REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

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Content

I. Editorial

The second edition of the HSI Report focuses on current developments in European labour and social security law in the second quarter of 2020. We would like to highlight two decisions of the European Court of Justice in particular.

In the decision in the *Yodel Delivery Network* case, the Court of Justice deals with work in the gig economy and, in this context, with the controversial question in national and European law as to when courier drivers are to be considered employees in the platform economy. *Prof. Martin Gruber-Risak* uses the decision made in the context of the Working Time Directive to further differentiate the criteria of the concept of employee in EU law and to test them in the gig economy. His comments on the decision can be found here (in German language).

In another decision, the Court of Justice had the opportunity to further develop its case law on anti-discrimination law. In the *Associazione Avvocatura per i diritti LGBTI* case, a lawyer had publicly stated in a radio interview that he would not employ homosexuals in his law firm. In response to a collective complaint by an Italian anti-discrimination association, the CJEU emphasised that this – detached from a specific job advertisement – constitutes discrimination in the field of employment and occupation. A comment by *Micha Klapp* of the DGB Bundesvorstand (Executive Board of the Confederation of German Trade Unions) can be found here (in German language).

In addition, numerous other rulings by the CJEU were issued, opinions by the Advocates General were filed and new proceedings were pending during the reporting period. The same applies to proceedings before the ECtHR. There, for example, a judgment was handed down in *Kövesi v Romania* on the freedom of opinion of civil servants. Specifically, the case concerned the removal from office of the chief prosecutor of the Romanian National Anti-Corruption Authority, who professionally criticised a change in the law. Two newly pending cases should also be mentioned: In the case *Aleksić v Serbia*, the ECtHR will deal with data protection issues in connection with the employer's access to an official e-mail account. The complaint in the case *Pansitta and others v Italy* concerns the legal prohibition for employees of the financial police to form trade unions.

We hope that the report will once again provide you with a comprehensive overview of the latest developments and hope you find it an inspiring read. 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 Gruber-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

Decisions

Judgment of the Court (Grand Chamber) of 4 June 2020 – C-588/18 – *Fetico and Others*

Law: Articles 5 and 7 Working Time Directive 2003/88/EC

Keywords: Weekly rest period – Annual leave – Special paid leave – Coincidence of leave entitlements

Core statement: If the period of weekly rest or annual leave includes an event giving rise to special leave under collective agreements, the right to leave as indicated by Union law can nevertheless be regarded as fulfilled.

Note: A collective agreement under Spanish law provides for special leave in certain situations (e.g. moving house, marriage, birth of a child, serious illness of a relative, exercise of trade union or company participation functions). In the present collective labour dispute, the issue was whether the entitlement to annual leave or the weekly rest period is compensated if the event triggering the special leave falls within the rest period or the annual leave. One of the arguments put forward was the parallelism with sickness[1] and parental leave[2], which do not remove the right to paid annual leave.

The CJEU does not follow this reasoning. The special leave should only enable employees to stay away from work in order to meet specific needs or obligations. Therefore, the special leave was inseparable from the working time during that period and could be counted towards the annual leave.

Moreover, special leave is not regulated by Union law. Therefore, the established principle of case-law that the exercise of leave guaranteed by Union law may not interfere with another leave guaranteed by Union law is not relevant. One part of the grounds of the judgment, however, makes one sit up and take notice: The CJEU expressly emphasises that the situation is different if there is a right that work cannot be performed as a result of force majeure (such as urgent family reasons in the case of illness or accidents). For then the right to remain away from work, which is anchored in Union law in Paragraph 7.1 of the Framework Agreement on Parental Work[3], exists. If a collective agreement defines such cases of force majeure and if such a case occurs during the leave, it could be concluded from these remarks that the leave entitlement was not fulfilled for such periods.

[1] CJEU of 30 June 2016 – C-178/15 – *Sobczyszyn*; CJEU of 20 January 2009, C-350/06 – *Schultz-Hoff*.
[2] CJEU of 4 October 2018 – C-12/17 – *Dicu*, cf. HSI-Newsletter 4/2018 under IV.10.
[3] Effective by Article 1 Parental Leave Directive 2010/18/EU.

Judgment of the Court (First Chamber) of 25 June 2020 – Joined Cases C-762/18 and C-37/19 – *Varhoven kasatsionen sad na Republika Bulgaria*

Law: Article 7 Working Time Directive 2003/88/EC

Keywords: Unlawful dismissal – Continued employment after court decision – Entitlement to unused paid annual leave for the period between dismissal and resumption of employment

Core statement: If an employee is unlawfully dismissed and reinstated, based on a judgement, he or she is entitled to annual leave or leave compensation even though he/she did not actually perform any work during the period in which he or she was unlawfully not employed.

New pending cases

Reference for a preliminary ruling from the Rechtbank Overijssel (Netherlands) lodged on 25 May 2020 – C-217/20 – *Staatssecretaris van Financiën*

Law: Article 7(1) Working Time Directive 2003/88/EC

Keywords: payment of reduced pay for sick leave during annual leave – interpretation of the terms 'paid' and 'while retaining his full salary

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria), lodged on 4 June 2020 – C-233/20 – *job-medium*

Law: Article 7 Working Time Directive 2003/88/EC, Article 31 (2) Charter of Fundamental Rights

Keywords: Holiday compensation not granted for the current (last) working year if the employee(s) unilaterally terminates the employment relationship prematurely without good cause ("resignation") – Examination whether it was impossible to use up the holiday

Note: The plaintiff had terminated his employment relationship by unjustified early termination. He was still entitled to 3.33 vacation days (converted to 322.06 EUR vacation compensation) at the time he left the company. According to Section 10 (2) of the Austrian Holiday Act, premature resignation of the employee without good cause precludes the receipt of (holiday) compensation. The plaintiff opposes this. The referring court would now like to know whether the Austrian legislation is compatible with European Union law and, if not, whether it would then be necessary to examine in addition whether it was impossible for the employee to use the holiday entitlement and according to what criteria this examination must be carried out.

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2. Equal treatment

Decisions

Judgment of the Court (Second Chamber) of 2 April 2020 – C-670/18 – *Comune di Gesturi*

Law: Equal Treatment Framework Directive 2000/78/EC

Keywords: Prohibition of discrimination on grounds of age – Public procurement – Exclusion of retired persons in the public or private sector

Core statement: A national rule prohibiting public administrations from awarding contracts for studies and consultancy services to retired persons is compatible with Union law, if it pursues a legitimate employment and labour market policy objective and that the means used to achieve that objective are appropriate and necessary.

Judgment of the Court (Grand Chamber) of 23 April 2020 – C-507/18 – *Associazione Avvocatura per i diritti LGBTI*

Law: Equal Treatment Framework Directive 2000/78/EC, Articles 11(1), 15(1) and 21(1) Charter of Fundamental Rights

Keywords: Prohibition of discrimination on the grounds of sexual orientation – Public statements excluding the recruitment of homosexuals – association lawsuit

Core statement: (1) discriminatory statements made by a person during a radio interview that he or she would never employ persons with a certain sexual orientation or work in their company fall under the term "conditions for access to employment" within the meaning of Directive 2000/78/EC.

(2) If such statements are not made in the context of an ongoing or planned recruitment procedure, it must be examined whether the connection with access to employment is not merely hypothetical.

(3) Directive 2000/78/EC allows Member States to grant the right of action to interest groups in order to sue for damages – even without an identifiable victim.

Note: For further details, see the comment by *Klapp* in the German language HSI-Report 2/2020, pp. 11 – 16.

In a radio interview, a lawyer stated that he would never employ homosexual persons in his capacity as a lawyer and that he did not want to cooperate with such persons. As a result, the "Associazione" (an association of lawyers who assist lesbians, gays, bisexuals, transgender and intersexuals (LGBTI) in court) sued him for damages. The lawyer lodged an appeal in cassation with the national court against his conviction.

With its decision, the CJEU follows the opinion of Advocate General Sharpston of 31 October 2019[4]. It was questionable whether such a statement would also fall within the scope of Directive 2000/78/EC if no recruitment procedure was currently taking place or planned. The CJEU affirmed this under the condition that the statement in question could actually be connected with the recruitment policy of a particular employer. It was therefore necessary to determine whether the person making the statement actually had an influence on the recruitment process or was perceived by outsiders as such a person relevant to the

[4] Opinion of the Advocate General *Sharpston* of 31 October 2019 – C-507/18 – *Associazione Avvocatura per i diritti LGBTI,* commented in HSI-Newsletter 4/2019 under IV.7.

recruitment process (para. 43). In determining this connection, the facts were to be assessed based on criteria such as the position and function of the author, the nature and content of the statement in question and its private or public nature (para. 44 et seq.). The defendant's alleged violation of his freedom of opinion did not apply, since discriminatory statements within the meaning of Directive 2000/78/EC were excluded from the scope of protection of freedom of opinion (para. 53). In conclusion, the CJEU states that Member States may, by means of national rules, grant associations the right to initiate legal proceedings to enforce the claims arising from this Directive, even if they do not act on behalf of a specific plaintiff or if no plaintiff can be identified (para. 63). With the present judgment, the CJEU demonstrates the complex (deterrent) effects of such a publicly expressed discriminatory statement.

Judgment of the Court (Seventh Chamber) of 23 April 2020 – C-710/18 – *Land Niedersachsen (Périodes antérieures d'activité pertinente)*

Law: Article 45 (2) TFEU, Free Movement of Persons Regulation (EU) No. 492/2011

Keywords: Collective agreement for the public sector (TVöD) – Limited crediting of relevant previous periods of service completed with an employer in another Member State

Core statement: A national provision that only takes into account to a limited extent for the classification of equivalent professional experience gained with an employer established in another Member State, while fully recognising professional experience gained with the same employer, is incompatible with the free movement of workers under Article 45 TFEU.

Note: Section 16 (2) of the collective agreement for the public sector (TVöD) regulates the recognition of relevant professional experience of an employee within the framework of the level allocation in the collective bargaining remuneration system of the public service. Professional experience gained with the same employer is fully recognised. However, periods spent with another employer are taken into account to a limited extent and only for pay grades 2 and 3, which leads to disadvantages in terms of remuneration. The Federal Labour Court had asked whether this provision was compatible with Article 45 (2) TFEU (discrimination on grounds of nationality) and the Regulation on the Free Movement of Persons (EU) No. 492/2011.

Already in 2013, the CJEU had ruled in an Austrian case that a comparable provision might constitute unlawful indirect discrimination on the grounds of nationality, as foreign employees do not have the opportunity to gain professional experience with the same employer. In the present case, as the CJEU clarifies, the issue at stake is the free movement of workers of a German national who had gained the relevant professional experience in France. Of the 17 years of professional experience gained by the applicant, only three years were incremental in her new post with the State of Lower Saxony. Such treatment may make it less attractive to take up employment in another Member State. According to the CJEU, this restriction of the free movement of workers is not justified by the objectives of equal treatment of fixed-term employees, the principle of merit, the objective of binding employees to their employer or an incentive to return to their former employer.

Opinions

Opinion of Advocate General Kokott delivered on 07.05.2020 – C-223/19 – *YS (Pensions d'entreprise de personnel cadre)*

Law: Article 4(2) and Article 5(2) c Equal Treatment Directive 2006/54/EC, Equal Treatment Framework Directive 2000/78/EC

Keywords: Gender equality in the field of pay and social security – Occupational pension schemes – Occupational pensions in the form of a direct promise of benefits by the employer

Core statement: (1) National regulations, which provide for the retention of a pension security contribution or the non-increase of the contractually agreed increase in their entitlements above a certain level for company pensioners on the basis of direct benefit commitments from state-controlled companies, may violate the Equal Treatment Directive 2006/54/EC if one gender is particularly affected by this in percentage terms.

(2) Such national provisions do not constitute indirect discrimination on grounds of age if the type of occupational pension in question was not completed after a certain date and therefore beneficiaries of occupational pensions completed later do not fall within the scope of those provisions.

