REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

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Content

I. Editorial

The fifth edition of the HSI Report covers the reporting period from January to March 2021.

The CJEU recently issued a new decision in the area of anti-discrimination law. Specifically, the judges had to deal with the question of whether the Equal Treatment Framework Directive 2000/78/EC also protects against unequal treatment within a group of employees with the same ground of discrimination (in this case a disability). The ruling was based on the problem of a cut-off date regulation for a pay supplement. In addition, the CJEU has passed several other decisions of practical relevance. In two recent judgements, it once again addressed the distinction between working time and rest time in the case of on-call duty (C-344/19 – *Radiotelevizija Slovenija* and C-580/19 – *Stadt Offenbach am Main*). The judgement in *Airhelp* (C-28/20) is also important. Here, the Grand Chamber of the CJEU found that a strike organised by a trade union in air transport does not constitute an 'extraordinary circumstance' within the meaning of the Passenger Rights Regulation.

The opinion of the advocate general in the appeal proceedings in *EPSU v. Commission* is also worth mentioning. The question is whether there is an obligation of the Commission to submit a framework agreement to the Council for a decision, so that its contents are transferred into an EU legislative act, if that framework agreement has come into being within the framework of the social dialogue pursuant to Article 155 (2) TFEU. Another opinion deals with the prohibition of wearing visible religious signs such as a headscarf at the workplace in a day-care center and a drugstore chain (Joined Cases C-804/18 and C-341/19 – *WABE and MH Müller Handel*).

From the case law of the ECtHR, a decision on whistleblowing is to be highlighted (No. 23922/19 – *Gawlik v. Liechtenstein*). A deputy chief physician was dismissed after he approached the public prosecutor's office with the suspicion that his superior had performed unauthorised euthanasia. In *Jurčić v. Croatia* (No. 54711/15), the ECtHR clearly rejected discrimination based on gender stereotypes by state authorities. At issue was the withdrawal of health insurance coverage from a pregnant woman after in-vitro fertilisation on the grounds that she was medically unfit for employment. Gender inequality is also the subject of a recent pending complaint concerning different retirement ages for women and men (No. 31428/20 – *Marin v. Romania*). Another complaint concerns a dismissal that may be related to the trade union activities of the person concerned (No. 976/20 – *Hoppen and Amber Grid v. Lithuania*). In the judgement in *Eminağaoğlu v. Turkey* (No. 76521/12), the ECtHR clarified that members of the judiciary also have the right to express public criticism of the judicial system.

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

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1. Annual leave

Decisions

Judgement of the Court (Eight Chamber) of 25 February 2021 – C-129/20 – *Caisse pour l'avenir des enfants (Emploi à la naissance)*

Law: § 2 No. 1 and § 3 No. 1 lit. b revised framework agreement on parental leave (implemented by Directive 2010/18/EU)

Keywords: Right to parental leave – Condition of employment subject to social security contributions at the time of birth

Core statement: The right to parental leave may not be made dependent on the parent being employed at the time of the birth or adoption of the child. However, it may be made subject to the condition that the parent has been employed continuously for at least twelve months beforehand.

Note: In the main proceedings, the plaintiff was repeatedly and intermittently employed as a teacher. At the time of the birth of her twins, she was unemployed. Approximately three years later and with a new job, she applied to the Luxembourg Family Fund for parental leave. According to Luxembourg law, the granting of parental leave is conditional on the worker being in employment subject to social security contributions at the time of the birth of the child. Her application was rejected for this reason.

The CJEU first held that the provision – also provided for in Luxembourg law – making the right to parental leave conditional on a twelve-month period of employment was compatible with the corresponding wording of § 3 no. 1 lit. b of the revised framework agreement on parental leave (para. 35). The CJEU further emphasised that the right to parental leave under § 2 No. 1 of the Framework Agreement is an individual right (para. 36). This right is a fundamental social right of the Union which derives from Article 33(2) of the EU Charter and may therefore not be interpreted restrictively (para. 44).[1] The right to parental leave is not subject to the condition that the parent in question must be employed at the time of the birth, and the entitlement under Union law may not be restricted by national law.

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[1] Cf. with further evidence CJEU 27 February 2014 – C-588/12 – *Lyreco Belgium*, para. 36.

2. Collective redundancy

Decisions

Judgement of the Court (Second Chamber) of 17 March 2021 – C-652/19 – *Consulmarketing*

Law: Collective Redundancies Directive 98/59/EC, § 4 Framework Agreement on fixed-term work (implemented by Directive 1999/70/EC), Article 51 Charter of Fundamental Rights

Keywords: Principle of non-discrimination – Collective redundancies – Application of a less favourable protective regime to fixed-term employment contracts concluded before its entry into force and converted into contracts of indefinite duration after that date.

Core statement: (1) National legislation which provides for different rules on protection against collective redundancies to apply in one and the same collective redundancy procedure does not fall within the scope of Directive 98/59/EC and cannot therefore be examined in the light of the fundamental rights guaranteed by the Charter and in particular Articles 20 and 30 thereof (equal treatment, protection in the event of unjustified dismissal).

(2) Section 4 of the Framework Agreement on fixed-term work allows a new rule on the protection of permanent workers in the event of unjustified collective dismissal to be extended to workers whose initially fixed-term employment contract is terminated after that date.

Note: With its entry into force on 7 March 2015, the Italian legal regulation has redesigned and lowered the protection of workers against collective dismissals. From now on, workers who have been hired since the effective date can no longer demand reinstatement in their original job, but only severance pay. The plaintiff in the main proceedings had been hired before the cut-off date, albeit for a limited period. Her employment was terminated after the cut-off date. In this case, the legal regulation considers the time of the de-termination, so that the plaintiff would no longer be covered by the old regulation, which the latter considers discriminatory.

The CJEU first denied the applicability of Directive 98/59/EC and the Charter of Fundamental Rights (principle of equality and protection in the event of unjustified dismissal, Articles 20, 30 of the Charter), as the Directive does not provide for a specific obligation in the present case. This is to be understood in such a way that the Directive does not deal with reintegration after an unlawful dismissal, but in particular provides for notification and consultation obligations. The Directive brings about only a partial harmonisation of the protection of workers in the event of collective redundancies. In this context, the Court makes a statement that is of interest in the light of the scope of application of the Charter according to Article 51: In order to establish that the directive is implemented, it is not sufficient that the provisions in question are part of a codification that serves to transpose a directive into national law as a whole. Rather, the specific provision must transpose Union law.

Regarding the discrimination against (formerly) fixed-term employees, this was justified, as the regulation provided an incentive for employers to convert fixed-term employment relationships into permanent ones.

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3. Equal treatment

Decisions

Judgement of the Court (Eighth Chamber) of 3 March 2021 – C-841/19 – *Fogasa*

Law: Article 2(1) and 4 Equal Treatment Directive 2006/54/EC

Keywords: Equal pay for men and women – Predominantly female part-time workers – National guarantee institution in the event of the insolvency of an employer – Upper limit for the satisfaction of employees' claims – Reduction of the upper limit for part-time workers – Pro rata temporis principle

Core statement: If, in the event of an employer's insolvency, a national institution has to be liable for the wages and severance payments still due to workers, and if a national regulation provides for a cap on this payment in the case of full-time workers, the benefits for part-time workers may be reduced pro rata temporis according to the hours worked by them in relation to the hours worked by full-time workers.

Judgement of the Court (Grand Chamber) of 26 January 2021 – C-16/19 – *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*

Law: Article 2(1) and (2)(a) and (b) Equal Treatment Framework Directive 2000/78/EC

Keywords: Discrimination on grounds of disability – Unequal treatment within a group of workers with disabilities – Pay supplement if a disability certificate was submitted after a date selected by the employer – Exclusion of those who submitted their certificate before that date

Core statement: If an employer pays a pay supplement only to those employees with a disability who have submitted a certificate of recognition of their disability after a cut-off date set by the employer, this may constitute direct or indirect discrimination on the grounds of disability.

Note: See the note by *Hlava*, HSI-Report 1/2021, p. 4 et seqq. (*German*).

Judgement of the Court (Eighth Chamber) of 21. January 2021 – C-843/19 – *INSS*

Law: Article 4(1) of Directive 79/7/EEC (equal treatment for men and women in matters of social security)

Keywords: Equal treatment for men and women in matters of social security – Early retirement pension – Amount of the pension to be received which must be at least equal to the statutory minimum – Justification of a particular disadvantage for female employees who are excluded from early retirement

Core statement: The entitlement to an early old-age pension may be made dependent on the condition that the amount of this pension is at least equal to that of the statutory minimum pension. If this puts female employees at a particular disadvantage, this can be justified by legitimate social policy objectives which have nothing to do with discrimination on grounds of sex.

Note: Under Spanish law, an early retirement pension can be claimed two years before the regular retirement age of 65. In addition to a minimum contribution period of 35 years, this requires that the amount of the (early) pension to be obtained is above the amount of the statutory minimum pension that workers can receive from the regular retirement age. In the

main proceedings, a woman who used to work as a domestic worker was denied an early retirement pension because the pension amount would have been below the minimum pension. For a long time, the group of domestic workers was subject to a special social security system in Spain, which was later transferred to the general Spanish social security system. In the special system for domestic workers, 89% of the insured were women. Due to the low remuneration as domestic workers and the correspondingly low pension contributions, this group was regularly unable to achieve a pension entitlement above the minimum pension and thus also unable to claim an early retirement pension. Against this background, the question arose whether the access requirements for early retirement pensions indirectly discriminated against women, contrary to the provisions of Directive 79/7/EEC.

The CJEU first referred to its previous case law, according to which the disputed condition for an early retirement pension does not violate Regulation (EC) No. 883/2004.[2] In order to assess the question of whether there is unequal treatment under Directive 79/7/EEC, the CJEU provides the national court with guidance as to which comparison groups are to be formed and, accordingly, which statistical comparisons are to be made (para. 28 et seq.). If unequal treatment is established, this can be justified against the background of the national legislature's broad discretion in social and employment policy. The restriction of access to an early retirement pension, which is the subject matter of the dispute here, was intended to safeguard the financial viability of the Spanish social security system by creating a balance between the time spent in working life and the time spent in retirement (paras. 36, 40). The sustainable financing of pensions is a legitimate objective of social policy[3] that can justify indirect discrimination.

Opinions

Opinion of Advocate General Rantos delivered on 25 February – C-804/18, C-341/19 – *WABE and MH Müller Handel*

Law: Article 2(2), Article 8(1) Equal Treatment Framework Directive 2000/78/EC, Article 10 Charta of Fundamental Rights (freedom of religion), Article 9 ECHR (freedom of religion)

Keywords: Discrimination on grounds of religion – Company-internal prohibition to wear visible or conspicuous large-scale political, philosophical or religious signs at the workplace – Prohibition to wear a headscarf – Customers' wish that the company pursues a policy of neutrality – Admissibility of wearing visible small signs

Core statement: (1) The prohibition in a private company of the wearing of any visible sign of political, philosophical or religious convictions at the workplace does not constitute direct discrimination against employees who follow certain rules of dress for religious reasons.

