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

In the fourth edition of the HSI Report for 2020, we look at current developments in case law and legal policy on European level in the reporting period from October to December 2020.

A look at the latest rulings of the CJEU shows that European law in particular encourages the questioning of traditional role models around care work – also in collective agreements. In the *Syndicat CFTC* case (C-463/19), the question was whether and under what conditions a leave entitlement granted after maternity leave provided for in a collective agreement can also be claimed by fathers.

The judgment in *Veselības ministrija* (C-243/19) concerned an application for reimbursement of the costs of cross-border healthcare provided in another EU country for religious reasons. This was based on the wish of a father, a member of Jehovah's Witnesses, that an urgent operation on his son should be carried out without a blood transfusion, which was refused in the state of affiliation.

It should also be emphasised that on 8 December the CJEU (as expected) dismissed the actions for annulment brought by Hungary and Poland against the reformed Posting of Workers Directive – the amendments are compatible with EU primary law. A ruling of the Grand Chamber deals with the applicability of the Posting of Workers Directive to lorry drivers in cross-border goods transport. In the case of *Jobcenter Krefeld* (C-181/19), the Grand Chamber of the CJEU ruled that the exclusion from Book II of the German Social Code (SGB II) benefits of EU foreigners whose right of residence in Germany derives solely from their children's school attendance violates the Free Movement of Persons Regulation. The CJEU's case law also dealt with issues such as temporary agency work, protection against discrimination and mass dismissal law. Two Opinions of Advocate General *Pitruzzella* give the CJEU the opportunity to further differentiate the criteria for distinguishing between on-call time as rest time or working time.

Traditional role models also preoccupied the ECtHR: Case *B. v. Switzerland* (No. 78630/12) concerned the exclusion of widowed men from survivors' pensions when their children have reached the age of legal majority, while widows can continue to receive this benefit. Another case concerned the question of whether the termination of a consular employee's foreign assignment due to her pregnancy constituted sex discrimination (No. 33139/13 – *Napotnik v. Romania*). In *Pişkin v. Turkey* (No. 33399/18), the Court held that dismissal based solely on alleged links to a terrorist organisation, without further examination under labour law, violated the right to respect for private and family life and the right to a fair trial. In addition, the freedom of expression of judges and prosecutors and other issues related to the right to a fair trial have been the subject of various judgments. In the future, the ECtHR will deal with the prohibition of strike action and discrimination on the grounds of trade union membership in some newly pending cases.

We hope that this report will once again provide you with a comprehensive overview of the latest developments in European and international labour as well as social security law and hope you enjoy reading 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

New pending cases

Reference for a preliminary ruling from the Federal Labour Court (Bundesarbeitsgericht, BAG, Germany), order of 16 October 2020 – C-518/20 – *XP gegen St. Vincenz-Krankenhaus GmbH*

Law: Article 7 (1) Working Time Directive 2003/88/EC, Article 31 (2) EU GRC

Keywords: Lapse of the right to paid annual leave – Continuous reduction in earning capacity of 15 months - Failure to request by the employer – No actual possibility of exercising the leave entitlement

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2. Collective redundancy

Decisions

Judgment of the Court of 11 November 2020 – C-300/19 – *Marclean Technologies*

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

Keywords: collective redundancies – threshold – reference period to be taken into account

Core statement: According to Art. 1(1)(a) of the Collective Redundancies Directive 98/59/EC, a contested individual redundancy is part of a collective redundancy if this individual redundancy took place within a reference period provided for in this provision for determining the existence of a collective redundancy, taking into account any period of 30 or 90 consecutive days, and if the employer made most of the redundancies for reasons not related to the employees.

Note: If a certain number of dismissals are made within 30 or 90 days, these are collective redundancies. The CJEU has now ruled that for this purpose not only those dismissals may be counted that were made before the dismissal at issue. On the contrary, a collective dismissal always occurs if the threshold value is exceeded in the relevant period before or after the dismissal.[1]

The CJEU therefore considered the Spanish legal situation, according to which only in exceptional cases the period after the dismissal was to be taken into account, to be

[1] As already Advocate General *Bobek* opinion of 11 June 2020 – *Marclean*, see note in HSI-Report 3/2020, under IV.8.

incompatible with Directive 98/59/EC. Section 17 (1) of the German Unfair Dismissals Act already complies with this requirement.[2]

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3. Equal treatment

Decisions

Judgment of the Court (First Chamber) of 18 November 2020 – C-463/19 – *Syndicat CFTC*

Law: Art. 14, 28 Equal Treatment Directive 2006/54/EC

Keywords: Equal treatment of men and women – Collective agreement granting entitlement to leave following statutory maternity leave to female workers bringing up their child themselves – Exclusion of male workers

Core statement: A national collective agreement may reserve to workers who are bringing up their child themselves the right to leave after the expiry of statutory maternity leave, provided that such additional leave is intended to protect workers both in respect of the effects of pregnancy and in respect of their maternity. Whether this is the case, in particular whether the conditions for granting this leave, its form and duration, as well as the level of legal protection associated with this leave, are met, must be examined by the national courts.

Note: See the note by *Wenckebach*, HSI-Report 4/2020, p. 4 et seqq. (*German*).

Opinions

Opinion of Advocate General de la Tour delivered on 19 November 2020 – C-511/19 – *Olympiako Athlitiko Kentro Athinon*

Law: Article 6(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Age discrimination – Public sector employees transferred to a labour reserve until termination of their contract of employment – Termination of employment on attainment of a full retirement pension – Reduction in the salary costs of the public sector

Core statement: A national rule under which public service employees who, within a certain period, satisfy the conditions for entitlement to a full retirement pension are transferred to a labour reserve until the termination of their contract of employment is not contrary to European Union law. On the one hand, this regulation pursues a legitimate objective of employment policy and, on the other hand, the means used to achieve this objective are appropriate and necessary.

Opinion of Advocate General Saugmandsgaard Øe delivered on 25 November 2020 – C-795/19 – *Tartu vangla*

Law: Article 2(2)(a), Article 4(1), Article 5 Equal Treatment Framework Directive 2000/78/EC

Keywords: Prohibition of discrimination on grounds of disability – Minimum hearing requirement for employment as a prison officer – Hearing impairment – Absolute bar to continued employment – Duty to provide reasonable accommodation

[2] Cf. Ascheid/Preis/Schmidt-*Moll*, Kündigungsrecht, 6th ed. 2021, § 17 Rn. 49 with further references.

Key statement: persons with disabilities are discriminated against by a national rule which makes it absolutely impossible to continue to employ prison officers if their hearing is below a certain threshold, without the employer checking whether the person concerned - where appropriate after reasonable accommodation has been made, for example by assigning him to a particular service or by allowing him to wear a hearing aid - is able to perform the duties arising from the employment relationship.

Note: The plaintiff has suffered from a hearing impairment in one ear since birth. Even with this limitation, he was employed – without complaint – for many years as a warden in a correctional institution in Estonia. According to Estonian law, it is an absolute obstacle to work as a prison officer if the hearing ability is below a defined threshold. Prison officers are required to be "all-round usable". After an examination revealed that the plaintiff's hearing did not reach this level, he was dismissed. According to the national standard, the extent to which a hearing aid could compensate for the impairment is not taken into account, whereas in the case of visual impairments, compensation by means of visual aids is possible.

The Advocate General *Øe* states that the employer of the hearing-impaired prison officer should have taken reasonable precautions. These could have been organisational measures, e.g. assigning the prison officer to another service which did not require such a high level of hearing ability (para. 92). If the employee could perform his or her duties – if necessary with the support of reasonable accommodation – then dismissal is not justified solely because the minimum hearing ability is too low by definition (cf. para. 94). In addition, the "permission to use such a [hearing] device (...) would also have to be regarded as a reasonable accommodation within the meaning of Article 5 of Directive 2000/78" (para. 97).

The Advocate General comes to a correct conclusion. In addition to Art. 5 of Directive 2000/78/EC, he could have referred to Art. 27 para. 1 lit. i of the UN Convention on the Rights of Persons with Disabilities, which requires the provision of reasonable accommodation at the workplace.

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo n.º2 de Vigo (Administrative Court No.2 of Vigo, Spain), lodged on 14 August 2020 – C-389/20 – *Tesorería General de la Seguridad Social*

Law: Art. 4(1) Equal Treatment Directive 79/7/EEC, Art. 5(b) Equal Treatment Directive 2006/54/EC

Keywords: Discrimination on grounds of sex – Special social security scheme for domestic workers – Female domestic workers – Exclusion from the possibility of contributing to unemployment insurance – Exclusion from unemployment benefits

Reference for a preliminary ruling from the Finanzgericht Bremen (Germany) lodged on 20 August 2020 – C-411/20 – *Familienkasse Niedersachsen-Bremen*

Law: Free Movement Directive 2004/38/EC, Coordination Regulation (EC) No. 883/2004

Keywords: Family benefits – Child benefit – Proof of domestic income – Equal treatment

Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 28 August 2020 – C-405/20 – *BVAEB*

Law: Art. 12 Equal Treatment Directive 2006/54/EC

Keywords: Equal treatment between men and women – Adjustment of civil servants' pensions – Adjustment of the real value of pensions for inflation

Note: A "social component" intended to reduce higher pensions in favour of lower pensions and thus to reduce the gap between them is to be examined for gender discrimination. The CJEU has been asked whether this unfairly discriminates against men, who tend to be able to claim high pensions.

Reference for a preliminary ruling from the Conseil d'État (Belgium) lodged on 29 September 2020 – C-485/20 – *HR Rail*

Law: Art. 5 Equal Treatment Framework Directive 2000/78/EC

Keywords: Probationary employment relationship – Inability to perform the essential functions of the previous job due to disability – Reasonable accommodation – Assignment to another suitable job

Note: In the main proceedings, a worker was employed by a Belgian railway undertaking as a specialist in track maintenance. During the probationary period, he was fitted with a pacemaker and was subsequently no longer allowed to be exposed to electromagnetic fields, such as those that existed in the railway tracks. He was then initially employed as a warehouse worker until his employer decided to dismiss him during his probationary period. The question now is whether the employer should have assigned the employee another job (suitable for him, e.g. continued employment as a warehouse worker) as a reasonable precaution (Art. 5 of Directive 2000/78/EC), which he would have been obliged to do in the case of a permanent employee (outside the probationary period).

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4. Fixed term employment

Judgment of the Court (Eighth Chamber) of 8 October 2020 – C-644/19 – *Universitatea "Lucian Blaga" Sibiu and others*

Law: Art. 1 and 2 RL Equal Treatment Framework Directive 2000/78/EC; § 4 para. 1 Framework Agreement on Fixed-Term Employment Contracts (implemented by RL 1999/70/EC)

Keywords: Retention of the status as a regular lecturer beyond the statutory retirement age – Restriction to lecturers who have the status of a dissertation advisor

Core statement: (1) If only those lecturers who are dissertation advisors are allowed to retain their status as full lecturer after reaching retirement age, while the other lecturers can only conclude fixed-term employment contracts with the university with lower remuneration, this violates § 4 No. 1 of the framework agreement on fixed-term employment contracts. However, this presupposes that the lecturers with dissertation supervision are employed for an indefinite period of time and are comparable to the teachers of the second category, and that the unequal treatment is not justified by an objective reason.

(2) Unequal treatment because of age is not given in this case.

Note: According to the implementing regulations of the Romanian Higher Education Act, regular teaching staff at the University of Sibiu may retain their status even after reaching retirement age if they are dissertation advisors. The complaint in this case was filed by an employee who did not supervise any dissertations, therefore lost his status as a regular lecturer upon retirement and was subsequently only repeatedly employed by the university on the basis of fixed-term employment contracts. These fixed-term contracts were less remunerated than those of the regular teaching staff.