(3) The employer's freedom to agree on pay may be restricted where this is necessary and where it is genuinely consistent with an objective in the public interest, such as maintaining the financial viability of pension schemes. The same applies to a restriction on the use of an employee's property within the meaning of Article 17 (1) Charter of Fundamental Rights caused by the retention of part of an occupational pension entitlement, if this entitlement exceeds a certain threshold and the amount of the contribution to be paid depends on the amount of the entitlement.

Opinion of Advocate General Saugmandsgaard Øe delivered on 14 May 2020 – C-30/19 – *Braathens Regional Aviation*

Law: Article 7, Article 15 Anti-discrimination Directive 2000/43/EC, Article 47 Charter of Fundamental Rights

Keywords: compensation for discrimination – refusal to acknowledge the existence of discrimination – link between sanction and discrimination

Core statement: If a person is willing to pay damages for discrimination, but refuses to acknowledge the discrimination, the injured person has the right to have the discrimination reviewed by a court and, if necessary, to have it established. A procedural means of terminating the proceedings, such as acknowledgement, must not lead to a different result.

Note: The present conclusion does not concern a specific labour law case, but its statements are also important for anti-discrimination law issues in the context of working life. The plaintiff, a Chilean-born passenger resident in Stockholm, was subjected to additional security checks on a domestic flight operated by the defendant as an airline. The plaintiff seeks damages for direct discrimination by the selection for screening. The defendant considered him to be an Arab Muslim and therefore subjected him to the additional security check. The defendant recognised the claim for damages, but contested the existence of any discrimination (para. 22 et seq.). The ombudsman representing the plaintiff (Swedish authority for combating discrimination) applied for a judicial finding that the passenger had been discriminated against by the airline. The court rejected the Ombudsman's requests for a declaratory judgment on the grounds that they were irrelevant in view of the defendant's acknowledgement.

An interesting aspect of the present case was that by acknowledging the penalty, the defendant was able to evade the court's finding that it had discriminated against the plaintiff. The referring court stated in that regard that the penalty fulfilled both a reparating and a preventive function. Furthermore, the national court must, under national law, comply with a recognition without actually examining the facts or the point of law. Therefore, no reliable conclusions can be drawn from such a judgment as to the merits of the plaintiff's arguments concerning the circumstances of the dispute (para. 30).

The Advocate General states that for many persons affected by discrimination, the overriding interest is not of an economic nature, so that the payment of a sum of money alone is generally not sufficient to compensate for the damage suffered. In accordance with the case law of the ECtHR[5], which considers discrimination to be compensated only if the injured party receives confirmation of the discrimination by the national authorities in addition to the compensation claimed (para. 88), the Advocate General considers his mandatory for compensation that the person affected by discrimination must be able to apply to a court to have it established. The deterrent effect is considerably reduced if the sanction is not clearly linked to the discriminatory behaviour (para. 98). The Advocate General therefore suggests that the CJEU should decide that there must be a connection between the sanction and the existence of discrimination, either through the recognition of the discrimination by its author or its determination by a court, so that the sanction can fully fulfil its compensatory and deterrent function.

For German labour law, the ruling means that if discrimination by the employer is present, this could also constitute an interest in the determination of discrimination based on Union law, which employees could assert in addition to their claim for damages.

Opinion of Advocate General Pitruzzella delivered on 18 June 2020 – C-16/19 – *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej and others*

Law: Article 2 Equal Treatment Framework Directive 2000/78/EC

Keywords: Prohibition of discrimination because of a disability – Different treatment within the group of disabled employees

Core statement: Differentiation within a group characterised by a protected characteristic (here disability) can constitute indirect discrimination if the following conditions are met:

a) The differentiation within the group made by the employer is based on an apparently neutral criterion;

b) this apparently neutral criterion is inseparably linked to the protected characteristic (in this case disability);

c) this criterion cannot be objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary.

Note: The procedure offers the Court of Justice the opportunity to develop its case law on the scope of the prohibition of discrimination in Article 2 of Directive 2000/78/EC with regard to the question whether the Directive also prohibits discrimination within the group of persons with disabilities (or within the group of other characteristics mentioned in the Directive).

In the present case, a Polish employer had decided to pay a monthly wage supplement of approximately 60 Euro to employees with a disability if they submit a notice of recognition of their disability after a certain deadline. The background is as follows: Polish law provides for

[5] Cf. inter alia ECtHR of 7 June 2012 – No. 38433/09 – *Centro Europa 7 S.r.l. and Di Stefano / Italy*, No. 81 and the case-law cited therein and No. 87 and 88.

the payment of a compensatory levy to companies if an employment rate of 6% of people with disabilities is not met. The employer wanted to save costs with the salary increase by having more employees submit a certificate of disability recognition. However, he made a distinction between disabled persons who had submitted the notification before or after a certain date. The Advocate General *Pitruzzella* finds clear words for this differentiation criterion: This is "obviously illogical and not objective" (marginal no. 56), since all employees who submit a notification, regardless of the deadline, contribute equally to the reduction of the compensatory levy.

Whether such different treatment within the group of persons with disabilities is covered by Directive 2000/78/EC or whether only non-disabled persons can be used as a comparison group is disputed. The Advocate General comes to the correct conclusion that according to the effet utile of the Directive it would be inadmissible to favour one group of employees with disabilities to the detriment of another group of employees with disabilities because of their disability (para. 44). This would be the case, for example, if employees "were treated differently on the grounds of the nature or degree of the disability" (para. 46). Since a disability is a necessary condition for obtaining a corresponding notice of assessment, the distinguishing criterion (time of filing the notice) is therefore also connected with the protected situation of "disability". The scope of application of the prohibition of discrimination on grounds of disability within the meaning of Directive 2000/78/EC was thus open (para. 68). Nor was this a positive measure within the meaning of Article 7 of Directive 2000/78/EC for the better integration of persons with disabilities, since the economic considerations (cost savings) had nothing to do with this objective (para. 72 et seq.). In the Advocate Generals view, this constituted indirect discrimination.

New pending cases

Reference for a preliminary ruling from the Verwaltungsgericht (Administrative Court) Darmstadt (Germany), lodged on 11 December 2019 – C-905/19 – *EP v Kreis Groß-Gerau*

Law: Article 64 Euro-Mediterranean Agreement with Tunisia

Keywords: Prohibition of discrimination – Prohibition of shortening the period of validity of a residence permit – Official employment permit

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3. General matters

Decisions

Judgment of the Court (Ninth Chamber) of 2 April 2020 – C-830/18 – *Landkreis Südliche Weinstraße*

Law: Article 7 Freedom of Movement Regulation (EU) No. 492/2011

Keywords: Reimbursement of transport costs for schoolchildren – Residence requirement in the Federal State concerned – Exclusion of children attending school in that Federal State and residing in another Member State

Core statement: (1) If a Federal State makes the assumption of responsibility for school transport dependent on residence in that state, this constitutes indirect discrimination against cross-border workers.

(2) Practical difficulties in organising the efficient transport of pupils do not constitute an overriding reason in the general interest that can justify indirect discrimination.

Order of the Court (Grand Chamber) of 8 April 2020 – C-791/19 R – Commission v Poland

Law: Article 19 (1) subparagraph 2 TEU, Article 279 TFEU

Keywords: Independence of the Disciplinary Chamber of the Polish Supreme Court – Preliminary legal protection

Core statement: The Republic of Poland must, immediately and until delivery of the judgment in Case C-791/19

- suspend the application of the provisions of the Disciplinary Chamber of the Supreme Court of Poland, which provide that that Chamber is to rule on disciplinary proceedings against judges at both first and second instance,
- refrain from referring proceedings before the Disciplinary Board to a panel which does not meet the requirements of independence.

Note: The summary proceedings are one of several decisions and pending cases concerning the controversial judicial reform in Poland. The Grand Chamber of the CJEU had disputed in its ruling of 19 November 2019[6] that the new Disciplinary Chamber of the Polish Supreme Court must be independent in order to be able to decide on disputes relating to the retirement of judges; otherwise, the disputes would have to be heard before another court.[7] In a similar case[8], the European Court of Justice – also in the Grand Chamber – has now issued a temporary injunction that the proceedings already pending before the Disciplinary Tribunal be suspended and may not be referred to another panel that does not meet the requirements of the *A.K.* judgment.

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4. Insolvency law

New pending cases

Reference for a preliminary ruling from High Court of Justice Business and Property Courts of England and Wales (United Kingdom) made on 22 April 2020 – C-168/20 – *MH and ILA*

Law: Articles 86(2), 89(1) of the Agreement on the Withdrawal of the United Kingdom from the EU

Keywords: National legislation providing that pension rights registered with national tax authorities are not included in the bankruptcy estate in national insolvency proceedings –

[6] CJEU of 19 November 2019 – joint cases C-585/18, C-624/18 and C-625/18 – *A.K.*
[7] Cf. *Hlava/Höller/Klengel*, HSI-Newsletter 4/2019, under IV.1.
[8] CJEU of 8 April 2020 – C-791/19 – *Commission / Poland*.

Application of the exemption to foreign pension rights not registered with national tax authorities irrespective of their registration abroad

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5. Mass dismissals

Opinions

Opinion of Advocate General Bobek delivered on 11 June 2020 – C-300/19 – *Marclean Technologies*

Law: Article 1(1)(a) Collective Redundancies Directive 98/59/EC

Keywords: Collective redundancies – Reference period for calculating the number of redundancies

Core statement: The reference period of 30 or 90 days, which is decisive in determining whether the threshold for collective redundancies has been exceeded, refers to each period before and after the dismissal of the employee in question.

Note: Directive 98/59/EC harmonises the law of the Member States on collective redundancies. One criterion to assess whether a collective redundancy exists is the number of redundancies within a period of 30 or 90 days. The European Court of Justice has the Spanish legal situation for examination, according to which only those dismissals are to be taken into account that take place in the period prior to the dismissal in question; later dismissals are irrelevant.

Advocate General *Bobek* considers this calculation method to be incompatible with Article 1 (1) (a) of Directive 98/59/EC. It was relevant under Union law whether the threshold value was exceeded in any period in which the dismissal took place.

According to the German Paragraph 17(1) of the KSchG, a reference period of 30 days applies – if the number of notices of dismissal issued within a 30-day period exceeds the threshold, the scope of application of Paragraph 17 of the KSchG is opened. This legal situation also reflects the stricter legal interpretation of *Bobek*.

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6. Posting of workers

Opinions

Opinion of Advocate General Sánchez-Bordona delivered on 28 May 2020 – C-620/18 – *Hungary v Parliament and Council*

Law: Rev. posting directive (EU) 2018/957 – posting directive 96/71/EC

Keywords: Compatibility of the revised Posting of Workers Directive with Union law – Action for annulment

Core statement: The action for annulment brought by Hungary against Directive (EU) 2018/957 amending Directive 96/71/EC is dismissed.

Note: This and the parallel proceedings C-626/18 concern the actions for annulment of Hungary and Poland against the Posting of Workers Directive revised in 2018. This directive contains improvements for the working conditions of posted workers. Advocate General *Sánchez-Bordona* concludes in its conclusions that the amendments were adopted on a sufficient legal basis and that they are also proportionate. A draft law passed by the Bundestag (Federal Parliament) is currently being discussed for their implementation in Germany.[9]

Opinion of Advocate General Sánchez-Bordona delivered on 28 May 2020 – C-626/18 – *Poland v Parliament and Council*

Law: Rev. posting directive (EU) 2018/957 – posting directive 96/71/EC

Keywords: Compatibility of the revised Posting of Workers Directive with Union law – Action for annulment

Core statement: The action for annulment brought by Poland against Directive (EU) 2018/957 amending Directive 96/71/EC is dismissed.

Opinion of Advocate General Bobek delivered on 30 April 2020 – C-815/18 – *Federatie Nederlandse Vakbeweging*

Law: Posting of workers Directive 96/71/EC, Article 56 TFEU (freedom to provide services)

Keywords: Drivers in international freight transport – Concept of posting – Collective agreements declared universally applicable – Collective agreement whose provisions on working conditions must also apply to subcontractors

Core statement: (1) Directive 96/71/EC applies to drivers in the carriage of goods by road who are posted to a Member State other than the one in whose territory they normally work.