(2) Indirect unequal treatment on grounds of religion may be justified by the employer's intention to pursue a policy of neutrality in the workplace in order to meet the wishes of its clientele.

(3) Within the framework of the neutrality policy, only the wearing of conspicuous large signs of political, philosophical or religious convictions at the workplace may be prohibited, while smaller visible signs are permitted. However, such a ban must be enforced in a coherent and systematic manner.

(4) National constitutional law protecting freedom of religion may not be taken into account as a favourable provision within the meaning of Article 8(1) of Directive 2000/78/EC when determining whether a difference of treatment indirectly based on religion is justified.

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[2] CJEU of 5 December 2019 – C-398/18 and C-428/18 – *Bocero Torrico and Bode*, para. 25 et seq, see note in HSI Newsletter 4/2019 under IV.

[3] Cf. already CJEU of 24 September 2020 – C-223/19 – *YS*, para. 61, with note in HSI Report 3/2020, p. 24.

(5) The rights under Article 10 Charter of Fundamental Rights and Article 9 ECHR (freedom of religion) may not be taken into account when examining the appropriateness and necessity of a company-internal rule that indirectly discriminates.

(6) An instruction issued by an employer on the basis of an internal ban on the wearing of signs of political, philosophical or religious convictions may be reviewed as to its compatibility with the constitutionally protected freedom of religion, provided that this does not violate the prohibition of discrimination in Directive 2000/78/EC.

Note: The Opinion relates to two references for preliminary rulings from German courts concerning so-called "headscarf bans" in the workplace. The proceedings before the Regional Labour Court of Hamburg[4] concern a Muslim curative education nurse in a non-denominational day-care centre for children. In a general "service instruction on compliance with the neutrality requirement" it was regulated, among other things, that "employees shall not wear any visible signs of their political, ideological or religious convictions towards parents, children and third parties at the workplace". Employees without customer contact were exempt from this. Since the Muslim employee refused to take off her headscarf, she was dismissed. In the opinion of the Court, the action for protection against dismissal brought against this would have to be upheld, as there was unjustified discrimination on grounds of religion under both constitutional and EU law. Since the CJEU in its fundamental rulings in the cases *G4S Secure Solutions*[5] and *Bougnaoui and ADDH*[6], the CJEU held that the employer's desire for religious neutrality was in itself sufficient to justify indirect discrimination, and therefore referred the case to the CJEU for a preliminary ruling.

The second reference concerns proceedings before the German Federal Labour Court.[7] The case concerns the dismissal of a Muslim saleswoman of the drugstore chain Müller. The saleswoman refused to take off her headscarf after her employer instructed her to "appear at work without conspicuous large-scale signs of political, philosophical or religious convictions". This rule applied to all sales outlets.

In his Opinion, the Advocate General fully supports the CJEU's reasoning in the *G4S Secure Solutions* and *Bougnaoui and ADDH cases*, according to which a general internal rule on the wearing of neutral clothing does not constitute direct discrimination on grounds of religion (para. 55). The Advocate General also refers to the above-mentioned judgements on the question of indirect discrimination. It is important to note his interpretation of the freedom to conduct a business in Article 16 Charter of Fundamental Rights. In *G4S Secure Solutions*, the Court stated that an employer's "desire to present an image of neutrality to customers" is covered by Article 16 of the Charter and may, in principle, constitute a legitimate aim to justify discrimination, "in particular where, in pursuing that aim, the employer involves only those employees who are to come into contact with his customers".[8] In *Bougnaoui and ADDH*, it was held that "subjective considerations such as the employer's desire to meet particular customer needs" were not a "genuine and determining occupational requirement" within the meaning of Article 4(1) of Directive 2000/78/EC.[9] For the *WABE* case, which dealt with the (alleged) wishes of the "customers" of the day-care centre, the Advocate General also includes under entrepreneurial freedom "the intention to meet customer wishes, in particular for commercial reasons" (para. 67), where – unlike in the *Bougnaoui and ADDH*

[4] Reference for a preliminary ruling of the Labour Court Hamburg, order of 21 November 2018 – 8 Ca 123/18; case reference to the CJEU: C-804/18 – *WABE*.
[5] CJEU of 14 March 2017 – C-157/15 – *G4S Secure Solutions*.
[6] CJEU of 14 March 2017 – C-188/15 – *Bougnaoui und ADDH*; Notes on both judgements: *Hlava*, HSI Newsletter 1/2017 under II.
[7] Reference for a preliminary ruling of the Federal Labour Court of 30 January 2019 – 10 AZR 299/18 (A); case reference to the CJEU: C-341/19 – *MH Müller Handel*.
[8] CJEU of 14 March 2017 – C-157/15 – *G4S Secure Solutions*, para. 38.
[9] CJEU of 14 March 2017 – C-188/15 – *Bougnaoui und ADDH*, para. 40.

case – it was not a question of the demand of a customer, but the clothing requirement "results from a general and undifferentiated policy of neutrality on the part of the company" (para. 67). The Advocate General therefore sees indirect unequal treatment as justified in the *WABE* case. However, this assessment does not go far enough. Entrepreneurial freedom cannot be guaranteed without barriers. An abstract danger that the neutral corporate image will be diluted by the wearing of religious symbols is not sufficient.[10] The question also arises whether the wearing of a headscarf would not be tolerated in a pluralistic society.[11] In any case, this would have to be included in the proportionality test.

In the *MH Müller Handel* case, only the wearing of "conspicuous large-size signs" was prohibited by the employer, but not the wearing of "small" visible signs of a religious affiliation. In this regard, the Advocate General, following the ECtHR's judgement in *Eweida and Others v. the United Kingdom*[12], states that "such discreet, unobtrusive signs cannot, however, disturb the company's customers who do not share the religion or belief of the employee concerned" (para. 74). However, an Islamic headscarf is not such a small visible sign (para. 76). Against the background of the objective of Directive 2000/78/EC, the Advocate General assumes that an employer may differentiate between conspicuous and less conspicuous religious signs in order to comply with its policy of neutrality, provided that it can thereby achieve its objective in a neutral manner.

With regard to the relationship of Directive 2000/78/EC to the Charter, the Advocate General states that the Directive merely concretises the prohibition of discrimination in Article 21 of the Charter, but is not intended to protect the freedom of religion in Article 10 of the Charter (para. 97). Rather, it considers that there is a danger that "the parallel application of all the rights enshrined in the Charter in the interpretation of Directive 2000/78 will make it impossible to implement this Directive, which concerns only the fundamental principle of non-discrimination in employment and occupation, fully and uniformly, while respecting its objectives" (para. 99). Article 10 of the Charter and Article 9 ECHR therefore play no role in the question of the proportionality of an internal neutrality requirement (para. 100) – the same then applies to Article 16 of the Charter (para. 103). This legal interpretation must be viewed critically. Even if the Framework Directive on Equal Treatment does not implement the freedom of religion protected by fundamental rights, this would nevertheless have to be considered in its interpretation.

He describes the relationship between the prohibition of discrimination under Union law in Directive 2000/78/EC and national provisions as coexistence (para. 105). Constitutionally, in order to protect freedom of religion – as required by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)[13] – further requirements can be placed on the neutrality policy of a company, if this does not violate the prohibition of discrimination in Directive 2000/78/EC (para. 111).

[10] *Hlava*, HSI-Newsletter 1/2017 under II.

[11] ECtHR of 15 January 2013 – No. 48420/10 – *Eweida and others v. United Kingdom*, para. 94; *Brose/Greiner/Preis*, NZA 2011, 369, 379.

[12] ECtHR of 15 January 2013 – No. 48420/10 – *Eweida and others v. United Kingdom*.

[13] In the context of the proportionality test, the German Federal Constitutional Court requires "that there must at least be a sufficiently concrete danger to the interests to be protected [e.g. economic losses of the entrepreneur]", Federal Constitutional Court of 18 October 2016 – 1 BvR 354/11, para. 61; cf. also supplementary order for reference of the German Federal Labour Court (Bundesarbeitsgericht, BAG) of 30 January 2019 – 10 AZR 299/18 (A), para. 41.

New pending cases

Reference for a preliminary ruling from Tribunal Superior de Justicia de Castilla y León of 4 February 2021, lodged on 11 February 2021 – C-86/21

Law: Article 7 Free Movement of Persons Regulation (EU) No. 492/2011, Article 45 TFEU

Keywords: Non-discrimination – Exclusion of recognition of periods of previous employment in a public hospital in another Member State – Absence of general criteria for the recognition of the career systems of the staff of the health services of the Member States.

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4. Fixed term employment

Decisions

Judgement of the Court (Seventh Chamber) 11 February 2021 – C-760/18 – *M.V. and others*

Law: § 5 Framework agreement on fixed-term work (transposed by Directive 1999/70/EC)

Keywords: Measures to prevent abuse through successive fixed-term employment contracts in the public sector – Absolute prohibition in the Constitution of the conversion of fixed-term employment contracts into contracts of indefinite duration – Obligation to interpret in conformity with Union law

Core statement: (1) Paragraphs 1 and 5(2) of the Framework Agreement on fixed-term work must be interpreted as meaning that the expression 'successive fixed-term employment contracts' contained therein also covers the automatic renewal of employees' fixed-term employment contracts pursuant to an express national provision.

(2) The obligation of the referring court to interpret and apply, as far as possible, national law in such a way as to enable appropriate sanctions to be imposed for abuse within the meaning of Clause 5(1) of the Framework Agreement on fixed-term work includes the assessment of whether successive fixed-term employment contracts may be converted into contracts of indefinite duration, even if national constitutional provisions strictly prohibit such conversion in the public sector.

Note: Under Greek law, fixed-term employment contracts were automatically renewed in certain case constellations solely on the basis of a statutory provision. The referring court raised the question of whether these were to be regarded as "successive" employment relationships within the meaning of Section 5(1) of the Framework Agreement on fixed-term work, which was answered by the CJEU affirmatively.

The second question that the CJEU had to deal with is linked to this: In 2001, a remarkable provision was included in the Greek Constitution: Article 103 (8) excludes the fixed-term employment relationship in the public sector. According to the referring court, this means that the sanctioning of violations of the regulations on fixed-term employment, which had been practised until that time and had been enacted in implementation of the Framework Agreement, is no longer possible.

The Court of Justice divides the competence to assess whether the measures of national law are sufficient to effectively prevent the abusive use of fixed-term employment relationships

between the national court and the CJEU.[14] It refers to the duty to interpret national law in conformity with Union law. The conversion of a fixed-term employment relationship into an employment relationship of indefinite duration is one way of complying with § 5 no. 1 of the Regulation on Fixed-term Employment. If this is not possible under national law, it must be examined whether there are other sufficiently effective and dissuasive sanctions.

