REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

The HSI is an institute of the Hans-Böckler-Stiftung

Edition 3/2022
Reporting period: 1 July – 30 September 2022

Content

I. Editorial

The present HSI Report 3/2022 reviews developments in primary and secondary EU law and the European Convention on Human Rights in the period from July to September 2022.

In a noteworthy case, the CJEU has ruled on whether a collective agreement regulating night work implements the Working Time Directive and must therefore be assessed in the light of the Charter of Fundamental Rights. Furthermore, it deals with the justification of unequal treatment of regular and irregular night work - for the latter, the collective agreement at issue provided for higher payments. The Court considers the supplements to be pay regulations rather than working time regulations. It was therefore not called upon to answer the question referred.

Among the other CJEU cases, a decision on annual leave compensation claims deserves to be highlighted. According to this decision, the limitation period only begins to run if the employer has actually put the employee in a position to actually exercise the right to annual leave. In the reporting period, the Court also had the opportunity to comment on social security law issues. These include the hiring of personal assistance services for persons with disabilities and the denial of family benefits to persons who are not currently employed.

In a case decided by the ECtHR, the German collective bargaining regulations, which provide for the primacy of the collective agreements of the majority trade union in the establishment, came under scrutiny. According to the ECtHR, Section 4a Collective Bargaining Act (Tarifvertragsgesetz) is compatible with the freedom of association. The members of minority trade unions concerned are not left without a collective agreement. In terms of comparative law, the German regulation does not have a direct equivalent, but there are regulations in other Member States that distinguish between representative and non-representative associations. The minority unions have to accept certain restrictions. The contested law therefore remains in place and the decision is not expected to lead to any significant legal changes.

In the other proceedings before the ECtHR, there are several cases about cuts in pension benefits and the question of whether this is a violation of the freedom of property. In addition, the circumstances under which an employer may disclose information about an employee's HIV infection that has come to light in the course of a routine examination in the workplace, or can pass this information on to a hospital, is an issue before the ECtHR. The Court also emphasises the obligation of Member States, derived from Article 8 ECHR, to establish effective protection against sexual harassment in the workplace.

With best wishes for the New Year
The editors
Dr. Johanna Wenckebach, Prof. Dr. Martin Gruber-Risak and Prof. Dr. Daniel Hlava

→ back to overview

II. Proceedings before the CJEU

Compiled and commented by

Dr. Ernesto Klengel, Dr. Amélie Sutterer-Kipping and Antonia Seeland, Hugo Sinzheimer Institute of the Hans-Böckler-Stiftung, Frankfurt/M.

Translated to English by Allison Felmy

1. Annual leave

Decisions

Judgment of the Court of Justice (Sixth Chamber) of 22 September 2022 – C-120/21 – *LB*

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

Keywords: Annual leave – allowance in lieu of leave not taken after termination of the employment relationship – three-year limitation period – starting point – adequate information provided to the worker

Core statement: For reasons of EU law, the three-year limitation period under German law begins at the earliest when the employer has enabled the workers concerned to actually exercise their right to paid annual leave.

Notes: A worker who was in an employment relationship with the employer from 1996 to 2017 claims from the employer an allowance in lieu of leave for periods between 2013 and 2017. The employer has invoked the statute of limitations, which would be partially successful if the limitation period started to run at the end of the respective reference period. The German Federal Labour Court (BAG) referred to the CJEU the question whether the limitation period begins to run even if the employer has not enabled the worker to actually take the leave.[1] The Court had left the question open in a 2019 ruling.[2] The question alluded to the recent case law of the CJEU, according to which the employer has the obligation to request the worker to take the outstanding annual leave in due time. Only then could the claim for allowance in lieu of leave expire 15 months after the end of the year.[3]

The Court of Justice has now applied this case law to the limitation period. It reasons that this in and of itself already constitutes a restriction of the leave entitlement, which is guaranteed inter alia in the EU Charter of Fundamental Rights, but which must be justified in the interest of legal certainty. It follows from this that the limitation period can only begin to run if the employer complies with its obligations to provide information. Otherwise, there would be a risk that the employer would invoke its own failure to put the workers in the position to actually take annual leave, so as to gain the benefit of the limitation period (paras. 48 et seq.).

1 BAG of 29 September 2020 – 9 AZR 266/20 (A).
2 BAG of 19 March 2019 – 9 AZR 881/16.
3 In this sense, CJEU of 6 November 2018 – C684/16 – *Max Planck Society*, paras 41 and 43; CJEU of 6 November 2018 – C-619/16 – *Kreuziger*, para 42.

According to Section 199(1) No. 2 of the German Civil Code (BGB), the regular limitation period begins at the end of the year in which the right arises and the obligee obtains knowledge of the circumstances giving rise to the claim and the person of the debtor, or should have been aware of them in the absence of gross negligence. This provision will now have to be interpreted in conformity with Union law. The starting point of the time limit presupposes that the employer has properly requested employees to take outstanding leave entitlements.

Judgment of the Court of Justice (First Chamber) of 22 September 2022 – C-518/20 and C-727/20 – *Fraport*

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

Keywords: Expiry of the entitlement to paid annual leave – incapacity for work or illness occurring during a reference period – employer's obligation to provide information

Core statement: The right to annual leave may not simply lapse after 15 months even in the case of long-term illness or reduced earning capacity which occurred during the reference period if the employer has not complied with its obligations to provide information.

Note: The starting point for the latest decisions of the CJEU is once again Article 7 of Working Time Directive 2003/88, according to which the Member States must take the necessary measures to ensure that every worker receives at least four weeks of paid annual leave, as well as Article 31(2) of the EU Charter of Fundamental Rights, which enshrines the right of workers to paid annual leave. From these provisions, the Court of Justice concludes that national leave regulations must be interpreted and developed in conformity with the Union law. In the first reference for a preliminary ruling, it is disputed whether a freight driver employed by Fraport, who has been receiving a pension for full but not permanent reduction in earning capacity since 1 December 2014 as a result of a severe disability, is entitled to 34 days of paid annual leave from the year 2014. The employer had not fulfilled its obligation to cooperate in the granting and taking of annual leave.

In the second request for a preliminary ruling, an employee who works at the St. Vincenz Hospital and has been incapacitated for work since her illness in 2017 claims that she is still entitled to 14 days of paid annual leave from 2017. In both cases, the employers invoke the fact that the statutory leave entitlements of workers who are unfit for work or have been on long-term sick leave expire in any case 15 months after the end of the respective leave year in the event of continued incapacity for work. In its requests for preliminary ruling, the German Federal Labour Court (BAG) therefore asked the Court to clarify whether this also applies if the worker in question only became continuously incapacitated for work in the course of a leave year and could have taken at least partial leave until then and at the same time the employer did not fulfil its obligations to cooperate with regard to the impending lapse of leave entitlement.

The CJEU first called to mind that the right to paid annual leave has a dual purpose. It is intended to enable workers to rest from the performance of their work duties on the one hand and to have a period of relaxation and leisure on the other. In principle, this presupposes that the employee has actually worked during the reference period. Although employees who are on sick leave during the reference period are in principle treated in the same way as working employees, this does not apply to employees who are incapacitated for work during several reference periods in a row. Otherwise, they would be able to accumulate indefinitely all the paid annual leave entitlements acquired during the period of absence from work, which would no longer be in line with the purpose of the leave.[4] In such cases, national legislation

[4] CJEU of 29 November 2017 – C-214/16 – *King*, paras. 53 and 54 and the case law cited therein.

or practice may restrict the entitlement to paid annual leave by providing for a carry-over period of 15 months, after which the entitlement to paid annual leave expires.

In its decision of 22 September 2022, the CJEU made an exception to this rule: the lapse of the leave entitlement is not justified if the entitlement relates to the reference period in which the employee was still working before reaching a state of total invalidity or incapacity for work and if the employer had not previously enabled the employee to assert this entitlement in good time. The Court ruled that in this particular situation, the expiry of the leave entitlement could only be considered if the employer had previously informed the employee of the leave entitlement and the possibility of its lapsing. In short: In future, in the case of permanent incapacity for work, a distinction will have to be made between leave entitlements acquired before the onset of the incapacity for work in the corresponding reference period and those acquired during the period of incapacity. Only the latter expire after 15 months from the end of the leave year, without any obligation on the part of the employer to cooperate.

New pending case

Request for a preliminary ruling from the Conseil de prud'hommes d'Agen (France) lodged on 14 February 2022, delivered on 21 April 2022 – C-271/22 – *Keolis Agen*

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

Keywords: Direct applicability of the Working Time Directive – public contract awarded to private transport operator – leave entitlement carry-over period

Notes: In the present case, the CJEU has before it the question of whether Article 7(1) of the Working Time Directive is directly applicable to the relationship between a private transport operator entrusted only with the provision of public services and its employees.

It is also asked which carry-over period is appropriate for the EU minimum of four weeks if the reference period for entitlement to paid leave is one year and whether it is contrary to Article 7(1) Working Time Directive if, in the absence of a national statutory or contractual provision, the carry-over period can be unlimited.

→ back to overview

2. Collective redundancies

New pending case

Request for a preliminary ruling from the Curtea de Apel București (Romania) lodged on 22 June 2022, delivered on 22 July 2022 – C-496/22 – *Brink's Cash Solutions*

Law: Article 1(1)(1) lit. b, Article 2(3) and Article 6 Collective Redundancies Directive

Keywords: Collective redundancy – consultation of the employee representation – expired mandate of the employee representation

Notes: The issue in this case is whether it is compatible with EU law that workers who have not appointed representatives and have no obligation to do so do not have to be consulted before collective redundancies.

