REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

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Content

I. Editorial

Regarding the current edition of the HSI Report, which covers the latest developments in the field of European labour and social security law in the fourth quarter of 2021, we first report on our own account: The co-editor *Prof Dr Daniel Hlava* is handing over his task as a co-author of the report. The other editors would like to thank him very much for his valuable work in the past and are very happy about the fact that he will remain co-editor of the entire report. Finally, we are very pleased to welcome *Antonia Seeland and Amélie Sutterer-Kipping* who are scientific associates at the Hugo Sinzheimer Institute to our circle of authors.

The **European Court of Justice (CJEU)** has recently had several opportunities to rule on the distinction between working time and rest time (within the current reporting period C-214/20 – *Dublin City Council*). Furthermore, the overview of the CJEU's case law covers the calculation of holiday pay in the event of prior illness and the scope of the principle of equal treatment of temporary agency workers (C-217/20 – *Staatssecretaris van Financiën*). Two other cases deal with the rights of workers with disabilities. For example, before giving notice of dismissal, employers are obliged under EU law to check whether employees with disabilities can be employed in another job that is suitable for them. This could be relevant in Germany, especially for dismissals in small businesses where the Dismissal Protection Act does not apply (opinion of Advocate General Rantos in the case C-485/20 – *HR Rail SA*).

The legal status of persons with disabilities is also one of the subjects of proceedings before the **European Court of Human Rights** (**ECtHR)** (Nos. 34591/19 and 42545/19 – *Toplak, Mrak v. Slovenia*). In Slovenia, a civil society movement had already obtained important rulings before the national courts for the access of persons with disabilities to public elections. Now the ECtHR has ruled that member states must either ensure accessible elections or, if that is not possible, at least provide reasonable accommodation to enable persons with disabilities to participate in the election.

In the decision *Yakutian Republican Trade Union Confederation v. Russia* (No. 29582/09) on the work of prison inmates and the trade union organisation of prisoners, the Court again emphasises the character of the ECHR as a *living instrument*. Other judgements deal with protection against harassment (No. 31549/18 – *Špadijer v. Montenegro*) and a case of modern forced labour (No. 20116/12 – *Zoletic and others v. Azerbaijan*).

We wish you a stimulating read and look forward to receiving your feedback at hsi@boeckler.de.

The editors

Dr Johanna Wenckebach, Prof Dr Martin Gruber-Risak and Prof Dr Daniel Hlava

→ back to overview

II. Proceedings before the CJEU

Compiled and commented by

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1. Annual leave

Decisions

Decision of the Court of Justice (second Chamber) of 9 December 2021 – C-217/20 – *Staatssecretaris van Financiën*

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

Keywords: Entitlement to paid annual leave – Reduced remuneration due to incapacity for work

Core statement: Reductions in pay during the period of incapacity for work due to illness may not be taken into account for the calculation of holiday pay.

Note: The applicant is employed in the Dutch tax administration. Since 2015, he was declared unfit for work for a longer period due to illness. His salary was reduced to 70% of the original amount during the course of the illness and this reduction was maintained during his annual leave. The applicant objects to this and claims that he was entitled to a full salary during his leave.

In its reference for a preliminary ruling, the referring court points out that it understands the term ‘full remuneration’ as the remuneration during that period, i.e., the salary reduced to 70% which was received during the reference period preceding the leave. The court further argues that the Working Time Directive only guarantees paid annual leave and does not comment on the amount of remuneration to be paid during the leave. Also, in the *Schultz-Hoff* judgment[1] , the CJEU itself only spoke of an ’ordinary’ remuneration to be paid (para. 14).

The Court recalls that the purpose of the right to annual leave is twofold. It is intended to enable the worker to rest from carrying out the work and to enjoy a period of relaxation and leisure and freely dispose of his or her own leave time. In contrast to sick leave, which is intended to enable the worker to recover from illness[2], the entitlement to annual leave is linked to the fact that the worker actually worked during the reference period (para. 25). The periods during which work was performed are therefore also the reference for holiday pay. However, since the occurrence of incapacity for work due to illness is independent of the employee's will, the holiday entitlement must not be affected by this circumstance. This would result in making the full entitlement to paid annual leave dependent on full-time employment in the relevant reference period and, secondly, to making the value of the leave entitlement dependent on the time at which it is exercised (para. 36 f.). It follows from all this that employees in the situation described above are to be treated in the same way as their

[1] CJEU of 20 January 2009 - C-350/06 and C-520/06 - *Schultz-Hoff*.
[2] CJEU of 30 June 2016 - C-178/15, para. 25 - *Sobczyszyn*.

colleagues who worked in the reference period in question, i.e. their holiday pay may not be reduced. For German law, the decision has the consequence that it must not be taken into account for the determination of holiday pay if attendance or performance bonuses or piecework wages are not achieved due to absences due to illness and other non-culpable reasons.[3]

Decision of the Court of Justice (seventh Chamber) of 25 November 2021 – C-233/20 – *job-medium GmbH*

Law: Article 7 (1) Working Time Directive 2003/88/EC, Article 31 (2) Charter of Fundamental Rights

Keywords: Financial compensation for paid annual leave not taken before the end of the employment relationship – Premature termination of the employment relationship by the employee

Core statement: If an employee terminates the employment relationship unilaterally without good cause, he/she is entitled to an allowance in lieu for the leave not granted. It does not matter whether the employee was prevented from taking the leave.

Note: After the CJEU[4] caused a paradigm shift in German holiday law[5] with its case law on the transferability of the holiday compensation entitlement, an Austrian provision was now under scrutiny. § 10 (2) of the Austrian Holiday Act excludes compensation for leave not granted if 'the employee leaves prematurely without good cause'.

In its decision, the CJEU refers to its case law according to which the entitlement to leave is a particularly important principle of EU social law and may not be interpreted restrictively. This also covers the allowance in lieu for annual leave not granted at the end of the employment relationship (para. 29). Article 7(2) of the Working Time Directive only provides as a precondition for the entitlement to allowance in lieu that the employment relationship has ended, and the employee has not taken all the annual leave – the reason for the termination of the employment relationship is thus not relevant under Union law.

§ 7(4) of the German Federal Leave Act (BUrlG) corresponds to these requirements. This provision is also not based on the reason for the termination.[6] The present decision underlines that termination due to the employee's conduct does not prevent the right to an allowance in lieu.

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 13 October 2020 – C-514/20 – *DS v. Koch Personaldienstleistungen GmbH*

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

Keywords: Collectively agreed overtime pay – Exclusive consideration of the hours actually worked without annual leave

[3] C.f. *Kühn*, in Neumann/Fenski/Kühn, Bundesurlaubsgesetz, 12th ed. 2021, § 11 marginal 47 et seqq with further references.

[4] CJEU of 20 January 2009 - C-350/06 and C-520/06 - *Schultz-Hoff*.

[5] Abandonment of the surrogate theory by Federal Labour Court of 19 June 2012 - 9 AZR 652/10; Federal Labour Court of 13 December 2011 - 9 AZR 399/10.

[6] Neumann/Fenski/Kühn/Neumann, BUrlG, 12th ed. 2021, § 7 marginal 120.

Note: It follows from the collective agreement applicable to the applicant that for the calculation of overtime pay, only periods are taken into account in which the employee actually worked, i.e. periods of annual leave are not taken into account. With its request for a preliminary ruling[7], the Federal Labour Court (Bundesarbeitsgericht – BAG) seeks clarification if, due to the particular importance of the annual leave entitlement, disadvantages in the amount of overtime pay based on the minimum leave taken are compatible with EU law, as this would mean that the overtime pay could in fact not be achieved when taking leave.

→ back to overview

2. Data protection

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 8 November 2021 – C-667/21 – *Krankenversicherung Nordrhein*

Law: Article 9(2)(h), Article 82(1) GDPR

Keywords: Health data of employees – Processing of employee data by the Medical Service of the Health Insurance Funds – Compensation for damages

Note: The German Medical Service of the Health Insurance Fund (MDK) provides expert opinions on the incapacity to work of insured persons, among other things, in cases regulated by law. The plaintiff is employed by an MDK. During a longer period of incapacity for work, his employer was commissioned by the health insurance fund to prepare a medical report on his illness. The plaintiff claims that this disclosed sensitive health data about him to his employer and demands compensation for damages. The Federal Labour Court's submission[8] relates to the admissibility of the collection of data for the employee employed by the MDK as well as the criteria according to which the amount of non-material damages is determined pursuant to Article 82 (1) of the GDPR.

→ back to overview

3. Equal treatment

Decisions

Judgement of the Court of Justice (Eighth Chamber) of 13 December 2021 – C-226/21 – *Sescam*

Law: § 4 No. 1 Framework agreement on fixed-term Employment Contracts (implemented by Directive 1999/70/EC)

Keywords: Concept of 'conditions of employment' – Exemption from emergency medical on-call services on grounds of age granted only to permanently employed workers.

[7] The judgement in the *Koch Personaldienstleistungen* case was delivered by the CJEU on 13 January 2022 and is presented in HSI Report 1/2022.

[8] Federal Labour Court of 26 August 2021 - 8 AZR 253/20.

Core statement: A national regulation according to which the right to exemption from on-call duty is granted to permanently employed workers to the exclusion of fixed-term employees is contrary to EU law.

Judgement of the Court (Second Chamber) of 21 October 2021 – C-824/19 – *Komisia za zashtita ot diskriminatsia*

Law: Article 2(2)(a) and Article 4(1) Equal Treatment Framework Directive 2000/78/EC, Articles 21 and 26 Charter of Fundamental Rights of the European Union – CFR, United Nations Convention on the Rights of Persons of Disabilities

Keywords: Prohibition of discrimination on grounds of disability – UN Convention on the Rights of Persons with Disabilities – Duties of a juror in criminal proceedings – Blind person – Complete exclusion from participation in criminal case – Appropriate accommodation

Core statement: The total exclusion from the office of juror because of the judge's blindness is direct discrimination on grounds of disability according to Article 2(2)(a) of the Framework Directive on Equal Treatment. An exception to the prohibition of discrimination for professional requirements regulated in national law presupposes the proportionality of the measure. This principle is disregarded and the prohibition of discrimination is violated by the fundamental and complete exclusion of a blind person from any opportunity to perform duties as a juror in criminal proceedings.

Note: In the present case, a blind juror VA was not allowed to participate in any proceedings of the chamber to which she was assigned, due to her blindless. TC and UB as court president and judge of a criminal chamber submit that the duties of a juror cannot be carried out by persons with a disability such as blindless and would, in principle, require possession of particular physical characteristics, such as vision. They claim that her exclusion from participation in the hearings of the criminal chamber to which she had been assigned sought to ensure full compliance with the principles of the Code of Criminal procedure, in particular the principle of immediacy and the direct assessment of evidence for the purposes of establishing the objective truth stemming from Articles 14 and 18 of that code. The immediacy and direct assessment of evidence are fundamental principles in criminal proceedings and capable of constituting a legitimate aim, within the meaning of Article 4 (1) of Directive 2000/78/EC. Likewise, by reason of the nature of a juror’s duties in criminal proceedings and the context in which they are carried out, which may in certain cases involve examination and assessment of visual evidence, vision may also be regarded as ‘a genuine and determining occupational requirement’ for the activity of juror in such proceedings, within the meaning of Article 4 (1) of Directive 2000/78/EC. However, as regard the necessity of that measure, it must be noted that VA was excluded from any participation and without any investigation as to whether reasonable accommodation such as material, personal or organisational assistance could be offered to her. Such a measure is obviously inappropriate. The blindness of the juror per se cannot justify a refusal of the activity. Employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment unless such measures would impose a disproportional burden on the employer (Article 5 of Directive 2000/78). This follows from Article 4 (1) of Directive 2000/78/EC, which must be read in the light of CRPD and Articles 21 and 26 CFR and must be interpreted as meaning that they preclude that a blind person be totally deprived of any possibility of performing the duties of a juror in criminal proceedings. Finally, it must be noted that it is clear from the title of, and preamble to, Directive 2000/78/EC, as well as from its content a purpose, that it is intended to establish a general framework for ensuring that everyone benefits from equal treatment by

providing effective protection against discrimination and to combat alle forms of discrimination on grounds of disability.

