

REPORT

ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI

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I. Editorial

In this edition of the HSI Report, we present the latest developments in the case law of the European labour and social security law in the first quarter of 2022.

Worth highlighting is the decision of the **European Court of Justice** (CJEU) *HR Rail* (of 10 February 2022 – C-485/20) which could be of great importance for the legal position of employees with disabilities. The Court states that before dismissing employees during their probationary period, it must be examined as a matter of priority whether reasonable accommodation for people with disabilities can be made, which may include a transfer to a suitable job.

Some of the further proceedings before the CJEU have already been the focus of public discussion. The judgment in the *Daimler* case (of 17 March 2022 – C-232/20) deals with the maximum duration of the hiring out of temporary workers. Since the CJEU emphasised the national courts' discretion in interpreting the term 'temporary', the outcome of the case before the (German) Federal Labour Court is still open. In the *Leistrütz* case, the issue is whether a Member State can provide for increased protection against dismissal for data protection officers compared to the GDPR. Advocate General de la Tour affirmed this in his opinion delivered on 27 January 2022 (C-534/20).

Regarding the **European Court of Human Rights** (ECtHR), the war in Ukraine is currently having an impact. The Russian Federation has been expelled from the Council of Europe and is therefore no longer a party to the ECHR. However, proceedings for previous violations of the Charter have still been pursued. The ECtHR ruled again on several cases related to labour and social security law in the first quarter: State parties to the ECHR are obliged to establish a legal system which guarantees real and effective protection against anti-union discrimination (of 8 March 2022 – No. 12736/10 – *Zakharova and Others v. Russia*). In addition, the judicial handling of the Corona pandemic has reached the Court: The ECtHR has considered a pandemic-related ban on a trade union meeting in Switzerland as a violation of the freedom of assembly, Article 11 ECHR (of 15 March 2022 – No. 21881/20 – *Geneva Community for Trade Union Action v. Switzerland*).

We hope you enjoy reading this report and welcome your feedback at hsi@boeckler.de.

The editors

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

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II. Proceedings before the CJEU

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1. Annual leave

Decisions

Judgment of the Court (Seventh Chamber) of 13 January 2022 – C-514/20 – Koch Personaldienstleistungen GmbH

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

Keywords: Annual leave – Working Time – Overtime – Calculation of working time on a monthly basis – No overtime pay when taking annual leave

Core statement: Article 7(1) of the Working Time Directive 2003/88/EC read in the light of Article 31(2) CFR, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold to overtime pay is reached, the hours corresponding to paid annual leave are not to be taken into account as hours worked.

Note: The case submitted by the Bundesarbeitsgericht¹ (Federal Labour Court) essentially dealt with the question of whether Article 31(2) Charter of Fundamental Rights (CFR) and Article 7 Working Time Directive 2003/88/EC must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to period of paid annual leave taken by the worker are not be taken into account as hours worked. The framework collective agreement for temporary agency work (Manteltarifvertrag für Zeitarbeit) contains the following passages: The additional allowance for overtime shall be paid for hours worked in excess of 184 hours for 23 working days. The additional allowance for overtime shall be 25 %. In August 2017, which included 23 working days, the plaintiff worked 121,75 hours during the first 13 days, then took, for the 10 remaining days, paid annual leave corresponding to 84,7 hours. But *Koch* refused to pay him an additional allowance for overtime, stating that the plaintiff had not exceeded threshold of the regular monthly working hours quota.

Taking the view that account had to be taken of the days of paid annual leave when determining the number of hours worked, the plaintiff brought an action before the German courts seeking an order requiring *Koch* to pay him a supplement of 25% for 22,45 hours, that is 72,32 €, corresponding to the number of hours worked exceeding the threshold of 184 hours.

¹ Federal Labour Court of 17 June 2020 – 10 AZR 210/19 (A), NZA 2020, 1551; see also [HSI-Report 4/2021](#), p. 42 and also [ErfK/Gallner](#), 22th ed. 2022, BUrIG, § 11 marginal 7a.

The Court held with regard to Article 7 of the Working Time Directive 2003/88/EC that every worker's right to paid annual leave must be regarded as a particularly important principle of EU social law from which no derogations may be made and whose implementation by the competent national authorities must be confined within the limits expressly laid down by that directive.² Furthermore, the Court held that the right to paid annual leave is, as a principle of EU social law, not only particularly important, but is also expressly laid down in Article 31(2) CFR.³ In the light of those objectives, the Court held that the right to paid annual leave, has the dual purpose of enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure. It is with a view to ensuring effective protection of his or her health and safety that the worker must normally be entitled to actual rest. This 'particularly important principle of the EU social law' (para. 23) has previously been the subject of several court decisions⁴, which led to some changes in German leave law as well. In the present case, too, the CJEU comes to the conclusion that Article 7 of the Working Time Directive, read in the light of Article 31(2) CFR, must be interpreted as precluding the provision in the collective labour agreement that might prevent the worker from taking his leave is inadmissible.

The consequences of the ruling for German labour law are not limited to the temporary employment sector but affect all collective labour agreements that take into account only the 'hours actually worked' and not also the hours during which the employee takes his paid annual leave. Such a mechanism may potentially deter a worker from taking his or her annual leave and is therefore not compatible with the right to paid annual leave provided for in Article 7(1) of the Working Time Directive 2003/88/EC.

Opinions

Opinion of Advocate General de la Tour delivered of 13 March 2022 – C-518/20 and C-727/20 – Fraport

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

Keywords: Incapacity to work due to illness during a reference period – Continued entitlement to paid annual leave at the end of a reference period and/or a carry-over period – Obligation to enable the worker to exercise his entitlement to paid annual leave

Core statement: The entitlement to paid annual leave acquired during a reference period in which a full incapacity for work or an incapacity for work due to an illness which has persisted since then has occurred can only be extinguished if the employer has enabled the employee to exercise this entitlement in good time.

New pending cases

Request for a preliminary ruling from the Nejvyšší soud České republiky (Supreme Court of the Czech Republic) of 6 December 2021, lodged on 28 January 2022 – C-57/22 – Ředitelství silnic a dálnic

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

Keywords: Successful dismissal protection proceedings – no further employment during the court proceedings – accrual of the entitlement to paid annual leave

² CJEU of 6 November 2018 – C-619/16 – *Kreuziger*, EU:C:2018:872, paragraph 28 and the case-law cited

³ CJEU of 25 June 2020 – C-762/18 and C-37/19 – *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, EU:C:2020:504, paragraph 54 and the case-law cited.

⁴ CJEU of 6 November 2018 – C-569/16 – *Bauer*, C-570/16 – *Willmeroth*; C-619/16 – *Kreuziger* and C-684/16 – *Max-Planck-Gesellschaft*, note by *Buschmann*, *HSI-Newsletter* 4/2018, p. 4 (in German).

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 26 February 2021 – C-120/21 – LB v TO

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

Keywords: Is the holiday entitlement subject to a regular limitation period of three years if the employer has not actually put the employee in a position to exercise his holiday entitlement by giving him appropriate notice and information?

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2. Data protection

Opinions

Opinion of Advocate General de la Tour of 27 January 2022 – C-534/20 – Leistriz

Law: Article 38(3) General Data Protection Regulation (EU) 2016/679 (GDPR), Article 16 TFEU

Keywords: Ordinary dismissal of data protection officers – Primacy of EU law – National rule prohibiting dismissal of a data protection officer without good cause – Data protection officer whose appointment is mandatory under national law

Core statement: A Member State's regulation providing for protection against dismissal of the data protection officer going further than the GDPR, in that an employer may only dismiss the data protection officer for good cause even if the dismissal is not related to the performance of the data protection officer's duties, complies with EU law.

Should the CJEU come to a divergent assessment, the following shall apply: The protection against dismissal of the data protection officer pursuant to Article 38(3) sentence 2 GDPR applies irrespective of whether the data protection officer is mandatorily appointed under Union law or national law.

Note: The claimant works for the defendant as 'Head of the Legal Team' and was appointed by the defendant as the company data protection officer. Due to its number of employees, the defendant is obliged to make such a designation. After the claimant was given ordinary notice of dismissal, the question arose as to whether the notice of dismissal was valid under section 38(2) in conjunction with section 6(4) sentence 2 of the German Data Protection Act (BDSG), as data protection officers can only be terminated extraordinarily for good cause.

With its first question, the referring Federal Labour Court (Bundesarbeitsgericht – BAG) essentially wants to know whether the exclusion of the ordinary dismissal of the data protection officer is compatible with Article 38(3) sentence 2 of the GDPR (para. 19). According to this, the data protection officer may not be dismissed or disadvantaged because of the performance of his/her duties – the protection against dismissal under national law thus clearly goes beyond this. According to the Advocate General, Article 38(3) sentence 2 GDPR aims to create a protective framework for the activity of the data protection officer. The Union legislator leaves it up to the Member States to further strengthen the independence of the data protection officer, e.g. by creating protection against dismissal, since a termination of the employment relationship necessarily brings about the termination of his office (para. 42). However, the protection provided by national law must be in line with the GDPR. In particular, it was important that a data protection officer may legitimately be dismissed if she/he no longer meets the necessary criteria of suitability for the performance

of his duties, such as those set out in Article 37(5) of that regulation, or if she/he fails to comply with the obligations laid down in the first and third sentences of Article 38(3) and in Article 38(5) and (6) of that regulation, or if the level of his expertise proves to be insufficient, (para. 51 et seq.).

In the case that the CJEU does not follow its first opinion, the Advocate General formulates alternative explanations on the further questions referred. The second sentence of Article 38(3) GDPR would also apply if the data protection officer is appointed on a mandatory basis under national law instead of under EU law, as the GDPR does not distinguish whether the appointment of the data protection officer is mandatory or optional (para. 55). In response to the Federal Labour Court's third question, the Advocate General stated that Article 38(3) sentence 2 GDPR was based on a sufficient legal basis. Therefore, it would not have been necessary to fall back on the competence bases under labour law. This is because the provision pursues the goal of 'protecting the data protection officer from any hindrance in the performance of his or her duties', which 'contributes to the effective realisation of the objectives of this Regulation, irrespective of the existence of an employment relationship' (para. 58).