→ back to overview

3. Data protection

Opinion

Opinion of Advocate General Sánchez-Bordona delivered on 22 September 2022 – C-34/21 – *Teaching Staff Committee*

Law: Article 88(1), (2) General Data Protection Regulation (EU) 2016/679 (GDPR)

Keywords: Employee data protection – more specific provision – live streaming of lessons by videoconference – absence of explicit consent from the teachers

Core statement: A legal provision such as Section 23 of the Hessian Data Protection and Freedom of Information Act (HDSIG) which does not provide more specific requirements for the processing of employee data within the meaning of Article 88(2) of the GDPR, is only applicable to the extent that it is covered by other provisions of this Regulation or by the national provisions referred to in Article 6(2) of the GDPR.

Notes: The Wiesbaden Administrative Court (VG Wiesbaden) has to deal with the issue of whether teachers' consent has to be obtained prior to arranging lessons via videoconferencing.[5] Section 23 of the HDSIG states, mutatis mutandis, that personal data may be processed to the extent necessary for the performance of the employment contract. The Administrative Court now wants to know whether it has to apply Section 23 HDSIG.

The question has the following legal background: The GDPR is a regulation pursuant to Article 288(2) TFEU, which is directly applicable and as such leaves no room for national law. In principle, national law can only apply to the extent that it is based on an opening clause in the GDPR.

In particular, the opening clause for employee data protection, Article 88(1), (2) GDPR, comes into consideration here. This allows for Member State legislation that is more specific 'to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context' (para. 1) and includes 'suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights'.[6]

The Advocate General first acknowledges that civil servant teachers are employees in the sense of data protection law,[7] before going on to state that Section 23 of the HDSIG does not meet the requirements of the opening clause, as the regulation is not more specific, but merely repeats the requirements of the opening clause of Article 88 of the GDPR. The Advocate General comments merely that Section 23 HDSIG in and of itself is 'superfluous'. He does not address whether the provision could be covered by the opening clause of Article 6(2) of the GDPR. Since it is a matter of specific requirements for the processing of data, these comments would indicate that the provision would not apply in this sense either.

This development is to be welcomed. Because the regulatory concept of the GDPR is: Where the general rules of the GDPR apply, the GDPR applies. Where, on the other hand,

---

5 See already the detailed explanations on the referral in HSI Report 2/2022, p. 6-7.

6 Whether the basis for competence on which the adoption of the GDPR by the EU relied also covers employee data protection has not been discussed here by the referring court; but cf. on this CJEU of 22 June 2022 – C-534/20 – *Leistritz*, with notes in HSI-Report 2/2022, p. 5-6, as well as *Heuschmid*, SR 2019, p. 1, 3-4. and *Däubler*, in Däubler/Wedde/Weichert/Sommer, EU-DSGVO und BDSG, 2nd ed. 2020, Art. 88 DSGVO marginal No. 4, who, however, believes that competence law concerns can be put aside.

7 This is also the case under Section 26(8), first sentence, No. 7 BDSG and Section 23(8), first sentence, No. 7 HDSIG.

the Member State wants to adopt a more specific regulation, it may do so. However, the German legislature has not succeeded in doing so, and has unnecessarily complicated the application of the law by enacting repetitive regulations.[8] The outcome of the proceeding is also of interest because Section 26 of the German Federal Data Protection Act (BDSG) contains a provision that is largely identical to Section 23 of the HDSIG. Thus, if the CJEU finds the Hessian regulation inapplicable in part, this should also apply to the BDSG.

For the most part, this will not affect the many company agreements that lay down specific requirements for the use of certain IT systems in company practice.

New pending case

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 27 April 2021, delivered on 13 September 2021 – C-560/21 – *KISA*

Law: Article 38(3), second sentence, GDPR, Section 6(4), first sentence, BDSG

Keywords: Dismissal of the data protection officer – conflicts of interest with the activity exercised

Notes: The German Federal Labour Court (BAG) refers two questions to the CJEU for a preliminary ruling:

Pursuant to Section 6(4), first sentence, of the German Federal Data Protection Act (BDSG), the data protection officer may be dismissed for good cause.[9] This in itself allows for dismissal for reasons related to his or her duties as data protection officer. The BAG would like to know whether this is compatible with Article 38(3), second sentence, GDPR, according to which the data protection officer cannot be dismissed because of the performance of his/her duties.

In case this is incompatible, the BAG would then like to know whether Article 38(3), second sentence, GDPR has a sufficient legal basis under primary law, in particular insofar as the provision covers data protection officers who are in an employment relationship with the controller. For here, the legal basis might be provided by labour law in the first place.[10]

→ back to overview

[8] Doubtful also Däubler, in Däubler/Wedde/Weichert/Sommer, EU-DSGVO und BDSG, 2nd ed. 2020, Art. 88 DSGVO marginal No. 22; the BAG considers Sec. 26 BDSG to be a more specific provision in the sense of an acte clair: decision of 07 May 2019 – 1 ABR 53/17, marginal No. 47 with further references to the preponderant opinion in the literature; for example, *Franzen*, in: ErfK, 22nd ed. 2022, BDSG § 26 marginal No. 2.

[9] On the protection against dismissal of a data protection officer under national and EU law, see CJEU of 22 June 2022 – C-534/21 – *Leistritz*, with notes in HSI Report 2/2022, p. 5.

[10] On this question see also fn. 4 above.

4. Equal treatment

Opinion

Opinion of Advocate General Ćapeta delivered on 8 September 2022 – C-356/21 – *TP*

Law: Article 3(1)(a) and (c) Equal Treatment Framework Directive 2000/78/EC

Keywords: Equal treatment in employment and occupation – prohibition of discrimination on the basis of sexual orientation – self-employed worker – refusal to renew a contract

Core statement: A national rule that makes it permissible to refuse to conclude a civil law contract for services if the refusal is motivated by that person's sexual orientation is incompatible with the Equal Treatment Framework Directive.

Note: Despite far-reaching protection at EU level, the status of LGBT persons remains worrying, as a look at the discrimination against 'marginalised groups' in some Member States shows, for example the interim proclamation of 'LGBT-free zones' in Poland. Against this background, the EU Commission even felt compelled to initiate infringement proceedings.

In the present case, the referring Warsaw court questioned a Polish regulation introduced in the course of the transposition of the Equal Treatment Framework Directive. According to this provision, unequal treatment on the basis of sexual orientation is permissible when choosing a contractual partner. The court referred the question to the CJEU for a preliminary ruling. The case concerns a long-time freelance employee of a Polish public television station. In December 2017, he and his partner published a Christmas music video on YouTube promoting tolerance towards LGBT. A short time later, the broadcaster terminated the long-term collaboration, whereupon the man sued for damages and compensation for pain and suffering.

Two fundamental questions arose: firstly, whether the refusal to conclude a contract because of the sexual orientation of the potential contractual partner falls within the scope of the Equal Treatment Framework Directive and secondly, if so, whether discrimination can be justified by the freedom to choose a party to a contract. Article 1 of the Equal Treatment Framework Directive relates the protection against discrimination to the substantive areas of employment and occupation. Conversely, it thus excludes from its scope of application the general civil law protection against discrimination in mass transactions.[11] Or, as the Advocate General pointedly puts it: 'The EU legislature confined "the battleground" of that directive to the area of "employment and occupation"' (para. 44). By referring to occupation the Directive includes self-employment in its material scope of protection. At the same time, a proposal has been in the Union's legislative pipeline since 2008 for a further directive,[12] which is intended to combat discrimination on the same grounds in the area of access to and supply of goods and services.

The answer to the first question therefore depends on what is meant by employment and occupation, and to what extent the use of the wording 'supply of goods and services' in another legislative proposal excludes the application of the Directive to self-employed service providers. According to the Advocate General, the term 'self-employment' within the meaning of the Framework Directive covers the supply of goods and services where the service

[11] EuArbRK-Mohr, RL 2000/78/EG Art. 1 marginal No. 7.

[12] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final).

provider undertakes personal work. In this case, potential buyers of goods or services may not refuse to conclude a contract because of the sexual orientation of the service provider. For the application of anti-discrimination law, it makes no difference whether a person providing work is at the same time to be regarded as a company and is therefore in an equal or a subordinate position vis-à-vis a potential employer. From the point of view of both the broadcaster and the editor, the situation is essentially the same: the broadcaster obtains editorial services that it needs and the editor offers his or her personal work.

According to the Advocate General, the referring court must disapply the Polish legislation. The Equal Treatment Framework Directive precludes national rules under which it is permissible to refuse to conclude a civil law contract for services if the refusal is motivated by that person's sexual orientation. The restriction of the free choice of the contractual partner is lawful in order to protect other important values of a democratic society, such as equal treatment in employment and occupation. Whether the CJEU will in fact follow the opinion in the present proceedings remains to be seen. Most recently, the Court strengthened the rights of same-sex parents in the *Coman* case.[13]

New pending case

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 24 February 2022, delivered on 3 August 2022 – C-518/22 – *AP Assistenzprofis*

Law: Article 4(1), Article 6(1) Equal Treatment Framework Directive 2000/78/EC, Article 21 EU Charter of Fundamental Rights, Article 19 United Nations Convention of the Rights of Persons with Disabilities (UN CRPD)

Keywords: Personal assistance for persons with disabilities – ge discrimination in the application procedure – right of wish and choice of the person with disabilities

Notes: The German Federal Labour Court (BAG) referred the question of possible age discrimination in the application procedure for the recruitment of a personal assistant service for persons with disabilities (Section 78 Book IX of the Social Code (SGB IX)) to the CJEU. The defendant provides assistance services and published a job offer on behalf of a 28-year-old student looking for a female assistant ‘preferably be between 18 and 30 years old’. The 50-year-old plaintiff then applied for this position, but was rejected by the defendant.

The plaintiff then claimed direct discrimination on the basis of age (Section 1 General Law on equal treatment (AGG)) and brought an action before the Labour Court. The defendant argues, among other things, that the unequal treatment is justified (Section 8(1) AGG, Section 10 AGG) because of the special nature of the service as a highly personal, all-encompassing support with daily living, which concerns the private sphere of the person with disabilities, as well as the right of the person with disabilities to express wishes and choices (Section 8 SGB IX, Section 33 SGB I).