Opinions

Opinion of Advocate General Tanchev delivered on 18 March 2021 – C-282/19 – *GILDA-UNAMS*

Law: § 5 No. 1 lit. a Framework Agreement on Fixed-term Work, Equal Treatment Directive 2000/78/EC, Article 21 Charter of Fundamental Rights

Keywords: Catholic teachers of religion – Requirement for teaching in public schools – Consent of a diocesan ordinary – Absence of an objective reason

Core statement: (1) It does not constitute an objective reason within the meaning of § 5 no. 1 of the framework agreement on fixed-term employment contracts if Catholic teachers of religion have to obtain the consent of a diocesan ordinary to teach at public schools. It follows that the renewal of fixed-term contracts may not be made conditional on the existence of this requirement.

(2) The referring court is obliged to disapply a national prohibition in a Member State which precludes the conversion of fixed-term contracts into contracts of indefinite duration only if the non-conversion leads to discrimination on grounds of religion or belief in breach of Article 21 of the Charter.

Note: In the present case, a group of Catholic religious education teachers are challenging the fixed-term nature of their employment contracts. They are employed by the Italian Ministry on a fixed-term basis, and all their employment contracts have exceeded a total duration of 36 months, some of which have even existed for 20 years. In their complaint, they are seeking to have their contracts of employment terminated. In return, they claim unequal treatment compared to teachers who are not teachers of religion. Their employment contracts are converted into permanent contracts in the case of a succession of fixed-term contracts exceeding a total duration of 36 months based on a transposition law for Directive 1999/70/EC (para. 24). In the case of the approximately 30% of religious education teachers who are employed on a fixed-term basis, this conversion is excluded by national law. In addition, in Italy, teachers of religion are only entitled to teach Catholic religion if they have a revocable certificate of aptitude issued by the diocesan ordinary (para. 18).

The referring court now wishes to know whether the circumstances of the main proceedings constitute "objective reasons" justifying recourse to fixed-term contracts, as provided for in § 5 no. 1 letter a of the Framework Agreement. Second, whether a prohibition on the conversion of fixed-term contracts into contracts of indefinite duration, which exists under Member State law and has been upheld by the Italian Constitutional Court, is compatible with § 5 of the Framework Agreement or otherwise incompatible with Union law, including Article 21 of the Charter.

The Advocate General finds that there is no "objective reason" within the meaning of the Framework Agreement justifying the successive recourse to fixed-term contracts. Both permanent and temporary teachers of religion would need the certificate of aptitude (para. 61). In addition, the optional nature of the teaching as an elective subject was not an objective reason, and the argument of the alleged need for flexibility among the teachers was

[14] Cf. also CJEU of 21 November 2018 – C-619/17 – *De Diego Porras*, para. 89 f., with note in HSI-Newsletter 4/2018, under IV.3; on the prohibition of abuse of rights under the Temporary Agency Work Directive 2008/104/EC *Klengel*, in: HSI Report 3/2020, pp. 4, 8.

also invalidated by the long-term contractual relationships (paras. 62, 74). However, since § 5 No. 1 of the Framework Agreement does not have direct effect and the conversion of the applicants' fixed-term contracts into contracts of indefinite duration is precluded by national law, the national courts must interpret national law in such a way that the effectiveness of § 5 is guaranteed, but an interpretation contra legem may not be made. The referring court is therefore obliged to convert the applicants' fixed-term contracts into contracts of indefinite duration only if the applicants' right under Article 21 of the Charter to be free from discrimination on grounds of religion or belief and the right to an effective remedy for that wrong under Article 47(1) of the Charter are infringed, in accordance with the principles set out by the Court in its judgement in *Egenberger*.[15] If this is found to be the case, the annulment of the prohibition of the conversion of the fixed-term employment contracts at issue by non-application of national law is required.

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5. Freedom of association and trade union rights

Decisions

Judgement of the Court (Fourth Chamber) of 11 February 2021 – C-407/19, C-471/19 – *Katoen Natie Bulk Terminals und General Services Antwerp*

Law: Articles 45, 49, 56 TFEU

Keywords: Access to the profession and recruitment – Modalities for the recognition of port workers – Mobility of port workers between different port areas – Safety certification

Core statement: (1) It is in principle compatible with the freedom of establishment and the freedom to provide services (Articles 49, 56 TFEU) if companies are obliged, for the performance of port work, to employ only those port workers who are recognised as such in accordance with national regulations. The prerequisite for this is that the relevant conditions and modalities are based, on the one hand, on objective, non-discriminatory and known in advance criteria that enable the port workers from other Member States to prove that they meet equivalent requirements. On the other hand, the quota of recognised workers must not be limited in number.

(2) On the other hand, a national regulation is not permissible according to which

- the recognition of port workers is the responsibility of an administrative committee composed of equal numbers of members appointed by the employers' and workers' organisations,
- this committee also decides, according to labour needs, whether the already recognised workers are to be included in a further contingent of workers who, after termination of the employment contract, do not have to initiate a new recognition procedure for a new employment relationship in the port,
- there is no time limit within which the committee must decide.

(3) As a condition for recognition as a dock worker, various proofs and certificates of personal suitability may be required, provided that the bodies responsible for conducting

[15] CJEU of 17 April 2018 – C-414/16, ECLI:EU:C:2018:257 – *Egenberger*, cf. *Heuschmid/Höller*, HSI-Newsletter 2/2018, note under II.

them guarantee the transparency, objectivity and impartiality of the examinations, tests or examinations.

(4) The recognition of port workers under the old legal basis may continue after the entry into force of a new legal regulation.

(5) The transfer of a dock worker to the contingent of workers in a port area other than the one in which he/she has been recognised may be regulated in a collective agreement, provided that the regulation proves necessary and proportionate to the objective of ensuring safety in all port areas.

(6) The employment of workers in port logistics may be made subject to the issuance of a "security certificate", the modalities of which shall be regulated in a collective agreement. The conditions for its issuance shall be necessary and proportionate to the objective of ensuring security in port areas and the procedure for obtaining it shall not impose an unreasonable and disproportionate administrative burden.

Note: According to the challenged Belgian regulations, certain work in the port may only be carried out by recognised port workers, whereby a joint committee consisting of employer and employee representatives decides on the recognition. The CJEU was asked whether the more detailed regulations were compatible with the free movement of workers, the freedom to provide services and the freedom of establishment. The CJEU partly answered in the negative and specified the requirements for such regulations.

The following aspects should be emphasised: With regard to the standard of examination, the Court refrains from a separate review of the freedom to conduct a business, Article 16 of the Charter, since the review of a restriction on the freedom of workers and the freedom to provide services already includes this. The Court emphasised the importance of market freedoms: The creation of a delimited, rigid quota of workers on whom companies must rely to carry out port work is therefore incompatible with the aforementioned fundamental freedoms.

The formation of a joint committee of employers and employees, which decides on the granting of recognition, is also incompatible with Union law. In particular, it is doubtful whether an organisation representing the already recognised port workers – i.e. the trade union – decides "objectively, transparently and without discrimination". The reasons for the ruling do not elaborate on the discrimination at issue here, but the criterion of citizenship is probably meant. The Court's decision is obviously motivated by the concern to ensure that access to jobs in the port is organised in a way that is compatible with the labour market.

Regulations governing the deployment of port workers in different port areas may be proportionate from the point of view of ensuring staffing in all port areas. The CJEU has not itself decided whether they are proportionate in individual cases but has left this to the assessment of the national courts.

Judgement of the Court (Grand Chamber) of 23 March 2021 – C-28/20 – *Airhelp*

Law: Article 5 para. 3 Air Passenger Rights Regulation (EC) No. 261/2004; Articles 16, 17 and 28 of the Charter of Fundamental Rights

Keywords: Air transport – Compensation in the event of flight cancellation – Unionised strike as "extraordinary circumstance"

Core statement: A strike organised by a trade union, in which the requirements of national law – in particular the period of notice – are observed, by means of which the interests of the company's employees are to be enforced and which is joined by one or more of the groups of employees necessary for the operation of a flight, does not fall under the term "extraordinary

circumstance" within the meaning of the Passenger Rights Regulation. The entitlement of passengers to compensation payments pursuant to Article 5(3) of Regulation (EC) No 261/2004 thus continues to exist.

Note: In the present case, a domestic flight in Sweden of the airline SAS could not be operated due to a pilot strike in Denmark, Sweden and Norway and was therefore cancelled.

An affected passenger assigned his rights against SAS for the cancellation of the flight to the company Airhelp. Airhelp brought an action for compensation before the Attunda District Court (Sweden) based on the Air Passenger Rights Regulation. SAS refused to pay, claiming that the pilots' strike was an "extraordinary circumstance" within the meaning of Article 5(3) of Regulation 261/2004, which was beyond its control and therefore not part of the normal exercise of its activities.

The question of whether strike-related flight cancellations oblige the airline to pay compensation can be of great importance for the enforceability of industrial action. To the extent that airlines do not have to pay compensation on the grounds of "exceptional circumstances", this limits the union's ability to exert pressure.

The Court emphasised that the right to strike is a manifestation of the fundamental right to collective bargaining enshrined in Article 28 of the Charter. As long as the strike relates to demands that can be negotiated within the framework of social dialogue and the strike is carried out in accordance with the legal requirements, it is therefore not an exceptional circumstance. On the other hand, it was irrelevant whether the union's demands were unreasonably high. The Court thus confirms its previous interpretation: strike action is part of the normal management of the company.[16]

However, circumstances caused by external influences are considered exceptional. This includes strikes carried out by the staff of other companies, such as air traffic controllers or airport staff. These industrial disputes could not be controlled by the company. Political strikes are also exceptional events. On the other hand, it was irrelevant whether the strike was organised by a trade union or whether the strike call was "initiated and followed by the air carrier's own employees".

The CJEU held that the risk of having to pay compensation for cancelled flights did not violate the essence of the airline's fundamental right to collective bargaining, protected by Article 28 of the Charter, as the company could continue to pursue its interests. Moreover, a systematic examination of this fundamental right is not undertaken. The airline's right to property and entrepreneurial freedom were not unconditionally granted and thus not infringed.

In parts of the reasoning, the Court adequately treats the fundamental right of the labour dispute. It is remarkable that the CJEU also recognises non-unionised strikes in principle. It should also be emphasised that the Court of Justice does not subject the present industrial dispute – unlike in the *Viking*[17] case – to an examination based on fundamental economic freedoms. Although the Court points out that the strike must comply with the requirements of national law, it does not mention possible requirements of Union law. Nevertheless, the restriction to permissible strikes, but especially to strikes aimed at achieving the goals of the "employees of the company", remains a drop of bitterness – especially in countries where the collective bargaining requirement of industrial action, as it is known in German law, is a foreign concept.

[16] CJEU of 7 May 1991 – C-338/89 – *Organisation Danske Slagterier*, para. 18.
[17] CJEU of 18 December 2007 – C-341/05 – *Laval*. Here, however, the strike objective (prevention of a cross-border relocation) had been considered a violation of the freedom of establishment.