According to German law (§§ 33 para. 1 No. 4, 52 para. 1 Judicature Act, GVG), persons who are unsuitable as jurors for health reasons should not be appointed to the office of juror or are to be removed from the list of jurors. The Federal Constitutional Court (BVerfG)[9] did not consider the deletion of the blind complainant from the list of jurors to be a violation of the prohibition of discrimination under Article 3(3) sentence 2 of the German Constitution.[10] Thus, a discrepancy in the case law of the CJEU and the BVerfG can be established. On the other hand, a fundamental exclusion due to visual impairment is not provided for under section 33 (1) No. 4 GVG, because it must at least be examined whether an atypical case exists, and the person is unsuitable for the office due to the disability. Reasonable accommodation could establish atypicality.

Judgement of the Court (Eighth Chamber) of 14 October 2021 – C-244/20 – *INSS*

Law: Article 3(2) Equal Treatment Directive 79/7/EEC

Keywords: Equal treatment of men and women – Social security – Widow's pension based on non-marital cohabitation under Catalan law – Prohibition of discrimination on grounds of sex.

Core statement: The question of whether survivors may be excluded from the survivor's pension under Spanish law who have lived in a non-marital partnership which has been recognised under the law of the autonomous community of Catalonia, but which has not been formalised by an entry in the register, does not fall within the scope of application of the Equal Treatment Directive. The Court of Justice of the European Union has no jurisdiction to answer the questions referred by the Tribunal Superior de Justicia de Cataluña (Supreme Court of Justice of Catalonia).

Opinions

Opinion of Advocate General Rantos of 11 November 2021 – C-485/20 – *HR Rail SA*

Law: Article 5 Equal Treatment Framework Directive 2000/78/EC

Keywords: Prohibition of any discrimination on grounds of disability – Person completing a training period in the context of his recruitment – Obligation to reassign that worker to another post for which he is competent, capable and available – Disproportionate burden

Core statement: Article 5 Equal Treatment Framework Directive must be interpreted as meaning that, where a worker, including one completing a traineeship as part of his or her recruitment, becomes permanently unfit, owing to the onset of a disability, to occupy the post to which he or she has been assigned within the undertaking, the employer is obliged, as part of the 'reasonable accommodation' provided for in that article, to reassign that worker to another post where he or she has the required competence, capability and availability and where that measure does not impose a disproportionate burden on the employer.

Note: The applicant was recruited by HR Rail, a public limited company, as a specialist maintenance technician for the maintenance of railway tracks. In December 2017, he was diagnosed with a heart condition requiring the fitting pacemaker, a device which is sensitive to the electromagnetic fields emitted, inter alia, by railway tracks. In June 2018, he was

[9] Federal Constitutional Court of 10 March 2004 - 2 BvR 577/01, NJW 2004, 2150.
[10] *Reichenbach,* NJW 2004, 3160; *Sachs,* JuS 2004, 818.

recognized as disabled by the service public federal Securite sociale Belgium. Following that decision, the applicant was assigned to the post of warehouseman. In July 2018, he lodged an appeal against that decision with the *commission d'appel de la médecine de l'administration*. In September 2018, the applicant was informed that he would be dismissed.

The CJEU has to decide whether Article 5 of Directive 2000/78/EC is to be interpreted as meaning that, where a worker, including one completing a traineeship in the context of his or her recruitment, becomes permanently unfit, due to the onset of a disability, to occupy the post to which he or she has been assigned, his or her employer is required, as a matter of 'reasonable accommodation' under that article, to reassign him or her to another post for which he or she has the necessary skill, capability and availability and where such a measure does not impose a disproportionate burden on the employer.

According to the Advocate General, Article 5 of Directive 2000/78 includes the obligation to reassign him or her to another post within the undertaking. The wording of Article 5 allows this interpretation, also in the light of the 20th recital of the Framework Directive.[11]'This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned' (para. 54).

As a result, the employee has no right to a transfer if his or her previous position can be maintained with the help of suitable, reasonable measures. However, he/she has a fundamental right to continued employment, either in the previous job or at least within the company, which also results from the required interpretation of Article 5 of the Framework Directive on Equal Treatment in accordance with the United Convention on the Rights of Persons with Disabilities (the UN-Convention) and the Charter of Fundamental Rights of the European Union ('the Charter').

Consequently, in the first step, the employer has to check whether an adaptation of the previous workplace can be made according to the needs of the person with disabilities. If no reasonable accommodation measures allow the disabled person to retain the post he or she has been assigned, the second step is to examine the possibility of reassignment of that worker to another post where he or she has the required competence, capability an availability (para. 74) and where that measure does not impose a disproportionate burden on the employer (para. 77).

The Advocate General's comments are to be understood in the sense that, firstly, the reassignment of the employee is also a reasonable accommodation within the meaning of the Framework Directive on equal treatment and, secondly, the employer is obliged to check whether the two cumulative conditions for a reassignment of that worker are met before dismissing the employee. Dismissal could only be a last resort (para. 68). If the CJEU follows the Advocate General, this is what is essentially new. The opinion and the result of the Advocate General are convincing, as the principle of reasonable accommodation decisively serves the realisation of social and professional participation of persons with disabilities.[12] The CJEU decision also has significance for German law. It is true that the German legislator has still failed to fully transpose the requirement to take reasonable accommodation into national law, in particular into the AGG.[13] Nevertheless, the principle is recognised in national

[11] According to CJEU of 11 April 2013 - C335/11 - *HK Danmark*, the list in recital 20 is not exhaustive.
[12] *Kocher/Wenckebach*, SR 2013, p. 17 et seq, 22.
[13] *Bechtolf*, in: Deinert/Welti, StichwortKommentar Behindertenrecht, 3rd edition 2022, Angemessene Vorkehrungen marginal 14 et seqq (forthcoming).

law by way of an interpretation of Section 241(2) of the German Civil Code (BGB) in conformity with international and EU law.[14] Thus, the obligation to examine the possibility of reassignment of a worker to another position before dismissal would arise both from the provisions of the law on protection against dismissal (including §§ 168 SGB IX in particular § 172(1) sentence 3 SGB IX on the approval of the Integration Office) and from anti-discrimination law (§§ 134 of the Civil Code in conjunction with §§ 7(1) sentence 1, 3 of the Equal Treatment Act (AGG)).[15] This is particularly relevant in cases that lie outside the scope of application of the Dismissal Protection Act (Kündigungsschutzgesetz).[16]

New pending cases

Request for a preliminary ruling from the Verwaltungsgerichtshof (Österreich), lodged on 11 November 2021 – C-681/21 – *Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau*

Law: Articles 2(1) and (2)(a) and Article 6(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Civil service law – Pension adjustment – Age – Discrimination

Request for a preliminary ruling from the Tribunal de première instance de Bruxelles (Belgium), lodged on 11 November 2021 – C-680/21 – *Royal Antwerp Football Club*

Law: Articles 45 and 101 TFEU

Keywords: Discrimination on grounds of nationality – Compatibility of the 'young players' rule' with EU law – Compulsory inclusion of 'young players' in the first-team squad of professional football clubs

Request for a preliminary ruling from the Tribunale ordinario di Vercelli (Italy), lodged on 20 July 2021 – C-450/21 – *UC/Ministero dell'istruzione*

Law: § 4 No. 1 Framework agreement on fixed-term employment contracts (implemented by Directive 1999/70/EC)

Keywords: Recognition and payment of additional remuneration – Training – Fixed-term teachers – The teacher's electronic card

→ back to overview

[14] Federal Labour Court of 19 December 2013 - 6 AZR 190/12, para. 53.

[15] Federal Labour Court of 19 December 2013 - 6 AZR 190/12, para. 50 et seq. In a case of a drug-addicted employee who could no longer perform his previous job after withdrawal treatment, according to the Court's opinion, the duty of consideration pursuant to § 241(2) of the German Civil Code (Bürgerliches Gesetzbuch, BGB) may require the transfer to a job suitable for the suffering within the framework agreed in the employment contract. If there is no corresponding workplace available, the examination of a rotation with other employees may be considered on the basis of the right to issue instructions under § 106 of the Trade, Commerce and Industry Regulation Act (HGB, Federal Labour Court of 19 May 2010 - 5 AZR 162/09). C.f. Federal Labour Court of 28 June 2017 - 5 AZR 263/16, para. 35, denying the obligation to create a workplace suitable for the suffering.

[16] It is recognised in literature that § 2 para. 4 AGG does not preclude this (cf. *Schlachter,* in: Erfurter Kommentar, 22nd ed. 2022, AGG, § 2 marginal 17; *Koch*, in: Schaub/Koch, Arbeitsrecht von A-Z, 25th ed. 2021) and case law (Federal Labour Court of 19 December 2013 - 6 AZR 190/12, marginal 15 et seqq.) that § 2 para. 4 AGG does not preclude this.

4. General matters

Decisions

Decision of the Court of Justice (nineth Chamber) of 22 October 2021 – C-691/20 – *O et al.*

Law: Articles 18, 49, 54 TFEU

Keywords: Freedom of establishment – Joint and several liability of associated companies for claims arising from an employment contract – Exclusion of companies established in another Member State

Core statement: The principle of non-discrimination, implemented by Article 49 TFEU, must be interpreted as not precluding national legislation under which a company, established in a Member State other than that in which the company it controls is established, cannot be held jointly and severally liable for the debts of the latter company arising from an employment contract.

Note: In 2004, the claimant in the main proceedings was employed by Company O as a security technician. He carried out his work exclusively in Portugal. After the company had ceased to pay his salary as of June 2018, he brought an action against company O, in its capacity as employer, as well as against companies P, OP, G and N, which, in the claimant's view, should be jointly and severally liable for the payment due to the existence of a common organisational structure between these companies. As companies O and P had in the meantime been declared bankrupt, the proceedings continued against companies OP, G and company N, whose registered office is in Luxembourg, and which directly or indirectly controlled the other four companies, all of which had their registered offices in Portugal. Under Portuguese law, associated companies whose registered office is in a Member State other than Portugal are excluded from joint and several liability for claims arising from an employment contract. The claimant states that this national legislation leads to discrimination in the treatment of employees contrary to Article 18 TFEU, as the treatment of employees' claims depends on the Member State where the company controlling their employer is registered.

By its question, the referring court asks, in essence, whether the national regulation at issue infringes the European principle of non-discrimination under Art 18(1) TFEU. As the CJEU recalled, national measures can be examined having regard to the first paragraph of article 18 TFEU only to the extent that they apply to situations which do not fall within the scope of specific rules on non-discrimination laid down by the FEU Treaty. In this instance, however the Court has stated that Article 49 TFEU is the more specific rule on non-discrimination. The freedom of establishment, which Article 49 TFEU grants to nationals of the Member States and which includes the right for them to take up and to pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails – in accordance to 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union – the right to exercise their activity in the Member State concerned through a subsidiary, a branch, or an agency. The freedom of establishment thus covers, in particular, the situation where a company established in a Member State creates a subsidiary in another Member state, acquires a holding in the capital of a company established in another Member State allowing it or him to exert a definite influence on the

company's decisions and to determine its activities[17]. The Court held that Article 49 TFEU does not preclude a Member State from legitimately improving the treatment of the claims of groups present in its territory and that, consequently, the exclusion of parent companies having their seat in a Member State other than Portugal from the joint and several liability regime provided for by the legislation at issue is not such as to make it less attractive for those companies to exercise the freedom of establishment guaranteed by Article 49 TFEU.