In the area of conflict between protection against discrimination for the plaintiff and enabling self-determination, participation and inclusion of the student with a disability, which also serves equality, the BAG asks the CJEU to answer the following question for a preliminary ruling: Can Article 4(1), Article 6(1), Article 7 and/or Article 2(5) of the Equal Treatment Framework Directive be interpreted in the light of the EU Charter of Fundamental Rights and in the light of Article 19 of the UN CRPD to the effect that, in a situation such as that in the main proceedings, direct discrimination on grounds of age can be justified?

→ back to overview

[13] CJEU of 5 June 2018 – C-673/16 – *Coman*.

5. Fixed-term employment

New pending case

Request for a preliminary ruling from the Juzgado Contencioso-Administrativo nº 17 de Barcelona (Spain) lodged on 17 May 2022 – C-331/22 – *Departamento de Justicia de la Generalitat de Catalunya*

Law: Clauses 2 and 5 Framework Agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: Public sector – transitional worker – abuse through successive fixed-term employment contracts or relationships

Notes: Spanish law does not provide for sanctions for abusive fixed-term employment of public servants who successfully pass a selection procedure. The referring court asks in this regard whether this is compatible with Clause 5 of the Framework Agreement on fixed-term work. According to the case-law of the Tribunal Supremo (Supreme Court, Spain), in the event of an abusive use of fixed-term contracts, it is sufficient as a measure for the public servant affected by the abuse to remain in fixed-term employment until the authority concerned establishes that a post must be created.

In so far as an unlawfulness under EU law is to be affirmed, the referring court wishes to know whether the national judicial authorities are required to convert the abusively fixed-term employment relationship into a permanent employment relationship, even though conversion is not provided for in the national legislation.

→ back to overview

6. General matters

Decision

Judgment of the Court of Justice (First Chamber) of 1 August 2022 – C-352/20 – *HOLD Alapkezelő*

Law: Articles 14 to 14b Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to collective investment in transferable securities; Article 17(1) EU Charter of Fundamental Rights

Keywords: Alternative investment funds – concept of remuneration – dividends distributed to certain senior managers

Core statement: The provisions on remuneration policies under Directive 2009/65/EC apply to dividends paid by an ‘undertaking for collective investment in transferable securities’ (UCITS) or an ‘alternative investment fund’ (AIF) to certain senior managers if the payment policy of those dividends may induce these employees to take risks which are detrimental to the interests of the UCITS or the AIF or their investors.

Opinions

Opinion of Advocate General Ćapeta delivered on 14 July 2022 – C392/21 – *Inspectoratul General pentru Imigrări*

Law: Article 9(3) Directive 90/270/EEC on safety and health requirements for work with display screen equipment

Keywords: Protection of the health and safety of workers – work with 'display screen equipment' – protection of workers' eyes and eyesight – concept of 'special corrective appliances'

Core statement: The term 'special corrective appliances' used in Article 9 of Directive 90/270/EEC is to be interpreted as including spectacles with corrective lenses, provided that these spectacles are intended to correct specific visual difficulties in order to enable work with display screen equipment. It is for the national court to determine whether the spectacles at issue in the present case satisfy those conditions.

Notes: The *Inspectoratul* case concerns the right of employees to special corrective appliances for working with computer screens. After consulting a specialist, the plaintiff, whose eyesight had deteriorated, bought new glasses with corrective lenses. His employer refused to cover the costs on the grounds that coverage was only due if the glasses were a special corrective appliance worn exclusively at the workplace and protected the worker from exposure to harmful factors such as screen light. Since corrective glasses could also be used in everyday life, they could not be equated with a special visual aid. The plaintiff then brought an action for payment against his employer.

The referring court asked the CJEU to clarify whether the term 'special corrective appliance' within the meaning of Article 9(3) of Directive 90/270/EEC also covered corrective glasses. Furthermore, the referring court had doubts as to whether 'special corrective appliance' within the meaning of the Directive should only be understood as a corrective appliance used exclusively at the workplace. According to the Advocate General's Opinion, the term 'special corrective appliance' used in the Directive must be interpreted as including corrective eyewear, provided that such eyewear is intended to correct specific visual complaints in order to enable work on display screen equipment. In other words: If the person were not working on a screen, other glasses would be suitable.

The questions referred, which at first sight seem unremarkable, may have far-reaching implications for the system of protection under national law for all workers who work with computer screens.[14] In Germany, the Fourth Chamber of the Neumünster Labour Court in a decision from 2000 excluded normal corrective glasses from the concept of 'special corrective appliances'. 'Special corrective appliances', it held, were special, workplace-related visual aids that were necessary from a medical point of view for work at computer screens in order to ensure pain-free, sharp vision in the middle distance without physical constraints.[15] Unlike the Romanian court, the Neumünster Labour Court refrained from requesting a referral.

[14] More detailed *Schneider*, ZESAR 2022, 219 et seq.

[15] ArbG Neumünster of 20 January 2000 – 4 Ca 1034 b/99, juris marginal No. 24.

Opinion of Advocate General Pitruzella delivered on 8 September 2022 – C-279/21 – *Udlændingenævnet*

Law: Article 13 of Decision No. 1/80 of the EEC/Turkey Association Council on the development of the Association

Keywords: Turkish workers with permanent residence permit – spousal reunification – requirement of passing a language test

Core statement: The so-called 'standstill rule' prohibits member states from introducing new regulations that have an aggravating effect on access to the labour market. If the family reunification of a Turkish worker and his spouse is linked to the successful completion of a language test, this constitutes a 'new restriction' within the meaning of Article 13 of Decision No. 1/80. This restriction is not appropriate and disproportionate and therefore not justified.

Opinion of Advocate General De La Tour of 29 September 2022 – C524/21 and C525/21 – *Agenţia Judeţeană de Ocupare a Forţei de Muncă Ilfov*

Law: Articles 2(1), 3(2), 12(a) Insolvency Directive 2008/94/EC

Keywords: Protection of employees in the event of employer's insolvency – employees' claims borne by guarantee institutions – limitation on the liability of guarantee institutions – recovery if the period of three months prior/subsequent to the initiation of insolvency proceedings is exceeded – protection of legitimate expectations after change of the legal situation

Core statements: 1. A national rule which, without transitional measures, provides for the recovery of sums wrongly paid for periods exceeding the legal limit or claimed after the expiry of the limitation period, when the former employees concerned are no longer entitled to apply to the guarantee institution for the payment of sums in respect of outstanding remuneration, is contrary to the social objective of the Insolvency Directive.

2. In cases where, at the time of the recovery or of the decision of the court seised, the employees are still entitled to assert their rights under the Insolvency Directive, the referring court must examine whether the time at which the recovery is effected still leaves the employee with the possibility of exercising the guarantee of remuneration provided for in Article 3(2) of the Insolvency Directive 2008/94/EC and, if so, whether the application of interest and penalties for late payment to the undue payment is not such as to reduce the amount guaranteed by the Directive.

New pending cases

Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 10 June 2022 – C-377/22 – *Ministero dell'Istruzione and Others.*

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

Key words: Selection procedure – school service – consideration of periods of service completed abroad in the EU

Notes: An Italian provision is under scrutiny under Union law according to which only the years of service completed by candidates in national state secondary schools as fixed-term employees are taken into account for participation in a selection procedure, and not also the years of service completed at institutions in other Member States.

Request for a preliminary ruling from the Rechtbank Den Haag (Netherlands) lodged on 11 August 2022 – C-540/22 – *Staatssecretaris van Justitie en Veiligheid*

Law: Articles 56 and 57 TFEU

Key words: Right of residence – third-country national employed in a Member State by a service provider established in another Member State

Notes: Increasingly, workers from third countries are being deployed across borders. This takes place not least within the context of favourable residence and work regulations of a Member State being used to gain access to the EU labour market.

The referring court has asked the CJEU for a preliminary ruling clarifying whether the freedom to provide services guaranteed by Articles 56 and 57 TFEU gives rise to a right of residence for third-country national workers in another Member State derived from that right. If the answer is in the negative, the referring court asks whether a rule under which a residence permit must be applied for for each worker if the duration of the service exceeds three months is compatible with the freedom to provide services.

Finally, it must be asked whether the period of validity of such a residence permit can be limited to two years or the duration of the work and residence permit in the state of origin, irrespective of the duration of the service, and to what extent fees can be charged for the respective applications.

→ back to overview

7. Part-time employment

Decision

Judgment of the Court of Justice (Seventh Chamber) of 7 July 2022 – C- 377/21 – *Zone de secours Hainaut – Centre*

Law: Clause 4 Framework agreement on part-time work (transposed by Directive 97/81/EC)

Keywords: Prohibition of discrimination – pro rata temporis principle – consideration of the seniority achieved by professional firefighters as members of the volunteer fire brigade for the calculation of remuneration

Core statement: When calculating the remuneration of full-time members of the professional fire brigade for seniority relevant to remuneration, the services previously performed as members of the voluntary fire brigade on a part-time basis may be credited according to the 'pro rata temporis' principle, i.e. according to the services actually rendered.

New pending case

Request for a preliminary ruling from the Giudice pi pace di Fondi (Italy) lodged on 18 August 2022 – C-548/22 – *Presidenza del Consiglio dei Ministri and Others.*

Law: Article 288 TFEU, Articles 17, 31 EU Charter of Fundamental Rights, Article 7 Working Time Directive 2003/88/EC

Keywords: Honorary judges – remuneration and social security in the event of termination of employment – unequal treatment compared to full judges

Notes: The questions concern the status of honorary judges attached to the Public Prosecutor's Office. Under scrutiny are provisions of Italian law according to which honorary judges at the Public Prosecutor's Office ex lege waive any claims regarding the implementation of the relevant directives, in particular the Framework Agreement on fixed-term employment contracts, entailing the loss of all other salary protection, labour law protection and social protection.