(2) The concept of "worker who, for a limited period of time, carries out his work in the territory of another Member State" within the meaning of Article 2(1) of Directive 96/71/EC presupposes a sufficient link with the territory. The existence of such a sufficient link must be assessed in the light of all the relevant evidence in the context of an overall assessment. Whether there are company law links between the companies involved in a particular posting is not the only decisive factor. Cabotage transport operations generally fall within the scope of Directive 96/71/EC.

(3) Article 3(1) of Directive 96/71/EC must be interpreted as meaning that the question whether a collective agreement has been declared universally applicable is to be determined by the applicable national law. A collective agreement that requires employers to ensure that subcontractors also comply with collectively agreed working conditions must be justified from the point of view of the freedom to provide services.

Note: The following posting constellation is involved: A Dutch transport company is bound by a collective agreement, which not only stipulates that employers bound by collective agreements must themselves observe the collectively agreed working conditions, but also requires sub-contractors in subcontractor agreements to comply with them. The collective bargaining agreement has not been declared generally binding, but it is a collective bargaining agreement with the same wording in this respect, which does not intervene due to

[9] Bundestag document (BT-Drs.) 19/19371; it is highly doubtful whether this draft law meets the requirements of the revised Posting of Workers Directive, cf. *DGB*, Ausschuss-Drs. 19(11)696.

the applicability of the first mentioned collective bargaining agreement. The Dutch trade union FNV requires the three companies involved to comply with the collective agreement applicable to the employees working for them, since the drivers usually carry out their work in the Netherlands.

Application of the collective agreement is possible from the point of view that Article 3 (1) of Directive 96/71/EC provides for the application of general collective agreements of the country of assignment for posted workers. Questions 1 and 2 refer to whether Directive 96/71/EC applies to the present case. The legal question as to the constellations in which the Posting of Workers Directive applies to drivers who drive on the territory of other States is of fundamental importance. However, the adoption of the mobility package is imminent, in which specific regulations for the constellations in question will be laid down.

In the opinion of Advocate General *Bobek*, the fact that the directive has not been based on the authorisation basis for transport does not, in the first place, prevent the application of the Posting of Workers Directive.[10] Secondly, drivers in road haulage were also to be regarded as posted workers. In the *Dobersberger* case, the CJEU had used the criterion of "sufficient connection" to the territory of the state concerned, which also plays a major role in the agreement on the mobility package. Only if such a connection existed could a constellation of posting be assumed. Train crews were therefore not to be regarded as posted within the meaning of the Directive when crossing a Member State. This was the case when professional drivers crossed a Member State in transit by lorry. If, on the other hand, drivers are made available to an employer abroad to provide journeys, this is clearly a constellation of posting. Cabotage journeys, i.e. journeys that begin and end in another Member State, are in principle subject to the Directive on the posting of workers. The Advocate General also decided that national law governs the assessment of whether a collective agreement is generally binding.

The approach of the Advocate General can only partially be followed for the existing legal situation before the amendment by the Mobility Package. Assuming that the criterion of "sufficient connection" to the national territory can actually be derived from the Directive, this would always be the case for journeys by truck through a Member State. Finally, truck drivers (unlike the on-board staff of a train) have the possibility of leaving the vehicle for longer periods during breaks. Even if one of the destinations is located in another Member State, there is no doubt about the "sufficient connection" with the consequence that the Posting of Workers Directive applies.

It is rather far-fetched that a collective agreement which requires a company to ensure that (sub)contractors comply with the collectively agreed working conditions should violate the freedom to provide services. The aim of such a collective agreement is to ensure that the employer does not undermine its application by outsourcing the work, thereby transforming the freedom of collective bargaining guaranteed in Article 28 of the Charter of Fundamental Rights into a mere right on paper. However, the legal dispute once again highlights the uncertainties resulting from the excessive interpretation of the fundamental freedoms and their application to regulations of labour and social law.

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[10] Also in the result already CJEU of 19 December 2019 – C-16/18 – *Dobersberger*, commented in HSI-Newsletter 4/2019, under IV.6.

7. Professional law

Decisions

Judgment of the Court (Ninth Chamber) of 4 June 2020 – C-828/18 – *Trendsetteuse*

Law: Article 1(2) Commercial Agents Directive 86/653/EEC

Keywords: Term "commercial agent" – Lack of possibility to influence the conditions of sale and the prices of the goods

Core statement: A person does not necessarily need to be able to change the prices of the goods he or she is selling on behalf of the principal in order to be classified as a commercial agent within the meaning of Directive 86/653/EEC.

Note: According to the applicant, his contractual relationship is a commercial agency contract under French law. Against this background, he claims damages for unjustified termination of the contract. According to the CJEU, the concept of commercial agent does not require the trader to change the price of the goods he sells on behalf of the principal. This rather broad interpretation would mainly be supported by the fact that otherwise, by drafting the contract, the trader would have the possibility to circumvent the commercial agent's claim upon termination of the contractual relationship. Further indications for the delimitation of employee and employer position cannot be taken from the decision.

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8. Social security

Decisions

Judgment of the Court (Grand Chamber) of 2 April 2020 – C-370/17 and C-37/18 – *CRPNPAC and Vueling Airlines*

Law: Article 11(1) Implementing Regulation (EEC) No 574/72 (replaced by Enforcement Regulation (EC) No 987/2009), Article 84a(3) Coordination Regulation (EEC) No 1408/71 (replaced by Regulation (EC) No 883/2004)

Keywords: Binding effect of A1 certificates – Flying personnel – Power of the courts of the host Member State to establish fraud and disregard the certificate – Binding effect of the civil courts on the validity of a criminal decision

Core statement: (1) the courts of a Member State in proceedings against an employer accused of fraudulent acquisition or use of A1 or E 101 certificates may only establish the existence of fraud and consequently disregard those certificates if they have previously satisfied themselves that they have been fraudulent

- that the dialogue and mediation procedure provided for in Article 84a(3) of Regulation (EEC) No 1408/71 was initiated without delay, so as to enable the competent institution of the issuing Member State to verify whether the certificates had been correctly issued in the light of the concrete evidence of fraud provided; and

- that the issuing institution has failed to carry out such a verification and to respond to these indications within a reasonable time and, where appropriate, to declare the certificates in question invalid or withdraw them.

(2) Where an employer has been convicted by a final criminal judgment in the host Member State, in breach of Union law, of an offence which has been found to constitute fraud in that Member State, a civil court bound by the res judicata of that judgment under national law may not, solely on the basis of the criminal conviction, order the employer to pay compensation to the workers or pension institution who have been victims of the fraud.

Note: The strict binding effect of A1 certificates, which had initially developed through the case law of the CJEU and was later incorporated into Article 5 of Regulation (EC) No 987/2009, has repeatedly been the subject of references for preliminary rulings. In *Altun and others*[11], the Court of Justice stated for the first time that the courts of the state of employment might disregard A1 certificates obtained fraudulently if the issuing social security institution in the sending state does not check them within a reasonable period of time. In the present *CRPNPAC* case the CJEU was concerned with the question of whether national courts may refuse an A1 certificate (or the predecessor certificate E101, which is the subject of this case) even if no such dialogue and mediation procedure has been carried out, but there are concrete indications that the document was obtained in an abusive or fraudulent manner.

In the main proceedings, an airline established in Spain recruited flying personnel for an airport in France, for whom E101 certificates were issued by the Spanish social security institution. According to the findings of the French criminal courts, which were called in to investigate allegations of undeclared work, the deployment of the flying personnel constituted an unlawful posting of workers, since the workers in question had been recruited for the sole purpose of operating from operational bases in France within French territory. The French social security institution requested the issuing institution to revoke the certificate only after the criminal judgment.

Contrary to the conclusions of the Advocate General *Øe*[12], the Court did not use the preliminary ruling procedure to relax the binding effect in cases of fraud, but relied on the principle of loyal cooperation between the social security institutions of the Member States. It reaffirms its view that, even where there are concrete indications of fraud, the dialogue and conciliation procedure provided for by Union law must be initiated first (para. 75). Only if the issuing institution, despite being given a reasonable period of time, fails to re-examine the certificate or to comment on the allegations, may a court of the host Member State disregard the certificate if there are concrete indications of fraud (provided that the guarantees of legal protection are respected; see para. 77).[13] If a court – such as the French Criminal Court here – is called upon to decide on the validity of an A1 certificate, it must first clarify whether this dialogue and mediation procedure has already been initiated and, if not, use every opportunity to have the competent domestic social security institution initiate a corresponding procedure (para. 79). The CJEU also sees this as an incentive for the issuing institution to respond to a request for review within a reasonable time, since its certificate could otherwise be disregarded (para. 81). However, it is doubtful whether this actually provides a sufficient incentive to react more quickly to a request from an institution in another EU country.

The present decision also shows, however, that not only the issuing institution must react within a reasonable period, but also the institution of the state of employment must submit its request in good time. In the present case, it took four years for the requesting French

[11] CJEU of 6 February 2018 – C-359/16 – *Altun et al.*, cf. HSI-Newsletter 1/2018, under IV.7.
[12] Opinion of 11 July 2019 – C-370/17 and C-37/18 – *CRPNPAC*, cf. HSI-Newsletter 3/2019 under IV.8.
[13] So already CJEU of 6 February 2018 – C-359/16 – *Altun et al.*, para. 54 et seq.

institution to contact the issuing Spanish institution. The Spanish institution then took two years to respond, which was clearly too long (see marginal no. 85). It remains unclear whether by comparing the delays of the two institutions, the Court of Justice actually intended to show that a belated request for verification of an A1 certificate could justify the issuing institution also reacting belatedly, without the possibility developed in *Altun and Others* of disregarding A1 certificates obtained fraudulently. Whether this is appropriate with regard to the social protection of posted workers seems questionable.

In the underlying proceedings, the airline concerned had been sentenced to a fine. The workers concerned have invoked this final judgment to claim damages and compensation. Although under French law civil courts are bound by the assessment of criminal liability, the principle of the effectiveness of Union law is, in the opinion of the CJEU, contrary to claims for damages which are payable solely on the basis of a criminal conviction.

Judgment of the Court (Sixth Chamber) of 2 April 2020 – C-802/18 – *Caisse pour l'avenir des enfants (Enfant du conjoint d'un travailleur frontalier)*

Law: Article 45 TFEU, Article 7(2) Regulation (EU) No 492/2011 on the free movement of persons

Keywords: Child benefit – Concept of "family members" – Child of the spouse of (non-resident) migrant workers – Different treatment compared to stepchildren of resident workers.

Core statement: (1) Child benefit, which is linked to the exercise of an employed activity of a frontier worker in a Member State constitutes a social advantage under Article 7(2) of Regulation (EU) No 492/2011.

(2) Frontier workers are also entitled to child benefit for the child of their spouse if he or she is responsible for the maintenance of the stepchild and all children resident in this Member State are entitled to this child benefit.

Judgment of the Court (Fifth Chamber) of 14 May 2020 – C-17/19 – *Bouygues travaux publics and Others*

Law: Articles 11(1)(a), 12a(2)(a) and 4(a) of Implementing Regulation (EEC) No 574/72 (replaced by Enforcement Regulation (EC) No 987/2009)

Keywords: Posted workers – A1 certificate – Binding effect in labour law

Core statement: An A1 or E 101 certificate is only binding on the courts with regard to social security.

Note: In a posting constellation, A1 certificates are binding in determining whether a posted employee continues to be covered by the social security system of the sending state. Beyond social security issues – e.g. concerning the employment relationship with the sending company – these certificates do not have any binding effect. This is in line with the established case law of the Court of Justice[14] and has now been reaffirmed. The case in question concerns a French provision, which requires employers to notify the national authorities of the relevant content of the contractual relationship prior to employment, so that the authorities can check, among other things, compliance with the provisions of labour law if there is no actual posting. Insofar as this obligation to notify concerns, at least in part, labour law issues in addition to social security issues, an A1 certificate has no Union law significance for the latter.

[14] Cf. only CJEU of 4 October 1991 – C-196/90 – *De Paep*, para. 13.