Judgement of the Court (tenth Chamber) of 25 November 2021 – C-249/20 P – *Commission/UG*

Law: Article 54 of the Statute of the CJEU

Keywords: Employment relationship in the public service – Contract for an indefinite period – Termination – Non-material damage – Degrading treatment on account of trade union activity and for taking parental leave

Core statement: The General Court of the EU incorrectly dealt with a claim by the plaintiff, an EU official. The plaintiff not only claimed non-material damages for degrading and discriminatory treatment, but also for her unjustified dismissal. The decision of the CFI has therefore been partially overturned by the CJEU.

New pending cases

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 21 July 2021 – C-453/21 – *X-FAB Dresden GmbH & Co. KG v Fc*

Law: Article 38(3) General Data Protection Regulation (EU) 2016/679 (GDPR)

Keywords: Dismissal of the applicant as data protection officer on the ground that he was both chairman of the works council and data protection officer at the defendant company

Note: The applicant is chairman of the works council and data protection officer at the defendant company. In his complaint, he contests his dismissal as data protection officer. He disagrees with the defendant's argument that there is a risk of conflicts of interest due to the exercise of both functions and therefore good cause justifying dismissal. The case-law of the Bundesarbeitsgericht (Federal Labour Court) takes so far the view that there is no fundamental incompatibility between the two functions. The employer's legal status is not unduly prejudiced by the fact that it is faced with a data protection officer who simultaneously exercises the rights of the works council under the Works Council Constitution Act (BetrVG). Under national law, the applicant's dismissal would be inadmissible pursuant to Paragraph 38 (2) in conjunction with the first sentence of Paragraph 6(4) of the Data Protection Act (BDSG) and Paragraph 626 of the German Civil Code (BGB). However, under EU law this would be admissible. Article 38 (3) second sentence, of the GDPR only provides that the data protection officer shall not be dismissed or penalised by the controller or the processor for performing his tasks. This means that the provisions of German BDSG make the dismissal of the data protection officer subject to stricter conditions than EU law. The question of whether the dismissal will be unsuccessful due to an infringement of Paragraph 38(2) in conjunction with the first sentence of Paragraph 6(4) of the BDSG depends on whether, pursuant to the second sentence of Article 38(3) of the GDPR, a Member State rule that makes the dismissal of the data protection officer subject to stricter conditions than EU law is permitted. If Section 38(2) in conjunction with Section 6(4) BDSG had to remain

[17] See, to that effect, judgements of 21 December 2016 - C-201/15 - AGET Iraklis, EU:C:2016:972, para. 45 and 46, and the case-law cited.

inapplicable due to the primacy of EU law, the defendant's appeal would be successful. The Bundesarbeitsgericht had already presented a similar case in the Leistritz case. The case concerned the ordinary dismissal of a data protection officer, who enjoys special protection against dismissal under national law, but not under EU law.

Request for a preliminary ruling from the Curtea de Apel București (Romania) lodged on 24 August 2021 – Case C-524/21 – *I.G. v Agenția Județeană de Ocupare a Forței de Muncă Ilfov*

Law: Articles 1, 2, 3, 4 Directive 2008/94

Keywords: State of insolvency, establishment and use of the Guarantee Fund for the payment of salary claims, date on which the insolvency proceedings are opened

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 16 November 2020 – Case C-604/20 – *ROI Land Investments Ltd. v FD*

Law: Article 21(2) and Article 21(1)(b) of Regulation (EU) No 1215/2012 Brussels I Regulation; Article 6 Rome I Regulation

Keywords: State of insolvency, establishment and use of the Guarantee Fund for the payment of salary claims, date on which the insolvency proceedings are opened

Note: The question is whether the German courts have international jurisdiction over the dispute. The Regulation (EU) No. 1215/2012 is relevant for civil matters having cross-border implications. It has to be clarified whether the usual place of work pursuant to Article 6 para. 1, 21 para. 2 is to be used for claims arising from a comfort letter and what the relationship is between this regulation and Sec. 48 para. 1a Labour Court Act (ArbGG), according to which the local jurisdiction of the labour court is also given for actions against the legal successor of the employer. Should German jurisdiction be competent, the decisive factor for the decision in the present case is whether German law is applicable, for which, according to Article 6 (1) Rome I Regulation (EC) No. 593/2008, it is decisive, inter alia, whether the plaintiff is to be regarded as a consumer at the time of the conclusion of the comfort agreement.

→ back to overview

5. Social security

Decisions

Decision of the Court of Justice (third Chamber) of 11 November 2021 – C-168/20 – *MH und ILA*

Law: Free Movement Directive 2004/38/EC, Article 21, 49 TFEU

Keywords: Freedom of establishment – Equal treatment – Pension rights in the bankruptcy estate – Pension rights of self-employed EU foreigners

Core statement: Pension rights of an established EU foreign national from a pension scheme may only be fully and automatically excluded from the bankruptcy estate on condition that the scheme in question was tax approved in that state at the time of the insolvency if this rule is based on an overriding reason in the general interest and does not go beyond what is necessary to achieve that objective.

Decision of the Court of Justice (tenth Chamber) of 28 October 2021 – C-462/20 – *ASGI et al.*

Law: Article 12 Combined Permits Directive 2011/98/EU, Article 14 Highly Qualified Persons Directive 2009/50/EC, Article 29 Qualification Directive 2011/95/EU

Keywords: Legal status of third-country nationals who are long-term residents – Rights of third-country workers holding a single permit or EU Blue Card – Rights of beneficiaries of international protection – Coordination of social security systems – Family benefits – Social assistance – Access to goods and services – Regulation of a Member State excluding third-country nationals from entitlement to the 'family card'.

Core statement: 1) When using the Italian 'family card', benefits are taken over by the provider without financial participation by the state or the general public. Therefore, it does not fall within the scope of application of the Coordination Regulation (EC) No 883/2004. Third-country workers and holders of the 'EU Blue Card' and their families do not experience any unequal treatment within the meaning of Union law as a result of this exclusion.

2) However, the 'family card' may constitute social assistance under Article 29 of the Qualification Directive and must thus include beneficiaries of international protection if the card falls under a system of assistance established by public authorities for individuals who do not have sufficient means to meet their basic needs.

3) The obligation of Member States to ensure equal access to goods and services for third-country workers, EU Blue Card holders and long-term residents and their families as for nationals obliges them to grant these categories of persons entitlement to the 'family card'.

Note: Italian law provides for a so-called 'family card'. It grants families benefits for goods or services. It can be applied for by families consisting of Italian nationals or nationals of EU Member States with regular residence on Italian territory, living together with at least three children under 26 years of age. Traders participate in the scheme voluntarily and grant a discount on goods. To participate, an agreement must be concluded with the relevant government agency for family policy.

It was questionable whether the exclusion of third-country nationals who are in the same situation as the Italian beneficiaries is compatible with Union law provisions. The CJEU answered in the negative. Access to the 'family card' must be opened to all nationals of Member States who fulfil the conditions of the provision.

Decision of the Court of Justice (eighth Chamber) of 25 November 2021 – C-372/20 – *Finanzamt Österreich*

Law: Article 11(3)(a), (e) of the Coordination Regulation (EC) No 883/2004, Article 45, 48 TFEU

Keywords: Family benefits for development aid workers who take their family members with them to their place of assignment in a third country – National regulation whose personal scope goes beyond that of the Regulation

Core statement: 1) A development aid worker who works for an employer established in another Member State which, under the legislation of that other Member State, is subject to its compulsory insurance scheme, and who is posted to a third country, shall be regarded as a person who pursues an activity as an employed person within the meaning of that provision

in the other Member State. When submitting an application, only one application must be submitted to an institution from one of the Member States.

2) The adoption of a legislation of a Member State whose personal scope goes beyond that of the Coordination Regulation is not contrary to Union law, provided that such provision is interpreted in accordance with that Regulation and its primacy is not called into question.

3) Union law does not generally prohibit a Member State from withdrawing the family benefits for development aid workers, provided that this is done indiscriminately with regard to the nationality of a Member State and that no difference in treatment arises depending on whether the right to free movement has been exercised.

Decision of the Court of Justice (third Chamber) of 21 October 2021 – C-866/19 – *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie*

Law: Article 52(1)(b) of the Coordination Regulation (EC) No 883/2004

Keywords: Worker who has been employed in two Member States – Minimum insurance period for old-age pension – Taking into account of contribution periods completed in the other Member State

Core statement: When calculating the theoretical amount of the benefit, the competent institution must take into account all periods of insurance, including those completed under the legislation of other Member States, when determining the limit which non-contribution periods may not exceed in relation to contribution periods as provided for by national legislation, whereas the calculation of the amount actually due must be taken into account only insurance periods completed under the legislation of the Member State concerned.

Opinions

Opinion of the Advocate General Szpunar of 16 December 2021 – C-411/20 – *Familienkasse Niedersachsen-Bremen*

Law: Article 4 Coordination Regulation (EC) No. 883/2004, Free Movement Directive 2004/38/EC

Keywords: Union citizen not in employment who has been staying in the territory of another Member State for less than three months – Exclusion from family benefits

Core statement: It is in breach of EU law for an EU foreigner to be able to receive family benefits during the first three months of his/her stay only if he/she has domestic income during that period, while a national of that Member State who returns to that Member State from an interim stay in another Member State can claim family benefits after his/her return regardless of his/her income.

New pending cases

Reference of a preliminary ruling of the Obersten Gerichtshof (Austria), lodged on 4 November 2020 – C-576/20 – *Pensionsversicherungsanstalt*

Law: Article 44(2) Implementing Regulation (EC) No. 987/2009, Coordinating Regulation (EC) No. 883/2004

Keywords: Consideration of child-raising period for old-age pension

Reference of a preliminary ruling of the Hof van Cassatie (Belgium), lodged on 4 November 2021 – C-661/21 – *Verbraeken J. en Zonen*

Law: Article 13(1)(b)(i) Coordination Regulation (EC) No. 883/2004, Article 3(1)(a), Article 11(1) Regulation (EC) No. 1071/2009 on admission to the occupation of road transport operator, Article 4(1)(a) Regulation (EC) No. 1072/2009 on access to the market in the carriage of goods by road

Key words: Road transport operator – Determination of the applicable social security system – Binding of the authorities of the Member State of employment to that determination – Authorization for road transport obtained by deception

→ back to overview

6. Temporary agency work

Decisions

Judgement of the Court (Second Chamber) of 11 November 2021 – C-948/19 – *Manpower Lit*

Law: Article 2(2), Article 5(1) Temporary Agency Work Directive 2008/104/EC

Keywords: Scope of the Temporary Agency Work Directive – Concepts of 'public undertaking' and 'exercise of an economic activity' – EU agency as 'user undertaking' – Principle of equal treatment – Administrative autonomy of the Union institutions

Core statement: 1) The transfer of workers from a temporary employment agency to the European Institute for Gender Equality (EIGE) is an activity in the core of sovereign duties and therefore falls within the scope of the Temporary Agency Work Directive.

2) The position occupied by an agency worker assigned to EIGE may be considered as the ‘same job’, even if the tasks foreseen for this position can only be performed by persons covered by the Staff Regulations of Officials of the EU.

3) The right to equal treatment vis-à-vis the EIGE refers to the working conditions to be granted under the EU Staff Regulations of Officials and not to the working conditions that would apply under national law.