→ back to overview

8. Professional Qualification

Opinion

Opinion of Advocate General Emiliou delivered on 8 September 2022 – C-270/21 – *A*

Law: Article 3 Professional Recognition Directive 2005/36/EC

Keywords: Recognition of professional qualifications – right to exercise the profession of nursery school teacher based on university degrees and pedagogical competence – regulated profession – professional qualification obtained in the former Soviet Union – third country

Core statement: The profession of nursery school teacher is not 'regulated' within the meaning of the Professional Recognition Directive if access to this profession and its exercise depend, firstly, on a higher education diploma which is not specifically geared to the exercise of this profession and, secondly, on pedagogical competence which is defined in a professional standard but the existence of which is assessed in each case by the employer.

A professional qualification obtained in the former Soviet Union and assimilated in the Republic of Estonia by its legislation to a qualification obtained in that Member State shall be deemed to have been obtained in that Member State and not in a third country.

→ back to overview

9. Public procurement law

Decisions

Judgment of the Court of Justice (Eighth Chamber) of 7 July 2022 – C- 213/21 and C-214/21 – *Italy Emergenza*

Law: Article 10(h) Public Procurement Directive 2014/24/EU

Keywords: Award of public contracts in civil protection and disaster control – priority of the award of emergency medical transport to voluntary organisations – concept of 'non-profit organisation or association' – application to social cooperatives

Core statement: Member States may exclude social cooperatives from awarding contracts for the provision of emergency ambulance services if they distribute refunds to their members in connection with their activities in accordance with their articles of association, thus enabling them to make an indirect profit.

Notes: The reference for a preliminary ruling concerns two procurement procedures for emergency medical transport under Italian law. The tenders in question were restricted to 'voluntary organisations' and the Italian Red Cross. Such 'voluntary organisations' may not have profit-making intentions and must pursue non-profit purposes. This was challenged by a social cooperative which is not covered by the regulation. It claimed that the Italian law on tendering violated Article 10(h) of Directive 2014/24/EU.

The question in the proceedings was whether such a social cooperative, which according to its statutes may distribute dividends to members, is a 'non-profit organisation' pursuant to Article 10(h) of Directive 2014/24/EU. The CJEU emphasises that 'non-profit organisations' may not be profit-oriented and recalls its earlier decision[16] according to which the reinvestment of profits intended to achieve the organisation's objective does not preclude this. However, it is thus clear that it contradicts the non-profit classification if profits can be distributed to members (para. 35). The Italian law in question is thus in conformity with EU law. The CJEU thus concretises the concept of a 'non-profit organisation' and clarifies that even the only indirect realisation of profits is contrary to this (para. 38).

German law contains a provision in Section 107(1) No. 4 German Competition Act (GWB) according to which charitable organisations include, in particular, aid organisations that are recognised as civil defence and disaster relief organisations under federal or state law. The Commission initiated infringement proceedings against this, since only non-profit status was decisive, which the CJEU has again confirmed with the present decision.[17] [18] Consequently, the interpretation of the presumption of non-profit status must not undermine the requirement of non-profit status or inadmissibly shorten the scope of application. Section 52 of the German Fiscal Code therefore remains decisive. This also applies to the application of national law.

Judgment of the Court of Justice (Fourth Chamber) of 14 July 2022 – C-436/20 – *ASADE*

Law: Articles 76 and 77 Public Procurement Directive 2014/24/EU, Article 2(2)(j) Directive 2006/123/EC on services in the internal market, Articles 49 and 56 TFEU

Keywords: Award of public contracts – contracts for the provision of social services in the form of personal assistance – exclusion of profit-making operators – location of the entity as a selection criterion

Core statement: In the interest of solidarity and budgetary efficiency of the social services system, national regulations may reserve the possibility for private non-profit institutions to participate in public procurement procedures for personal assistance services, but not only for those institutions that are located in the place where services are to be provided.

Notes: Personal social services can be contracted by the competent administration through 'contractual action agreements' according to the law of the Valencian Community, one of the autonomous regions of Spain. The conclusion of such agreements is possible with private entities ('social initiatives') such as foundations or voluntary organisations that are non-profit and local. The award procedure under the concentrated action is independent of the estimated value of the services.

ASADE, the State Association of Domiciliary Care Providers, filed a complaint against this award procedure. It claimed that the exclusion of profit-making institutions was, inter alia, a

[16] CJEU of 21 March 2019 – C-465/17 – *Falck Rettungsdienste and Falck*.
[17] Previously CJEU of 21 March 2019 – C-465/17 – *Falck Rettungsdienste and Falck*.
[18] Commission letter of formal notice of 6 April 2022, INFR(2022)4000.

violation of the equal treatment requirement under Article 76(1) of Directive 2014/24/EU. Furthermore, it saw it as questionable whether this procedure complies with EU law, as it does not require fulfilment of the conditions of Article 77 of Directive 2014/24/EU, which determines the conditions for entities to participate in the simplified public procurement procedure for social services.

In its judgment, the CJEU points to the wide margin of discretion available to Member States in the rules on the principles for awarding contracts (Article 76 Directive 2014/24/EU), in particular on how to provide services in order to meet the needs of users in the best possible way (para. 85). Furthermore, the CJEU applies the requirements developed in previous case law[19] to the principle of equal treatment under Article 76 of Directive 2014/24/EU (para. 94): The institution must actually serve the general interest and must not pursue purely commercial interests.[20] Thus, no (indirect) profit may be made through the provision of services. This rule is not violated, however, if the costs necessary for the provision of services or the employment of workers are reimbursed. In the present judgment, the CJEU expands on the above-mentioned requirements by deciding that possible profits must be reinvested in the sense of the social, public welfare-centred objectives of the entity. As a result, the CJEU finds that the award of contracts under the 'contractual action agreements' as such is compatible with EU law, in particular Article 76 of Directive 2014/24/EU.

However, it is incompatible with Article 76 of Directive 2014/24/EU that only entities are included in the award procedure which at the time of submission of the tender are already established at the place where services are subsequently to be provided. This regulation is disproportionate. It is possible, however, to require establishment locally as a prerequisite for the *performance* of the contract.

Judgment of the Court of Justice (Fourth Chamber) of 15 September 2022 – C-669/20 – *Veridos*

Law: Articles 38 and 49 Procurement Directive 2009/81/EC; Article 47 EU Charter of Fundamental Rights

Keywords: Award of works, supply and service contracts – abnormally low tender

Core statements: 1. When a tender is suspected to be abnormally low, a contracting authority must verify whether this is indeed the case, taking into account all relevant aspects of the tender and the contract documents. This applies even if this criterion is not applicable under national law.

2. A contracting authority's assessment that none of the tenders submitted to it is abnormally low may be subject to judicial review in the context of proceedings against the decision to award the contract in question.

→ back to overview

[19] CJEU of 28 January 2016 – C- 50/14 – *CASTA and others*; of 11 December 2014 – C-113/13 – *Azienda sanitaria locale n. 5 'Spezzino' and others*.

[20] See also above the decrees on procedure C-213/21 and C-214/21 – *Italy Emergenza*, p. 21.

10. Social security

Judgments / Decisions

Judgment of the Court of Justice (Second Chamber) of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*

Law: Article 44(2) Implementing Regulation (EC) No 987/2009, Article 21 TFEU

Key words: Entitlement to an old-age pension – periods of child-raising completed in other Member States – gainful activity pursued in only one Member State

Core statement: Child-raising periods in another Member State are to be taken into account for the calculation of the old-age pension even if the person concerned does not fulfil the condition of gainful employment established in accordance with Article 44(2) of the Implementing Regulation, but he or she was gainfully employed in the competent Member State both before and after the child-raising period outside that country.

Notes: The plaintiff in the main proceedings was an Austrian citizen and self-employed in Austria. She then moved to other Member States, gave birth to children there and devoted herself to their upbringing without pursuing employment. Back in Austria, she again took up self-employment. When calculating her old-age pension, the child-raising periods outside the country were not treated as insurance periods under Austrian law. She appealed against this, citing the right to freedom of movement (Article 21 TFEU).

It now had to be clarified whether the relevant provision for taking into account child-raising periods (Article 44(2) of the Implementing Regulation) exclusively regulates the requirements and thus Article 21 TFEU does not apply. The child-raising periods would then not be taken into account, as the claimant was not employed in Austria at the beginning of the child-raising periods.

In its decision, the CJEU refers in particular to the objective of the Implementing Regulation to realise freedom of movement. It would be contrary to this objective and the practical effectiveness of the provision if it were exhaustive (paras. 48 et seq.). The CJEU then addresses the question of whether Article 21 TFEU is to be interpreted as meaning that the periods at issue are to be taken into account when granting pensions. The CJEU continues its case law in the *Reichel-Albert* case,[21] according to which the exclusive employment in the Member State liable for pension payments before and after the period outside the country establishes a sufficient link between the child-raising periods in other countries and the acquired insurance periods. Thus, the child-raising periods outside the country must be taken into account for the old-age pension. Otherwise, there would be discrimination solely on the basis of the exercise of the right to freedom of movement and thus a violation of Article 21 TFEU (paras. 63-64). The CJEU thus once again strengthens freedom of movement.

[21] CJEU of 19 July 2012 – C-522/10 – *Reichel-Albert*.

Decision of the Court (Seventh Chamber) of 14 July 2022 – C-25/22 – *Finanzamt Österreich*

Law: Coordination Regulation (EC) No 883/2004, Article 18 TFEU, Article 94 of the Rules of Procedure of the Court of Justice.

Keywords: Entitlement to family allowance – third-country nationals working for an international organisation – permanent residence in the Member State

Notes: The proceedings in the original case concern the denial of family allowance on the grounds that a third-country national working for an international organisation is not entitled to it.