Opinions

Opinion of Advocate General Pitruzzella delivered on 14 May 2020 – C-181/19 – *Jobcenter Krefeld*

Law: Article 7(2) of Regulation (EU) No 492/2011, Article 24 of the Citizenship of the Union Directive 2004/38/EC

Keywords: SGB II exclusion of benefits for EU foreigners – Entitlement to social assistance – Former migrant workers with dependent children attending school in the host Member State – Right of access to education

Core statement: (1) Article 24 of Directive 2004/38/EC does not regulate the application of the principle of equal treatment to a citizen of the Union who has a right of residence on the basis of Article 10 of Regulation (EC) No 492/2011.

(2) Former migrant workers whose children attend school in the host Member State and who have a right of residence derived from this right are entitled to equal treatment with regard to basic social security benefits.

(3) Children with a right of residence based on Article 10 of Regulation (EC) No 492/2011 and the parent who actually has parental care for these children have a right of access to basic social security benefits.

Note: The referral proceedings concern the exclusion of EU foreigners from basic social security benefits under the Second Book of the Code of Social Law (SGB II), which the CJEU had already dealt with in other cases in the past.[15] In the *Alimanovic* case[16], the CJEU ruled in 2015 that the exclusion of EU foreigners whose right of residence and salary arises solely from the purpose of seeking employment (Section 7(1) sentence 2 no. 2 lit. b SGB II) is compatible with Union law. In the present reference for a preliminary ruling from the LSG NRW[17], the question is now whether the exclusion under Section 7(1) sentence 2 no. 2 lit. c SGB II also stands up to scrutiny under Union law. This provision excludes EU foreigners from benefits under SGB II if their right of residence is derived solely – or in addition to their job search – from Article 10 of Regulation (EU) No 492/2011 and thus from the right of residence of their children granted for educational purposes.

In the main proceedings, a Polish national living in Germany with his school-age children applied to the *Jobcenter Krefeld* for basic security benefits. The *Jobcenter* refused the application on the ground that the applicant would remain in Germany solely for the purpose of seeking employment. The authority did not attach any further importance to the school attendance of the children. It was now questionable whether the exclusion of benefits was compatible with the UN law principle of equal treatment in Article 24 of the Citizens of the Union Directive 2004/38/EC – which also applies to the granting of social assistance benefits. According to Article 24 (2) of Directive 2004/38/EC, an exception to this principle is possible for persons who are neither employees nor self-employed persons or persons to whom this status is maintained. In the opinion of the Advocate General *Pitruzzella*, however, this exception is not applicable to EU citizens who derive their right of residence from Article 10 of Regulation (EU) No. 492/2011.

[15] Cf. e.g. CJEU of 11 November 2014 – C-333/13 – *Dano*; cf. HSI-Newsletter 5/2014.
[16] CJEU of 15 September 2015 – C-67/14 – *Alimanovic*.
[17] Order of 14 February 2019 – L 19 AS 1104/18; commented by *Knospe*, NZS 2019, 314.

New pending cases

Reference for a preliminary ruling from the Bundesfinanzgericht (Austria) lodged on 16 April 2020 – C-163/20 – *Finanzamt Hollabrunn Korneuburg Tulln*

Law: Article 7(1) and (2) of Regulation (EU) No 492/2011 on the free movement of persons, Articles 4 and 5(b), Articles 7 and 67 of Regulation (EC) No 883/2004 on coordination, Article 60(1) sentence 2 of Article 60(1) of Regulation (EC) No 987/2009 on the implementation of the Schengen acquis, Articles 18 and 45(1) TFEU

Keywords: Adjustment of family benefits for a child who does not reside permanently in the Member State paying the family benefit – Calculation of the adjustment on the basis of the comparative price level for the country concerned published by Eurostat in relation to the Member State paying the family benefits.

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9. Tax law

Decisions

Judgment of the Court (Eighth Chamber) of 30 April 2020 – joined cases C-168/19 and C-169/19 – *Istituto nazionale della previdenza sociale*

Law: Article 18 TFEU (ban on discrimination), Article 21 TFEU (free movement of persons)

Keywords: Pensioner residing in a Member State other than the state which pays him a pension and who is not a national of the Member State of residence

Core statement: A tax system whereby the taxing power of two Member States for pensions is divided according to whether the recipients have worked in the private or public sector and whether (in the second case) they are nationals of the Member State of residence is in conformity with Union law.

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10. Temporary work

Opinions

Opinion of Advocate General Sharpston delivered on 23 April 2020 – C-681/18 – *KG (Missions successives dans le cadre du travail intérimaire)*

Law: Article 5 (5) Temporary Agency Work Directive 2008/104/EC

Keywords: Temporary agency work – Successive contracts with the same user undertaking – Equal treatment – Circumvention of the provisions of the directive

Core statement: (1) successive assignments of the same worker to the same user enterprise, which together exceed a duration that can reasonably be considered "temporary", constitute an abuse of this form of employment relationship.

(2) Member States may not, however, exclude the abuse of rights by successive assignments by means of specific legislation. It is for the national court to assess whether there is an abuse of rights in each individual case.

(3) In the event of abuse, the national court must do everything within its jurisdiction, having regard to all national law, to ensure the full effectiveness of Directive 2008/104/EC by penalising the abuse in question and eliminating the consequences of the infringement of Union law.

Note: Directive 2008/104/EC sets EU-wide guidelines for temporary agency work as an employment model. Twelve years after the directive came into force, the CJEU has for the first time had to deal with the central and controversial[18] question of how long temporary workers can be used as workers and how often their assignments can be extended. Article 5 (5) of Directive 2008/104/EC contains the indefinite provision that circumvention of the Directive's provisions by successive assignments is not permitted. According to Article 1 (1) of Directive 2008/104/EC, the Directive covers the temporary work of temporary workers.

Since the Directive is based on the principle of temporary work, it is obvious that chains of assignments require justification, for example by temporary peaks in orders. The approach of focusing solely on the renewal of the same employment relationship is not convincing. The exclusive use of a period of temporary employment would make it possible to circumvent the provisions of the Directive by replacing temporary workers. The actual temporary workers would lose their jobs without creating permanent employment relationships. When assessing the abuse of rights, it must therefore be taken into account whether an employer uses different or the same temporary workers in relation to the workplace.

Although the final motion of Advocate General *Sharpston* is reserved to the density of control of the Member State law, it contains important principles. For example, the Advocate General considers the prohibition of the abusive use of temporary work, in particular through successive deployments of temporary workers, to be subject to judicial review under Article 5 (5) of Directive 2008/104/EC. The benchmark for the assessment was not only the provisions of Article 5 of the Directive, i.e. the exceptions to the principle of equal treatment, but also all provisions of the Directive. Advocate General *Sharpston* emphasises, among other things, that the Directive is based on the assumption that employment contracts of indefinite duration are the usual form of employment relationship. It aims to promote the access of temporary workers to permanent employment with the user enterprise.

The courts of the Member States had to determine when an assignment could no longer be regarded as "temporary". The directive does not call for any specific legal provisions restricting chain operations of temporary agency workers. The courts must, however, be particularly vigilant when a user enterprise uses successive temporary employment contracts (as the Advocate General emphasises: also with temporary workers who change jobs) without an objective explanation being given.

Sharpston has to admit that Article 5(5) of the Temporary Agency Work Directive does not contain any guidelines as to what measures the Member States must take to prevent abuse. However, in its conclusion it does not sufficiently take into account the fact that there is no room for manoeuvre in the question of whether specific measures must be incorporated into Member State law. If the Member States were free to incorporate concrete measures to prevent abuse of rights into their legal systems, this would result in considerable differences in the regulation of temporary work in the Member States, so that there can be no question of the directive having any harmonising effect on this important issue. On the contrary, Member States with a laissez-faire approach to temporary agency work would have a competitive

[18] On the subject of the dispute, cf. *Sansone*, in: Preis/Sagan, Europäisches Arbeitsrecht, 2. ed., para. 12.26 et seq.; on German law, for instance *Hamann/Klengel*, EuZA 2017, 194, 197 et seq.

advantage. This is precisely what the directive seeks to prevent. It would therefore be welcome if the European Court of Justice were to recognise that although Article 5(5) of Directive 2008/104/EC contains a general legal concept, it is fully justiciable and requires concrete implementation measures. The pending judgment of the CJEU thus provides the opportunity to provide an impetus for a substantial further development of the law on temporary agency work (and precarious employment relationships in general)[19].

New pending cases

Reference for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Germany) lodged on 3 June 2020 – C-232/20 – *Daimler*

Law: Section 19(2) German Temporary Employment Act (AÜG), Temporary Agency Work Directive 2008/104/EC

Keywords: Concept of "temporary" posting of a temporary worker – Right to establish an employment relationship – Question of the power of the parties to a collective agreement to regulate the extension of the maximum individual posting period

Note: The proceedings concern a temporary employee who was exclusively assigned to Daimler AG (defendant) for a period of four years. In doing so, he was permanently assigned to a job for which the defendant had a permanent need for employment, in accordance with a relevant collective bargaining agreement. The plaintiff seeks a judicial declaration that an employment relationship exists between him and the defendant. The submitting Labour Court of Appeal (LAG) Berlin-Brandenburg[20] would like the CJEU to clarify how the indeterminate legal term "temporary" is to be interpreted in the sense of the Temporary Employment Directive. In doing so, it hopes for a clear time limit for "temporary" employment. The court itself sees this as exceeded by the 55 months of employment of the plaintiff with the defendant. Furthermore, the court would like to know whether the Temporary Employment Directive itself, in the absence of national regulations, can be used as a basis for the sanction that an employment relationship is established with the user enterprise. Finally, the court asks whether it can be left to the parties to the collective agreement to extend the individual maximum duration of the assignment beyond the legally defined period. LabourNet Germany reports that further lawsuits are pending before the Federal Labour Court for exceeding the permissible maximum duration of the transfer. It is therefore possible that the Federal Labour Court will also be filing further submissions.

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[19] Cf. also the prohibition of abuse of rights in Clause 5 of the Framework Agreement on fixed-term work, on the convergence of the two provisions, e.g. *Seiwerth*, NZA 2020, 273.
[20] Reference number: 15 Sa 1991/19.

11. Working time

Decisions

Order of the Court (Eighth Chamber) of 22 April 2020 – C-692/19 – *Yodel Delivery Network*

Law: Working Time Directive 2003/88/EC

Keywords: Platform employees – Concept of employee – Courier drivers

Core statement: A person is not an "employee" within the meaning of Directive 2003/88/EC if he or she is given the opportunity:

- to use subcontractors to provide the service he or she has undertaken to provide;
- accept or refuse tasks offered, or unilaterally set the maximum number;
- provide its services to third parties, including direct competitors of the alleged employer, and
- to determine his or her own "working time" within certain parameters and to organize his or her time according to his or her personal preferences and not only according to the interests of the alleged employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to prove the existence of a relationship of subordination between that person and his or her alleged employer.

Note: See the note by *Gruber-Risak* in the German language HSI-Report 2/2020, pp. 4 – 10.

Judgment of the Court (Tenth Chamber) of 30 April 2020 – C-211/19 – *Készenléti Rendőrség*

Law: Working Time Directive 2003/88/EC, Health and Safety Framework Directive 89/391/EEC

Keywords: On-call police in border service – Refugee situation as a special event – Prerequisite for an exemption from the Working Time Directive

Core statement: The Working Time Directive applies to on-call police officers deployed to secure the external borders of the EU, except where the tasks are carried out in the context of exceptional occurrences, the seriousness and extent of which require measures that are essential to protect life, health and safety of the community and whose proper implementation would be called into question if all the provisions of the Directive had to be observed.