Opinions

Opinion of Advocate General Pikamäe delivered on 20 January 2021 – C-928/19 P – *EPSU/Commission*

Law: Articles 154 and 155 TFEU

Keywords: Dialogue between the social partners at Union level – Refusal of the Commission to submit to the Council a proposal for a decision on the implementation of an agreement of the social partners – Discretionary power of the Commission – Obligation to state reasons for the refusal.

Core statement: The EU Commission is not obliged to forward a proposal submitted jointly by the social partners pursuant to Article 155 (2) TFEU to the European Council for a decision. It has a wide margin of discretion here.

Note: The social dialogue of the European social partners has a special position in the EU (cf. Articles 151, 154 TFEU). Trade union and employer organisations at EU level have the possibility to conclude (framework) agreements and to forward these to the Commission so that it can draw up a legal act for implementation and submit it to the Council for decision (Article 155 (2) TFEU). In the present case, the CJEU is dealing for the first time with the question of whether the Commission is obliged under Article 155 (2) TFEU to forward a corresponding application by the social partners to the Council or whether it has a margin of discretion in this respect.

At first instance, the European Court had ruled in favour of the Commission.[18] Some language versions of the norm indicated an obligation, but due to the position of the Commission in the European legislative process and its sole right of initiative in most cases (Art. 17 para. 2 TEU), the Court granted it a wide margin of discretion.[19]

Contrary to this view, however, there is much to suggest that the Commission can only carry out a mere legal review without assessing the content of the social partner agreement politically.[20]

The European Federation of Public Service Unions (EPSU) appealed against the first-instance ruling to the CJEU. In the present final submissions, the result of the first instance is confirmed. The Commission is not bound by a request under Article 155 (2) TFEU to transpose a social partner agreement into European law (para. 77). The Commission has a wide margin of discretion (para. 88). If the CJEU follows this interpretation, it would considerably devalue the special social partner procedure at EU level[21] and reduce the incentive for joint (protracted) negotiations on such an agreement.

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[18] European Court of 24 October 2019 – T-310/18 – *EPSU und Goudriaan v. Commission*, with note in HSI-Newsletter 4/2019 under IV.1.; c.f. *Rainone*, After the 'Hairdressing agreement', the EPSU case: can the Commission control the EU social dialogue?, ETUI Policy Brief No. 15/2020.

[19] European Court of 24 October 2019 – T-310/18 – *EPSU und Goudriaan v. Commission*.

[20] This is supported, for example, by *Franzen* in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 3rd ed3. Aufl., Article 155 Rn. 20; *Kocher* in: Frankfurter Kommentar, Article 155 TFEU marginal no. 26 et seq.; in contrast e.g. *Eichenhofer* in: Streinz, EUV/AEUV, 3rd ed., Article 155 marginal no. 18.

[21] Cf. the reference by *Hlava/Höller/Klengel*, HSI-Newsletter 4/2019 under IV.1.

6. General matters

Decisions

Judgement of the Court (First Chamber) of 25 February 2021 – C-804/19 – *Markt24*

Law: Article 21(1)(b)(i) Regulation (EU) 1215/2012

Keywords: Jurisdiction over individual contracts of employment – No performance of work for the entire duration of the employment relationship – 'Place where or from which the employee habitually carries out his work' – Obligations vis-à-vis the employer

Core statement: (1) Where, under a contract of employment, work has not been performed for a reason attributable to the employer, the place of performance of the work within the meaning of the provisions of Chapter II, Section 5 of Brussels 1a Regulation (EU) 1215/2012 is determined by the agreed place of performance of the work.

(2) National rules on jurisdiction for actions brought by employees must not disregard which jurisdiction is more favourable to the employees.

(3) Pursuant to Article 21(1)(b)(i) of Regulation (EU) 1215/2012, an employee's action may be brought before the court of the place where or from which, according to the employment contract, the essential part of the obligations towards the employer were to be performed.

Note: In the present case, the international jurisdiction of the Austrian court seised is at issue.[22] An employee resident in Austria had signed an employment contract as a cleaner with a German employer. The work was to be performed in Germany. The signing took place in a bakery in Salzburg, not in the Salzburg branch of the employer. The employee was neither assigned work nor paid. The employment relationship was effectively terminated after a few weeks. The employee filed a claim for payment of, inter alia, the salary for default of acceptance with an Austrian court.
According to the CJEU, the applicability of Article 20 Regulation (EU) 1215/2012 is not dependent on whether work is actually performed (para. 26). Accordingly, the action must be brought before a German court. It could also not be argued that the Austrian provisions were advantageous for the employee: The favourability principle does not apply to the conflict-of-law rules (para. 33).

Pursuant to Article 21 Regulation (EU) 1215/2012, the action may also be brought at the place where the work is usually performed. According to the CJEU, if such work has not actually been performed, the intention of the parties to the employment contract must be taken into account. Whether it is a matter of an establishment abroad is subject to the findings of the local court concerning the facts of the case.

Judgement of the Court (First Chamber) of 25 February 2021 – C-940/19 – *Les Chirurgiens-Dentistes de France*

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

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

Core statement: Member States are entitled to 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. The possibility of allowing

[22] Instructive on the GA's opinion in these proceedings are the explanations in HSI Report 4/2020, p. 19 et seq.

partial access to a profession therefore does not contradict the principle of mutual recognition of professional qualifications in the sense of the free movement of persons and services.

Judgement of the Court (Grand Chamber) of 2 March 2021 – C-824/18 – *A.B.*

Law: Article 2 und Article 19 para. 1 Sous-para. 2 EUV, Article 267 AEUV, Article 4 Abs. 3 EUV

Keywords: Rule of law – Judicial independence – Procedure for the appointment of judges to the Polish Supreme Court – Lack of independence of the National Council of the Judiciary – Enactment of legislation declaring pending cases closed and precluding any judicial remedy in such cases in the future

Core statement: (1) The gradual amendments to the Polish Act on the National Council of Justice, which have removed effective judicial control over decisions on the appointment of judges to the Polish Supreme Court, may be contrary to EU law.

(2) In the event of a proven violation of Article 19(1)(2) TEU, the principle of the primacy of Union law obliges the national court to disapply such amendments.

Note: In the present case, the CJEU once again dealt with a case on the Polish judicial reform.[23] Here, too, it was about the procedure for appointing the Supreme Court in Poland and the question of whether the independence of the judges was safeguarded. Specifically, the dispute concerned amendments to the law from 2018 and 2019, according to which judges who had unsuccessfully participated in the selection procedure of the National Council of Justice for a judicial position at the Supreme Court could no longer appeal against their rejection.[24]

New pending cases

Reference for a preliminary ruling from the Corte suprema di cassazione (Italy) of 21 December 2020, lodged on 18 January 2021 – C-33/21

Law: Article 14 para. 2 lit. a (ii) Coordination Regulation (EEC) No. 1408/71 (replaced by Regulation (EC) No. 883/2004)

Keywords: "Person employed predominantly in the territory of the Member State in which he resides" – "Place where the worker habitually carries out his work" – Field of aviation and flight crew

Note: The question in this case is whether Italian social security legislation applies to employees of an airline even if their assigned duty station is in Italy, but the airline is based in Ireland.

Flying personnel of a carrier may be subject to the legislation of the Member State if the carrier maintains a "branch" or "permanent representation" in that Member State. However, this was excluded in the present case by the lower courts.

The referring court therefore seeks clarification from the CJEU as to whether the expression "person employed principally in the territory of the Member State in which he resides" (Article 14(2)(a)(ii) Regulation (EC) No.1408 /71) can be interpreted in the field of aviation and air

[23] See most recently, e.g. CJEU (Grand Chamber) of 8 April 2020 – C-791/19 R – *Commission v. Poland*, with ed. in HSI Report 2/2020, p. 17 f.; see on Case C-619/18 also *Giegerich*, Noch ist der Rechtsstaat nicht verloren: Der EuGH stellt eine Verletzung der richterlichen Unabhängigkeit durch den polnischen Gesetzgeber fest, at https://jean-monnet-saar.eu/?page_id=2222.

[24] For more details on the subject matter of the main proceedings and the reasons for the decision, see CJEU Press Release No. 31/21 of 2 March 2021.

crew in the same way as it is defined (in the field of judicial cooperation in civil matters, in the judicial field and in the field of individual contracts of employment (Regulation (EC) No. 44/2001)) in Article 19(2)(a) of the latter Regulation as "the place where the worker habitually carries out his work".

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7. Insolvency

New pending cases

Reference for a preliminary ruling from Nejvyšší správní soud (Highest Administration Court, Czech Republic), order of 18 February 2021, lodged on 11 February 2021 – C-33/21 – *HJ*

Law: Insolvency Directive 2008/94/EC

Keywords: Employee status of managing directors of a company – Insolvency protection – Managing director as a member of the statutory body of the same company

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8. Social Security

Decisions

Judgement of the Court (Tenth Chamber) of 24 March 2021 – C-870/19, C-871/19 – *Prefettura Ufficiio territorial del governo di Firenze*

Law: Article 15(7) of Regulation (EEC) No 3821/85 (on recording equipment in road transport), Article 19 of Regulation (EC) No 561/2006 (on the harmonisation of certain social legislation relating to road transport)

Keywords: Recording equipment in road traffic – Failure to submit the record sheets of the tachograph for the current day and the preceding 28 days – Single or multiple infringement

Core statement: If, during a check, drivers fail to produce the tachograph record sheets for several working days over a period of up to 28 days, the competent authorities of the Member State in which the check was carried out may find only one infringement and therefore impose only one penalty.

Opinions

Opinion of Advocate General Saugmandsgaard Øe delivered on 11 February 2021 – C-535/19 – *A (Soins de santé publics)*

Law: Free Movement Directive 2004/38/EC, Article 7 para. 1 lit. b Coordination Regulation (EC) No. 883/2004

Keywords: Economically inactive Union citizens who have left their Member State of origin to settle in a host Member State for the purpose of family reunification – Refusal of access to

the social security system of the host Member State and to public health care benefits – Actual integration link with the host Member State.

Core statement: (1) Public health care benefits to which there is an entitlement without a means test do not fall under the term "social and medical care" within the meaning of Coordination Regulation (EC) No. 883/2004, but under the term "sickness benefits".

(2) Article 11(3)(e) of the Coordination Regulation (EC) No 883/2004 refers only to the legislation applicable to sickness benefits and not to the material conditions for the receipt of such benefits. This provision alone cannot be used to assess whether Union citizens who settle in another Member State may be excluded from state-funded health benefits because they are not gainfully employed in the host Member State.

(3) According to Article 21 TFEU, Article 4 of Regulation 883/2004 and Article 24 in conjunction with Article 7(1)(b) and Article 14(2) of Directive 2004/38/EC), economically inactive Union citizens who have transferred the centre of their entire interests to the host Member State and can prove an actual integration link with it may not be automatically excluded from access to social security and from equal access to state-funded health care benefits solely on the grounds that he/she does not pursue an employed or self-employed activity in the host Member State.