Although the CJEU could not identify any unequal treatment on the grounds of age within the meaning of Directive 2000/78/EC, there could be a violation of the principle of equal treatment of fixed-term employees pursuant to Section 4 No. 1 of the Framework Agreement on Fixed-term Employment Contracts. For this purpose, the referring court would have to clarify whether the regular teaching staff who receive their status as dissertation supervisors are comparable permanent employees. If this is the case, there would be unequal treatment in terms of remuneration. This cannot be justified on the grounds of personnel administration or budgetary considerations, since these are not legitimate objectives within the meaning of the framework agreement.

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5. General matters

Judgment of the Court (Fourth Chamber) of 3 December 2020 – C-62/19 – *Star Taxi App*

Law: Article 2(a), Art. 4 Directive 2000/31/EC on electronic commerce, Article 1(1)(b) Information Procedures Directive (EU) 2015/1535, Art. 9 and 10 Services Directive 2006/123/EC

Keywords: Platform economy – Notion of 'information society services' – Service bringing passengers into direct contact with taxi drivers – Authorisation rules for service activities

Core statement: (1) A taxi app that brings licensed taxi drivers and potential customers together without interfering in the further course of the service or assuming quality guarantees is an "information society service" within the meaning of Article 2(a) of Directive 2000/31/EC in conjunction with Article 1(1)(b) of Directive (EU) 2015/1535.

(2) Such an intermediary service may be subject to the same authorisation requirement as other providers of taxi ordering services. However, the requirements for prior authorisation must meet the criteria of Art. 9 and 10 of Directive 2006/123/EC.

Note: The subject matter of the proceedings is the state regulation of services of the platform economy. In the *Asociación Profesional Elite Taxi* case, the Grand Chamber of the European Court of Justice already had to deal with the question of whether an offer by Uber is an information society service or a transport service.[3] The issue was an intermediary service that brought together non-professional drivers and passengers via an app. How to characterise Uber's service was relevant to the question of how it could be regulated by the state. At the end of 2017, the Court of Justice concluded that it was a transport service within the meaning of Article 2(2)(d) of Directive 2006/123/EC, which does not fall within the scope

[3] CJEU of 20 December 2017 – C-434/15 – *Asociación Profesional Elite Taxi*, with note in HSI-Newsletter 4/2017 under IV.1 (German only).

of the Services Directive (para. 40). In this respect, the provisions on transport services (Art. 90 et seq. TFEU) were relevant for this offer by Uber pursuant to Art. 58 (1) TFEU.[4]

The present case also concerns an internet-based taxi service. Via the Star Taxi app, passengers are shown available taxi drivers, whom they can then freely select. The service offered differs in several respects from the one in the Rs. *Asociación Profesional Elite Taxi*. Advocate General *Szpunar* described this as follows: "Firstly, Star Taxi App does not need to hire taxi drivers because they have their own licence and resources to provide inner-city transport services. Star Taxi App only offers its service to them as a supplement to make their own services more efficient. For Star Taxi App, taxi drivers are not employees like Uber drivers, but customers, in other words recipients of the service. Second, Star Taxi App does not exercise any control over or decisive influence on the conditions under which the transport services are provided by the taxi drivers, who freely determine those conditions within the limits, if any, set by the applicable rules."[5] The Court therefore concluded for the Star Taxi app that it is an "information society service". The conditions for an official authorisation of the service are therefore based on Art. 9 and 10 of Directive 2006/123/EC.

Opinions

Opinion of Advocate General Saugmandsgaard Øe delivered on 29 October 2020 – C-804/19 – *Markt24*

Law: Article 21(1)(b)(I), Articles 20 to 23 Brussels 1a Regulation (EU) No. 1215/2012

Keywords: International jurisdiction over contracts of employment – Remuneration – Non-executory contract of employment – Exclusion of rules of jurisdiction provided for by the national law of the court seised – Concept of 'place where or from where the employee habitually carries out his work'

Core statement: (1) An action brought by an employee domiciled in one Member State against an employer domiciled in another Member State for payment of the remuneration agreed in the employment contract falls within the scope of the Brussels 1a Regulation (EU) No 1215/2012, even if these employees have not in fact performed any work.

(2) No further international jurisdiction can be established under national law by the court in whose district the employee is domiciled or habitually resident for the duration of the employment relationship or in whose district the remuneration is payable.

(3) Where an employee and an employer have concluded a contract of employment and the employee has not in fact performed any work in fulfilment of the contract, the "place... where or from where the employee habitually carries out his work" within the meaning of Article 21(1)(b)(i) of the Brussels Ia Regulation is in principle the place of work agreed in that contract.

Note: Brussels 1a Regulation (EU) No. 1215/2012 governs the question in which Member State actions are to be brought (international jurisdiction). For labour law, Art. 21 stipulates that actions against an employer are to be brought at the employer's place of residence or at the place where the work is habitually performed. In addition, there is a third option: if an employee "does not or did not habitually carry out his work in any one country ", she or he may bring his action in the "courts for the place where the business which engaged the employee is or was situated".

In the present case, a contract of employment was concluded between an employee resident in Austria and a German employer. The employee was not assigned any work, no wages

[4] CJEU 20 December 2017 – C-434/15 – *Asociación Profesional Elite Taxi*, para. 40, 90 et seqq.
[5] Opinion of the Advocate General *Szpunar* of 10 September 2020 – C-62/19 – *Star Taxi App*, para. 45.

were paid and the employment relationship was effectively terminated after a few weeks. Can the action for default of acceptance wages be filed in Austria?

For Art. 21 Brussels 1a Regulation to be applicable at all, a certain element of duration and permanence is required. In the opinion of the Advocate General, this does not depend on whether work has already been performed – the conclusion of the employment contract is sufficient. If the applicability of the Regulation is to be affirmed, the question is whether additional jurisdictions beyond the Brussels 1a Regulation can be provided for in Austrian law, which the Advocate General denies: The Brussels 1a Regulation does not serve the harmonisation of social policy, within the framework of which more favourable regulations are permissible, but the creation of a unified system of jurisdictional regulations.

In the context of the examination of the place of jurisdiction according to the Brussels 1a Regulation, the Advocate General takes the view that the habitual place of work can be determined even if no work has actually been done. In this case, the place of work agreed between the parties must be used. The variant according to Art. 21 (1) (b) (ii) Brussels 1a Regulation, according to which the place of establishment of an employer in the Member State concerned is decisive, is, however, subsidiary to the place of the usual performance of work. The Advocate General rejected the possibilities considered by the referring court of taking recourse to Article 21 (1) (b) of the Brussels 1a Regulation to consider the place where the employee was ready to work as decisive, as well as the possibility of taking recourse to the place where the contract was initiated.

Access to jurisdiction in his home country could, however, be opened up from another point of view: If the employer had a local branch that was involved in the conclusion of the contract, the employee could invoke Art. 7 No. 5 Brussels 1a Regulation.[6] According to the Advocate General, this should be clarified in the present case.

Opinion of Advocate General Hogan delivered on 1 October 2020 – C-940/19 – *Les Chirurgiens-Dentistes de France and others*

Law: Article 4 f(6) Directive 2005/36/EC (on the application of professional qualifications)

Keywords: Recognition of professional qualifications – National provision introducing partial access to certain professions in the health sector

Core Statement: Member States may allow only partial access to one of the professions covered by Directive 2005/36/EC even if the directive actually provides for a mechanism of automatic recognition of professional qualifications.

Opinion of Advocate General Hogan of 17 December 2020 – C-896/19 – *Repubblika*

Law: Art. 2, 19(1)(2) TEU, Art. 47 EU CFR

Keywords: Effective judicial protection – Judicial independence – Procedure for the appointment of judges – Powers of the Prime Minister – Involvement of a committee on judicial appointments

Core Statement: (1) A judicial review of the validity of a procedure for the appointment of judges, as provided for in the Maltese Constitution, must comply with European law.

(2) It is not fundamentally contrary to Union law if a constitutional provision of a Member State provides for the participation of the executive (e.g. the Prime Minister) in the appointment procedure for judges. However, the minimum requirements for judicial independence under EU law must be guaranteed. These include freedom from hierarchical

[6] Cf. on the systematics EuArbRK/*Krebber,* Brüssel Ia-VO, Article 20 para. 10.

control and financial autonomy from the executive and the legislature, as well as sufficient protection against impeachment and disciplinary measures.

(3) The procedure for the appointment of judges cannot be called into question under Article 19(1) TEU, interpreted in the light of Article 47 of the Charta of Fundamental Rights, in order to support actions brought before the pending judgment.

New pending cases

Reference for a preliminary ruling from the District Court (Amtsgericht) Hamburg (Germany), lodged on 7 June 2020 – 31c C 285/19

Law: Art. 5(3) Air Passenger Rights Regulation (EC) No 261/2004

Keywords: Trade union organised strike as an "extraordinary circumstance"

Note: The District Court Hamburg had to decide whether air passengers are entitled to compensation payments in the event of delays caused by a "strike of their own staff organised by a trade union". The obligation to pay compensation would not exist if the aforementioned constellation constituted an "extraordinary circumstance" within the meaning of Article 5(3) of the Passenger Rights Regulation (EC) No 261/2004.

The referring court assumes that the trade union strike is an extraordinary circumstance because, unlike in a decision of the CJEU of 17 April 2018[7], this is not a wildcat strike. In that judgment, the CJEU held that the restructuring measures taken by the company could have foreseeably given rise to disagreements and conflicts with employees that could have resulted in a strike.

The referring court held that disputes arising from the employees' wage increase demands did not constitute an "exceptional circumstance". Compared to these, however, strikes aimed at a general improvement of working conditions are not typical and are much more difficult for the company to calculate. Also, in contrast to the above-mentioned judgement, the company had not created any circumstances with its conduct (e.g. company restructuring) which would most probably lead to a dispute with the workforce. For this reason, in the view of the court, this constellation was an "exceptional circumstance".

The right to freedom of association in collective bargaining and negotiation, which is protected under EU law, also precludes the assumption that a union strike is controllable, because, according to the court, this suggests in a certain way that the airline has a duty to its passengers to end the strike by meeting their wage increase demands.

This view may come as a surprise, since in collective bargaining it must regularly be expected that there will also be unannounced strikes. The Federal Labour Court (Bundesarbeitsgericht – BAG) already stated in its 1980 decision: "Collective bargaining autonomy without the right to strike is nothing more than 'collective begging'"[8]. Employers also have a much wider range of means of defence at their disposal than simply meeting wage increase demands.

There will probably be no significant changes for German law, as the airline has already settled the demanded payment in order to avoid litigation[9] and the dispute is therefore settled and removed from the CJEU's register of proceedings.

[7] CJEU of 17 April 2018 – C-195/17 – *Krüsemann u.a.*

[8] Bundesarbeitsgericht (German Federal Labour Court) of 10 June 1980 – 1 AZR 168/79.

[9] *Fischer*, juris Praxisreport Arbeitsrecht 45/2020 Note 1, D.

Reference for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court), lodged on 21 October 2020 – C-534/20 – *Leistritz*

Law: Article 38(3), second sentence, of the GDPR (Regulation (EU) 2016/679)

Keywords: Ordinary dismissal of data protection officers – Primacy of Union law

Notes: The plaintiff works for the defendant as a "legal team leader" and was additionally appointed by the defendant as a company data protection officer. The defendant is obliged to make this appointment due to its size. After the plaintiff was later given ordinary notice of termination, the question arose as to whether the notice of termination was valid under section 38(2) in conjunction with section 6(4) sentence 2 of the Federal Data Protection Act, as data protection officers can only be dismissed extraordinarily for good cause.

