REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
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Content

I. Editorial

We are very happy to present to you the first edition of the **HSI Report on European Labour and Social Security Law**. The Report provides conveniently arranged and concise quarterly information on current proceedings before the CJEU and the ECtHR, which are of interest from a labour and social security law perspective. It is an extract from the German-language '**HSI-Report zum Europäischen Arbeits- und Sozialrecht**', which was recently published in its new format in mid-May 2020 and which also includes political developments in the EU concerning labour and social law as well as in international labour law. The report is edited by *Dr. Johanna Wenckebach* (Scientific Director of the HSI), *Prof. Dr. Martin Risak* (University of Vienna, Austria) and *Dr. Daniel Hlava* (expert for European social law at the HSI).

With the great feedback from more than 1,300 subscribers and in order to facilitate discussions on European labour and social law in a wider circle beyond German-speaking labour lawyers we have decided to translate the annotated procedural overviews on the CJEU (II.) and the ECtHR (III.) into English and to publish them in a separate publication format. The reporting period of the first edition of the HSI Report refers to the first quarter of 2020.

In this edition, we would like to draw special attention to two decisions. The question of whether civil servants may be banned from striking arises in some member states. For example, a complaint procedure is currently pending before the ECtHR on the compatibility of the controversial German ban on civil servants' strikes with the ECHR. Against this background, it is important to note what the EU General Court (T-402/18 – *Aquino and Others v Parliament*) has ruled on the ban on strikes by civil servants, in this case the interpreters of the EU Parliament: The General Court concluded that such a ban would violate European fundamental rights simply because there was no clear legal basis for it. A comment by *Klaus Lörcher* on this ruling in German can be found here.

From the case law of the ECtHR, we would like to call attention to Decision No. 11608/15 – *Herbai v Hungary*. The judgment strengthens the right to freedom of expression in the employment relationship beyond the highly regarded recent judgments of the Court of Justice on whistleblowing and betrayal of secrets. A comment by *Karsten Jessolat*, also in German, can be found here.

We wish you an inspiring read and look forward to your feedback to hsi@boeckler.de. You are very welcome to disseminate the report further and to invite colleagues to subscribe for free to it.

The editors
Dr. Johanna Wenckebach, Prof. Dr. Martin Risak and Dr. Daniel Hlava

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II. Proceedings before the CJEU

Compiled and commented by

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1. Annual leave

Opinions

Opinion of Advocate General Hogan delivered on 29 January 2020 – C-762/18 and C-37/19 – *Varhoven kasatsionen sad na Republika Bulgaria und Iccrea Banca*

Law: Article 7 of Directive 2003/88/EC, Article 31(2) of the Charta of Fundamental Rights

Keywords: Entitlement to rest leave for the period between unlawful dismissal and re-employment – Compensation for annual leave not taken on termination of employment

Core statement: (1) An entitlement to paid annual leave arises for the period between the date of dismissal until the date of reinstatement after a successful legal action for wrongful dismissal.

(2) Employees are entitled to severance pay if they were unable to take their leave before termination of the employment relationship due to dismissal. Excepted from this are periods in which the worker was employed by another employer.

Note: From the perspective of Advocate General Hogan, the period between termination of employment and the final and conclusive decision in favour of a legal action for wrongful dismissal gives rise to a right to rest leave. This does not change if the employee does not work during this period and therefore does not need to take time off, since the employee is then not able to perform his or her duties for a reason that is unforeseeable and independent of his or her will (para. 47). In addition, since the protection of the Charta of Fundamental Rights includes the entitlement to holiday pay[1], the holiday entitlement accrued for this period must be compensated upon termination of the employment relationship. The only exception to this is periods during which the worker was employed by another employer.

The opinion of the Advocate General is in line with the previous case law of the CJEU. According to German law, the holiday entitlement also arises during the period of the proceedings for protection against dismissal, if the dismissal is invalid.[2] As the CJEU had clarified in the Max Planck ruling in 2019, the employer has the obligation to request the employees to take the leave in due time before the leave expires. In any event, if the employee fails to do so, the holiday entitlement does not expire even during a longer period of legal proceedings and must be compensated in the event of an affirmative final judgment.

[1] So CJEU (Gr. Chamber) of 6 November 2018 – C-569/16 – *Bauer, Willmeroth*, para. 38 et seq.

[2] Federal Labour Court (Bundesarbeitsgericht, hereafter abbreviated BAG) 14 May 2013 – 9 AZR 760/11; on various constellations in dismissal protection proceedings: Litzig, in: Kittner/Zwanziger/Deinert, Arbeitsrecht, 8th ed. 2015, § 49 margin no. 153 et seq.

Opinion of Advocate General Kokott deliverd on 26 March 2020 – C-119/19 P and C-126/19 P – *Kommission/ Carreras Sequeros u.a.*

Law: Article 6 of Annex X Civil Service Statute, Article 31(2) of the Charta of Fundamental Rights

Keywords: Civil Service Law – New special provisions on the granting of leave for officials of the European Union serving in a non-member country – Plea of illegality

Core statement: The ruling of the European Court of Justice, according to which the reduction of the holiday entitlement of EU employees is unlawful, is to be reversed.

Note: In its ruling of 4 December 2018, *Carreras Sequeros and others v Commission*, the EU Court of First Instance found the reduction of the annual leave entitlement for EU staff working abroad to be illegal. The court argued that the significant reduction of annual leave from 42 to 24 days within three years was contrary to the principle of promoting improved living and working conditions for the persons concerned. The reduction of the holiday entitlement was neither compensated by other privileges of the persons concerned nor was any other justification apparent. The appeals lodged by the Commission, the Council and Parliament before the CJEU are directed against this decision.

The Advocate General *Kokott* proposes that the Court of Justice sets aside the contested judgment for the reason that the Court of First Instance failed to take account of relevant factors when reviewing the application of the principle of proportionality. In particular, the legislature is not accused of a manifest error of assessment in weighing the burden of the new regulation against its advantages.

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2. Definition of employee

Opinions

Opinion of Advocate General Kokott delivered on 23 January 2020 – C-658/18 – *UX (Statut des juges de paix italiens)*

Law: Article 7 of Directive 2003/88/EC (working time), Clause 4 of the Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Italian Magistrates' Court – Status of employees – Right to paid leave – Comparability with professional judges

Core statement: (1) An Italian 'Giudice di pace' (Magistrates' Court) is a court of a Member State with jurisdiction to hear actions under Article 267 TFEU.

(2) An Italian magistrate is a worker entitled to parental leave within the meaning of Article 7 of the Directive 2003/88/EC if he/she carries out a significant amount of judicial work, cannot decide for himself/herself which proceedings he/she will deal with and is subject to the obligations of professional judges under national law.

(3) Judges must not be held personally liable for the application of overriding Union law on the grounds of a manifest breach of inapplicable national law.

Note: The main issue in the proceedings is whether an Italian magistrate of the 'Giudice di pace' (Magistrates' Court) is to be regarded as a worker within the meaning of Article 7 of Directive 2003/88/EC and is therefore entitled to paid annual leave.

The Magistrates' Court is the first instance in the Italian court system for minor civil and criminal cases. Its purpose is to relieve the burden of ordinary jurisdiction. The magistrates are fully qualified lawyers who formally work on a voluntary basis.[3] In the original proceedings, the plaintiff magistrate had already been active as such for 16 years and last completed around 1800 proceedings within one year, which she conducted on two days a week. She asserted a claim for payment of holiday pay.

The Advocate General *Kokott* initially dealt in detail with the question of whether another Magistrates' Court, to which the judge turned with her claim, is a court with the right of referral within the meaning of Article 267 TFEU, which she answered in the affirmative. In view of the scope and duration of her activity as a magistrate, her remuneration could also not be regarded as mere expense allowance, but rather as a remuneration for her activity that would secure her livelihood (para. 79 et seq.). Furthermore, disciplinary measures similar to those imposed on professional judges could be imposed on magistrates (para. 84). Insofar as she cannot decide for herself which proceedings she handles, she is therefore to be regarded as a worker within the meaning of Article 7 of the Directive. In this respect, she is also entitled to a minimum of four weeks' paid annual leave.

The Advocate General then dealt with the question of whether the magistrate can claim leave beyond the minimum period of four weeks, as is the case with professional judges. Since magistrates are regularly appointed for a period of four years, the Advocate General examined this on the basis of the prohibition of discrimination for fixed-term employees in Section 4 of the framework agreement on fixed-term employment contracts. Since the working conditions were comparable to those of professional judges (para. 106), magistrates were entitled to remuneration for leave, which was determined on the basis of the usual remuneration of magistrates.

The Advocate General thus expresses once more that the national designation of an activity as 'honorary office' does not necessarily mean that it is not actually an employment relationship within the meaning of Union law (here, the Directive 2003/88/EC).

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3. Equal treatment

Decisions

Judgment of the Court (Seventh Chamber) of 27 February 2020 – C-773/18 bis C-775/18 – *Land Sachsen-Anhalt*

Law: Articles 2, 6 and 9 of Directive 2000/78/EC

Keywords: Age discrimination – Remuneration of officials – Back pay based on an earlier discriminatory classification – Limitation period for claims for compensation – Principles of equivalence and effectiveness

Core statement: 1. Back-payment of remuneration may be calculated on the basis of an age-discriminatory pay scale which has ceased to apply, provided that a large number of officials are affected, that there is no other (valid) reference system and that the difference in treatment is not perpetuated indefinitely.

[3] Cf. more information about this institution: http://www.regione.taa.it/Giudicidipace/istituzione.aspx.

2. In accordance with the principle of effectiveness, a limitation period for compensation may not start to run from the date of a judgment of the Court of Justice establishing the discriminatory nature of a similar provision, if there is a risk that the persons concerned will not be able to recognise within the limitation period that they have been discriminated against, or the extent to which they have been discriminated against. This may in particular be the case if there is disagreement in the Member State concerned as to whether this judgment is applicable to the (similar) measure in question.

Note: The grouping of officials in a pay system must not be discriminatory on the basis of age. This statement and the legal consequences resulting from it have already been ruled out by the European Court of Justice in several judgments. Most recently, its case law has increasingly focused on Austrian pay systems. The present case concerns three preliminary rulings by the Administrative Court of Halle on the amount of back pay for civil servants and judges of the State of Saxony-Anhalt (Germany) for a transitional period starting in 2008. The back-payment was made by two state laws that were intended to implement the Federal Constitutional Court's case law, according to which the previous civil servant's salary was underestimated according to the standards of the constitution. The back payment was calculated as a percentage of the remuneration earned in the respective year in accordance with the old version of the Federal Remuneration Act (Bundesbesoldungsgesetz – BBesG). However, until March 2011, the BBesG (old version) provided that the classification was based on age.

