REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
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Content

I. Editorial

The tenth edition reports on developments in labour and social security law under EU primary and secondary legislation and jurisdiction as well as on the European Convention on Human Rights in the period from April to June 2022.

Among the cases before the **European Court of Justice** (CJEU), the judgment in *Luso Temp* (C-426/20) plays in the field of temporary agency work, adding further pieces to the puzzle of the EU's regulatory approach. There, the Court explicitly refers to temporary agency work as an atypical form of employment, emphasises the importance of equal treatment with the permanent workforce and interprets the concept of working and employment conditions broadly.

Data protection is prominently represented in the *Leistritz* case (C-534/20): Following a referral by the German Federal Labour Court, the CJEU ruled that data protection officers can continue to invoke the protection against dismissal under the German data protection law. The outcome of the case *Commission v. Austria* (C-328/20) was not surprising, too: The adjustment of the Austrian family allowance for children living abroad to the (usually lower) cost of living there is inadmissible under EU law.

The right of workers to join a trade union is at stake in the **European Court of Human Rights**' (ECtHR's) judgment in *Vlahov v*. *Croatia* (No. 31163/13). A Croatian trade union refused 15 membership applications, partly to prevent a 'hostile takeover' of a trade union section by pro-employer workers. The facts of the case gave the Court the opportunity to weigh the workers' individual freedom of association against the federation's collective freedom of association.

Other prominent ECtHR issues during the reporting period included employer sanctions on trade union membership, the ban of a trade union meeting on the grounds of pandemic conditions, the freedom of expression of judges in the context of public debates and the rights of persons with disabilities to assistance from the state in managing their daily lives.

We hope you enjoy reading!

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

Decision

Judgment of the Court (First Chamber) of 7 April 2022 – C-236/20 – *Ministero della Giustizia and Others (Status of Italian Justices of the Peace)*

Law: Article 7 Working Time Directive 2003/88/EC; Section 4, 5 No. 1 Framework Agreement on fixed-term work (set into force by Directive 1999/70/EC); Section 4 Framework Agreement on part-time work (set into force by Directive 97/81/EC)

Keywords: Justices of the peace (magistrates) and ordinary judges – measures to punish the abusive use of fixed-term employment contracts – paid annual leave

Core statement: A national regulation according to which justices of the peace who work part-time or on a fixed-term basis, unlike professional justices, are neither entitled to paid annual leave of 30 days nor to a social security and pension scheme dependent on the employment relationship is contrary to EU law. The same applies for national law which provides that a fixed-term employment relationship may not be renewed more than three times in succession, each time for four years, for a total duration not exceeding 16 years, and which does not provide for effective and dissuasive sanctions for abusive renewals of employment relationships.

Opinion

Opinion of Advocate General *De La Tour* delivered on 5 May 2022 – C-120/21 – *LB*

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

Keywords: Allowance in lieu of paid annual leave – limitation period of three years – starting point – employer's obligations to provide encouragement and information

Core statement: An entitlement to paid annual leave acquired for a reference period as well as the correlating entitlement to financial remuneration must not be subject to a three-year limitation period, the running of which begins with the end of the reference period, if the employer has not complied with its obligations to provide encouragement and information

Note: In the *Kreuziger*[1] and *Max Planck Society*[2] decisions, the Court of Justice held that leave can only be extinguished if the employee has been made aware of this legal consequence and has been put in a position to actually take the leave. This entitlement could

[1] CJEU of 6 November 2018 – C-619/16 – *Kreuziger*, see note *Buschmann*, HSI Newsletter 4/2018 (German), note under II.
[2] CJEU of 6 November 2018 – C-684/16 – *Max Planck Society*, *Buschmann*, HSI Newsletter 4/2018 (German), note under II.

not be extinguished if the employer did not fulfil its obligation to inform the employee.[3] In the present case, another facet of leave law is now being examined: Does the right to compensation for leave become time-barred if no proper notice has been given of the expiry of the entitlement after the end of the carry-over period? The Advocate General is of the opinion that the limitation period cannot start to run if the employer has failed to give notice.

New pending cases

Request for a preliminary ruling from the Arbeitsgericht Ludwigshafen am Rhein (Germany), lodged on 17 March 2022 – C-206/22 – *Sparkasse Südpfalz*

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

Keywords: Fulfilment of the leave entitlement – quarantine during the holiday period

Note: Is the annual leave entitlement also fulfilled if the employee is subject to a government-ordered quarantine during an authorised leave and is therefore prevented from exercising the entitlement without restriction? This question has been referred to the CJEU by the Labour Court Ludwigshafen am Rhein. According to German law, it has to be decided whether quarantine is treated in the same way as illness during leave, for which § 9 Federal Law of Leave (Bundesurlaubsgesetz – BUrlG) stipulates that days of illness are not counted towards the leave entitlement. This is supported by the fact that if it is impossible to perform work due to the quarantine order, the entitlement to work ceases and therefore the entitlement to leave under holiday law can no longer be fulfilled.[4] Under EU law, taking quarantine periods into account could violate the holiday entitlement guaranteed under Article 7(1) of the Working Time Directive 2003/88/EC, especially since employees under strict hygiene conditions are not able to organise their time freely and in a self-determined manner, which is also the motivation for the CJEU case law on the continuation of the entitlement to compensation in the case of long-term illness. These considerations can probably be applied to leave already granted, which the CJEU will now have to rule on.

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 12 October 2021, delivered on 11 March 2022 – C-192/22 – *Bayerische Motoren Werke*

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

Keywords: Progressive retirement employment relationship – expiry of an annual leave entitlement due to illness – employer's obligation to cooperate

Note: In the case at hand, the employee and the employer had agreed on a part-time employment relationship for older workers consisting of work and release phases. Under this agreement, the employee had taken all of his leave on the last days of his working phase, which was followed by the release phase and the end of the employment relationship. The employee was unable to work due to illness within the leave period. The employer had failed to request the employee to take his leave during the entire period and had also failed to advise him of the risk of a possible forfeiture.

[3] CJEU of 25 June 2020 – C-762/18 – *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, para. 72.

[4] In this sense on § 9 BUrlG ErfK/*Gallner*, § 9 BUrlG marginal no. 1: The obligation to work cannot be suspended again, however in marginal no. 2 cautious to transfer to other constellations; as here LAG Hamm of 27 January 2022 – 5 Sa 1030/21; differently LAG Köln of 13 December 2021 – 2 Sa 488/21; LAG Düsseldorf of 15 October 2021 – 7 Sa 857/21.

The employee now sued for compensation for part of the holiday days not taken due to illness, since the employer had complied with his holiday planning wishes, but not with his obligations to cooperate.

The BAG argues that in its decision *Max Planck Society*[5], the CJEU had clarified that the employer has a burden of initiative in realising the employee's holiday entitlement and that it therefore does not expire without efforts on the part of the employer.[6] Furthermore, the CJEU ruled[7] that the statutory holiday entitlement does not expire if the employee is incapacitated for work until the end of the holiday year and therefore cannot take his holiday.

The Federal Labour Court (Bundesarbeitsgericht – BAG) now wants to clarify whether the forfeiture of leave pursuant to § 7(3) Federal Law on Leave (Bundesurlaubsgesetz – BUrlG) is also in conformity with EU law if the employee can no longer take the leave he has not taken due to the special nature of his progressive retirement employment relationship - taking into account the circumstances that the employer had not complied with his obligations to cooperate but granted the leave to the desired extent - and the leave could not be taken solely due to the employee's inability to work.

Request for a preliminary ruling from the Tribunale di Lecce (Italy), lodged on 24 March 2022 – C-218/22 – *Comune di Copertino*

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

Keywords: Public service – limitation of public expenditure – organisational requirements of the public employer – prohibition of leave compensation in the case of self-termination

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2. Data protection

Decision

Judgment of the Court (First Chamber) of 22 June 2022 – C-534/20 – *Leistritz*

Law: Article 38(3) sentence 2 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 the termination of a data protection officer's employment without just cause – data protection officer whose appointment is mandatory under national law

Core statement: The dismissal of a data protection officer may be made conditional on good cause, even if the dismissal is not related to the fulfilment of his/her tasks as data protection officer, provided that this arrangement does not affect the implementation of the objectives of the GDPR.

Note: The applicant is employed by the defendant as a "head of legal affairs" and was simultaneously appointed by the defendant as the company data protection officer (hereinafter: DPO). Due to its size, the defendant was obliged to do so. By letter of 13 July

[5] CJEU of 6 November 2018 – C-684/16 – *Max Planck Society for the Advancement of Science*.
[6] Federal Labour Court (Bundesarbeitsgericht) of 12 October 2021 – 9 AZR 577/20 (A), para. 10 et seq.
[7] CJEU of 20 January 2009 – C-350/06 and C-520/06 – *Schultz-Hoff,* para. 43, 49; of 22 November 2011 – C-214/10 – *KHS*, para. 28, 38, 44; confirmed by CJEU of 29 November 2017 – C-214/16 – *King*, para. 55 et seq. and most recently 25 June 2020 – C-762/18 and C-37/19 – *Varhoven kasatsi- onen sad na Republika Bulgaria,* para. 71 et seq.

2018, the company terminated the applicants' employments contract with notice, invoking a restructuring measure of that company, in the context of which the activity of internal legal adviser and the data protection service were to be outsourced.

The applicant contests an ordinary termination of her employment relationship and states that this was invalid pursuant to § 38(2) and the second sentence of § 6(4) of the German Data Protection Act (BDSG). The second sentence of § 6(4) BDSG, as data protection officers could be terminated extraordinarily only if there was just cause. Such comprehensive protection was not provided for by the relevant European law standard in such cases, Article 38(3) sentence 2 of the GDPR did not provide for such comprehensive protection. The question is therefore about the primacy of application in the case of contradictions between national and European data protection regulations.

The referring Court considers the provision of the BDSG – which goes beyond the GDPR – to be covered by the GDPR and uses the wording, objective and regulatory context of § 38(3) sentence 2 of the GDPR for its reasoning.

According to the wording, Article 38(3), (2) of the GDPR prohibits any 'dismissal'" or 'disadvantage' of the DPO(s), which describes an obligation of the controller(s) to protect the DPO(s) from any decision that would terminate his/her office (para. 21). Article 38(3), (2) of the GDPR is effective irrespective of whether the controller or processor and the DPO are in an employment relationship; the provision merely draws a line with regard to the grounds on which the office of the DPO may not be terminated under any circumstances. The objective of the GDPR is 'to ensure a high level of protection of natural persons within the European Union and, to that end, to ensure a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such natural persons with regard to the processing of personal data throughout the European Union' (para. 26).

The EU was entitled by Article 16 TFEU to enact data protection regulations in the form of the GDPR. However, in the case of provisions such as Article 38(3) sentence 2 of the GDPR, which, in addition to data protection law, also regulates social policy areas such as protection against dismissal, member states are not prevented from enacting stricter protective measures within the framework of the favourability principle. The limit of this regulatory power was, in turn, only the objectives of the GDPR, which, in the view of the CJEU, would be impaired if dismissal was ruled out even if the DPO lacked professional qualities or behaved in a way that did not comply with the GDPR.

New pending case

Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany), lodged on 20 January 2021 – C-34/21 – *Hauptpersonalrat der Lehrerinnen und Lehrer*

Law: § 23(1) Hessian Data Protection and Freedom of Information Act (HDSIG); § 26(1) BDSG; Article 88(1), (2) GDPR

Keywords: Introduction of live streaming lessons – consent of the teachers concerned – compatibility of Hessian and German employee data protection with European law

Core statement: When introducing live streaming lessons through video conferencing systems, do the respective teachers have to give their consent in addition to the parents for their children, or is the data processing covered by national data protection law? This question is of concern to the referring Court (Administrative Court Wiesbaden, Germany), because the defendant school authority considered the processing of the teachers' personal data to be already covered by § 23(1) sentence 1 HDSIG, which, inter alia, allows processing for the performance of an employment relationship. However, the Court questioned whether this was in conformity with European law, because it was not clear whether § 23 HDSIG

could be regarded as a specific provision with regard to the processing of personal employment data pursuant to Article 88(1) and (2) of the GDPR (para. 16). It is problematic that the requirements of the GDPR are neither guaranteed by the provision itself nor elsewhere in the law (para. 16). § 23(1) sentence 1 of the HDSIG continues the basic idea of necessity for data processing from the Federal Constitutional Courts' census ruling[8], but does not meet the requirements of Article 6(1) sentence 1 lit. f of the GDPR, which prescribes a comprehensive weighing of interests (marginal no. 10 et seq.).