New pending cases

Reference for a preliminary ruling from the High Court (Ireland), of 30 November 2020, lodged on 4 January 2021 – C-3/21 – *Chief Appeals Officer*

Law: Coordination Regulation (EC) No 883/2004

Keywords: Entitlement to a retroactive payment – Difference between Irish and Romanian child benefit – Period between arrival and the lodging of an application for child benefit

Reference for a preliminary ruling from the Verwaltungsgericht Wien (Administration Court Vienna, Austria) of 21 January 2021, lodged on 1 February 2021, C-58/21

Law: Article 13(2)(b) Coordination Regulation (EC) No 883/2004

Keywords: Quantitative centre of an activity – Determination of the jurisdiction of a Member State – Waiver of the right to practise as a lawyer in Austria and abroad as a condition for the grant of an old-age pension

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9. Working time

Decisions

Judgement of the Court (Grand Chamber) of 9 March 2021 – C-344/19 – *Radiotelevizija Slovenija*

Law: Article 2 No. 1 Working Time Directive 2003/88/EC, Occupational Health and Safety Framework Directive 89/391/EEC

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

Core statement: On-call duty, with the requirements of availability by telephone and a return to the workplace within one hour depending on the need, is working time to the full extent if an overall assessment shows that the restrictions imposed significantly impair the possibility of freely organising the on-call time not used for professional purposes. In this context, the consequences of such a time requirement and, if applicable, the average frequency of assignments during the on-call time are to be given special consideration. In such an assessment, it is irrelevant whether there are few opportunities for leisure activities in the immediate vicinity of the place of work.

Note: In Case C-580/19, the plaintiff in the main proceedings worked as a firefighter for the city of Offenbach am Main. In addition to his duties, he was regularly required to be on call. During on-call duty, he did not have to stay at a place determined by the employer, but he was required to be available at all times and had to be able to reach the city boundary of Offenbach am Main in 20 minutes dressed for duty in the event of an operation.

In contrast, Case C-344/19 concerned a broadcasting technician who was deployed to maintain a radio broadcasting system in the Slovenian mountains. In addition to his regular working hours, he also had to perform on-call duties. During this time, he had to be able to reach his workplace within one hour. Due to this time requirement and the special geographical location, he could not go home to the valley during the on-call duty, but was in fact forced to stay in accommodation provided by the employer.

The two plaintiffs were unanimous in their view that their on-call time should be recognised as working time and remunerated accordingly due to the respective restrictions. In essence, the CJEU had to deal in both cases with the question of the extent to which on-call time is to be classified as "working time" or as "rest time" within the meaning of Directive 2003/88/EC.

By way of introduction, the Court refers in its usual manner to the dichotomy of the European concept of working time, according to which working time and rest time are consistently mutually exclusive. It then goes on to say that a period during which employees do not actually perform any work for their employer does not necessarily have to be classified as "rest time". On-call time is automatically classified as "working time" if employees are obliged to remain at their workplace, which is not identical to their home, during this period and to make themselves available for possible tasks on the part of the employer. Stand-by time in the form of on-call duty can also be considered as "working time" in its entirety if the organisation of the free time is so limited due to the restrictions imposed by the employer that it differs noticeably from a period in which the employee only has to be available for his/her employer. In contrast, restrictions of lesser intensity which allow employees to dispose of their time and to devote themselves to their own interests without major restrictions would only constitute "working time" within the meaning of Directive 2003/88/EC if the time is accounted for by the work actually performed during such a period.

However, only restrictions imposed on workers by national law, by collective agreement or by the employer, in particular based on the employment contract, the work regulations or the on-call duty roster, may be taken into account. On the other hand, organisational difficulties that on-call time may entail for workers and that do not result from such restrictions but are, for example, the consequence of natural circumstances or the free choice of workers, cannot be taken into account. However, when deciding whether on-call time is working time, special consideration must be given to the frequency with which the worker is called upon by the employer. Finally, the Court held that the classification of on-call time as "rest time" is without prejudice to the employer's existing obligations under the Occupational Safety and Health Framework Directive 89/391/EEC, according to which on-call time which, by reason of its length and frequency, constitutes a risk to the health or safety of workers, irrespective of whether it is to be classified as "rest time" within the meaning of Directive 2003/88/EC.

Judgement of the Court (Grand Chamber) of 9 March 2021 – C-580/19 – *Stadt Offenbach am Main*

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

Keywords: On-call duty of firefighters – Obligation to reach the city limits within 20 minutes in emergency clothing and vehicle – No requirement as to the place of stay – De facto restriction of the choice of place and the perception of personal interests

Core statement: On-call duty, with the requirement to reach the city limits within 20 minutes in emergency clothing with an emergency vehicle provided and using the siren, is working time to the full extent if an overall assessment shows that the restrictions imposed considerably impair the possibility of freely organising the time of on-call duty which is not used for professional purposes. Special attention must be paid to the consequences of such time constraints and, if applicable, to the average frequency of assignments during on-call time.

Note: See above (C-344/19 – *Radiotelevizija Slovenija*).

Judgement of the Court (Fifth Chamber) of 17 March 2021 – C-585/19 – *Academia de Studii Economice din Bucuresti*

Law: Articles 2 No. 1, 3 and 6(b) Working Time Directive 2003/88/EC

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

Core statement: The requirements of Article 2 No. 1 and Article 3 of Directive 2003/88/EC for the minimum daily rest period refer to these contracts in cases where an employee has concluded several employment contracts with the same employer. Each contract is not to be considered individually.

Note: The Bucharest Academy of Economic Sciences employed staff who, in addition to their permanent position, participated in scientific projects of the Academy. The state supervisory authority objected, among other things, to the resulting non-compliance with daily and weekly rest periods. The court brought by the Academy essentially submitted the question to the CJEU for interpretation as to whether the rest periods provided for in Articles 2, 3 of Directive 2003/88/EC refer to each employment contract between employer and employee separately or whether the working time spent with the employer is to be taken into account as such. Unsurprisingly, the CJEU confirmed the latter interpretation. German law formally complies

with this requirement[25], although there are the well-known enforcement deficits.[26] The question of the validity of the minimum rest periods in the case of several employers, which is interesting from the point of view of EU law, was considered by the CJEU to be irrelevant to the decision and therefore inadmissible.[27]

Opinions

Opinion of Advocate General Saugmandsgaard Øe, delivered on 28 January 2021 – C-742/19 – *Ministrstvo za obrambo*

Law: Article 1 para. 3 Working Time Directive 2003/88/EC, Article 2 para. 2 OSH Framework Directive 89/391/EEC

Keywords: Concept of "working time" – Applicability to military personnel of the armed forces of the Member States – Guarding of military installations

Core statement: (1) Military personnel are subject to the Working Time Directive and the Framework Directive on health and safety at work unless they carry out "specific activities" of the armed forces, the particularities of which necessarily preclude the application of the provisions of the two Directives. Guarding military installations is not one of these activities.

(2) Guard duties in the barracks, during which the military staff member must be present and at the disposal of his/her superiors without being on actual duty, are to be regarded as "working time" to the full extent. National legislation providing for a different calculation of remuneration for this time is permissible.

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[25] In Germany, the performance of work for different employers must also be taken into account in terms of working time law, cf. *Wank*, Erfurter Kommentar, 21st ed. 2021, § 2 para. 18.

[26] For example, forms such as constant accessibility and excessive working hours indicate non-compliance with the Working Time Act, cf. for example the Labour Force Survey of the Federal Statistical Office, https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-3/ueberlange-arbeitszeiten.html, as well as DGB-Index Gute Arbeit 2020, p. 70.

[27] For further details, see *Ch. Schneider*, ZESAR 2020, 278, in the context of the discussion of the opinion.

III. Proceedings before the ECtHR

Compiled and commented by

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1. Freedom of association

New pending cases (notified to the respective government)

No. 976/20 – *Hoppen und Amber Grid v. Lithuania* (4th section) communicated on 24 December 2019 – published on 5 January 2021

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

Keywords: Termination of employment – Discrimination because of trade union activities in the workplace

Note: The first complainant (Hoppen) is an employee in a company of the Lithuanian natural gas transport system and has been employed there since 1993. The second complainant (Amber Grid) is the trade union represented in the company. The first complainant was a member of the company's works council, which, with the support of the second complainant, conducted collective bargaining on working conditions in the company in 2017. The employer intended to terminate the employment relationship with the first complainant in November 2017 for personal reasons (lack of team spirit) and applied to the state supervisory authority for approval of the termination, which was subsequently granted. The first complainant brought an action against this before the administrative court. During the court proceedings, it was pointed out in particular that there were indications of discrimination, since in the first complainant's view the dismissal was connected with his trade union activities. After the Supreme Administrative Court dismissed the complaint, the employer terminated the employment relationship with the first complainant in June 2019. The action for protection against dismissal brought against this was unsuccessful. In his appeal, the first complainant claimed that in the proceedings for protection against dismissal it was not objectively examined, considering the submissions of both parties, whether there was a reason for dismissal in accordance with the statutory provisions. Rather, only the employer's submissions were considered in the court's decision on the validity of the dismissal. In particular, the possible discrimination of the first complainant because of his trade union activities had not been considered. Thus, the right to a fair trial according to Article 6 ECHR was violated. Furthermore, a violation of Article 14 in conjunction with Article 11 ECHR is alleged, since the dismissal, which was clearly pronounced because of the first complainant's trade union activities, interferes with the second complainant's right to freedom of association.[1]

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[1] ECtHR of 27 October 1975 – No. 4464/70 – *National Union of Belgian Police v. Belgium*; ECtHR of 6 February 1976 – No. 5614/72 – *Swedish Engine Drivers' Union v. Sweden*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*.

2. Freedom of expression

Decisions

Judgement (2nd section) of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*

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

Keywords: Disciplinary measure for public criticism of judicial authorities – Surveillance and recording of telephone conversations – Access to a tribunal

Core statement: Members of the judiciary have the right to express public criticism of the judicial system, despite their duty of political restraint.

Note: The subject matter of the complaint is the imposition of a disciplinary measure against a judge in his function as senior judicial officer. The complainant worked in the judicial service as a public prosecutor and judge as part of his legal career before being appointed as a judicial officer "of the first degree" in 2012. In 2007, the Istanbul Public Prosecutor's Office had initiated criminal proceedings against alleged members of a criminal organisation (Ergenekon) for planning a coup d'état. In relation to this investigation, the complainant publicly criticised the law enforcement authorities and the way in which the investigation was conducted. He had also commented on current issues of judicial and constitutional reform and criticised the appointment of the Minister of Justice. Prior to the initiation of the disciplinary proceedings, criminal proceedings were pending against the complainant for influencing judicial officials, on the occasion of his telephone connection was ordered. The criminal proceedings led to the complainant's acquittal. As a result of the disciplinary proceedings in which the information obtained through the telephone surveillance was used, the High Council of Judges and Prosecutors (HSYK) ordered the transfer of the complainant to another post in Çankırı Province. The appeals against the disciplinary measure were unsuccessful. Due to a change in the law, the transfer was changed to a reprimand in 2015, while the allegations against the complainant remained valid.