Opinion

Opinion of the Advocate General Pitruzzella of 9 December 2021 – C-426/20 – *Luso Temp*

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

Keywords: Temporary agency work – Entitlement to paid leave – Compensation due to the termination of the contractual relationship – Principle of equal treatment – Basic working and employment conditions of temporary agency workers

Core Statement: A temporary agency worker is entitled to holiday and corresponding holiday pay at the end of the employment relationship in proportion to the length of service for the user company in accordance with the regulations applicable at the user company. The principle of equal treatment also requires, regarding compensation for unused holiday, that a temporary agency worker is treated in the same way as an employee who is directly

employed by the user company and performs the same activity during the assignment to the hirer.

Note: The legal question to be answered in the proceedings is whether the right to compensation for holiday not taken constitutes a basic working and employment conditions of within the meaning of Article 5 (1) of the Temporary Agency Work Directive and is thus subject to the equal treatment claim of temporary agency workers. This is the first time that the CJEU has discussed the concept of 'essential terms and conditions of employment' within the meaning of the Temporary Agency Work Directive. This is relevant for German law, as national Courts explicitly refer to the Directive for the determination of the essential working conditions within the meaning of German law.[18]

The Advocate General answers the question in the affirmative, argues for a broad interpretation of the term and refers to the objective of the Directive to bring the working conditions of temporary agency workers closer to those of the core workforce and – for the present constellation – to the significance of the holiday entitlement (para. 33 et seq.). He also draws a convincing parallel to the framework agreement on fixed-term employment and discusses the case law on this (para. 51 ff. and in particular para. 60).[19]

→ back to overview

7. Transfer of business

Opinions

Opinion of Advocate General Pitruzella of 9 December 2021 – C-237/20 – *Federatie Nederlandse Vakbeweging*

Law: Article 5 para. 1 Transfer of Undertakings Directive 2001/23/EC

Keywords: Transfer of undertakings – Safeguarding of employees' rights – Exception for insolvency proceedings – Pre-pack

Core statement: A pre-pack transaction, in which the sale of an enterprise or its economically viable parts is prepared in all details before the opening of insolvency proceedings, is subject to the protection of employees guaranteed by Article 3 and 4 of the Transfer of Undertakings Directive. An exceptional circumstance does not apply.

Note: The pre-pack under Dutch law is a procedure developed by the judiciary without any statutory anchoring, the purpose of which is to prepare the company or part of it for sale immediately following the opening of insolvency proceedings.

Already in 2017, the CJEU ruled in the *Smallstep* case that an exception to the applicability of the Transfer of Undertakings Directive is not relevant for the pre-pack.[20] However, the decision did not end the debates among experts in the Netherlands on the applicability of the law on transfers of undertakings, which led the Dutch Hoge Raad, the country's Supreme Court, to refer the question of applicability to the CJEU again in a slightly different case.

[18] Federal Labour Court of 23 March 2011 - 5 AZR 7/10, para. 25, 29; Federal Labour Court of 21 November 2015 - 5 AZR 604/14, para. 23.
[19] On the parallel to fixed-term employment law (here in connection with the question of job reference), cf. *Seiwerth,* NZA 2020, p. 273 et seq.
[20] CJEU of 22 June 2017 - C-126/16 - *Smallstep*.

The Advocate General is of the opinion that such a pre-pack does not fulfil the exceptional circumstances of Article 5 (1) of the Transfer of Undertakings Directive, as it is not carried out with the aim of liquidating the assets. According to the *Smallstep decision*[21], the decisive factor is that the pre-pack aims to thoroughly prepare the transfer of the business before the insolvency in order to preserve the value of the business, to provide the creditors with the highest possible income and to secure jobs.

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Social n.º 1 de Madrid (Spain) of 30 July 2021, lodged on 20 September 2021 – C-583/21 – *NC*

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

Keywords: Applicability of the directive on the transfer of undertakings – Notary who is at the same time a civil servant and a private employer of the staff working for him – Takeover of the notarial office

→ back to overview

8. Working time

Decisions

Decision of the Court of Justice (fifth Chamber) of 11 November 2021 – C-214/20 – *Dublin City Council*

Law: Article 2(1) of the Working Time Directive 2003/88/EC

Keynote: Concept of 'working time' – Reserve firefighter – On-call time – Exercise of an independent occupational activity during on-call time – Restrictions arising from on-call time

Core statement: Stand-by time which a reserve fire fighter performs in the form of on-call duty and during which this employee performs an independent professional activity with the authorisation of his employer, but which must reach his duty station within a maximum of ten minutes in the event of an emergency call, may constitute working time. This is to be affirmed if an overall assessment of all the circumstances of the individual case shows that the restrictions imposed on the employee during the on-call time are of such a nature that they objectively quite considerably impair his or her possibility to freely organise his or her time. Particular consideration shall be given to the extent of the periods of on-call time, the possibility of pursuing another occupational activity and the permission to refuse to participate in individual assignments.

Note: Cf. note by *Buschmann*, HSI Report 4/2021, p. 5. (in German)

[21] CJEU of 22 June 2017 - C126/16 - *Smallstep*; but see also CJEU of 9 September 2020 - C-674/18, C-675/18 - *TMD Friction*, see also HSI-Report 3/2020, p. 21 et seq.; in more detail *Krause*, in: Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 7 para. 97.

Decision of the Court of Justice (tenth Chamber) of 28 October 2021 – C-909/19 – *Unitatea Administrativ Teritorială D.*

Law: Article 2 No. 1 Working Time Directive 2003/88/EC, Article 31 (2) EU-CFR

Keywords: Concepts of 'working time' and 'rest period' – Compulsory continuing vocational training undertaken at the employer's instigation.

Core message: If an employee is obliged by his/her employer to undergo legally prescribed professional training which takes place outside his/her usual place of work and during which he/she does not perform his/her usual duties, these training periods are to be classified as 'working time'.

Note: The plaintiff is employed by a Romanian municipality as a firefighter. As a necessary condition for obtaining the job, the plaintiff was instructed by his employer to complete 160 hours of professional training. Of the hours completed by the plaintiff, 124 were outside his normal working hours. The plaintiff wishes to be paid for these hours as overtime.

The national court referred the question to the CJEU as to whether the professional training provided at the employer's request, which took place outside the normal place of work and outside normal working hours, constituted working time or rest time within the meaning of Article 2 of the Working Time Directive (para. 21). This is because under Romanian law, professional training is not classified as working time.

Unsurprisingly, the Court classified the training time in question as working time. The CJEU held that the classification of working time and rest time was governed by the Working Time Directive, which concretised the principle of maximum working hours and rest periods contained in Article 31(2) of the EU Directive and could therefore not be interpreted restrictively in the light of that principle.[22] According to the CJEU, it was irrelevant for the classification as working time that the obligation to undergo further training resulted from national regulations, that the periods of further training were outside regular working hours, that they did not take place at the usual place of work and that the further training activity did not correspond to the regular work activity. The decisive criterion was rather that the further vocational training was instigated by the employer. The purpose of focusing on this criterion was to protect the employee, as the weaker party in the employment relationship[23], from being instructed by the employer to undertake further training even during rest periods.[24] The decision serves to harmonise and concretise the concept of working time, but has no concrete consequences for the German legal situation, as training instructed by the employer must always be classified as working time within the meaning of the Working Hours Act, which is once again underlined by this ruling.[25]

→ back to overview

[22] CJEU of 9 March 2021 - C-344/19 - *Radiotelevizija Slovenija*, para. 26 and 27 as well as the case law cited there; on the subject, see also the comment by *Buschmann*, HSI-Report 4/2021, S. 5.

[23] Cf. CJEU of 14 May 2019 - C-55/18, para. 44 - *CCOO* and of 17 March 2021 - C-585/19, para. 51 - *Academia de Studii Economice din Bucureşti.*

[24] Cf on the similar topic of the business trip: *Preis/Schwarz*, Dienstreisen als Rechtsproblem, HSI-Schriftenreihe Bd. 31, Frankfurt am Main 2020.

[25] *König*, NZA-RR 2021, 686.

III. Proceedings before the ECtHR

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1. Equal Treatment

Decisions

Judgement (second section) of 26 October 2021 – No. 34591/19 and 42545/19 – *Toplak and Mrak v. Slovenia*

Law: Article 13 ECHR (right to effective remedy) in conjunction with Article 1 Additional Protocol No. 12 (general prohibition of discrimination); Article 14 ECHR (prohibition of discrimination) in conjunction with Article 3 Additional Protocol No. 1 (right to free elections)

Keywords: Discrimination against severely disabled persons in the exercise of voting rights – technically assisted voting – Effective legal remedy

Core statement: The use of technology-assisted voting is recognised as a means of ensuring the right to vote for persons with disabilities, with national authorities having to decide on the use of voting machines for this purpose.

Note: See the comment by *Rabe-Rosendahl/Kohte*, HSI Report 4/2021, p. 18 (in German).

Decision (third section) of 19 October 2021 – No. 40075/14 – *Morozov v. Russia*

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

Keywords: Adequate working conditions for a blind person – Termination of employment – Removal of the breach of the right

Core statement: The subsequent elimination of a violation of the ECHR means that an applicant is no longer violated in the recognised rights under Article 34 ECHR.

Note: The applicant, who has been blind since childhood, has been employed as a masseur in a Moscow clinic since 2008. In 2012, this clinic was merged with another clinic and the applicant was transferred to another workplace, where he also worked as a masseur. As this workplace no longer corresponded to the previous conditions and, in the applicant's view, was no longer suitable for a blind person, he refused to sign amendments to his contract. As a result, the clinic terminated the employment relationship. The action for protection against dismissal brought against this was successful in the appeal instance and the applicant was awarded compensation in the amount of RUB 5000 as compensation for non-pecuniary damage. He returned to work as a result of this decision. The workplace was made suitable for the blind according to the applicant's wishes.

In his complaint, the applicant alleges a violation of Article 8 ECHR in conjunction with Article 14 ECHR.

The Court assumes that the applicant's claim was ultimately upheld regarding the working conditions he demanded and that he is therefore no longer violated in the rights granted by the ECHR.[26] This also applies even though the compensation awarded to him for the non-pecuniary damage was less than he had originally claimed.[27] Therefore, the applicant had to be rejected as inadmissible pursuant to Article 35 (3a) ECHR.

New pending cases (notified to the respective government)

No. 53780/20 – *Szal v. Polonia* (1st section) submitted on 26 November 2020 – delivered on 17 November 2021

Law: Article 6 ECHR (right to a fair trial); Article 14 ECHR (prohibition of discrimination)

Keywords: Remuneration for prisoners – Loss of work and wages due to measures to combat the Covid 19 pandemic

Note: The applicant was a prisoner in the *Sztum* Prisonfacility. He worked as a prisoner in an external company, a water and heat meter factory. Due to the Covid 19 pandemic measures, a curfew was imposed in March 2020, so the applicant was not allowed to leave the prison to reach his workplace. The employment relationship was not formally terminated. Payment of remuneration was stopped for the period of non-employment. According to national legislation, workers whose employment was suspended due to the pandemic curfew could claim payment of remuneration from their employers. Prisoners working on release from prison are not considered as employees under national legislation and are exempt from the provisions on continued payment of remuneration. The applicant claims that he has been denied access to a court under Article 6 ECHR and that he is discriminated against regarding remuneration claims as a prisoner compared to regular workers within the meaning of Article 14 ECHR.

→ back to overview

2. Freedom of expression

Judgement (fourth section) of 19 October 2021 – No. 40072/13 – *Miroslava Todorova v. Bulgaria*

Law: Article 6 ECHR (right to a fair trial); Article 10 ECHR (freedom of expression); Article 18 ECHR (limitation of restrictions on rights)

Keywords: Disciplinary measures against judges – Public criticism of the judicial system – Independence and impartiality of the court

Core statement: State authorities have the burden of proving that a disciplinary measure taken against a judge for breach of professional duties is free from any suspicion of having been imposed in retaliation for the exercise of the right to freedom of expression.