The question is interesting because with the norms from the HDSIG it concerns the first data protection regulations ever.[9] Many provisions from the HDSIG were incorporated into the BDSG with identical content (§ 23(1) sentence 1 HDSIG corresponds, for example, to § 26(1) sentence 1 of the BDSG). In general, in addition to the Federal Labour Court, large parts of the literature are also convinced of the conformity of German employee data protection with European law. This is because the requirement of necessity has been further specified by case law (para. 16). According to this, data processing is only permissible if it is suitable, necessary and, after a comprehensive weighing of goods and interests, appropriate to achieve the legitimate purpose pursued.[10]

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3. Equal treatment

Decisions

Judgment of the Court (Second Chamber) of 2 June 2022 – C-587/20 – *HK v Denmark and HK v Private*

Law: Article 3(1)(a) and (d) Equal Treatment Framework Directive 2000/78/EC; Article 12 CFR (freedom of association)

Keywords: Prohibition of age discrimination – scope – presidency of a workers' organisation – statutory age limit for eligibility as chairperson

Core statement: The age limit for eligibility as chairperson contained in the statutes of a workers' organisation falls within the scope of the Equal Treatment Framework Directive. It is irrelevant for the application of the directive that this is a political office and that the person concerned is elected to this office.

Note: In the present case, the HK/Private Workers' Organisation introduced an age limit for the position of chairperson. A, who held the position of sector convenor from 1993 to 2011, exceeded this limit at the age of 63, which disqualified her from re-election. The Equal Treatment Board, acting on behalf of A, brought an action before the court in Copenhagen, claiming that it was contrary to Danish anti-discrimination law for A not to be allowed to stand for chair again because of her age, and seeking compensation. The referring court considered that the resolution of the dispute before it depended on whether A, as the politically elected chair of *HK/Privat,* fell within the scope of the Equal Treatment Framework Directive. As an elected sector convenor, she did not have the status of an employee under national law, i.e. she did not have a function in which she was subject to a superior's right to issue instructions.

[8] Federal Constitutional Court (Bundesverfassungsgericht) of 15 December 1983 – 1 BvR 209/83.
[9] The HDSG was not only the first data protection law in Germany, but even worldwide; cf. *Simitis/Hornung/Spiecker,* in Simitis/Hornung/Spiecker, Datenschutzrecht, 1st ed. 2019, Introduction para. 1.
[10] Federal Labour Court (Bundesarbeitsgericht) of 20 June 2013 – 2 AZR 546/12, NZA 2014, 143, para. 23.

In its decision, the Court agrees with the Advocate General's Opinion and interprets Article 3(1)(a) and (d) of the Equal Treatment Framework Directive as meaning that the age limit at issue falls within the scope of that Directive. First, the Court finds that the 'conditions of access' within the meaning of Article 3(1)(a) of that directive to the post of chairperson of a work organisation fall within the scope of that directive. It is clear from the wording of the directive that its scope is not limited to the conditions of access to posts held by workers within the meaning of Article 45 TFEU[11] . Moreover, the objective of the directive would not be achieved if the protection against discrimination in employment and occupation granted by it depended on the nature of the duties performed in the context of the employment. Furthermore, the political nature of such a post is irrelevant to the question of whether those conditions fall within the scope of the Equal Treatment Framework Directive, since it applies to both the public and private sectors and irrespective of the field of activity, and the exceptions are expressly laid down.

Such an interpretation is not precluded by the right of labour organisations to freely elect their representatives (Article 12 CFR), because this right must be reconciled with the prohibition of discrimination in employment and occupation regulated in the Equal Treatment Framework Directive as a concretisation of the general principle of non-discrimination enshrined in Article 21 CFR. Since freedom of association is not an absolute right, its exercise may be restricted in accordance with Article 52(1) of the European Convention on Human Rights, provided that the restriction respects the essence of the right and complies with the principle of proportionality. The restrictions resulting from the directive were necessary to guarantee employment and occupational rights.

Last but not least, the Court held that the exercise of the activity of chairperson of a work organisation is also covered by Article 3(1)(d) of the Equal Treatment Framework Directive, according to which it applies, inter alia, to participation in a workers' organisation. Indeed, chairmanship is a form of ‘participation’ in such an organisation.

The decision underlines that age limits are subject to strict scrutiny under EU law for both the public and private sectors and regardless of the field of activity as well as the legal form.

Judgment of the Court (Sixth Chamber) of 18 May 2022 – C-450/21 – *Ministero dell'istruzione*

Law: Section 4 No. 1 Framework agreement on fixed-term employment contracts (set into force by Directive 1999/70/EC)

Keywords: Additional remuneration – in-service training – fixed-term teachers – 'electronic card for teachers'

Core statement: It is contrary to Union law if only civil servants, but not temporary teaching staff of the Ministry of Education are granted financial benefits for further training.

[11] According to the settled case-law of the Court of Justice, an ‘employee’ within the meaning of this provision is a person who, for a certain period of time, performs services for another person in accordance with the latter's instructions, for which he receives remuneration in return, cf. CJEU of 14 June 2012 – C-542/09 -- *Commission* v. *Netherlands*, para. 68; Preis/Sagan/*Sagan*, Europäisches Arbeitsrecht, 2nd ed. 2019, § 1 para. 111.

Judgment of the Court (Seventh Chamber) of 5 May 2022 – C-265/20 – *Universiteit Antwerpen and others*

Law: Section 4 No. 1 Framework agreement on part-time work (set into force by Directive 97/81/EC)

Keywords: Academic staff in part-time employment – teaching assignment – automatic permanent appointment of full-time staff – calculation of the proportion of part-time employment in relation to full-time employment

Core statement: 1) If members of the academic staff who carry out their teaching duties on a full-time rather than part-time basis are automatically appointed for an indefinite period, while part-time staff are alternatively either permanently appointed or employed on a fixed-term basis, is this contrary to Union law.

2) Employers who employ part-time workers shall be free as to the manner of calculating the percentage that such part-time employment represents in relation to comparable full-time employment.

Judgment of the Court (First Chamber) of 5 May 2022 – C-405/20 – *BVAEB*

Law: Article 5(c), 12 Equal Treatment Directive 2006/54/EC; Protocol No. 33 to Article 157 TFEU; Article 157 TFEU

Keywords: Applicable occupational social security scheme – civil servants' retirement – national legislation providing for an annual adjustment of retirement pensions – degressive adjustment in accordance with the amount of the pensions, which ceases altogether above a certain amount – grounds for justification

Core statement: 1) The limitation in time of the effects of the principle of equal treatment between men and women does not apply to a national regulation which provides that occupational retirement pensions are adjusted annually.

2) National legislation which provides for a degressive annual adjustment of the amount of the civil servants' retirement pension and which has an unfavourable effect on a significantly higher proportion of male pensioners than female pensioners is nevertheless in conformity with EU law if it pursues, in a consistent and systematic manner, the objectives of ensuring the sustainable financing of pensions and reducing the difference in the level of state-funded pensions, without going beyond what is necessary to achieve those objectives.

Judgment of the Court (Sixth Chamber) of 28 April 2022 – C-86/21 – *Gerencia Regional de Salud de la Junta de Castilla y León*

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

Keywords: Non-discrimination – exclusion of recognition of periods of previous employment in a public hospital in another Member State – absence of general criteria for the recognition of periods of previous employment in other Member States.

Core statement: A national rule is contrary to EU law which precludes the professional experience acquired by a worker in a public health service of another Member State from being taken into account for the determination of seniority, unless the restriction on the free movement of workers which that rule entails serves an objective in the general interest, ensures the attainment of that objective and does not go beyond what is necessary in order to attain that objective.

Note: In a Spanish public hospital, a job as a nurse was advertised which required five years of professional experience in Spain. The applicant applied for the job, but in her more than ten years of professional experience she had completed more than half of it in Portugal, so that she did not complete the required five years in Spain. With her action, she wants to achieve that the services performed in Portugal are also taken into account in the context of recognition (para. 13).

With a neatly elaborated examination of the freedom of movement of workers under Article 45 TFEU, the CJEU comes to the conclusion that the non-observance of foreign periods of employment in the entitlement to access to grades constitutes indirect discrimination under Article 45 TFEU and Article 7(1) of the Free Movement Regulation of foreigners compared to nationals (para. 32). Although the objective of ensuring the quality of the national health care system is to be regarded as being in the general interest and the measure of non-compliance is also in principle suitable for achieving the objective, the necessity of the measure is problematic. Contrary to the assertion of the defendant Regional Health Directorate of Castile and León that there is no sufficient European harmonisation of health systems, the CJEU refers to its own decisions[12], in which precisely such quality comparison and examination procedures (in the specific case for basic medical training) were the subject of negotiations and thus both exist and function.

Opinions

Opinion of Advocate General Medina delivered on 28 April 2022 – C-344/20 – *S.C.R.L*.

Law: Article 8 Equal Treatment Framework Directive 2000/78/EC

Keywords: Equal treatment in employment and occupation – discrimination on grounds of religion or belief – religious headscarf – Member States' margin of appreciation – religion and religious beliefs as an independent ground of discrimination

Core statement: The Equal Treatment Framework Directive does not prohibit the protection of religion and religious beliefs as separate grounds of discrimination. A national provision which – unlike the Framework Directive – presents religion and belief as separate grounds for protection does not constitute a more favourable transposition within the meaning of Article 8 of the Framework Directive.

Opinion of Advocate General Medina delivered on 7 April 2022 – C-638/20 – *MCM*

Law: Article 7(2) Free Movement Regulation (EU) No 492/2011; Article 45 TFEU

Keywords: Study grant for study abroad – social integration of non-resident students – student who is a national of the state conferring the grant and who is permanently resident in the state where he/she is studying – parent who was previously a migrant worker in the state of study

Core statement: A Member State may make the payment of a study grant for study abroad by students whose parents have worked as migrant workers in the host country conditional on a special link with the country of origin if

1. the child has lived in the host country since birth and has never lived in the country of origin; and

[12] CJEU of 3 March 2022 – C-634/20 – *Sosiaali- ja terveysalan lupa- ja valvontavirasto,* para 38; of 6 October 2015 – C-298/14 – *Brouillard*, para 57; of 8 July 2021 – C-166/20 – *Lietuvos Respublikos sveikatos apsaugos ministerija*, paras 34, 38.

2. the country of origin subjects its other nationals who do not fulfil the residence requirement and who apply for the study grant to study in another EU Member State to the same requirement of a link to the country of origin.

New pending cases

Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (Spain), lodged on 2 February 2022, delivered on 17 February 2022 – C-113/22 – *TGSS*

Law: Articles 4 to 6 Equal Treatment Directive 79/7/EEC

Keywords: Sex discrimination – allowance – granting exclusively to women

Request for a preliminary ruling from the Tribunal du travail de Liège (Belgium), lodged on 2 March 2022 – C-148/22 – *Commune d'Ans*

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

Keywords: Public administration – completely neutral administrative environment – prohibition of wearing signs of certain beliefs – covert sex discrimination

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 28 October 2021, delivered on 10 March 2022 – C-184/22 – *KfH Kuratorium für Dialyse und Nierentransplantation*

Law: Article 2(1), Article 4(1) Equal Treatment Directive 2006/54/EC; Section 4 No. 1 Framework Agreement on Part-Time Work (set into force by Directive 97/81/EC); Article 157(1) TFEU

Keywords: Overtime supplement – collective agreement regulation – discrimination against part-time employees in terms of payment – compensation on the grounds of prohibited discrimination on grounds of sex

Note: The 8th Senate of the Federal Labour Court (Bundesarbeitsgericht – BAG) has referred several questions to the CJEU on overtime pay for part-time employees. It thus follows the 10th Senate of the Federal Labour Court, which had already addressed similar questions.[13] The background to both cases are collective agreements which provide that the employer is only obliged to pay an overtime premium or to grant corresponding compensatory time off as a credit to the working time account if the employee performs work in excess of the working time owed by a full-time employee. In the case pending before the 8th Senate, the applicant is employed by the defendant as a part-time nurse with a working time of 40% of the regular weekly working time of a full-time employee. She is claiming overtime supplement or a corresponding time credit as well as compensation according to § 15 German General Act on Equal Treatment (AGG). At the defendant, women are predominantly represented in the group of part-time employees as well as in the group of full-time employees, whereby their share among the full-time employees (68%) is lower than among the part-time employees (85%).