The CJEU found that the subsequent payment on the basis of the old version of the BBesG resulted in new unequal treatment (paras. 38 et seq.). Nevertheless, no 'upward adjustment' could be considered as a legal consequence in such a way that the back-pay was to be calculated according to the highest step of the respective grade. At the time, there was no valid (non age-discriminatory) reference system, since all civil servants were potentially affected by the discrimination (paras. 49 et seq.).[4] The temporary reference to the BBesG was therefore approved by the CJEU.

Section 15(2) of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) provides for a claim for damages in the event of discrimination suffered in order to implement Article 17 of Directive 2000/78/EC. Pursuant to Section 15(4) AGG, this claim must be asserted within two months of the time 'when the employee become aware of the discrimination', unless otherwise provided for in the collective agreement. This two-month preclusive period from the time when the employee becomes aware of the discrimination was already considered to be in conformity with Union law in earlier rulings of the Court of Justice.[5] However, it was questionable in the present case when the plaintiffs in the main proceedings were aware that their pay system was age-discriminatory. In the ***Hennigs and Mai*** cases, the CJEU found in September 2011 that the age-based classification of public sector employees violates Union law.[6] The state of Saxony-Anhalt took this ruling as a starting point for the commencement of the time limit under Section 15(4) AGG. At that time, however, the Land, the Federal Ministry of the Interior and the majority of the German administrative courts still took the view that this CJEU judgment concerned only salaried employees and was not transferable to civil servants (see paras. 82 et seq.). The plaintiffs in the main proceedings, however, had neither taken note of the ***Hennigs and Mai*** judgment in a timely manner, nor had they recognised its significance for their own remuneration system. Only in the later Specht and Others decision was it clarified by the CJEU that the remuneration of civil servants was not to be based on age either.

[4] With reference to CJEU of 19 June 2014 – C-501/12 u.a. – ***Specht and others***, paras. 81, 96.

[5] On the length of the period see CJEU of 8 July 2010 – C-246/09 – ***Bulicke***; for the start of the period from knowledge see CJEU of 7 November 2019 – C-280/18 – ***Flausch and others***, para. 55.

[6] Judgment of 8 September 2011 – C-297/10 and C-298/10.

Especially the latter findings of the CJEU are directly relevant for the interpretation of Section 15(4) AGG. In the literature and in the case law of the Federal Labour Court, knowledge of a disadvantage is understood as 'knowledge of the facts justifying the claim'.[7] However, grossly negligent ignorance is not sufficient to set the time limit in motion.[8] In the case of an uncertain and dubious legal situation, the preclusive period begins 'at the point in time from which the filing of an action is reasonable for the person concerned, i.e. the action is sufficiently promising, even if not without risk (...). Accordingly, the objective clarification of the legal situation by the highest court decisions is decisive in these cases'[9]. This legal view has now been confirmed by the CJEU. If a legal situation has not yet been sufficiently clarified or the question of age discrimination is afflicted with so many doubts that it cannot be assumed that the persons concerned are aware of it, the preclusive period of Section 15(4) AGG does not start.

New pending cases

Reference for a preliminary ruling from the Sąd Okręgowy w Krakowie (Poland) lodged on 2 January 2019 – C-16/19 – *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej u.a.*

Law: Article 2 of Directive 2000/78/EC

Keywords: Discrimination on grounds of disability – Differentiation within the group of people with disabilities – Reference date for benefits

Note: In the present case, employees of a public hospital for whom a degree of disability (Grad der Behinderung – GdB) has been recognised after a certain key date (1 September 2014) are paid a monthly supplement to their remuneration by their employer. In the case of the plaintiff in the initial proceedings, a GdB was already recognised before this cut-off date, which is why he did not benefit from the additional payment. It is now questionable whether this differentiation within the group of people with disabilities constitutes discrimination prohibited by Article 2 of Directive 2000/78/EC.

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (Spain) lodged on 20 November 2019 – C-843/19 – *INSS*

Law: Article 208(1)(c) of the Ley General de la Seguridad Social (General Law on Social Security) of 2015

Keywords: Entitlement to a voluntary early retirement pension – Method of calculation – Indirect discrimination against women insured under the general scheme

Reference for a preliminary ruling from the Varhoven administrative sad (Bulgaria) lodged on 12 November 2019 – C-824/19 – *Komisia za zashtita ot diskriminatsia*

Law: Article 5(2) Convention on the Rights of Persons with Disabilities, Article 2 and Article 4(1) of Directive 2000/78/EC

Keywords: Participation of a visually impaired person as a juror in criminal proceedings – Concrete disability of the permanently blind person as a characteristic which constitutes an essential and determining requirement for the activity of the juror, the existence of which

[7] Federal Labour Court (BAG) of 22 January 2009 – 8 AZR 906/07, para. 85 with futher evidence; *Zwanziger* in: Deinert/Heuschmid/Zwanziger (ed.), HdB Arbeitsrecht, § 93 Gleichbehandlung para. 181a.
[8] Federal Labour Court (BAG) of 15 March 2012 – 8 AZR 160/11, para. 60 with futher evidence.
[9] Federal Administrative Court (BVerwG) of 30 October 2014 – 2 C 6/13, para. 51 with further evidence from jurisdiction.

justifies unequal treatment and which does not constitute discrimination on grounds of the characteristic 'disability'

Reference for a preliminary ruling from the Riigikohus (Estonia) lodged on 29 October 2019 – C-795/19 – *Tartu vangla*

Law: Article 2(2) in conjunction with Article 4(1) of Directive 2000/78/EC

Keywords: Deficit of the hearing below the prescribed standard as an absolute obstacle to working as a prison officer – Exclusion of corrective aids in assessing compliance with the hearing requirements

Note: The question is whether a person with a hearing impairment may be excluded from working as a prison officer if his or her residual hearing is below a certain limit. The question referred for a preliminary ruling must also be assessed against the background of the UN Convention on the Rights of Persons with Disabilities, which prohibits discrimination of any kind on the grounds of disability in Article 27(1)(a), 'including selection, recruitment and employment conditions, continued employment, promotion and safe and healthy working conditions'. Article 27(1)(i) CRPD also calls for the provision of reasonable accommodation in the workplace. However, according to the question submitted, Estonian law does not include the use of hearing aids that can improve hearing or other reasonable accommodation in the assessment of whether a hearing impaired person can work as a prison officer.

Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 12 December 2019 – C-914/19 – *Ministero della Giustizia*

Law: Article 6 of Directive 2000/78/EC, Article 21 Charter of Fundamental Rights, Article 10 TFEU

Keywords: Discrimination on grounds of age – Access to the profession – Age limit for access to the profession of notary

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4. Fixed-term work

Decisions

Judgment of the Court (Second Chamber) of 22 January 2020 – C-177/18 – *Baldonedo Martín*

Law: Clauses 4 and 5 of the Framework agreement on fixed-term work (implemented by Directive 1999/70/EC), Article 51 Charter of Fundamental Rights

Keywords: Non-discrimination – Compensation on termination of employment – Applicability of the Charter of Fundamental Rights

Core statement: (1) It does not constitute a prohibited discrimination if neither interim civil servants employed under a fixed-term contract nor career civil servants employed under a contract of indefinite duration are entitled, on termination of their service for objective reasons, to compensation such as that to which contract staff employed under a contract of indefinite duration are entitled.

(2) Nor shall there be any discrimination in relation to contract staff employed under a fixed-term contract who receive compensation at the end of their contract.

Note: Under Spanish law, employees can claim compensation on termination of their employment, the amount of which is based on length of service and the salary received to date. Civil servants, on the other hand, do not receive any compensation upon termination of their employment, which the plaintiff had opposed.

The CJEU does not see any unlawful discrimination in comparison with permanent contract employees. Among other things, it is a factual reason for the unequal treatment that in the case of fixed-term contracts, the termination of the employment relationship is foreseeable from the outset, whereas the termination of an employment relationship of indefinite duration is not foreseeable for employees.[10] For the comparison groups of fixed-term civil servants and fixed-term employees, the principle of non-discrimination, Clause 4(1) of the Framework Agreement, is not applicable, because it concerns exclusively the relationship between fixed-term and permanent employees, but not the comparison of different groups of fixed-term employees.[11]

The Court also considers that it does not need to examine the equality requirements laid down in the Charta, as Spain does not implement EU law with regard to compensation for dismissal, as required by Article 51(1) for the application of the Charter. The compensation for dismissal of Spanish origin does not serve to combat the abuse of successive fixed-term employment relationships within the meaning of Article 5 of the Framework Agreement. In this context, the CJEU refers to the judgment in *de Diego Porras II*.[12] However, this is not convincing, since the CJEU has established here that the compensation for dismissal in itself is not sufficient to prevent abuse. The Spanish regulation on compensation for dismissal explicitly refers to fixed-term employment relationships. If the CJEU denies the implementation of the Framework Agreement, it places a worryingly restrictive emphasis on the application of the Charta's fundamental rights relating to employment, which also leads to results that are difficult to predict. It remains to be seen whether the decision in this respect remains an individual case.

Judgment of the Court (Second Chamber) of 19 March 2020 – C-103/18 und C-429/18 – *Sánchez Ruiz und Fernández Álvarez u.a.*

Law: Clause 5 of the Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: Chain limitation of employment relationships – Abuse control – Staffing procedures – Permanent staffing needs

Core statement: If employees are permanently assigned to a representative office without a selection procedure but with their employment relationship being renewed annually, then these are ‘successive fixed-term employment relationships’. The protection provided by the Framework Agreement on fixed-term work applies even if the employee has himself or herself agreed to successive fixed-term contracts. The prohibition on the abuse of fixed-term employment contracts is neither unconditional nor sufficiently precise and cannot therefore be relied on before a national court in a dispute between a civil servant and his or her employer.

[10] See in particular CJEU of 21 November 2018 – C-619/17 – *de Diego Porras*, Rn. 71 f., explained in HSI-Newsletter 4/2018, under IV.3.
[11] CJEU of 21 November 2018 – C-245/17 – *Viejobueno Ibáñez*, cf. HSI-Newsletter 4/2018, under IV.3.
[12] CJEU of 21 November 2018 – C-619/17 – *de Diego Porras*, paras. 94 et seq.

New pending cases

Reference for a preliminary ruling from the Tribunale di Vicenza (Italy) lodged on 15 November 2019 – C-834/19 – *Ministero della Giustizia und Repubblica italiana*

Law: Clause 2 of the Framework Agreement on fixed-term work (implemented by Directive 1999/70/EC), Clause 2 of the Framework Agreement on part-time work (implemented by Directive 1997/81/EC)

Keywords: Honorary judges – Exclusion from the concept of 'worker' in national law – Concept of 'part-time worker' – Concept of 'fixed-term worker'

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5. Insolvency law

New pending cases

Reference for a preliminary ruling from the Okresný súd Košice I (Slovakia) lodged on 30 October 2019 – C-799/19 – *Sociálna poisťovňa*

Law: Articles 2 and 3 of Directive 2008/94/EC

Keywords: Non-material damage resulting from the death of an employee caused by an accident at work classified as 'employees' unfulfilled claims arising from employment contracts' – Claim declared irrecoverable in enforcement proceedings for the employer's insolvency

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6. Minimum fees for self-employed persons

Decisions

Order of the Court (Ninth Chamber) of 6 February 2020 – C-137/18 – *hapeg dresden*

Law: Article 15 of Directive 2006/123/EC

Keywords: National minimum rates for the fees of engineers and architects

Core statement: The legal prohibition on agreeing with architects or engineers on fees below the minimum rates of the scale of fees for architects and engineers (Honorarordnung für Architekten und Ingenieure – HOAI) infringes the freedom to provide services.