The BAG now wants to know from the CJEU whether Union law, in particular Art. 38 para. 3 sentence 2 of the GDPR, permits a provision of a Member State that makes the termination of the employment relationship of a data protection officer subject to stricter conditions than under Union law. If Section 38(1) and (2) in conjunction with Section 6(4) sentence 2 had to remain inapplicable due to the primacy of application of EU law (in particular Article 38(3) sentence 2 of the GDPR), the ordinary termination of the data protection officer would not be void, contrary to the view of the courts at first instance. Should this question be answered in the affirmative, the BAG would further like to know whether Union law also precludes the more extensive national protection against dismissal if the appointment of the data protection officer is not obligatory under Article 37(1) of the GDPR, but only under the law of the Member State. The possible priority of application of Article 38 (3) sentence 2 of the GDPR could only exist for data protection officers appointed on a mandatory basis under Union law, as the regulation could only be considered conclusive in this respect.

Finally, in the event that the first questions are answered in the affirmative, the Federal Labour Court is interested in whether Article 38(3) sentence 2 of the GDPR is based on a sufficient basis of authorisation under EU law, in particular to the extent that it covers data protection officers who are in an employment relationship with the controller.

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6. Insolvency law

Decisions

Judgment of the Court (Eighth Chamber) of 25 November 2020 – C-799/19 – *Sociálna poist'ovňa*

Law: Art. 1, 2, 3 Insolvency Directive 2008/94/EC

Key words: Concepts of outstanding claims of employees and insolvency of an employer – Fatal occupational accident – Compensation for non-material damage – Submission of the claim to the employer – Impossibility – Guarantee institution

Core statement: (1) An employer is not deemed to be "insolvent" if an application for enforcement has been made against him in connection with a claim for damages awarded by a court, but the claim has been declared irrecoverable in the enforcement proceedings because of his de facto insolvency. However, it is necessary to examine whether the Member State concerned has decided to extend the protection of employees provided for in the Insolvency Directive in the event of such an insolvency which has been established in accordance with other procedures provided for in national law.

(2) Compensation owed by an employer to surviving dependants for non-material damage suffered as a result of the death of an employee due to an accident at work can only be subsumed under " employees' claims arising from contracts of employment or employment relationships" within the meaning of the Insolvency Directive if it is covered by the concept of "pay" as defined under national law.

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7. Posting of workers

Decisions

Judgment of the Court (Grand Chamber) of 1 December 2020 – C-815/18 – *Federatie Nederlandse Vakbeweging*

Law: Article 1(3), Article 2(1), Article 3(1), (3) and (8) of the Posting of Workers Directive 96/71/EC – Article 56 TFEU

Keywords: Drivers in international goods transport – Concept of "posted worker" – Cabotage transport – Freedom to provide services – Universally applicable collective agreements

Core statement: (1) The Posting of Workers Directive 96/71/EC is applicable to the transnational provision of services in the road transport sector.

(2) Workers who work as drivers under a charter contract between two undertakings established in different Member States are posted workers if their work has a sufficient connection with that territory. The existence of such a link is determined in the context of an overall assessment of factors such as the nature of the activities carried out by the workers concerned in that territory, the closeness of the link of the activities to the territory of each Member State in which they are working and the proportion which those activities represent there of the total transport service. In this context, instructions to start work at the registered office of an undertaking in another Member State or to finish work there are not in themselves sufficient for the assumption that the driver has been sent to the territory of that other Member State within the meaning of the Posting of Workers Directive.

(3) The existence of a group of companies between the lender and the hirer is not decisive for the assessment of whether there is a posting of workers.

(4) If cabotage transport is carried out in the territory of another Member State within the framework of a charter contract, this is in principle a posting constellation.

(5) Whether a collective agreement within the meaning of Art. 3 para. 1 and 8 of the Posting of Workers Directive 96/71 has been declared generally binding is to be assessed on the basis of the applicable national law.

Note: A Dutch transport company commissions a German and a Hungarian group company under a charter contract to take over lorry journeys which begin and end in the Netherlands. A Dutch collective agreement provides that the employees of the contracted companies are also subject to the working conditions regulated by the agreement, even if the employment contract itself is governed by foreign law. The referring Dutch court assumes that the collective agreement can only be applicable in posting constellations.

The CJEU develops some principles as to when a driver is to be regarded as posted to a Member State (para. 42 et seq.). The prerequisite for this is a "sufficient connection with the

territory concerned".[10] With regard to lorry journeys, the Court differentiates: if the driver's activity includes loading or unloading the lorry in the Member State, maintenance and cleaning, such a connection is to be assumed. This is not the case, however, if the vehicle merely passes through the territory. A driver, for example, who drives through German territory on her way from Lodz to Marseille would not be regarded as posted within the meaning of the Posting of Workers Directive. This is different for so-called cabotage transports, i.e. journeys whose origin and destination are in the same host state (cf. the definition in Art. 2 No. 3, 6 of Regulation No. 1072/2009): Here, a posting is already to be assumed under the applicable law.

The term "sufficient connection" is not mentioned in the current legal acts but can now be found in Directive (EU) 2020/1057, which specifies the requirements for the posting of drivers. The decision of the CJEU in the present case thus anticipates the legal situation that will apply after the Mobility Package enters into force on 2 February 2022.[11]

The answer to the further questions referred on the compatibility of the application of the collective agreement with the Services Directive contained explosive social policy content.[12] The CJEU did not take a position on the matter and justified this by stating that national law determines whether a collective agreement is to be regarded as generally binding. An interpretation autonomous of Union law was out of the question. This is remarkable because national law (as well as the collective agreements themselves) of course must be in conformity with fundamental freedoms. In the past, rulings in which social policy regulations were declared incompatible with fundamental freedoms have sometimes led to considerable criticism of the social policy orientation of EU law.[13] The restraint now adopted is to be welcomed, but should be based on a solid legal doctrinal foundation.

Judgment of the Court (Grand Chamber) of 8 October 2020 – C-620/18 – *Hungary v Parliament and Council*

Law: Posting of Workers Directive (EU) 2018/957, Coordination Regulation (EC) No 593/2008, Articles 9, 53, 58, 62 TFEU

Keywords: Compatibility of the reformed Posting of Workers Directive with Union law

Core statement: Hungary's action for annulment of the Posting of Workers Directive (EU) 2018/957 is dismissed. The amendments made were adopted on the correct legal basis and are also proportionate.

Judgment of the Court (Grand Chamber) of 08 December 2020 – C-626/18 – *Poland v Parliament and Council*

Laws: Posting of Workers Directive (EU) 2018/957, Coordination Regulation (EC) No 593/2008, Articles 9, 53, 58, 62 TFEU

Keywords: Compatibility of the reformed Posting of Workers Directive with Union law

Core statement: The action for annulment brought by Poland against the Posting of Workers Directive (EU) 2018/957 is dismissed.

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[10] As already CJEU of 19 December 2019 – C-16/18 – *Dobersberger*, Rn. 31 with reference to this in HSI-Newsletter 4/2019 (German only) under IV.6. on cross-border rail transport.

[11] More on the mobility package HSI-Report 2/2020 (de), under VII.1.1.

[12] See already the notes to the Opinion of Advocate General, HSI-Report 2/2020, under IV.4.

[13] Cf. *Ulber/Wiegand*, Die Bindung von Arbeitnehmervereinigungen an die europäischen Grundfreiheiten, HSI-Schriftenreihe, Bd. 24, 2018.

8. Social security

Decisions

Judgment of the Court (Grand Chamber) of 6 October 2020 – C-181/19 – *Jobcenter Krefeld*

Laws: Art. 7(2) and Art. 10 Free Movement of Persons Regulation (EU) No 492/2011; Art. 24(2) Free Movement Directive 2004/38/EC; Art. 4 Coordination Regulation (EC) No 883/2004

Keywords: Exclusion of foreigners from SGB II benefits (basic assistance für jobseekers in Germany) – Jobseekers whose right of residence is also derived from their children's school attendance

Core statement: § 7(1) sentence 2 no. 2 lit. c SGB II, which excludes EU foreigners and their children, who all have a right of residence in Germany due to their children's school attendance, without exception from benefits to secure their livelihood, violates Art. 7(2) and Art. 10 of Regulation (EU) No. 492/2011. This interpretation is not called into question by Art. 24(2) of Directive 2004/38/EC. At the same time, there is a violation of Art. 4 of Regulation (EC) No. 883/2004

Note: The question of the extent to which foreign persons may be excluded from basic social security benefits under Book II of the Social Code (SGB II) has repeatedly occupied the CJEU.[14] The *Alimanovic* case was significant in this regard. In that decision the Court of Justice allowed exclusion under § 7(1) sentence 2 no. 2 lit. b SGB II for EU foreigners whose right of residence results solely from the purpose of seeking work.[15] The case now decided by the Court of Justice concerned the exclusion of benefits under section 7(1) sentence 2 no. 2 lit. c SGB II. This applies to foreigners "whose right of residence results directly or derivatively from their children only from the right to attend general education or training under Article 10 of Regulation (EU) No 492/2011"[16].

This was the case here. A Polish national was denied subsistence benefits on the basis of § 7(1) sentence 2 no. 2 lit. c SGB II, as his right of residence had only resulted from the purpose of seeking work. The fact that his children continued to have a right of residence due to their school attendance, from which the single father derived a right of residence, made no difference for the decision of the competent job centre in Krefeld. The LSG NRW had referred the question to the CJEU as to whether the underlying regulation was compatible with Union law.[17]

The Court first clarified that schoolchildren whose right of residence results from Article 10 of Regulation (EU) No. 492/2011, as well as their custodial parent, may not be disadvantaged in the granting of social benefits (Article 7(2) of Regulation (EU) No. 492/2011), even if the parent no longer has worker status (para. 54 et seq.). Article 24(2) of Directive 2004/38/EC does not preclude this. This provision allows Member States to deny social assistance benefits to employed persons and jobseekers during the first three months of residence. Following the European Commission, the Court of Justice states that it would be "paradoxical" if Article 24(2) of Directive 2004/38/EC were to be interpreted in such a way that social assistance benefits are denied if the right of residence can be derived not only

[14] CJEU of 11 November 2014 – C-333/13 – *Dano*, with notes in HSI-Newsletter 5/2014 (German); CJEU of 15 September 2015 – C-67/14 – *Alimanovic*; CJEU of 25 February 2016 – C-299/14 – *García-Nieto u.a.* with notes in HSI-Newsletter 1/2016 (German).

[15] CJEU of 15 September 2015 – C-67/14 – *Alimanovic*.

[16] BT-Drs. 18/10211, S. 13.

[17] Request for prelimary ruling of Regional Social Court of NRW of 14 February 2019 – L 19 AS 1104/18.

from parenthood in accordance with Regulation (EU) No 492/2011, but also from seeking employment in accordance with Directive 2004/38/EC. "Such an interpretation would have the effect of excluding the parent and his or her children, who have a right of residence pursuant to Article 10 of Regulation No 492/2011, from equal treatment with nationals in the area of social assistance if that parent decides to seek employment in the host Member State" (para. 71). Furthermore, § 7(1) sentence 2 no. 2 lit. c SGB II also violates the principle of equal treatment in Article 4 of Directive 2004/38/EC (para. 88).

The decision of the CJEU is in line with the older case law of the BSG in similar cases.[18] Accordingly, an exclusion of benefits can only be considered for persons whose right of residence results solely from seeking work and not if there is another right of residence due to the school attendance of a child. Section 7(1) sentence 2 no. 2 lit. c SGB II, which states otherwise, is contrary to EU law in this respect.

Judgment of the Court (Second Chamber) of 29.10.2020 – C-243/19 – *Veselības ministrija*

Law: Article 20(2) Coordination Regulation (EC) No 883/2004, Article 8(5) and (6)(d) Patients' Rights Directive 2011/24/EU, Article 21(1) EU CRC

Key words: Prior authorisation of hospital treatment abroad in the EU – Method of treatment used – Opposing religious belief

Core message: (1) An insurance state may refuse to grant prior authorization according to Art. 20 Para. 2 of Regulation (EC) No. 883/2004 for hospital treatment abroad in the EU for religious reasons, if medically effective hospital treatment is available in this member state.