By its reference for a preliminary ruling, the Austrian court essentially seeks to ascertain whether the Coordination Regulation and Article 18 TFEU are to be interpreted as precluding national law in so far as it confers entitlement to family allowances on persons residing in Austria and employed by an international organisation, where the agreement on the seat of the organisation in question excludes such an extension in respect of persons who are neither Austrian nationals nor permanently resident in Austria.

In its order, the CJEU held that the reference for a preliminary ruling was inadmissible because the requirements of Article 94(c) of the Rules of Procedure of the Court of First Instance were not met. On the one hand, the reasons why the referring court has doubts about the interpretation of the Coordination Regulation and Article 18 TFEU are not given. Secondly, the connection between Union law and national law is not explained. The facts of the case fall under international law, in this case the Headquarters Agreement as the law giving rise to the claim, and not Union law, since the main proceedings concern a third-country national.[22] Furthermore, Article 18 TFEU does not apply to cases between Union citizens and third-country nationals.

However, it is possible for the referring court to refer a reference for a preliminary ruling in this case to the CJEU again if the conditions of Article 94(c) of the Rules of Procedure of the Court of First Instance are met.

Judgment of the Court of Justice (Grand Chamber) of 1 August 2022 – C-411/20 – *Familienkasse Niedersachsen-Bremen*

Law: Article 4 Coordination Regulation (EC) No 883/2004, Article 24(1) and (2) Free Movement Directive 2004/38/EC

Keywords: Exclusion from family benefits – exclusion of Union citizens who are not economically active during the first three months of residence in the host Member State – discrimination on grounds of nationality

Core statement: It constitutes direct discrimination on grounds of nationality if non-working EU foreigners are denied family benefits during the first three months of their legal habitual residence in another Member State, while such a benefit is paid to nationals in a comparable situation.

Notes: The background to the decision at issue is a provision in the German Law on Income Tax (Sec. 62(1a) EStG) according to which the entitlement to child benefit for EU citizens is excluded for the first three months after they have established their habitual residence in Germany, unless the person earns income subject to income tax in Germany. According to the German legislature, this provision is necessary in particular to protect the state from an

[22] This distinguishes the case from the *Finanzamt Österreich* case (C-372/20), which concerned family allowances for EU citizens working as development workers; see HSI Report 4/2021, p. 13.

unreasonable financial burden.[23] German law does not provide for such a restriction or requirement for its own nationals when they transfer their residence to Germany.

On the basis of this provision, the competent family benefits office rejected the claim for child benefit of the plaintiff in the main proceedings and justified this in particular on the grounds that she was not gainfully employed in Germany. The plaintiff then appealed this decision. The Bremen Fiscal Court, which dealt with this case, essentially asked the CJEU whether Section 62(1a) EStG constituted direct discrimination under Article 4 of the Coordination Regulation or whether this could be justified by Article 24(2) of the Free Movement Directive.

By way of introduction, the Court looks at these two provisions in the light of the prohibition of discrimination on grounds of nationality (Article 18 TFEU), which constitutes a fundamental legal principle of the Union. As a concretisation of this, the principles of equal treatment according to Article 4 of the Coordination Regulation and Article 24 of the Free Movement Directive are of great importance. However, exceptions are provided, for example, for social assistance benefits under Article 24(2) of the Free Movement Directive. It is questionable whether German child benefit falls under this provision.

Social benefits are granted to the persons concerned on the basis of personal need and serve to secure their existence. In contrast, 'family benefits' within the meaning of Article 3(1)(j) in conjunction with Article 1(z) of the Implementing Regulation serve to compensate for family burdens and are not subject to a means test. The German child benefit is to be classified as such a 'family benefit' and thus does not fall under the exemption provision of Article 24(2). According to the CJEU, the legal concept of Article 24(2) likewise provides no justification for applying it to the German child benefit: On the one hand, exceptions to the principle of equal treatment are to be interpreted narrowly (para. 50); on the other hand, the overall scheme of the Free Movement Directive (cf. Article 14(1) Free Movement Directive) confirms that deviating regulations can only be considered for social assistance benefits.

The Coordination Regulation does not provide for any exceptions for 'family benefits' either, so that the German regulation in the present case constitutes direct discrimination and violates Article 4 of the Coordination Regulation.

Significantly, however, the CJEU comments that the denial of such a family benefit is possible if the person is only temporarily residing in another Member State. It thus clarifies under which circumstances an exception to the principle of equal treatment is possible. In the application of the law, it is thus the task of national authorities (family benefits office) and courts to determine where a person's actual place of residence (Article 2(1) in conjunction with Article 1(j) of the Coordination Regulation) is located, as distinct from a place of residence that is only temporary (paras. 70 et seq.).

Judgment of the Court of Justice (Seventh Chamber) of 15 September 2022 – C-58/21 – *Rechtsanwaltskammer Wien*

Law: Article 13 Coordination Regulation (EC) No 883/2004, Article 1(2) Annex II of the EC-Switzerland Agreement on the Free Movement of Persons

Key words: Coordination of social security systems – lawyer practising principally in Switzerland and pursuing his profession in two other Member States – application for early retirement pension – national rule requiring renunciation of the pursuit of the profession

[23] BT-Drs. 19/8691 (in German), p. 64.

Core statements: 1. Member States have the possibility to grant contribution-based early retirement benefits under national law even if the person concerned is subject to the legislation of another Member State under Article 13 of the Coordination Regulation. [24]

2. The granting of an early retirement pension may not be made dependent on a renunciation of the practice of law.

Judgment of the Court of Justice (Seventh Chamber) of 29 September 2022 – C-3/21 – *Chief Appeals Officer and Others*

Law: Article 76(4) and Article 81 Coordination Regulation (EC) No 883/2004

Key words: Social security for migrant workers –family benefits – retroactive payment – relocation to another Member State – concept of 'claim' – twelve-month limitation period

Core statements: 1. The term 'claim' within the meaning of Article 81 Coordination Regulation (EC) No 883/2004 refers only to an application submitted by a person who has exercised his or her right to free movement to the authorities of a Member State which is not competent under the conflict-of-law rules of that Regulation.

2. EU law, in particular the principle of effectiveness, does not preclude the application of national legislation under which the retroactive effect of an application for child benefit is subject to a 12-month limitation period, since that limitation period does not make it practically impossible or excessively difficult for the migrant workers concerned to exercise the rights conferred on them by Coordination Regulation No 883/2004.

Opinion

Opinion of Advocate General Pikamäe delivered on 7 July 2022 – C- 404/21 – *INPS and Repubblica italiana*

Law: Article 4(3) TEU, Article 8 of Annex IIIa Conditions of Employment of the ECB

Key words: ECB staff – transfer of national pension rights to the EU pension scheme – absence of rules allowing such transfer

Core statement: A Member State to which a negotiation on an agreement on the transfer of acquired pension rights of employees in the Member State to the ECB's pension scheme is proposed is obliged under the principle of sincere cooperation (Article 4(3) TEU) to participate actively and in good faith. This willingness on the part of the Member States is a 'sine qua non' for the exercise of the right to transfer pension rights, which is why a Member State may not simply evade it.

The courts of the Member States also have a special role to play when they have todeal with a dispute concerning the transfer of pension rights. On the one hand, they are obliged under the principle of sincere cooperation to ensure judicial protection of the rights of individuals under Union law. On the other hand, they are entitled to take the most effective measures provided for under national procedural rules to compel the national authorities to participate actively and in good faith in the negotiations and to effectuate the transfer of pension rights. In addition, national courts should examine whether the Member State can be held liable for breach of Article 4(3) TEU.

[24] CJEU of 23 April 2015 – C382/13 – *Franzen and others* , paras 58 to 61; of 19 September 2019 – C-95/18 and C-96/18 -- *van den Berg and others,* para 53.

New pending cases

Request for a preliminary ruling from the Sozialgericht Nürnberg (Germany) lodged on 26 April 2022 – C-284/22 – *Familienkasse Bayern* Nord

Law: Article 4 of the Coordination Regulation (EC) No 883/2004

Keywords: Migrant workers – child benefit claim – income not subject to social security contributions

Note: The referring court asks for an examination of the legal situation in Germany according to which migrant workers whose income is subject to German income tax but who are not in a compulsory insurance relationship do not receive German child benefit.

Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 21 June 2022 – C-411/22 – *Thermalhotel Fontana*

Law: Article 3(1)(a) of the Coordination Regulation (EC) No 883/2004, Article 7 of the Free Movement Regulation (EU) No 492/2011, Article 45 TFEU

Keywords: Quarantine ordered by health authorities – remuneration for quarantine as sickness benefit – frontier worker

Notes: In question is the Austrian legal situation regarding pandemic-related compensation benefits, according to which the right to compensation for employees who are in quarantine only arises if this has been ordered by a domestic authority:

1. Is an allowance to which employees are entitled during their isolation and which is to be initially paid by the employer to the employees but reimbursed to the latter by the State a sickness benefit within the meaning of Article 3(1)(a) of Coordination Regulation (EC) No 883/2004?

2. If this is not the case: Is it compatible with Union law, in particular with the free movement of workers, if the benefit is conditional on the isolation being ordered by a domestic authority on the basis of national epidemiological legislation, so that such an allowance is not paid to workers who, as frontier workers, are resident in another Member State and whose isolation is ordered by the health authority of their State of residence?

Action brought on 8 July 2022 – C-459/22 – *Commission v. Netherlands*

Law: Articles 45, 65 and 63 TFEU

Keywords: Transfer of pension capital – pension under the employment relationship

Notes: The Commission is pursuing an action against the Netherlands for breach of obligations, claiming that rules on the transfer of pension capital via the so-called ‘second pillar’, the additional pension build-up via the employer, are incompatible with the free movement of workers, the freedom to provide services and the free movement of capital. These requirements are easier for domestic pension providers to fulfil than for foreign ones.

Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands) lodged on 15 August 2022, delivered on 18 August 2022 – C-549/22 – *Raad van bestuur van de Sociale verzekeringsbank*

Law: Articles 1, 68(4) and 70 of the Euro-Mediterranean Agreement

Keywords: Survivors' benefit – export of survivors' benefit – direct applicability

Notes: The present proceedings concern the direct applicability of provisions of the Euro-Mediterranean Agreement on the transfer of survivors' benefits to survivors residing in Algeria.

→ back to overview

11. Temporary agency work

Judgment / Decision

Order of the Court (Sixth Chamber) of 6 September 2022 – C-244/22 – *Mara-Tóni*

Law: Article 3(1)(b) of the Temporary Agency Work Directive 2008/104/EC; Article 53 § 2 of the Rules of Procedure of the CJEU

Keywords: Continuation of work with a subcontractor as temporary agency work – manifest inadmissibility of a reference for a preliminary ruling – requirements as to the substance of the question referred for a preliminary ruling

Core statement: The order for reference does not meet the requirements of specifying and explaining the factual and legal context of the main dispute and of selecting the provisions of Union law sought to be interpreted and the connection between them and the national law applicable to the main facts.

Opinion

Opinion of Advocate General Collins delivered on 14 July 2022 – C-311/21 – *TimePartner Personalmanagement*

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

Keywords: Principle of equal treatment – equal pay – collective agreement on temporary agency work fixing a lower rate of pay than that of the permanent workforce – respect for overall protection

Core statements: 1. By means of a collective agreement on temporary agency work, deviations from the principle of equal treatment with regard to pay are also possible to the detriment of temporary agency workers pursuant to Article 5(3) of the Temporary Agency Work Directive. The prerequisite for this is that the collective agreements in question provide for compensatory advantages in relation to the essential working and employment conditions of temporary agency workers that are proportionate to this, so that their overall protection is respected.

2. Respect for overall protection shall be assessed by comparing the essential terms and conditions of employment of temporary agency workers with those of members of the

permanent workforce. Member States may also give the social partners the option of derogating collective agreements for temporary agency workers.

3. Where a Member State allows the social partners to conclude derogating collective agreements, national legislation does not need to lay down detailed conditions and criteria to be fulfilled by the social partners, provided that respect for the overall protection of temporary agency workers is ensured.

4. Collective agreements on temporary agency work are reviewable by national courts to ensure that they respect overall protection.

Notes: Clauses in collective agreements that allow a derogation from the principle of equal treatment of temporary agency workers are under scrutiny by the CJEU. Article 5(3) of the Temporary Agency Work Directive allows such derogations through collective agreements only with due regard for the overall protection of temporary agency workers. What this means exactly has not yet been clarified by case law. In the present proceedings, the Court of Justice will have the opportunity to provide comprehensive clarification. It becomes all the more topical – and potentially explosive – because, following a ruling by the Court, an interpretation of German law in conformity with Union law can be considered.[25]

Advocate General Collins argues that Article 5(3) of the Temporary Agency Work Directive should be regarded as justiciable (paras. 78 et seq.). A comparison of the working conditions for temporary agency workers with the permanent staff will have to be carried out; the overall protection is not to be determined for the collective agreement on temporary agency work in the abstract (para. 48). Article 5(3) of the Temporary Agency Work Directive must be interpreted narrowly as an exception to the principle of equality. If the collective agreement brings disadvantages, these must be compensated by advantages elsewhere. Moreover, a disadvantage in terms of pay could not be compensated for by an entirely incidental advantage elsewhere (para. 39). Rather, the disadvantage and the advantage compensating for it must be in reasonable proportion to each other (para. 40).

The reasoning is not entirely clear on the question of whether all temporary agency workers are to be included in the comparison, i.e. whether disadvantages can occur for individual temporary agency workers in a specific case, whether the overall comparison is to be made separately for each individual temporary agency worker and whether disadvantages can be compensated for at a later date.[26] The Advocate General is of the opinion that the Member States are not obliged to lay down more detailed criteria as to what ‘overall protection’ means (paras. 66 et seq.). Even if the sweeping character of the latter statement can be questioned against the background of an effective enforcement of EU law, the opinion is a welcome signal in favour of a clear and – given the widespread use of temporary agency workers to reduce personnel costs and their consequences for the protection of interests – necessary strengthening of the principle of equality in temporary agency work.

→ back to overview

[25] *Kolfhaus*, Flexibilität und Fragmentierung durch Arbeitnehmer*innenüberlassung, vol. 6 of Arbeitsrechtlichen Schriften, Baden-Baden 2022, p. 320 et seq.

[26] *Kolfhaus*, Flexibilität und Fragmentierung durch Arbeitnehmer*innenüberlassung, op.cit., p. 156 et seq.

12. Working time

Decisions

Judgment of the Court of Justice (Eighth Chamber) of 7 July 2022 – C-13/21 – *Pricoforest*

Law: Article 13(1)(b) Regulation (EC) No 561/2006 on the harmonisation of certain social legislation relating to road transport.

Keywords: Road transport – exemptions from the rules on driving personnel, driving times, breaks and rest periods for vehicles of certain sectors used within a radius of up to 100 km from the location of the undertaking – meaning of 'radius of up to 100 km from the location of the undertaking'.

Core statements: 1. The term 'radius of up to 100 km from the location of the undertaking' within the meaning of Article 13(1)(b) of Regulation (EC) No 561/2006 is to be understood as covering a straight line of not more than 100 km drawn on the map from the location of the undertaking and connecting that location to any point in a circular geographical area around it.

2. Derogations from Articles 5 to 9 of this Regulation shall apply only to the carriage of goods not exceeding this radius.

Judgment of the Court of Justice (Seventh Chamber) of 7 July 2022 – C-257/21 and C-258/21 – *Coca-Cola European Partners Germany*

Law: Working Time Directive 2003/88/EC, Articles 20 and Article 51(1) of the EU Charter of Fundamental Rights

Key words: Different levels of supplements for regular night work and irregular night work – regulation by collective agreement – equal treatment – implementation of Union law – union competence

Core statement: A provision in a collective agreement that provides for a higher remuneration supplement for irregular night work than for regular night work does not implement the Working Time Directive within the meaning of Article 51(1) EU Charter of Fundamental Rights and the national provision is therefore not to be measured against the EU Charter of Fundamental Rights.

Notes: Some collective agreements in Germany provide for supplements for night work as compensation for its special burdens for employees. On various occasions, the amount of the supplements was differentiated according to whether the night work was performed 'regularly' or rather exceptionally, 'irregularly'. The Federal Labour Court (BAG) had already considered such a collective agreement provision to be incompatible with Article 3(1) of the German Constitution and ruled that the higher supplement was to be paid for night work, irrespective of whether it was to be performed regularly or irregularly.[27] It has now referred another collective agreement to the CJEU. The BAG asked whether such a collective agreement implements Union law within the meaning of Article 51(1) EU Charter of Fundamental Rights and thus is to be measured not only against the German Constitution, but also against the EU Charter of Fundamental Rights. If the fundamental freedoms of the

[27] BAG of 21 March 2018 – 10 AZR 34/17, NZA 2019, 622.

EU Charter of Fundamental Rights were applicable, it asked for the assessment against the right of equal treatment under Union law, Article 20 EU Charter of Fundamental Rights.

The Court of Justice considers that the collective agreements do not implement the EU Charter of Fundamental Rights. The Working Time Directive only regulates the working time itself, but not the remuneration including special bonuses. In particular, it does not contain a "specific obligation" for night work supplements.

New pending case

Request for a preliminary ruling from the Corte suprema di cassazione (Italy) lodged on 12 May 2022, delivered on 15 July 2022 – C-477/22 – Azienda regionale sarda trasporti

Law: Article 3(a) and Article 6(3) Regulation (EC) No 561/2006 on the harmonisation of certain social legislation relating to road transport

Keywords: Passenger transport – 'regular route' – maximum driving time

Notes: The questions referred relate to the interpretation of the terms ‘regular route’, ‘not exceeding 50 kilometers’ and ‘total accumulated driving time during two consecutive weeks’.

→ back to overview

III. Proceedings before the ECtHR

Compiled and commented by

Karsten Jessolat, German Trade Union Legal Service, Centre for Appeal and European Law

Translated to English by Allison Felmy

1. Equal Treatment

New pending cases (notified to the respective government)

Judgment (3rd section) of 1 September 2022 – No. 26922/19 – *P. C. v. Ireland*

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

Keywords: Exclusion of a prisoner from the statutory old-age pension – old-age pension as property – age discrimination – personal status of the prisoner

Core statement: Only unequal treatment on the basis of a characteristic or status mentioned in Article 14 ECHR can constitute discrimination, while the term 'other status' has a broad meaning and its interpretation is not limited to personal, innate or inherent characteristics.

Notes: The complainant reached the age of 66 on 10 February 2006 and received a statutory old-age pension from that date. In March 2011, he was sentenced to several years of imprisonment. Under national law, persons serving a custodial sentence are excluded from receiving the statutory old-age pension. On this basis, payment of the pension to the plaintiff was discontinued as of the date on which he began serving his prison sentence. Appeals against this decision before the domestic courts were unsuccessful.

The appellant first alleges a violation of Article 1 of Protocol No. 1, arguing that the old-age pension is a statutory social security benefit to which he was already entitled before his imprisonment. A retroactive revoking of this entitlement constituted a limitation of his property right. Furthermore, he claims that he is discriminated against by the stoppage of the old-age pension both because of his age and because of his status as a prisoner.

With regard to the alleged violation of Article 1 of Protocol No. 1, the Court refers in its assessment to its case-law according to which there is no interference with the protection of property if the statutory conditions for the granting of benefits or pensions provided for under domestic law are not or are no longer fulfilled.[28] Only if the payment of a pension is subsequently discontinued or reduced due to a change in the law can this lead to an interference with the rights protected under Article 1 of Protocol No. 1.[29] Due to the legal provisions that provide for the exclusion of prisoners from benefits under the statutory pension system, the complainant no longer meets the requirements for the granting of the old-age pension upon entering prison, so that there is no interference with the protection of

[28] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*; ECtHR of 27 April 1999 – Nos. 40832/98, 40833/98 and 40906/98 – *Bellet, Huertas and Vialatte v. France*; ECtHR of 28 April 2009 – No. 38886/05 – *Rasmussen v. Poland*.