By its first question, the referring court asks whether this constitutes unequal treatment of full-time and part-time workers. The referring court is inclined to the view that there is no unequal treatment of part-time and full-time employees if part-time and full-time employees receive the same remuneration per hour worked. Nevertheless, against the background of

[13] Order of the Federal Labour Court (Bundesarbeitsgericht) of 11 November 2020 – 10 AZR 185/20 (A), see also HSI Report 2/2021, p. 14 .

the reference for a preliminary ruling of the Federal Labour Court of 11 November 2020[14], the referring court cannot exclude with the necessary clarity that a mere orientation towards the remuneration received 'per working hour' leads to unequal treatment with regard to other working conditions.

In the event that the Court of Justice should affirm unequal treatment, the referring court also wants to know, against the background of the concrete numerical ratios, whether it is sufficient for the finding that unequal treatment 'affects significantly more women than men' that there are significantly more women than men among part-time employees, or whether it must be added that there are significantly more men among full-time employees or that there is a significantly higher proportion of men.

In the event that the Court answers both the first and second questions in the affirmative, the referring court also wishes to know whether the difference in treatment can be justified by the fact that the parties to the collective agreement wished to avoid placing full-time employees at a disadvantage. Last but not least, the purpose of the national collective agreement is precisely to ensure that the same work or work of equal value is remunerated in the same way, irrespective of whether it is performed by a full-time or part-time employee.

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4. Fixed term employment

Decisions

Judgment of the Court (Seventh Chamber) of 7 April 2022 – C-133/21 – *Elliniko Dimosiov*

Law: Clause 4 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC)

Keywords: Prohibition of discrimination – successive fixed-term contracts in the public sector – national law introducing a difference in treatment as regards pay between in workers employed under fixed-term contracts of employment and those employed under open-ended contracts of employment – lack of justification – meaning of objective reasons

Core statement: Workers who work on the basis of a fixed-term contract are entitled to the same remuneration as regular workers employed for an indefinite period of time.

Judgment of the Court (Sixth Chamber) of 26 April 2022 – C-464/21 – *Universitat de Barcelona*

Law: Clause 2, 3 No. 1 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC)
Keywords: Scope of application of the Framework Agreement on Fixed-term work – concept of the 'fixed-term worker'

Core statement: A worker who has worked in the public sector under successive fixed-term contracts and is entitled to have his or her employment relationship converted into a 'permanent, non-permanent employment relationship' falls within the scope of the Framework Agreement on Fixed-term work.

[14] Order of the BAG of 11 November 2020 – 10 AZR 185/20 (A), see also HSI Report 2/2021, p. 14.

Judgment of the Court (Seventh Chamber) of 30 June 2022 – C-192/21 – *Comunidad de Castilla y León*

Law: Section 4 No. 1 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC)

Keywords: Prohibition of discrimination – failure to take into account the services provided by an interim civil servant who has become a career civil servant for the purpose of consolidating his or her personal grade – concept of 'objective grounds'

Core statement: Periods of service acquired while still working as a temporary civil servant are to be taken into account.

New pending cases

Request for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain), lodged on 22 December 2021 and 27 January 2022 – C-59/22 – *Consejería de Presidencia*

Law: Sections 2, 5 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC)

Keywords: Public sector – worker employed for an indefinite period but not on a permanent basis – measures to prevent and penalise abuse through successive fixed-term employment contracts or relationships

Request for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain), lodged on 21 December 2021 and 17 February 2022 – C-110/22 – *UNED*

Law: See above, Case C-59/22

Keywords: See above, Case C-59/22

Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy), lodged on 25 February 2022 – C-132/22 – *Ministero dell'Istruzione, dell'Università e della Ricerca*

Law: Article 3(1)(b) Free Movement Regulation (EU) No 492/2011, Articles 45(1) and (2) TFEU

Keywords: Combating precarious employment – ranking lists for the award of permanent and temporary teaching posts – consideration only of professional experience acquired at national institutions – proportionality

Request for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain), lodged on 3 February 2022 – C-159/22 – *Agencia Madrileña de Atención Social de la Comunidad de Madrid*

Law: Clause 5 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC)

Keywords: Successive recruitments or renewals of fixed-term contracts – sufficiently dissuasive measures for recourse to successive fixed-term employment relationships – compatibility of various aspects of Spanish fixed-term employment law with Union law –

conversion into employment relationship of indefinite duration as a sanction of the unlawfulness of national law under Union law

Request for a preliminary ruling from the Cour di Rimini (Italy) lodged on 3 March 2022 – C-190/22 – *Presidenza del Consiglio dei Ministri*

Law: Clause 2, 4 Framework Agreement on Fixed-term work (set into force by Directive 1999/70/EC); Articles 15, 20, 30 and 47 Charter of Fundamental Rights

Keywords: Legal status and rights of lay judges – age limit of 70 years – principle of the rule of law – disciplinary proceedings – assessment procedure

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5. General matters

Decision

Judgment of the Court (Seventh Chamber) of 5 May 2022 – C-101/21 – *HJ*

Law: Article 2(2) and Article 12(a) and (c) Insolvency Directive 2008/94/EC

Keywords: Protection of employees in the event of their employer's insolvency – concept of 'employee' – limitation on the responsibility of the guarantee institutions – cumulation of functions – national case-law refusing the benefit of guarantees laid down by that directive

Core statement: National case-law which establishes the non-rebuttable presumption that a person who performs concurrently the duties of CEO and of a member of a statutory body of a trading company, and thus at the same time holds a certain power of management in the company concerned, is not to be regarded as an employee within the meaning of that directive and, therefore, cannot benefit from the guarantees provided for by that directive is contrary to the social purpose of the Insolvency Directive.

Note: The applicant in the main proceedings, who had been working as an architect for a trading company on the basis of a contract of employment since 2010, was elected chairman of the management board of that company in September 2017. Subsequently, a supplementary agreement to his original employment contract was concluded, stating that, he was not entitled to remuneration for the performance of that function. After the company became insolvent in the course of 2018, the applicant applied to the Czech Republic Labour Office for payment of his remuneration for the months of July to September 2018. However, this application was rejected on the grounds that during the period in question the applicant had filled the position as CEO, which meant that under Czech law there was no relationship of superiority and subordination to that company.

Even though the Insolvency Directive does not itself define the concept of employee, it follows from the case law of the Court of Justice that the Member States' discretion in defining this concept is not unlimited. Thus, the Member States cannot define the concept of employee completely autonomously. According to the settled case-law of the Court of Justice, the directive pursues a social purpose consisting in guaranteeing a minimum level of protection to all workers in the event of the insolvency of their employer, so that Member

States may exclude certain persons only in specific cases laid down in that directive (para. 34).[15]

Furthermore, the exclusion must be justified by objective reasons and constitute a measure necessary to prevent abusive practices within the meaning of Article 12(a) of the Directive.

At first sight, the national case law fits into the logic underlying Article 12(a) of the Directive. However, at the same time, it establishes the non-rebuttable presumption that it would constitute an abuse if a person who does not exercise his company law functions in a relationship of superiority and subordination, but who in fact manages the commercial company in question, were granted the guarantees provided for in the Directive (para. 43). According to the Court, such a general presumption of the existence of an abuse, which cannot be rebutted in the light of all the particular circumstances of each case, is inadmissible.[16] Furthermore, the Court pointed out that national case-law could possibly be justified on the basis of Article 12(c) of the Directive, which provides that a guarantee obligation is to be refused or limited where an employee, alone or together with close relatives, was the owner of a substantial part of the employer's undertaking or business and had a significant influence on its activities (both conditions being cumulative). However, the national case-law in the main proceedings does not refer to this condition in any way (para. 45).

Opinions

Opinion of Advocate General *Kokott,* delivered on 7 April 2022 – C-675/20 P – *Brown v Commission and Council*

Law: Article 4(1) Annex VII to the Staff Regulations

Keywords: Civil service – acquisition of the nationality of the place of employment after entering the service – withdrawal of entitlement to receive the expatriation allowance

Core statement: The judgment of the CJEU of 5 October 2020, *Brown v Commission* (T-18/19, EU:T:2020:465), is set aside. The applicant is entitled to the expatriation allowance even after changing his nationality.

Opinion of Advocate General *De la Tour,* delivered on 28 April 2022 – C-604/20 – *ROI Land Investments*

Law: Articles 17, 21 Regulation (EU) No. 1215/2012; Article 6 Rome I Regulation (EC) No. 593/2008

Keywords: International jurisdiction of German courts – insolvency of German employer - claim arising from comfort agreement with a foreign company – applicable law

Core statement: A natural or legal person may be regarded as an employer within the meaning of Article 21(1) and (2) of the Regulation, irrespective of whether he is domiciled in a Member State, even if the employee has not concluded her/his contract of employment with him, but has concluded an agreement as an integral part of it under which he is liable for the performance of the employer's obligations towards the employee and he has a direct interest in the proper performance of the contract of employment. The application of Article 6 of the Regulation is excluded if the conditions of Article 21(2) of the Regulation are fulfilled.

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[15] Cf. accordingly CJEU of 5 November 2014 – C -311/13 – *Tümer*, para. 42.

[16] Cf. CJEU of 4 March 2004 – C-334/02 – *Commission v. France*, para. 27 and of 25 October 2017 – C-106/16 – *Polbud*, para. 64, as well as the opinion of Advocate General *Kokott* in case *Grenville Hampshire* – C-17/17, para. 65.

Opinion of Advocate General *De La Tour*, delivered on 28 April 2022 – C-677/20 – *IG Metall and ver.di*

Law: § 21(6) SEBG (German 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 (SE Employee Involvement Directive)

Keywords: Election of employee representatives as members of the Supervisory Board – SE established by way of transformation in a dualist form – agreement on the future involvement of employees – absence of a trade union right of nomination for Supervisory Board members – separate ballot for employee representatives proposed by the trade unions

Core statement: The agreement on employee involvement in an SE created by way of transformation must provide for a separate ballot for the election, to employee representatives' posts within the Supervisory Board, of a certain proportion of candidates put forward by the trade unions, where that specific requirement is provided for and mandated by the national law applicable to the company to be transformed.

Note: The transformation of a company under German law into a European SE often has the (often also desired) effect of 'freezing' co-determination, which means that the German thresholds for company co-determination no longer apply and the statutory women's quota also remains non-binding.[17] In the present case, the German trade unions IG Metall and ver.di had brought an action against the company SAP, because in 2014, when the company was converted from a public limited-liability company under German law into an SE with a dualist system, it had not taken up the trade unions' right, provided for in German law, to make their own proposals for certain members of the Supervisory Board and to have them elected in a separate ballot. IG Metall and ver.di saw this as a violation of Article 4(4) SE Employee Involvement Directive, according to which in the case of an SE established by transformation, at least the same level of employee involvement must be ensured in respect of all components as exists in the company which is to be transformed into an SE.

By way of introduction, the Advocate General points out that the lack of European harmonisation in employee participation made the establishment of the 'special negotiating body' necessary in the first place. The circumstances of the body's freedom of negotiation were to be determined on the basis of the criteria prescribed by Article 4(4) of the SE Employee Involvement Directive. Since the wording of the provision was very broad (guaranteeing 'all elements of employee involvement'), criteria regarding the election procedure had to be taken into account in addition to the purely proportional composition of the Supervisory Boards. Ultimately, it is a 'value-judgment' (para. 50) to assess which elements are characteristic of the national procedure of employee participation (para. 52).