The complaint alleges that the right of access to a court was violated because the HSYK was not an independent court. In addition, the use of the recordings of telephone conversations in the disciplinary proceedings had inadmissibly interfered with the complainant's private life. Finally, the imposition of a disciplinary measure for the criticism expressed violated the right to freedom of expression.

The Court first refers to its previous case-law[2], according to which labour and service disputes concerning the dismissal of judges fall within the scope of Article 6 ECHR. The HSYK is a body largely composed of judges and prosecutors. The procedure was mainly written and offered few procedural guarantees to the complainant. No evidence was admitted or evaluated. An oral hearing, in which witnesses could have been heard, did not take place. Finally, the HSYK's decision was only rudimentarily reasoned. Thus, the HSYK did not meet the requirements set by the Court of Justice for an independent court.[3] As regards the use of the information obtained in the course of the telephone surveillance, this constitutes a violation of Article 8 ECHR, since it was knowledge obtained in criminal proceedings that was

[2] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*; ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*; ECtHR of 19 January 2017 – No. 5114/09 – *Kulykov and Others v. Ukraine*; ECtHR of 28 March 2017 – No. 45729/05 – Sturua v. Georgia; ECtHR of 31 October 2017 – No. 147/07 – *Kamenos v. Cyprus*.

[3] ECtHR of 14 October 1983 – Nos. 7299/75 and 7496/76 – *Albert and Le Compte v. Belgium*; ECtHR v. 14 November 2006 – No. 60860/00 – *Tsfayo v. United Kingdom*; ECtHR of 6 November 2018 – No. 55391/13 – *Ramos Nunes De Carvalho e Sá v. Portugal*.

used in the disciplinary investigation without there being a legal basis for it.[4] Finally, both the disciplinary investigation and the sanction imposed constituted an interference with the right to freedom of expression. Although the interference was required by law under Turkish law, there was no pressing social need for it and the measure was not proportionate to the legitimate aim pursued. The Court has always emphasised the special role of the judiciary in a democratic society. As a guarantor of justice, a fundamental value in a state governed by the rule of law, it must enjoy the confidence of the public if it is to be successful in fulfilling its tasks.[5] Against this background, even if judges and civil servants in the judiciary have to exercise due restraint in exercising their right to freedom of expression, they are not precluded from expressing critical opinions in public on issues concerning the judicial system.[6] The Court therefore unanimously found a violation of both Article 6 ECHR, Article 8 ECHR and Article 10 ECHR. The complainant's application for legal compensation was dismissed.

Judgement (2nd section) of 16 February 2021 – No. 23922/19 – *Gawlik v. Liechtenstein*

Law: Article 10 ECHR (freedom of expression)

Keywords: Dismissal of a doctor – Filing of a criminal complaint against a colleague – Interest in prosecution versus damage to the employer

Core statement: Information disclosed by whistleblowers may be covered by the right to freedom of expression even if the information in question later proved to be false or could not be proven.

Note: See comment by *Colneric*, HSI-Report 1/2021, p. 9 et seqq (*German*).

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3. Non-Discrimination

Decisions

Judgement (1st section) of 4 February 2021 – No. 54711/15 – *Jurčić v. Croatia*

Law: Article 14 ECHR (Prohibition of discrimination) in conjunction with Article 1 Additional Protocol No. 1 (protection of the right to property)

Keywords: Discrimination on grounds of sex – Denial of health insurance cover as a female employee during pregnancy

Core statement: Gender stereotyping by public authorities is a serious obstacle to the achievement of genuine gender equality, which is one of the main objectives of Council of Europe member states.

Note: The complainant was initially employed from 1993 until October 2009. On 17 November 2009, she underwent in vitro fertilisation. On 27 November 2009, she started a new employment relationship in a company in Split, about 360 km from her place of residence. She was registered for statutory health insurance with the Croatian health

[4] ECtHR of 7 June 2016 – No. 30083/10 – *Karabeyoğlu v. Turkey*.
[5] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.
[6] ECtHR of 26 April 1995 – No. 15974/90 – *Prager und Oberschlick v. Austria*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.

insurance fund and insured as an employee. In December 2009, the complainant found out that she was pregnant with twins and went on sick leave due to pregnancy-related complications. She applied for continued payment of wages, which is granted by the health insurance to insured employees. This was used as an opportunity to check the complainant's health insurance status, which led to her being retroactively denied health insurance as an employee, as it was considered that the employment was only fictitious and was intended to ensure continued payment of wages during pregnancy. In addition, the state health insurance was of the opinion that the complainant was medically unfit to work in a city far from her home due to her pregnancy. The complainant unsuccessfully objected to this. The action, in which she claimed a violation of the prohibition of discrimination, was dismissed at all instances. The Constitutional Court confirmed the opinion of the administrative courts.

The complaint alleges discrimination on grounds of sex, as the complainant was denied access to statutory health insurance as an employee solely on the grounds of pregnancy.

According to the case law of the Court of Justice, only a difference in treatment based on an identifiable characteristic or status can constitute discrimination within the meaning of Article 14 ECHR.[7] A difference in treatment is discriminatory if it has no objective and reasonable justification, i.e. if there is no reasonable relationship between the means used and the aim pursued.[8] In doing so, the Court recognises, albeit indirectly, the need to protect pregnancy and maternity.[9] In the case of the applicant, the Court concludes that the decision to deny health insurance cover on the basis of employment declared fictitious because of the applicant's pregnancy could only be taken in respect of a woman. Accordingly, the decision constitutes unequal treatment on grounds of sex. It is true that the authorities were entitled to check the health insurance status of the applicant, who had taken up employment shortly after the in vitro fertilisation. However, the administrative practice that such checks are often carried out on pregnant women, as confirmed by the domestic courts, is considered problematic by the Court. To the extent that the authorities limited their decision to a finding that the applicant was medically unfit for the job in question as a result of in vitro fertilisation, it is implied that women should not work or seek employment during pregnancy or the mere possibility thereof. However, this is gender stereotyping, which is a serious obstacle to the achievement of genuine substantive gender equality, which is one of the main objectives of the Council of Europe member states.[10] The Court unanimously found a violation of Article 14 ECHR in conjunction with Article 1 Additional Protocol No. 1 and awarded the applicant compensation of €7,500.

New pending cases (notified to the respective government)

No. 31428/20 – *Marin v. Romania* (4th section) communicated on 14 August 2020 – published on 9 March 2021

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

Keywords: Retirement age – Different treatment of men and women

Note: The case concerns the question of whether a difference in retirement age between men and women constitutes unlawful discrimination on grounds of sex. The complainant, a

[7] ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*.
[8] ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali v. Greece*.
[9] ECtHR of 24 January 2017 – No. 60367/08 und 961/11 – *Khamtokhu und Aksenchik v. Russia*; ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 3 October 2017 – No. 16986/12 – *Alexandru Enache v. Romania*; ECtHR of 27 March 1998 – No. 20458/92 – *Petrovic v. Austria*.
[10] ECtHR of 25 July 2017 – No. 17484/15 – *Carvalho Pinto de Sousa Morais v. Portugal*.

civil servant, had reached the retirement age for women of 63 years under national legislation. The retirement age for men is 65. The complainant applied to continue her employment until the age of 65. According to national law, an employment relationship may be continued beyond the retirement age if the employer agrees. According to a decision of the Constitutional Court, women who have reached retirement age are entitled to continue employment until they reach the retirement age set for men. The complainant asserted her claim in court but was unsuccessful in all instances. According to these decisions, the complainant's employment relationship had been effectively terminated, as the employer's consent to the continuation of the employment relationship had not been obtained. The question for the Court, particularly in view of its previous case law[11], is whether the complainant was discriminated against based on her sex within the meaning of Article 14 ECHR because she had to retire earlier than men.

No. 64480/19 – *Moraru / Romania* (4th section) communicated on 4 December 2020 – published on 9 March 2021

Law: Article 2 Additional Protocol No. 1 (right to education) in conjunction with Article 14 ECHR (prohibition of discrimination)

Keywords: Exclusion from studies – Differentiation based on physical characteristics

Note: The complainant was not admitted to the entrance examination for the study of medicine at the military academy because of her height and weight. Statutory thresholds for admission to military educational institutions require compliance with certain medical criteria, including a body weight within certain weight limits and a minimum body height. The complainant's challenge before the domestic courts was unsuccessful. The Court of Appeal held that the statutory criteria were lawful and did not constitute discrimination, considering the nature of the professional activities. The proceedings will focus on the question of whether the general application of anthropometric criteria can constitute discrimination within the meaning of Article 14 ECHR.

No. 59775/19 – *Vrkljan v. Croatia* (1st section) communicated on 8 November 2019 – published on 5 February 2021

Law: Article 1 Additional Protocol No. 12 (General prohibition of discrimination)

Keywords: Termination of employment – Discrimination against wartime veterans

Note: In the context of a social plan, the complainant was dismissed by his employer. He was selected as one of the employees to be dismissed, in particular because he did not have war veteran status, although he had more than 20 years of service. He claims discrimination against war veterans who had shorter service. The question is whether the difference in treatment was objectively justified by a legitimate aim.

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[11] ECtHR of 25 July 2017 – No. 17484/15 – *Carvalho Pinto de Sousa Morais v. Portugal*; ECtHR of 20 October 2020 – No. 33139/13 – *Napotnik v. Romania*.

4. Procedural law

Decisions

Judgement (2nd section) of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*

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

Keywords: Transfer of judges – Possibility of judicial review – Violation of judicial independence

Core statement: The special importance of the judiciary in a democratic society as well as its independence from state organs requires the protection of judicial staff against measures affecting their status or career.

Note: After a varied judicial career, the complainant had been presiding judge of the Ankara Administrative Court since 1998. Following a decree of the High Council of Judges and Prosecutors (HSYK), he was transferred first to the Ankara Regional Administrative Court in 2005 and then to the Sivas Regional Administrative Court in 2006. This decision was based on an official evaluation which had classified the complainant's professional performance as "average" and thus justified his removal from the post of presiding judge under national law. An appeal against the HSYK's decision was rejected on the grounds that there was no right of appeal against the transfer and that it could not be challenged before the ordinary courts.

The complainant argues that the impossibility of challenging the transfer measure in court denied him the right of access to an independent court.

The Court first affirms that the right of access to a court is not absolute and may be restricted by law if the aim is legitimate and the restriction proportionate.[12] However, if the question is whether a decision is arbitrary or based on a procedural error, and if it concerns a subjective right of the person concerned, the scope of application of Article 6 ECHR is opened insofar as it concerns a civil law claim.[13] Particularly against the background of the importance of the separation of powers and the independence of the judiciary, the complainant as a judge was to be granted protection against arbitrary transfer. The Court again pointed out that disputes between civil servants and the state generally fall within the scope of Article 6 ECHR.[14] Even if, in the present case, access to a court was expressly excluded under national rules, the exclusion of members of the judiciary from the guarantees of Article 6 ECHR in matters concerning their conditions of employment could not be justified by objective interests of the State. Therefore, the impossibility of judicial review of the transfer decision was not justified by a legitimate aim, so the Court unanimously found a violation of Article 6 ECHR and awarded the complainant compensation of €12,500.