Note: The applicant worked for the Hungarian riot police (Miskolc). The latter assigned him to the Border Guard for the years 2015 – 2017. Within the framework of this activity, the plaintiff employee was assigned on-call duties outside the normal working hours. These services were classified by his employer as rest time. The referring court would like to know from the CJEU whether members of the forces of law and order who carry out surveillance tasks at the external borders of a Member State in the event of an influx of third-country nationals at those borders are covered by the exception in Article 2(2)(1) of Directive 89/391/EEC (para. 31). Directive 89/391/EEC defines the scope of application of Directive 2003/88/EC. Accordingly, public service activities are excluded from the scope of Directive 2003/88/EC if they are absolutely necessary to ensure effective protection of the public interest. The defendant argues that this is the case in the present case, since planning the work schedules of the border police officers cannot be considered due to the necessity of a continuous

presence at the borders and due to the impossibility to foresee the extent of the tasks to be performed (para. 36). In contrast, the CJEU considers the Working Time Directive 2003/88/EC to be applicable, since an exception to the directive may only be made in cases in which the activities are carried out in the context of exceptional events whose severity and extent require measures that are indispensable for the protection of life, health and safety of the public. Those conditions are not met in the present case, since the defendant has not explained why the applicant's duties would be affected by the granting of rest periods at regular intervals, nor why, because of the special nature of those events, his duties can be performed only continuously and only by that worker alone. Nor can the costs incurred by the employer in having to replace the worker during rest periods be a justification for not applying the directive.[21]

Judgment of the Court (Eighth Chamber) of 7 May 2020 – C-96/19 – *Bezirkshauptmannschaft Tulln (Attestation de jours sans conduite)*

Law: Article 34(3) and (2) of Regulation (EU) No 165/2014 (on tachographs in road transport), Commission Decision 2009/959/EU

Keywords: Road transport – Working days and rest days – Digital tachographs – Missing recording

Core statement: The driver of a motor vehicle equipped with a digital tachograph may be required, in the absence of records in this tachograph, to submit a certificate of activity issued by his employer in accordance with the form in the Annex to Commission Decision 2009/959/EU as subsidiary proof of his activities.

Note: The working conditions of professional drivers are repeatedly the subject of CJEU case law in various contexts. This also concerns questions of health and safety at work, especially the observance of driving and rest times. For example, a driver may not spend his weekly rest period in the vehicle[22] and clarifications have been made at the beginning and end of the weekly rest period[23]. In this context, questions of documentation of working times are also relevant in order to be able to monitor compliance with the regulations.[24] The procedure that has been decided on in this case concerns the question of whether Article 34(3)(2) of Regulation (EU) No 165/2014 prohibits Member States from requiring the carriage of other forms in addition to the digital tachograph for verification purposes. As the CJEU points out, such a prohibition does not apply to driverless days that are not recorded by the tachograph. Otherwise, this would run counter to the objective of the Regulation, which is to improve the working conditions of drivers, and instead make it easier to refrain from recording such data (para. 38). In contrast, the prohibition in the Regulation on requiring more extensive forms serves only to reduce bureaucracy.

An improvement in the working and social conditions of professional drivers is a major concern of the recently adopted EU mobility package, too. This package regulates rest periods and return periods.

[21] Cf. in this sense CJEU of 9 September 2003 – C-151/02 – *Jaeger*, para. 66 et seq.
[22] CJEU of 20 December 2017 – C-102/16 – *Vaditrans*, cf. *Heuschmid/Hlava*, HSI-Newsletter 4/2017 under IV.2.
[23] CJEU of 10 April 2019 – C-834/18 – *Rolibérica*, cf. *Hlava/Höller/Klengel*, HSI-Newsletter 2/2019 under IV.2.
[24] Another reference for a preliminary ruling is currently pending: C-906/19 – *Ministère public*.

New pending cases

Reference for a preliminary ruling from the Curtea de Apel Iași (Romania) lodged on 11 December 2019 – C-909/19 – *BX v Unitatea Administrativ Teritorială D.*

Law: Working Time Directive 2003/88/EC, Article 31(2) Charter of Fundamental Rights (Fair and Reasonable Working Conditions)

Keywords: Definition of working time – Compulsory training courses attended after the end of normal working time and outside the place of work

Note: The applicant works as a firefighter in the voluntary service for emergencies for the defendant, a Romanian local authority. The parties agreed that the plaintiff should take part in further training financed by the defendant. The place of training was outside the usual place of work. Of the 160 hours of vocational training, the plaintiff completed 124 hours outside normal working hours. For these 124 hours, he demanded payment of remuneration.

The national court of appeal wishes to know from the Court of Justice the legal nature of the time spent by an employee, at the employer's request and for the employer's benefit, on continuing vocational training outside his or her normal place of work and outside normal working hours on weekdays and weekly rest days. In that regard, the national court considers that that period constitutes working time, since the geographical and temporal organisation of the training does not allow the worker to exercise his rest period freely. It concludes that, in accordance with the two-pole approach of the Union legislature, according to which working time and rest are always mutually exclusive, working time must be presumed to be working time. Moreover, the fact that the firefighter in question is a voluntary firefighter does not lead to exclusion from the scope of application of the Working Time Directive. The CJEU had already decided this on an earlier occasion.[25]

However, should the Court of Justice find that the period of further training at issue is not covered by the Working Time Directive, the national court would like to know whether a national rule which does not oblige the employer to observe the rest periods of employees during compulsory further training is compatible with Union law.

Reference for a preliminary ruling from Labour Court (Ireland) made on 20 May 2020 – C-214/20 – *Dublin City Council*

Law: Article 2 Working Time Directive 2003/88/EC

Keywords: On-call time as working time – Maximum period of 10 minutes – Possibility for the worker(s) to be employed by other employers during on-call time – Whether workers who work for a second employer during on-call time are simultaneously working time in relation to the first and second employer

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[25] Cf. only CJEU of 21 February – C-518/15 – *Matzak*, commented by *Buschmann*, HSI-Newsletter 1/2018, Anm. under II.

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. 40825/15 – *Aleksić / Serbia* (4th section) submitted on 31 July 2015 – delivered on 3 April 2020

Law: Article 8 ECHR (right to respect for private and family life); Article 10 ECHR (freedom of expression)

Keywords: Reading of e-mails by the employer – Libel action

Note: The complainant's public employer, the Serbian Statistical Office, had provided the complainant with an e-mail account for business purposes. From this account, the employer had intercepted and read e-mails with both private and professional content. The content of the e-mails was used as evidence in a libel action brought against the complainant by a fellow employee.

The Court of Justice will have to examine, in the light of its previous case-law[26], whether there has been an interference with the right to respect for private and family life protected by Article 8 ECHR.

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2. Freedom of association

New pending cases (notified to the respective government)

No 79696/13 – *Pansitta and Others v Italy* (1st Section) lodged 20 November 2013 – notified on 15 May 2020

Law: Article 11 ECHR (freedom of assembly and association); Article 14 ECHR (non-discrimination)

Keywords: Legal ban on the formation of trade unions

Note: The complainants are members of the financial police and complain about the prohibition under national law to form trade unions in this area of the police force. They also allege a violation of Article 14 ECHR, since there is unequal treatment compared to state

[26] ECtHR of 3 April 2007 – No. 62617/00 – *Copland / United Kingdom*; ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu / Romania.*

police officers who are not prevented from forming trade unions. The Court already refers to its previous case law in its question to the parties.[27]

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3. Freedom of expression

Decisions

Judgment (4th Section) of 5 May 2020 – No 3594/19 – *Kövesi v Romania*

Law: Article 6 ECHR (right to a fair trial); Article 10 ECHR (freedom of expression)

Keywords: Removal of the Chief Prosecutor of the National Anti-Corruption Agency after criticism of legal reforms – Scope of judicial review

Core statement: The views expressed in a public debate by members of the judiciary, which concern the judiciary and do not go beyond purely professional criticism, are protected by the freedom of opinion, so that any state intervention is subject to strict control.

Note: The complainant was appointed Chief Prosecutor of the National Anti-Corruption Directorate by the President of Romania on 15 May 2013 for a term of three years. The term of office was extended for a further three years in 2016. In 2017, the new government formed after the parliamentary elections in 2016 adopted a Government Emergency Ordinance amending the Criminal Code and the Code of Criminal Procedure, which, among other things, aimed at decriminalising abuse of office. In a press release concerning the investigation of various corruption incidents by the Anti-Corruption Agency, the Anti-Corruption Agency criticized both the drafting of the decree and its purpose. Subsequently, the Supreme Council of the Judiciary, the body responsible for management and discipline within the judiciary, opened an investigation in the framework of a disciplinary procedure. The aim of this investigation was to remove the complainant from her office, since she had exceeded her powers by making public statements. The Minister of Justice proposed to the President, after the investigations of the disciplinary authority had been concluded, that the complainant be dismissed from her office, which the President initially refused to do. The Prime Minister thereupon submitted a request to the Constitutional Court to resolve a constitutional conflict between the government and the President with the aim of deciding on the removal of the complainant from office. In its decision of 7 June 2018, which was justified by the fact that the constitution does not grant the president any discretionary power with regard to dismissal, the Constitutional Court confirmed the complainant's dismissal.

The European Court of Human Rights states first that disputes between the state and its officials in principle fall within the scope of application of Article 6 of the ECHR.[28] Since there was no provision in the national legal system that expressly excluded the complainant from the right of access to a court, she was entitled to have her dismissal reviewed by national courts.[29] However, even if one were to assume that national law in the complainant's case expressly excluded access to a court, the exclusion would have required an objective justification taking into account the interests of the State.

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[27] ECtHR of 2 October 2014 – No. 10609/10 – *Matelly / France*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara / Turkey*; ECtHR of 27 October 1975 – No. 4464/70 – *Nationale Polizeigewerkschaft / Belgium*.

[28] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen et al. / Finland*.

[29] ECtHR of 23 June 2016 – No. 20264/12 – *Baka / Hungary*.

With regard to the freedom of expression protected by Article 10 of the ECHR, the Court first of all proceeds from its general principles according to which members of the judiciary can be expected to exercise restraint in the exercise of their freedom of expression in all cases in which the authority and impartiality of the judiciary may be called into question.[30] This follows from the special role of justice for society, which, as the guarantor of justice, a fundamental value in a state governed by the rule of law, must enjoy the trust of the public if it is to carry out its tasks successfully.[31] However, since questions of separation of powers in a democratic society concern very important matters in which the public has a legitimate interest to be informed, a public debate on the functioning of the judicial system enjoys a high degree of protection under Article 10 ECHR. In the present case, the complainant has voiced criticisms of legislative reforms, in particular concerning her competence to investigate corrupt offences. These were questions of public interest that did not go beyond mere criticism from a purely professional point of view. These views expressed by the complainant were therefore subject to the high level of protection of freedom of expression, especially since the aim was not to destroy public confidence in the judiciary.

The Court of Justice therefore unanimously held that there had been a violation of both Article 6 and Article 10 ECHR.

Judgment (Second Section) of 30 June 2020 – No 58512/16 – *Cimperšek v Slovenia*

Law: Article 10 ECHR (freedom of expression); Article 6 ECHR (right to a fair trial)

Keywords: Rejection of the application of a court expert – Expression of criticism of the Ministry of Justice – Refusal to hold an oral hearing

Core statement: The Contracting States have a discretionary power in assessing the need to intervene in the rights guaranteed under the ECHR, based on European standards, although monitoring of the rights granted by Article 10 (1) ECHR must be strict because of their special significance.

Note: In April 2013, the complainant applied to the Ministry of Justice for the post of judicial expert for the assessment of the effects of natural and other disasters. After he had successfully passed an examination required for the appointment as expert in May 2014, he was informed that his swearing-in was scheduled for July 2014. He then sent several e-mails, which he also forwarded to other applicants, to the Ministry of Justice, some of which complained in an offensive manner about the delay in processing his application. The Ministry then informed him that there were doubts as to whether the complainant had the necessary personal qualities for the post of court expert. The Ministry subsequently rejected the complainant's application for the post of expert witness. The appeal against this decision was unsuccessful before both instances of the administrative courts. The Administrative Court refused to hold an oral hearing. A constitutional complaint lodged against this was not accepted for consideration.