Note: The decision fully follows the ruling of the CJEU in the infringement proceedings between the *Commission v Germany* of 4 July 2019.[13] In this case, the Court of Justice ruled that the German Fee Structure for Architects and Engineers (HOAI), which sets both minimum and maximum rates for the remuneration of architects and engineers in Section 7(2)-(4), violates the freedom to provide services. Admittedly, the Court of Justice recognised the assurance of the quality of planning services and consumer protection as overriding

[13] C-377/17; see note in HSI-Newsletter 3/2019 under IV.1.

reasons in the public interest which could be used to justify the HOAI.[14] However, the system of HOAI does not achieve these objectives in a coherent and systematic manner, since planning services can also be provided by service providers who do not demonstrate professional competence.[15] This did not, however, lead to any statement regarding the permissibility of regulating minimum fees for the self-employed in general.[16]

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7. Posting of workers

New pending cases

Reference for a preliminary ruling from the Hoge Raad der Nederlande (Netherlands), lodged on 21 December 2018 – C-815/18 – *Federatie Nederlandse Vakbeweging*

Law: Article 1, Article 2(1), Article 3(1) and (8) of Directive 96/71/EC (posting of workers), Article 56 TFEU

Keywords: Applicability of the Posting of Workers Directive to drivers engaged in the international carriage of goods by road – Concept of 'collective agreements declared universally applicable'

Note: A referral procedure of foreseeable broad effect: The FNV (Dutch Federation of Trade Unions) claims that a Dutch collective agreement also applies to the employment relationships of drivers employed by German and Hungarian group companies and whose employment contracts are subject to the respective national law. The application of the Netherlands collective agreement rules is at issue, since the collective agreement contains a clause according to which the terms and conditions of employment contained therein must also be applied to employees employed by subcontractors if, in the (hypothetical) application of Netherlands law, this would result from Directive 96/71/EC. The employer relies, inter alia, on the fact that Dutch law is not applicable and that the collective agreement clause is contrary to the freedom to provide services, Article 56 TFEU.

The application of the Directive had recently become relevant in the *Dobersberger*[17] case, in which the CJEU 'found' the criterion of a sufficient connection to the territory of the state concerned, which is why the host state's regulations for train crews would not apply. In the present case, the applicant trade union association relies on the continued application of the legislation of the State of origin, Article 3(7) of the directive establishing a principle of favourability between the working conditions required by the statute on employment contracts and the minimum working conditions of the host State.

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[14] CJEU of 4 July 2019 – C-377/17 – *Kommission / Deutschland*, paras. 75, 77.
[15] CJEU of 4 July 2019 – C-377/17 – *Kommission / Deutschland*, paras. 90, 92.
[16] For a regulatory proposal on this, see *HSI*, Entwurf eines Gesetzes über Mindestentgeltbedingungen für Selbstständige ohne Arbeitnehmer (Solo-Selbstständige), HSI-Working-Paper No. 12, 2nd edition.
[17] CJEU of 19 December 2019 – C-16/18 – *Dobersberger*, cf. HSI-Newsletter 4/2019, under IV.6.

8. Professional law

Decisions

Judgment of the Court (Fourth Chamber) of 27 February 2020 – C-384/18 – *Kommission/ Belgien (Comptables)*

Law: Article 25(1) and (2) of Directive 2006/123/EC, Article 49 TFEU (freedom to provide services)

Keywords: Restrictions on multidisciplinary activities of accountants

Core statement: The Belgian legislation prohibiting the simultaneous exercise of activities as accountants together with activities as insurance brokers or in the banking or financial services sector is contrary to the freedom to provide services.

New pending cases

Reference for a preliminary ruling from the Sąd Apelacyjny w Krakowie (Poland) lodged on 18 October 2019 – C-765/19 – *R.B.P.*

Law: Article 19(1) subpara. 2, Article 2, Article 4(3) and Article 6(3) TEU, Article 47 of the Charta of Fundamental Rights, Article 267 TFEU

Keywords: Judicial independence – Appointment by a non-independent and impartial body

Note: The case is one of several preliminary rulings on judicial reform and the employment relationships of judges in Poland currently pending before the CJEU or recently decided. Most recently, for example, the Grand Chamber of the Court of Justice decided that the new Disciplinary Chamber of the Polish Supreme Court must be independent in order to be able to rule on disputes relating to the retirement of judges of the Supreme Court.[18] Previously, the CJEU had ruled that lowering the retirement age of the judges of the Polish Supreme Court was contrary to Article 19(1) subpara. 2 TEU.[19]

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9. Public procurement

Decisions

Judgment of the Court (Second Chamber) of 30 January 2020 – C-395/18 – *Tim*

Law: Article 18(2) and Article 57(4) of Directive 2014/24/EU

Keywords: public procurement – subcontractor's breach of environmental, social and labour law obligations – automatic exclusion of the economic operator from the award procedure

Core statement: Economic operators can also be excluded from the award procedure if a reason for exclusion is established in relation to a subcontractor. However, the provisions of

[18] CJEU of 19 November 2019 – related cases C-585/18, C-624/18 and C-625/18 – *A.K.*, cf. HSI-Newsletter 4/2019 under IV.1.

[19] CJEU of 24 June 2019 – C-619/18 – *Kommission / Polen*; CJEU of 5 November 2019 – C-192/18 – *Kommission / Polen*.

the Public Procurement Directive in conjunction with the principle of proportionality preclude a national rule according to which such exclusion must be automatic.

Note: Non-economic criteria in the award of public contracts are important instruments to ensure that environmental and social standards are respected in economic life. In order to curb widespread circumvention, such standards are often extended to subcontractors. The Advocate General had argued that exclusion from the award procedure was possible if it was included in the tender conditions. The CJEU has restricted the possibilities for this.

The reasoning of the judgment starts promisingly: Article 57(4) lit. a), Article 18(2) of the Public Procurement Directive allows the exclusion of economic operators from the award procedure in order to ensure compliance with environmental, social and labour law standards. Accordingly, the contracting authority can be authorised and even obliged to exclude candidates from the award of contracts who can be proven to have infringed such regulations. In its ruling, the CJEU clarifies that this can also include infringements committed by subcontractors.

However, the Court does not consider an automatic exclusion of such economic operators from the award procedure to be permissible. It derives the restriction from the principle of proportionality. The Court also refers to Article 57(6) of the Public Procurement Directive, according to which economic operators must be able to prove that they can be regarded as reliable despite a ground for exclusion. An ‘automatic‘ exclusion in the sense that there is no such right to be heard is incompatible with this.

The public procurement laws in Germany often contain an attribution of legal infringements by subcontractors. Under German law, however, contract award blocks are usually only imposed on the basis of gross violations, whereby the authority has an intended discretionary power (‘intendiertes Ermessen‘), i.e. in exceptional cases admission to the award procedure is possible (cf. e.g. Section 21 Federal Law on the Posting of Workers, Section 21 Federal Illegal Employment Act, Section 19(1) Federal Minimum Wage Act, Section 6(1) Tender and Public Procurement Act Berlin, Section 12(2) Public Procurement Act Hessen).

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10. Right to strike for civil servants

Decisions

Judgment of the General Court of 29 January 2020 – T-402/18 – *Aquino and Others v Parliament*

Law: Article 28 Charta of Fundamental Rights, Article 55 Staff Regulations of Officials of the European Communities

Keywords: Strike by EU officials – European Parliament interpreters

Core statement: The right to strike for civil servants of the EU institutions cannot be restricted without a clear legal basis.

Note: The General Court had ruled in the first instance on a strike ban for EU officials, in this case the interpreter of the EU Parliament. The court concluded that such a ban already

violated European fundamental rights because there was no clear legal basis. For more details on the decision and its significance, see the German-language comment by *Lörcher*.[20]

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11. Social security

Decisions

Judgment of the Court (Tenth Chamber) of 22 January 2020 – C-32/19 – *Pensionsversicherungsanstalt (Cessation d'activité après l'âge du départ à la retraite)*

Law: Article 17(1)(a) of Decision 2004/38/EC

Keywords: Right of permanent residency – Reaching retirement age at the time of withdrawal from the labour force

Core statement: In order to acquire the right of permanent residence before the end of a continuous five-year period of residence, an employee must have exercised a gainful activity in the Member State for at least the previous twelve months and have resided there continuously for at least three years. These conditions also apply to workers who, at the time of retirement, have reached the age laid down by the legislation of the Member State for claiming an old-age pension.

Judgment of the Court (Eighth Chamber) of 23 January 2020 – C-29/19 – *Bundesagentur für Arbeit*

Law: Article 62(1) and (2) of Regulation (EC) No 883/2004

Keywords: Calculation of unemployment benefit – Notional assessment pay – Assessment period for migrant workers – Remuneration paid after termination of employment

Core statement: (1) In determining whether pay was received on at least 150 days within the assessment period under Section 150 of the German Social Security Code III (Section 152 SGB III), the period during which pay was received during employment in another Member State or Switzerland shall also be taken into account.

(2) If the previous remuneration is taken as a basis for calculating the amount of unemployment benefit, it may not be disregarded for the reason that it was not accounted for and paid until after the person concerned left their employment.

Note: The judgment is of particular importance for migrant workers who have become unemployed shortly after giving up their employment and apply for unemployment benefit I. The amount of the unemployment benefit is generally calculated on the basis of the salary that was earned within one year prior to unemployment (assessment period). This period is extended to two years pursuant to Section 150(3) sentence 1 no. 1 SGB III if otherwise at least 150 days of entitlement to remuneration do not occur. If no 150 days of entitlement to remuneration are achieved within the two-year assessment period either, a notional remuneration which is based on the vocational qualification of the unemployed person is taken as the basis for the assessment remuneration instead (Section 152 SGB III).

[20] *Lörcher*, HSI-Report 1/2020, pp. 4 et seq.