[12] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni v. Rumänien*; ECtHR of 19 February 2013 – No. 2834/06 – *Petko Petkov v. Bulgaria* citing ECtHR of 21 November 2001 – No. 35763/97 – *Al-Adsani v. United Kingdom*.

[13] ECtHR of 19 September 2017 – No. 35289/11 – *Regner v. Czech Republic*; ECtHR of 26 June 1986 – No. 8543/79 – *Van Marle u. a. v. Netherlands*; ECtHR of 19 October 2006 – No. 1855/02 – *Kök v. Turkey*.

[14] ECtHR of 19 April 2007 – Nr. 63235/00 – *Vilho Eskelinen et al. v. Finland*; ECtHR of 9 January 2013 – Nr. 21722/11 – *Oleksandr Volkov v. Ukraine*; ECtHR of 19 January 2017 – Nr. 5114/09 – *Kulykov et al. v. Ukraine*; ECtHR of 28 March 2017 – No. 45729/05 – *Sturua v. Georgia*; ECtHR of 31 October 2017 – No. 147/07 – *Kamenos v. Cyprus*.

Judgement (3rd section) of 2 March 2021 – No. 10698/18 – *Voronkov v. Russia*

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

Keywords: Delayed payment of remuneration for work – Prevention of bringing an action – Declaration of lack of territorial jurisdiction of the court seised – Prescription period

Core statement: The refusal of domestic courts to rule on the merits of a case is tantamount to a denial of justice which affects the essence of Article 6 ECHR.

Note: The complainant was employed as a security guard in a private security company. After 14 months of non-payment of remuneration in full by his employer, he terminated his employment in 2015. He brought an action before the Promychlenny District Court of Samara for the payment of the remaining remuneration claims. The Promychlenny District Court declared that it did not have jurisdiction and held that the action should be brought before the Oktiabrsky District Court of Samara, as the company that employed the plaintiff had its registered office there. The plaintiff then filed his lawsuit with this court, which in turn declared that it did not have territorial jurisdiction, as the company's registered office was not in its district but was located in Promychlenny. After the lawsuit was filed again before the Promychlenny District Court of Samara, the court, after examining the plaintiff's claims, found that they were time-barred, since according to the relevant provisions of the national labour law, claims must be filed within three months after the termination of the employment relationship. This time limit had expired with the renewed filing of the lawsuit. Further appeals against this decision were unsuccessful.

The appellant alleges a violation of his right of access to a court, since the courts he had brought before had successively declined territorial jurisdiction with regard to the examination of the substantive merits of his claims, as a result of which the claims became time-barred.

The Court first refers to its case-law according to which, under Article 6 ECHR, every individual has the right to bring a dispute concerning civil claims before a court.[15] This right includes, in addition to access to a court, the right to a judicial resolution of the dispute.[16] This right may be restricted by national rules if a legitimate aim is pursued and there is a reasonable relationship between the means employed and the aim pursued.[17]

Such legitimate limitations also include statutory limitation periods, which serve the purpose of establishing legal certainty between disputing parties.[18] However, the refusal of courts to rule on the merits of a case is tantamount to a denial of justice that affects the essence of Article 6 ECHR.[19] Even if one assumes that statutory limitation periods serve legal certainty and legal peace, the restriction of the applicant's right did not pursue this objective in the present case. The complainant assumed in good faith that the statutory limitation period had been observed by bringing the action before the Promychlenny District Court, which ultimately declared itself competent. Accordingly, at least one of the courts dealing with the case committed an error regarding the application of the rules of local jurisdiction which was not attributable to the complainant. Because of the impossibility of asserting the claims due to the expiry of the statute of limitations, the Court found a violation of Article 6 ECHR.

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[15] ECtHR of 11 March 2014 – Nos. 52067/10 and 41072/11 – Howald Moor and Others v. Switzerland; ECtHR of 21 February 1975 – No. 4451/70 – Golder v. United Kingdom.

[16] ECtHR of 1 March 2002 – No. 48778/99 – *Kutić v. Croatia*; ECtHR of 10 July 2003 – No. 58112/00 – *Multiplex v. Croatia*.

[17] ECtHR of 21 June 2016 – No. 5809/08 – *Al-Dulimi und Montana Management Inc. v. Switzerland*; ECtHR of 22 October 1996 – Nr. 22083/93 – *Stubbings u. a. v. United Kingdom*.

[18] ECtHR of 7 July 2009 – No. 1062/07 – *Stagno v. Belgien*; ECtHR of 22 October 1996 – No. 22083/93 – *Stubbings et al v. United Kingdom*; ECtHR of 11 March 2014 – No. 52067/10 and 41072/11 – *v. Switzerland*; ECtHR of 13 February 2020 – No. 25137/16 – *Sanofi Pasteur v. France*.

[19] ECtHR of 13 July 2004 – No. 40786/98 – *Beneficio Cappella Paolini v. San Marino*; ECtHR of 28 February 2008 – No. 37878/02 – *Tserkva Sela Sossoulivka v. Ukraine*; ECtHR of 22 December 2009 – No. 21851/03 – *Bezymyannaya v. Russia*.

Judgement (1st section) of 4 February 2021 – No. 68188/13 – *Vorotnikova v. Latvia*

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

Keywords: Denial of an early retirement pension – Denial of the right to be heard – Unlawfully obtained evidence

Core statement: The parties to a legal dispute must have the opportunity to acquaint themselves with the evidence before the court and to comment on its existence, content and authenticity in a reasonable form and time.

Note: The dispute is based on a complaint that a case before the domestic court was decided based on wrongfully obtained evidence which was not communicated to the parties to the proceedings. In 2011, the complainant applied for an early retirement pension on the grounds that she had taken care of her disabled child until his death at the age of seven. The State Social Insurance Institution, which was under the Ministry of Welfare, rejected the application on the grounds that, according to the relevant law, the pension could only be granted to persons who had cared for a child up to the age of eight. The complainant challenged this decision before the administrative courts. After being successful before the Administrative Court, the Administrative Court overturned this decision on appeal. In her appeal against this decision, the complainant argued that the relevant law on state pensions had been misinterpreted. In this regard, the Supreme Court sought opinions from various state institutions, which were not forwarded to the appellant. Further submissions from the complainant were not included in the court file. In this regard, the Supreme Court stated that such a procedure was not provided for in the Administrative Procedure Act.

The complainant argues that the decision of the Supreme Court was taken based on evidence that was unlawfully collected and not forwarded to the parties to the proceedings. As a result, the right to an adversarial procedure was violated.

The Court recalls its case-law that the right to an adversarial process is one of the fundamental components of a fair trial within the meaning of Article 6 ECHR and includes the right of the parties to be aware of and to express their views on all evidence and submissions made in order to influence the judicial decision.[20] This means that the parties to the proceedings must have the opportunity to acquaint themselves with the evidence before the court and to comment on its existence, content and authenticity in a reasonable form and time.[21] This requirement applies equally to non-binding expert opinions that are intended to support the court's decision-making process and to information and expert opinions that the court obtains on its own initiative in order to reach a decision. Even if the National Administrative Procedure Act allowed the Supreme Court to request opinions from state institutions that do not have the status of parties to the proceedings, the complainant should have been given the opportunity to familiarise herself with these opinions and to comment on them. Because of the denial of this option, the Court unanimously found a violation of Article 6 ECHR and awarded the complainant compensation in the amount of €3,000.

[20] ECtHR of 7 June 2001 – No. 39594/98 – *Kress v. France*; ECtHR of 21 June 2007 – No. 25053/05 – *Ferreira Alves v. Portugal* and ECtHR of 27 March 1998 – No. 21981/93 – *K.D.B. v. Netherlands*.

[21] ECtHR of 3 March 2000 – No. 35376/97 – *Krčmář et al v. Czech Republic*; ECtHR of 15 December 2016 – No. 15275/11 – *Colloredo Mannsfeld v. Czech Republic*.

(In)admissibility decisions

Judgement (1st section) of 12 January 2021 – No. 68470/12 – *Neyman v. Ukraine*

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

Core statement: The admissibility requirement of exhaustion of domestic remedies provided for in Article 35 ECHR is mandatory and cannot be circumvented by arguing the futility of available domestic remedies.

Note: The complainant applied to the state pension fund for the recalculation of his old-age pension and the payment of the resulting difference. By decision of 5 August 2011, the competent district court granted a claim in this regard. The time limit for appeal was ten days in accordance with statutory provisions, so that the judgement became final on 16 August 2011. On 9 November 2011, the pension fund appealed against the judgement, pointing out that it had not been notified of the time and place of delivery of the judgement, and requested that the time limit for appeal be extended. The Court of Appeal conducted the appeal proceedings without reference to a late appeal and set aside the first instance judgement. The appellant did not file the complaint which was allowed by the Court of Appeal.

The appeal before the ECHR alleges a violation of Article 6 ECHR on the grounds that the principle of legal certainty was violated by allowing the late appeal.

The Court recalls the fundamental feature of the protection mechanism established by the ECHR, according to which it is subsidiary to national systems for the protection of human rights. The rule of exhaustion of domestic remedies is based on the assumption that an effective remedy under national law is available in respect of the alleged human rights violation.[22] Since, in the case of the complainant, the Court of Appeal had expressly allowed an appeal, but he did not make use of this remedy, the legal remedy before the domestic courts was not exhausted within the meaning of Article 35 of the ECHR. This is not precluded by the fact that – as the applicant argues – it would have been futile to make use of the available domestic remedies.[23] Accordingly, the Court unanimously declared the application inadmissible.

New pending cases (notified to the respective government)

No. 48762/19 – *Bieliński v. Poland* (1st section) communicated on 11 September 2019 – published on 9 March 2021

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

Keywords: Granting of a statutory old-age pension – Stay of proceedings – Requirement of a decision by the Constitutional Court – Excessively long duration of proceedings

Note: The complainants are 23 civil servants from different areas of the administration who had applied for the reassessment of their old-age pension. After their applications were rejected by the Social Insurance Institution, they brought an action before the competent courts. In the appeal instance, the proceedings were suspended in view of a decision of the Constitutional Court in a comparable legal dispute. An appeal against the decision to stay the proceedings was unsuccessful. In their appeal, the complainants claim that they are hindered in their right of access to a court within the meaning of Article 6 of the ECHR due to the excessively long duration of the proceedings caused by the stay of proceedings.

[22] ECtHR of 25 March 2014 – No. 17153/11 – *Vučković et al v. Serbien*.
[23] ECtHR of 27 January 2009 – No. 22138/07 – *Masjutschenko v. Ukraine*.