The Court considers the refusal of the Administrative Court to hold an oral hearing to be a violation of Article 6(1) of the ECHR, according to which every person has the right to have disputes concerning his or her claims heard in public by an independent and impartial court established by law. A waiver of an oral hearing is possible only in exceptional circumstances which justify deciding a dispute without an oral hearing.[32] This is of particular importance in the present proceedings because the legal questions which were also relevant for the

[30] ECtHR of 28 October 1999 – No. 28396/95 – *Wille / Liechtenstein*; ECtHR of 13 November 2008 – No. 64119/00 and 76292/01 – *Kayasu / Turkey*; ECtHR of 26 February 2009 – No. 29492/05 *Kudeshkina / Russia*; ECtHR of 9 July 2013 – No. 51160/06 – *Di Giovanni / Italy.*

[31] ECtHR of 23 April 2015 – No. 29369/10 – *Morice / France.*

[32] ECtHR of 6 November 2018 – No. 55391/13 – *Ramos Nunes de Carvalho e Sá / Portugal.*

decision of the court of appeal related to questions of fact that were in dispute between the parties. Since, under national law, it was not possible to hold the oral proceedings in the appellate court, the Court of Justice considers the refusal to hold the oral proceedings to be a violation of Article 6 ECHR.

The refusal of a state to employ a person as a public servant cannot in itself constitute the basis for a complaint under the ECHR.[33] However, the issue is not whether the complainant is entitled to be employed in the civil service, but whether the decision of the Ministry of Justice constitutes a violation of the exercise of the right to freedom of expression guaranteed by Article 10 ECHR. The ECHR does not grant a right to access to the civil service, but States Parties are obliged not to impede such access for reasons protected by the ECHR. The Court found that the complainant was refused the office of judicial expert based on the statements he had made in the exercise of his rights under Article 10 ECHR and therefore constituted an interference with the right to freedom of expression. However, this interference, which was provided for by law as one of the conditions for the post sought, because of the requirement of personal suitability, and which pursued a legitimate aim because of the associated preservation of the authority and impartiality of the judiciary, was not necessary in a democratic society. The discretionary decision as to whether interference with the right to freedom of expression is necessary is subject to strict requirements.[34] In particular, it requires a balance to be struck between the right to freedom of expression and the public interest that may be affected. By basing their decision exclusively on the justification of the Minister of Justice that the complainant does not have the personal aptitude, the administrative courts have not made the necessary weighing for the exercise of discretion.

The Court of Justice therefore ruled that there had been a breach of both Article 6 and Article 10 of the ECHR and awarded the complainant compensation of 15,600 EUR for non-material damage.

New pending cases (notified to the respective government)

***No. 26360/19 – Manole / Republic of Moldova* (2nd section) filed on 14 May 2019 – delivered on 19 June 2020**

Law: Article 8 ECHR (right to respect for private and family life); Article 10 ECHR (freedom of expression); Article 6 ECHR (right to a fair trial)

Keywords: Dismissal from the judiciary – Public criticism of a decision of the court – Bias of the court

Note: The complaint concerns the dismissal of the complainant from the judiciary. The complainant had criticised a journalist for a decision taken by the court concerning the television station where the journalist was employed. The court's decision and the complainant's dissenting opinion were then published, following which disciplinary proceedings were instituted against the complainant before the SJC, which led to his dismissal from the judiciary.

The Court of Justice must first determine whether the SJC is an independent and impartial court[35] within the meaning of Article 6 ECHR, based on a law[36]. It must also examine whether

[33] ECtHR of 2 December 2014 – No. 61960/08 – *Emel Boyraz / Turkey*; ECtHR of 26 September 1995 – No. 17851/91 – *Vogt / Germany*; ECtHR of 24 November 2005 – No. 27574/02 – *Otto / Germany*.
[34] ECtHR of 20 October 2009 – No. 39128/05 – *Lombardi Vallauri / Italy*; ECtHR of 20 December 1997 – No. 19736/92 – *Radio ABC / Austria*.
[35] ECtHR of 6 November 2018 – No. 55391/13 – *Ramos Nunes de Carvalho e Sá / Portugal*.
[36] ECtHR of 11 July 2006 – No. 36455/02 – *Gurov / Moldova*.

there has been an interference with freedom of opinion and, if so, whether this was lawful and necessary.[37]

No 39650/18 – *Żurek / Poland* (1st section) submitted on 6 August 2018 – delivered on 14 May 2020

Law: Article 6 ECHR (right to a fair trial); Article 10 ECHR (freedom of expression); Article 14 ECHR (non-discrimination)

Keywords: Dismissal from the judiciary – Criticism of government legislation – Access to an independent and impartial court based on law

Note: The complainant was a judge at the District Court in Krakow. In that capacity, he was elected for a four-year term as a member of the National Council of the Judiciary, of which he became spokesman. After the Polish Government adopted several draft laws in 2015 to reform the structure of the Constitutional Court, which called into question the independence of the judiciary,[38] the complainant took part in a public debate and strongly criticised the new rules adopted. Due to an amendment to the law on the National Council of the Judiciary, his term of office in this Council was prematurely terminated, about which he received no official notification. The law did not provide for judicial review of the early removal from office.

With regard to the measure that was taken, the complainant complains of the lack of access to a court within the meaning of Article 6 of the ECHR and the denial of the possibility of appeal within the meaning of Article 13 of the ECHR. It is also argued that the complainant's right to freedom of expression has been violated.

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4. Procedural law

Decisions

Judgment (4th Section) of 21 April 2020 – No 36093/13 – *Šimaitienė v Lithuania*

Law: Article 6 ECHR (right to a fair trial); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Dismissal of a judge – Order of a president – Compensation for salary not paid during the suspension

Core statement: The mere existence of a legal basis in national law justifying an interference with the protection of property does not satisfy the principle of legality. Rather, such a legal basis must also be compatible with the principle of the rule of law and offer guarantees against arbitrariness.

Note: In February 2006, criminal proceedings were instituted against the plaintiff, who had been a judge at the Vilnius District Court since 1995, on charges of abuse of office and forgery of documents. At the same time, she was suspended from her judicial duties without continued payment of remuneration. In 2010, she was acquitted of the criminal charges by

[37] ErfK/*Preis* BGB § 611a Rn. 714; Sate Labour Court (LAG) Rheinland-Pfalz of 21 February 2013 – 2 Sa 386/12.

[38] See also the judgment of the CJEU (Grand Chamber) of 19 November 2019 – joint cases C-585/18, C-624/18 and C-625/18 – *A.K.*, cf. HSI-Newsletter 4/2019 under IV.1.

Kaunas Regional Court. Although the court of appeal overturned the decision of the lower court, it discontinued the criminal proceedings because the charges were time-barred. The Appeals Court subsequently appealed against the decision with regard to the statute of limitations, expressly pointing out that with the discontinuation of the proceedings the question of the complainant's guilt had not been decided and could not be equated with an acquittal. While the criminal proceedings were still in progress, the competent disciplinary authority initiated disciplinary proceedings against the complainant with the aim of removing her from her post. After completion of the disciplinary investigations, the President of the Republic, on the recommendation of the Judicial Council, dismissed the complainant from the office of judge.

In civil proceedings, the complainant challenged both her removal from office and demanded payment of remuneration for the period since her suspension. The action was dismissed by the national courts at all instances, on the one hand finding that the President of the Republic had the legal power to remove a judge from office. The payment of remuneration for the time during a suspension ordered because of criminal proceedings was only provided for by law if the innocence of the person concerned was subsequently established.

On the one hand, the complainant complained of a violation of Article 6 of the ECHR because of the lack of independence of the judges who made the decision in the civil proceedings. In addition, she asserted a violation of Article 1 of Additional Protocol No. 1 in that she was unjustly not paid any further remuneration for the period of her suspension.

With regard to the alleged violation of Article 6 ECHR, the Court points out that, taking into account the idea of separation of powers, the members of a judicial panel, even if they are appointed by the executive or legislative organs, must be free from influence and pressure when exercising their judicial functions.[39] Likewise, judges must decide subjectively free of personal prejudice or bias with regard to their impartiality, so that there are sufficient guarantees, also from an objective point of view, to exclude any legitimate doubt in this respect.[40] In the present case, the Court concludes that the appellant has not proved any facts that would indicate a lack of independence or impartiality of the judges involved in her case, which is why the complaint had to be rejected as manifestly unfounded in so far as it is directed at a violation of Article 6 ECHR.

With regard to the complaint concerning the alleged violation of Article 1 Additional Protocol No. 1, the Court first held that the appellant's claim for payment of the remuneration withheld during the suspension was based on a provision of national law. According to that provision, such a claim is justified if the person concerned has not been found guilty in criminal proceedings that gave rise to the suspension.[41] The Court further concludes that the refusal of the Government to compensate the applicant for her unpaid salary constitutes an impairment of the use of property within the meaning of Article 1(2) of Additional Protocol No. 1.[42] This interference was not lawful, since the national court, when deciding on the question whether the complainant was entitled to payment of the remuneration for the period of her suspension, examined exclusively whether her innocence had been proven in the criminal proceedings. Under the national rules, however, the withholding of remuneration would have been justified only if the complainant's guilt had been proven.

The Court found by five votes to two that there had been a violation of Article 1 of Additional Protocol No. 1 and awarded the appellant compensation for the pecuniary loss suffered in the amount of 94,370 EUR. Judges *Kjølbro* and *Ranzoni* took the view, in the context of a

[39] ECtHR of 18 July 2013 – Nos. 2312/08 and 34179/08 – *Maktouf and Damjanović / Bosnia and Herzegovina* ; ECtHR of 18 October 2018 – No. 80018/12 – *Thiam / France.*
[40] ECtHR of 23 November 2017 – No. 66847/12 – *Haarde / Iceland.*
[41] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy / Hungary.*
[42] ECtHR of 2 July 2013 – No. 41838/11 – *R.Sz. / Hungary.*

common dissenting opinion that the complainant could not, because of the criminal proceedings brought against her, rely on a legitimate expectation as regards the compensation to which she might be entitled. Accordingly, no property within the meaning of Article 1 of Additional Protocol No. 1 had come into existence, so that the provision in question must remain inapplicable.

(In)admissibility decisions

Decision (4th Section) of 28 April 2020 – No 26278/07 – *Obradović / Serbia*

Law: Additional Protocol No. 12 (general prohibition of discrimination)

Keywords: Payment for overtime – Settlement by retrial – "resolution" of the dispute within the meaning of Article 37(1)(b) ECHR

Core statement: In order to come to the conclusion that a dispute within the meaning of Article 37 (1) (b) ECHR has been resolved and that there is therefore no longer any objective justification for the complainant to pursue the complaint, it must be examined whether the circumstances complained of by the complainant still exist and whether the effects of a possible violation of the ECHR have also been eliminated on account of these circumstances.

Note: The complainant, who is a police officer employed by the Ministry of the Interior in the Republic of Serbia, claimed overtime pay in a complaint against his employer. The claim was dismissed in two instances in 2006 because there was no legal entitlement for police officers to remuneration for overtime, although the complainant pointed out that other courts had ruled in favour of the plaintiffs in comparable cases. In a retrial, which was held in 2011 based on new facts, the complainant was awarded the full amount of overtime pay. In the proceedings before the ECtHR, the complainant complained that his rights under Additional Protocol No. 12 had been infringed by the inconsistency in the case-law of the national courts and by the impossibility of being able to comment on the defendant's submissions.

The Court assumes that the dispute was resolved within the meaning of Article 37.1(b) ECHR by the decision in the retrial, which was positive for the complainant, and that the complaint therefore had to be removed from the register. This condition is fulfilled if there is no longer an objective justification for the complainant to pursue his application and the circumstances directly objected to no longer exist and the effects of a possible violation of the ECHR based on these circumstances have also been eliminated.[43] In the present case, the Court concludes that the retrial put an end to the alleged violations of the ECHR and eliminated, as far as possible, the effects of the situation, which the appellant had complained about before the Court of Justice.[44]

Decision (Second Section) of 21 April 2020 – Nos. 35215/06 and 43414/08 – *Şevcenco and Timoşin / Republic of Moldova*

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

Keywords: Termination of employment for a criminal offence – Settlement in reopening proceedings – Abusiveness of the complaint

Core statement: Even if the appellant is not obliged, under Section 47(7) of the Rules of Procedure of the ECtHR, to provide all possible information relating to his appeal, the Court

[43] ECtHR of 24 October 2002 – No. 36732/97 – *Pisano / Italy.*
[44] ECtHR of 13 July 2000 – Nos. 39221/98 and 41963/98 – *Scozzari and Giunta / Italy.*

must be informed of the essential matters which are at the heart of the dispute and which are relevant to its decision.