Note: The complainant is a judge of a criminal chamber of the *Sofia* City Court. She has also been the Chairperson of the Union of Judges of Bulgaria (*UJB*) since October 2009. In this capacity, she publicly criticised the Bulgarian judicial system and in particular the role of the

[26] ECtHR of 20 March 2012 - No. 19424/07 - *Predić-Joksić* v. *Serbia.*
[27] ECtHR of 3 October 2013 - No. 552/10 - *I.B.* v. *Greece*; ECtHR of 2 December 2014 - No. 61960/08 - *Emel Boyraz* v. *Turkey.*

Superior Council of Magistracy (*CSM*) in reforming the judiciary with a view to fighting corruption and organised crime. In particular, it criticised the promotion of individual judges and prosecutors who were suspected of being close friends with politicians. Due to several complaints about conflicts of interest and excessive delays in court proceedings, the President of the *Sofia* City Court initiated disciplinary proceedings against several judges of the court, including the complainant. An investigation by the *CSM* led to the conclusion that the complainant had delivered judgements late in several cases. The *CSM* imposed as a disciplinary measure the dismissal of the complainant from the service. A judicial review of this decision eventually led to its amendment by the Supreme Administrative Court and the conversion of the disciplinary measure into a transfer to a subordinate court (*Sofia* District Court) for a period of two years.

The complaint alleges that the complainant's right to a fair trial was violated by the fact that the *CSM* does not constitute a court in the sense of Article 6 ECHR. In addition, the complainant alleged that the Supreme Administrative Court lacked the necessary independence and impartiality. Furthermore, the complainant argued that the disciplinary proceedings against her constituted a hidden punishment for her publicly expressed criticism of the judicial system.

The Court finds that the *CSM* is a sui generis judicial body under domestic law, which is neither a court nor a classical administrative body subordinate to the executive. The term ‘court’ does not necessarily presuppose a court of a classical nature that is integrated into the ordinary court structures of the country. A public authority can also be granted judicial power if it is responsible for deciding on the basis of legal norms in an orderly procedure on issues that fall within its competence.[28] Furthermore, there are no indications from the complainant's submissions that the panel of the Supreme Administrative Court lacked the necessary impartiality due to its composition. Therefore, a lack of independence and impartiality of the court could not be established.

However, to the extent that the complainant complains that the disciplinary proceedings amount to covert punishment for her publicly expressed criticism of the judicial system, the Court concludes that this violates the complainant's right to freedom of expression. If the exercise of the right to freedom of expression results in a state measure exclusively or mainly justified on that ground, there is an interference with the right protected by Article 10 ECHR.[29] The reasons put forward by the authorities to justify the measure in question must be taken into account, as must the arguments put forward by the persons concerned.[30] In doing so, an independent assessment must be made of all the evidence that emerges from the facts of the case and the submissions of the parties. If there is prima facie evidence of the version of events put forward by the person concerned, it is for the state authorities to prove that the measure in question was taken for other reasons.[31] In the Court's view, the facts that the complainant voiced the public criticism of the judicial system in her capacity as chairperson of the professional association of judges and that the CSM initially proposed the removal of the complainant from her post as a disciplinary measure indicate that the disciplinary proceedings were not carried out because of the alleged breaches of official duty, but as a

[28] ECtHR of 15 January 2009 - No. 10468/04 - *Argyrou and Others* v. *Greece*; ECtHR of 9 July 2013 - No. 51160/06 - *Di Giovanni* v. *Italy*; ECtHR of 31 October 2017 - No. 147/07 - *Kamenos* v. *Cyprus.*

[29] ECtHR of 23 June 2016 - No. 20261/12 - *Baka* v. *Hungary*; ECtHR of 13 November 2008 - Nos. 64119/00 and 76292/01 - *Kayasu* v. *Turkey*; ECtHR of 30 June 2020 - No. 58512/16 - *Cimperšek* v. *Slovenia.*

[30] ECtHR of 20 November 2012 - No. 58688/11 - *Harabin* v. *Slovakia*; ECtHR of 5 May 2020 - No. 3594/19 - *Kövesi v. Romania*; ECtHR of 8 October 2020 - No. 41752/09 - *Goryaynova* v. *Ukraine*; ECtHR of 11 December 2012 - No. 35745/05 - *Nenkova-Lalova* v. *Bulgaria.*

[31] ECtHR of 23 June 2016 - No. 20261/12 - *Baka* v. *Hungary.*

sanction for the critical statements. Accordingly, the Court found a violation of Article 10 ECHR as well as Article 18 ECHR.

Judge *Salkova* and Judge *Harutyunyan,* in a joint partial dissenting opinion, hold that a violation of Article 6 ECHR must be found. The fact that in the disciplinary proceedings against the complainant only the allegation of political influence was investigated and the reason for which the decisions she dealt with were belatedly removed was completely disregarded indicates that the decision-making bodies lacked the necessary independence and impartiality.

Judgement (first section) of 9 December 2021 – No. 52969/13 – *Wojczuk v. Poland*

Law: Article 10 ECHR (freedom of expression)

Keywords: Whistleblowing – Justified and proportionate criminal conviction and financial penalties imposed on applicant for denouncing, by poison-pen letters to competent State authorities, financial and employment-related shortcomings on the part of his employer, the director of a State museum – Sufficient and relevant reasons

Core statement: The national authorities must strike a fair balance between two equally important Convention rights: that of the applicant's freedom of expression, as guaranteed by Article 10 of the Convention; and that of protecting the reputation of the museum and its director, as recognised by Article 8 of the Convention.

Note: The applicant complained under Article 10 of the Convention that his criminal conviction constituted a disproportionate and unjustified sanction because criticising the professional activities of someone such as the museum's director, who was a public figure, had to be tolerated in a democratic society. The complainant was employed as an art historian by the museum from 1997 to 2008. In November 2007 and March 2008, he wrote letters to various state authorities (Tax office, the Supreme Audit Office…). The letters contained allegations about mismanagement of public funds, infringements, flaws in the organization of the workplace and accounting, the hiring of staff and labour law violations about his employer (State Museum) and the director of that museum. At the request of the museum, criminal proceedings were initiated against the complainant for defamation. The applicant was criminally convicted and a fine was imposed on him, which ended with a criminal conviction and a fine was imposed.

The applicant argued that the interference in his case had thus been unjustified and disproportionate within the meaning of paragraph 2 of Article 10 ECHR.

The Court starts from the admissibility of the complaint and finds that the criminal conviction of the complainant for defamation is directed at acts which concern the area of freedom of expression. Therefore, the conviction must be regarded as an interference with the exercise of the right to freedom of expression.[32]

A further prerequisite for interference with the right to freedom of expression under Article 10 ECHR is that it is provided for by law and is necessary in a democratic society.[33] The national authorities must ensure that a proper balance is struck between two equally important Convention rights: that of the applicant's freedom of expression, as guaranteed by Article 10

[32] ECtHR of 6 October 2015 - No. 15450/03 - *Müdür Duman* v. *Turkey.*

[33] Cf. on this: ECtHR of 20 October 2015 - No. 11182/10 - *Pentikäinen* v. *Finland*; ECtHR of 29 March 2016 - No. 56925/08 - *Bédat* v. *Switzerland*; ECtHR of 15 October 2015 - No. 27510/08 - *Perinçek* v. *Switzerland.*

ECHR and that of protecting the reputation of the museum and its director, as recognized by Article 8 of the convention. [34]

In the present case, the Court thus concludes that the complainant's criminal conviction for defamation constitutes an interference with the exercise of his right to freedom of expression. This interference was prescribed by law by the domestic provisions of criminal law. It was also necessary in a democratic society, since it pursued the legitimate aim of protecting the reputation or rights of others, namely those of the museum as well as its director. In doing so, the Court pointed out in particular that the applicant's letters in question did not constitute whistleblowing, as he did not thereby pass on information about facts, but merely value judgements. The Court therefore held that there was no violation of Article 10 ECHR.

In a dissenting opinion, Judges *Felici* and *Ktistakis take the* view that the complainant did not fulfil the criminal offence of defamation with his statements, so that the interference with freedom of expression was not provided for under domestic criminal law. Therefore, a violation of Article 10 ECHR would have had to be found.

New pending cases (notified to the respective government)

No. 9891/15 – *Kraynov v. Russia* (third Sektion) – lodged on 9 February 2015 – delivered on 23 November 2021

Law: Article 10 ECHR (freedom of expression); Article 11 ECHR (freedom of assembly and association)

Keywords: Dismissal from civil service – Public criticism of the employer

Explanations: The complaint concerns the dismissal of a police officer from his position after he publicly criticised corruption in the police apparatus during his election campaign. It is claimed that there has been a violation of Article 10 ECHR and Article 11 CRC, whereby the proportionality of the interference is to be assessed.[35]

No. 20592/21 – *Bakradze v. Georgia* (fifth section) – lodged on 24 January 2020 – delivered on 6 October 2021

Law: Article 10 ECHR (freedom of expression); Article 11 ECHR (freedom of assembly and association); Article 14 ECHR (prohibition of discrimination); Article 1 Additional Protocol No. 12 (general prohibition of discrimination)

Keywords: Application for a judicial position – Rejection due to public criticism

Note: The applicant submitted her application for a judiciary in Georgia and was rejected in the selection procedure. Previously, as a member of an association 'Unity judges', she had publicly criticised the state of the judiciary. She brought an action against the selection decision, arguing that she had been rejected solely because of her critical statements, but was unsuccessful in all instances before the national courts. On the basis of the complaint, the Court will examine whether the complainant's claim that she was not appointed because of her public criticism constitutes an interference with freedom of expression under Article 10 ECHR.[36]

→ back to overview

[34] ECtHR of 29 March 2016 - No. 56925/08 - *Bédat* v. *Switzerland.*
[35] ECtHR of 21 July 2011 - No. 28274/08 - *Heinisch* v. *Germany*; ECtHR of 12 February 2008 - No. 14277/04 - *Guja* v. *Moldova*; ECtHR of 26 February 2009 - No. 29492/05 - *Kudeshkina* v. *Russia.*
[36] ECtHR of 23 June 2016 - No. 20261/12 - *Baka* v. *Hungary*; ECtHR of 8 December 2020 - No. 33794/14 - *Panioglu* v. *Romania*; ECtHR of 30 June .2020 - No. 58512/16 - *Cimperšek* v. *Slovenia.*

3. Freedom of association

Decisions

Judgement (third section) of 7 December 2021 – No. 29582/09 – *Yakut Republican Trade Union Confederation v. Russia*

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

Keywords: Formation of and joining trade unions – No trade union organisation of prisoners – Work of prisoners not a professional activity

Key message: The ECHR is a '*living instrument*' and developments are conceivable that will require the extension of trade union freedom to working prisoners in the future, especially if they work for a private employer.

Note: The dispute concerns the question of whether the unionisation of working prisoners may be restricted. The complainant, a trade union confederation in the Republic of *Sakha* (Yakutia), was established in 1991. The inmates of a correctional institution in *Yakutsk* work mainly in a sawmill operated there and in prison maintenance. The complainant's chairman inspected the prison several times between 1998 and 2002 and found that the inmates were underpaid for their work, they did not receive disability benefits, regular working hours were not observed, as well as workplace safety was neglected and accidents at work were concealed. The complainant sensitised the inmates about their rights. In February 2006, the inmates of the prison formed a trade union and decided to join the complainant. The complainant accepted the union as a member. A law had already come into force in Yakutia in January 2006 prohibiting prisoners from being founders or members of public associations. As a result, the prosecutor's office investigated the union founded by the prisoners and demanded that the court declare the union unlawful and expel it from the complainant's association. The domestic courts granted this request. The complainant complied with the final judgement and expelled the union from its ranks.

The complaint alleges that the restriction on prisoners to organise violates Article 11 ECHR.