Furthermore, they argue that this denies them the right to an effective appeal under Article 13 ECHR.

No. 60235/19 – *Dorosh v. Russia* (3rd section) communicated on 13 November 2019 – published on 8 March 2021

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

Keywords: Action for unfair dismissal – Access to court – Sovereign immunity

Note: The complainant was employed based on a permanent employment contract with a company that is organisationally assigned to the French embassy in Moscow. The employment relationship was terminated by the employer in 2013. An action for protection against dismissal brought against this was successful in the first instance and led to the employer being ordered to pay compensation for dismissal. This decision became final. In the course of the judicial enforcement proceedings, the competent court annulled the decision, which was permissible under national law. The court held that the complainant's employer enjoyed sovereign immunity regarding Russian jurisdiction, as it was part of the French embassy. The action was therefore inadmissible. An appeal against this decision was unsuccessful. The complainant argues that she was denied access to a court within the meaning of Article 6 ECHR due to the state immunity of her former employer and the inadmissibility of her action for protection against dismissal based on this. Considering its case law [24], the Court will examine whether the denial of access to a court on the basis of State immunity violates Article 6 ECHR.

No. 22339/20 – *Sayin / Turkey* (2nd section) communicated on 25 December 2018 – published on 15 January 2021

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

Keywords: Application for promotion – Administrative inactivity – No enforcement of judicial decisions

Note: The complainants are six civil servants who had applied for more senior posts. As their applications for promotion remained unprocessed and they therefore assumed that they had been implicitly rejected, they brought an action against this and at the same time applied for compensation in the amount of the difference in salary to which they were entitled as a result of the promotion in relation to their previous post. The administrative courts considered the administration's inaction to be unlawful and awarded the complainants the requested salary difference. The decisions were not enforced within the statutory period of 30 days, so they took legal action to enforce the decision. Their applications were rejected on the grounds that they were untimely, as appeals against the non-enforcement of judicial decisions are only admissible after one year of inactivity. The complainants see this as a violation of Article 6 ECHR and believe that the inadmissibility decision deprives them of the right to an effective remedy under Article 13 ECHR.

[24] ECtHR of 23 March 2010 – No. 15869/02 – *Cudak v. Lithuania*; ECtHR of 29 June 2011 – No. 34869/05 – *Sabeh El Leil v. France*.

No. 36124/13 – *Kotlyar / Ukraine* (5th section) communicated on 26 Mai 2013 – published on 11 January 2021

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

Keywords: Amount of the state pension – Personal attendance at the oral proceedings

Note: The proceedings concern the dispute of the complainant, a retired police officer, against his employer on the amount of his pension entitlements. After the plaintiff had been successful at first instance, the Court of Appeal overturned this decision and dismissed the action. The judgement was handed down following an oral hearing in the absence of the complainant. The appellant argued that he had not been summoned to the oral hearing by the Court of Appeal and that he had not been served with the defendant's statement of grounds for appeal. As a result, his right to a fair trial under Article 6 ECHR was violated.

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5. Protection of privacy

Decisions

Judgement (3rd section) of 9 February 2021 – No. 15227/19 – *Xhoxhaj / Albania*

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

Keywords: Keywords: Dismissal from the judiciary – Anti-corruption campaign to reform the judicial system – Legality of the review procedure

Core statement: It is not the role of the ECtHR to take the place of domestic courts and interpret domestic legislation on the admissibility and assessment of evidence.

Note: In order to fight corruption within the judiciary, the Albanian legislature passed a law in 2014 to re-evaluate judges and prosecutors (Vetting Act). According to this act, all judges and prosecutors as well as their family members were to be examined by a newly created independent commission (IQC) with regard to their financial situation, possible connections to organised crime and their professional competence. The IQC was composed of persons who were not members of the judicial service. The Reassessment Act stipulated, among other things, that if the persons concerned were suspected of corruption, they had to prove their innocence.

In her complaint to the ECtHR, the complainant alleged that her right to a fair trial had been violated because the IQC and its Appeals Chamber lacked the necessary independence and impartiality. In particular, she complained that their members, as they were not members of the judiciary, lacked the necessary professionalism and experience. Likewise, the statutory burden of proof rule, according to which the complainant has to rebut the allegation of corruption, violates the right to a fair trial. With regard to the protection of private and family life under Article 8 ECHR, the complaint was based on the arbitrary nature of the dismissal.

With regard to the violation of Article 6 ECHR, the Court reiterates that it is not its task to interpret national legislation instead of the domestic courts.[25] Thus, insofar as the admissibility of evidence or the manner in which it is assessed is concerned, it is for the domestic courts to decide on the relevance of the evidence, its probative value and the

[25] ECtHR of 20 October 2011 – No. 13279/05 – *Nejdet Şahin und Perihan Şahin v. Turkey*.

burden of proof.[26] The right to a fair trial guaranteed under Article 6 ECHR establishes the court's duty to examine the parties' submissions, including the evidence contained therein.[27]

However, this duty does not require an examination of every argument put forward. Rather, the parties can only expect an answer to the questions relevant to the decision.[28] Taking these principles into account, the Court concludes that the reassessment procedure conducted before the IQC complied with the requirements of Article 6 ECHR. The IQC was, by virtue of the Reassessment Act, a court within the meaning of Article 6 ECHR and its composition was not objectionable. The investigation procedure also met the requirements of a judicial procedure. The complainant had sufficient opportunity to comment on the allegations made. The rules on the burden of proof complied with legal requirements. Insofar as a violation of Article 8 ECHR is alleged, the Court, referring to its case law ,[29] states that labour disputes are not per se excluded from the scope of application of Article 8 ECHR. In the present case, the dismissal of the complainant from her judicial office had serious consequences for her private and family life, so that Article 8 ECHR is applicable.[30] However, the interference in the complainant's private life was in accordance with the law and necessary in a democratic society. Even if dismissal from office is the most serious disciplinary measure, it was necessary in this case in view of the legislative objective of combating corruption. The Court therefore held by five votes to two that there had been neither a violation of Article 6 ECHR nor a violation of Article 8 ECHR.

Judge *Serghides*, in a dissenting opinion, held that there was a violation of Art 6 ECHR because the IQC was not to be considered a court based on a law. Judge *Dedov*, in another dissenting opinion, held that the dismissal of the complainant from her judicial office was disproportionate in view of her almost 25-year judicial career and her possession of non-excessive assets.

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6. Social Security

Decisions

Judgement (1st section) of 11 February 2021 – No. 4893/13 – *Casarin / Italy*

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

Keywords: Recovery of mistakenly obtained salary shares – Errors of discretion by public authorities – Protection of legitimate expectations – Proportionality of the interference

Core statement: The responsibility borne by the State for its actions must not be transferred to the employees in the case of erroneous overpayment of remuneration by the fact that it can be reclaimed under all circumstances.

Note: The complainant was a civil servant teacher in the National Education Service. In agreement with the Ministry of the Civil Service and the National Institute of Social Security

[26] ECtHR of 21.01.1999 – No. 30544/96 – *García Ruiz v. Spain*; ECtHR of 7 June 2012 – No. 38433/09 – *Centro Europa 7 S.r.l. und Di Stefano v. Italy*; ECtHR of 23 October 2018 – No. 39804/06 – *Lady S.R.L. v. Republic of Moldova*.
[27] ECtHR of 12 February 2004 – No 47287/99 – *Perez v. France*.
[28] ECtHR of 09 December 1994 – No. 18390/91 – *Ruiz Torija v. Spain*.
[29] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[30] ECtHR of 17 October 2019 – No. 58812/15 – *Polyakh et al.. v. Ukraine*; ECtHR of 27 November 2018 – No. 45434/12 – *J. B. et al.. v. Hungary*; ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*.

(INPS), the Ministry of Education initiated a so-called inter-ministerial mobility procedure. As a result, the complainant was transferred to the INPS and received a personal allowance from September 1998 to February 2004 to compensate for the difference between her previous salary and her new (lower) salary. In 2008, the INPS claimed back the compensatory allowance of €13,288.39 paid in the period from 1998 to 2004, after a case-law of the national courts had ruled that the payment of this allowance was unlawful. An action brought by the INPS against the complainant led to the latter being ordered to pay the amount claimed at second instance. This decision was upheld by the Court of Cassation. The INPS accepted an instalment payment offered by the complainant after an enforcement of the judgement was threatened.

The complainant claims that the recovery violates her right under Article 1 of Additional Protocol No. 1.

The Court notes that under Article 1 of Additional Protocol No. 1, interference with the protection of property may be made in accordance with the law, in the public interest and with due regard for a fair balance between the rights of the person or persons concerned and the interests of the community.[31] As the recovery in this case was based on the case law of the national courts interpreting national legislation, the measure was prescribed by law. The recovery was based on a provision that had subsequently become unlawful, so that it served a legitimate objective that was in the public interest. Regarding the proportionality of the intervention, the state has a margin of discretion. In doing so, however, it must take into account that the error in the provision which led to its unlawfulness and thus to the recovery of the overpayment was exclusively the responsibility of the state and therefore could not be to the detriment of the complainant.[32] Moreover, in the recovery of overpayments by state institutions, both the economic and the social situation of the persons concerned must be taken into account. Since in the present case the complainant alone had to bear the burden of the error committed by the administration, the interference was disproportionate, considering the particular circumstances of the individual case. The Court therefore unanimously found a violation of Article 1 of Additional Protocol No. 1 and awarded the applicant compensation of €8,000 and compensation for the damage suffered.

New pending cases (notified to the respective government)

No. 26922/19 – *P. C. / Ireland* (5th section) communicated on 8 May 2019 – published on 2 March 2021

Law: Article 14 ECHR (prohibition of discrimination); Article 1 Additional Protocol No. 1 (protection of property) in conjunction with Article 13 ECHR (right to an effective remedy)

Keywords: Refusal of a pension due to serving a prison sentence

Note: The complainant paid contributions to the State Pension Insurance (PRSI) throughout his working life. In 2006, he reached the designated drawing age of 66 and received the state pension (SPC). In 2011, he was sentenced to 15 years' imprisonment, part of which was suspended. He was released from prison early in March 2020. Due to legal provisions according to which persons in prison or judicial custody are excluded from receiving the SPC for the duration of this period, the PRSI stopped pension payments. A complaint against this was unsuccessful at all instances. A constitutional complaint was rejected on the grounds that the legal provisions on the exclusion of pension payments to detained persons do not violate the prohibition of discrimination. The complainant claims to have been discriminated against due to the denial of his pension compared to other prisoners who can receive private

[31] ECtHR of 6 January 2000 – No. 33202/96 – *Beyeler v. Italy*; ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*.

[32] ECtHR of 26 April 2018 – No. 48921/13 – *Čakarević v. Croatia*; ECtHR of 20 May 2010 – Nr. 55555/08 – *Lelas v. Croatia*.

income. Moreover, the refusal of the national courts to examine the issue of discrimination constitutes a violation of the right to an effective remedy.

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