In the main proceedings, an employee resident in Germany worked in Switzerland for many years until October 2014. In November 2014, he first pursued an occupation in Germany, which ended after less than one month. The remuneration to which he was entitled for that work was not paid until December 2014. The Federal Employment Agency calculated his entitlement to unemployment benefit on the basis of a notional assessment wage in accordance with Section 152 SGB III, since he had not acquired 150 days of entitlement to remuneration in Germany. In addition, the remuneration for employment in Germany, which was only paid retroactively in December, was not taken into account, since according to Section 150(1) SGB III, only 'the payroll periods accounted for when the respective employment relationship is terminated' are taken into account. Subsequent payments are not taken into account. This requirement serves to simplify administration and to ensure that unemployment benefits are calculated and paid quickly.[21]

The European Court of Justice, which was asked for a preliminary ruling by the German Federal Social Court[22], had to deal here in particular with the interpretation of Article 62 (1) and (2) of Regulation (EC) 883/2004. It came to the conclusion that the period of employment in Switzerland, with which an agreement on the free movement of persons exists, must be taken into account when assessing whether 150 days with entitlement to remuneration were fulfilled within the assessment period. Thus, a fictitious assessment of unemployment benefit pursuant to Section 152 SGB III is not applicable in this case. By contrast, Article 62(2) of Regulation (EC) 883/2004 allows the amount of the claim to be calculated on the basis of the remuneration received in Germany (para. 32). This means that a notional assessment cannot be considered even if the employment in Germany only comprised a few days. This has not been uncontroversial up to now, but it is in line with the case law of the Federal Social Court[23], which is confirmed by the present ruling.

The second question referred for a preliminary ruling concerns the situation in which the remuneration earned in Germany (in this case in November 2014) had not yet been accounted for before the employee left employment and could therefore not be taken into account under Section 150(1) SGB III. It is questionable whether in this case a notional assessment under Section 152 SGB III is permissible. According to the German language version of Article 62(1) of Regulation (EC) 883/2004, only the remuneration earned 'during' the last employment was to be taken into account. In the opinion of the CJEU, however, this was neither in accordance with the other language versions of the provision nor with its objective (paras. 47, 49). The freedom of movement of workers would be impaired if the right under Article 62(1) of Regulation (EC) 883/2004 were made dependent on the pay being accounted for and paid on the last working day at the latest (para. 50).

Judgment of the Court (Eighth Chamber) of 5 March 2020 – C-135/19 – *Pensionsversicherungsanstalt (Prestation pour la rééducation)*

Law: Articles 3 and 11 of Regulation (EC) No 883/2004

Keywords: Scope of the coordination regulation – Sickness, invalidity and unemployment benefits – Abandonment of employment in the Member State of origin and transfer of residence to another Member State – Application for rehabilitation allowance

Core statement: The home Member State may refuse to grant a person the benefit of a rehabilitation allowance where that person has transferred his or her residence to another

[21] *Mutschler* in: Knickrehm/Kreikebohm/Waltermann (ed.), Kommentar zum Sozialrecht, SGB I, § 150 para. 5.

[22] Order of 23 October 2018 – B 11 AL 9/17 R.

[23] Cf. Federal Social Court (Bundessozialgericht, BSG) of 17 March 2015 – B 11 AL 12/14 R, para. 23; *Rolfs* in: Gagel (ed.), SGB III, § 152 para. 11a; *Mutschler* in: Knickrehm/Kreikebohm/Waltermann (ed.), Kommentar zum Sozialrecht, SGB I, § 150 para. 7a with further proofs.

Member State and has completed the majority of his or her insurance periods there, since he or she will then be subject to the legislation of the Member State of residence rather than that of the home Member State.

Judgment of the Court (Eighth Chamber) of 12 March 2020 – C-769/18 – *Caisse d'assurance retraite und de la santé au travail d'Alsace-Moselle*

Law: Article 5(b) of Regulation (EC) No 883/2004

Keywords: Increase in the rate of old-age pension – Taking into account an allowance paid for bringing up a disabled child in another Member State – Principle of equal treatment

Core statement: (1) the integration allowance for mentally handicapped children and young people (Section 35a Book Eight of the German Social Security Code – SGB VIII) does not constitute a benefit within the meaning of Article 3 of Regulation (EC) No 883/2004 and therefore does not fall within the material scope of that Regulation.

(2) aid for the upbringing of disabled children (Article L. 541-1 of the French Social Security Code) and the integration allowance for mentally disabled children and adolescents (in Section 35a SGB VIII) are not similar benefits within the meaning of Article 5(a) of Regulation (EC) No 883/2004.

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Social No 41 de Madrid (Spain) lodged on 20 November 2019 – C-841/19 – *Fogasa*

Law: Article 2(1) of Directive 2006/54/EC, Article 4(1) of Directive 79/7/EEC (social security)

Keywords: Spanish Wages Guarantee Fund (FOGASA, Fondo de Garantía Salarial) – Ratio of part-time employment to comparable full-time employment – Double taking into account of reduced pay in the calculation of the extent of FOGASA's liability – Scheme which particularly penalises female workers compared with male workers

Reference for a preliminary ruling from Augstākā tiesa (Senāts) (Latvia) lodged on 20 March 2019 – C-243/19 – *Veselības ministrija*

Law: Article 20 of Regulation (EC) No 883/2004, Article 21(1) Charta of Fundamental Rights, Article 8(5) of Directive 2011/24/EU (patient mobility)

Keywords: Refusal to authorise hospital treatment – Method of treatment used – Religious conviction contrary to the law

Reference for a preliminary ruling from the Corte suprema di cassazione (Italy) lodged on 11 April 2019 – C-302/19 – *Istituto Nazionale della Previdenza Sociale (Prestations familiales pour les titulaires d'un permis unique)*

Law: Article 12(1)(e) of Directive 2011/98/EU (work and residence)

Keywords: Must the members of the worker's family who hold a single permit and are nationals of a non-member country be excluded from the calculation of the family allowance if they reside in the non-member country of origin?

Reference for a preliminary ruling from the Administrativen sad Varna (Bulgaria) lodged on 22 October 2019 – C-784/19 – *TEAM POWER EUROPE*

Law: Article 14(2) of Regulation (EC) 987/2009

Keywords: Determination of the place of activity of temporary employment agencies – This requires them to provide a significant proportion of their temporary employment services to users established in the same Member State

Reference for a preliminary ruling from the Cour de cassation (France) lodged on 11 December 2019 – C-906/19 – *Ministère public*

Law: Article 3(a), Article 19(2) of Regulation (EC) No 561/2006 (on social legislation relating to road transport), Article 15(2) and (7) of Regulation (EEC) No 3821/85, Regulation (EU) No 165/2014 (on tachographs in road transport)

Keywords: Scope of application of the Road Traffic Social Regulations – Sanctioning of companies and/or drivers – Permission to deviate from the documentation obligation

Reference for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 2 December 2019 – C-879/19 – *Format*

Law: Regulation (EEC) 1408/71 (amended by Regulation (EC) No 1992/2006)

Keywords: Concept of a person normally employed in the territory of two or more Member States – Applicability of the regulation to a person who, under a single contract of employment and for a period covered by that contract, performs work in the territory of at least two Member States for immediately successive periods of several months

Reference for a preliminary ruling from the Tribunal de grande instance de Rennes (France) lodged on 21 January 2020 – C-27/20 – *CAF*

Law: Articles 20 and 45 TFEU, Article 4 of Regulation (EC) No 883/2004, Article 7 of Regulation (EU) No 492/2011

Keywords: Calculation of family benefits – Decrease in the recipient's income following a substantial increase in another Member State on his or her return to the State of origin – Comparison with resident persons who have not exercised their right to freedom of movement

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12. State aid law

Decisions

Judgment of the Court (Ninth Chamber) of 27 February 2020 – C-79/19 P – *Litauen / Kommission*

Law: Article 33m(1) of Regulation (EC) No 1257/1999 (support for rural development)

Keywords: Appeal – Use of funds excluded from EU financing – Early retirement aid

Core statement: The Court of First Instance was entitled to consider that early retirement aid was granted to Lithuanian farmers who, although registered in the milk quota database, had, for example, only one cow, so that they could not be considered to have income from agricultural activity.

Note: In the judgment, the Court confirms a Commission decision imposing a flat-rate financial correction on the Republic of Lithuania for 'early retirement payments'. The Commission had justified the decision on the grounds that the Republic of Lithuania had failed to carry out appropriate checks on compliance with the obligation for farmers to exercise an agricultural activity before receiving early retirement aid. The CJEU followed this decision.

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13. Transfer of business

Decisions

Judgment of the Court (Fourth Chamber) of 27 February 2020 – C-298/18 – *Grafe und Pohle*

Law: Article 1(1) of Directive 2001/23/EC

Keywords: Operation of bus lines – Takeover of the workforce – No takeover of operating resources

Core statement: A transfer of an undertaking can also occur when an activity is taken over, the performance of which requires significant operating resources, if no operating resources but significant parts of the workforce are taken over and the previously exercised activity is continued without interruption.

Note: In this case, which originated in Germany (reference for a preliminary ruling from the Cottbus Labour Court), the CJEU had to decide whether it was sufficient for the assumption of a transfer of an undertaking in the case of an activity involving the use of operating resources (local public bus transport service) if only the workforce was transferred, but not extensive operating resources (in this case the buses).[24] In the case of the takeover in question, strict tendering requirements made it virtually impossible for the transferee to take over the aging buses of the previous operator. However, it took over substantial parts of the bus drivers working for the previous operator.

In an earlier ruling[25], the CJEU had ruled that bus companies are businesses involving operating resources and denied a transfer of undertakings due to the lack of a takeover of the buses. Now, however, within the framework of an overall assessment, the CJEU took into account that the transferee would provide essentially the same bus transport services as its predecessor and would rely on the experienced bus drivers, who were indispensable for smooth operations and were a scarce resource, especially in rural regions (paras. 37 et

[24] As regards the request of the Advocate General, see the note in HSI-Newsletter 3/2019, under IV.4.
[25] CJEU of 25 January 2001 – C-172/99 – *Liikenne*.

seq.).[26] By taking over the drivers, the CJEU saw the identity of the transferred unit preserved and therefore affirmed a transfer of operations.

Judgment of the Court (Fourth Chamber) of 26 March 2020 – C-344/18 – *ISS Facility* Services

Law: Article 3(1), Article 4 of Directive 2001/23/EC

Keywords: Public contract for cleaning services – Transfer of business in the case of activities in establishments which are transferred to different transferees

Core statement: If, prior to the transfer of an undertaking, an employee works in different undertakings which are then transferred to different purchasers, the contract of employment is transferred proportionally to each of the transferees. If such a split proves impossible or if the rights of the employee are affected, it must be assumed under Article 4(2) of Directive 2001/23/EC that any termination has been effected by the transferee.

Note: In that case, a branch manager was responsible for various businesses before the transfer of the business took place. The subject of the proceedings was the question, which has not yet been decided, of the consequences of the simultaneous sale of the businesses, in which the employee works, to different transferees. Do employment relationships arise proportionately to all purchasers or does the employment contract pass to one of the transferees in its entirety?

The CJEU decided in favour of the splitting of the employment relationship, which was rather unfavourable for employees and followed the Advocate General in the result and in large parts of the reasoning.[27] According to which criteria the extent of the work to be performed for the various new employers was determined could be determined by the member state law. In this respect, it would seem obvious to orientate oneself to the periods of employment prior to the transfer of the undertaking.