Overall, the Advocate General's comments contribute to legal clarity. With regard to the first question referred for a preliminary ruling concerning the extended protection against dismissal of the data protection officer(s), it seems obvious that the CJEU follows the Advocate General's opinion and classifies Section 38(2) in conjunction with Section 6(4) sentence 2 BDSG as not being contrary to EU law. If, contrary to expectations, it decides otherwise, it would have to deal in depth with the interface between labour and data protection law in its decision.⁵

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3. Equal treatment

Decisions

Judgment of the Court (Third Chamber) of 10 February 2022 – C-485/20 – HR Rail SA

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

Keywords: Dismissal of a person with a disability during the probationary period – Reasonable accommodation – Obligation of the employer to employ the employee in another job – Disproportionate burden

Core statement: Employees who, on grounds of his or her disability, have been declared incapable of performing the essential functions of the post that he or she occupies, are to be assigned to another position for which she or he has the necessary competence, ability, and availability, unless that measure imposes a disproportionate burden on the employer.

Note: See the comment by *Sutterer-Kipping*, HSI Report 1/2022, p. 5. (in German)

⁵ *Sommer*, ZESAR 2021, 340 (341).

Judgment of the Court (Third Chamber) of 24 February 2022 – C-389/20 – TGSS

Law: Article 4(1) Equal Treatment Directive 79/7/EEC

Keywords: Discrimination on grounds of sex – Domestic workers – Unemployment protection – Disadvantage for female workers – Legitimate social policy objectives – Proportionality

Core statement: Unemployment benefits may not be withheld from domestic workers if this puts female workers at a particular disadvantage compared to male workers and the regulation is not justified by objective reasons.

Note: In Spain, there is a special social security system for domestic workers which leads to their exclusion from unemployment insurance. The Court provides some interpretative guidance in order to assess whether this exclusion from unemployment insurance constitutes prohibited indirect discrimination on grounds of sex in violation of Article 4(1) of the Equal Treatment Directive.

In the present case, 95,5% of the employees covered by the special system were women on the cut-off date of 31 March 2021, while the proportion in the general social insurance system was 49,0%. Assuming that these data is valid, it can be assumed that female employees are disadvantaged.⁶

With regard to the possible justification, the Court stated that the reasons put forward by the Spanish government (maintaining the level of employment, promoting recruitment, combating illegal employment and social fraud) constitute legitimate reasons. However, this objective is not likely to be pursued in a coherent manner if only domestic workers are covered by the special scheme. This is because comparable employment relationships with non-commercial employers such as private gardeners, chauffeurs, but also employees in agriculture or cleaning companies are all covered by unemployment insurance. Moreover, it is questionable why unemployment insurance, of all things, is excluded from the scope of protection, while other risks, such as accidents at work or occupational diseases, are covered. If the exclusion of groups of employees from unemployment insurance for reasons of labour market policy constitutes indirect unequal treatment, the CJEU thus applies a strict standard for the coherence of the measure, which the Spanish regulation for domestic workers at issue in this case does not seem to meet.

Opinions

Opinion of Advocate General de la Tour of 13 January 2022 – C-587/20 – HK/Danmark and HK/Privat

Law: Article 3(1)(a) and (d) Equal Treatment Framework Directive 2000/78/EC, Article 12 Charter of Fundamental Rights of the European Union (freedom of association).

Keywords: Principle of equal treatment in employment and occupation – Prohibition of discrimination on grounds of age – Scope – Post of elected sector convenor of an organisation of workers – Statutes of that organisation under which only members under the age of 60 or 61 on the date of the election are eligible to stand as sector convenor

Core statement: Article 3(1)(a) and (d) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an age limit laid down in the statutes of an organisation

⁶ Cf. on the standard of review when using statistical data to prove indirect unequal treatment, CJEU of 24 September 2020 – C-223/19, EU:C:2020:753 – *YS*, para. 51 et seq., see also [HSI Report 3/2020](#), p. 24.

of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.

Note: A, who was born in 1948, was recruited in 1978 as a union representative in a local branch of the Danish trade union HK. In 1980, she was transferred to the national confederation. The congress of HK/Service (now HK/Privat) elected her as deputy convenor in 1992, then convenor in 1993. She was subsequently re-elected every four years and held the post of sector convenor of that body until 8 November 2011, when she reached the age of 63 and had exceeded the age limit laid down in Paragraph 9 of the statutes of that body for standing for the election to be held that year. Paragraph 9(1) provides that only members who are under the age of 60 on the date of the election may be elected as sector convenor, with that age limit being deferred to 61 for members re-elected after the 2005 congress (para. 9). After a complaint had been lodged by A, the Equal Treatment Board held, by its decision of 22 June 2016, that it was contrary to the law relating to the prohibition of discrimination in the labour market for A to be prohibited, by reason of her age, to stand for election as sector convenor of HK/Privat at the congress in 2011 and ordered HK/Danmark and HK/Privat to pay a compensation of 25.000 DKK (approximately 3.460 €) plus interest. As that decision was not complied with, the applicant in the main proceedings (the Equal Treatment Board, in its capacity as A's representative in the dispute in the main proceedings) brought an action against HK/Danmark and HK/Privat before the Københavns Byret (District Court, Copenhagen, Denmark).

The referring court states that, as elected sector convenor, A was not employed but held an office based on trust. However, her role as sector convenor included certain elements characteristic of ordinary workers. It takes the view that the Court of Justice has not defined in detail the concepts of 'employment', 'self-employment' and 'occupation' mentioned in Article 3(1)(a) of Directive 2000/78 and that it has not given a ruling on whether politically elected representatives in an organisation of workers fall within the scope of that directive.

First of all, the Advocate General points out that the directive 2000/78/EC applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'. In his view it is clear that the use, in Article 3(1)(a) of Directive 2000/78 of the concepts of 'employment', 'self-employment' and 'occupation' demonstrates that the EU legislature did not have any intention to limit the scope of that directive to positions which grant their holders the status of 'worker' within the meaning of Article 45 TFEU and the many rules of EU secondary law which seek to protect workers as the weaker party in an employment relationship. In that context, the concept of 'worker' usually refers to a person who for a certain period of time performs services for and under the direction of another person in return for which he or she receives remuneration (para. 34). The objectives pursued by that directive are not primarily the protection of employees as the weaker party in an employment relationship, but the fight against discrimination in the professional context (para. 37). This means that all forms of employment are covered, regardless of their nature and form, and it does not matter whether a person is an employee or not (paras. 32, 48). Thus, the activities of A and the regulation of the statutes fall within the scope of application of the Framework Directive.

Advocate General de la Tour convincingly deduces from the legislative history that the concept of 'involvement' under Article 3(1)(d) of the Framework Equal Treatment Directive also includes eligibility for the administration or management post of a trade union (para. 57). According to the Advocate General, the view that the election of a sector convenor of an organisation of workers falls within the scope of the Framework Directive 2000/78 is

compatible with the freedom of trade unions to elect their representatives, which constitutes a component of freedom of association, as enshrined in Article 12(1) of the Charter. The Advocate General argues that freedom of association is not an absolute right, and its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. Otherwise it would be possible in the statutes of a trade union to use a person's religion or sexual orientation, among other things, to prohibit him or her from being eligible for the position of sector convener of that organisation (para. 70).

Opinion of Advocate General Rantos of 27 January 2022 – C-405/20 – BVAEB

Law: Articles 5, 12 Equal Treatment Directive 2006/54/EC, Article 157 TFEU

Keywords: Equal treatment between men and women – Inflation-related adjustment of civil servants' pensions

Core statement: An annual adjustment of pensions of civil servants in the form of a degressive upgrading with a complete exclusion above a certain pension level is permissible if this regulation has an unfavourable effect on a significantly higher proportion of men than of women but is justified by objective factors which have nothing to do with a discrimination based on gender.

New pending cases

Request for a preliminary ruling from the Bundesverwaltungsgericht der Republik Österreich, lodged on 26 January 2022 – C-52/22 – BF

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

Keywords: Unequal treatment of civil servants' emoluments – Adjustment of pension – Reference date

Request for a preliminary ruling from the Tribunalul Bihor (Romania), lodged on 18 October 2021 – C-642/21 and Others – Parchetul de pe lângă Tribunalul Bihor and Others

Law: Articles 2(1) and (2), Art. 3(1)(c), Art. 9(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Limitation period – Claims for damages – Age discrimination – Exclusion of the upgrading of civil servants after the entry into force of a law

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4. Fixed term employment

Decisions

Judgment of the Court (Second Chamber) of 13 January 2022 – C-282/19 – MIUR and Ufficio Scolastico Regionale per la Campania

Law: Section 5(1)(a) Framework Agreement on fixed-term work, Article 1 and Article 2(2) Equal Treatment Framework Directive 2000/78/EC, Article 21 Charter of Fundamental Rights of the European Union

Keywords: Catholic religious education teachers – Prerequisite for teaching in public schools – Approval of a diocesan ordinary – Concept of ‘objective reasons’ justifying the renewal of such contracts

Core statement: A national provision under which the rules protecting against abusive successive fixed-term employment contracts do not apply to Catholic teachers of religion in public teaching establishments is inadmissible if there are no other effective measures in the national legal order to penalise such abusive recourse.

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5. General matters

Decisions

Judgment of the Court (Grand Chamber) of 18 January 2022 – C-261/20 – Thelen Technopark Berlin GmbH

Law: Articles 15(1), (2)(g) and (3) Services Directive 2006/123/EC, Article 49 TFEU (freedom of establishment).

Keywords: Reference for a preliminary ruling – Freedom to provide services – Architects’ and engineers’ fees – Fixed minimum tariffs – Direct effect – Judgment establishing a failure to fulfil obligations delivered during proceedings before a national court or tribunal

Core statement: A legal provision which sets minimum fees for the services of architects and engineers need not be left unapplied merely because it infringes Article 15(1), (2)(g) and (3) of the Services Directive.

Note: The anterior version of the German Fee Regulations for Architects and Engineers (HOAI) set minimum and maximum rates for the corresponding services, which the CJEU declared to be contrary to EU law due to a violation of the freedom to provide services.⁷ The present legal dispute now revolves around the question of whether the HOAI in its former version is not only contrary to EU law, but also inapplicable to old cases. This would mean that service providers or clients could not invoke the minimum and maximum rates. According to the CJEU, this was not the case in a legal dispute between private parties, so the HOAI was applicable despite the infringement of EU law. However, the party disadvantaged by this is free to claim state liability against the Federal Republic of Germany because of the violation of the freedom to provide services.

⁷ CJEU of 4 July 2019 – C-377/17 – *Commission v. Germany*, see also [HSI-Newsletter 3/2019](#), p. 16.

Judgment of the Court (Seventh Chamber) of 3 March 2022 – C-162/20 P – WV

Law: Article 60(1) Staff Regulations

Keywords: Public service – Unauthorised absence – Deduction from annual leave – Withholding of remuneration

Core statement: It is an abuse of the disciplinary procedure to consider that an official present at his place of work who performs his duties badly or even disobeys instructions is guilty of 'unauthorised absence' within the meaning of Article 60(1) of the Staff Regulations, and that deductions may therefore be made from his leave or remuneration. This erroneous classification as 'unauthorised absence' has the effect of imposing on the official a financial penalty not provided for in the Staff Regulations, without the benefit of the guarantees of due disciplinary process.

