las)*: Article 45 TFEU precludes compulsory use of Dutch language for cross-border employment documents (EELC 2013-2).

4 July 2013, C-233/12 *(Gardella)*: for purposes of transferring pension capital, account must be taken of employment periods with an international organisation such as the EPO (EELC 2013-3).

**12. 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).

20 June 2013, C-7/12 *(Riežniece):* re dismissal after parental leave based on older assessment than employees who did not go on leave (EELC 2013-2).

**13. 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).

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18 April 2013, C-247/12 *(Mustafa)*: EU law does not require guarantees at every stage of insolvency proceedings (EELC 2013-3).

25 April 2013, C-398/11 *(Hogan)*: how far must Member State go to protect accrued pension entitlements following insolvency? (EELC 2013-2).

28 November 2013, C-309/12 *(Gomes Viana Novo)*: Member State may limit guarantee institution's payment obligation in time (EELC 2013-4).

**14. 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).

12 September 2013, C-64/12 *(Schlecker)*: national court may disregard law of country where work is habitually carried out if contract more closely connected with another county (EELC 2013-3).

**15. Fundamental Rights**

7 March 2013,C-128/12 *(Banco Portugues)*: ECJ lacks jurisdiction re reduction of salaries of public service employees (EELC 2013-2).

30 May 2013, C-342/12 *(Worten)*: employer may be obligated to make working time records immediately available (EELC 2013-4).

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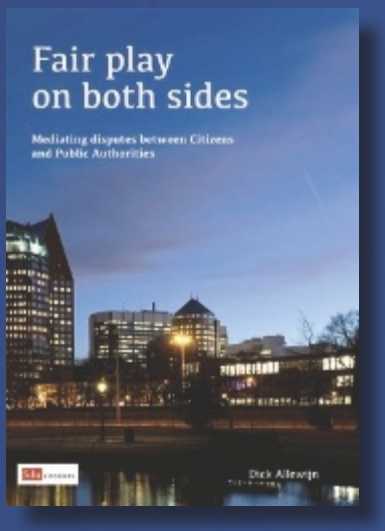
**About the author**
Dick Allewijn (1952) has spent most of his working life in administrative jurisdiction. Since 2000 he has presided as a part-time judge at the District Court of The Hague and has run his own practice as a registered mediator (outside the jurisdiction of the The Hague District Court). He provides mediation training at the Centre for Conflict Management and the Amsterdam ADR Institute and has published many works on administrative law, jurisdiction and mediation, and the relationship between the three. In 2011 he was awarded a PhD for a thesis entitled Tussen partijen is in geschil... de bestuursrechter als geschilbeslechter ("Regarding the dispute between the parties..., the administrative judge as a dispute settler"), which examines the role of the administrative judge in conflict resolution. He is also member of the Scheltema Commision (advisory commission for the statutory regulation of the general principles of administrative law).

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