(2) Prior authorisation on the basis of Article 8(5) and (6)(d) of Directive 2011/24/EU may not be refused in such a case, interpreted in the light of Article 21(1) of the EU Directive, unless such refusal is objectively justified by the legitimate aim of preserving a certain level of medical and nursing care or a certain level of medical knowledge in the Member State of affiliation.

Note: See the note by *Hlava*, HSI-Report 4/2020, p. 10 et seqq. (*German*).

Judgment of the Court (Eighth Chamber) of 08 October 2020 – C-657/19 – *Finanzamt D*

Law: Article 132(1)(g) VAT Directive 2006/112/EC

Keywords: Value added tax – Tax exemptions – Services closely linked to social welfare and social security – Preparation of care reports – Taxable person appointed by the medical service of the long-term care insurance scheme – Establishment recognised as having a social character

Core statement: (1) The preparation of expert reports on the need for long-term care by independent experts commissioned by the Medical Service of a long-term care insurance fund, which are used by that long-term care insurance fund to determine the extent of any entitlement of its insured persons to benefits, constitutes a service closely connected with social welfare and social security, in so far as it is indispensable for the proper achievement of revenue in this area.

(2) Assessors may be refused recognition as an institution with a social character even if the person concerned 1.) renders their services consisting in the preparation of assessments on the need for care as a subcontractor on behalf of the Medical Service, which has been recognised as such an institution, 2.) the costs of the preparation of these reports are

[18] Cf. e.g. Federal Social Court of 25 January 2012 – B 14 AS 138/11 R.

indirectly and flat-rate borne by the respective long-term care insurance fund and 3) the said expert has the possibility under national law to conclude a contract directly with this fund for the preparation of the reports in order to benefit from this recognition, but has not made use of this possibility.

Judgment of the Court (Fifth Chamber) of 25 November 2020 – C-303/19 – *Istituto Nazionale della Previdenza Sociale (Prestations familiales pour les résidents de longue durée)*

Law: Art. 11 Long-Term Residence Directive 2003/109/EC

Keywords: Legal status of third-country nationals who are long-term residents – Right to equal treatment – Entitlement to a family benefit for family members who do not reside in the territory of that Member State

Core message: It is contrary to Union law if, for the purposes of determining entitlement to social security benefits, no account is taken of those family members of a long-term resident who are residing in a third State, whereas this is the case for family members of nationals of that Member State. The prerequisite for this is that the Member State, when transposing Directive 2003/109/EC, did not express its intention to make use of the exception from equal treatment opened by Article 11(2) of the Directive.

Judgment of the Court (Fifth Chamber) of 25 November 2020 – C-302/19 – *Istituto Nazionale della Previdenza Sociale (Prestations familiales pour les titulaires d'un permis unique)*

Law: Art. 12 Directive 2011/98/EU (Directive on the combined work and residence permit for third-country nationals)

Keywords: Rights of third-country workers holding a long-term residence permit – Right to equal treatment – Regulation of a Member State which does not take into account family members of the holder of a single permit not residing in the territory of that Member State for the purpose of determining entitlement to a family benefit

Core statement: A national rule is contrary to Union law if, for the purpose of determining the entitlement to a family benefit of a holder of a single permit for work and residence, it does not take into account family members residing in a third State, whereas such family members are taken into account in the case of nationals of that Member State.

Judgment of the Court (First Chamber) of 17 December 2020 – C-710/19 – *G. M. A. (Demandeur d'emploi)*

Law: Article 14(4)(b) Free Movement Directive 2004/38/EC, Article 45 TFEU

Keywords: Job-seeker – Reasonable period of time to take the necessary steps to obtain employment – Requirements imposed by the host Member State on the job-seeker during that period

Core statement: A host Member State is obliged to give Union citizens a reasonable period of time to familiarize themselves with potentially suitable employment opportunities and to take the necessary steps to obtain employment. The period begins at the time when this Union citizen has registered as a job seeker. During this period, the host Member State may require jobseekers to prove that they are seeking employment. Only after this period has expired can that Member State require jobseekers to prove not only that they are continuing to seek employment, but also that they have a real chance of being hired.

New pending cases

Reference for a preliminary ruling from the Federal Finance Court (Bundesfinanzgericht, Austria) lodged on 30 July 2020 – C-372/20 – *Finanzamt für den 8., 16. und 17. Bezirk in Wien*

Law: Article 11(3)(a) or (e) of the Coordination Regulation (EC) No 883/2004

Keywords: Entitlement to Austrian family allowances under the Family Burdens Equalisation Act (Familienlastenausgleichsgesetz – FLAG) for a German national while working for an Austrian aid organisation in Uganda – Entitlement under national law – Indirect discrimination

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9. Temporary agency work

Decision

Judgment of the Court (Second Chamber) of 14 October 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 – Equal treatment – Measures necessary to prevent abusive use of temporary agency work – Obligation on Member States to prevent successive assignments

Core statement: Union law does not require Member States to limit the number of successive assignments of the same temporary worker to the same user undertaking or to make the lawfulness of the use of temporary agency work dependent on the provision of objective reasons for the use of temporary agency work. Member States may not, however, remain inactive in order to preserve the temporary nature of temporary agency work and to achieve the objective of preventing circumvention of the Temporary Agency Work Directive 2008/104.

Note[19]: In this judgment, the CJEU has for the first time ruled on the permissible duration of the assignment of temporary agency workers. Member States are required to take measures to preserve the temporary nature of temporary agency work, although they are free to decide on the effective measures. If a company resorts to a chain of successive temporary work contracts, it must always be examined whether there is an inadmissible circumvention, even if temporary workers have been used on a rotating basis (workplace-related approach). Practice in Germany often deviates from this requirement. Adjustments are necessary here. The CJEU is expected to deal with this legal issue again soon (Case C-232/20 – Daimler[20]). Particular attention should be paid to the question of how intensively the CJEU monitors the effectiveness of the measures taken by the member states.

[19] See already the comments by *Klengel* on the present ruling, HSI-Report 3/2020, comment under II.

[20] Regional Labour Court of Berlin-Brandenburg Order of 13 May 2020 – 15 Sa 1991/19; see HSI-Report 2/2020, note under IV.7.

Opinions

Opinion of Advocate General Sánchez-Bordona delivered on 10 December 2020 – C-784/19 – *TEAM POWER EUROPE*

Law: Article 12(1) of the Coordination Regulation (EC) No 883/2004 – Article 14(2) of the Implementing Regulation (EC) No 987/2009

Keywords: Posting of workers – Applicable social security law – Temporary agency work – Member State in which the employer normally carries out its activities

Core statement: An undertaking engaged in providing temporary staff can be considered to normally carry out its activities in the Member State in which it is established, even if it does not to provide a significant proportion of the temporary work to hirers established in the same Member State, unless the existence of fraud or abuse is established.

Note: What social security regime are temporary agency workers posted abroad in the EU subject to? The CJEU was prompted to examine this question in greater depth in the present case. The plaintiff was a Bulgarian temporary worker who had been posted to a German company. The Bulgarian authorities refused to issue an A1 certificate, which serves as proof of social security[21], on the grounds that German social security law was applicable. This met with criticism from the GA, as had already been the case in the opinion of the EU Commission.

The interpretation of Art. 12 para. 1 of the Coordination Regulation (EC) 883/2004 is decisive, according to which the laws of the country of origin are to be applied if the employer usually works there. Art. 14 para. 2 Implementing Regulation (EC) 987/2009 puts this in concrete terms: Other significant activities than purely internal administrative activities must usually be carried out there. The question therefore arises as to whether temporary work agencies have a place where they are "normally" active and whether this is the place of administration or the place of work of the temporary agency workers.

The Advocate General focuses on where the recruitment, selection and hiring of workers takes place. The activity of the temporary workers themselves is irrelevant, as they provide the typical service for the enterprise.[22] An exception could only be recognised if the cross-border construction is fraudulent or abusive, for example through letterbox companies. The Advocate General does not find it objectionable if temporary employment agencies establish themselves in the Member States with the most favourable laws for them in order to post workers from there. However, the lack of a sufficient administrative structure at this location, only a slight connection of the workers to the temporary employment agency under labour law and the hiring out to a single customer in another EU country as well as a connection to this company under company law are indicative of an abuse.

The opinion of the Advocate General cannot be followed. The provision in question is tailored to other constellations. If, for example, a company from another sector occasionally hires out temporary workers for whom there is no need for deployment at certain times, it usually continues to carry out its activities in that state. The business model of commercial temporary agency work, on the other hand, consists precisely in not "working" itself, but in having temporary agency workers work for others. Therefore, no A1 certificate can be issued for these temporary workers, who are subject to the social security system of the sending state. In any case, the place of work of the temporary workers must be taken into account when determining the usual place of activity of the temporary employment agency. Should the opinion of the Advocate General and the Commission prevail, there would be a considerable

[21] Instructive on the A1 certificate *Heuschmid/Schierle* in: Preis/Sagan, Europäisches Arbeitsrecht (European Labour Law), para. 16.38.

[22] See already CJEU 10 February 2000 – C-202/97 – *FTS*, para. 43 et seq.

economic incentive to have temporary workers from countries with low social standards work in countries with higher standards.[23]

New pending cases

Reference for a preliminary ruling from the Tribunal Judicial da Comarca de Braga – Juízo do Trabalho de Barcelos (Portugal) lodged on 15 July 2020 – C-426/20 – *Luso Temp*

Law: Art. 3(1)(f) and Art. 5(5) Temporary Agency Work Directive 2008/104/EC

Keywords: Temporary agency work – Holiday entitlement – Differrent calculation for temporary agency workers and permanent staff

Note: The Portuguese Tribunal Judicial da Comarca de Braga has also "discovered" the Temporary Agency Work Directive. According to Portuguese law, the length of leave and the amount of holiday pay for temporary agency workers is based on the duration of their employment with the hirer. The calculation of the holiday entitlement of permanent employees, on the other hand, is usually more favourable, since for calendar years in which the employees were employed during the year, regulations apply which result in a higher holiday entitlement than the pro rata holiday entitlement. The decisive question is therefore: Is there a violation of the principle of equal treatment pursuant to Art. 5 para. 1 of the Temporary Agency Work Directive?

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10. Working time

Opinions

Opinion of Advocate General Pitruzzella delivered on 6 October 2020 – C-580/19 – *Stadt Offenbach am Main (Période d'astreinte d'un pompier)*

Laws: Art. 2 Working Time Directive 2003/88/EC

Key words: On-call duty of a firefighter – Obligation to reach the city limits within 20 minutes in operational clothing and vehicle – No requirement as to place of stay – De facto restriction on choice of place and on personal perception of interests

Core statement: (1) The decisive factor for the classification of on-call time as working time is the intensity of the restrictions. This results in particular from the given reaction time to the employer's call.

(2) If the shortness of the reaction time does not obviously significantly restrict the employee's free choice of location, further indications may be used for the assessment. These must be general and objective indications from the exercise of the employer's authority to issue directives, whereby particular weight is to be attached to the indication of frequent official use during on-call time.

(3) If, during their on-call time, firefighters are obliged to reach the city limits within 20 minutes in their operational clothing and vehicle, this constitutes working time.

Note: The plaintiff works as a firefighter for the city of Offenbach am Main. In addition to his regular duties, he has to be on call. During this time, the plaintiff was obliged to be available

[23] C.f. press release of the union IG BAU, 12 January 2021 on the opinion.

at all times and to be able to reach the city limits of Offenbach am Main within 20 minutes in the event of an emergency. The plaintiff applied for the on-call times to be recognised as working time and for them to be remunerated accordingly.

At the beginning of his observations, the Advocate General referred to the dichotomous concept of working time of the Court of Justice[24], which only recognises the two mutually exclusive states of working time and rest time (para. 49). This distinction corresponds to the clear wording of the norm and can, if intended, only be overcome by the European legislator (paras. 53 - 55).