Note: The complainants were employees of a public corporation. Criminal proceedings were instituted against them by the public prosecutor's office for misappropriation of funds in the course of their official duties. After completion of the investigations by the public prosecutor's office, but before the conclusion of the judicial criminal proceedings, the employer terminated the employment relationships with the complainants. An action for dismissal protection brought against this was unsuccessful in all instances. After conclusion of the labour court proceedings, the complainants were acquitted of the accusations made against them in the criminal proceedings. In a retrial that the complainants pursued on the basis of the acquittals against the pronounced terminations of their employment relationships, it was established that the terminations were invalid and that they were entitled to compensation for the material and non-material damage suffered as a result.

In their complaint, the complainants complained of an infringement of Article 6 ECHR because the judicial decisions initially taken declaring the termination of their employment relationships to be valid were not sufficiently reasoned. In so doing, they failed to inform the Court that these decisions were annulled in the subsequent retrial. The Court of Justice only obtained that information from the Government's submission.

The Court emphasises that, in principle, any conduct on the part of a complainant which is manifestly contrary to the purpose of the right of appeal established by the ECHR and which affects the proper functioning of the Court and the proper conduct of the proceedings before the Court can be regarded as abusive within the meaning of Article 35(3)(a) ECHR.[45] According to this provision, an appeal may be declared inadmissible if it is based on invented facts.[46] Likewise, incomplete and therefore misleading information, especially if it is part of the core of the decision and the complainant does not sufficiently justify the incompleteness, may amount to an abuse.[47] With regard to the present procedure, the Court notes that the appellants have not, in the context of their appeal, referred to the full developments of the case at national level without giving any plausible reason for doing so. Accordingly, the complaint had to be rejected for abuse of the right of individual complaints under Article 35 (3) lit. a ECHR.

New pending cases (notified to the respective government)

No. 20854/15 – *Milinković / Serbia* (4th section) submitted on 22 April 2015 – delivered on 15 June 2020

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

Keywords: Dismissal from the post of official – Disciplinary proceedings – Requirement to hold an oral hearing

Note: The applicant was a prison officer in a detention centre and was released from his civil service status after disciplinary proceedings had been carried out. The Administrative Court decided the legal dispute without conducting an oral hearing. The complainant complains of a violation of Article 6(1) of the ECHR.

[45] ECtHR of 1 July 2014 – No. 43835/11 – *S.A.S. / France*; ECtHR of 28 February 2017 – No. 28796/04 – *Bivolaru / Romania*.

[46] ECtHR of 6 September 1996 – No. 21893/93 – *Akdivar et al. / Turkey*; ECtHR of 12 May 2015 – No. 36862/05 – *Gogitidze et al. / Georgia*.

[47] ECtHR of 30 September 2014 – No. 67810/10 – *Gross / Switzerland*; ECtHR of 13 March 2018 – No. 55517/14 – *Vilches Coronado et al. / Spain*.

In view of its previous case-law[48], the Court of Justice must examine whether the failure to hold an oral hearing violated the right to a fair trial.

No. 7512/18 – *Starkevič / Lithuania* (2nd section) submitted on 5 February 2018 – delivered on 25 May 2020

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

Keywords: Dismissal from civil service for criminal misconduct – Use in disciplinary proceedings of information obtained in criminal proceedings

Note: Criminal proceedings were instituted against the complainant, who was a police officer, on suspicion of abuse of authority. The criminal proceedings were discontinued on the grounds of insignificance, but it was established that the criminal acts were suitable to justify disciplinary consequences. The complainant was then dismissed from the police service after disciplinary proceedings had been conducted. The Administrative Court referred to the findings made in the criminal proceedings.

For the Court of Justice, the first question that arises is whether the use in disciplinary proceedings of the findings obtained in the criminal proceedings constitutes a violation of Article 6 of the ECHR.[49] Furthermore, it must be examined whether this is also to be seen as an encroachment on the right to respect for private life as protected by Article 8 ECHR.[50]

No. 30745/18 – *Cotora / Romania* (4th section) submitted on 21 June 2018 – delivered on 6 April 2020

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

Keywords: Reduction of salary – Disciplinary proceedings – Adequate statement of reasons for the decision

Note: Disciplinary proceedings have been initiated against the complainant, a judge on appeal, for interference in the work of another judge. She was accused of influencing the outcome of a selection procedure in which other judges had applied for leading positions.

The complainant complained that the disciplinary measure had not been sufficiently examined in the appeal proceedings. The Court of Appeal had only checked the formal legality of the measure, but had not examined its justification or proportionality.

No. 47309/12 – *Vyshnevskyy / Ukraine* (5th section) submitted on 17 July 2012 – delivered on 16 April 2020

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

Keywords: Adjustment of an old-age pension to average wages – Possibility to comment on the defendant's submissions – Right to be heard

Note: The complainant requested that his old age and reduced earnings pension be adjusted to take account of the increase in average wages for the period since retirement. After the

[48] ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá / Portugal*; ECtHR of 8 June 2010 – No. 28353/06 – *Motion Pictures Guarantors Ltd. / Serbia*.

[49] ECtHR of 15 July 2010 – No. 9143/08 – *Šikić / Croatia*; ECtHR of 28 March 2017 – No. 45028/07 – *Kemal Coşkun / Turkey*.

[50] ECtHR of 8 April 2014 – No. 36259/04 – *Blaj / Romania*; ECtHR of 15 January 2015 – No. 68955/11 – *Dragojević / Croatia*; ECtHR of 29 June 2017 – No. 33242/12 – *Terrazzoni / France*.

pension insurance institution had rejected the claim, it was ordered to meet the plaintiff's claim in the legal proceedings. On appeal, the court of second instance overturned the decision and did not send the grounds of appeal to the complainant.

It is questionable whether Article 6 ECHR was infringed because the appellant was not given the opportunity to comment on the opponent's grounds of appeal and his right to be heard was thereby infringed.

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5. Protection of privacy

Decisions

Judgment (2nd section) of 26 May 2020 – No. 1122/12 – *P.T. v Republic of Moldova*

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Disclosure of sensitive medical data in certificate for presentation in different life situations – Disproportionate intervention – No legitimate aim

Core statement: In view of the fundamental importance of data protection for the effective exercise of the right to respect for private life, the discretionary scope of the contracting states is limited in shaping their respective legal and administrative frameworks.

Note: The complainant is HIV positive. In 2011, he underwent a medical examination to obtain a military service passport. He informed the doctors who examined him about his illness, who issued him with a certificate exempting him from military service. According to national legal regulations, the exemption certificate had to contain the medical reason for the exemption from military service. In order to obtain a national identity card, which under national law is mandatory for everyone, the complainant had to produce either his military service passport or the certificate of exemption from military service.

With regard to the admissibility of the complaint under Article 35 ECHR, the Court concluded that the complainant had no legal remedy under national law against the content of the exemption certificate, since it was expressly laid down by a government decision and the national courts were therefore unable to verify whether it infringed the rights of the applicant. In the absence of prospects of success of an action against the government decision to amend the contents of the exemption certificate, the complainant had no effective legal remedy available to him, and the complaint was therefore admissible.[51]

As regards the right to respect for private and family life guaranteed by Article 8 ECHR, the Court held that the obligation to disclose confidential medical information resulting from the exemption certificate constituted a disproportionate interference with the right to protection of private life. That follows in particular from the way in which the certificate of exemption was formulated and the associated possibility of making the information contained therein concerning the nature of a person's illness available to third parties, including potential employers or private undertakings. The systematic storage and use of information relating to the private life of a person by public authorities has a significant impact on the interests protected by Article 8 ECHR and therefore constitutes an encroachment on the relevant

[51] ECtHR of 10 January 2012 – No. 32816/07 – *Ciubuc et al. / Moldova*; ECtHR of 3 October 2019 – No. 74438/14 – *Nikolyan / Armenia*.

rights.[52] This is even more true when the processing of this information concerns intimate and sensitive data, such as those relating to the physical or mental health of an identifiable person.[53] Even if the interference with the complainant's rights protected by Article 8 ECHR based on the government decision was in accordance with national law, it is not apparent that it was justified by a legitimate aim.

The Court of Justice therefore unanimously ruled that there had been an infringement of Article 8 ECHR and awarded the complainant compensation for the non-material damage in the amount of 4000 EUR.

New pending cases (notified to the respective government)

No. 33134/18 – *Shibayeva / Russia* (3rd section) filed on 20 June 2018 – delivered on 18 June 2020

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Termination of employment – Conflict of interest due to family involvement

Note: The complainant worked as a telephone operator for the professional fire brigade. Her husband was deputy head of the department in which the complainant was employed. In the course of a public prosecutor's investigation, serious violations of anti-corruption laws were discovered in the complainant's department. In particular, the investigation revealed that the complainant was employed on her husband's initiative. The head of department was not informed of this fact. Both the complainant and her husband were dismissed from their employment relationship due to loss of confidence. The complainant's action for protection against dismissal before the national court was unsuccessful in all instances.

The Court first asks the question whether Article 8 ECHR is applicable to the present case at all.[54]

No. 54460/16 and 8430/16 – *Poļakovs and Jurgileviča / Latvia* (5th section) submitted on 9 September 2016 and 8 February 2016 – delivered on 21 April 2020

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

Keywords: Employment as a teacher in the civil service – Previous criminal conviction

Note: The complainants were initially employed as salaried teachers. In 2015, they applied for admission as teachers in the State Quality Service for Education due to a change in the law. Both complainants had been convicted of criminal offences of rioting, aiding and abetting fraud in 1981 and 2007 respectively. Because of these convictions, they were refused admission to the civil service, as national regulations do not allow persons convicted of intentional crimes to work as teachers in the civil service. Actions brought against them before the national courts were unsuccessful.

The complainants argue that the prohibition of professions resulting from the measure was disproportionate, in particular because it did not take into account the fact that the offences were committed over a long period and did not concern serious or particularly serious crimes.

[52] ECtHR of 4 May 2000 – No. 28341/95 – *Rotaru / Romania*; ECTHR of 4 December 2008 – Nos. 30562/04 and 30566/04 – *S. and Marper / United Kingdom*.
[53] ECtHR of 25 February 1997 – No. 22009/93 – *Z. / Finland*; ECtHR of 23 February 2016 – No. 40378/06 – *Y.Y. / Russia;* ECtHR of 26 January 2017 – No. 42788/06 – *Surikov / Ukraine*.
[54] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov / Ukraine*.

Under German law, there is no legal entitlement to the establishment of a civil-service relationship if someone has committed a substantial criminal offence and is therefore unsuitable. This is always the case if an applicant in ordinary criminal proceedings has been sentenced by a German court to at least one-year's imprisonment for an intentional criminal offence. This also applies if the conviction was handed down a long time ago.[55] If the appointing authority was not aware that the appointed person has been convicted of a criminal offence and therefore appears to be unworthy of an appointment to an official position, the appointment must be revoked with effect for the past as well (Section 14 (1) no. 2 of the Federal Civil Service Act – BBG).

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6. Social security

Decisions

Judgment (Third Section) of 12 May 2020 – No. 18921/15 – *Nechayeva v Russia*

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

Keywords: Financial aid for the purchase of housing for civil servants – Reduction of the aid due to lack of available funds – Reduction not provided for by law

Core statement: The primary prerequisite for an intervention in the protection of property is the lawfulness of the intervention as provided for by a legal provision, whereby the mere lack of funds is not a circumstance that releases the state from its obligations.