New pending cases

Request for a preliminary ruling from Oberster Gerichtshof (Austria), lodged on 14 September 2021 – C-710/21 – IEF Service

Law: Article 9(1) Insolvency Directive 2008/94/EC

Key words: Activity in the territory of two Member States – Place where the work is habitually carried out

Note: Is, in the case of employer insolvency, for the satisfaction of the unfulfilled claims of an employee who habitually carries out or has carried out his work in two member states,

- a) the guarantee institution of the Member State to whose legislation he is subject in the context of the coordination of social security schemes (social security),
- b) the guarantee institution of the other Member State in which the insolvent undertaking has its registered office is competent, or
- c) the guarantee institutions of both Member States are responsible, so that the employee can choose which one to use when applying?

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 11 December 2020 – C-677/20 – IG Metall and ver.di

Law: Paragraph 21(6) SEBG (SE Employee Involvement Act), Article 4(4) Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees

Keywords: Supervisory board - conversion into an SE under company law - agreement on the future involvement of employees - absence of a trade union right of nomination for supervisory board members

Core statement: The Federal Labour Court (Bundesarbeitsgericht – BAG)⁸ referred the question to the CJEU as to whether the participation of trade union representatives on the supervisory board of the Societas Europaea (SE), which under German law as a defining element of employee participation, must continue to exist even after the transformation of an Stock corporation into an SE under company law, is valid under EU law.

⁸ Federal Labour Court of 18 August 2020 – 1 ABR 43/18 (A), BAGE 172, 43-54.

Note: The conversion of companies under German law, for example into the legal form of an SE, often results in a restriction of company participation, if not as a goal.⁹ When the SE is established, a special negotiating body must be set up with which the company management reaches an agreement on the future involvement of employees. Section 21(6) SE Employee Involvement Act (SEBG) stipulates that when an SE with a registered office in Germany is established by way of conversion, a separate selection procedure for persons nominated by the trade unions for a certain number of supervisory board members representing the employees must be guaranteed. The BAG referred the question to the CJEU as to whether this provision is covered by Article 4 Directive 2001/86/EC. According to the provision of the Directive, the contents of the agreement on the involvement of employees in the SE can be freely agreed, whereby with regard to all components of employee involvement, at least the same level of involvement must be guaranteed as existed in the company which is to be converted into an SE.

Request for a preliminary ruling from the Tribunale ordinario di Padova (Italy), lodged on 13 December 2021 – C-765/21 – D. M./Azienda Ospedale-Università di Padova

Law: Article 4 Regulation No. 507/2006 on the authorisation of medicinal products for human use, Regulation (EU) 2021/953 on a framework for the issuance, verification, and acceptance of interoperable COVID-19 certificates.

Keywords: Compulsory vaccination of health care workers – Convalescent status – Refusal of only conditionally approved vaccination – Automatic leave of absence without pay – Possibility of the employee being employed elsewhere – Discrimination against persons who did not want to or could not be vaccinated for medical reasons.

Note: The Tribunal ordinario di Padova submits the Italian version of compulsory vaccination to the CJEU for review. The issues are, on the one hand, the authorisation of the vaccines, the obligation to vaccinate even if the healthcare workers in question have already been infected and thus already acquired natural immunity, consequences under labour law of refusing to vaccinate with a provisionally authorised vaccine, and their compatibility with the principle of non-discrimination 'in the light of Regulation 2021/953', which provides a framework for restricting freedom of movement in the EU on the basis of COVID-19 certificates.

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⁹ See, for example, the references to co-determination avoidance at <https://www.roedl.de/themen/mitbestimmung-societas-europaea-se/freiheit-rechtsform-gesellschaft-arbeitnehmer-europaeische-aktiengesellschaft>; overview in *Sick*, Erosion als Herausforderung für die Unternehmensmitbestimmung, in: Mitbestimmungsreport No. 58, https://www.imu-boeckler.de/de/faust-detail.htm?sync_id=HBS-007666, p. 13.

6. Posting of workers

Decisions

Judgment of the Court (Grand Chamber) of 8 March 2022 – C-205/20 – Bezirkshauptmannschaft Hartberg-Fürstenfeld

Law: Article 20 Directive 2014/67/EU on the enforcement of the Posting of Workers Directive 96/71/EC

Keywords: Freedom to provide services – Posting of workers – Penalties – Proportionality – Direct effect – Principle of primacy of EU law

Core statement: Article 20 of the Enforcement Directive has direct effect insofar as it requires that the penalties provided for therein to be proportionate, has direct effect and may thus be relied on by individuals before national courts against a Member State which has transposed it incorrectly.

Judgment of the Court (Sixth Chamber) of 10 February 2022 – C-219/20 – Bezirkshauptmannschaft Hartberg-Fürstenfeld

Law: Article 5 Posting of workers in the framework of the provision of services Directive 96/71/EC, Article 47 Charter of the Fundamental Rights of the European Union

Keywords: Freedom to provide services – Posting of workers – Terms and conditions of employment – Remuneration – Penalties – Limitation period – Right to good administration – Effective judicial protection

Core statement: Article 5 Posting of workers Directive 96/71/EC, read in conjunction with Article 47 CFR and in the light of the general principle of EU law relating to the right to good administration, must be interpreted as not precluding national legislation providing for a five-year limitation period for failure to comply with obligations relating to the remuneration of posted workers.

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7. Professional qualifications

Decisions

Judgment of the Court (Sixth Chamber) of 3 March 2022 – C-634/20 – Sosiaali- ja terveysalan lupa- ja valvontavirasto

Law: Directive 2005/36/EC

Keywords: Recognition of professional qualifications – Diploma issued in the Member State of origin – Limitation to three years of the right to practise medicine – Supervision by a registered medical practitioner and completion of the three-year special training in general medicine

Core statement: A person who has completed basic medical training in the Member State of origin and who lacks only proof of completion of a one-year professional traineeship may not be granted permission to practise medicine only on condition that it is limited to three years

and subject to the condition that he or she practises under the direction and supervision of a registered medical practitioner and successfully completes the special three-year training in general medicine during that period.

Judgment of the Court (Eighth Chamber) of 3 March 2022 – C-590/20 – Presidenza del Consiglio dei Ministri and Others

Law: Article 2(1) lit. c, Articles 3(1) and (2) Coordination Directive 75/363/EEC

Keywords: Coordination of the laws, regulations and administrative provisions relating to the activities of doctors – Training as a specialist – Appropriate remuneration – Application of Directive 82/76/EEC to training commenced before its entry into force and continued after the expiry of the transposition period

Core statement: Any specialist further training on a full-time or part-time basis which was commenced before the entry into force of Directive 82/76 on 29 January 1982 and continued after the deadline for the implementation of this Directive on 1 January 1983 shall be appropriately remunerated for the period of this further training from 1 January 1983 until its completion within the meaning of this Annex, provided that this further training relates to a specialist area specified in more detail in the Directives.

Opinions

Opinion of Advocate General Szpunar of 10 March 2022 – C-577/20 – Sosiaali- ja terveystieteiden lautakunta ja valvontavirasto

Law: Article 2(1) Professional Qualifications Directive 2005/36/EC

Keywords: Free movement of persons and services – Recognition of professional qualifications – Professional title of psychotherapist – Psychotherapy diploma from another Member State – Assessment of equivalence of training

Core statement: An application for access to a profession on the basis of a diploma obtained in partnership with a university of another Member State but exclusively in the host Member State, in the language of that State and with the aim of practising the profession in question in that State, is not subject to the Professional Qualifications Directive, nor can the applicant rely on the fundamental freedoms under Articles 45 and 49 TFEU. This is because the provisions of the Directive apply to nationals who wish to pursue a regulated profession in a Member State other than the one in which they acquired their professional qualification.

New pending cases

Action brought on 4 February 2022 – C-75/22 – European Commission v Czech Republic

Law: Articles 3, 7, 45, 50 et seq. Professional Qualifications Directive 2013/55/EU

Keywords: Infringement proceedings – Failure to define the legal status of examinees – Professional title for architects and veterinary surgeons – Training of nurses – Authorised activities of pharmacists – Time-limits for processing applications for recognition of professional qualifications

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8. Social security

Decisions

Judgment of the Court (Fifth Chamber) of 10 March 2022 – C-247/20 – Commissioners for Her Majesty's Revenue and Customs

Law: Article 7(1)(b) and Article 16 Free Movement Directive 2004/38/EC, Article 21 TFEU

Keywords: Right to move and reside freely within the territory of the Member States – Child who is a national of a Member State staying in another Member State – Right of residence derived from the parent who is the primary carer of that child – Requirement of comprehensive sickness insurance cover – Child having a permanent right of residence for part of the periods concerned

Core statement: 1. Article 21 TFEU and Article 16(1) Directive 2004/38 must be interpreted as meaning that neither a child, a Union citizen, who has acquired a right of permanent residence, nor the parent who is the primary carer of that child is required to have comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of that directive, in order to retain their right of residence in the host State.

2. Article 21 TFEU and Article 7(1)(b) Directive 2004/38 must be interpreted as meaning that, as regards periods before a child, a Union citizen, has acquired a right of permanent residence in the host Member State, both that child, where a right of residence is claimed for him or her on the basis of that Article 7(1)(b), and the parent who is the primary carer of that child must have comprehensive sickness insurance cover within the meaning of that directive.

Opinions

Opinion of Advocate General Pitruzzella of 17 March 2022 – C-713/20 – Raad van bestuur van de Sociale verzekeringsbank

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

Keywords: Social security status for migrant workers – Employment relationship with a temporary employment agency – Period between two employment relationships

Core statement: Temporary agency workers who are usually employed in a Member State other than the Member State of residence are not subject to the social security legislation of the State of employment but to that of the State of residence.

Note: In two cases before Dutch courts, temporary agency workers claimed to be subject to the social security system of the State of employment also in periods between their assignments. The referring Dutch court indicated in the order for reference that there was no employment relationship between the assignments. Under this condition, the Advocate General argues that the social security statute of the State of residence is decisive. The situation is different if the employment relationship continues, for example because of a leave of absence, and only the principal duties are suspended.¹⁰

¹⁰ CJEU of 13 September 2017 – C-569/15 – *Staatssecretaris van Financiën*, para. 21 et seq.