From the case-law of the Court of Justice, clear preconditions for the classification of on-call duty as working time could be derived: 1.) The employee is at a place determined by the employer, 2.) the employee is available to the employer to respond to a call, and 3.) the reaction time to the employer's call is particularly short (para. 62).

The restrictions imposed by the employer, which do not allow the employee to take an appropriate rest period, are decisive for the classification (para. 82). In this context, a short reaction time had a special, but not sole, indicative effect, as it directly and objectively influenced the employee's freedom (para. 90). The Advocate General also attaches more weight to it than to the circumstantial evidence of the place of stay given to the employee by the employer. If the reaction time was very short, it could therefore usually be assumed to be working time (para. 99). However, if the shortness of the time was less significant, there could be other indications which could be decisive. In this context, the Advocate General separately emphasises the restriction of particularly frequent use during on-call duty.

In conclusion, the Advocate General advises the Court to confine itself to making these criteria as general and objective as possible and to leave the assessment of the individual case to the national courts.

It can be assumed that the CJEU will follow the Opinion. It is in line with the CJEU's approach from previous judgments to stringently enforce the twofold nature of the concept of working time and to formulate the distinguishing criteria as objectively and generally as possible in order to facilitate the interpretation and application of the law for the national courts and thus enable them to make a clear assessment of the individual cases (para. 58).

Opinion of Advocate General Pitruzzella delivered on 6 October 2020 – C-344/19 – *Radiotelevizija Slovenija (Période d'astreinte dans un lieu reculé)*

Law: Art. 2 Working Time Directive 2003/88/EC

Keywords: Organisation of working time – Concepts of working time and rest period – On-call time – Maintenance of television transmitters in high mountains

Core statement: (1) For the classification of a period of on-call time as working time or rest time, the intensity of the restrictions is decisive and in particular the reaction time to the employer's call.

If the reaction time is short, but not so short that the employee's free choice of location is completely prevented, additional criteria can be used to examine the overall effect. These additional criteria must result from the employer's authority to issue instructions, i.e. they may not be drawn from objective situations that have nothing to do with the employer's sphere of control. Examples are:

- Workers' scope of action vis-à-vis the employer's reputation,
- consequences of failure to act or delay in acting,

[24] CJEU of 21 August 2018 – C-518/15 – *Matzak*, para. 55; of 3 October 2000 – C-303/98 – *Simap*, para. 47; of 10 September 2015 – C-266/14 – *Federación de Servicios Privados del sindicato Comisiones obreras*, para. 26.

- the need to wear functional clothing to work,
- availability of a company car to reach the place of work,
- the timing and duration of on-call duty; and
- the presumed frequency of the assignments.

(2) If workers work in a geographically inaccessible place without the employer imposing local restrictions and with a response time of one hour, this does not constitute "working time". This also applies if workers stay for certain periods of time in accommodation close to the place of work (broadcasting station) and the possibilities for leisure activities are limited due to the geographical particularities of the place.

Note: The initial case raises some questions in connection with the characterization of the time of an on-call duty as working time or as rest time within the meaning of the Working Time Directive. Specifically, the case involved a broadcasting technician who was assigned to maintain a radio broadcasting system in the high mountains. He was obliged to start work within one hour during the period of on-call duty. Due to the particular geo-graphical location and the specified response time, it was not possible for him to go home to the valley during the on-call period. Opportunities for recreational activities were also limited on the mountain. It was questionable, among other things, whether the distinction criteria developed by the CJEU were also sufficient for assessing a special constellation such as the one at hand.

Advocate General *Pitruzzella* does not see this as an obligation on the part of the employer for the employee to stay at a certain place, as the CJEU formulated it in the *Matzak* case[25] as a criterion for the characterization of working time. According to the GA, the geographical specificity of the place of work has no effect on the classification of on-call time as working time or rest time. For this purpose, he draws a comparison with employees on oil platforms and those who have simply chosen to live far away from their place of work (para. 77 et seqq.). The latter is certainly to be assigned to the employee's sphere of responsibility as a rule, although the Advocate General's additional comment that modern communication technologies nowadays make it easier to maintain contact with the family (cf. marginal no. 84) is not particularly helpful. The final motions deal in detail with the question of which criteria can be used for the overall assessment of on-call times. What is not addressed in the present case is whether the activity in a transmitter station on a mountain could not in any case be an activity within the meaning of Article 17 (3) (a) of Directive 2003/88/EC due to the associated distance from the employee's place of residence, for which equivalent health protection must be ensured in any case. However, this is not the subject of the question referred.

Opinion of Advocate General Pitruzzella delivered on 11 November 2020 – C-585/19 – *Academia de Studii Economice din Bucureşti*

Law: Art. 2(1), (3) and (6)(b) Working Time Directive 2003/88

Key words: Workers with several contracts of employment with the same employer - Working time and rest periods – Maximum daily and weekly working time – Application per worker or per contract

Core statement: (1) The term 'working time' means 'any period during which an employee (...) works, is at the employer's disposal and carries out his activity or duties' on the basis of all the contracts of employment concluded by that employee with the same employer.

[25] CJEU of 21 August 2018 – C-518/15 – *Matzak*, para. 59 et seqq.

(2) The minimum rest period of eleven consecutive hours per 24-hour period and the applicable maximum weekly working time, including overtime, shall apply to all contracts between a worker and the same employer.

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III. Proceedings before the ECtHR

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1. Equal treatment

Decisions

Judgment (4th Section) of 20 October 2020 – No. 33139/13 – *Napotnik v. Romania*

Law: Art. 1 Additional Protocol No. 12 (general prohibition of discrimination)

Keywords: Termination of the foreign assignment of a female consular officer – Discrimination on the ground of pregnancy – Maintenance of the functioning of the department

Core statement: Where unequal treatment is based on sex, the principle of proportionality requires that the measure chosen is not only generally appropriate to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances.

Notes: The complainant is a Romanian consular officer and employed in the Ministry of Foreign Affairs. Since 2006, she had been posted to the Romanian Embassy in Ljubljana (Slovenia). In January 2009, she informed the ambassador that she was pregnant. As a result, the complainant's posting to Ljubljana was terminated. She was transferred back to the Ministry in Bucharest. The complainant brought an action before the domestic courts against the termination of her secondment to the Foreign Representation. She argued that the reason for the measure was her pregnancy. The courts upheld the Ministry's decision and found no discrimination against the complainant because of her pregnancy, as the termination of the foreign assignment was taken within the bounds of permissible discretion.

According to the principles established by the Court in its case-law, the standards laid down for Article 14 ECHR are also applicable to the cases concerning Article 1 of Additional Protocol No. 12. Accordingly, the need for protection of pregnancy and maternity is recognised.[26] Since only women can be treated differently on the grounds of pregnancy, such a difference in treatment constitutes direct discrimination on grounds of sex if it is not justified by objective reasons.[27]

The Court assumes, on the one hand, that the complainant was treated differently on the basis of her sex and, on the other hand, that the early termination of her assignment abroad was necessary in order to ensure and maintain the functioning of the diplomatic representation in Slovenia. The complainant's absence during medical appointments and maternity leave would have seriously affected consular activities at the embassy. Although the measure was motivated by the complainant's pregnancy, it was not intended to place her in a less favourable position. The national authorities therefore had relevant and sufficient

[26] ECtHR of 27 March 1998 – No. 20458/92 – *Petrovic v. Austria* ; ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 24 January 2017 – Nos. 60367/08 and 961/11 – *Khamtokhu und Aksenchik v. Russia*; ECtHR of 3 October 2017 – No. 16986/12 – *Alexandru Enache v. Romania*.

[27] See also: CJEU of 8 November 1990 – C-177/88 – *Dekker*; CJEU of 14 July 1994 – C-32/93 – *Webb*.

reasons to justify the necessity of the measure. Accordingly, the Court has not found a violation of Article 1 of Additional Protocol No. 12.

New pending cases (notified to the respective government)

No. 18350/20 – *Bilyy v. Ukraine* (5th section) filed 8 April 2020 – served 23.11.2020

Law: Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination); Art. 1 Additional Protocol No. 12 (general prohibition of discrimination)

Keywords: Dismissal of a KGB officer – Constitutionality of a lustration law – Discrimination against other public servants

Note: The complainant served from 1986 to 1991, first as a trainee and later as an officer in the counterintelligence service of the KGB. Since 1993, he was deployed in the Security Service of Ukraine (SBU). As a result of the "Government Purge Law" enacted in 2014, he was dismissed from the service in 2018 on the grounds that he had previously served in the KGB. The decision was upheld by the Supreme Court following decisions by the lower courts. In his complaint, the complainant alleges a violation of Article 8 ECHR, Article 14 ECHR and Article 1 Additional Protocol No. 12 by the application of the law.

The question to be examined is whether the measure in question interfered with the complainant's right to respect for his private life and, in particular, whether he was treated differently from public servants who did not serve in the KGB and, if so, whether such discrimination was objectively justified.[28]

No. 36452/20 – *Kolesnychenko v Ukraine* (5th section) filed 19 August 2020 – served 23 November 2020

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination)

Keywords: Dismissal from judicial office – Legality of lustration laws

Note: As a judge, the complainant had been a member of the High Council of the Judiciary since 2007 and became its president in 2010. Due to a "Law on the Restoration of Confidence in the Judiciary" adopted in 2014, his membership in this body ended. In 2017, the Supreme Court dismissed the complainant from the bench on the basis of the "Government Purge Act". The court of first instance that heard the case declared the dismissal unlawful. The Supreme Court reversed the decision and dismissed the case.

The complainant alleges that essential arguments raised in the proceedings before the Supreme Court were not taken into account, so that Article 6 ECHR was violated. He further claims that the dismissal violated his right to respect for private life and that he was discriminated against in comparison to other judges who held high-ranking positions during the reign of Viktor Yanukovych and who were not dismissed.

The Court will examine whether the principles of equality of arms and of due process have been respected with regard to the applicant's complaint.[29] It will also have to examine whether the dismissal legitimately interfered with the complainant's private life and whether this constitutes justified unequal treatment.

[28] ECtHR of 27 July 2004 – Nos. 55480/00 and 59330/00 – *Sidabras and Džiautas v. Lithuania*; ECtHR of 3 September 2015 – No. 22588/08 – *Sõro v. Estonia*; ECtHR of 21 October 2014 – No. 38162/07 – *Naidin v. Romania*.

[29] ECtHR of 5 September 2013 – No. 9815/10 – *Čepek v. Czech Republic*; ECtHR of 27 October 2016 – Nos. 4696/11 and 4703/11 – *Les Authentiks und Supras Auteuil 91 v. France*.

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2. Freedom of association

New pending cases (notified to the respective government)

No. 35673/15 – *National Trade Union Workers' Initiative v. Poland* (1st section) filed 13 July 2015 – served 5 November 2020

Law: Art. 10 ECHR (right of expression); Art. 11 ECHR (freedom of assembly and association)

Keywords: Prohibition of trade union activities

Note: The complainant is a trade union founded by employees of a nationwide Polish chain of shops (Aelia Polska Ltd). The union's statutory objectives include representing the interests of its members and fighting for the improvement of their working and safety conditions and for decent wages. After the trade union organised strike actions, during which the strikers distributed leaflets drawing attention to the poor working conditions in the company and to the exploitation, oppression and bullying of trade union members by the employer, the employer obtained an injunction against the trade union before the Regional Court of Poznań, prohibiting it from carrying out further strike actions and distributing leaflets. An appeal filed by the trade union was dismissed.

The Court asks the parties whether the court's prohibition of the union's activities interferes with the right to freedom of expression and freedom of association.