Note: The complainant was an official of the Russian Ministry of Labour and Employment from 2002 to 2015. Due to her family situation – she is married and has four children – she was entitled by law to assistance in acquiring a flat. The amount of the allowance was based on the size of the apartment to which the civil servants were entitled because of their family situation. On this basis, the competent authority determined an amount of assistance for the complainant that, because of the funds made available to the Ministry by the federal authorities, was reduced in proportion to the assistance to be granted to all civil servants. There was no legal basis for this reduction of aid. The action for payment of the full amount of aid was unsuccessful in all instances, and the Court of Appeal in particular considered that the calculation made by the Ministry based on the provisions of substantive law was correct. In her appeal, the appellant complains that the reduction of the aid is an arbitrary interference with her property.

The Court recalls, first of all, that Article 1 Additional Protocol No. 1 does not guarantee a right to social benefits at a certain level and does not restrict the freedom of the Contracting States to decide whether to introduce social systems at all for the purpose of granting certain benefits.[56] In the present case, however, the complainant was entitled under domestic law to be granted state assistance for the acquisition of a home, since she fulfilled the necessary conditions for this. Nor was the amount of the claim questioned by the state authorities. However, to the extent that the assistance was reduced due to a lack of funds to be made available by higher-ranking authorities, there is no national statutory regulation for this, which

[55] German Federal Administrative Court (Bundesverwaltungsgericht) of 15 May 1997 - 2 C 39/96.
[56] ECtHR of 30 June 2005 – No. 11931/03 – *Tétériny / Russia*; ECtHR of 9 April 2015 – No. 65829/12 – *Tchokontio Happi / France*; ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy / Hungary*; ECtHR of 31 October 2017 – No. 38775/14 – *Krajnc / Slowenia*.

leads to the illegality of the intervention.[57] A lack of funds does not constitute a circumstance that releases the state from its obligations under the ECHR.[58]

The Court therefore found that there had been a breach of Article 1 of Additional Protocol No. 1 and ordered the Government to compensate the material damage consisting of the difference between the aid to be claimed and the aid actually paid. In that regard, it is stated in the grounds that, where a breach of the law has been established, its consequences must be remedied and, in order to restore the situation as it existed before the breach, compensation for the material damage must be paid.[59]

Judgment (4th Section) of 30 June 2020 – No. 26944/13 – *Popović and Others v Serbia*

Law: Article 14 ECHR (prohibition of discrimination) in connection with Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Granting different disability benefits to disabled civilians and disabled war veterans -- Objectively justified unequal treatment

Core statement: National authorities have a discretionary power to justify discrimination, bearing in mind that they have a better direct knowledge of society and its needs than international courts when assessing economic and social matters.

Note: The complainants are four civilians who are paraplegic as a result of accidents or the impact of third parties and have therefore been recognised by the national authorities as being 100% severely disabled. They receive social benefits both for assisted living and for assistance from an assisting person. In 2007 and 2008, the complainants brought civil law actions, alleging discrimination against former war veterans who receive, in comparable situations, more extensive benefits such as a personal disability allowance, an orthopaedic allowance and higher allowances for assisted living. The complaints were unsuccessful in all instances and also before the Constitutional Court. The courts were of the opinion that the unequal treatment was prescribed by law and objectively justified, since the causes that were the reason for the complainants' disability could not be compared with those that affected the disability of war veterans.

The Court first points out the fundamental conditions for the existence of discrimination within the meaning of Article 14 ECHR. According to these, only a difference in treatment of persons based on a characteristic mentioned in Article 14 ECHR can constitute discrimination in the same or comparable situations.[60] Such unequal treatment is discriminatory if it has no objective and reasonable justification or if there is no reasonable relationship between the means used and the aim pursued.[61] With regard to the discrimination alleged by the complainants in relation to disabled war veterans, the Court held that the national authorities have a margin of discretion in justifying the difference in treatment. In doing so, they must first take into account that the granting of social security benefits must be compatible with Article 14 ECHR.[62] With regard to the social conditions and needs of citizens in their country, the national institutions have better knowledge than international courts. They are therefore better placed than these to judge what is in the public interest in the context of the balancing exercise to be carried out.[63] If the government justifies

[57] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy / Hungary*.
[58] ECtHR of 8 October 2019 – No. 53068/08 – *Fedulov / Russia*.
[59] ECtHR of 25 March 2014 – No. 71243/01 – *Vistiņš und Perepjolkins / Latvia*.
[60] ECtHR of 5 September 2017 – No. 78117/13 – *Fábián / Hungary*; ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali / Greece*.
[61] ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali / Greece*.
[62] ECtHR of 12 April 2006 – No. 65731/01 and 65900/01 – *Stec et al. / United Kingdom*.
[63] ECtHR of 7 July2011 – No. 37452/02 – *Stummer / Austria*.

the difference in treatment essentially because war veterans suffered their injuries during military service, during which they were naturally exposed to a higher risk, and in the exercise of the duty imposed on them by the state, this weighing up of interests is not objectionable.

The Court found by five votes to two that there was no violation of Article 14 ECHR. The judges *Vehabović* and *Paczolay* issued a joint dissenting opinion, in which they took the view that the difference in treatment should apply solely to economic services and not to medical services.

(In)admissibility decisions

Decision (2nd section) of 2 June 2020 – No. 43480/17 – *Fizgejer v Estonia*

Law: Article 14 ECHR (prohibition of discrimination) in connection with Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Granting of an old-age pension dependent on residence – Exhaustion of legal recourse

Core statement: The existence of mere doubts about the prospects of success of a particular remedy, which is not manifestly futile, does not constitute a reason for not exhausting that remedy.

Note: The complainant is entitled to a state pension under the law. At the beginning of her old-age pension entitlement, the complainant was resident in Estonia. In 2007, the pension insurance institution received information that the complainant had transferred her residence to Germany. As a result, the pension payments were initially suspended and the complainant was asked to apply for the resumption of pension payments, stating her place of residence. The relevant letter was sent back to the pension insurance institution from Germany, stating that the recipient had moved away unknown. In 2009, the complainant turned to the insurance institution and asked it to inform her of the reason for the suspension of her old-age pension, stating at the same time that she was now living in the United States. The pension insurance institution replied to the complainant that the pension payments had now been suspended because there was no social security agreement between Estonia and the USA. According to national law, the resumption of pension payments could only be considered if she was resident in the EU or in a country with which Estonia had an agreement at the time in question. Following further correspondence between the complainant and the pension insurance institution, the latter refused to resume pension payments in November 2011. The complainant addressed various letters to the Parliamentary Committee for Social Affairs, the Chancellor of Justice, the President of the Republic and the Supreme Court of Estonia between 2013 and 2017, but without initiating formal legal proceedings. At the beginning of 2018, pension payments in favour of the complainant were resumed at her request, as a legal amendment had entered into force, according to which the old-age pension is granted irrespective of residence.

The Court rejected as inadmissible the complaint alleging infringement of Article 14 of the ECHR on the grounds of alleged discrimination on the basis of place of residence, on the grounds that the legal remedies before the national courts had not been exhausted. It is a fundamental characteristic of the protection regime established by the ECHR that it is subsidiary to national systems of human rights protection. The Court is responsible for monitoring the implementation by the States Parties of their obligations under the ECHR. It is the task of the States Parties to ensure that the fundamental rights and freedoms enshrined in the ECHR are respected and protected at national level. As a result, they are obliged to

make use of the legal remedies available in the national legal system first.[64] The sending of letters to various institutions cannot be regarded as constituting recourse to such a legal remedy, particularly since these institutions were not competent to decide on the question of the complainant's pension payments. As far as the latter also turned to the Supreme Court, the latter expressly pointed out that it could only review the matter in an ongoing court case. In this connection, the Court of Justice states that the decision of the pension insurance institution to suspend the pension payments of the appellant was an administrative decision that could have been challenged before the administrative courts. Since an effective domestic remedy within the meaning of Article 35 ECHR was thus not lodged, the appeal was inadmissible.

New pending cases (notified to the respective government)

No. 32522/19 – *Nechyporenko and others / Ukraine* (5th section) filed on 8 June 2019 – delivered on 4 June 2020

Law: Article 14 ECHR (prohibition of discrimination); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Compensation for receiving a disability pension – Constitutional complaint as a national legal remedy

Note: The complainants were members of the National Police. Because of the health problems, they had suffered while on duty, they applied for a retirement pension and an invalidity pension, as well as for the payment of an allowance, which under national law is paid in the event of early retirement on health grounds. The payment of that compensation was refused because they had not indicated in their application that their retirement was due to health reasons. Disputes on this matter before the national courts have been unsuccessful at all instances. One constitutional complaint was rejected as inadmissible.

The complaint alleges infringement of Article 14 of the ECHR, since the compensation provided for by law was refused solely because the health reasons for retirement were not stated and that there was therefore unequal treatment in comparison with persons who stated this reason.

The Court will have to examine whether the ground of discrimination invoked by the complainants falls within the concept of "other status" within the meaning of Article 14 ECHR. It will also have to examine whether the constitutional complaint is an effective remedy within the meaning of Article 35(1) ECHR in relation to the complaint of infringement of Article 14 ECHR in conjunction with Article 1 of Additional Protocol No. 1.

Nos. 63312/13 and 68602/13 – *Acquaviva and Others and Alfini and Others v Italy* (1st section) lodged on 26 September 2013 and 22 October 2013 – received on 13 May 2020

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

Keywords: Granting of an allowance for persons employed abroad – Amendment of the law

Note: The complainants allege infringement of Article 6 ECHR, as they are deprived of an allowance for employment abroad granted on the basis of the established case-law of national courts by the application of a new law.

[64] ECtHR of 25 March 2014 – No. 17153/11 – *Vučković et al. / Serbia*.

In this context, the Court of Justice has to examine in particular the question of whether any interference was justified by reasons of the general interest and was sufficiently proportionate to the objective pursued by the legislature.[65]

No. 65346/17 – *Güllü / Turkey* (2nd section) submitted on 4 August 2017 – delivered on 11 May 2020

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

Keywords: Granting of a retirement pension – Loss of value due to currency devaluation

Note: The complainant receives a state pension both as a retired civil servant and from a previous employment relationship. In 2013, he requested a recalculation of his monthly pension in view of the monetary depreciation that has occurred since his retirement. The request was rejected. The action before the national courts was unsuccessful in all instances.

The Court asks whether there is an infringement of the protection of property in that the interest rate applied to retirement pensions is insufficient in comparison with inflation rates.[66]

No. 35788/19 – *Monterreal Sanchez / Spain* (3rd section) filed on 24 June 2019 – delivered on 4 May 2020

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

Keywords: Granting of early retirement benefits after termination of employment – Retroactive invalidity of termination

Note: The complainant received early retirement benefits following the termination of his employment following a mass dismissal in June 2010. Due to decisions by the labour court, the termination in connection with the mass dismissal was declared invalid. For the period from 12 September 2012 to 2 December 2013, the date of the renewed termination of the employment relationship, it was determined that the employment relationship of the complainant continued. For this period, the plaintiff did not receive any compensation payments from his former employer. Nevertheless, the pension insurance institution has reduced the subsequent early retirement benefits by monthly instalments with regard to the existing but unfulfilled compensation claims from the employment relationship.

The complaint alleges that the national authorities have deprived the complainant of his property without any legal provision to do so.[67]

No. 11944/16 – *Milivojević / Serbia* (4th section) submitted on 24 February 2016 – delivered on 3 April 2020

Law: Article 14 ECHR (prohibition of discrimination); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Entitlement to recalculation of disability pension – discrimination in relation to old-age pension

[65] ECtHR of 28 October 1999 – Nos. 24846/94, 34165/96, 34173/96 – *Zielinski and Pradal and Gonzalez et al. / France*; ECtHR of 7 June 2011 – No. 43549/08 – *Agrati et al. / Italy*.
[66] ECtHR of 23 September 1998 – No. 19639/92 – *Aka / Turkey*.
[67] ECtHR of 26 April 2018 – No. 48921/13 – *Čakarević / Croatia*.

Note: The complaint concerns the refusal of the social security institution to recalculate the complainant's reduced earning capacity pension in the light of his pension contributions paid retroactively, whereas recipients of an old-age pension were given this possibility.

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