The Court first concludes that the domestic court's decision to exclude the prisoners' union as a member of the complainant restricted the complainant's right under Article 11 ECHR. It expressly pointed out that prisoners enjoy the protection of all fundamental rights and freedoms under the ECHR, with the exception of Article 5 ECHR (right to liberty). They do not forfeit their Convention rights merely because of their status as prisoners. These rights also include trade union freedom under Article 11(1), (2).[37] The interference with this right was prescribed by law. The restriction also served a legitimate aim, as the right of prisoners to form and join trade unions can be restricted for reasons of national security or public safety.[38] On the question of whether the interference was necessary in a democratic society, the Court first affirmed that trade union freedom is an essential element of the social dialogue between workers and employers and an important tool for achieving social justice and harmony.[39] Restrictions on trade unions can only be considered in a democratic society if they are based on standards which are in conformity with the rules of the ECHR and are based on a reasonable assessment of the relevant facts.[40] Taking these principles into account, the Court considers that prison work differs in many respects from occupational

[37] ECtHR of 6 May 2005 - No. 74025/01 - *Hirst* v. *United Kingdom (para. 2).*
[38] ECtHR of 6 May 2005 - No. 74025/01 - *Hirst* v. *United Kingdom (para. 2).*
[39] ECtHR of 9 July 2013 - No. 2330/09 - *Sindicatul „Păstorul cel Bun"* v. *Romania.*
[40] ECtHR of 12 November 2008 - No. 34503/97 - *Demir and Baykara* v. *Turkey.*

work. The former is primarily aimed at rehabilitation and resocialization. It aims at the reintegration of the prisoner into society and is compulsory.[41] However, the Court points out that the ECHR is a *'living instrument'*[42] , and developments are conceivable that will require the extension of trade union freedom to working prisoners in the future, especially when they work for a private employer. However, current practice in Council of Europe member states, where few examples of specific domestic regulation of prisoners' trade union rights exist, does not currently allow for an interpretation of Article 11 ECHR as requested by the complainant. Consequently, it was decided that the decision of the domestic courts did not violate Article 11 ECHR.

In Germany, the *Prisoners' Trade Union/Federal Organisation* (GG/BO) has existed since 2014 as an association that campaigns for workers' rights of prisoners in German prisons. According to the case law of various German courts of fact, the fundamental rights of freedom of association or freedom of association resulting from Article 9 of the Basic Law are granted unconditionally and also apply to the area of the prison system.[43] The Federal Constitutional Court has left open the question of whether associations of prisoners calling themselves a trade union and their members can invoke the freedom of association under Article 9 (3) of the Basic Law.[44]

New pending cases (notified to the respective government)

No. 59129/10 – *RPD OAO AMTP et al. v. Russia* (third section) – lodged on 22 September 2010 – delivered on 8 October 2021

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

Keywords: Participation of trade unions in collective bargaining – Privileging of trade unions

Note: The complainant union was prohibited from engaging in collective bargaining on behalf of its members. According to national legislation, only so-called 'primary' trade unions are entitled to engage in collective bargaining with employers. The status of a 'primary' trade union depends on its members being employed exclusively or predominantly by the same employer, not on the number of its members. Although the complainant union had a number of workers from the company in question as members, it was not considered a 'primary' union. The Court has to examine, on the basis of the complaint, whether the right under Article 11 ECHR to form and join trade unions[45] has been violated and whether the interference, if any, was prescribed by law, necessary and proportionate.[46] In particular, it is important to ask whether a legal provision granting preferential status to a 'primary' trade union is sufficiently clear and precise, and what the social need is to privilege 'primary' trade unions in terms of collective bargaining capacity.

→ back to overview

[41] ECtHR of 7 July 2011 - No. 37452/02 - *Stummer* v. *Austria.*
[42] ECtHR of 12 November 2008 - No. 34503/97 - *Demir and Baykara* v. *Turkey.*
[43] Higher Regional Court (OLG) Hamm of 2 June 2015 - III-1 Vollz (Ws) 180/15; OLG Karlsruhe of 29 June 1983 - 11 W 93/82; LG Mannheim of 22 July 1982 - 4 T 260/81; KG Berlin of 16 December 1981 - 2 Ws 171/81 Vollz.
[44] BVerfG of 29 October 2015 - 1 BvR 2572/15.
[45] ECtHR of 12 August 2008 - No. 34503/97 - *Demir and Baykara* v. *Turkey.*
[46] ECtHR of 9 July 2013 - No. 2330/09 - *Sindicatul "Păstorul cel Bun"* v. *Romania*; ECtHR of 10 June 2021 - No. 45487/17 - Norwegian *Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF)*.

4. Forced labour

Decisions

Decision (fifth section) of 7 October 2021 – No. 20116/12 – *Zoletic v. Azerbaijan*

Law: Article 4 ECHR (prohibition of slavery and forced labour); Article 6 ECHR (right to a fair trial); Article 1 Additional Protocol No. 1 to the Convention (protection of property)

Keywords: Positive obligations – Domestic authorities' failure to institute and conduct an effective investigation into migrant workers' arguable claims of cross-border human trafficking and forced labour

Core statement: The failure of the state to take appropriate measures to combat forced labour in individual cases, although authorities were aware or should have been aware of it, constitutes a violation of Article 4 § 2 ECHR.

Note: The 33 applicants are Bosnian-Herzegovinian nationals who were recruited in their home country by a temporary employment agency (*Serbaz*) in 2009 and brought to Azerbaijan, which was a subsidiary of a construction company (*Acora*). The company was registered in Azerbaijan in 2007 and active in the construction sector until the end of 2009. Most of the applicants stayed in Azerbaijan for periods of six months or longer. Once they entered Azerbaijan, their passwords were taken away by representatives of *Serbaz*. No individual work permits for them were obtained from the authorities. They lived in houses transformed into dormitories in poor and unhygienic conditions, they had no access to adequate medical care and their freedom of movement was restricted by their employer. Violations of strict internal rules established by *Serbaz* were punished by fines, beatings, detention in 'a specially designated place' and physical threats. For the period from May to November 2009, the applicants were not paid any wages and could not meet the necessities of life. According to them, each worker was deprived of approximately 10,000 US Dollars (USD) in wages.

After returning home, the complainants lodged a civil claim against *Serbaz* company with the *Sabail* District Court in Azerbaijan seeking payment to each applicant of USD 10.000 in unpaid waged as well as USD 5000 in respect of non-pecuniary damage caused by alleged 'breaches of their rights and freedoms' They were supported in this by various international NGOs. The court found that the applicants had been directly employed by *Acora* and that their wages were to be paid by *Acora.* Lastly, the court held that the applicants' allegations concerning violations of their rights and freedoms were unsubstantiated.

The Court of Appeal upheld the first-instance judgement and also pointed out that the provisions of the Law on labour migration and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (ICRMW) were not applicable to the applicants, because they concerned lawful 'migrant workers', whereas the applicants had not been individuals who had migrated from one country to another on lawful grounds. Instead, the applicants had been foreign employees who had concluded employment contracts with a foreign company *Acora* abroad and had been temporarily seconded to Azerbaijan to work at the subsidiary company.

Criminal proceedings for human trafficking and forced labour were initiated against several representatives of the *Serbaz* company in Bosnia-Herzegovina, four of whom were sentenced to imprisonment. Nine other defendants were acquitted as they could not be proven to have participated in the crimes.

The Court starts from the premise that, despite the unsubstantiated submissions of the complainants, there was sufficient circumstantial evidence to suggest a violation of Article 4

ECHR with regard to the facts described before the domestic court. These were supported in particular by the findings of the NGOs that were heard in the proceedings. There is no doubt that trafficking in human beings threatens the human dignity and fundamental freedoms of its victims and therefore cannot be considered compatible with the fundamental values applicable in a democratic society and under the ECHR.[47] According to Article 4 ECHR, the state is not only responsible for its direct actions, but also for its failure to effectively protect the victims of slavery servitude, or forced or compulsory labour by virtue of its positive obligations.[48] In order to comply with their positive obligation to penalize and effectively prosecute the practices referred to in Article 4 of the Convention, member States are required to put in place a legislative and administrative framework that prohibits and sanctions slavery and forced labour.[49] If state authorities become aware or need to be aware of facts that give rise to suspicion of a violation of the prohibition of slavery and forced labour, they are obliged to take appropriate measures to remove the individual from that situation or risk and to sanction the violation. If they fail to do so, there is a violation of Article 4 ECHR. [50]

Having regard to circumstances of the case, the court considers the totality of the applicants' arguments and submissions concerning their irregular situation and their working and living conditions, including those made in the domestic civil proceedings, constituted an 'arguable claim' of treatment contrary to Article 4 of the Convention. The Court notes that the applicants' 'arguable claim' was sufficiently and repeatedly drawn to the attention of the domestic authorities in various ways. Since the authorities' attention was 'sufficiently drawn' to the allegations in question, they must have acted on their own motion by instituting and conducting an effective investigation, even though there was no formal criminal complaint made by the applicants themselves. But this did not happen either in the civil proceedings or as a result of the criminal investigation by Azerbaijani investigative authorities. The Court therefore found a violation of Article 4 ECHR and awarded each applicant a sum of €5,000.

The case is an immediate reminder of the exploitation of migrant workers from Eastern Europe in the meat industry in Germany. Numerous outbreaks of Covid-19 in German slaughterhouses once more focused public attention on the precarious conditions of these workers. In reaction, the federal government announced a new legal framework, including a ban of contract and temporary work. The Occupational Safety and Health Inspection Act was finally adopted in December 2020. The new legal framework is an important precondition of more fundamental improvement in working conditions, but not sufficient to ensure better working and living conditions for migrant workers.[51] .[52] Unfortunately, the question of whether these conditions correspond to human dignity has not yet been submitted to German labour courts. The decision of the ECtHR promises hope regarding possible legal disputes.

→ back to overview

[47] ECtHR of 25 June 2020 - No. 60561/14 - *S. M. v. Croatia.*
[48] ECtHR of 11 October 2012 - No. 67724/09 - *C. N. and V.* v. *France*, op. cit. N.
[49] ECtHR of 30 March 2017 - No. 21884/15 - *Chowdury* v. *Greece.*
[50] ECtHR of 13 November 2012 - No. 4239/08 - *C. N. v. United Kingdom.*
[51] See *Lübker/Schulten*, WSI minimum wage, Towards a new Minimum Wage Policy in Germany and Europe, Report No.71e 2022; https://socialeurope.eu/an-end-to-wage-dumping-in-the-german-meat-industry.
[52] See for example *Schulten/Specht*, Ein Jahr Arbeitsschutzkontrollgesetz. Fundamental change in the meat industry?, in: APUZ 51-52/2021, https://www.bpb.de/apuz/Fleisch-2021/344835/ein-jahr-arbeitsschutzkontrollgesetz (14 January 2022).

5. Protection of Privacy

Decisions

Judgement (fifth section) of 9 November 2021 – No. 31549/18 – *Špadijer v. Montenegro*

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

Keywords: Bullying by colleagues as a result of whistleblowing – Failure of state authorities to ensure protection against bullying – Applicability of Article 8 ECHR

Core statement: The positive obligation of the state resulting from Article 8 ECHR to effectively apply the laws for the protection against serious harassment is of particular importance whenever such harassment has been triggered by whistleblowing activities.

Note: The complainant was a correctional officer and worked as a shift supervisor in a women's prison in *Podgorica.* She reported to her employer an incident that had occurred on New Year's Eve 2012/2013. Some male staff members had entered the women's prison and had 'physical contact' with two female inmates. The report led to disciplinary proceedings against the male staff members and resulted in a temporary reduction in salary. As a result, the complainant's private car was damaged. She was massively insulted by colleagues. Her supervisor had forbidden her to organise the duty rosters for a long period of time after the incident. She was ignored by colleagues. Instructions she had given to other staff were not carried out without sanction. The complainant first initiated a mediation procedure with her employer for protection against bullying at work and presented the incidents. After her request was rejected, she filed a complaint. In the course of these proceedings, an expert report was submitted which attested to the complainant's psychological problems in connection with conflicts at work. In 2015, she was assaulted in a car park and physically abused by several blows. After a long period of incapacity, the complainant retired in May 2016 due to mental health problems.