No. 52977/19 – *Hellgren v. Finland* (2nd section) filed 2 October 2019 – served 21 October 2020

Legislation: Art. 11 ECHR (freedom of assembly and association); Art. 14 ECHR (prohibition of discrimination)

Keywords: Lockout for exercising the right to strike – Discrimination on the ground of trade union membership

Note: The complainant is employed by the Finnish Post Office, a company under private law. After a collective agreement applicable to the company expired, the trade union of which the complainant is a member intended to take strike action in order to put pressure on the negotiations for a new collective agreement. The employer intended to use external agency workers in the event of the strike. In preparation for the upcoming strike, the union decided that members would refuse to work overtime and train new workers. When the complainant was asked by the employer to train external agency workers, she refused to do this work. However, she agreed to continue doing her normal work. The employer did not accept this, but released her from work without continued payment. In response to the complaint against this measure, the competent regional court held that the employer had not been entitled to refuse the complainant's work and to deny her remuneration. The Court of Appeal upheld this decision. The Supreme Court reversed these decisions and upheld the employer's position.

The case raises the question of whether the measure interfered with the complainant's right to freedom of association under Article 11 ECHR and whether she was discriminated against in the exercise of her Convention rights within the meaning of Article 14 ECHR.

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3. Freedom of expression

Decisions

Judgment (4th Section) of 8 December 2020 – No. 33794/14 – *Panioglu v. Romania*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Disciplinary measure against a judge – Publication of unfounded allegations - Judicial duty of restraint – Professional advancement

Core statement: The high standards of judicial office require a duty of restraint in the exercise of freedom of expression in order to preserve public confidence in the judiciary.

Note: The complainant, a judge at the Court of Appeal in Bucharest, wrote an article in 2012 in which she accused the President of the Court of Cassation of being responsible for crimes allegedly committed during the Ceauşescu regime in his then capacity as a prosecutor, calling into question his moral and professional integrity. The article was published in a national newspaper and on an internet news site with the name of the complainant. In disciplinary proceedings, the Judicial Department of the Supreme Council of the Judiciary (SJCSM) found that she had violated the Code of Conduct for Judges and Prosecutors. Appeals against this decision, arguing in particular that the disciplinary proceedings hindered the complainant's professional development, were unsuccessful until the Court of Cassation.

Since the interference was based on the Code of Conduct, the Court starts from the premise that it is an interference protected by law with the legitimate aim of protecting the rights and reputation of others and preserving the authority of the judiciary. Judicial personnel, and judges in particular, must be expected to exercise due restraint in exercising their freedom of expression.[30] The interference was also necessary in a democratic society, as the complainant, as a judge, should have been aware of the risks and implications of publishing the article for her professional life. She could have been expected to exercise due restraint in exercising her right to freedom of expression in cases where the authority and impartiality of the judiciary was in question. The measure was also not disproportionate, since, even if the fact of disciplinary proceedings remained permanently in the personal file, it did not prevent the complainant from applying for or actually participating in promotion procedures. The "chilling effect" of the disciplinary proceedings on the complainant's exercise of freedom of expression was not unreasonable in the circumstances of the present case.[31] The Court therefore found that there was no violation of Article 10 ECHR.

Judgment (1st Section) of 15 October 2020 – No. 965/12 – *Guz v. Poland*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Disciplinary proceedings against judges – Criticism of an application procedure – Undermining of the dignity of the office of judge

Core statement: Although the judiciary, as the guarantor of justice, a fundamental value in a state governed by the rule of law, must enjoy the confidence of the public in order to successfully fulfil its tasks, this cannot have the consequence that judges are prohibited from any criticism of the functioning of the judicial system.

[30] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 9 July 2013 – No. 51160/06 – *Di Giovanni v. Italy*.
[31] ECtHR of 21 February 2012 – No. 31029/05 – *Antonescu v. Romania*; ECtHR of 9 July 2013 – No. 51160/06 – *Di Giovanni v. Italy*.

Note: In the context of his application for the office of judge at the Gliwice Regional Court, the complainant was accused in a report by a senior judge of having a difficult relationship with his superiors, whose instructions he allegedly did not follow. In a letter to the President of the Regional Court, the complainant described this assessment as "superficial, unjust and tendentious". He maintained this criticism on several occasions, even when he appealed against the subsequent decision of the Judicial Council not to forward his application to the President of the Republic. After the Supreme Court rejected this appeal, disciplinary proceedings were initiated against the complainant. In March 2011, he was convicted of "undermining the dignity of the judiciary" and a warning was issued against him. Appeals against this decision were unsuccessful before the domestic courts. The complainant alleges a violation of the right to freedom of expression protected by Article 10 ECHR, arguing that his statements were not offensive and were only made internally. Moreover, it was in the public interest to make public the details of the procedure surrounding the rejection of his promotion and the reason for the rejection.

The Court found that the interference was "prescribed by law" within the meaning of Article 10 ECHR, as the complainant's conduct constituted a disciplinary offence under domestic law. However, Art. 10 ECHR requires not only that the contested measure must have a legal basis in domestic law, but that this must be accessible to the person concerned and foreseeable in its effects.[32] The relevant provision was sufficiently clear and foreseeable for the complainant as a judge who was familiar with the law.

Nevertheless, the interference was not necessary "in a democratic society". It is recognised in the case-law of the Court of Justice that judges must exercise due restraint in exercising their right to freedom of expression in all cases where the authority and impartiality of the judiciary might be called into question.[33] However, in the present case, it had to be taken into account that the complainant's comments did not concern the exercise of his judicial function, but related to an internal application procedure and concerned the assessment of the complainant by a superior. Moreover, the Court points out that the requirement of restraint cannot have the effect of prohibiting judges from expressing themselves, through value judgments based on a sufficient factual basis, on matters of public interest relating to the functioning of the judiciary, thereby prohibiting any criticism of it.[34] Furthermore, a distinction must be made between justified criticism and insults. In the latter case, an appropriate penalty would in principle not constitute a violation of Art. 10 ECHR.[35] Even if the sanction imposed was the mildest possible measure, it was disproportionate, as the warning remained in the complainant's personal file for a period of five years. Taking these circumstances into account, the Court found a violation of Article 10 ECHR and ordered the government to pay compensation for non-material damage in the amount of € 6,000.

[32] ECtHR of 17 May 2016 – No. 42461/13 und 44357/13 – *Karácsony et al. v. Hungary*.
[33] ECtHR of 28 October 1999 – No. 28396/95 – *Wille v. Liechtenstein*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 9 July 2013 – No. 51160/06 – *Di Giovanni v. Italy*; ECtHR of 15 November 2016 – No. 75255/10 – *Simić v. Bosnia and Herzegovina*.
[34] ECtHR of 23 April 2015 – No. 29369/10 – *Morice v. France*.
[35] ECtHR of 27 May 2003 – No. 43425/98 – *Skałka v. Poland*.

Judgment (5th Section) of 8 October 2020 – No. 41752/09 – *Goryaynova v. Ukraine*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Dismissal of prosecutors – Publication of criticism of law enforcement authorities – Duty of loyalty and public interest in information

Core message: The duty of loyalty and confidentiality of public officials towards their employer and the associated requirement of moderation and decency in the dissemination of accurate facts can be overridden by the public interest in certain information

Note: Disciplinary proceedings were instituted against the complainant, a senior public prosecutor at the Odessa public prosecutor's office, with the aim of removing her from the service. She was accused of having published several open letters on the internet accusing employees of the prosecution of corruption and abuse of office. She filed a complaint against the disciplinary measure, which ordered her dismissal from office, which was successful in the first instance and led to her reinstatement. The decision of the Court of Appeal, which was upheld on appeal, led to the annulment of the first instance judgment and the confirmation of the finding that the complainant's dismissal was lawful. In particular, the Court of Appeal denied a violation of Article 10 ECHR, pointing out that the complainant's status as a state employee was defined by specific legislation. An appeal to the Supreme Court was rejected.

The Court first points out that the protection of freedom of expression granted by Article 10 ECHR also extends to the workplace in general and to the civil service in particular.[36] It emphasises that employees have a duty of loyalty, restraint and discretion towards their employer, which requires that the dissemination of even accurate information be done with moderation and decency. This applies in particular to the public service, as its employees are subject to special duties of loyalty and confidentiality.[37] With regard to the proportionality of the interference, it must be examined whether relevant and sufficient reasons justify it, taking into account various factors such as the public interest in the information, the factual basis on which it is based, the motive of the whistleblower, the damage caused to the employer, if any, as well as the severity of the sanctions imposed on the whistleblower.[38] However, the duty of loyalty and confidentiality of civil servants to maintain the necessary moderation and decency in the dissemination of even accurate information may be overridden by the public interest in certain information. Applying these principles, the Court concludes in the present case that the national courts failed to take into account the relationship between the complainant's duty of loyalty and the public interest in being informed about corruption and abuse of office in the law enforcement system. On the other hand, the Court of Appeal was of the opinion that, as a matter of principle, civil servants may not make any statements other than those directly prescribed by law. Moreover, the sanction imposed on the complainant was disproportionate as the most severe possible measure, since the complainant's actions did not lead to serious damage to the reputation of the law enforcement authorities. As the measure was not necessary in a democratic society, the Court found a violation of Article 10 ECHR. The complainant was awarded compensation of €4,500 for non-material damage.

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[36] ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Moldova*; ECtHR of 26 February 2009 – No. 29492/05 – *Kudeshkina v. Russia*; ECtHR of 17 September 2015 – No. 14464/11 – *Langner v. Germany*.

[37] ECtHR of 26 September 1995 – No. 17851/91 – *Vogt v. Germany*; ECtHR of 26 February 2009 – No. 29492/05 – *Kudeshkina v. Russland*; ECtHR of 17 September 2015 – No. 14464/11 – *Langner v. Deutschland*.

[38] ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Moldova*, ECtHR of 21 July 2011 – No. 28274/08 – *Heinisch v. Germany*; ECtHR of 5 November 2019 – No. 11608/15 – *Herbai v. Hungary*.

4. Procedural law

Decisions

Judgment (4th Section) of 20 October 2020 – No. 36889 – *Camelia Bogdan v. Romania*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Suspension of judges – Appeal against removal from office – Impossibility to challenge suspension

Core message: The right of access to a court is not absolute and may be subject to limitations, provided that they do not restrict or diminish the individual's access to justice in such a way or to such an extent as to impair its essence.

Note: In February 2017, the Supreme Council of Magistracy of Romania (CSM) imposed a disciplinary measure on the complainant, a judge at the Court of Appeal in Bucharest, with the sanction of removal from judicial office. She was accused of having carried out off-duty activities that were incompatible with the function of a judge. The complainant appealed against this decision. During the appeal proceedings, the CSM ordered the suspension of the complainant with immediate effect, which also resulted in the withholding of her salary. An appeal against the suspension was not provided for under national law. In December 2017, the Supreme Court of Cassation and Justice partially upheld the complainant's appeal and ordered her transfer to another court instead of her removal from office. In June 2018, she received retroactive payment of her remuneration for the period of suspension.

Article 6 ECHR applies to the suspension in question, the Court held, as the protection of the provision extends to all disputes between judges[39] and the provisional measure was adopted in the context of disciplinary proceedings.[40] Under the national legislation in force at the relevant time, the complainant had no legal remedy to challenge the suspension. Nor did the domestic practice of the courts provide for a review of such a measure. The complainant had therefore been denied access to a court within the meaning of Article 6 ECHR in connection with her suspension from service by the CSM, making it impossible for her to perform her duties as a judge and receive her remuneration for a period of nine months.[41] The Court therefore found a violation of Art. 6 ECHR and ordered the government to pay compensation for non-material damage in the amount of € 6,000.

Judgment (3rd Section) of 8 December 2020 – No. 42301/11 – *Maslennikov v. Russia*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Dismissal from employment – In camera trial

Core message: It is a fundamental principle enshrined in Art. 6 ECHR that court hearings must be held in public to protect litigants from the absence of public scrutiny in the justice system.