Since both the applicant trade unions and the referring Federal Labour Court (with reference to the national legislative history of the co-determination regulations[18]) emphasised the special benefit of the trade union nomination right for the employee representatives as well as its significance in national law, the Advocate General comes to the conclusion that 'the specific ballot for the trade union representatives is an element characteristic of the participation regime in Germany and [...] cannot therefore be subject of negotiations' (para. 52). According to the Advocate General, it is important that the involvement of employees on company policy is not subject of negotiations on the concrete involvement agreement, but that the decision taken under national law on its legal form is accepted across the board

[17] See only: *Sick*, in: Mitbestimmungsreport No. 58, www.imu-boeckler.de/de/faust-detail.htm?sync_id=HBS-007666, p. 13.
[18] Federal Labour Court (Bundesarbeitsgericht) of 18 August 2020 – 1 ABR 43/18 (A) para. 27 et seq.; cf. Bundestag document (BT-Drs.) 7/4845 p. 5.

(para. 51). However, the right of trade unions to nominate members of the Board must then also consistently apply to foreign trade unions in order not to favour German employees over foreign employees.

With this ground-breaking opinion, the Advocate General demonstrates the special importance of trade unions in industrial relations and for democratic corporate co-determination, also in the European context. It is to be hoped that the CJEU will follow the Advocate General's stringent reasoning and take an important step towards a functioning employee participation at the European level with its decision.

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6. Professional qualification

Decision

Judgment of the Court (First Chamber) of 16 June 2022 – C-577/20 – *Sosiaali- ja terveysalan lupa- ja valvontavirasto*

Law: Article 2, Article 13(2) Professional Recognition Directive 2005/36/EC; Articles 45 and 49 TFEU

Keywords: Recognition of professional qualifications – regulated profession – right to use the professional title of psychotherapist on the basis of a diploma awarded by a university in another Member State – assessment of the equivalence of the training in question – principle of sincere cooperation between Member States

Core statement: 1) The competent authority of the host Member State must assess an application for access to a regulated profession with regard to Article 45 or Article 49 TFEU if the profession has neither been regulated nor practised for the minimum period laid down in Article 13(2) Professional Recognition Directive in the Member State in which the training certificate was issued.

2) A national authority to which an application for authorisation to pursue a regulated profession is submitted shall be obliged to recognise as accurate a diploma issued by the authority of another Member State and not to call into question the qualifications certified thereby. However, if there are serious doubts, it may ask the issuing authority to verify the legitimacy of this diploma. If the latter confirms the legitimacy, the requesting authority may question the diploma in question only if it is manifestly incorrect.

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7. Social security

Decisions

Judgment of the Court (Fourth Chamber) of 5 May 2022 – C-451/19 and C-532/19 – *Subdelegación del Gobierno en Toledo*

Law: Article 20 TFEU; Article 2, 3 and 4 Family Reunification Directive 2003/86/EC

Keywords: Union citizen who has never made use of his freedom of movement – minor child who is a third-country national – derived right of residence – insufficient means of subsistence – relationship of dependence – permanent cohabitation

Core statement: A relationship of dependency that may justify granting a derived right of residence to the third-country national parent of a minor Union citizen is presumed if the third-country national parent lives permanently with the other parent who is a Union citizen.

Note: In its judgment, the Court states that it is incompatible with Union law to reject applications for family reunification without first assessing whether there is a relationship of dependency between the Union citizen and his family member which could force the Union citizen to leave the territory of the Union.

Moreover, where the Union citizen is a minor, the assessment of whether there is a relationship of dependency must be based on consideration of all the circumstances of the case in the light of the best interests of the child. In that regard, the Court points out that that relationship of dependence does not exist merely because the Union citizen and his or her third-country national spouse are obliged to live together by virtue of the obligations arising from marriage. Rather, the decisive factor is that the minor citizen of the Union lives permanently with both parents and that both parents share custody of that child on a daily basis and jointly exercise its legal, financial and emotional care.

Next, the Court finds that such a relationship of dependence exists where a minor citizen of the Union would be forced to leave the territory of the Union in order to follow his or her third-country national parent, who is himself or herself forced to leave the territory because his or her other minor child, a third-country national, has been denied a derived right of residence. Therefore, as a result of the denial, the minor child with Union citizenship is ultimately also forced to leave the territory and forgo the enjoyment of the core set of rights conferred by Union citizenship status.

Judgment of the Court (Seventh Chamber) of 19 May 2022 – C-33/21 – *INAIL and INPS*

Law: Article 14 No. 2(a)(i) and (ii) Regulation (EEC) No. 1408/71; Article 11(5), Article 13(1)(a) and (b) Regulation (EC) No. 883/2004

Key words: Concept of 'home base' – flying personnel – workers employed in the territory of two or more Member States – connecting criteria

Core statement: Flying personnel not covered by an E101 certificate who are on board aircraft during working hours, with the exception of 45 minutes per day spent in a ‘crew room’ in the Member State of residence, are subject to the legislation of that Member State.

Judgment of the Court (Second Chamber) of 16 June 2022 – C-328/20 – *Commission v Austria*

Law: Article 4, 7 and 67 Coordination Regulation (EC) No. 883/2004; Article 7(2) Free Movement Regulation (EU) No. 492/2011

Keywords: Child benefits – adjustments of family benefits depending on the price level in the children's country of residence – discrimination against migrant workers

Core statement: The Austrian regulation, which adjusts family benefits according to the country of residence of the beneficiary's children, is in breach of the Coordination Regulation. Furthermore, the Austrian adjustment mechanism constitutes unjustified indirect discrimination based on the nationality of migrant workers.

Note: The Court of Justice declared the Austrian factorisation of family benefits for beneficiaries whose children reside in other EU countries to be inadmissible and thus endorsed the opinion of Advocate General *de la Tour.*[19]

More specifically, the Court stated that family allowances and child allowances are family benefits within the meaning of the Coordination Regulation and, as such, may not be reduced or modified on account of the fact that the beneficiary or the family members reside in a Member State other than the one which grants them (Article 7 Coordination Regulation). The family benefits granted by a Member State to employed persons whose family members reside in that Member State would therefore have to be exactly the same as those granted by that Member State to employed persons whose family members reside in another Member State.

The Republic of Austria put forward the justification that the adjustment of the amount of benefits for non-resident children is intended to ensure that the support and the consequent alleviation of family burdens correspond in value to the benefits granted to children resident in Austria. This did not convince the Court. Indeed, family allowances and social and tax advantages in Austria are not determined according to the actual costs of maintaining children, but are granted on a flat-rate basis and depend on the number and, where applicable, the age of the children, without taking into account their actual needs. The Court considers that this lack of consistency in the application of the adjustment mechanism is also confirmed by the fact that the family benefit and the social advantages are not subject to any adjustment mechanism where the children reside in Austria, even though there are indisputable differences in price levels between the regions of that Member State. In the light of the foregoing, the Court finds that, in so far as the national legislation provides for an adjustment of family allowance according to the State of residence of the beneficiary's children, it is contrary to the Coordination Regulation.

Next, as regards family allowances and all tax benefits, the Court points out that, under EU law in the field of social security, any discrimination based on the nationality of migrant workers is prohibited. The Austrian adjustment mechanism constitutes unjustified indirect discrimination on grounds of nationality, since, first, it applies only where the child does not reside in Austria and, second, it essentially concerns migrant workers who come from Member States where the cost of living is lower than in Austria. Finally, with reference to the *Aubriet* case[20], the Court emphasised that migrant workers contribute to the financing of the social policy measures of those States by means of the taxes and social security contributions which they pay in the host Member State on account of the paid employment which they pursue there, without the place of residence of their children being relevant in this

[19] Opinion of Advocate General *de la Tour of* 20 January 2022 – C-328/20 – *Commission* v. *Austria*; see also HSI Report 1/2022, p. 16 et seq.

[20] CJEU of 10 July 2019 – C-410/18 – *Aubriet*, para. 33 and the case law cited therein.

respect. Accordingly, the Court finds that the Austrian legislation at issue also infringes the Free Movement Regulation.[21]

Judgment of the Court (Second Chamber) of 30 June 2022 – C-625/20 – *Instituto Nacional de la Seguridad Social (INSS)*

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

Keywords: Indirect discrimination on grounds of sex – incompatibility of two or more entitlements to social benefits – determination of indirect discrimination on the basis of statistical data – formation of the relevant comparator groups – justification

Core statement: A regulation that prevents the accumulation of different benefits in the case of occupational invalidity is inadmissible if this regulation disadvantages female employees in a special way compared to male employees. For this purpose, the proportion of male employees subject to the regulation in question must be determined in comparison to the proportion of female employees concerned.

Note: In Spain, there are two different strands of occupational invalidity insurance for self-employed and employed employment. If the conditions for benefits from the different systems are met (e.g. if both forms of employment have been exercised alongside each other and the occupational invalidity affects both sides), the claims can be accumulated. If there are claims to a pension from only one of the schemes for several reasons – e.g. because of different causes for the occupational invalidity – accumulation is to be excluded. While in the dependent employment scheme the gender ratio is almost balanced, the ratio of women and men in the self-employed strand of occupational invalidity insurance is 36% to 64%, which suggests that men are more often eligible for both schemes.
The Court considers that gender discrimination is possible, but that the statistical derivation must refer to the totality of those who are in principle entitled to benefits from both strands. Within this group, it would have to be determined what proportion of men and women were prevented from receiving benefits twice by the provision in question. In assessing whether indirect discrimination is to be affirmed, the national court must take into account the fact that even a relatively small difference which is constant over a long period of time may constitute an indication.[22]

Opinion

Opinion of Advocate General *Pikamäe* delivered on 2 June 2022 – C-199/21 – *Finanzamt Österreich*

Law: Article 60(1) Implementing Regulation (EC) No. 987/2009

Keywords: Family benefits to the parent who has taken in the child – failure of the entitled parent to assert the claim – obligation to take into account the application of the other parent

Core statement: It is contrary to Union law if family benefits that have actually contributed to the maintenance of the family member can be reclaimed, only because the parent entitled to make the application failed to do so, so that the other parent made the application.

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[21] For more details on the indexation of the Bavarian family allowance, see *Dau*, jurisPR-SozR 14/2022, note 4.
[22] Cf. CJEU of 9 February 1999 – C-167/97 – *Seymour-Smith and Perez*, para. 61.

8. Temporary agency work

Decision

Judgment of the Court (Sixth Chamber) of 12 May 2022 – C-426/20 – *Luso Temp*

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

Keywords: Principle of equal treatment – concept of 'basic working and employment conditions' – compensation for annual leave not taken on termination of the employment relationship

Core statement: The holiday pay to which temporary agency workers are entitled when their employment relationship with a user undertaking is terminated must not be less than that to which they would be entitled if they had been hired directly by the user undertaking for the same job and for the same duration of employment.

Note: Under Portuguese law, there is a special rule for the calculation of holiday pay entitlement for temporary agency workers, which in some constellations places them in a worse position than employees covered by the general rules. After a detailed examination, the Court concludes that the holiday and compensation entitlements are to be subsumed under the concept of 'basic working and employment conditions' within the meaning of Article 5(1) Temporary Agency Work Directive, i.e. they are subject to the principle of equal treatment for temporary agency workers. Portuguese law must be interpreted as far as possible in accordance with these requirements.

In particular, the parallel drawn with the respective Section 4 of the framework agreements on part-time work and fixed-term contracts, which the Court makes under the aspect of atypical, precarious employment relationships, is remarkable.[23] The Court even deduces from the comparison with these provisions that the equal treatment requirement protects temporary agency workers particularly strongly. The outcome of the case could hardly have been otherwise, given the established broad interpretation of the facts of working and economic conditions[24]. The amount of holiday entitlement for temporary agency workers during the temporary employment period must therefore be at least equal to that of comparable members of the permanent workforce.

New pending case

Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary), lodged on 6 April 2022 – C-244/22 – *Mara-Tóni*

Law: Article 3(1) Temporary Agency Work Directive 2008/104/EC; Article 1(1) Transfer of Undertakings Directive 2001/23/EC

Keywords: Unauthorised hiring out as temporary agency work – hiring out to subcontractors as temporary agency work – qualification of several temporary agency workers hired out without the necessary permit as an undertaking – application of the Transfer of Undertakings Directive to temporary agency workers

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[23] See para. 36 of the present judgment.