Opinion of Advocate General de la Tour of 20 January 2022 – C-328/20 – Commission v Austria

Law: Articles 4, 7 and 67 of Regulation (EC) No 883/2004, Article 7(2) of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union

Keywords: Coordination of social security systems – Freedom of movement for workers – Equality of treatment – Family benefits – Social and tax advantages – Adjustment of the amount of benefits and advantages in line with the price level in the children’s State of residence

Core statement: The Austrian legislation on the adjustment of the amount of family benefits and social and tax advantages for persons working in Austria whose children reside in another Member State is contrary to the principle of equal treatment set out in both Article 4 Regulation No 883/2004 and Article 7(2) Regulation No 492/2011.

Note: The Republic of Austria grants family allowance (similar to child benefit in Germany) in the form of lump-sum cash payments as well as a number of social and tax benefits for families. However, for employed persons whose children have their habitual residence in another Member State of the Union, Austrian law provides since 2019 for an adjustment of these benefits in line with the price level of the child’s country of residence. The Commission considers this to be an infringement of Articles 7 and 67 of the Coordination Regulation on the one hand and of Article 4 of the Coordination Regulation and Article 7(2) of the Free Movement Regulation on the other and has initiated infringement proceedings against Austria.

In the view of Advocate General, those benefits are subject to the general rule set out in Article 7 Regulation No 883/2004, entitled ‘Waiving of residence rules’, relating in particular to the amount of cash benefits, since that article provides that those benefits are not to be subject to any reduction or amendment on account of the fact that the beneficiary or the members of his or her family reside in a Member State other than that in which the institution responsible for providing benefits is situated. That rule reiterates the principle of the exportability of social security benefits laid down in point (b) of the first paragraph of Article 48 TFEU. To fix the amount of those benefits on the basis of the residence of family members therefore constitutes an infringement of the right of free movement conferred on EU citizens (para. 63).

That system is based on the general idea that, if a migrant worker pays social contributions and taxes in a Member State, he or she must be able to benefit from the same allowances as nationals of that State. That system would be rendered ineffective if one of the Member States was entitled to adjust the amount of benefits in line with the recipient’s place of residence (para. 68).¹¹

The Advocate General also qualifies the regulation as indirect discrimination against migrant workers on the ground of nationality (Article 4 Coordination Regulation and Article 7(2) Free Movement Regulation) (para. 130). The regulatory objectives pursued, according to which the benefits granted to families with children in Austria and in other Member States are to be equivalent in value, cannot be upheld, as the benefits are granted as a lump sum (para. 135 et seq.). In order to achieve the objective of the functioning and balance of the social security system, he also considers that the difference in treatment according to the place of residence of the child of worker concerned is neither appropriate nor necessary in order to establish or restore the supportive function and the fairness of the social system. Austrian family allowances are financed by employers’ contributions calculated on the basis of the total

¹¹ CJEU of 18 September 2019 – C -32/18 – *Moser*, para. 42 and 46.

amount of workers' wages, a migrant worker therefore participates in the same way as a national worker in determining the amount of the sums paid by his or her employer (para. 144 et seq.).

If the CJEU follows the opinion of Advocate General, this would not mean any change for the granting of child benefits in Germany. In addition to residence or habitual abode in Germany, the only condition for entitlement for EU citizens is full tax liability or limited tax liability when included in social security law.

Opinion of Advocate General Emiliou of 3 February 2022 – C-576/20 – Pensionsversicherungsanstalt

Law: Article 44(2) Implementing Regulation (EC) No. 987/2009

Keywords: Social security for migrant workers – Coordination of social security systems – Examination of entitlement to an old-age pension – Taking into account child-raising periods completed in another Member State – Professional activity exercised in only one Member State

Core statement: EU law does not require a Member State on whose territory a person has been an employed or a self-employed person to take into account a child-raising period completed by that same person in another Member State as if the child had been raised in its own territory unless all the conditions laid down in Art. 44(2) of the Regulation are met in the situation at issue.

New pending cases

Request for a preliminary ruling from the Juzgado de lo Social nº 26 de Barcelona (Spain), lodged on 19 November 2020 – C-625/20 – KM v Instituto Nacional de la Seguridad Social (INSS)

Law: Article 4 Equal Treatment Directive 79/7/EEC, Article 5 Equal Treatment Directive 2006/54/EC

Keywords: Indirect discrimination on the ground of sex or gender, gender distribution in the different Spanish Social Security schemes

Request for a preliminary ruling from the Cour de cassation du Grand-Duché de Luxembourg (Luxembourg), lodged on 1 December 2021 – C-731/21 – GV v Caisse nationale d'assurance pension

Law: Articles 18, 45 and 48 TFEU, Article 7(2) Free Movement Regulation (EU) No. 492/2011

Keywords: Survivor's pension – Civil partnership – Registration as a condition of recognition – Unequal treatment on grounds of nationality

Request for a preliminary ruling from the Tribunal du travail francophone de Bruxelles (Belgium), lodged on 20 January 2022 – C-45/22 – Service fédéral des Pensions

Law: Article 55(1)(a) Coordination Regulation (EC) No 883/2004

Keywords: Survivor's pension – Double benefit – Prohibition of accumulation

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9. Temporary agency work

Decisions

Judgment of the Court (Second Chamber) of 17 March 2022 – C-232/20 – Daimler

Law: Article 1(1), Article 5(5), Article 10, Article 11 Temporary Agency Work Directive 2008/104

Keywords: 'Temporary' agency work – Filling a permanent job with temporary agency work – Successive assignments – Penalties – Derogation by the social partners from the maximum duration laid down by the national legislature

Core statement: 1) The term 'temporarily' used in Article 1(1) Temporary Agency Work Directive does not preclude the permanent employment of fluctuating temporary workers, even if they are deployed in permanent jobs and not only on a temporary basis.

2) An assignment of a temporary worker of 55 months is abusive if it results in a period of employment which is longer than what may reasonably be characterised as 'temporarily', in the light of all the relevant circumstances, taking into account all the relevant circumstances, in particular the specific nature of the sector, and in the context of the national legislative framework, without any objective explanation being given for the fact that the user undertaking concerned has recourse to a series of successive temporary employment contracts'. It is for the referring court to decide.

3) Where a Member State prescribes a maximum assignment period of the same temporary agency worker to the same user undertaking, a transitional provision which does not take account of periods prior to the entry into force of that provision when calculating the period is not permissible. In a legal dispute between private parties, however, this provision is not to be disregarded solely on the grounds of a violation of Union law.

4) Even if national law does not provide sufficient penalties for non-compliance with that directive, a temporary agency worker cannot derive a individual right to establish an employment relationship with the user undertaking from Union law.

5) The social partners in the user undertaking's branch may be permitted under national law to derogate from a maximum assignment period of a temporary agency worker otherwise applicable under national law.

Note: What does the term 'temporary' in the context of the Temporary Agency Work Directive mean? In Germany, a temporary agency worker may be assigned to the same company for 18 months and must then leave (for at least three months), section 1(1) sentence 4, (1b) Act on Temporary Agency Work (AÜG). Subsequently, another temporary worker can be deployed to the same job. There are collective agreements that further extend the maximum period of temporary employment for the specific employees (section 1(1b), sentence 3 AÜG), also with the justification of providing the temporary agency workers in question with a longer-term perspective in the company under the application of 'equal pay'. The applicant in the present case argued that a transfer period of 55 months can no longer be considered as 'temporary'. The Berlin-Brandenburg Regional Labour Court (LAG Berlin-Brandenburg)¹² has referred the question to the CJEU as to whether such a case structure is in conformity with EU law.

¹² LAG Berlin-Brandenburg of 13 May 2020 – 15 Sa 1991/19.

After the legal questions on the duration of temporary agency work had remained unresolved for a long time, the CJEU had already anticipated some issues of the present decision in the *KG* case on 14 October 2020,¹³ but also left room for interpretation. The Court had inferred a justiciable requirement for the duration of temporary assignments from the interplay between the stipulation that temporary work must be ‘temporary’ and the prohibition of the abuse of temporary work and the circumvention of protective provisions, Article 5 (5) of the Directive¹⁴, but left the detailed principles of interpretation open. At least, it did indicate that temporary work must not become a permanent situation for a worker and that a series of successive temporary work contracts can constitute a circumvention of the provisions of the Directive, ‘especially’, but not only, if the temporary worker is assigned to the same user undertaking.¹⁵

Remarkably, in the *Daimler* ruling, the CJEU explicitly refused to infer from the ‘temporary’ that the filling of a permanent job with changing temporary workers is prohibited from the outset. In addition, it refrained from explaining the EU law requirements of ‘temporary’ in more detail. As a dogmatic connecting factor, the Court again referred to the prohibition of circumvention in Article 5(5) Temporary Agency Work Directive, although the Regional Labour Court did not refer to this provision in the question referred. It then left the Member State courts with a wide margin of appreciation in the interpretation – and the Member States in the determination of the sanctions against infringements – once again and in confirmation of the aforementioned decision of 14 October 2020. The CJEU has missed an opportunity to harmonise the Member States’ provisions on temporary agency work, to make the ‘temporary’ nature of temporary agency work relevant in practice and thus to help workers in temporary agency work to achieve a more effective protection concept.

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10. Transfer of business

New pending cases

Request for a preliminary ruling from the Supremo Tribunal de Justiça (Supreme Court, Portugal), lodged on 27 October 2021 – C-675/21 – Strong Charon

Law: Article 1, 3 Transfer of Undertakings Directive 2001/23/EC

Keywords: Contract Succession – Absence of a contractual relationship – Transfer of the economic entity – Takeover of only one employee

Note: The plaintiff in the main proceedings worked for the security company Strong-Charon and was employed as a security guard at the industrial facilities of a client. Strong-Charon lost this contract to the company 2045-Empresa de Segurança. The latter continued the order with some of the client's equipment and (intangible) assets and the same number of workers, taking over one of the four employees of Strong-Charon's economic unit. However, the plaintiff was not employed by either company after the reallocation, against which he took legal action.

¹³ CJEU of 14 October 2020 – C-681/18 – *KG*, more on the decision, for example, note *Klengel*, in: [HSI-Report 3/2020](#), p. 4; *Franzen*, NZA 2021, 24; *Brors AuR* 2021, 156; *Stiebert/Pohl*, ZESAR 2021, 241.

¹⁴ CJEU of 14 October 2020 – C-681/18 – *KG*, para. 63: ‘to preserve the temporary nature of temporary agency work’; *Klengel*, in: [HSI-Report 3/2020](#), p. 4, dissenting view *Stiebert/Pohl*, ZESAR 2021, 241.