Note: Due to repeated unlawful cooperation with police informers, disciplinary proceedings were initiated against the complainant, who worked as a department head in the Ministry of the Interior. In the result he was dismissed from the service. He brought an action against this order, which was dismissed by the competent Regional Court. The oral hearing held in the course of the proceedings was held in camera. Likewise, the oral proceedings in the

[39] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen et al. v. Finland*.
[40] ECtHR of 15 October 2009 – No. 17056/06 – *Micallef v. Malta*.
[41] ECtHR of 23 May 2015 – No. 33392/12 – *Paluda v. Slovakia*.

appeal proceedings brought by the complainant were only conducted in the presence of the parties to the proceedings in camera. A review by the Presidium of the Supreme Court was denied.

The complainant alleged a violation of Art. 6 ECHR.

It is a fundamental principle enshrined in Art. 6 ECHR that court hearings must be held in public, which is reiterated by the Court. Publicity protects litigants from the administration of justice without public scrutiny. It serves to maintain people's trust in the courts. By making the administration of justice transparent, publicity contributes to the achievement of the objective of Article 6 ECHR to ensure a fair trial. This objective is one of the fundamental principles of any democratic society.[42] An exception may only be made to this if it is necessary in the interests of public morality, public order or national security in a democratic society. This may be the case, for example, if the interests of juveniles or the protection of the private life of the parties so require or if, in the opinion of the court, it is absolutely necessary in special circumstances where publicity would prejudice the interests of justice. The conduct of the hearing in camera must be made absolutely necessary by the circumstances of the individual case.[43] The courts must make specific findings that the exclusion of the public is absolutely necessary to justify an interest in secrecy.[44] In the present case, there was no evidence that these conditions were met. Nor had the domestic courts made a reasoned decision to exclude the public. In particular, it was not explained which information concerning the complainant's case was to be regarded as state secrets. Accordingly, the Court found a violation of Article 6 ECHR. The government was ordered to pay compensation of € 1,950.

Judgment (2nd Section) of 15 December 2020 – No. 33399/18 – *Pişkin v. Turkey*

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

Keywords: Dismissal of employees from public service – Inadequate judicial review – Impact on professional and social reputation through stigmatisation

Core message: Regarding measures affecting fundamental human rights, the concepts of "lawfulness" and "rule of law" require adversarial proceedings before independent courts in a democratic society even when national security is at stake.

Note: Due to alleged links to a terrorist organisation that the national authorities believe was responsible for the military coup of 15 July 2016, the complainant, who had been employed as an expert by a public development agency since 2010, was dismissed under an emergency law. This law allowed for the dismissal of civil servants and public employees through a simplified procedure that did not require an adversarial process and did not provide for any special procedural guarantees. It was sufficient for the employer to establish that the employee belonged to the illegal structures defined by law, without having to justify this in more detail. The review of the dismissal decision was unsuccessful before the national courts in all instances. The dismissal had taken place based on the applicable legal situation, which is why a reason for dismissal, which is a prerequisite for dismissal according to labour law regulations, was not to be taken into account.

According to the Court, the domestic courts should have taken into account all factual and legal issues that were relevant to the case at hand. This includes the review of the dismissal under domestic labour law. As the courts did not examine these issues, the complainant's right to a fair trial under Article 6 ECHR was violated. The government was also unable to

[42] ECtHR of 2 October 2012 – No. 18498/04 – *Khrabrova v. Russia*.
[43] ECtHR of 25 October 2016 – No. 37037/03 – *Chaushev et al. v./ Russia*.
[44] ECtHR of 4 December 2008 – No. 28617/03 – *Belashev v. Russia*; ECtHR of 23 October 2012 – No. 38623/03 – *Pichugin v. Russia*.

invoke Art. 15 ECHR, which allows for measures derogating from ECHR obligations in cases of national emergency. The domestic emergency legislation did not contain any express provision to the effect that any possibility of judicial review of dismissals was excluded.

As regards the applicability of Art. 8 ECHR, the Court reiterates that professional activities are not excluded from the notion of "private life".[45] Restrictions on a person's professional life may affect social identity through the development of relationships with others.[46]

By basing the complainant's dismissal solely on his alleged links to illegal activities, and by disregarding other justifications required by labour law, the challenged measure had a significant impact on the complainant's right to respect for his private life. The judicial review of the dismissal was inadequate as its factual background was not established. Consequently, the complainant did not enjoy the minimum level of protection against arbitrary interference required by Article 8 ECHR.[47]

For these reasons, the Court found a violation of both Art. 8 ECHR and Art. 6 ECHR and awarded the complainant compensation for the immaterial damage in the amount of € 4,000.

Judge Bošnjak, in a favourable opinion, held that with regard to Art. 8 ECHR, it should have been examined whether the positive obligations of the state had been fulfilled in the present case. In addition, the application for compensation for pecuniary loss (Art. 41 ECHR) should not have been dismissed on the grounds of the absence of a causal link.

Judge Koskelo, in a similarly favourable opinion, considers the Court's decision to be an important contribution in the context of the problems that have arisen in Turkey in relation to the measures taken in connection with the attempted coup in July 2016. However, he expresses concerns with regard to the links made by the decision between Art. 6 ECHR and Art. 8 ECHR.

Judge Yüksel, in a partially dissenting opinion, expresses concerns about the compensation awarded to the complainant, as domestic law already provides for such reparation.

(In)admissibility decisions

Decision (4th Section) of 9 September 2020 – No 6340/20 – *Mihad Lavić v Bosnia and Herzegovina*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Judicial title to payment of remuneration for work – Delay in enforcement

Core message: Even though it is not open to a state authority to justify the non-fulfilment of a judgment debt with a lack of resources, the deferral of enforcement of final titles may be justified in exceptional circumstances.

Note: The complainant was an employee of the Herzegovina-Neretva Cantonal Administration at the relevant time. The Government of Bosnia and Herzegovina had concluded a collective agreement with the Union of State Employees in 2000 regulating the working conditions of state employees. In order to develop the civil service in post-war Bosnia and Herzegovina, the salaries and other benefits (such as meal allowances and bonuses) of public servants were increased. Some of the cantons had difficulties meeting the new conditions. In order to avoid going into debt, they tried to withdraw from the collective bargaining obligations, but to no avail. Unilateral withdrawal from a collective agreement was not permitted. As a result, the working conditions for state employees were renegotiated and

[45] ECtHR of 28 May 2009 – No. 26713/05 – *Bigaeva v. Greece*; ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*.
[46] ECtHR of 19 October 2010 – No. 20999/04 – *Özpınar v. Türkei*.
[47] ECtHR of 26 July 2011 – No. 29157/09 – *Liu v. Russia* ; ECtHR of 20.06.2002 – No. 50963/99 – *Al Nashif v. Bulgaria*.

their salaries, meal allowances and bonuses were reduced. However, according to the "favourability principle", which is a key principle of national labour law, if a right arising from an employment relationship is regulated differently by different legal instruments, the law that is more favourable to the worker applies. As the cantons concerned were not able to fulfil the rights under the collective agreement until all parties involved, including the public employees' union, agreed to revise the collective agreement in 2013 and 2016, the benefits under the collective agreement were not passed on to the employees.

For the period from September 2009 to July 2012, the complainant obtained court orders for payment of the collectively agreed remuneration, which was not paid to him for that period. The enforcement of these titles was unsuccessful. Based on a decision of the Constitutional Court, the cantonal administration was obliged in September 2015 to take the necessary measures to ensure enforcement from the titles within a reasonable period of time. No payment has yet been made to the complainant.

The Court first points out that it is not for the state authorities not to comply with payment orders issued against them on the grounds of lack of funds.[48] In other proceedings against the government of Bosnia and Herzegovina,[49] which also concerned the non-enforcement of judgments for payment of the salaries of state employees, it had indeed found a violation of Art. 6 ECHR due to the delay in payment. However, the Constitutional Court of Bosnia and Herzegovina had already ordered the Canton of Herzegovina-Neretva to take the necessary measures to ensure the execution of all domestic judgments against it within a reasonable time. In doing so, it had set a timeframe until 2032. The Court had ruled in another case, also involving the non-enforcement of domestic judgments against another canton, that an enforcement timeframe of that duration was acceptable and tantamount to implementing the general measures it had indicated.[50] Accordingly, the Court concludes in the present case that the matter is disposed of within the meaning of Article 37(1)(b) ECHR, so that the complaint had to be removed from the list of cases.

Decision (4th Section) of 9 November 2020 – No 28251/18 – *Husein Šarganović v Bosnia and Herzegovina*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Judicial title to payment of remuneration for work – Delay in enforcement

Core message: Even if a state authority is not entitled to justify the non-fulfilment of a judgment debt with a lack of resources, the deferral of the enforcement of final judicial titles may be justified in exceptional circumstances

Note: See No. 6340/20 – *Mihad Lavić v. Bosnia and Herzegovina*.

Decision (4th Section) of 13 October 2020 – No. 8039/19 – *Esad Akeljić / Bosnia and Herzegovina*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Judicial title to payment of remuneration for work – Delay in enforcement

[48] ECtHR of 7 May 2002 – No. 59498/00 – *Burdov v. Russia*; ECtHR of 30 June 2005 – No. 11931/03 – *Teteriny v. Russia*; ECtHR of 31 October 2006 – No. 41183/02 – *Jeličić v. Bosnia and Herzegovina* .

[49] ECtHR of 14 November 2017 – No. 68955/12 – *Kunić et al. v. Bosnia and Herzegovina* ; ECtHR of 14 November 2017 – No. 20514/15 – *Spahić et al. v. Bosnia and Herzegovina*.

[50] ECtHR of 15 September 2020 – No. 40841/13 – *Muhović u. a. v. Bosnia and Herzegovina* .

Core message: Even if a state authority is not entitled to justify the non-fulfilment of a judgment debt with a lack of resources, the deferral of the enforcement of final judicial titles may be justified in exceptional circumstances

Note: See No. 6340/20 – *Mihad Lavić v. Bosnia and Herzegovina*.

Decision (5th Section) of 22 September 2020 – No. 31193/18 – *Pliske v. Germany*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Pension due to reduced earning capacity and injury benefit – Excessive length of proceedings – Exhaustion of legal remedies

Core message: Although the rule of exhaustion of domestic remedies is relatively flexible and can be applied without excessive formalism, it is nevertheless necessary to apply the available remedies in accordance with the domestic procedure and in conformity with the formal requirements provided for in domestic law.

Note: After an accident at work, the complainant applied to the employers' liability insurance association for an injury allowance and an injury pension. Both were rejected because, in the opinion of the Insurance Association, a reduction in earning capacity that would entitle her to a pension could not be proven. Furthermore, there was no causality between the accident and the subsequent health problems. The appeals against the decisions were rejected. After suspending the proceedings for a period of 25 months, the Social Court of Frankfurt am Main[51] ordered the Employer's Liability Insurance Association to grant a partial pension for the period from 20 December 2002 to 31 July 2009. For the rest, it dismissed the action. No decision has yet been made on the complainant's appeal against this decision.[52] At her request, the Hessian Regional Social Court awarded the complainant compensation of € 2,500 for the unjustified delay in the proceedings.[53] Further claims for compensation, which the complainant had asserted for the period from July 2009 to February 2014, were rejected. The appeal to the Federal Social Court was not allowed. The Federal Social Court rejected an application for legal aid in this regard.[54] An application for legal aid for a constitutional complaint submitted by the complainant in person to the Federal Constitutional Court was accompanied by a draft of a constitutional complaint. This application was rejected as inadmissible, as was the constitutional complaint itself.[55]

The applicant complained of a violation of Art. 6 ECHR, as the compensation granted did not adequately compensate her for an excessively long duration of the proceedings.