[24] On the law on fixed-term contracts CJEU of 14 September 2016 – C-596/14 – *de Diego Porras*, para. 30; CJEU of 14 October 2020 – C-681/18 -- *KG*, para. 54; *Ulber*, Teilzeit, in Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 14 para. 60; *Kamanabrou*, Befristung, in Schlachter/Heinig, § 15 para. 14 et seq.

9. Transfer of business

Decision

Judgment of the Court (Third Chamber) of 28 April 2022 - C-237/20 – *Federatie Nederlandse Vakbeweging*

Law: Articles 3 to 5 Transfer of Undertakings Directive 2001/23/EC

Keywords: Transfer of business – safeguarding of employees' rights – exceptions insolvency proceedings – insolvency preceded by a 'pre-pack'

Core statement: 1) A 'pre-pack' under Dutch law fulfils the requirement of the exceptional circumstances of Article 5(1) Transfer of Undertakings Directive for insolvency proceedings if its main purpose is to enable the creditors' community to be satisfied as well as possible and the employment to be preserved as far as possible, provided that such a 'pre-pack' procedure is governed by statutory or regulatory provisions.

2) Such a 'pre-pack' fulfils the requirement of the exception in Article 5(1) Transfer of Undertakings Directive that the insolvency proceedings are conducted "under the supervision of a competent public authority" if the transfer is prepared in the course of the proceedings by a "prospective insolvency administrator" who is under the supervision of a 'competent public authority', provided that such a 'pre-pack' procedure is regulated by legal or administrative provisions.

Note: The present case shows how important it is for the referring court to prepare the case precisely in the context of the preliminary ruling procedure: As in the *FNV* case[25], it had to be decided whether the so-called 'pre-pack' under Dutch law corresponds to bankruptcy proceedings within the meaning of Article 5(1) of the Transfer of Undertakings Directive with the consequence that the employees cannot invoke their rights under Articles 3, 4 of the Directive. The "pre-pack" is a kind of preparatory insolvency procedure in which agreements are already made before the insolvency, on the basis of which, after the insolvency, the relevant company or a part of the company is sold.

However, although there has been no significant change in the law in the meantime, the Court of Justice has now surprisingly made a different assessment. While it could be deduced from the 2017 decision that the exception from the application of Articles 3, 4 of the Transfer of Undertakings Directive does not apply, the Court now considers the exception to apply in certain circumstances. It had to be decided for each individual case whether the 'pre-pack' did not serve the continuation of the company, but the dissolution of the company for the greatest possible satisfaction of the community of creditors – then the exception would apply. However, the rules for the 'pre-pack' procedure were based solely on principles of case law, which did not meet the requirements of legal certainty for classification. The exception for bankruptcy proceedings presupposes that the conditions of the proceedings in question are regulated by statutory or regulatory provisions.

Also, on the question of whether the 'designated insolvency administrator' as well as the 'prospective supervisory judge' offer a guarantee that the sale is carried out "under the supervision of a competent public authority", the referring court highlighted circumstances that lead to a different assessment from the 2017 decision: This practice would not in principle be precluded by the application of the exception of Article 5(1) Transfer of

[25] CJEU of 22 June 2017 – C-126/16 – *FNV*; with reference by *Heuschmid/Hlava*, HSI-Newsletter 2/2017, p. 24.

Undertakings Directive. However, since the 'pre-pack' under Dutch law is only based on the law of judges, the Directive remains fully applicable.

New pending case

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 1 March 2022 – C-134/22 – *G GmbH*

Law: Article 2(3) Collective Redundancies Directive 98/59/EC

Keywords: Collective dismissal – effects of the breach of the duty to notify the works council – purpose of forwarding the notification to the employment agency

Core statement: § 17 of the Law on protection against dismissal according to German Law on protection against dismissal (Kündigungsschutzgesetz – KSchG) obliges employers to submit a collective redundancy notice to the Federal Employment Agency. The Federal Labour Court is seeking clarification from the CJEU as to the purpose of Article 2(3) subparagraph 2 of the Collective Redundancies Directive on which this provision is based. Following on from this, the still unresolved legal question of whether a breach of the obligation leads to the invalidity of the employer's dismissals in question is to be decided.[26] The Federal Labour Court is of the opinion that the consequence of ineffectiveness should only be excluded if the referral to the Federal Agency has an exclusively procedural dimension without any individual protection. The Federal Labour Court[27] seems to agree with this classification as a merely procedural provision, but is faced with the fact that if there is an obligation to forward the notification to the Federal Employment Agency, labour market policy reasons are obvious[28], even if the exact number of dismissals is not yet known at the time in question.

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10. Working time

New pending cases

Request for a preliminary ruling from the Rayonen sad Kula (Bulgaria) lodged on 18 November 2021 – C-732/21 – *Glavna direktsia "Pozharna bezopasnost i zashtita na naselenieto"*

Law: Article 1(3) and Article 12 lit. b Working Time Directive 2003/88/EC

Keywords: Application of the Working Time Directive – public service activities – armed forces, police, civil protection – protection of night workers – consideration of privileges in relation to leave, retirement, severance pay and additional remuneration for seniority

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[26] Against the invalidity of the dismissal ErfK/*Kiel*, § 17 KSchG, marginal no. 36a.
[27] Federal Labour Court (Bundesarbeitsgericht) of 27 January 2022 – 6 AZR 155/21 (A), para. 26 et seq.
[28] Also Däubler/Deinert/Zwanziger-*Callsen*, 11th ed. 2019, § 17 KSchG, marginal no. 42 with reference to the explanatory memorandum.

III. Proceedings before the ECtHR

Compiled and commented by

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1. Equal treatment

Decisions

Judgment (Grand Chamber) of 9 June 2022 – No. 49270/11 – *Savickis and Others v. Latvia*

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

Keywords: Discrimination – unequal treatment of pensioners on the basis of nationality – wide margin of appreciation

Core statement: States have a wide margin of appreciation in the field of social security, so that discrimination on grounds of nationality can be justified by 'very weighty reasons' when calculating the amount of a retirement pension in individual cases.

Note: The applicants were born in different regions of the former Soviet Union and moved to the territory of Latvia at a time when it was still a Soviet Socialist Republic of the Soviet Union. After Latvia became independent in 1990, they obtained the status of 'permanent resident non-citizens'. At the time they reached the statutory retirement age, the periods of employment they had completed outside Latvia in the Soviet Union were not taken into account when calculating their retirement pension according to the legal provisions. In contrast, Latvian nationals who had worked outside Latvia in the Soviet Union received a pension for which these years of employment were recognised. On the basis of the Court's decision of 18 February 2009[29], which found that this unequal treatment violated Article 14 ECHR in conjunction with Article 1 Additional Protocol No. 1, the applicants applied for a recalculation of their retirement pensions. The applications were rejected. Appeals against this decision were unsuccessful in all instances before the national courts. In 2011, the national Constitutional Court declared the relevant legal provision to be constitutional. Moreover, according to the national courts, the present case was different from the facts underlying the Court's decision of 18 February 2009, as the applicant there had resided on the territory of Latvia during the periods at issue. In view of the continuity of the State and the finding that Latvia was not the successor to the rights and obligations of the Soviet Union, there were objective and reasonable grounds for the difference in treatment.

The applicants allege a violation of Article 14 ECHR in conjunction with Article 1 Additional Protocol No. 1, as the disregard of their periods of employment in the territory of the former Soviet Union in the calculation of their retirement pension discriminates against them in comparison with Latvian nationals solely on the basis of their status as 'permanently resident non-citizens'.

[29] ECtHR of 18 February 2009 – No. 55707/00 – *Andrejeva* v. *Latvia*.

The Court reiterates that Article 1 Additional Protocol No. 1 does not guarantee a right to a pension of a particular amount. If a state creates a pension scheme, it must be compatible with Article 14 ECHR.[30] No reason is seen to deviate from the previous case law[31] . Accordingly, Article 14 ECHR in conjunction with Article 1 of Additional Protocol No. 1 is applicable. In the present case, too, 'nationality' or the lack of Latvian nationality is the sole criterion for the contested distinction.[32] Accordingly, very weighty reasons must be present in order to justify unequal treatment in such cases. However, the particular circumstances of the individual case must be taken into account when determining the scope of assessment of the respondent state.[33] It can be assumed that the applicants were in a similar situation to persons with the same employment biography but holding Latvian nationality. The Court recognises the legitimate aims of the national statutory provision. These are, on the one hand, to avoid retrospective approbation of the consequences of the immigration policy practised during the period of the unlawful occupation and annexation of the country. The controversial pension scheme is in line with the effort to rebuild the nation's life after achieving independence. On the other hand, the scheme serves to ensure the protection of the economic system. The privileging of Latvian nationals serves these goals. The unequal treatment also only concerns past periods of employment completed before the introduction of the pension scheme in question. Moreover, the applicants' basic benefits were not affected, as they were not completely excluded from receiving a pension. Taking into account the circumstances of the case, the Court finds that the difference in treatment is compatible with the legitimate objectives pursued and that the reasons put forward by the Latvian authorities in that regard can be regarded as valid. The defendant state did not exceed its margin of appreciation, so that the Court comes to a different conclusion from the decision of 18 February 2009[34] and has not found a violation of Article 14 ECHR.

In a favourable special opinion, Judge *Wojtyczek* points out that there is no obligation under international law to assume any social security law obligation for the years of employment accrued in the former Soviet Union, unless there are intergovernmental agreements on this.

In contrast, Judge *O'Leary* and Judges *Grozev* and *Lemmens,* in a joint dissenting opinion, hold that the present case is no different from the *Andrejeva* case[35] and that the assessment must likewise lead to a violation of Article 14 ECHR.

Another dissenting opinion by Judge *Seibert-Fohr*, joined by Judges *Turković, Lubarda* and *Chanturia, held* that the grounds adopted by the Latvian Constitutional Court to justify discrimination on grounds of nationality were not "very weighty" within the meaning of the Court's case-law. The difference in treatment in the present case is based solely on nationality and does not serve the purpose of contributing to the development of Latvia. Therefore, the discrimination was disproportionate, so that a violation of Article 14 ECHR would have had to be recognised.

[30] ECtHR of 12 April 2006 – Nos. 65731/01 and 65900/01 – *Stec and Others v. United Kingdom*.
[31] ECtHR of 18 February 2009 – No. 55707/00 – *Andrejeva* v. *Latvia*.
[32] ECtHR of 16 September 1996 – No. 17371/90 – *Gaygusuz* v. *Austria*; ECtHR of 30 September 2003 – No. 40892/98 – *Koua Poirrez* v. *France*; ECtHR of 22 March 2012 – No. 5123/07 – *Rangelov* v. *Germany*.
[33] ECtHR of 15 September 2016 – No. 44818/11 – *British Gurkha Welfare Society and Others* v. the *United Kingdom*; ECtHR of 5 September 2017 – No. 78117/13 – *Fábián* v. *Hungary*; ECtHR of 22 March 2016 – No. 23682/13 – *Guberina* v. Croatia.
[34] ECtHR of 18 February 2009 – No. 55707/00 – *Andrejeva* v. *Latvia*.
[35] ECtHR of 18 February 2009 – No. 55707/00 – *Andrejeva* v. *Latvia*.

Judgment (Third Section) of 31 May 2022 – No. 23077/19 – *Arnar Helgi Lárusson v. Iceland*

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

Keywords: Discrimination against wheelchair users – no access to public buildings – disproportionate or undue burden of adjustment measures

Core statement: For the participation of persons with disabilities in social and cultural life, it applies that the state, within the scope of its discretionary powers, has to take necessary and appropriate adjustments to correct factual inequalities that are unjustified and therefore constitute discrimination.

Explanations: The applicant is a paraplegic who is confined to a wheelchair. In 2015, he brought a claim for damages in the amount of 1,000,000 ISK (approximately 7,300 EUR). He based his claim on the fact that, as a wheelchair user, he was denied access to two buildings housing the only arts and culture centre in his home municipality and the municipal events centre, respectively, due to the structural conditions. The domestic courts rejected the claim at all instances. The decisions were essentially justified on the grounds that there had been no violation of applicable building regulations and that it was within the discretion of municipalities to improve access to public buildings for persons with disabilities with the funds allocated to them.

The applicant claims that he is prevented from participating in the society of the municipality and suffered discrimination.