Their claim was dismissed on the grounds that the incidents complained of did not constitute mobbing because they did not have the required frequency and did not extend over a period of at least six months.

The decision was upheld on appeal. With regard to the attacks against the complainant, it had not been proven that they were related to the complainant's complaint. Moreover, bullying was only discrimination if the treatment was based on personal characteristics of the employee or a group of employees.

With regard to the applicability of Article 8 ECHR, the Court has already held in various contexts that the concept of private life is broad and cannot be defined exhaustively. It encompasses the physical and psychological integrity of a person[53] and extends to values such as well-being and dignity, personality development and relationships with other people.[54] In order for Article 8 ECHR to apply, the attack on a person must reach a certain degree of severity and be carried out in a way that affects the personal enjoyment of the right to respect for private life.[55] On the basis of the incidents set out by the complainant and the findings of the medical report submitted in the application proceedings, which established the existence of a permanent psychosis, the Court assumes that there is a causality between the incidents in question and the failure to take action by public authorities. Therefore, the

[53] ECtHR of 25 September 2018 - No. 76639/11 - *Denisov* v. *Ukraine;* ECtHR of 11 December 2012 - No. 29525/10 - *Remetin* v. *Croatia.*
[54] ECtHR of 10 September 2020 - No. 36908/13 - *N. Š.* v. *Croatia* with further references.
[55] ECtHR of 14 January 2020 - No. 41288/15 - *Beizaras and Levickas* v. *Lithuania.*

treatment complained of falls within the scope of Article 8 ECHR, which imposes a positive obligation on the State to protect private life. [56]

Article 8 ECHR is intended to protect individuals from arbitrary interference by public authorities, which also implies a positive obligation to respect private life, which may include state measures with regard to the relations of individuals with each other.[57] The interests of the individual and those of the community as a whole must be taken into account. Since the state must protect individuals from interference with their private lives, it must create an appropriate legal framework to ensure this protection.[58] This also applies in the context of harassment in the workplace.[59] In the context of Article 10 ECHR, the Court has considered that a reference by the employee to unlawful conduct by the employer requires special protection in certain circumstances.[60]

Measured against these conditions, the Court concludes that, even if the incidents at the workplace described by the complainant may not in fact have constituted harassment, the investigations carried out by the state authorities and courts were nevertheless insufficient to afford the complainant the protection deriving from Article 8 ECHR. In particular, there is a lack of assessment of all the incidents in question as well as a lack of consideration of a possible connection with whistleblowing. The State therefore failed to fulfil its positive obligation to ensure the protection of private life, so that the Court found a violation of Article 8 ECHR and ordered the respondent government to pay compensation of € 4,500.
In a remarkable concurring opinion, Judge *Yudkivska* points out the changing requirements of human dignity due to societal conditions and its relation to Article 8 ECHR. Looking at two other recent decisions of the Court[61], she concludes that today's society, with its increased sensitivity, demands that bullying be considered a violation of human rights.

Judgement (first section) of 16 December 2021 – No. 44691/14 – *Budimir v. Croatia*

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

Keywords: Withdrawal of professional license – Termination of employment – Positive obligation of the state under Article 8 ECHR – Scope of judicial review

Core statement: In reviewing the positive and negative obligations of the state arising from Article 8 ECHR, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied upon.

Note: The complainant was granted a special permit in 1997 to perform the duties of a certified motor vehicle inspector. In the context of this activity, he carried out a test on a tractor in October 1998 and determined its roadworthiness. Ten days later, the tractor collided with a police vehicle. The investigation of the accident revealed that the tractor's brake system was defective. Criminal proceedings were initiated against the complainant, which led to the conclusion in 2001 that he was not responsible for the accident. In the meantime, his license to carry out vehicle inspections was withdrawn by the national authorities in March 1999. Appeals against this decision led to the license being returned to

[56] ECtHR of 30 November 2010 - No. 2660/03 - *Hajduová* v. *Slovakia.*
[57] ECtHR of 12 November 2013 - No. 5786/08 - *Söderman* v. *Sweden.*
[58] ECtHR of 1 July 2014 - No. 41694/07 - *Isaković Vidović* v. *Serbia.*
[59] ECtHR of 17 November 2015 - No. 36656/14 - *Dolopollos* v. *Greece.*
[60] ECtHR of 12 February 2008 - No. 14277/04 - *Guja* v. *Moldova*; ECtHR of 17 September 2015 - No. 14464/11 - *Langner* v. *Germany*; ECtHR of 21 July 2011 - No. 28274/08 - *Heinisch* v. *Germany.*
[61] ECtHR of 22 Avril 2021 - No. 29555/13 - *F. O.* v. *Croatia*; ECtHR of 14 January 2020 - No. 41288/15 - *Beizaras and Levickas* v. *Lithuania.*

him in May 2004. Immediately after the revocation of the license, the complainant's employer terminated his employment in March 1999 on the grounds that he was no longer allowed to perform the duties of a motor vehicle inspector and that no other job was available. An action for protection against dismissal brought against this was unsuccessful before the courts in all instances. An action brought against the public administration for payment of damages due to the unlawful conduct of the administrative authorities was dismissed on the grounds that unlawful conduct on the part of the authorities was not discernible. A constitutional complaint filed against this was rejected as inadmissible.

The complainant claims that he was dismissed from his employment due to the unlawful decision of the national administrative authorities, which resulted in the withdrawal of his license to conduct motor vehicle examinations, and that as a consequence he was unemployed and without income for a longer period of time. This was a violation of Article 8 of the ECHR.

With regard to the applicability of Article 8 ECHR, the Court first refers to its case law and points out that the term 'private life' is a broad concept that cannot be defined exhaustively. In any event, it encompasses the physical and psychological integrity of a person.[62] In this context, disputes concerning the employment relationship are not per se excluded from the scope of 'private life' as defined in Article 8 ECHR. There are typical aspects of private life that can be affected by dismissal, demotion, non-admission to a job or other similar adverse measures.[63] In the present case, the official decision to withdraw the professional licence had a direct impact on the complainant's employment relationship and led to its termination. Since the competent authorities had revised their decision only five years later, the action for protection against dismissal was futile and could not compensate the complainant.

In addition to the negative obligation to protect the individual from arbitrary interference by the public authorities, Article 8 ECHR also contains a positive obligation of the state to provide measures that ensure respect for private and family life.[64] It is true that the present case does not involve a classic labour dispute. However, the decision of the state authorities to revoke the license has a direct impact on the employment relationship. Since the domestic courts denied the applicant damages for the loss of employment resulting from unlawful decisions by the authorities, they failed to balance the applicant's right to respect for his private life against the public interest. The Court therefore concludes that the domestic authorities failed to provide an effective legal framework for the recovery of the damage suffered and therefore violated Article 8 ECHR. The respondent government was ordered to pay compensation of €2000. The defendant government was ordered to pay compensation in the amount of €2000.

Judge *Polačkova* and Judges *Wojtyczek*, and *Ktistakis*, in a joint dissenting opinion, held that domestic remedies under Article 35 ECHR had not been exhausted. The complainant had never explicitly invoked the right to respect for his private life in his constitutional complaint and had thus not raised all relevant arguments before the domestic courts.

→ back to overview

[62] ECtHR of 4 December 2008 - Nos. 30562/04 and 30566/04 - *S. and Marper* v. *United Kingdom*; ECtHR of 3 April 2012 - No. 41723/06 - *Gillberg* v. *Sweden*; ECtHR of 5 September 2017 - No. 61496/08 - *Bărbulescu* v. *Romania.*

[63] ECtHR of 25 September 2018 - No. 76639/11 - *Denisov* v. *Ukraine.*

[64] ECtHR of 17 October 2019 - Nos. 1874/13 and 8567/13 - *López Ribalda and Others* v. *Spain.*

6. Procedural law

Decisions

Judgements (first section) of 8 November 2021 – Nos. 49868/19 and 57511/19 – *Dolińska-Ficek und Ozimek v. Poland*

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

Keywords: Violations in the appointment of judges – Manifest breaches in appointment of judges to newly established Supreme Court's Chamber of Extraordinary Review and Public Affairs following legislative reform – Tribunal established by law – Lack of independence of the National Council of the Judiciary from the legislative and executive – No directly available procedure or remedies to challenge alleged defects

Core statement: The requirement of a tribunal be 'established by law' is to ensure 'that the judicial organisation in a democratic society did not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament.

Note: The Court had to deal once again[65] with the Polish judicial reform of 2017. The National council of the judiciary is a body which was introduced in the polish judicial system in 1989, by the Amending Act of Constitution of the Polish People's Republic. Its organisation was governed by the 20 December 1989 Act on the NCJ as amended and superseded on several occasions (ustawa z dnia 20 grudnia 1989 r. o Krajowej Radzie Sądownictwa). The second Act on the NCJ was enacted on 27 July 2001. Those two Acts provided that the judicial members of the Council were to be elected by the relevant assemblies of judges at different levels, and from different types of court, within the judiciary. The 1997 Constitution of the Republic of Poland provides that the purpose of the NCJ is to safeguard the independence of courts and judges. Article 187 § 1 governs the composition of its twenty-five members: seventeen judges (two sitting ex officio: the First President of the Supreme Court, the President of the Supreme Administrative Court and fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts); four Members of Parliament chosen by the *Sejm*; two members of the Senate; the Minister of Justice, and one person indicated by the President of the Republic of Poland ('the President' or 'the President of Poland').

As part of the general reorganisation of the Polish judicial system prepared by the government, the amending act on the NCJ and certain other statutes of 8 December 2017 had entrusted the polish parliament, the *Sejm, with* election of twenty-three out of twenty-five members of the *NCJ* for a joint four-year term of office As a result, the legislative and executive branches of power had granted themselves a quasi-monopoly to appoint the members of the NCJ.

The applicant *Dolińska-Ficek* is a judge at the *Mysłowice* District Court. She applied for a publicly advertised position as a judge at the *Gliwice* Regional Administrative Court in October 2017. The complainant *Ozimek is a* judge at the local court in *Lublin*. He applied for a publicly advertised position as a judge at the *Lublin* Court in March 2018. Both were rejected by the *NCJ on the* grounds that they had not demonstrated the required knowledge, skills and aptitude. They complained that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which examined their appeals against the resolutions of the NCJ, had not been 'independent and impartial tribunal established by law' and alleged a

[65] Cf. ECtHR of 7 May 2021 - No. 4907/18 - *Xero Flor w Polsce sp. z o.o.* v. *Poland*; see HSI Report 2/2021, p. 26.

breach of Article 6 § 1 of the Convention. The Supreme Court dismissed the applicant's appeal and upheld the resolution of the NCJ. For the supreme Court an interference in the decision of Council is admissible, as it would encroach into the sphere of special authority of *NCJ.*

The Court first points out that according to the necessary broad interpretation of Article 6 ECHR, rights are also to be understood as 'civil claims' which have a direct and substantial impact on a private property or non-property right of a person.[66] Such a right arises in the present case from the legal right to equal access to public office. The effects of the domestic decisions affect the applicant's professional career and therefore have a significant impact on her private rights, including her status and financial situation. These principles also apply to disputes concerning the appointment and promotion of judges.[67]

In a recent judgement[68] the Court had clarified the term tribunal 'established by on law'. According to this, the purpose of the relevant provision in Article 6 ECHR is that the organisation of the judiciary in a democratic society must not depend on the discretion of the executive, but must be regulated by a law enacted by Parliament. Whether there is a violation of Article 6 ECHR is to be examined according to three criteria:[69]

(1) whether there is a manifest breach of domestic law,

(2) whether this violation fundamentally affects the procedure for the appointment of judges and

(3) whether the possible infringement has been effectively reviewed by national courts.