It is also for the national court to determine whether the division disadvantages the employee or whether the division is impossible. If the employment relationship is terminated for that reason, the termination must be regarded as having been brought about by the employer in accordance with Article 4(2) of Directive 2001/23/EC. The CJEU thus assumes that the deterioration in working conditions does not change the split in the employment relationship, but that employees would be treated preferentially if they terminated one or both employment relationships after the transfer of the undertaking.[28]

The Court obviously has in mind that in several Member States, dismissal by the employer results in the payment of severance pay. Such a compensation claim by law does not exist in Germany.[29] Here, the validity of the employer's notice of termination is generally governed by the German Dismissal Protection Act (Kündigungsschutzgesetz – KSchG), the application of which to a notice of termination by an employee motivated by deteriorating working conditions as a result of a transfer of an undertaking does not appear to be very appropriate. However, it may be inferred from Article 4(1) of the Directive that employees may not suffer any disadvantages from the split-up and may not be dismissed, in particular due to circumstances connected with the split-up of their employment relationship (see para. 36). Accordingly, it is not to be regarded as a breach of obligations under the employment contract if employees can not start to work for one employer because they have to work for

[26] Cf. on the requirement for an overall assessment *Krause*, in: Schlachter/Heinig (ed.), Europäisches Arbeits- und Sozialrecht, § 7 para. 41; *Winter*, in: Franzen/Gallner/Oetker (ed.), Kommentar zum europäischen Arbeitsrecht, RL 2001/23/EG, Art. 1 paras. 71, 82 f.

[27] Critical of the conclusions HSI-Newsletter 4/2019, IV.5.

[28] Cf. CJEU of 27 November 2008 – C-396/07 – *Juuri*.

[29] In detail *Winter*, in: Franzen/Gallner/Oetker (ed.), EAS, Art. 4 RL 2001/23/EG, paras. 13 et seq.

the other employer at the same time. Furthermore, the activity for the different employers does not constitute a possibly prohibited competitive activity.

Opinions

Opinion of Advocate General Tanchev delivered on 5 March 2020 – C-674/18 und C-645/18 – *TMD Friction*

Law: Article 5 of Directive 2001/23/EC, Article 8 of Directive 2008/94/EC (insolvency)

Keywords: Occupational pensions – Insolvency – Transfer to the transferee of liability for the supplementary pension scheme for employees of an undertaking transferred by an insolvent transferor

Core statement: Equivalent protection in the context of insolvency proceedings within the meaning of Article 5(2)(a) of Directive 2001/23/EC requires that the pension benefits in question are legally binding, i.e. that they can be claimed before the courts. A reduction of the occupational pension scheme due to the insolvency of the former employer is obviously disproportionate if the employee receives less than half of the resulting benefits or lives below the risk of poverty threshold determined by Eurostat as a result of the reduction.

Note: Under Article 5(2)(a) of Directive 2001/23/EC, the transferee is not required, contrary to the transfer of rights and obligations ordered by Article 3(1) of the Directive on the transfer of businesses, to be liable for supplementary pension benefits based on periods of employment prior to the opening of insolvency proceedings in respect of the assets of the transferor. The prerequisite for this is an equivalent protection of the employees' claims.

Under German law, the 'Pensionssicherungsverein' is the institution responsible for insolvency protection of company pension benefits in the event of the insolvency of the former employer. For various reasons, the benefits of the Pensionssicherungsverein in the event of insolvency may be considerably lower than the pension entitlements, which the employees would have received from the transferor. For various reasons, the benefits of the Pensionssicherungsverein in the event of insolvency may be considerably lower than the pension entitlements, which the employees would have received from the transferor. The German Federal Labor Court has referred various questions to the CJEU as to whether the German legal situation is compatible with Union law.

According to Article 8 of Directive 2008/94/EC, the Member States must take the necessary measures to protect, inter alia, the vested rights of employees to old-age benefits, including benefits from supplementary occupational pension schemes in the event of insolvency. In the Advocate General's view, this provision must be observed if the Member State makes use of the option in Article 5(2)(a) of Directive 2001/23/EC not to make the transferee liable for the pension scheme. In the Advocate General's view, the substitute benefits must therefore be legally binding and amount to at least half of the resulting benefits. In addition, – in accordance with the case law of the CJEU since the *Robin* judgment[30] – the reduction must not result in the employee living below the poverty risk threshold.

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[30] CJEU of 25 January 2007 – C-278/05 – *Robin*.

14. Working time

Opinions

Opinion of Advocate General Pitruzzella delivered on 13 February 2020 – C-107/19 – *Dopravní podnik hl. m. Prahy*

Law: Article 2 of Directive 2003/88/EC

Keywords: Concept of 'working time' – Rest period during which a worker is obliged to be at the disposal of his or her employer in order to depart on an assignment within two minutes – Obligation to comply with the legal assessments of a higher court which are incompatible with Union law – Primacy of Union law

Core statement: (1) Rest breaks, during which workers must be able to set off on an assignment within two minutes if necessary, are working time. The occasional and unpredictable nature or frequency of duty journeys during this rest period does not affect this legal qualification.

(2) A national court shall not be bound by the legal assessment of a higher court if the assessment is not in accordance with Union law.

Note: This procedure fits into the casuistry of the legal qualification of on-call time.[31] The plaintiff is employed as a firefighter with Dopravní podnik (Transport Company of the City of Prague). During his 30-minute break, he had to be ready for action within two minutes. However, he was only compensated for his breaks as working time if they were actually interrupted by an operation. The plaintiff objected to this.

The Advocate General stated in his opinion that the plaintiff was not able to organise his breaks at his discretion and to devote himself to his personal and social interests because of the necessity to be ready for action within two minutes. Rather, he is always available to the defendant during his breaks, as he is on permanent alert and is obliged to follow the instructions of his employer.[32] Nor was the plaintiff replaced by another employee during his breaks (para. 39). For this reason, his break times were to be assessed as working time. Nor did it preclude the fact that these breaks were only accidental and unforeseeable, so that they could not be regarded as an ordinary part of the exercise of professional obligations, since the legal qualification should not be made dependent on the fluctuations to which such a chance event is subject, since this would lead to considerable legal uncertainty (para. 40).

If the CJEU follows the conclusions of the Advocate General, this would be a further step towards the elimination of legal grey areas in the delimitation of working time and rest periods, towards a comprehensive protection of employees. A decision of the CJEU in this directive would once again increase the urgency of adapting German working time law to Directive 2003/88/EC.[33]

[31] Cf. e.g. CJEU of 21 February 2018 – C-518/15 – *Matzak*.

[32] Cf. CJEU of 10 September 2015 – C-266/14 – *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 36.

[33] *Ulber* in: Preis/Sagan (ed.), Europäisches Arbeitsrecht, paras. 7.132 et seq.

New pending cases

Reference for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 10 October 2019 – C-742/19 – *Ministrstvo za obrambo*

Law: Article 2 of Directive 2003/88/EC

Keywords: Scope of application of the Directive 2003/88/EC to defence personnel or military personnel on guard duty in peacetime – On-call duty or periods when military personnel are on guard duty

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III. Proceedings before the ECtHR

Compiled and commented by

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1. Data protection

New pending cases (notified to the respective government)

No. 26968/16 – *Florindo De Almeida Vasconcelos Gramaxo / Portugal* (Third Section), lodged on 9 May 2016 – communicated on 20 January 2020

Law: Article 8 ECHR (Right to respect for private and family life); Article 6 ECHR (Right to a fair trial)

Keywords: Termination of employment for conduct-related reasons – Evaluation of data from a navigation device

Note: The complaint concerns the plaintiff's dismissal for conduct on the basis of information obtained through the GPS navigation system installed in his company car, which was provided by the employer. The Court will have to examine whether the plaintiff has been informed that the data obtained via the navigation device may be used[34], whether the national authorities have complied with their obligations under Article 8 ECHR to guarantee privacy[35], whether the use of the evidence obtained via the navigation device respected the plaintiff's right to a fair trial[36] and whether the principle of legal certainty under Article 6(1) ECHR has been respected in view of the fact that other national courts have given different decisions in comparable cases. [37]

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2. Freedom of association

Decisions

Judgment (Second Section) of 14 January 2020 – No. 76061/14 – *Karaoglu Atik et al. / Turkey*

Law: Article 11 ECHR (Freedom of assembly and association)

Keywords: Condemnation of demonstrators who have committed acts of violence against the forces of law and order protecting Parliament following the end of an authorised peaceful

[34] ECtHR 5 September 2017 – No. 61496/08 – *Bărbulescu / Rumänien*.
[35] ECtHR 17 October 2019 – No. 1874/13, 8567/13 – *López Ribalda u. a. / Spanien*; ECtHR 5 September 2017 – No. 61496/08 – *Bărbulescu / Rumänien*.
[36] ECtHR 17 October 2019 – No. 1874/13, 8567/13 – *López Ribalda u. a. / Spanien*.
[37] ECtHR 29 November 2016 – No. 76943/11 – *Lupeni Griechisch-Katholische Gemeinde u. a. / Rumänien*; ECtHR 20 October 2011 – No. 13279/05 – *Nejdet Şahin und Perihan Şahin / Türkei*.

demonstration – Reprehensible conduct – Imposition of a mild (financial) penalty – Court decisions based on a proper appraisal of the facts and proper and sufficient reasons

Core statement: If individual participants in an authorised peaceful demonstration commit acts of violence and thereby disrupt the lawful activities of others, such disruptions, which go beyond the exercise of freedom of assembly, can justify as 'reprehensible acts' a restriction of the right under Article 11 ECHR through appropriate sanctions.

Note: The plaintiffs are members of the Turkish teachers' union 'TRNC'. On 28 October 2009, they took part in a demonstration organised by 27 trade unions in order to demand the repeal of a new immigration law. The demonstration took place under conditions imposed by the authorities, which included blocking the road leading to the parliament. In front of the parliament building, the police had formed a security cordon to prevent access to the building for participants in the demonstration. The plaintiffs forcibly penetrated the security cordon and thus gained access to the Parliament building. Criminal proceedings were initiated against the plaintiffs for violently obstructing police work and they were sentenced to fines of between €2000 and €4000. The Supreme Court upheld the judgments of the lower courts. The plaintiffs complain that the court decisions infringe their right to freedom of assembly.

Referring to its previous case-law on Article 11 ECHR, the Court of Justice first of all states that the provision only protects the right to freedom of 'peaceful assembly'. It does not cover demonstrations whose organisers and participants have violent intentions.[38] Even if the plaintiffs committed acts of violence against the law enforcement authorities at the end of the authorised peaceful demonstration, even though the organisers of the event had expressly not called for violence, the demonstration fell within the scope of Article 11 ECHR, since public demonstrations can always be at risk of events beyond the control of the organisers. Consequently, the Court found an interference with the plaintiffs' right to freedom of assembly. This interference is, however, prescribed by law, since national laws explicitly allow the imposition of conditions for the organisation of public demonstrations in order to maintain security and order and to prevent criminal offences. The offence of assault on police officers in the exercise of their duties is regulated by the national criminal code. The intervention in the fundamental right was also necessary in a democratic society, as it served to ensure the safety of the members of parliament and employees working in the parliament building. The sentencing of the plaintiffs to a fine also appears to be proportionate, since on the one hand their conduct, particularly after the end of the peaceful demonstration, can be described as 'reprehensible'[39], but on the other hand they were not sentenced to imprisonment but to a milder (monetary) penalty. Accordingly, the Court does not find a violation of Article 11 ECHR.