¹⁵ CJEU of 14 October 2020 – C-681/18 – *KG*, para. 60, 74, repeated verbatim by CJEU of 17 March 2022 – C-232/20 – *Daimler*.

The decisive factor in this case is whether succession of the contract is to be classified as a transfer of an undertaking. According to the CJEU¹⁶, the requirement of 'legal transfer' (Article 1(1) Transfer of Undertaking Directive) is to be interpreted broadly, so that the succession to the contract may also be covered. In addition, the referring court would like to know whether the mere fact that the customer also provides the equipment to the new service provider can establish the transfer of the economic entity if, at the same time, the main workforce and intangible assets are not transferred, which seems questionable to the court, especially under the aspect that it would be economically unreasonable to require the customer to replace the equipment.

For the CJEU, the decisive factor is an overall assessment that takes into account each criterion of the so-called seven-point catalogue¹⁷. A categorisation, e.g. according to activities with a high or low level of equipment and an isolated consideration¹⁸ of the circumstances thus falls short¹⁹. Similarly, it is not enough to demand the cumulative existence of the individual identity-creating criteria.²⁰ Following on from this, the referring court asks, thirdly, whether the decision should also take into account the fact that the Transfer of Undertakings Directive is also intended to create a fair balance between the interests of the employees and those of the transferee.²¹

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11. Working time

Decisions

Judgment of the Court (Second Chamber) of 24 February 2022 – C-262/20 – Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto

Law: Article 8, Art. 12 (a) Working Time Directive 2003/88/EC, Article 20, 31 Charter of Fundamental Rights

Keywords: Working time of police officers and firefighters – Health protection during night work – National regulation according to which night work is shorter than the normal duration of day work – Equal treatment between workers in the private sector and those in the public sector, including police officers and firefighters, as regards the duration of night work

Core statement: 1) The Working Time Directive does not impose an obligation on Member States to adopt national rules providing that the normal duration for night work is shorter than for day work. However, the workers concerned must be granted other protective measures in terms of working time, pay and compensation in order to compensate for the particular burden of the night work performed.

¹⁶ CJEU of 7 March 1996 – C-171/94 and C-172/94 – *Merckx and Neuhuys*, para. 30; CJEU of 19 October 2017 – C-200/16 – *Securitas*, para. 22 et seq.; cf. on German law e.g. BAG of 11 December 1997 – 8 AZR 729/96.

¹⁷ CJEU of 11 March 1997 – C-13/95 – *Süzen*, para. 14; CJEU of 27 February 2020 – C-298/18 – *Grafe and Pohle*, para. 29 et seq., Notes in *HSI Report 1/2020*, p. 21.

¹⁸ CJEU of 20 November 2003 – C-340/01 – *Abler et al.*, para. 33 et seq.

¹⁹ In its decision of 19 March 2015 – 8 AZR 150/14 para. 24, the BAG distanced itself from the categorisation in its previous case law.

²⁰ Greiner/Pionteck, RdA 2020, 84, 87.

²¹ Thus generally CJEU of 26 March 2020 – C-344/18 – *ISS Facility Services NV*, para. 26, Notes in *HSI-Report 1/2020*, p. 22 et seq.; critically on the significance of this finding *Klengel*, *Kollektivverträge im EU-Betriebsübergangsrecht*, 2020, p. 167 et seqq.

2) Legislation which sets a normal night working time of seven hours for workers in the private sector does not compulsorily apply to workers in the public sector if this difference in treatment is based on an objective and reasonable criterion.

Note: The starting point of the proceedings is the claim of a Bulgarian firefighter against his employer for remuneration for night work. The plaintiff is a shift supervisor in the fire and civil protection department of the Ministry of the Interior. Bulgarian labour law provides that normal day work is eight hours, but night work is only seven hours. However, civil servants of the Ministry of Interior, such as police officers and firefighters, are excluded from this rule (para. 69). The referring court asks the CJEU whether Article 8 and Article 12(a) of the Working Time Directive require the adoption of national legislation which provides that the normal duration of night work is also shorter than the normal duration of day work for public sector workers (para. 35).

Underlining the special importance of the rest period (para. 38), the CJEU concludes that while Article 8 of the Working Time Directive prescribes a maximum duration of night work, Article 12(a) of the Working Time Directive, which is also relevant, grants the Member States a significant discretion with regard to the concrete measures to be taken (para. 48). There is no regulation under EU law which contains a relationship between the normal duration of night work and that of day work, so that the normal duration of night work can be determined independently of day work (para. 49). This leads to the conclusion that the Working Time Directive does not contain such an obligation to adopt a regulation fixing the duration of night work. However, it must be ensured by the Member States that night workers are granted other protective measures in terms of working time, pay and compensation in order to compensate for the special burden of night work (para. 51).

By its second question, the referring court asks whether a distinction established by national law between workers in the private sector and those in the public sector is contrary to the principle of equal treatment in Articles 20 and 21 CFR. Here, the CJEU states that a difference of treatment such as in the present case is justified if that 'difference of treatment is based on an objective and proportionate criterion, that is to say, if it is related to a legally legitimate aim pursued by that legislation and if it is proportionate to that aim.' (para. 80). However, the reasons reproduced by the referring court, which are the basis of the current situation of public servants, are purely legal and economic considerations and are not sufficient to justify the difference in treatment at issue in the main proceedings (para. 76).

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III. Proceedings before the ECtHR

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1. Equal Treatment

Decisions

Judgment (Third Section) of 8 March 2022 – No. 12736/10 – Zakharova and Others v. Russia

Law: Article 14 ECHR (prohibition of discrimination) in conjunction with Article 11 ECHR (freedom of assembly and association).

Keywords: Discrimination on the grounds of trade union membership – Termination of employment – Prima facie case of discrimination – Shifting the burden of proof

Core statement: In order to ensure effective legal protection against discriminatory treatment, states are obliged under Article 11 ECHR and Article 14 ECHR to establish a judicial system that ensures real and effective protection against anti-union discrimination.

Note: The three applicants work at a municipal youth educational institution in *Ostrov*. As trade union members, they are volunteers in a trade union of employees for education and science. Due to organisational conflicts between district branches of this trade union, an independent trade union was established in May 2008, which the applicants joined and to whose executive committee they were elected. The applicants were told by their employer to either resign from their employment or to leave the independent union. The applicants refused to comply with these requests. In September 2008, the employer unilaterally reduced their working hours and thus their salaries. Citing the need to make staff redundant, the employer dismissed the applicants' employment in November 2008, at which time collective agreement negotiations was underway with the independent trade union in which the applicants participated as volunteer officers. The actions brought against the dismissals resulted in a declaration that the dismissals were unlawful and in the reinstatement of the applicants. Both the first instance court and the Court of Appeal based their decisions on the lack of consultation with the trade union, which is a prerequisite for dismissal by the employer under national law. In addition, the employer had failed to prove the necessary reduction in staff. The courts rejected the applicants' claim that they had been discriminated against because of their trade union activities.

The Court considers the complaint alleging a violation of Article 14 ECHR in conjunction with Article 11 ECHR admissible. Even though the applicants were reinstated as a result of the judicial decisions on dismissals, the national authorities and courts have neither recognised a violation of the rights deriving from Article 14 ECHR in conjunction with Article 11 ECHR nor provided any remedy in this respect.²²

With regard to the merits of the complaint, the Court reiterates that persons affected by discriminatory treatment must have the possibility under domestic law to seek legal redress

²² ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*.

against it. Therefore, under Art. 11 ECHR and Art. 14 ECHR, states are obliged to establish a judicial system that ensures real and effective protection against anti-union discrimination.²³ As regards proving discriminatory treatment, the Court refers to its previous case law²⁴, according to which, where there is prima facie evidence, it is for the government to show that the discrimination was justified. It follows that in cases where workers are discriminated against, it is necessary to shift the burden of proving the absence of discrimination to the employer. The European Committee of Social Rights of the Council of Europe²⁵ and the ILO's Committee on Freedom of Association²⁶ also see the need to shift the burden of proof to the employer in employment discrimination cases. A prima facie case may follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted facts and presumptions, whereby the courts are bound by the principles of the free evaluation of all evidence.²⁷ Applying these principles, the Court assumes the existence of prima facie evidence. The applicants experienced discriminatory treatment in the immediate aftermath of their trade union activities. The employer was unable to demonstrate that the dismissals were related to an intended reduction in staff. This suggests a strong presumption that the union activities were the reason for the dismissals. Such prima facie evidence is sufficient to shift the burden of proving the absence of discriminatory treatment to the employer. It is not sufficient for the employer to claim that the discrimination alleged by the employee is unsubstantiated.²⁸ Since the domestic courts have admitted or rejected the applicants' allegation of discrimination without examining it, the State has failed to fulfil its positive obligations to ensure effective and clear judicial protection against discrimination. The Court therefore found a violation of Article 14 ECHR in conjunction with Article 11 ECHR and awarded the applicants compensation of 7,500 € each.

The result of this case law with regard to the shifting of the burden of proof corresponds to the legal situation applicable in Germany under section 22 General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG), the principles of which are also likely to be transferable to discrimination on grounds of trade union membership contrary to Article 9(3) of the German Constitution (Grundgesetz).

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2. Freedom of association

Decisions

Judgment (Third Section) of 15 March 2022 – No. 21881/20 – Geneva Community for Trade Union Action (CGAS) v Switzerland

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

Keywords: Trade union demonstration on 1 May – Ban on public assemblies due to Covid 19 pandemic – Necessity of the measure

²³ ECtHR of 30 July 2009 – No. 67336/01 – *Danilenkov and others v. Russia*.

²⁴ ECtHR of 13 November 2007 – No. 57325/00 – *D. H. and Others v. Czech Republic*.

²⁵ *Digest of the case law of the European Committee of Social Rights, December 2018*.

²⁶ *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fifth (revised) edition, 2006*.

²⁷ ECtHR of 23 June 2016 – No. 20261/12 – *Bakav. Hungary*.

²⁸ ECtHR of 31 July 2012 – No. 20546/07 – *Makhashev v. Russia*; ECtHR of 7 October 2014 – No. 28499/02 – *Begheluri v. Georgia*.

Core statement: A general measure justifying an interference with the right to liberty requires a solid justification as well as a particularly thorough and valid review with the content of a balancing of interests by the national courts.

Note: The applicant is a non-profit association established under Swiss law to defend the interests of workers and its member organisations, particularly in the field of trade union and democratic freedoms. It regularly organises trade union demonstrations in the canton of Geneva. In order to contain the Corona pandemic, the Swiss government issued numerous decrees on 13 March 2020, including bans on assembly until 30 May 2020.