The Court has already emphasised in previous cases[36], which concerned the rights of persons with disabilities, that the obligation of states to make adjustments and take measures to enable and ensure the participation of persons with disabilities in social and cultural life is to be derived from Article 14 ECHR. This would help to correct factual inequalities that are unjustified and therefore constitute discrimination. In this context, the Court has pointed to the importance of Article 30 of the UN Convention on the Rights of Persons with Disabilities[37], which explicitly obliges States Parties to take measures to ensure that persons with disabilities can participate in cultural life on an equal basis with others. However, States have a margin of appreciation in implementing such measures, taking into account the circumstances of the individual case to determine whether discrimination may be justified.[38] Applying these principles, the Court finds in the present case that Iceland has made considerable efforts to provide access to public buildings in municipalities for persons with disabilities, following a 2011 parliamentary resolution. To the extent that the municipality in which the applicant resides disregarded the two buildings in the context of prioritisation in order to achieve accessibility, this discretionary decision is not open to challenge. The obligation to take further measures would have imposed a disproportionate or undue burden on the public authorities. Accordingly, the Court found that there was no violation of Article 14 ECHR in conjunction with Article 8 ECHR.

In a dissenting opinion, Judge *Zünd* held that the discretionary decision of the state authorities had been flawed. For example, one of the buildings had been extensively renovated between 2006 and 2014 without any construction measures being taken to make it

[36] ECtHR of 26 October 2021 – Nos. 34591/19 and 42545/19 – *Toplak and Mrak* v. *Slovenia,* with comment *Rabe-Rosendahl/Kohte*, HSI Report 4/2021, p. 18 (in German); ECtHR of 30 April 2009 – No. 13444/04 – *Glor* v. *Switzerland*.

[37] UN Convention on the Rights of Persons with Disabilities.

[38] ECtHR of 7 November 2013 – Nos. 29381/09 and 32684/09 – *Vallianatos and Others* v. *Greece*; ECtHR of 26 October 2021 – Nos. 34591/19 and 42545/19 – *Toplak and Mrak* v. *Slovenia*; ECtHR of 24 May 2016 – No. 38590/10 – *Biao* v. *Denmark*.

barrier-free. Moreover, it had to be taken into account that the applicant had already filed the complaint in 2015, so that the municipality had sufficient time to improve access to public buildings for people with disabilities.

New pending cases (notified to the respective government)

No. 44628/19 – *Anghelache and Others v. Romania* (Fourth Section) – lodged on 19 August 2019 – delivered on 8 April 2022

Law: Article 6 ECHR (right to a fair trial); Article 1 Additional Protocol No. 12 (general prohibition of discrimination)

Keywords: Payment of hardship allowances – different judicial decisions on the same facts - unequal treatment

Note: The applicants are employed in a state-run Sanitary-Veterinary and Food Safety Directorate and claim a hardship allowance, which they are entitled to under the law for hazardous work. The employer paid this allowance to its employees, with the exception of the applicants, who therefore challenged this decision before courts. In the final court decision, the claims were dismissed on the grounds that the allowance was only payable to certain salary levels. In other similar cases, however, national courts have interpreted the relevant legal provision differently and awarded the allowance to the respective applicants.

The applicants claim that they are subjected to discrimination within the meaning of Article 14 ECHR as a result of the different treatment.[39] They also allege a violation of the principle of legal certainty arising from Article 6 ECHR due to the different case law of the national courts on the same facts.[40]

No. 73248/16 – *Oprea v. Republic of Moldova* (Second Section) – lodged on 25 November 2016 – delivered on 06 April 2022

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

Keywords: Granting of parental leave – favourable treatment only for female employees – discrimination on grounds of sex

Note: The application concerns the alleged discrimination on grounds of sex. The applicant, an employee of the Ministry of Internal Affairs, applied for parental leave. He was denied parental leave on the grounds that, according to national law, only female employees are entitled to parental leave. After the applicant stopped showing up to work, he was dismissed from his employment. He brought an action seeking acknowledgment of discrimination, reinstatement and compensation. The national courts found discrimination but dismissed the claims for reinstatement and/or compensation.

The applicant alleges a violation of Article 14 ECHR in conjunction with Article 8. He has not lost his victim status despite the courts' decisions.[41]

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[39] ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish* an Others v. *Romania*; ECtHR of 10 May 2012 – No. 34796/09 – *Albu and Others* v. *Romania*.

[40] ECtHR of 20 November 2020 – No. 33139/13 – *Napotnik* v. *Romania*; ECtHR of 10 May 2012 – No. 34796/09 – *Albu and Others* v. *Romania*.

[41] With reference to ECtHR of 12 March 2012 – No. 30078/06 – *Konstantin Markin* v. *Russia.*

2. Freedom of association

Decisions

Judgment (Second Section) of 24 May 2022 – No. 70098/12 – *Alıcı and Others v. Turkey*

Law: Article 5 ECHR (right to liberty and security); Article 11 ECHR (freedom of assembly and association)

Keywords: Unlawful arrest and detention – preventing participation in a union-organised demonstration

Core statement: The fact that any demonstration in a public place can lead to disturbances of everyday life does not in itself justify an interference with the exercise of the right to freedom of assembly.

Note: The 22 applicants are members of the Turkish Education, Science and Culture Workers' Union (*Eğitim ve Bilim Emekçiler Sendikası*). They were planning to take part in a demonstration organised by the union in *Ankara on* 27 March 2012 against the government's intention to amend a law restricting the trade union rights of public employees. On their way to the demonstration, the applicants were arrested by police officers and detained for more than 14 hours in a police station in order to check their identities. Since they refused to disclose their personal details, administrative offence proceedings were initiated against the applicants, which resulted in a fine being imposed on them. Appeals against this were unsuccessful in all instances.

On the one hand, the applicants claim a violation of Article 5(1) ECHR, as they were detained for an unreasonable period of time without a legal basis and the imposition of a fine was unjustified. In addition, their right to freedom of assembly was violated.

The Court does assume that citizens are obliged to disclose their personal details to the police, even if there is no suspicion that a criminal offence has been committed.[42] However, any deprivation of liberty must comply with the purpose of Article 5 ECHR, so that even detention that is lawful under national law can be arbitrary.[43] Even if one assumes that the applicants were taken to the police station in order to establish their identity, the duration of the measure in particular suggests that the actual reason for the arrest was to prevent their participation in the demonstration.

With regard to the alleged violation of Article 11 ECHR, the Court refers to the principles established by its case law[44]. According to these principles, in the case of a lawful demonstration, state authorities may only take measures that guarantee the conduct of the demonstration and the safety of all citizens. In the present case, however, the Court concludes that the police action was taken for the sole purpose of preventing the applicants from taking part in the demonstration.

The Court therefore finds a violation of both Article 5(1) ECHR and Article 11 ECHR. The application for compensation was dismissed.

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[42] ECtHR of 25 September 2003 – No. 52792/99 – *Vasileva* v. *Denmark*; ECtHR of 5 April 2011 – No. 14569/05 – *Sarigiannis v. Italy*; ECtHR of 17 October 2017 – No. 49752/07 – *Başbakkal Kara* v. *Turkey*; ECtHR of 4 November 2003 – No. 47244/99 – *Novotka* v. *Slovakia.*

[43] ECtHR of 22 October 2018 – No. 35553/12 – *S., V. and A. v. Denmark*; ECtHR of 4 April 2000 – No. 26629/95 – *Witold Litwa v. Poland*; ECtHR of 23 February 2012 – No. 29226/03 – *Creangă* v. *Romania*; ECtHR of 19 February 2009 – No. 3455/05 – *A. and Others* v. *United Kingdom*.

[44] ECtHR of 5 June 2016 – No. 20347/07 – *Eğitim ve Bilim Emekçileri Sendikası* v. *Turkey*.

Judgment (Fifth Section) of 02 June 2022 – No 59402/14 – *Straume v. Latvia*

Law: Article 11 ECHR (freedom of assembly and association); Article 10 ECHR (freedom of expression); Article 6 ECHR (right to a fair trial)

Keywords: Complaint by a trade union to the employer – sanctions against workers in response – absence of a public judicial hearing

Core statement: National authorities must ensure that trade unions have the opportunity to express their demands to the employer in order to improve the situation of workers in the company.

Note: The applicant had been employed by the state-owned airline *Latvijas Gaisa Satiksme* (LGS), which is under the supervision of the Ministry of Transport. She is a member and chairperson of the Latvian Air Traffic Controllers' Union. In March 2012, the union sent a letter to the employer and to the Minister of Transport, signed by a.o. the applicant, complaining about the shift schedules of instructors. They were to be assigned additional shifts without pay. In response, the employer first ordered a mental health examination of the applicant. She was then suspended, and her salary withheld. She was also banned from entering the workplace. The applicant unsuccessfully appealed against these measures. The employer filed a counterclaim for a declaration that the employment relationship be terminated. The court granted this application and dismissed the applicant's claim. The decisions were upheld by both the Court of Appeal and the Supreme Court. The oral hearings before the courts of instance were held in camera at the request of the employer, who invoked the protection of state and business secrets.

As the applicant considers that the measures imposed by the employer were caused by the letter she sent to the employer in her capacity as trade union chairperson, she alleges a violation of Article 11 ECHR in conjunction with Article 10 ECHR. She also alleges a violation of Article 6 of the ECHR, as the judgments were handed down without public oral hearings.

The complaint focuses on freedom of expression in close connection with freedom of association, as the applicant criticised the employer in her capacity as a trade union leader. The subsequent measures, which are considered lawful by the domestic courts, are therefore examined by the Court under Article 11 ECHR, which must be interpreted in the light of Article 10 ECHR.[45] According to the case law of the Court[46], a trade union whose aim is to protect the occupational interests of its members must be able to freely articulate its demands to the employer, otherwise itis deprived of an essential means of action. The applicant has exercised this right in the present case. The Court sees the measures imposed by the employer as a direct consequence of the exercise of this right and therefore finds a violation of Article 11 ECHR, explicitly pointing out that even if the measures were lawful under domestic law, the interference cannot be considered "necessary in a democratic society" and is therefore not in conformity with Article 11 ECHR. The decision also has significance for German law, as it may strengthen the right of trade unions and their members to point out abuses in the workplace.

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[45] ECHR of 26 April 1991 – No. 11800/85 – *Ezelin v. France*; ECtHR of 12 September 2011 – Nos. 28955/06, 28957/06, 28959/06 and 28964/06 – *Palomo Sánchez and Others* v. *Spain*; ECtHR of 25 September 2012 – No. 11828/08 – *Trade Union of the Police in the Slovak Republic and Others* v. *Slovakia*; ECtHR of 1 December 2011 – Nos. 8080/08 and 8577/08 – *Schwabe and M. G. v. Germany*.

[46] ECtHR of 20 November 2018 – No. 44873/09 – *Ognevenko* v. *Russia*; ECtHR of 2 July 2002 – Nos. 30668/96, 30671/96 and 30678/96 – *Wilson, National Union of Journalists and Others v. United Kingdom*; ECtHR of 27 October 1975 – No. 4464/70 – *National Union of Belgian Police v. Belgium*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 25 September 2012 – No. 11828/08 – *Trade Union of the Police in the Slovak Republic and Others* v. *Slovakia*; ECtHR of 4 April 2017 – No. 35009/05 – *Tek Gıda İş Sendikası v. Turkey,* with comment *Buschmann/Jessolat,* in: HSI-Newsletter 2/2017, p. 10 et seq.

The Court further points out that the holding of a public hearing is in line with the principle of fair trial inherent in Article 6 ECHR. This is a fundamental principle of every democratic society.[47] In the present proceedings, it was not apparent that the exclusion of the public was necessary to protect the public interest. In particular, the national courts did not find that state or business secrets were disclosed during the oral proceedings. Even if full disclosure of facts could endanger national security or the security of others, techniques would have to be applied by the courts to address such security concerns. Fundamental procedural safeguards such as public hearings must not be completely negated in any case.[48] The Court therefore found a violation of both Article 11 ECHR and Article 6 ECHR. The applicant was awarded compensation in the amount of 25,000 EUR.

Judgment (First Section) of 5 May 2022 – No. 31163/13 – *Vlahov v. Croatia*

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

Keywords: Criminal conviction of a trade union representative for refusing to admit potential members – lack of justification by national courts

Core statement: The state must take measures within its discretionary powers to ensure trade union freedom, the substance of which must not be restricted.