[29] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*; ECtHR of 17 April 2012 – No. 31925/08 – *Grudić v. Serbia*.

property. Rather, the change in the complainant's personal situation led to the elimination of the entitlement, so that a violation of Article 1 of Protocol No. 1 cannot be established.
With regard to a violation of Article 14 ECHR, the Court holds, first, that the question of discrimination may also extend to social security benefits.[30] A prerequisite for a violation of Article 14 ECHR is that there is a difference in treatment between persons in comparable situations,[31] whereby the purpose of the legal act leading to the different treatment in question is relevant for the comparability.[32] Only unequal treatment on the basis of an identifiable characteristic or status can constitute discrimination within the meaning of Article 14 ECHR.[33] In this context, the term 'other status' is to be interpreted broadly and is not limited to personal innate or inherent characteristics.[34] Consequently, discrimination can only exist if the complainant belongs to a group of persons comparable to other groups that are treated differently with regard to the purpose of a state measure.

Insofar as the complainant alleges age discrimination, the Court first assumes that the characteristic age falls under the term 'other status'.[35] However, the complainant has failed to prove in the proceedings before the domestic courts that the abolition of the old-age pension for prisoners specifically disadvantages older people. As far as discrimination on the grounds of prisoner status is concerned, this characteristic also falls under the term 'other status' within the meaning of Article 14 ECHR.[36] However, prisoners are not comparable to persons who are in a similar situation, such as mentally ill persons who are admitted to psychiatric hospitals for the treatment of their illness or prisoners who are in pre-trial detention. Mentally ill persons are restricted in their freedom for the purpose of medical treatment, whereas prisoners are detained for punitive purposes. Pre-trial detainees differ from convicted criminal prisoners in that they are presumed innocent until convicted. The Court therefore unanimously holds that there was neither a violation of Article 1 of Protocol No. 1 nor of Article 14 ECHR.

New pending cases (notified to the respective government)

No. 29204/21 – *Dudek v. Poland* (1st section) – lodged on 29 May 2021 – communicated on 4 July 2022

Law: Article 14 ECHR (prohibition of discrimination); Article 1 Protocol No. 1 (protection of property); Article 8 ECHR (right to respect for private and family life).

Keywords: Exclusion of care benefits when receiving an old-age pension – Discrimination because of the receipt of the old-age pension

Notes: The complainant receives a statutory old-age pension. She cares for her disabled husband, who is unable to live independently. In 2019, she applied for a care allowance, which is paid according to statutory provisions to persons who care for disabled adults and either do not pursue employment or give up their gainful employment to do so. The application was rejected by the authorities on the grounds that persons receiving an old-age pension are excluded from benefits for caring for disabled relatives. Appeals against the

30 ECtHR of 7 July 2011 – No. 37452/02 – *Stummer v. Austria*; ECtHR of 16 September 1996 – No. 17371/90 – *Gaygusuz v. Austria*; ECtHR of 11 June 2002 – No. 36042/97 – *Willis v. United Kingdom*.
31 ECtHR of 24 January 2017 – Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik v. Russia*.
32 ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*.
33 ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*.
34 ECtHR of 16 October 2010 – No. 42184/05 – *Carson v. United Kingdom*; ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*.
35 ECtHR of 25 July 2017 – No. 17484/15 – *Carvalho Pinto de Sousa Morais v. Portugal*.
36 ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*; ECtHR of 13 December 2011 – No. 31827/02 – *Laduna v. Slovakia*; ECtHR of 9 July 2013 – No. 42615/06 – *Varnas v. Lithuania*.

official decision were unsuccessful. The complainant alleges discrimination within the meaning of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1. She is of the opinion that as a recipient of an old-age pension she is discriminated against in relation to the receipt of care allowance compared to persons who are able to work and receive a salary.

→ back to overview

2. Freedom of association

Decision

Judgment (3rd Section) of 5 July 2022 – No 815/18 – *Beamtenbund und Tarifunion (dbb) and Others v.Germany*[37]

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

Keywords: Collective Bargaining Unity Act – displacement of conflicting collective agreements concluded by minority trade unions – legislator's discretionary power

Core statement: The guiding principles underpinning Article 11 ECHR are the discretionary power of states with regard to the measures to be taken to protect freedom of association and the prohibition on restricting the core elements of trade union freedom.

Notes: The proceedings concern the complaint of three trade unions (Beamtenbund und Tarifunion [dbb], Marburger Bund, GdL) and five members of these trade unions against the decision of the German Federal Constitutional Court (BVerfG) of 11 July 2017 on the compatibility of the Uniformity of Collective Agreements Act with the Basic Law.

A long-held principle in the case law of the Federal Labour Court (BAG),[38] which has existed since 1957, was that a company may conclude collective agreements with different trade unions, but only one collective agreement: that corresponding most closely to the work predominantly performed in the enterprise to achieve the purpose of the enterprise (‘one enterprise, one collective agreement’). According to the principle of collective bargaining unity, other collective agreements concluded for the enterprise were then superseded. In its judgment of 7 July 2010, the BAG[39] abandoned this case law, as it no longer saw a legal basis for the previously held view. According to the principle of collective bargaining plurality, from then on different collective agreements for comparable employees could be concluded side by side for a company.

On 3 July 2015, the German legislature passed the Uniformity of Collective Agreements Act amending the Collective Agreements Act (TVG) (by insertion of Section 4a), which came into force on 10 July 2015. According to this law, in a company with several overlapping collective agreements of different trade unions that have the same content, only the collective agreement concluded with the trade union with the largest membership in the company is applicable. The complainants filed a constitutional complaint against this law. In its judgment of 11 July 2017, the BVerfG[40] essentially rejected the complaints and found that the amendment to the law was largely compatible with Article 9(3) of the Basic Law.

---

37 For more details on the proceedings, see also *Kocher*, HSI Report 3/2022 (in German), p. 15.
38 BAG of 29 March 1957 – 1 AZR 208/55, BAGE 4, 37.
39 BAG of 7 July 2010 – 4 AZR 549/08.
40 BVerfG of 11 July 2017 – 1 BvR 1571/15.

In their complaints, the complainants allege a violation of Article 11 ECHR and argue that the Uniformity of Collective Agreements Act interferes with their freedom of association, as they are no longer able to conclude collective agreements in companies where trade unions with a larger number of members have already concluded collective agreements with the employer.

The Court prefaces its decision by stating that the core area of freedom of association under Article 11 ECHR is characterised by two guiding principles: on the one hand, states are granted a wide margin of discretion with regard to measures to protect trade union freedom, but, on the other hand, the core elements of trade union freedom may not be restricted in their substance.[41] Within the limits of their discretion, states are free to design their collective bargaining systems and, if necessary, to grant special status to certain representative trade unions.[42] The extent of the discretionary power depends, inter alia, on the restriction of trade union freedom and in particular the right to conclude collective agreements. However, the Uniformity of Collective Agreements Act does not contain such a fundamental restriction. Rather, Section 4a TVG is intended to encourage trade unions to coordinate their collective bargaining among themselves. Insofar as Section 4a(4) TVG grants smaller trade unions the right to replicate the collective agreements of the majority trade unions, these trade unions do not have to renounce any collective agreement against their will. Moreover, the Court points out that other Contracting States also have systems which, in one way or another, restrict the conclusion of collective agreements to larger trade unions or trade unions which are representative of the entire workforce of an enterprise. Such national rules are compatible with both the relevant ILO standards and the European Social Charter. Taking all the circumstances into account, the Court therefore finds, by five votes to two, that the Uniformity of Collective Agreements Act does not violate Article 11 ECHR, as the national legislature has not exceeded its margin of appreciation.

In a dissenting opinion, Judges *Serghides* and *Zünd* hold that the Uniformity of Collective Agreements Act violates Article 11 ECHR. If it is clear from the outset that a collective agreement is superseded because it was concluded by a minority union, the substance of that union's right to represent its members is violated. The judges also find that the Uniformity of Collective Agreements Act violates Article 14 of the ECHR, as it discriminates against smaller trade unions compared to trade unions with a larger number of members in a company. However, a violation of Article 14 ECHR was not alleged by the complainants.

New pending cases (notified to the respective government)

No. 38204/19 – *Alonso Radesca and Others v.Switzerland* (3rd section) – lodged on 12 July 2019 and 7 June 2021 respectively – communicated on 23 August 2022

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

Keywords: Termination of employment for participating in a strike – Criminal conviction for trespassing

Notes: The complainants are 21 employees of a hospital in *Neuchâtel*. After they took part in a strike that was judged illegal by the state authorities, and they were therefore convicted of criminal trespass, the employer terminated their employment. Actions brought against this were unsuccessful in all instances before the domestic courts. A violation of Article 11 ECHR

[41] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 15 May 2018 – No. 2451/16 – *Association of Academics v. Iceland*; ECtHR of 10 June 2021 – No. 45487/17 – *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*.

[42] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 4 July 2017 – No. 35009/05 – *Tek Gıda İş Sendikası v. Turkey*.

is alleged before the Court of Justice. The questions to be examined concern the freedom of association of the complainants, the necessity of the interference and its proportionality.