New pending cases (notified to the respective government)

No. 31876/15 – *Tučs / Latvia* (Fifth Section), lodged on 20 June 2015 – communicated on 13 January 2020

Law: Article 6 ECHR (right to a fair trial); Article 11 ECHR (freedom of assembly and association); Article 14 ECHR (Prohibition of discrimination)

Keywords: Termination of employment contract – Transfer of employees to an economically solid part of the company – Discrimination against trade union members

Note: The company where the plaintiff was employed transferred all employees of a subsidiary to the parent company, with the exception of the plaintiff and one other employee,

[38] ECtHR 19 January 2016 – No. 17526/10 – *Gülcü / Turkey*; ECtHR 4 October 2016 – No. 2653/13, 60980/14 – *Yaroslav Belousov / Russia*.

[39] ECtHR 15 October 2015 – No. 37553/05 – *Kudrevičius u. a. / Lithuania*.

who are both union members. After approximately one year, both employees were informed that the subsidiary would be liquidated and their employment terminated. An action brought by the plaintiff against the termination was unsuccessful before the national courts. In his complaint, he complains that, in addition to the violation of the right to a fair trial in accordance with Article 6 ECHR, he also violated the freedom of assembly and association guaranteed by Article 11 ECHR and the prohibition of discrimination in Article 14 ECHR, since in the plaintiff's view the measure was intended exclusively to remove union members from the company.

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3. Freedom of expression

Decisions

Judgment (Fourth Section) of 5 November 2019 – No. 11608/15 – *Herbai / Ungarn*

Law: Article 10 ECHR (Freedom of expression)

Keywords: Publicly expressed opinion of an employee – Relation to the employer

Core statement: (1) The right to freedom of expression guaranteed by Article 10 ECHR protects in particular the critical statements made by an employee in the context of a public discourse about the employer, if these are not motivated by the discovery of misconduct by the employer.

(2) The admissible scope of the restriction of freedom of expression in the employment relationship must, when examining proportionality, take due account of the nature of the statements, the motives of the employee, the damage that may have been caused to the employer as a result, and the severity of the sanctions imposed by the employer.

Note: The decision concerns the right to freedom of expression in the employment relationship beyond whistleblowing and betrayal of secrets. For a detailed discussion of this decision, see the commentary by *Jessolat*.[40]

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4. Non-discrimination

New pending cases (notified to the respective government)

No. 4086/18 – *Oleynik / Russia* (Third Section), lodged on 27 December 2017 – communicated on 5 February 2020

Law: Article 14 ECHR (Prohibition of discrimination); Article 8 ECHR (Right to respect for private and family life)

Keywords: Application for an advertised job – rejection on the grounds of sexual orientation

[40] *Jessolat*, HSI-Report 1/2020, pp. 10 et seq.

Notes: The plaintiff was invited to an interview with a private foundation for the support of educational programmes on the basis of his application for an advertised post. He was informed that 'traditional views' would be maintained and that homosexual applicants would not be recruited. When asked whether the plaintiff was homosexual, he replied that he was, and the interview was closed and he was informed that recruitment was not an option. The plaintiff subsequently brought an action, alleging that he had been refused employment on discriminatory grounds. The District Court dismissed the complaint on the grounds that an unlawful act could not be established. Appeals lodged against this decision were unsuccessful. Pursuant to Article 14 ECHR in conjunction with Article 8 ECHR, the plaintiff asserts that his refusal to offer him employment on the grounds of his sexual orientation is discriminatory.

No. 7732/19 – *Hercezi / Croatia* (First Section), lodged on 30 January 2019 – communicated on 27 February 2020

Law: Article 14 ECHR (Prohibition of discrimination); Article 1 Protocol No. 12 (General prohibition of discrimination)

Keywords: Termination of employment after an accident at work – Entitlement to severance pay in accordance with the collective agreement – Discrimination against statutory severance payment entitlement

Note: The plaintiff suffered an accident at work, which led to a total loss of earning capacity and entitled him to an invalidity pension. The employment relationship ended by operation of law when the pension insurance institution determined that he was fully disabled. According to the relevant provisions of the collective agreement, which applied to his employer, the latter paid the plaintiff a severance payment of approximately € 1,100. According to the relevant Croatian labour legislation, employees who suffer accidents at work and who are permanently incapacitated after having been treated are entitled to a severance payment of at least twice the amount paid to the plaintiff. Accordingly, the plaintiff sued his employer for payment of the difference to the severance pay to which he was legally entitled. The national courts dismissed the action on the grounds that, under the law, a claim to severance pay is only available to workers who have suffered a partial loss of their capacity to work and who cannot be offered another job because of their physical limitations. Referring to Article 14 ECHR and Article 1 and Additional Protocol No. 12, the plaintiff alleges discrimination on the grounds of disability and claims that the national courts have discriminated against him in comparison to workers with a lesser degree of health impairment.

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5. Procedural law

Decisions

Judgment (Second Section) of 18 February 2020 – No. 73579/17, 14620/18 – *Černius und Rinkevičius / Lithuania*

Law: Article 6 ECHR (Right to a fair trial)

Keywords: Refusal by national courts to reimburse the procedural costs of setting aside fines incurred in successful litigation – Pecuniary loss resulting from procedural costs, which

significantly exceed the success of the case – Obligation for national courts to examine the proportionality of the fine – Legal costs not excessive

Core statement: The right of access to justice is infringed when national courts, in the event of a successful judgment, refuse to reimburse the costs of proceedings irrespective of the amount.

Note: The appellants claim reimbursement of the costs of representation by a lawyer, which were incurred in proceedings in which they obtained a judicial decision averting a fine for alleged breaches of obligations under the employment contract. They were employed as supervisory officers in a private security company. They were accused of failing to publicly display the workers' work plans, which was a violation of national labour laws and was punishable by a fine. In the context of legal disputes, however, in which they were represented by a lawyer, the decisions on the payment of a fine were overturned. The lawyer appointed for this purpose charged the plaintiffs for the costs of his work. The authority rejected the claim for these costs on the grounds that administrative action was not unlawful. The actions brought against this decision were unsuccessful.

The ECtHR emphasises first of all that the right of access to justice under Article 6(1) ECHR is not absolute and may be subject to limitations which are at the discretion of the State but which must be compatible with the ECHR.[41] In view of the fact that the ECHR is intended to guarantee practical and effective rights, access to court must not be prevented by the fact that, after a trial, persons seeking justice are in a worse economic situation than before.[42] This is precisely the case, however, when the burden associated with the conduct of proceedings is greater than the success achieved, i.e. the costs of proceedings exceed the economic success of a case many times over. Since in the cases of the plaintiffs the originally imposed fine was € 500, and the lawyer acting for the plaintiff charged cost notes of about €1,000 each for the conduct of the proceedings, the decision of the national courts failed to take the necessary proportionality into account. The Court of Justice ruled that there had been a violation of Article 6(1) ECHR and awarded the plaintiffs compensation of €1,000 each.

Judgment (First Section) of 30 January 2020 – No. 29483/11 – *Cicero and others / Italy*

Law: Article 6(1) ECHR (Right to a fair trial); Article 1 Protokol No. 1 (Protection of Property)

Keywords: Application of new, retroactive law to pending proceedings – Reduction of the remuneration of plaintiffs by application of the new retroactive law – Excessive and disproportionate burden

Core statement: While there is nothing to prevent the national legislature from enacting retroactive legislation, such retroactive effect may however not influence ongoing legal proceedings pending against the State.

Notes: The case concerns the question of whether laws with retroactive effect are applicable to pending proceedings before national courts. The plaintiffs are five employees of local government authorities. Their remuneration consisted of a basic salary and other additional salary components. As of 1 January 2000, the plaintiffs were transferred to jobs in the Ministry of Education, Universities and Research. Under the remuneration system in force at the Ministry, they received a salary calculated solely on the basis of the basic salary, but increased gradually over the years, taking into account the length of service. The salary paid up to December 31 1999 was converted into a notional period of service, with the result that the seniority achieved with the local government authorities was not fully taken into account.

[41] ECHR 21 February 1975 – No. 4451/70 – *Golder / UK*.
[42] ECHR 5 April 2018 – No. 40160/12 – *Zubac / Croatia*.

As a result, the plaintiffs brought an action for payment of compensation based on their full years of service. During the course of the dispute, a national law was enacted which implemented the Ministry's practice of only partially taking into account, for the purpose of calculating basic salary, the period of service completed before the start of employment with other authorities. Referring to this change in the law, the national courts rejected the plaintiffs' claims.

According to the ECtHR, a national legislature is not precluded from regulating, by means of retroactive provisions, the rights deriving from the applicable laws. Nevertheless, the principle of the rule of law and the concept of a fair trial enshrined in Article 6 ECHR precludes – except in compelling reasons of public interest – the legislature from interfering in the administration of justice in order to influence the judicial decision on a dispute.[43] Respect for the rule of law and the concept of fair trial require that all the grounds invoked to justify such measures be treated with the greatest possible care.[44] In the light of these principles, it is consistent with the settled case-law of the Court of Justice that a State which, in the absence of an overriding reason relating to the general interest, intervenes in a decisive manner in proceedings in order to ensure that the outcome in proceedings in which it is itself involved is favourable to it is in breach of Article 6(1) ECHR. Accordingly, the national government has thus infringed Article 6(1) ECHR by enacting retroactive legislation, which influenced the outcome of the plaintiffs' litigation. This interference also had the effect of unduly and disproportionately reducing the income of the plaintiffs, so that an infringement of Article 1 Protocol No. 1 was also established. The Court awarded the plaintiffs compensation in varying amounts.

Judgment (Fifth Section) of 4 February 2020 – No. 13813/06 – *Shibayeva / Russia*

Law: Article 6 ECHR (Recht auf ein faires Verfahren); Article 1 Zusatzprotokoll Nr. 1 (Schutz des Eigentums)

Keywords: Right to reinstatement after termination of employment – Delay in enforcement – Objection of loss of job in enforcement proceedings

Core statement: If in enforcement proceedings to enforce a claim for reinstatement the employer objects to the loss of the job, this is irrelevant if the time required to create a new job is not explained.

Note: The plaintiff was employed as a veterinarian by a state veterinary authority. After she had filed a complaint against the termination of her employment relationship, the competent municipal court, in its judgment of 20 October 2005, found the termination to be invalid and ordered the employer to reinstate the plaintiff. Since the employer refused to reinstate the plaintiff, she enforced the execution of the judgment of the City Court. The plaintiff was subsequently reinstated on 19 December 2006. The remuneration in arrears for the period from the termination of the employment relationship until her reinstatement was paid to the plaintiff on the basis of a further court decision. In her complaint, she claims that her right to a fair trial and her right to protection of property were adversely affected by the delayed enforcement of her reinstatement.