Note: The applicant was a representative of the customs union CSH and in this capacity he refused to admit 15 employees of the customs office to the union at that time. He invoked, on the one hand, an agreement with other union members not to increase the number of members until the next election. In doing so, they wanted to protect the existing leadership structure and interests of the union, because with the admission of workers close to the employer in the run-up to the election, there was a risk of "takeover". On the other hand, the protection of members' interests and independence from the employer was also enshrined in the union's statute. However, the union president appointed the 15 workers as members. The applicant was removed from office by decision of the newly constituted union assembly. Criminal charges were then brought against him on the charge of preventing citizens from joining trade unions under Article 109 of the Croatian Criminal Code. He was sentenced to four months imprisonment. The constitutional complaint against this was dismissed as unfounded.

Before the ECtHR, the applicant complains about the criminal conviction and thus procedural omissions and the reasons given for the decision by the national courts. He invokes Article 11 ECHR.

Referring to previous case law[49], Article 11 ECHR protects, according to the ECtHR, the right of trade unions to establish their own rules and manage their affairs, e.g. membership. The interference found consisted in the prosecution of the applicant. Therefore, the question before us concerns the extent to which the state could intervene to protect the prospective trade union members from the impediment of their right to associate. The rights of the applicant and the union he represented at the relevant time to control their membership by

[47] ECtHR of 12 April 2006 – No. 58675/00 – *Martinie v. France*; ECtHR of 12 July 2001 – No. 33071/96 – *Malhous* v. *Czech Republic*; ECtHR of 17 December 2013 – No. 20688/04 – *Nikolova and Vandova v. Bulgaria*.

[48] ECtHR of 16 April 2013 – No. 40908/05 – *Fazliyski* v. *Bulgaria*; ECHR of 11 February 2010 – No. 31465/08 – *Raza v. Bulgaria*.

[49] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 9 July 2013 – No. 2330/09 – *Sindicatul "Păstorul cel Bun" v. Romania* ; ECtHR of 27 February 2007 – No. 11002/05 – *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. United Kingdom.*

deciding who could join must be taken into account. The decisive factor is whether the interference was necessary in a democratic society.

The ECtHR finds that the state's duty to protect exists only if the rejection of the 15 employees is a violation of the statutes, the rules of which are completely arbitrary and unreasonable or involve exceptional hardship. This is not the case here because, among other things, there were no (shop) agreements from which only the union members benefited. Moreover, it was possible to join the other local trade union with the same organisational area. It is also decisive that it is not apparent that the applicant did not represent the interests of the union or other members and thus violated the statutes. Non-admission did not discriminate against the persons concerned. The interference was thus not necessary in a democratic society and is a violation of Article 11 ECHR. The applicant was awarded non-pecuniary damages of 5,000 EUR.

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3. Freedom of expression

Decisions

Judgment (First Section) of 16 June 2022 – No. 39650 – *Żurek v. Poland*

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

Keywords: Polish judicial reform – lack of judicial review – paramount importance of freedom of expression

Core statement: In view of the prominent position that the judiciary occupies among the organs of state in a democratic society and taking into account the importance of the separation of powers, particular attention must be paid to protecting the members of the judiciary from measures that jeopardise their independence.

Note: The applicant is a judge at the *Crakow* Regional Court and was the court's spokesperson. In 2010, he was initially elected to the National Council for the Judiciary, *Krajowa Rada Sądownictwa* (NCJ), for a four-year term. This is a constitutional body whose task is to safeguard the independence of the courts and judges. One of its main tasks is to select candidates for appointment to the judiciary. The appellant's term in the NCJ was extended in 2014 until 2018. He was also appointed as the spokesperson of the NCJ. In this capacity, he had already been voicing criticism of the judicial reform intended by the new government and implemented in 2017 in interviews, online articles as well as the NCJ's YouTube channel since 2015. He saw a weakening of judicial independence because of the legal changes, as the appointment of judges was now made by the Parliament (*Sejm*). Based on the adopted legislation, the applicant was dismissed from the NCJ before the end of his term. Similarly, he was removed from the position of Speaker of the Regional Court. A tax audit concerning him was extended to his wife, and the applicant's parents were also questioned. Based on an anonymous letter, disciplinary proceedings were also initiated against the applicant for alleged official irregularities. These proceedings have not been concluded at the present time. An appeal against the dismissal from the NCJ is not provided for under national law.

The applicant claims that he had been denied access to a court of law, as the premature and allegedly arbitrary termination of his term of office in the NCJ is not subject to appeal under national law. Moreover, he considers that the measures, as well as the initiation of the

disciplinary proceedings and the questioning of family members in the context of his tax declaration, were a consequence of his critical stance towards the judicial reform and thus violate Article 10 ECHR.

The Court refers to its recent case law[50], according to which Article 6 ECHR applies to the premature termination of the term of office of members of the NCJ and their lack of judicial review affects the applicant's right of access to a court. With regard to Article 10 ECHR, the Court recalls that this provision also protects civil servants and judges.[51] This concerns in particular disciplinary proceedings aimed at removal from office.[52] In the context of the assessment of evidence, the Court must take into account the submissions of the parties as well as the sequence of relevant events.[53] In the light of these principles, the Court finds that the applicant's statements must be seen as grounds for both -his removal from the NCJ and the initiation of the disciplinary proceedings as well as the extension of the tax audit. In view of the accumulation and timing of the measures, the Court considers that they were strategy aimed at intimidating the applicant because of his statements. Due to the paramount importance of freedom of expression for a democratic society, the Court considers the measures complained of to be a violation of Article 10 ECHR. In total, the applicant was awarded compensation of 15,000 € for non-pecuniary damage and 10,000 € for material damage the violation of for both Article 6 ECHR and Article 10 ECHR.

As with the decision of 15 March 2022[54] , the Polish judge *Wojtyczek* has published a partly concurring and partly dissenting opinion, arguing that Article 6 ECHR is not applicable in the present case. With regard to Article 10 ECHR, he is also of the opinion that there is a violation, but he criticises that the extension of the scope of application of Article 10 ECHR to statements by public officials may entail certain contradictions.

The Court's decision is one of a series of recent judgments[55] concerning the lack of independence of the judiciary in Poland as a result of the judicial reform of 2017. Regarding this case law, a violation of Article 6 ECHR is once again established. In addition, however, measures taken due to public criticism of this legislation may now also violate Article 10 ECHR. A special signal is sent by the fact that the defendant government is ordered to pay significant compensation for the first time.

[50] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda* v. *Poland* (s. HSI Report (en) 1/2022, p. 29 et seq.).

[51] ECtHR of 26 September 1995 – No. 17851/91 – *Vogt* v. *Germany*; ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Moldova*; ECtHR of 28 October 1999 – No. 28369/95 – *Wille v. Liechtenstein*; ECtHR of 20 November 2012 – 58688/12 – *Harabin* v. *Slovakia*; ECtHR of 23 June 2018 – 20261/12 – *Baka* v. *Hungary*.

[52] ECtHR of 28 October 1999 – No. 28369/95 – *Wille v. Liechtenstein*; ECtHR of 20 November 2012 – 58688/12 – *Harabin v. Slovakia*; ECtHR of 13 November 2008 – Nos. 64119/00 and 76292/01 – *Kayasu v. Turkey*; ECtHR of 7 December 2010 – No. 15966/06 – Poyraz v. Turkey; ECtHR of 20 November 2012 – 58688/12 – *Harabin* v. *Slovakia*; ECtHR of 23 June 2018 – 20261/12 – *Baka* v. *Hungary*; ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova* v. *Bulgaria* (s. HSI Report 4/2021, p. 20 et seq.).

[53] ECtHR of 20 November 2012 – 58688/12 – *Harabin* v. *Slovakia*; ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*; ECtHR of 8 October 2020 – No. 41752/09 – *Goryaynova v. Ukraine*; ECtHR of 23 June 2018 – 20261/12 – *Baka v. Hungary*; ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova v. Bulgaria.*

[54] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda* v. *Poland* (s. HSI Report 1/2022, p. 29 et seq.).

[55] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda* v. *Poland* (s. HSI Report 1/2022, p. 29 et seq.); ECtHR of 7 May 2021 – No. 4907/18 – *Xero Flor w Polsce sp. z o.o.* v. *Poland* (s. HSI Report 2/2021, p. 49 et seq.); ECtHR of 29 June 2021 – No. 26691/18 – *Broda and 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*.

New pending cases (notified to the respective government)

No. 41232/13 – *Balacci v. Republic of Moldova* (Second Section) – lodged on 29 May 2013 – delivered on 2 May 2022

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

Keywords: Whistleblowing – criminal charges against superiors – dismissal for alleged operational reasons

Note: The applicant was employed in the Customs Service. He had filed a complaint against his superior because of irregularities in the service. As a result, his employment was initially terminated, but he was later reinstated. A short time later, he again made public statements about the irregularities. This was followed by a dismissal due to alleged reorganisation measures and the associated loss of his job. An action against the dismissal was unsuccessful before the domestic courts.

Since the applicant assumes that the termination of his employment is related to the public statements, he alleges a violation of Article 10 ECHR.[56]

No. 27444/22 – *Gąciarek v. Poland* (First Section) – lodged on 24 May 2022 – delivered on 10 June 2022

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

Keywords: Public criticism of the Polish judicial reform – disciplinary measures against a judge

Note: The applicant is a judge at the Warsaw Regional Court and a member of a judges' association that has frequently been critical of the judicial reform implemented in Poland in 2017. As a result of a criticism, he made of a judgment because the court was not properly staffed, he was initially transferred to the court's Execution Division and later suspended from his judicial functions. Disciplinary proceedings instituted against him resulted in the reduction of his salary by 40%. The decision was upheld by the Supreme Court.

The applicant alleges, inter alia, a violation of Article 10 ECHR, as he considers that the disciplinary measure against him was imposed solely because of his critical statements in connection with the judicial reform. In addition, he alleges a violation of Article 6 ECHR, as the Disciplinary Chamber of the Supreme Court was composed in accordance with the provisions adopted in the context of the controversial judicial reform and thus not in accordance with the principles of the rule of law.

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[56] ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova* v. *Bulgaria* (s. HSI Report 4/2021, p. 20 et seq.); ECtHR of 27 February 2018 – No. 1085/10 – *Guja* v. *Republic of Moldova*.

4. Procedural Law

Decisions

Judgment (Fourth Section) of 5 April 2022 – Nos. 19059/18 and 19725/18 – *Benkharbouche and Janah v. the United Kingdom*

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

Keywords: Statutory minimum wage – state immunity – unequal treatment on grounds of nationality – acknowledgement of a violation of the ECHR

Core statement: If a violation of the ECHR is acknowledged by the respondent government in proceedings before the ECtHR, the Court is still empowered to award compensation to the applicants under Article 41 ECHR without examining the existence of a violation of the ECHR.

Note: The two applicants are Moroccan nationals employed as domestic workers in various foreign embassies in the United Kingdom. Following the termination of their employment, they claimed payment of the statutory minimum wage under domestic law from their employers - the Republic of Sudan and the State of Libya respectively. The employers relied on state immunity, according to which a foreign state cannot be subject to the jurisdiction of a British court. This view was initially followed by the Labour Court, whereas the Court of Appeal pointed to a breach of Article 6 ECHR in the relevant domestic regulation. In a declaration made before the court, the employers acknowledged the violations and agreed to compensate the applicants for the pecuniary damage. The court did not rule on the question of whether the ECHR had been violated.

The applicants allege a violation of Article 6 ECHR, as the domestic statutory provision on state immunity denied them access to a court and discriminated them on grounds of origin within the meaning of Article 14 ECHR compared to nationals of the United Kingdom solely on the basis of their nationality.

The respondent government undertook to pay the applicants 20,000 £ each and to reimburse the costs and expenses of the proceedings. As a result, it required to strike out the application in accordance with Article 37 ECHR.