In her appeal, the applicant claims that on the basis of the Covid 19 regulations it was prohibited from organising the demonstrations for 1 May 2020 and was therefore forced to withdraw the permit it had applied for. Thus, its right to freedom of assembly had been violated.

According to the Court's case law²⁹, non-profit associations cannot themselves invoke respect for the human rights accorded to their members. However, since the applicant, whose purpose was, inter alia, to organise trade union demonstrations, was prevented from achieving this statutory purpose by the Covid 19 measures, the Court concedes that it is a victim of a human rights violation within the meaning of Article 34 ECHR.

As regards exhaustion of remedies, the Court emphasises that Article 35 ECHR must be assessed in the context of the circumstances of each individual case and the provision must be applied with a certain flexibility and without excessive formalism.³⁰ Therefore, not only the remedies theoretically provided for in the domestic legal system, but also the legal and political context as well as the personal situation of the respective applicants have to be taken into account.³¹ With regard to the particular health and political situation in the context of the Corona measures, the Court assumes that the applicant did not have an effective legal remedy against a violation of freedom of assembly under domestic law, so that the exhaustion of domestic legal remedies was not relevant. The Federal Court responsible for assessing the constitutionality of the Covid 19 Regulations had not examined the compatibility of these regulations with the freedom of assembly. The appeal was therefore to be considered admissible as a whole.

On the merits of the complaint, the Court, referring to its case-law³², assumes that the state measures to combat the Covid 19 pandemic constitute an interference with Article 11 ECHR. In assessing whether such interference is necessary in a democratic society, the Court recognises that there is a serious risk to public health from the Covid 19 pandemic and that knowledge about the danger of the virus was very limited at the beginning of the pandemic. Therefore, states had to react quickly. However, a total ban on assembly means such a radical measure, which requires a particularly thorough and valid justification, with the different interests having to be weighed against each other by the domestic courts.³³ In the present case, such a weighting of interests by the Swiss courts, including the Federal Supreme Court, had not taken place. Particularly because of the urgency of the Covid 19 measures, independent and effective judicial review of these measures taken by the executive would have been all the more important. Although the Court does not fail to

²⁹ ECtHR of 29 February 2000 – No. 45053/98 – *Association des amis de Saint-Raphaël et de Fréjus and others v. France*; ECtHR of 5 February 2002 – No. 51564/99 – *Čonka v. Belgium*.

³⁰ ECtHR of 19 March 1991 – No. 11069/84 – *Cardot v. France*; ECtHR of 22 June 1972 – No. 2614/65 – *Ringeisen v. Austria*.

³¹ ECtHR of 16 September 1996 – No. 21893/93 – *Akdivar v. Turkey*.

³² ECtHR of 15 October 2015 – No. 37553/05 – *Kudrevičius and Others v. Lithuania*.

³³ ECtHR of 19 January 2021 – No. 14065/15 – *Lacatus v. Switzerland*; ECtHR of 6 October 2005 – No. 74025/01 – *Hirst v. United Kingdom*; ECtHR of 8 January 2009 – No. 29002/06 – *Schlumpf v. Switzerland*.

recognise the threat to society and public health posed by the Covid 19 pandemic, the interference with the applicant's freedom of assembly was disproportionate to the aim pursued, given its importance in a democratic society. Moreover, the domestic courts did not review the constitutionality of the impugned measures. The Court therefore found a violation of Article 11 ECHR and considered this finding as adequate compensation for the non-material damage.

Judge *Krenc* delivered a concurring opinion, which was joined by Judge *Pavli*. They emphasised that an exceptional and uncertain situation such as the Covid 19 pandemic poses major and complex challenges for domestic authorities in terms of restrictions on fundamental freedoms. In this respect, the Court's judgment sets standards for the preservation of the rule of law as defined by the ECHR.

Judge *Seibert-Fohr* and Judges *Ravarani* and *Roosma*, in a joint dissenting opinion, already criticised the Court's decision on the admissibility of the appeal because of the lack of exhaustion of legal remedies. The applicant could have maintained the application for authorisation of the demonstration and appealed against a negative decision. Moreover, the Court's decision wrongly placed the right to freedom of assembly above the protection of public health.

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3. Freedom of expression

Decisions

Judgment (Second Section) of 1 March 2022 – No. 16695/19 – *Kozan v. Turkey*

Law: Article 10 ECHR (freedom of expression) in conjunction with Article 13 ECHR (right to effective remedy)

Keywords: Disciplinary measure against a judge – Criticism of the judicial system – Publication of a press article on a Facebook page

Core statement: A debate on judicial power concerns a socio-political discourse in which judges, despite the duty of restraint imposed on them, are not prevented from participating and making personal statements on the subject.

Note: The applicant has been a judge at a criminal court in *Van* since 2011 and a member of the jury court in *Sivas* province since July 2015. On 27 May 2015, a press article was published on the role of the judiciary in the December 2013 corruption scandal, in particular criticising certain decisions of the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* [HCJP]) and questioning its independence from the executive. The applicant made this article available to the participants of a private Facebook group consisting of professionals of the judiciary and members of legal academia. The article triggered a lively discussion among the members of the Facebook group about the state of the judiciary in Turkey. Disciplinary proceedings were initiated against the applicant as a result of the publication for breaching his duties of loyalty. The HCJP issued a reprimand against the applicant because the circulation of the article was seen as an approval of the criticism expressed in it. This behaviour was incompatible with the dignity of the office of a judge. The appeal against the decision was unsuccessful before the HCJP's General Assembly, so that the disciplinary order became final in 2018.

The applicant considers that the disciplinary measure violates his right to freedom of expression under Article 10 ECHR. In addition, he complains about the lack of an effective remedy within the meaning of Article 13 ECHR, as there is no possibility of judicial review of the HCJP's decisions under national law.

The Court, referring to its previous case law³⁴, emphasises that the general principles developed with regard to freedom of expression also apply to judges. In a democratic society, questions of the separation of powers and, in particular, the preservation of the independence of the judiciary are important for the general interest.³⁵ Even if these are political issues, judges are not prevented from participating in the debate.³⁶ This also applies when members of the judiciary can be expected to exercise their freedom of expression with restraint in view of their independence and neutrality.³⁷ The right to freedom of expression also extends to the dissemination of information via the internet and must be guaranteed in particular when using so-called social media sites.³⁸

Applying these principles, the Court assumes that the disciplinary measure, which is legally provided for under domestic law, still pursues the legitimate aim of maintaining the authority and impartiality of the judiciary. However, the disciplinary measure imposed on the applicant does not meet a compelling social need and therefore does not constitute a necessary measure in a democratic society within the meaning of Article 10(2) ECHR. In making this assessment, it must be taken into account that the applicant disseminated a press article containing value judgments in connection with a debate on the independence of the judiciary. The mere dissemination of the article does not mean that the applicant agrees with the opinion contained therein. In addition, the imposition of a disciplinary measure on a judicial body has a deterrent effect on the entire profession. In view of the paramount importance of the right to freedom of expression, the disciplinary order is in no way justified and therefore violates Article 10 ECHR.

In previous decisions³⁹ the Court has already found that the HCJP lacks the necessary impartiality, so that in the present case, too, the applicant had no legal remedy within the meaning of Article 13 ECHR. The Court therefore found a violation of Article 10 ECHR in conjunction with Article 13 ECHR and awarded the applicant compensation in the amount of 6,000 €. The Court therefore found a violation of Article 10 ECHR in conjunction with Article 13 ECHR.

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³⁴ ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

³⁵ ECtHR of 23 April 2015 – No. 29369/10 – *Morice v. France*.

³⁶ ECtHR of 28 October 1999 – No. 28396/95 – *Wille v. Liechtenstein*.

³⁷ ECtHR of 28 October 1999 – No. 28396/95 – *Wille v. Liechtenstein*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

³⁸ ECtHR of 18 December 2012 – No. 3111/10 – *Ahmet Yıldırım v. Turkey*.

³⁹ ECtHR of 13 November 2008 – No. 76292/01 – *Kayasu v. Turkey*; ECtHR of 19 October 2010 – No. 20999/04 – *Özpinar v. Turkey*.

4. Procedural law

Decisions

Judgment (First Section) of 17 February 2022 – No. 46586 – d'Amico v. Italy

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

Keywords: Calculation of the amount of a survivor's pension – Change of national case-law by retroactive amendment of the law

Core statement: The principle of the rule of law and the right to a fair trial preclude any interference by the legislature in the administration of justice if the purpose is to influence judicial decisions.

Note: In the Italian pension system, according to the legal situation in force since 1959, a distinction was made in the granting of retirement pensions for public and private sector employees. Public sector pensions consisted of a percentage of the last salary earned and fringe benefits (e.g. cost-of-living allowance), the latter being paid in full. Private sector employees' pensions resulted from a percentage of the last salary earned, with benefits also reduced on a percentage basis. In 1994 and 1995, laws were passed to harmonise the two pension systems. These had the effect that also fringe benefits of civil servants' pensions were determined by taking into account the percentage used to calculate the pension. For pensioners who received their pension before the change in the law came into force, the original regulations continued to apply as vested rights.

The applicant's husband retired on 1 January 1990 and received a civil servant's pension according to the regulations in force at that time. When he died on 1 April 2002, the applicant was granted a survivor's pension, in the calculation of which the fringe benefits were reduced by the pension-law percentage. In her action, she claimed that, in light of the vested rights provisions, the fringe benefits had to be included in the calculation of the survivor's pension in the unreduced amount. The competent Court of Auditors upheld the action with reference to the case law of the national courts, according to which the harmonisation of pension schemes only applied to pensions granted after 1 January 1995. While the appeal against the decision was pending, a law came into force on 1 January 2007 on the basis of which the calculation of survivors' pensions had to be carried out independently of vested rights applicable until then. On the basis of this new legislation, the Court of Appeal annulled the first instance decision and dismissed the case.

The applicant claims that she is being violated in her right to a fair trial under Article 6 ECHR by a legal change that occurred during her ongoing court proceedings, which deviated from the legal situation that had been in force until then.

The Court emphasises that a national legislature is not prevented from adopting new retroactive provisions in order to amend existing laws.⁴⁰ However, it follows from the principle of the rule of law that interference by the legislature with the case-law currently in force is excluded if it is intended to influence a judicial decision of a dispute.⁴¹ Statutory pension regulations can be changed and no guarantee of the existence of such a regulation for the

⁴⁰ ECtHR of 7 November 2000 – No. 39374/98 – *Anagnostopoulos and Others v. Greece*.