The Court points out that, when considering the appropriateness of delaying enforcement proceedings, account must be taken of the complexity of the enforcement procedure, the conduct of the parties involved and the importance of the procedure for the debtor.[45] With

[43] ECHR 28 October 1999 – No. 24846/94, 34165/96 to 34173/96 – *Zielinski und Pradal und Gonzalez u. a. / France*; ECHR 24 June 2014 – No. 48357/07, 52677/07, 52687/07 and 52701/07 – *Azienda Agricola Silverfunghi S.A.S. u. a. / Italy*.
[44] ECHR 31 May 2011 – No. 52851/08, 53727/08, 54486/08 and 56001/08 – *Maggio u. a. / Italy*.
[45] ECtHR 15 February 2007 – No. 22000/03 – *Raylyan / Russia*, with furher references.

regard to labour disputes, the enforcement authorities must act with particular urgency.[46] When enforcing a claim for reinstatement after ineffective termination, it is important to note that enforcing this claim may cause organizational problems for the debtor if he has meanwhile occupied the job elsewhere and has to restructure the business as a result of the creditor's obligation to continue employment. This can mean that enforcement proceedings can take longer than, for example, in the case of the fulfilment of a payment obligation. In this case, national law protecting the plaintiff provides for the possibility of payment of the remuneration by the employer for the period of non-enforcement. Even if the plaintiff's job had ceased to exist in the present proceedings after her dismissal, the employer did not argue before the national courts that the creation of a new job required a time expenditure, which would have justified the delay in enforcement. There was therefore no reason for the Court of Justice to depart from its settled case-law according to which the delay in enforcement of judgments of national courts for a period of more than one year is unreasonable and constitutes an infringement of the right to a fair trial. Consequently, the Court of Justice has also ruled in this case that there has been a violation of Article 6(1) of the ECHR and awarded the plaintiff compensation of € 900.

(In)admissibility decisions

Decision (Fourth Section) of 11 February 2020 – No. 54640/13 – *Munteanu / Romania*

Law: Article 6 ECHR (Right to a fair trial); Article 13 ECHR (Right to an effective remedy)

Keywords: Re-opening of a case before the national court following a decision of the ECtHR – Implementation of the decisions of the ECtHR by national law – Examination of the conditions by national courts

Core statement: The reopening of proceedings before national courts following an ECtHR decision is governed by national rules, the conditions for which are to be examined by the national courts.

Note: In 2001, the plaintiff had pleaded before national courts the illegality of his dismissal from the employment relationship. The action was unsuccessful at all instances. A complaint before the ECtHR led to a finding of an infringement of Article 6 ECHR and of Article 1 Protocol No. 1 and to an order for payment of compensation for the pecuniary and non-pecuniary loss. Subsequently, the plaintiff applied to the national Supreme Court for a retrial of his case with a view to reinstatement. The Supreme Court dismissed the application as inadmissible, since the conditions required under national law, namely the serious consequences of the infringement established by the ECtHR, would not have existed in the case of the plaintiff. A resolution of the Committee of Ministers of the Council of Europe of 6 December 2012 stated that no further individual measures were considered necessary in the case of the plaintiff concerning the decision of the ECtHR. In his renewed complaint, the plaintiff alleged a violation of Article 6(1) ECHR, since national courts refused to reopen the proceedings. Furthermore, he complained, pursuant to Article 13 ECHR, that he had no effective domestic remedy available to him, which would enable him to obtain an adequate remedy against the non-enforcement of the original judgment of the ECtHR.

Referring to its previous case-law, the Court points out that the finding of a violation of the ECHR is essentially declaratory in nature and that, by Article 46 ECHR, the national States have committed themselves to implement the judgments of the Court to which they are party, with enforcement being monitored by the Committee of Ministers of the Council of Europe.[47] In the present case, the Committee of Ministers did not consider it necessary to take further

[46] ECtHR 28 June 1990 – No. 11761/85 – *Obermeier / Austria*.
[47] ECtHR 11 July 2017 – No. 19867/12 – *Moreira Ferreira / Portugal*.

individual measures after the decision of the ECHR. Insofar as national law provides for implementation of the judgments of the ECHR, the Supreme Court has applied the conditions described therein in a manner, which is not objectionable. Therefore, the refusal of the Supreme Court to reopen the proceedings did not constitute a renewed violation of Article 6 ECHR.

In Germany, the question of the admissibility of an action for restitution based on a decision of the European Court of Human Rights[48] was the subject of a legal dispute. The Court of Justice had found a violation of Article 8 of the ECHR in the termination of the plaintiff's employment relationship by the church employer, which was based on a breach of the duty of loyalty due to the divorce and remarriage of the employee. The plaintiff had thereupon brought an action for restitution with the aim of determining the invalidity of the dismissal. The initial proceedings had been concluded with legal effect by the national courts before Section 580 No. 8 of the Code of Civil Procedure (ZPO) came into force on 31 December 2006. The Federal Labour Court (BAG) had dismissed the restitution claim with reference to the cut-off date provision of Section 35 Introductory Act of the ZPO (EGZPO) and objected that the plaintiff had a claim for reinstatement against his employer.[49] The BAG then rejected a claim for reinstatement on the grounds that the claim constituted an infringement on the freedom to conclude contracts as part of the constitutionally guaranteed private autonomy. The creation of a claim for reinstatement in the event of a violation of the Convention by a final and absolute judgment dismissing the action in the dismissal protection proceedings would impair the legal force as a fundamental principle of civil procedural law.[50] A constitutional complaint lodged against this was unsuccessful.[51]

New pending cases (notified to the respective government)

No. 66649/13 – *Crivoi / Republic of Moldova* (Second Section), lodged on 8 October 2013 – communicated on 7 February 2020

Law: Article 6 ECHR (Right to a fair trial); Article 1 Protocol No. 1 (Protection of Property)

Keywords: Competitor dispute proceedings – Right of appeal of the unsuccessful applicant

Notes: A third person successfully conducted judicial competition proceedings against the plaintiff's employer with the aim of filling the plaintiff's position. The plaintiff tried to challenge the decision of the court of first instance. Her appeal was dismissed on the grounds that she was not a party to the proceedings and therefore did not have the right to appeal against the decision. In her appeal, the appellant alleges infringement of Article 6(1) ECHR because she was refused access to the Court of First Instance.

No. 57038/16 – *Poszler / Romania* (Fourth Section), lodged on 19 September 2016 – communicated on 31 January 2020

Law: Article 6 ECHR (Right to a fair trial)

Keywords: Action for protection against dismissal – Inadmissibility of the action on the ground that the application is defective – Principle of the adversarial proceedings

Notes: The plaintiff had brought proceedings against her employer, the local tax office, for protection against dismissal, in which she claimed reinstatement and, in the alternative, damages for termination of the employment relationship. In these proceedings, it was

[48] ECtHR 23 September 2010 – No. 1620/03 – *Schüth / Germany*.
[49] Federal Labour Court (BAG) of 22 November 2012 – 2 AZR 570/11.
[50] Federal Labour Court (BAG) of 20 October 2015 – 9 AZR 743/14.
[51] Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) 20 April 2016 – 2 BvR 1488/14.

established that there was no reason for dismissal for operational reasons and that she therefore had to be reinstated. This judgment was amended in the appeal instance and the plaintiff's claim was dismissed on the grounds that she did not apply for annulment of the termination in her action. The plaintiff now claims, with reference to Article 6 of the ECHR, that there has been a breach of the principle of adversarial proceedings, since the Court of Appeal based its decision on grounds of which she learned only after delivery of the judgment at first instance and which the defendant did not present in the appeal proceedings, so that it was impossible for her to comment on them.

No. 74729/17 – *Ayuso Torres / Spain* (Third Section), lodged on 10 October 2017 – communicated on 16 January 2020

Law: Article 10 ECHR (Freedom of expression); Article 6 ECHR (Right to a fair trial)

Keywords: Counter-constitutional statements as misconduct – Discontinued disciplinary proceedings – No need for legal relief

Notice: Disciplinary proceedings were initiated against the plaintiff, a military officer, for allegedly anti-constitutional statements made during a television interview. The disciplinary proceedings led to the conclusion that the plaintiff had publicly expressed his opinion against the constitution, but had not acted with the intention of committing an infringement of the law. Consequently, it was established that he was not guilty of a serious breach of duty and that no sanction was imposed on him. The plaintiff applied for judicial review of the disciplinary decision. The action was dismissed as inadmissible on the ground that there was no need for legal relief, since the plaintiff was not adversely affected by the contested decision. The complaint alleges interference with the right to freedom of expression granted by Article 10 ECHR by initiating disciplinary or judicial proceedings. Furthermore, the question is raised whether the denial of the right to bring an action infringes the plaintiff's right of access to a court under Article 6 ECHR.

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6. Professional ban

Decisions

Judgment (Fifth Section) of 30 January 2020 – No. 74354/13 – *Namazov / Azerbaijan*

Law: Article 8 ECHR (Recht auf Achtung des Privat- und Familienlebens)

Keywords: Exclusion of a lawyer from the Bar for breach of professional ethics following a verbal dispute with a judge – Lack of procedural guarantees in disciplinary proceedings – Failure of the Court to assess the proportionality of the sanction

Core statement: Although the special status of lawyers as organs of the administration of justice requires them to behave with discretion and respect before the courts, it also gives them privileges in relation to other persons, which give them a certain discretion in their arguments before the courts.

Note: The plaintiff is a lawyer who specialised in the protection of human rights and who represented a number of persons associated with political opposition parties. During the oral hearing in a criminal case against persons who had participated in a demonstration

organised by the opposition, the plaintiff got into a verbal confrontation with the presiding judge. Because of the statements, which were considered to be an insult and thus contempt of court, disciplinary proceedings were instituted against the plaintiff before the Bar Association with the aim of excluding him from the professional association. The exclusion of the plaintiff from the Bar Association, ordered by the Disciplinary Board, was confirmed by all instances of the national courts.

The Court held, first of all, that the exclusion of the appellant from the Bar Association is tantamount to a prohibition of his profession which prevents him from practising as a lawyer in the future and therefore constitutes an interference with the exercise of his right to respect for his private life under Article 8 ECHR. Such an interference is only permissible if it is provided for by law and justified by a legitimate aim and is necessary in a de-democratic society.[52] While the Court leaves open whether the interference was provided for by law and agrees with the government's view that the interference pursues the legitimate objective of 'maintaining order', since it concerns the position of the legal profession in the administration of justice, the Court also considers that the interference is not justified by a legitimate objective of 'maintaining order'. However, it reaffirms that the proper functioning of the courts would not be possible without relationships based on consideration and mutual respect between the various actors in the judicial system.[53] The special status of lawyers gives them a central role in the administration of justice, which entails a number of obligations, particularly with regard to their conduct. Although their behaviour towards the courts must be discreet, honest and dignified, they are given a certain discretion in terms of the arguments they present in court.[54] With regard to the present case, the Court finds that the national courts have not sufficiently assessed the proportionality of the interference. They have not given any reason why a milder sanction than a prohibition to practise a profession could not be envisaged. The Court therefore concludes that the reasons given by the national courts in support of the prohibition were not sufficient and that the sanction imposed on the applicant was disproportionate to the objective pursued. There was therefore an infringement of Article 8 ECHR, punishable by the payment of compensation amounting to €7,000.