The Court does point out that in certain circumstances it may be appropriate to strike out an application on the basis of a Unilateral Declaration by the respondent government under Article 37 ECHR, even if the applicant wishes the case to be continued. However, the decisive question here is whether the Unilateral Declaration provides a sufficient basis for considering further consideration of respect for human rights to be dispensable.[57] In the present case, since the compensation offered by the government falls significantly short of the applicants' original claims for payment of the compensation to which they are entitled, the Court considers it necessary to make a decision on compensation for the acknowledged violation of human rights. Even if it accepts the Government's concession, it is nevertheless empowered to award the applicants compensation under Article 41 ECHR,[58] without itself examining the substantive issues raised. Accordingly, the applicants were each awarded 50,000 € as compensation for pecuniary damage and compensation of 5,000 EUR and 6,500 EUR respectively for non-pecuniary damage.

[57] ECtHR of 8 April 2004 – No. 26307/95 – *Tahsin Acar* v. *Turkey*; ECtHR of 20 October 2009 – No. 858/08 – *Radoszewska-Zakościelna* v. *Poland*.

[58] ECtHR of 8 February 2000 – No. 32819/96 – *Caballero* v. *United Kingdom.*

Judgment (Fifth Section) of 7 April 2022 – No. 18952/18 – *Gloveli v. Georgia*

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

Keywords: Inability of judicial review of a selection decision – judicial independence – importance of procedural fairness

Core statement: In view of the importance of judicial independence, the national selection procedure for the appointment of judges must not be deprived of review by the courts in accordance with the rule of law.

Note: The applicant is a practising lawyer with many years of professional experience. She worked as a judge between 1999 and 2005. In 2017, she applied for a judgeship. Her application, after initially being shortlisted, was rejected on the grounds that she did not have the qualifications required to fill the post. A review of this decision was not provided for under national law, so that the court seised by the appellant dismissed the action as inadmissible.

The applicant takes the view that she was denied access to a court within the meaning of Article 6 ECHR due to the lack of a judicial review possibility with regard to the rejection decision.

Referring to its case law[59], the Court first states that disputes concerning the appointment, career and dismissal of judges fall within the scope of Article 6 ECHR. It must then first be examined whether domestic law explicitly excludes appeals against decisions on appointments.[60] Under Georgian law, an appeal against a selection decision is excluded if the candidate has not been shortlisted. In the present case, the applicant had been invited for interviews and aptitude tests, so it can be assumed that she was initially shortlisted. Nevertheless, her application was rejected on formal grounds without taking into account the results of the selection procedure. Therefore, the Court concluded that domestic law excluded the applicant from access to a court.

In a second step, it must be examined whether the rejection of an appeal against a selection decision could be justified on objective grounds in the State's interest.[61] In this regard, the Court of Justice has already stated in previous decisions[62] that, in view of the prominent place of the judiciary in a democratic society and the importance of judicial independence for the separation of powers, special attention must be paid to the protection and career of judges. It follows that a procedure based on the rule of law and its possibility of judicial review is required to have decisions on the deployment of judicial personnel reviewed. As Georgian law does not meet these requirements, the Court found a violation of Article 6 ECHR in the applicant's case and ordered the respondent government to pay compensation of 3,600 EUR.

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[59] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland* (HSI Report 1/2022, p. 29 et seq.); ECtHR of 8 November 2021 – Nos. 49868/19 and 57511/19 – *Dolińska-Ficek and Ozimek* v. *Poland*; ECtHR of 22 July 2021 – No. 11423/19 – *Gumenyuk v. Ukraine*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey* (s. HSI Report 1/2021, p. 23 et seq.); ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen* v. *Turkey* (HSI Report 1/2021, p. 27).

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

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

[62] ECtHR of 8 November 2021 – Nos. 49868/19 and 57511/19 – *Dolińska-Ficek and Ozimek v. Poland*; ECtHR of 26 July 2011 – No. 58222/09 – *Juričić* v. *Croatia*; ECtHR of 15 September 2015 – No. 43800/12 – *Tsanova-Gecheva v. Bulgaria*; ECtHR of 30 June 2009 – No. 20774/05 – *Fiume v. Italy*; ECtHR of 12 October 2021 – Nos. 43391/18 and 17766/19 – *Bara and Kola v. Albania*.

New pending cases (notified to the respective government)

No. 19371/22 – *Stoianoglo v. Republic of Moldova* (Second Section) – lodged on 19 January 2022 – delivered on 30 May 2022

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

Keywords: Suspension from office as general prosecutor – lack of possibility of judicial review

Note: Criminal investigations were initiated against the applicant. As a result, he was suspended from his office as public prosecutor as of October 2021. An action brought against this was dismissed on the grounds that the decision on suspension was not an administrative act that could be challenged by legal remedies. This decision was confirmed by the Supreme Court.

The applicant alleges a violation of his right of access to a court under Article 6 ECHR.[63]

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5. Protection of privacy

New pending cases (notified to the respective government)

Nos. 55273/21 and 55562/21 – *Kocot and Kappes v. Poland* (First Section) – lodged on 5 November 2021 – delivered on 1 June 2022

Law: Article 8 ECHR (right to respect for private and family life); Article 6 ECHR (right to a fair trial) in conjunction with Article 13 ECHR (right to an effective remedy)

Keywords: Successful application for judicial office – delay of appointment by the President of the Republic

Note: The applicants are university professors and specialists in civil and international law. In 2017, they applied for vacant judgeships. After the successful selection process, the National Judicial Council recommended the appointment of the complainants to the President of the Republic in 2018. In 2020, the applicants inquired about the status of their application. In response, they were only informed that the process was under consideration. Further enquiries in 2021 remained unanswered.

On the one hand, the applicants claim that their right to respect for private life has been violated due to the inaction of the President of the Republic. In addition, they complain that they are denied access to a court due to the lack of opportunity for judicial review of their case.

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6. Protection of property

[63] ECtHR of 23 June 2018 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen* v. *Turkey* (s. HSI Report 1/2021, p. 27); ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan* v. *Romania* (s. HSI Report 4/2020, p. 29).

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Judgment (Fifth Section) of 16 June 2022 – No. 40424/12 – *Ramiz Jafarov v. Azerbaijan*

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

Keywords: Entitlement to a supplementary pension – consideration of periods of service in different areas of the judiciary – excessively long duration of proceedings

Core statement: It is exclusively a matter for national authorities and courts to apply national law, so that an allegedly erroneous interpretation can only be reviewed by the Court of Justice to determine whether it results in a violation of the ECHR.

Note: The applicant entered the judicial service after completing his legal education. From 1977 to 2000, he was assigned to various areas of law enforcement for a period of 23 years and one month. From 2000 to 2007, he worked as a judge. Under national law, services with the prosecution authorities are entitled to a supplementary pension after 25 years of service. The applicant applied for this supplementary pension in 2007, stating in support of his application that his work as a judge should be considered as years of service. The State Social Protection Fund rejected the application on the grounds that the applicant had not reached the required length of service. Appeals against the decision were unsuccessful before the Supreme Court after the lower courts found the claim partially justified. The Supreme Court pointed out the clear legal situation, according to which the entitlement to the supplementary pension only arises after 25 years of service with the prosecution authorities. However, the Court recommended to the legislator that periods of service in the general judicial service should also be taken into account for the granting of the supplementary pension against the background of possible discrimination.

The applicant claims that his right to property was violated by the denial of the supplementary pension. He also alleges a violation of Article 6 ECHR, as a final decision on his application took more than nine years.

The Court, referring to its case law[64], concludes that the granting of a pension may fall within the scope of Article 1 of Additional Protocol No. 1. Even though this provision only applies to existing possessions and does not create a right to acquire property, a legitimate expectation to acquire property rights may, under certain circumstances, affect the scope of protection of Article 1 Additional Protocol No. 1.[65] However, the Court points out that this does not guarantee a right to a pension of a particular amount.[66] The reduction of such a benefit requires justification as an interference with possessions.[67] If the conditions for the granting of a pension are not or are no longer fulfilled, there is no interference with the possession protected by Article 1 of Additional Protocol No. 1.[68] Taking these principles into account, the Court finds for the present case that the applicant's primary concern was to have the application of domestic law reviewed by the authorities and courts, which is not the Court's task. As the claim asserted is not protected by Article 1 of Additional Protocol No. 1, a violation could not be established.

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[64] ECtHR of 19 October 2000 – No. 31107/96 – *Iatridis* v. *Greece*.

[65] ECtHR of 11 January 2007 – No. 73049/01 – *Anheuser-Busch Inc.* v. *Portugal*; ECtHR of 28 September 2004 – No. 44912/98 – *Kopecký* v. *Slovakia*.

[66] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy* v. *Hungary*; ECtHR of 5 March 2019 – No. 36366/06 – Yavaş and Others v. Turkey.

[67] ECtHR of 28 April 2009 – No. 38886/05 – *Rasmussen* v. *Poland*.

[68] ECtHR of 27 April 1999 – No. 40832/98 – *Bellet, Huertas and Vialatte* v. *France*; ECtHR of 10 April 2012 – No. 26252/08 – *Richardson* v. *United Kingdom*; ECtHR of 24 October 2013 – No. 52943/10 – *Damjanac* v. *Croatia*.

However, as regards the duration of the administrative or judicial procedure, the Court, referring to decisions in previous cases[69], finds that the dispute, which was not particularly complex, was not decided in a reasonable time, so that there was a violation of Article 6 ECHR. For this, the applicant was awarded compensation in the amount of 2,000 EUR.

New pending cases (notified to the respective government)

No. 19529/16 – *Leonte v. Republic of Moldova* (Second Section) – lodged on 30 June 2016 – delivered on 3 May 2022

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

Keywords: Social security liability – simultaneous employee and managing director status

Note: The applicant is the only owner as well as the managing director of a limited liability company and at the same time the administrator of the company under a labour agreement. She applied to the Social Security Authority for maternity-related benefits. This was denied on the grounds that as the owner of a limited liability company she was not subject to compulsory social insurance and therefore could not claim maternity-related benefits. A complaint against this decision was unsuccessful in all instances.

It is questionable whether there is an encroachment on the protection of the applicant's possession and whether this is in the interest of the general public[70] or whether it impose an excessive burden on the applicant.[71] In addition, the complainant alleges discriminatory treatment compared to other employees subject to social security payments.

No. 71375/17 – *Chondrogiannis v. Greece* (Second Section) – lodged on 29 September 2017 – delivered on 1 June 2022

Law: Article 8 ECHR (right to respect for private and family life) in conjunction with Article 12 ECHR (right to marry); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Marriage without the employer's permission – disciplinary proceedings – refusal of pension benefits

Note: The applicant, a navy officer, married in 1973 without first asking his employer for permission. According to the regulations in force at the time, this constituted a serious disciplinary offence and resulted in his dismissal from the navy. After this law was later repealed, the applicant was reinstated to military service eight years later. Upon retirement, the time during which he was dismissed was not recognised as pensionable service.

The question to be examined here is whether there has been a violation of Article 8 ECHR and/or Article 12 ECHR because the reduction of his pension benefits is due to the fact that he was temporarily discharged from navy because of an unauthorised marriage, although the conduct on which the dismissal was based was later legalised.

[69] ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish and Others* v. *Romania*; ECtHR of 27 June 2000 – No. 30979/96 – *Frydlender* v. France; ECtHR of 27 June 2017 – No. 931/13 – *Satakunnan Markkinapörssi Oy and Satamedia Oy* v. *Finland*.

[70] ECtHR of 23 October 2007 – No. 40117/02 – *Cazacu* v. *Moldova*.

[71] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy* v. *Hungary*.

No. 39998/20 – *Tomas v. Croatia* (First Section) – lodged on 24 August 2020 – delivered on 30 May 2022

Law: Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Reduction of a disability pension – criminal conduct – repayment of the entire pension

Note: The applicant was granted a military disability pension as a war veteran in 2010. It was subsequently discovered that he had submitted forged documents when applying for the pension, which is why criminal proceedings were initiated against him for fraud. The pension decision was subsequently changed, and he was awarded a disability pension as a civilian, which is lower than that of a former military member. As a result of the criminal proceedings, the applicant was ordered to reimburse all pension contributions paid to him between 2009 and 2012.

In his complaint, he claims that he should only have been ordered to reimburse the difference between the pension actually paid to him and the lower pension to which he is entitled on the basis of the new pension decision. He considers this to be a violation of Article 1 of Additional Protocol No. 1.

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