The Court emphasises the need to apply the rule of exhaustion of domestic remedies in a proportionately flexible manner and without excessive formalism.[56] However, it is necessary that an appellant pursue the available remedies in accordance with the domestic procedure and in conformity with the formal requirements provided for in domestic law.[57] In the present case, the Court considers that the applicant has not made an effective constitutional complaint by applying for legal aid. Such an appeal requires that all documents relevant to the examination of the appeal be submitted. At the very least, the essential content of the challenged decisions must be communicated. The complainant's attention was expressly drawn in good time to this and to the fact that so far only the draft of a complaint had been

[51] Social Court Frankfurt am Main of 20 January 2015 – S 8 U 161/12.
[52] Hesse State Social Court – L 3 U 29/15 (pending).
[53] Hesse State Social Court 20 September 2017 – L 6 SF 10/16 EK U.
[54] Federal Social Court of 11 January 2018 – B 10 ÜG 5/17 BH.
[55] Federal Constitutional Court of 24 April 2018 – 1 BvR 464/18 (n. v.).
[56] ECtHR of 16 July 1971 – No. 2614/65 – *Ringeisen v. Austria*.
[57] ECtHR of 1 June 2010 – No. 22978/05 – *Gäfgen v. Germany*; ECtHR of 25 September 2006 – No. 71759/01 – *Agbovi v. Germany*.

submitted. Therefore, a constitutional complaint was neither unreasonable for the complainant, nor did it constitute a disproportionate obstacle to the effective exercise of her individual right of complaint under Article 41 of the ECHR. In particular, in view of the fact that no court costs were incurred for the proceedings before the Federal Constitutional Court and that there was also no requirement to be represented by a lawyer, the complainant was in a position to file a constitutional complaint in due time. Since the complainant had not exhausted the domestic remedies available to her, the complaint had to be dismissed pursuant to Article 35 (1) and (4) ECHR.

New pending cases (notified to the respective government)

No. 9988/16 – *Kuznetsov and Others v. Ukraine* (5th section) submitted on 10 December 2015 – delivered on 23 November 2020

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

Keywords: Dismissal from public service – Constitutionality of a lustration law

Note: The six complainants are former civil servants. They were dismissed from their positions in the civil service under a "government purge law", a so-called lustration law, enacted in 2014. They had previously held key positions in the civil service under the government of President Viktor Yanukovych. They challenged their dismissal before the administrative courts. The proceedings have been suspended by the courts as the constitutionality of the law is currently being examined by the National Constitutional Court. In other similar cases, the Supreme Court had upheld the claims of former civil servants dismissed under the above-mentioned law and ordered their reinstatement. The complainants claim that their dismissal under the Act violates Article 8 ECHR and that the suspension of the proceedings violates their right to a fair trial under Article 6 ECHR.

The Court must first examine whether the applicants have exhausted all effective domestic remedies within the meaning of Article 35(1) ECHR, taking into account whether there are circumstances that constitute an exception to the rule of exhaustion of remedies.[58] Furthermore, it will have to be examined whether the administrative court proceedings were heard within a reasonable period of time within the meaning of Art. 6 ECHR and whether there has been an interference with the rights protected by Art. 8 ECHR.

No. 25240/20 – *Gyulumyan and Others v. Armenia* (1st Section) submitted on 26 June 2020 – delivered on 12 December 2020

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination)

Keywords: Statutory change of retirement age – Early retirement

Note: The four complainants were appointed constitutional judges for life, with the Armenian Constitution providing for a retirement age of 70. In 2005, the Constitution was amended by referendum and the retirement age was lowered to 65. Following a change of government in 2018 after a parliamentary election, the new government adopted a comprehensive package of judicial reforms in 2019. As part of these reforms, all constitutional judges, including the complainants who had taken office under the old legal regime, were offered early retirement. The complainants rejected this offer and were subsequently retired in June 2020. A statutory

[58] ECtHR of 6 September 2001 – No. 69789/01 – *Brusco v. Italy*; ECtHR of 21 March 2017 – No. 41698/06 – *Muratović v. Serbia*; ECtHR of 17 March 2020 – No. 29026/06 – *Beshiri and others v. Albania*.

application against this was rejected by the Supreme Court and the appellants' positions at the Constitutional Court were filled anew.

According to the complainants, the fact that they had no possibility to defend themselves against the retirement under domestic law constituted a violation of Article 6 ECHR, as they were denied access to a court. In addition, they claimed a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR. Art. 8 ECHR, as comparable measures had not been taken with regard to other officials. Moreover, they claimed that the loss of their remuneration in connection with their retirement violated their property protected by Article 1 of Additional Protocol No. 1.

The Court first asks whether the applicants' claim is a civil claim within the meaning of Article 6 ECHR and whether the provision is applicable to the present case.[59] Furthermore, it is questionable whether the early retirement of the complainants affects their private life and whether Article 8 ECHR therefore applies.[60]

No. 31390/18 – *Petrescu and Others v. Romania* (4th section) submitted on 28 June 2018 – delivered on 22 October 2020

Law: Art. 6 ECHR (right to a fair trial); Art. 14 ECHR (prohibition of discrimination); Art. 1 Additional Protocol No. 1 (protection of property)

Keywords: Contradictory case law of domestic courts – Recognition of periods of pensionable service

Note: The complaint concerns the conflicting jurisprudence of domestic appellate courts which had to decide whether or not the complainants had worked under "special conditions" as employees of the forensic medical service. This question was crucial for specific pension-related rights and affected the calculation of the employees' seniority. Some jurisprudence held that it was sufficient if the forensic service workers concerned actually fulfilled the "special conditions". Another part of the jurisprudence was of the opinion that the "special conditions" first had to be recognised by the regional labour authority, which had to check and determine the prerequisites in each individual case. The complainants' requests for a declaration that they were working under "special conditions" were rejected by the national courts. In parallel proceedings, the same facts were decided in favour of the respective workers. In October 2019, the Supreme Court ruled that working conditions in the forensic service should be considered as "special conditions" by default. This decision became binding on all domestic courts only when the reasons for the decision were published in the Official Gazette on 12.12.2019. However, a review decision cannot change the outcome of cases that have already been decided.

The question for the Court is therefore whether the complainants have been granted a fair hearing within the meaning of Article 6 ECHR when other decisions favourable to the employees have been taken in similar cases and whether the principle of legal certainty has been respected by the national courts.[61] Furthermore, it will have to be examined whether the allegedly inconsistent decisions of the domestic courts in comparable cases interfered with the property protected by Article 1 of Additional Protocol No. 1 with regard to the complainants' future pension rights.[62] Finally, it is questionable whether the complainants

[59] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.
[60] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[61] ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish et al. v. Romania*; ECtHR of 10 May 2012 – No. 34796/09 – *Albu et al. v. Romania*.
[62] ECtHR of 24 March 2009 – No. 21911/03 – *Tudor Tudor v. Romania*; ECtHR of 2 November 2010 – No. 38155/02 – *Ştefănică et al. v. Romania*.

have suffered discriminatory treatment in view of the different decisions taken by the national courts.[63]

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5. Protection of privacy

Decisions

Judgment (1st section) of 17 December 2020 – No. 73544/14 – *Mile Novaković v. Croatia*

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

Keywords: Dismissal of teachers – Failure to use Croatian official language – Consideration of specific post-conflict context – Mitigating measure

Core message: The termination of the employment relationship of workers by the employer must meet an urgent social need and be proportionate to the objective pursued thereby.

Note: The complainant worked as a teacher in a secondary school in Eastern Slavonia, an area that was peacefully reintegrated into the Croatian territory after the war until 15 January 1998. He was dismissed from his job for failing to use the official Croatian language during lessons. He taught classes attended by pupils of different ethnic origins, including Croats and Serbs. Due to a law that came into force before the beginning of the 1998/99 school year, all education in the Republic of Croatia had to be conducted in Croatian. In the course of a school inspection, it was found that the principal did not use the official Croatian language due to a lack of appropriate language skills. The competent school authority then terminated the employment relationship for personal reasons. An action brought against this was unsuccessful in all instances before the national courts. In particular, the Constitutional Court did not consider the dismissal of the complainant to be arbitrary or discriminatory.

The Court reaffirms its legal opinion that Art. 8 ECHR also includes the right to personal development and the right to establish and develop relationships with other people and the outside world.[64] In disputes concerning the employment relationship, the questions of the applicability of Art. 8 ECHR and the existence of "interference" are inextricably linked.[65]

Taking into account the Government's objective of protecting the right of pupils to education in the Croatian language, no alternatives to dismissal were considered which would have enabled the complainant to adapt his teaching to the applicable legislation. Domestic regulations provide for the possibility of correcting irregularities in teachers' work. Moreover, according to Croatian labour law, in case of dismissal for personal reasons, there is an obligation to offer the employee additional training or retraining for another job, if such training would not be futile. In addition, the law only came into force shortly before the start of the school year and complainants were not given the opportunity to complete a language course. Finally, the specific post-war situation of the region of Eastern Slavonia at the relevant time had to be taken into account in the concrete case. Therefore, the dismissal of the complainant was in accordance with the law and pursued a legitimate aim. However, it did not meet an urgent social need, nor was it proportionate to the aim pursued.[66] The associated interference with Art. 8 ECHR was therefore not necessary in a democratic

[63] ECtHR of 2 November 2010 – No. 38155/02 – *Ştefănică et al. v. Romania*; ECtHR of 21 February 2008 – No. 29556 – *Driha v. Romania*.
[64] ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*; ECtHR of 4 December 2008 – No. 30562/04 and 30566/04 – *S. and Marper v. UK*.
[65] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[66] ECtHR of 7 June 2016 – No. 33160/04 – *Şahin Kuş v. Turkey*.

society. A violation was recognised and the government was ordered to pay € 5,000 in compensation for the non-material damage.

Judge Wojtyczek, in a dissenting opinion, held that the discrimination against the complainant did not take place in his private sphere but in the sphere of public life and therefore did not fall within the scope of Article 8 ECHR. The complaint should therefore have been examined under the conditions of Article 1 Protocol No. 12.

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6. Social security

Decisions

Judgment (3rd section) of 20 October 2020 – No. 78630/12 – *B. v. Switzerland*

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

Keywords: Suspension of payment of a survivor's pension to the widowed male parent – Age of majority of the child to be cared for – Discrimination on the ground of sex

Core message: Ensuring progress in gender equality, which is a declared objective of the member states of the Council of Europe, means that only very weighty reasons can justify a difference in treatment.

Note: After the death of his wife, the complainant gave up his gainful employment in order to take care of his minor children. The competent compensation office granted him a widower's pension for the period until the youngest child reached the age of majority. The relevant statutory provisions stipulate that the pension is only paid to female widowed parents beyond the time when the last child reaches the age of majority. The appeals against the decision of the pension provider were unsuccessful before the national courts. In particular, the Swiss Federal Court held that the relevant statutory provision was to be applied by the national authorities despite the unequal treatment of men and women contained therein.

With regard to the admissibility of the appeal, the Court first notes that a widow's or widower's pension is intended to relieve the surviving spouse of the need to engage in gainful employment in order to have time to care for the children. Thus, the pension affects the way in which family life is to be organised and structured, so that Art. 14 ECHR in conjunction with Art. 8 ECHR is applicable.[67]

Even if one assumes that the widow's pension was introduced in Switzerland in 1948 without a corresponding benefit for widowers, taking into account the status of women in society at that time, a reference to traditions, general assumptions or prevailing social attitudes is no longer sufficient today to justify different treatment based on gender. The ECHR, as a "living instrument", must be interpreted in the light of current living conditions and the concepts prevailing in democratic states today.[68] It cannot be established that the discontinuation of the pension affects the complainant less than a widow in a comparable situation. After 16 years of inactivity, at the age of 57 he faces the same difficulties in the labour market as a woman. The Court therefore found a violation of Article 14 ECHR in conjunction with Article 8 ECHR and awarded the applicant compensation of € 5,000 for non-material damage.

[67] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 11 December 2018 – No. 65550/13 – *Belli und Arquier-Martinez v. Switzerland*.
[68] ECtHR of 25 April 1978 – No. 5856/72 – *Tyrer v. UK*; ECtHR of 7 June 2001 – No. 39594 – *Kress v. France*.

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