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7. Remuneration for work

Decisions

Judgment (Fourth Section) of 14 January 2020 – No. 29422/17 – *Lazarević v Bosnia and Herzegovina*

Law: Article 6(1) ECHR (Right to a fair trial)

Keywords: Entitlement to legitimate collectively agreed remuneration components – Poor economic situation of the employer – Arbitrary court decisions

Core statement: The application of law by national courts, which in principle cannot be reviewed by the ECtHR, infringes the right to a fair trial if the national court's assessment is arbitrary or manifestly unreasonable and leads to a 'denial of justice'.

[52] ECtHR 12 June 2014 – No. 56030/07 – *Fernández Martínez / Spanien*.
[53] ECtHR 15 December 2015 – No. 29024/11 – *Bono / Frankreich*; ECtHR 19 April.2018 – No. 41841/12 – *Ottan / Frankreich*.
[54] ECtHR 23 April 2015 – No. 29369/10 – *Morice / Frankreich*.

Note: The plaintiff had taken legal action against his employer for the payment of a severance pay and special bonuses and social security contributions following a dismissal for refusing to conclude a new employment contract under changed conditions. The courts upheld his claim in all instances with regard to the payment of a severance pay and rejected the further claims based on provisions of a collective agreement. The reason given was that although the claims under the collective bargaining agreements were justified, the employer was in a bad economic situation so that he could not be expected to pay. In particular, the court of appeal referred to the fact that the amount in dispute had not reached the level required for an appeal. The plaintiff complained that this denied him access to court.

The Court notes, first, that the claims made by the plaintiff clearly found their legal basis in the relevant collective agreements. In examining the appellant's claims under employment law, the national court of first instance disregarded those provisions. As far as the decision is based on the economic situation of the plaintiff's former employer, these considerations are irrelevant. Even if it is not the task of the Court of Justice to interpret national legislation[55], an infringement of Article 6 ECHR exists if the findings of the national court are arbitrary and manifestly inappropriate and lead to a 'denial of justice'.[56] With regard to the decision of the appellate court to justify it in accordance with the statutory provisions on the grounds that the required value in dispute has not been achieved, such a rule is a legitimate and reasonable procedural requirement which takes into account the role of the higher courts to have to deal only with matters of particular importance. In any case, however, the Court of First Instance infringed the plaintiff's right to be heard, so that there is a violation of Article 6(1) of the ECHR.

New pending cases (notified to the respective government)

No. 77396/14 – *Constantinou u. a. / Zypern* (Third Section), lodged on 9 December 2014 – communicated on 29 January 2020

Law: Article 1 Protocol No. 1 (Protection of property); Article 1 Protocol No. 12 (General prohibition of discrimination)

Keywords: Reduction in the remuneration of civil servants – Legal provision – Discrimination in relation to employees in the private sector

Note: In 2011, in the context of the economic crisis, the Greek government adopted a law (No. 112 (I)/2011) which provided for, among other things, an emergency contribution by public sector employees to help rescue the deteriorating budgetary situation. As a result of the statutory regulation, a certain percentage of the plaintiffs' salaries was not paid in the period from 1 September 2011 to 31 December 2016. In their complaint, they allege both a violation of Article 1 Protocol No. 1 and discrimination under Article 1 Protocol No. 12 on account of the unequal treatment as public servants compared to employees in the private sector, who were not required to pay a corresponding compulsory levy.

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[55] ECtHR 19 December 1997 – no. 155/1996/774/975 – *Brualla Gómez de la Torre / Spanien*.
[56] ECtHR 11 July 2017 – no. 19867/12 – *Moreira Ferreira / Portugal*.

8. Social security

Decisions

Judgment (Fifth Section) of 5 March 2020 – No. 60477/12 – *Grobelny / Poland*

Law: Article 1 Protokol No. 1 (Protection of property)

Keywords: Loss of invalidity pension due to incorrect assessment of the applicant's ability to work – Refusal to pay compensation on the basis of the principle of the res judicata nature of a decision – Respect for social justice and fairness – Disproportionate burden on the applicant – Failure of the authorities

Core statement: When the state authorities decide to withdraw an invalidity pension, it must be borne in mind that this must not lead to a complete loss of income, with the requirement of legal certainty taking second place to social security.

Note: Since 1994, the plaintiff has been receiving a pension from the Farmers' Social Insurance Fund for full incapacity for work in relation to his previous agricultural activity. An examination of his state of health carried out in April 2008 revealed that he did not (or no longer) meet the conditions for receiving the disability pension. By decision of 16 May 2008, payment of the pension was suspended retroactively as of 1 April 2008. An action brought against this decision was unsuccessful in all instances. In December 2009, the plaintiff underwent medical treatment for orthopaedic complaints. On the basis of the diagnoses made in this connection, he applied again in January 2010 for a disability pension to be granted. The Social Insurance Fund then determined that the plaintiff was fully disabled and granted him a temporary disability pension for the period from December 2009 to April 2011. It was further established that the full disability had existed since at least April 2008. However, a claim for retroactive payment of the disability pension since April 2008 was unsuccessful in all instances. As a result, the plaintiff brought an action for payment of compensation permitted under national law for the failure to pay the pension since 2008. Both the District Court and the Court of Appeal dismissed the claim on the grounds that the original decision of the Social Insurance Fund to withdraw the pension as of April 1, 2008 had become final.

The ECtHR first recalls the constituent elements of Article 1 Additional Protocol No. 1, which contain three different rules. According to these rules, the peaceful use of property is guaranteed (1). It may only be withdrawn under certain conditions (2), whereby the State is entitled to impose taxes or other necessary charges in accordance with the public interest (3).[57] The principles set out in Article 1 Protocol No. 1 also apply to social benefits. The freedom of the State to provide social benefits under a social security system shall not be restricted. If there are corresponding regulations, the granting of social benefits shall be governed by the existing laws, subject to the conditions specified therein. Since in a modern democratic state many people are dependent on social benefits, i.e. they are dependent on a minimum level of state protection, the importance of such a right is expressed by the fact that it falls within the scope of application of Article 1 Protocol No. 1. In the present case, the Court concludes that it is irrelevant whether the intervention was lawful and pursued a lawful objective. On the contrary, the withdrawal of the pension was disproportionate, since the plaintiff was exposed to excessive interference, since the incorrect assessment of his ability to inherit led to a complete loss of his income. Moreover, it is to be expected from proper Acting of the administration that a timely and proper response to errors committed is given.

[57] ECtHR 24 October 1986 – No. 9118/80 – *AGOSI / Vereinigtes Königreich*; ECtHR 7.6.2012 – No. 38433/09 – *Centro Europa 7 S.R.L. und Di Stefano / Italien*.

The principle of legal certainty, which should be guaranteed by the legal force of a court decision, must take a back seat to respect for social security and fairness. The Court found a violation of Article 1 of Protocol No. 1 and awarded the plaintiff compensation of €2,500 and the reimbursement of pecuniary loss amounting to €3,460.

Judgment (Second Section) of 11 February 2020 – No. 82968/17 – *Šeiko / Lithuania*

Law: Article 1 Protocol No. 1 (Protection of Property)

Keywords: Reparation of damage caused by crimes by monthly deduction of twenty percent of the old-age pension – legitimate aim of protecting the interests of victims of crime – prohibition of deprivation of any means of subsistence.

Core statement: In the event of intervention in property by state authorities, an appropriate relationship must be observed between the means employed and the desired objective, so that this must not lead to a permanent, complete loss of income.

Note: The legal dispute concerns the question of whether a claim for damages based on a criminal offence, which the plaintiff was ordered to pay, may be deducted from a state retirement pension by way of enforcement. In a judgment of 31 December 2014, the plaintiff was sentenced to a suspended sentence for a criminal offence committed against her neighbours and to compensation for the material and non-material damage suffered by the injured parties in the amount of € 5,908. As she did not pay the amount sentenced, an enforcement order was issued which provided, among other things, for the attachment of twenty percent of the state retirement pension granted to her. In addition to the state retirement pension, the plaintiff received social security benefits and was provided with a municipal apartment at a rent of €11.02. The plaintiff alleges infringement of Article 1 of Additional Protocol No. 1 by claiming back damages by way of reduction of her retirement pension, which constitutes undue hardship.

The Court considers, first, that the part of the appellant's retirement pension, which was deducted from her monthly pension constitutes an interference with the peaceful enjoyment of property and therefore falls within the scope of Article 1 of Protocol No 1.[58] In the context of the examination of the legality of the interference, the ECtHR states that national law allows, under certain conditions, the reduction of retirement benefits by twenty to fifty percent. The legitimate aim of the intervention is to protect the interests of the victims of the crime. With regard to the proportionality of the intervention, it must be taken into account that the plaintiff has brought the situation upon herself and that it is not a question of the permanent, complete loss of pension entitlement.[59] Even if the plaintiff only had a small pension, the reduction of the claim did not constitute unreasonable hardship, since she was able to make a living with the remainder. Accordingly, the Court of Justice did not find a violation of Article 1 of Additional Protocol No. 1.

Under German law, claims to a statutory retirement pension can be seized under the same conditions – and free of seizure – as income from employment, Section 54(4) of the Third Book of the Code of Social Law (SGB I).

[58] ECtHR 5 July 2001 – No. 41087/98 – *Phillips / Vereinigtes Königreich*.
[59] ECtHR 5 July 2017 – No. 78117/13 – *Fábián / Ungarn*.

New pending cases (notified to the respective government)

No. 62250/19 – *Jivan / Romania* (Fourth Section) – lodged on 22 November 2019 – communicated on 13 February 2020

Law: Article 8 ECHR (Right to respect for private and family life); Article 6 ECHR (Right to a fair trial)

Keywords: Determination of the degree of disability – Overall assessment of the state of health – Excessive length of proceedings

Note: In proceedings before the national authorities, the 88-year-old plaintiff, whose leg is partially amputated and who suffers from multiple health impairments, for which reason he is dependent on the use of a wheelchair and the assistance of an assistant, claimed that the degree of disability established was wrongly underestimated in law. In the course of the judicial review of the decision, it was established that the partial amputation of the leg could not be classified as a 'severe disability' according to the statutory provisions and that the official decision was therefore not wrong in law. The plaintiff claims that the national courts failed to take into account his overall state of health when determining the degree of disability, as required by law, which constitutes a violation of Article 8 ECHR.

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