⁴¹ ECtHR of 28 October 1999 – Nos. 24846/94 and 34165/96 to 34173/96 – *Zielinski and Pradal and Gonzalez and Others v. France*.

future follows from a judicial decision.⁴² Nevertheless, the state may not arbitrarily interfere in the judicial process.⁴³

In the present case, the calculation of survivors' pensions was determined by statutory provisions, which were confirmed by final decisions of the national courts. The enactment of the laws in 2007, while the applicant's case was pending, interfered with the legal dispute to her detriment, without compelling reasons of general interest justifying it. However, respect for the principle of the rule of law and the principle of a fair trial requires that the justification of such a measure be examined with the greatest possible care.⁴⁴ In this context, it is not sufficient to justify the amendment of the law on the grounds of unequal treatment of pensioners. Financial considerations alone cannot justify the legislature's intervention to settle disputes.⁴⁵ The Court therefore found a violation of Article 6 ECHR and ordered the respondent government to pay compensation of 9,700 € to the applicant.

Judgment (Third Section) of 1 February 2022 – No. 4418/18 – Kramareva v. Russia

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

Keywords: Participation of a public prosecutor in unfair dismissal proceedings – Public prosecutor as independent observer without special powers – Principle of equality of arms

Core statement: The principle of equality of arms as an element of a fair trial grants each party a reasonable opportunity to present its case under conditions that do not put it at a substantial disadvantage vis-à-vis its opponent.

Note: The applicant challenged the dismissal for operational reasons of her employment relationship which existed with a state-owned enterprise before the *Preobrazhensky* District Court in Moscow. In her complaint, she sought a declaration that the dismissal was invalid, reinstatement, payment of compensation and the surrender of her employment papers. During the oral hearing before the court, a public prosecutor was present who gave an opinion according to which the action should be dismissed with the exception of the claim for the surrender of the employment papers. The court upheld the action with regard to the surrender of the working papers and the payment of compensation. In all other respects, the action was dismissed. In the appeal proceedings, the public prosecutor's office was again represented and defended the first instance judgment, which was upheld on appeal. Further appeals before the Supreme Court were unsuccessful.

The applicant claims that the participation of the public prosecutor in the dismissal protection proceedings did not grant her a right to equality of arms in the judicial proceedings and therefore deprived her of the right to a fair trial under Article 6 ECHR.

The Court reiterates that the principle of equality of arms is a fundamental element of a fair trial within the meaning of Article 6 and must guarantee the parties a reasonable opportunity to present their views in a manner that does not place them at a substantial disadvantage vis-à-vis the litigant.⁴⁶ The mere fact that a public prosecutor, as an independent member of the domestic judiciary, participates in civil proceedings outside the field of criminal law does

⁴² ECtHR of 13 April 2006 – No. 75470/01 – *Sukhobokov v. Russia*.

⁴³ ECtHR of 18 January 2007 – No. 69524/01 – *Bulgakova v. Russia*.

⁴⁴ ECtHR of 31 March 2011 – No. 46286/09 – *Maggio and Others v. Italy*.

⁴⁵ ECtHR of 28 October 1999 – Nos. 24846/94 and 34165/96 to 34173/96 – *Zielinski and Pradal and Gonzalez and Others v. France*; ECtHR of 29 March 2000 – No. 36813/97 – *Scordino v. Italy*; ECtHR of 31 May 2011 – No. 46286/09 – *Maggio and Others v. Italy*.

⁴⁶ ECtHR of 24 April 2003 – No. 44962/98 – *Yvon v. France*; ECtHR of 7 June 2001 – No. 39594/98 – *Kress v. France*; ECtHR of 15 January 2009 – No. 42454/02 – *Menchinskaya v. Russia*.

not in itself lead to an impairment of the balance existing between the parties.⁴⁷ In particular, in cases against Russia, the Court had held that the participation of a public prosecutor in civil proceedings does not necessarily lead to a disadvantage of one of the parties.⁴⁸ In the present proceedings, too, it is not apparent from the appellant's submissions that the participation of the prosecutor affected the fairness of the proceedings and thereby violated the principle of adversarial procedure. The Court has therefore not found a violation of Article 6 ECHR.

Justice *Serghides*, in a dissenting opinion assumes a violation of the right to a fair trial. He considers that the participation of the public prosecutor in civil proceedings, as provided for by domestic law, has the aim of influencing the decisions of the courts and is therefore necessarily to the detriment of one of the parties. The right to a fair trial loses its effectiveness when a state organ (here: the public prosecutor's office) joins the proceedings in order to influence the court with regard to the outcome of the proceedings. In the opinion of Judge *Serghides*, therefore, not only a violation of Article 6 ECHR should have been found, but also appropriate compensation should have been awarded.

Judgment (Grand Chamber) of 15 March 2022 – No. 43572/18 – Grzęda v. Poland

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

Keywords: Polish judicial reforms – Weakening of judicial independence – Impairment of the right of access to court

Core statement: The concept of ‘civil rights and obligations’ within the meaning of Article 6 ECHR cannot be interpreted solely with reference to the domestic law of the respective state, but is an autonomous concept derived from the ECHR.

Note: The applicant has been a judge at the *Gorzów Wielkopolski* Administrative Court since 1986. In 2016, he was elected to the National Council for the Judiciary (NCJ) for a four-year term. As a result of the judicial reform implemented in Poland in 2017, he was dismissed from the NCJ before the end of the term. According to the applicant, there was no possibility to challenge this decision. He continues to be a judge at the Supreme Administrative Court.

Relying on Article 6 ECHR and Article 13 ECHR, the applicant complains that he was denied access to a court and lacked an effective remedy with regard to the decision on the early termination of his term in the NCJ.

The controversial Polish judicial reform of 2017 has already been the subject of several decisions of the Court of Justice, leading to the conclusion that the independence of the judiciary in Poland must be called into question.⁴⁹ This case law is now confirmed by the decision of the Grand Chamber. The Court ruled that although the dismissal from the judiciary at all is not at issue in this case, the early termination of the affiliation as judge to the NCJ also falls under the protection of Article 6 ECHR. The protection due to judges against arbitrariness by the legislature or the executive is to be guaranteed by the control of the judicial organs.⁵⁰ In this regard, the Court emphasises the importance of the NCJ with regard to the independence of the judiciary in the appointment and dismissal of judges. The Polish

⁴⁷ ECtHR of 14 March 2002 – No. 39832/98 – *Todorov v. Bulgaria*; ECtHR of 24 April 2003 – No. 44962/98 – *Yvon v. France*; ECtHR of 7 June 2001 – No. 39594/98 – *Kress v. France*.

⁴⁸ ECtHR of 1 April 2010 – No. 5447/03 – *Korolev v. Russia*; ECtHR of 26 May 2009 – No. 3932/02 – *Batsanina v. Russia*.

⁴⁹ ECtHR of 7 May 2021 – No. 4907/18 – *Xero Flor w Polsce sp. z o.o. v. Poland* (see HSI Report 2/21, V. 4.); ECtHR of 29 June 2021 – No. 26691/18 – *Broda u. Bojara v. Poland*; ECtHR of 22 July 2021 – No. 43447/19 – *Reczkowicz v. Poland*; ECtHR of 8 November 2021 – Nos. 49868/19 and 57511/19 – *Dolińska-Ficek and Ozimek v. Poland*.

⁵⁰ ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen v. Finland*.

judicial reform led to a weakening of judicial independence, as it placed the appointment of judges under undue control of the executive and legislative branches. Due to the lack of access to a court, the Court considers the applicant's right to a fair trial as defined in Article 6 ECHR to have been violated. The payment of compensation for non-material damage was rejected.

Judge *Lemmens* emphasises in an approving opinion that the judiciary, as part of the state power, has to protect the rights of citizens. When it becomes the plaything of political powers and lacks independence, this protection becomes an illusion in many cases.

In a partially dissenting opinion, Judges *Serghides* and *Felici* criticise the decision with regard to the rejection of compensation, as it renders the case law meaningless. In their opinion, the principle of effective protection of human rights inherent in the ECHR⁵¹ requires compensation for non-material damage in this case.

In a dissenting opinion, the Polish judge *Wojtyczek* considers Article 6 ECHR not applicable in the present case. Judicial independence exclusively concerns the institutional order of the separation of powers and not the individual rights of members of the judiciary. If judicial independence is made an individual right of the judge, the fundamental distinction in modern law between the individual and state organs is blurred and the rule of law is undermined.

New pending cases (notified to the respective government)

No. 47070/20 – *Levrault v. Monaco* (Fifth Section) – lodged on 19 October 2020 – delivered on 8 February 2022

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

Keywords: Non-renewal of a secondment – Duty to state reasons for an administrative decision

Note: The applicant was seconded to the judicial authorities of the Principality of Monaco as a staff member of the French judicial authorities from 1 September 2016 to 31 August 2019. He applied for an extension of the secondment, which was refused by the Monaco authorities without giving reasons. An action for annulment of this decision was unsuccessful.

The appeal challenges the right to a fair hearing, arguing that the decision to extend the secondment was not sufficiently reasoned and that it was manifestly arbitrary, misleading and in denial of justice.

No. 24735/16 – *Rullo and Others v. Italy* (First Section) – lodged on 26 April 2016 – delivered on 7 February 2022

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

Keywords: Transfer of undertaking – Recognition of previous periods of service – Applicability of retroactive legislation

Note: The applicants were originally employed by municipal authorities. The jobs were taken over by the Ministry of Education, Universities and Research on the basis of a statutory law. Their length of service with the local government was not fully recognised by the new employer, which resulted in a classification in a lower step of the respective grade. The applicants brought an action for classification in the grade corresponding to their actual seniority and for the determination of compensation to which they were entitled. After the first

⁵¹ ECtHR of 13 May 1980 – No. 6694/74 – *Artico v. Italy*.

instance rulings were issued, further legislation was passed confirming the employer's interpretation of the original legislation. In light of the new legislation, the claims were dismissed by the domestic courts. In particular, the Court of Cassation saw no reason to examine the constitutionality of the legal provisions.

The applicants claim that the retroactive application of the new legislation exerts an influence on the judicial decision, which would be a violation of Article 6 ECHR. Moreover, the questions for the Court are whether an interference was based on compelling reasons of general interest and whether it constitutes an excessive individual burden for the affected employees.