In the present case, the fact that the composition of the *NCJ* no longer has the necessary independence from the legislative and executive branches of government due to the election by the *Sejm is an* obvious violation of national law. This impairs the basic procedural rules for the appointment of judges. The violation of the law continues in the appointment of the Chamber of Extraordinary Appeals and Public Affairs of the Supreme Court by the *NCJ*. This constitutes undue legislative and executive influence in the appointment of judges, which is incompatible with Article 6 ECHR and which constitutes a fundamental procedural violation and calls into question the legitimacy of the Court. The Court therefore hold that has been a violation of Article 6(1) ECHR as regards the right to an independent and impartial tribunal established by law and ordered the respondent State to pay compensation of €15,000 each of the applicants.

Judgement (first section) of 9 December 2021 – No. 68437/13 – *Hamzagić v. Croatia*

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

Keywords: Disability pension due to post-traumatic stress syndrome – Opinion of an administrative authority – **No** assessment by a medical specialist

Core Statement: The present case concerns the applicant's complaint under Article 6(1) of the Convention that in the administrative proceedings his entitlement to a disability pension was decided on the basis of the findings of the experts who lacked the relevant competence and neutrality to assess his condition.

[66] ECtHR of 25 September 2018 - No. 76639/11 - *Denisov* v. *Ukraine.*
[67] ECtHR of 26 July 2011 - No. 58222/09 - *Juričić* v. *Croatia*; ECtHR of 9 October 2012 - No. 12628/09 - *Dzhidzheva-Trendafilova* v. *Bulgaria*.
[68] ECtHR of 1 December 2020 - No. 26374/18 - *Guðmundur Andri Ástráðsson* v. *Iceland.*
[69] So also ECtHR of 7 May 2021 - No. 4907/18 - *Xero Flor w Polsce sp. z o.o.* v. *Poland*; see HSI Report 2/2021, para. 4.

Note: The applicant, who lives in Germany, spent three months in a prisoner of war camp during the war in Bosnia-Herzegovina, where he was exposed to various types of traumatic events. In connection with this, he was diagnosed with post-traumatic stress disorder (*PTSD*) in Germany. In 2010, he applied for a disability pension in Germany, which was granted. Due to an international agreement on social security matters, the German authorities forwarded his application to the Croatian Pension Insurance Fund. A specialist who worked for the Fund examined the applicant's medical documents submitted by the German insurance institution and noted that the applicant had been diagnosed with PTSD, but that his condition did not amount to a disability under the criteria of Croatia (applicable domestic criteria). The applicant appealed, contesting the expert's findings and arguing that he had been recognised as having a disability in Germany. Thereupon the Central Office of the Fund (*Hrvatski zavod za mirovinsko osiguranje, Središnja služba*) obtained the opinion of an in-house appeals expert, who examined the applicant's medical documentation and reported that his condition did not amount to a disability under the applicable domestic criteria. The applicant contested the experts' findings and argued that they should have examined him in person.

The applicant claims that he was denied pension rights by the court decision only because his request to obtain a psychiatric report was rejected. He claims that this violated his right to a fair trial under Article 6 ECHR.

The Court reiterates that it is primarily for the national courts to assess the evidence they obtain and the relevance of any evidence that a party wishes to have produced..[70] Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial 'tribunal' and does not expressly require that an expert heard by that tribunal fulfils the same requirements.[71] In the light of the foregoing considerations, the Court does not find anything unfair in the reasoned decision of the Administrative Court refusing to obtain an additional verification of his condition. That court found that the relevant medical facts of the case had been established by the two expert reports obtained in the case which were consonant with the medical documentation in the file, that each country examined disability for the purposes of awarding a disability pension on the basis of its own medical and legal criteria and that in the case at hand the experts had concluded that the applicant's illnesses did not amount to a disability under the Croatian criteria.

Judges *Turković* and *Schembri Orland* disagree with the finding of a non-violation of Article 6 § 1. They held that even if it was within the discretion of the domestic authorities to grant a request for further assessment, it was necessary, taking into account the particular circumstances of the applicant to conduct an additional verification of the applicant's condition by a specialist in psychiatry. The lack of additional verification constituted therefore a violation of the right to a fair trial.

Judgement (second Section) of 14 December 2021 – No. 53176/17 – *Gražulevičiūtė v. Lithuania*

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

Keywords: Suspension of a doctor – Serious breach of duty – Reassessment of the same facts – Res judicata of a previous decision

[70] ECtHR of 18 March 1997 - No. 21497/93 - *Mantovanelli* v. France; ECtHR of 13 July 2000 - No. 25735/94 - *Elsholz* v. *Germany.*

[71] ECtHR of 5 July 2007 - No. 31930/04 - *Sara Lind Eggertsdóttir* v. *Iceland*; ECtHR of 28 August 1991 - No. 13468/87 - *Brandstetter* v. *Austria*; ECtHR of 22 May 2018 - No. 28621/15 - *Devinar* v. *Slovenia.*

Core statement: Fair hearing – Failure of Supreme Administrative Court to respect res judicata effect of a final court decision annulling the applicant's suspension as a clinical researcher – Reassessment of same factual circumstances without reopening the first set of court proceedings, and rendering the first set largely devoid of any legal effect

Note: The applicant was employed as a doctor in a clinical research project in a private company, the Centre for Clinical and Basic Research, from May 2007 to July 2011. She conducted several clinical studies aimed at researching the effectiveness of medicinal products for the treatment of rheumatological diseases. In the course of this study, a patient died. The applicant was then suspended from further work on the study due to an order by the State Medicines Control Agency (*SMCA*). The *SMCA* subsequently conducted investigations into whether the applicant had made any errors during the clinical trial. The applicant brought an action against the suspension order before the administrative court. In the course of these proceedings, it was legally established that the applicant had not made any errors during her work on the trial that had caused the patient's death. The *SMCA*'s suspension order was consequently declared unlawful. Following this decision, the applicant brought an action for compensation for the damage she had suffered as a result of the suspension. The Administrative Court partially upheld the claim and ordered the state authorities to compensate her for the financial loss. The court rejected a claim for compensation for non-material damage. On appeal by both parties, the Supreme Administrative Court allowed the *SMCA*'s appeal, rejected the civil claim for damages on the part of the applicant and dismissed her appeal. The Supreme Administrative Court held that, that the *SMCA* had not acted unlawfully and that official liability could therefore not be considered.

The applicant argued that the right to a court comprised the requirement that in cases where a final court decision had been reached, it could not be questioned. In her case, however, the Supreme Administrative Court had departed from the principles of legal certainty and res judicata, since the facts which had already been established within the first set of court proceedings concerning the annulment of the *SMCA* orders for her suspension had been disregarded in the second set of court proceedings concerning the claim for damages.

According to the case-law of the Court of Justice, the right to a fair hearing under Article 6(1) of the Convention, interpreted in the light of the principles of the rule of law and legal certainty, encompasses the requirement that where the courts have finally determined an issue, their ruling should not be called into question.[72] A review of a final and binding judgement, solely for the purpose of obtaining a new hearing and a new determination of the case, is permissible only if required by substantial or compelling circumstances.[73] In any event, a reconsideration of a judicial decision must not be treated as an appeal in disguise. The mere possibility that there are two views on a point of law is not a ground for reconsideration.[74] This principle is a fundamental element of the right to a fair trial guaranteed by Article 6 ECHR. The applicant was fully exculpated by the final decision of the Administrative Court.

The Supreme Administrative Court's approach of giving the State a 'second chance" to review the legality of the suspension order violates the principle of legal certainty. The Court cannot know that there was a fundamental defect or miscarriage of justice underlying the

[72] ECtHR of 23 January 2001 - No. 28342/95 - *Brumărescu* v. *Romania*; ECtHR of 12 January 2006 - Nos. 47797/99 and 68698/01 - *Kehaya and Others* v. *Bulgaria.*

[73] ECtHR of 24 July 2003 - No. 52854/99 - *Ryabykh* v. *Russia*; ECtHR of 22 March 2005 - No. 6267/02 - *Rosca* v. *Moldova*; ECtHR of 27 October 2016 - No. 8001/07 - *Vardanyan and Nanushyan* v. *Armenia.*

[74] ECtHR of 29 March 2011 - No. 40713/04 - *Shchurov* v. *Russia.*

legally concluded proceedings. [75] This, in the Court's view, undermined the applicant's rights under Article 6(1) of the Convention.

With regard to the alleged violation of Article 8 ECHR, the Court rejected the complaint as inadmissible, as the applicant did not put forward any grounds showing that her private life was affected by the suspension.

As a result, the Court found a violation of Article 6 ECHR and awarded the applicant compensation in the amount of €10,000.

In a concurring opinion, Judge *Kūris* nevertheless expresses discomfort with the Court's decision with regard to the inadmissibility of the complaint under Article 8 ECHR, as he considers the suspension to be a serious interference with private life. Judge *Koskelo* and Judge *Kjølbro, in a* partially dissenting opinion, take the view that the two cases brought by the complainant concern different legal consequences and therefore no binding effect can arise between the judicial decisions and consequently a violation of Article 6 ECHR cannot be established.

(In)admissibility decisions

Decision (fifth section) of 4 November 2021 – No. 19300/12 – *Glazyrin v. Ukraine*

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

Keywords: Dismissal protection proceedings – Excessively long duration of proceedings – Consideration of the number of instances

Core statement: In determining whether the total length of court proceedings is excessively long, the number of court instances must be taken into account in addition to the duration in terms of time.

Note: The applicant was employed by the State Tax Administration. The employment relationship was terminated due to personnel reductions. In August 2005, he brought an action for protection against dismissal, also claiming payment of arrears of remuneration. The action was initially granted in September 2006. This decision was partially overturned by the Court of Appeal in September 2007 and led to a change in the notice period and the payment of the corresponding salary arrears. This decision was upheld by the Court of Appeal in August 2011. A retrial initiated by the complainant in September 2011 was dismissed as inadmissible in October 2011.

The applicant complains of a violation of Article 6 ECHR due to the length of the judicial proceedings. The Court assumes that the total length of the proceedings of six years and two months does not yet constitute an excessively long length of proceedings and therefore does not constitute a violation of Article 6 ECHR. In particular, it must be taken into account that the legal dispute was examined in four instances before the domestic courts (including the retrial).[76] The complaint was therefore to be dismissed pursuant to Article 35(3) and (4) ECHR.

[75] ECtHR of 24 July 2003 - No. 52854/99 - *Ryabykh* v. *Russia*; ECtHR of 21 January 2020 - No. 29115/07 - *Şamat* v. *Turkey.*
[76] ECtHR of 27 September 2011 - No. 27753/06 - *L. Z.* v. *Slowakei.*

New pending cases (notified to the respective government)

No. 474/21 – *Shevchuk v. Ukraine* (5. Sektion) – lodged on 28 December 2020 – delivered on 22 November 2021

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

Keywords: Disciplinary proceedings - Dismissal from the judiciary – Committee of a court as a court within the meaning of Article 6 ECHR

Note: The applicant was dismissed from the post of judge as a result of disciplinary proceedings. The disciplinary proceedings were conducted before a standing committee of the Constitutional Court. The applicant alleges that the committee was not a court within the meaning of Article 6 ECHR, as there was no opportunity to defend himself through a lawyer and to comment on the allegations made in the disciplinary proceedings. In addition, it is argued that his dismissal had a serious impact on family life and that the dismissal was in response to critical statements made by the complainant, which constitutes a violation of Article 10 ECHR.

→ back to overview

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