No. 45343/18 – Ottaviani and Others v. Italy (First Section) – lodged on 18 September 2018 – delivered on 7 February 2022

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

Keywords: Transfer of undertaking – Recognition of previous periods of service – Applicability of retroactive legislation

Note: See no. 24735/16 - *Rullo and Others v. Italy*

No. 37113/17 – Temeșan v. Romania (Fourth Section) – lodged on 17 May 2017 – delivered on 3 February 2022

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

Keywords: Private business relationship of a judge with the plaintiff's employer – Apprehension of bias on the part of the court

Note: The case concerns an employment dispute of the applicant against his employer about the continuance of the employment relationship. In the proceedings before the Labour Court, the applicant applied for the recusal of two judges of the Court of Appeal. He argued that one judge had business relations with his defendant employer, a bank, and that another judge had worked in the law firm representing the employer in the case against him before she became a judge. The court rejected the bias claims. The labour court case led to the termination of the employment relationship.

The appeal alleges a violation of Article 6 ECHR and complains about the lack of impartiality of the appellate court.

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5. Protection of Privacy

Decisions

Judgment (Fourth Section) of 8 February 2022 – No. 62250/19 – Jivan v. Romania

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

Keywords: Recognition of disability status – Balancing competing interests – Personal self-determination as a right to respect for private life

Core statement: The discretion granted to the state by the ECHR with regard to issues of social, economic and health policy is considerably restricted when the rights of disabled or elderly people in need of care are affected, so that weighty reasons are required for any restrictions on these rights.

Note: The applicant was born in 1930 and died in 2020. In 2015, he had a partial leg amputation. He also suffered from various diseases such as cataracts, hearing loss and incontinence. He was dependent on a wheelchair and most recently bedridden as he was no longer able to move his wheelchair on his own. He was assisted in his daily activities by his son. Based on an examination conducted in 2017 to assess his disability status, a commission determined that he had a *moderate* disability. The applicant challenged this decision before the *Bihor* District Court in 2019, seeking a finding of *severe* disability with the requirement of a personal assistant. The court granted the applicant's request. On the Commission's appeal against this, the judgment was overturned by the *Oradea* Court of Appeal in 2018, which found that the applicant's conditions could only be classified as a moderate disability.

The complaint, which was permissibly continued by the applicant's son after his death⁵², asserts that the refusal to grant a personal assistant interfered with his private life because it interfered with his self-determination and cut off his associated access to the outside world.

The Court reiterates that the concept of 'private life' within the meaning of Article 8 ECHR is to be understood broadly and includes the right to self-determination.⁵³ This is an important principle for the interpretation of the guarantees granted by Article 8 ECHR and concerns a particularly aspect of a person's existence and identity, a core right subject to the protection of the ECHR.⁵⁴ As the applicant was dependent on constant assistance due to his health condition, the domestic authorities were obliged to take measures to ensure his self-determination and dignity and thus his right to respect for private life under Article 8 ECHR.

Although the ECHR gives the wide discretion in matters of general policy, including social, economic and health policy,⁵⁵ this is significantly limited when it comes to the rights of vulnerable groups who are at risk of being discriminated against. These include, in particular, people with disabilities or older people in need of care. Very serious reasons are needed to restrict the rights of these people.⁵⁶ Applying these principles, the Court finds that the national authorities, in their assessment of the applicant's medical condition, did not sufficiently take into account his right to self-determination and respect for his dignity. In particular, they did not pay attention to the impact of his health impairment on his life and did

⁵² ECtHR of 28 September 1999 – No. 28114/95 – *Dalban v. Romania*; ECtHR of 17 December 2020 – No. 73544/14 – *Mile Novaković v. Croatia*; ECtHR of 15 January 2019 – No. 55303/12 – *Kanal v. Turkey*.

⁵³ ECtHR of 27 August 2015 – No. 46470/11 – *Parrillo v. Italy*.

⁵⁴ ECtHR of 29 April 2002 – No. 2346/02 – *Pretty v. United Kingdom*.

⁵⁵ ECtHR of 20 May 2014 – No. 4241/12 – *McDonald v. United Kingdom*.

⁵⁶ ECtHR of 22 March 2016 – No. 23682/13 – *Guberina v. Croatia*; ECtHR of 20 May 2010 – No. 38832/06 – *Alajos Kiss v. Hungary*; ECtHR of 18 February 2020 – No. 3891/19 – *Cînta v. Romania*.

not make arrangements to provide him with the assistance he constantly needed. The domestic authorities therefore failed to provide the applicant, an elderly disabled person, with effective protection of the right to respect for private life. The Court therefore found a violation of Article 8 ECHR and awarded the applicant's son compensation of 8,000 €.

Judgment (Second Section) of 18 January 2022 – No. 14833/18 – Adomaitis v. Lithuania

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

Keywords: Disciplinary proceedings – Interception of telephone conversations – Necessity of the intervention

Core statement: The interception of telephone conversations constitutes a very serious interference with a person's rights and can only be justified by very serious reasons, such as reasonable suspicion of serious criminal offences.

Note: Disciplinary proceedings were initiated against the applicant, the director of *Kybartai* Prison, on suspicion of abuse of office. He was suspected of having provided inmates with benefits in return for payment. Because of the accusations, a public prosecutor's investigation was initiated at the same time, the subject of which was the monitoring of the applicant's telephone traffic. The information gathered confirmed the suspicions. The results of the investigation were used in the disciplinary proceedings and led to the applicant's removal from office.

In addition to a violation of Article 6 ECHR, which is justified by the applicant's lack of access to the information obtained in the preliminary proceedings, the applicant alleges a violation of Article 8 ECHR by the telephone surveillance ordered by the public prosecutor.

As regards the violation of the right to a fair trial, the Court finds that, according to the findings of the domestic courts, the applicant was granted sufficient access to the results of the investigation in the judicial proceedings. Thus, the requirements of the adversarial procedure and the equality of arms associated with it have been fully complied with. The procedure contained adequate safeguards to protect the interests of the applicant.

Applying the case law of the Court⁵⁷, the interception of the applicant's telephone conversations and the storage of this information, as well as its use in the disciplinary proceedings, constitutes an interference with the right to respect for his private life under Article 8 ECHR. The Court reiterates that the interception of telephone conversations constitutes a very serious interference with a person's rights and that only very serious grounds, such as a reasonable suspicion of serious criminal activity, can be used as a basis for a warrant for interception.⁵⁸ Secret surveillance of citizens is only permissible under the ECHR to the extent that it is strictly necessary for the protection of democratic institutions.⁵⁹ The Court considers this condition to be met in the present case. The interference was provided for by law under domestic law. The investigation of the acts of corruption of which the applicant was suspected serves a legitimate aim within the meaning of Article 8 (2) ECHR, as it aims at the prevention of disorder or crime and the protection of the rights and freedoms of others. The interference was also proportionate, taking into account, on the one hand, the seriousness of the charges against the applicant and, on the other hand, his position as the head of a correctional institution and the fact that he had not previously been

⁵⁷ ECtHR of 6 July 2010 – No. 35601/04 – *Pocius v. Lithuania*.

⁵⁸ ECtHR of 10 February 2009 – No. 25198/02 – *Iordachi and Others v. Moldova*.

⁵⁹ ECtHR of 4 May 2000 – No. 28341/95 – *Rotaru v. Romania*; ECtHR of 31 July 2012 – No. 36662/04 – *Drakšas v. Lithuania*.

guilty of any offence. As a result, the Court found neither a violation of Article 6 ECHR nor of Article 8 ECHR.

New pending cases (notified to the respective government)

No. 70267/17 and 18424/18 – *Țimpău and Popa v. Romania* (Fourth Section) – lodged on 14 September 2017 and 12 April 2018 – delivered on 13 January 2022

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

Keywords: Termination of employment – Withdrawal of teaching licence

Note: The applicants are teachers of Orthodox religion. The school where they worked terminated their employment after the archbishop withdrew the applicant's teaching licence. The domestic courts declared themselves to be without jurisdiction to consider an action for unfair dismissal in light of the decision under canon law.

The applicants claim a violation of Article 8 ECHR, as the alleged reasons for the dismissal (misconduct in class) had negative consequences for their private lives. In addition, a violation of Article 6 ECHR is alleged due to the failure of domestic courts to review the matters.

No. 60943/15 – *Rosca v. Moldova* (Fourth Section) – lodged on 14 September 2017 and 12 April 2018 – delivered on 13 January 2022

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

Keywords: Disciplinary proceedings – Public dissemination of the allegations

Note: The applicant was a judge and was dismissed from her post due to unconfirmed professional misconduct in the context of disciplinary proceedings. The allegations against her were disseminated in the media during the trial.

The applicant submits that the allegations made against her before the domestic courts were not valid and that the courts relied on information that was not confirmed in the course of the disciplinary proceedings. This would violate the applicant's right to respect for private life within the meaning of Article 8 ECHR.

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6. Protection of property

New pending cases (notified to the respective government)

No. 32306/16 – *Cegielski v. Poland* (First Section) – lodged on 2 June 2016 – delivered on 7 February 2022

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

Keywords: Interest on a pension claim – Retroactive annulment of a court decision

Note: The applicant has been receiving a pension for his former work as a civil servant at the Ministry of the Interior since 1990. The pension was reduced due to a change in the law for the period from 1 January 2010. As a result of his successful claim, the applicant's

entitlement was restored by a judgment of the Regional Court of *Warsaw*, which was confirmed by a judgment of the Court of Appeal. As a result, his pension for the past period was refunded in full. Interest was only paid on the remuneration for the period from 12 April 2013 to 19 July 2013. In a further action, the applicant sought interest on his remuneration for the full period of non-granting. The court of last instance dismissed the claim on the grounds that the pension authority had not been responsible for the delay in paying the full pension.

The applicant alleges a violation of the protection of his property, as he was unjustly deprived of assets by the temporary reduction of his retirement benefits. In addition, he claims that he is discriminated against because of his special status as a pensioner within the meaning of Article 14 ECHR.

No 46882/16 – *Argalioti v. Greece (First Section)* – lodged on 2 August 2016 – delivered on 21 January 2022

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

Keywords: Granting of an old-age pension – Retroactive amendments to statutory provisions – Excessively long duration of proceedings

Note: In 1992, the applicant, a Turkish national of Greek origin, applied to the Social Insurance Institution (IKA) for an old-age pension taking into account the recognition of her periods of service in her country of origin. A 1992 law which established this entitlement was retroactively amended in 1994 to the effect that the periods of service abroad were not recognised in the calculation of the old-age pension. A complaint alleging, among other things, the unconstitutionality of the relevant legal provisions from 1994, which was ruled on in the final instance in 2016, was unsuccessful.

The application alleges a violation of the right to respect for property within the meaning of Article 1 of Additional Protocol No. 1 by the retroactive application of statutory provisions. Furthermore, the question is raised whether the proceedings, which lasted from 1999 to 2016 before the domestic courts, were heard within a reasonable time within the meaning of Article 6 ECHR.

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