→ back to overview

3. Freedom of expression

New pending cases (notified to the respective government)

No 54192/15 – *NSZZ Solidarność Region Gdański and Kuzimski v.Poland* (1st section) – lodged on 22 October 2015 – communicated on 6 July 2022

Law: Article 10 ECHR (freedom of expression)

Keywords: Damage to the employer's reputation by a trade union member – Limits to freedom of expression

Notes: The complainants are the regional administration of the *Solidarność* trade union in *Gdańsk* and a member of the trade union employed in a Polish enterprise. During a meeting with the employer's representatives, the second complainant pointed out abuses in the workplace and made a defamatory statement about the enterprise. A complaint was then filed at the instigation of the plant manager, demanding a public apology and a cease and desist order. The court upheld the action in its entirety, finding that the complainant's allegations were unjustified and therefore not covered by freedom of expression. Further appeals against the decision were unsuccessful. The subject of the proceedings is whether the complainants' right to freedom of expression under Article 10 ECHR has been violated by the decisions of the domestic courts.[43]

→ back to overview

4. Procedural law

Decisions

Judgment (1st Section) of 21 July 2022 – No 48762/19 – *Bieliński v.Poland*

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

Keywords: Reduction of old-age pension due to a change in the law – Excessively long duration of proceedings – Consideration of the importance of the proceedings for the applicant's livelihood

Core statement: The reasonableness of the duration of court proceedings depends not only on the complexity of the facts of the case but also on whether and, if so, in what way the litigation is delayed by the parties to the proceedings, taking into account in particular the economic significance of the proceedings for the applicant.

Notes: The complainant was employed in the Ministry of the Interior since 1977, first in uniformed service and from 1982 in the administration of the Office for State Protection. He began drawing an old-age pension in May 2000 and an invalidity pension in August 2000.

[43] ECtHR of 12 September 2011 – Nos. 28955/06, 28957/06, 28959/06 and 28964/06 – *Palomo Sanchez and Others v. Spain*.

Due to a change in the law in January 2009, both pensions were reduced, whereby the coefficient relevant for the calculation was reduced from 2.6% to 0.7% for each year of service completed in the period from 1944 to 1990. Due to a further change in the law in August 2019, a further pension reduction was made, which led to the cessation of the disability pension. The complainant filed an appeal against the pension board's decision in this regard, which was submitted to the competent regional court in Warsaw in January 2018. In June 2018, the proceedings were suspended with reference to other proceedings pending in similar cases before the Constitutional Court. The complainant unsuccessfully appealed against the stay order. In addition, he also initially unsuccessfully applied for the resumption of the suspended proceedings. In December 2019, the litigation was continued on the basis of the decision of the Warsaw Court of Appeal. In May 2021, the original decision on the second reduction of the old-age pension from 2017 was annulled by a final decision of the Warsaw Court of Appeal in September 2021. The complainant was awarded compensation for the pension reduction that had taken place until then.

The complainant claims that the excessive length of the proceedings violated his right to a fair trial within the meaning of Article 6 ECHR. Furthermore, he is of the opinion that there was no legal remedy against the decision of the Regional Court to stay the proceedings and that he therefore no longer had the possibility to challenge the initial decision on the reduction of his pension.

The Court applies its principles on the question of the reasonable duration of judicial proceedings[44] to the present case. According to these principles, the complexity of the facts as well as the procedural conduct of the respective plaintiff and the competent authorities are to be assessed in the light of the special circumstances of the individual case. In particular, the economic significance of the legal dispute for the respective plaintiff must also be taken into account. States must organise their judicial systems in such a way that domestic courts can meet all the requirements of Article 6 ECHR, which includes the obligation to hear litigation within a reasonable time.[45] States are responsible for delays resulting from a deficient organisation of justice in this respect. It may therefore be necessary to take legislative, organisational, budgetary or other measures to address the problem of unreasonable delays in court proceedings.[46]

Applying these principles, the Court concludes in the applicant's case that the total duration of the proceedings before the domestic courts of more than four years is not reasonable within the meaning of its case-law. In doing so, it does not fail to take into account the fact that the Polish judiciary was involved in numerous proceedings concerning the reduction of social benefits of former staff members. Nevertheless, it is the duty of the state to organise its judicial system in such a way that its courts can deal with cases within a reasonable time. In particular, pension disputes involving the current livelihood of the persons concerned require careful but also speedy processing by the state authorities.

As regards the claim of a violation of Article 13 ECHR, the Court points out that under Polish law there is no remedy to challenge the stay of court proceedings pending the examination of a point of law by the Constitutional Court. Thus, it does not have an effective remedy by which it could have obtained compensation for a violation of the Convention.

---

44 ECtHR of 26 October 2000 – No. 30210/96 – *Kudła v. Poland*.

45 ECtHR of 7 July 2015 – No. 72287/10 – *Rutkowski and others v. Poland*; ECtHR of 28 July 1999 – No. 34884/97 – *Bottazzi v. Italy*; ECtHR of 29 March 2006 – No. 36813/97 – *Scordino v. Italy*.

46 ECtHR of 10 May 2011 – No. 37346/05 – *Finger v. Bulgaria*.

The Court therefore unanimously found a violation of both Article 6 ECHR and Article 13 ECHR and awarded the complainant compensation for non-material damage in the amount of €2,100.

New pending cases (notified to the respective government)

No 13129/19 – *Mannanthara Natarajan v.Germany* (3rd section) – lodged on 5 March 2019 – communicated on 1 September 2022

Law: Article 6 ECHR (right to a fair trial); Article 35 ECHR (admissibility requirements).

Keywords: CJEU as a lawful judge within the meaning of Article 101(1) of the Basic Law – Failure of the social courts to request a preliminary ruling

Notes: The complaint concerns social law proceedings in which the calculation of the complainant's pension entitlements is at issue. In the proceedings before the Social Court and the Social Court of Appeal, she has suggested that the proceedings be stayed and submitted to the CJEU for a preliminary ruling. The courts of first instance dismissed the action, and the Social Court of Appeal did not allow an appeal. An appeal against this was rejected by the Federal Social Court as inadmissible. A constitutional complaint was not accepted for decision by the Federal Constitutional Court. The complainant alleges a violation of her right to a fair trial pursuant to Article 6 ECHR, in particular alleging a violation of the right to the lawful judge within the meaning of Article 101(1) GG, as the social courts failed to initiate a preliminary ruling procedure pursuant to Article 267 TFEU.

No 32590/07 – *Velasco Nuñez v.Spain* (3rd section) – lodged on 4 November 2020 – communicated on 31 August 2022

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

Keywords: Retroactive disqualification from holding judicial office – Subsequent amendment of the conditions – Principle of legal certainty

Notes: The complainant was appointed as a judge at a criminal court of appeal in 2017. He had already passed a specialisation examination in 1990, which was required for appointment at that time. In 2013, these specialisation exams were abolished due to a decision of the Supreme Court. Applicants who had taken this specialisation exam by 2011 but were not considered for recruitment challenged the appointment decision. They challenged the decision on the grounds that seniority, rather than the results of the specialisation examination, should have been the basis for the appointment. As a result, the Supreme Court ordered that the complainant be dismissed from the post, and another candidate with higher seniority was appointed. The complainant unsuccessfully challenged the dismissal decision before the domestic courts. The subject of the proceedings is the question of whether the principle of legal certainty, which is a fundamental aspect of the rule of law within the meaning of Article 6 ECHR, was violated by the subsequent removal from office due to the retroactive change in the conditions for recruitment. [47]

→ back to overview

[47] ECtHR of 20 October 2011 – No. 13279/05 – *Sahin and Sahin v. Turkey*; ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*.

5. Protection of privacy

Decisions

Judgment (5th section) of 15 September 2022 – No. 24867/13 – *M.K. v. Ukraine*

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

Keywords: Dismissal from service – disclosure of information about positive HIV test to the employer – missing information about blood test

Core statement: The protection of personal and, in particular, medical data is a fundamental part of the right to respect for private and family life, so that respect for the confidentiality of such data is crucial to respect for patients' privacy and their trust in the medical profession and health services.

Notes: The complainant is a civil servant of the Ministry of Defence and was deployed in the State Border Guard Service. In the course of a routine examination carried out in a hospital, she was found to be HIV-positive in December 2005. The examination report, which was communicated to the complainant, contained no reference to the HIV test or its result. In February 2006, the complainant was dismissed from the service for health reasons. Prior to this, the hospital where she was examined had informed the competent commission, which had to decide on the dismissal, about the results of the examination. The complainant brought both a claim for damages and criminal proceedings for unlawful disclosure of personal data against the hospital. Both proceedings were unsuccessful before the domestic courts.

The complainant alleges a violation of Article 8 ECHR, taking the view that both the concealment of the results of the examination and their disclosure to her employer constitute a violation of the protection of privacy.

The Court prefaces its decision with the principles of its previous case law on the protection of personal data. According to this, information relating to the person as a patient is part of his or her private life.[48] The protection of this medical data is fundamental to the protection of the right to respect for private and family life under Article 8 ECHR. Respect for the confidentiality of health data is an essential part of the legal systems of all States Parties to the ECHR. It not only imparts a sense of respect for the patient's privacy, but also helps to maintain the patient's trust in the medical profession and health services.[49] Otherwise, people in need of medical care may be discouraged from disclosing personal information necessary to receive appropriate medical care. This would not only put the patient's own health at risk, but also, in the case of communicable diseases, threaten the health of the general public.[50] These considerations also apply when it comes to protecting the confidentiality of HIV-related information. Disclosure of such information can have devastating consequences for an individual's private and family life and their social and professional situation.[51]

With regard to informing the complainant of the test result, the Court therefore concludes that even under domestic law the hospital was obliged to inform the complainant of the result of the HIV test. Since this obligation was breached, a violation of Article 8 ECHR is given.

---

48 ECtHR of 17.07 2008 – No. 20511/03 – *I. v. Finnland*; ECtHR of 10 October 2006 – No. 7508/02 – *L. L. v. Frankreich*.

49 ECtHR of 25 February 1997 – No. 22009/93 – *Z. v. Finnland*; ECtHR of 30 October 2012 – 57375/08 – *P. and S. v. Polen*; ECtHR of 29 April 2014 – No. 52019/07 – *L. H. v. Latvia*.

50 ECtHR of 25 February 1997 – No. 22009/93 – *Z. v. Finland*.

51 ECtHR of 25 February 1997 – No. 22009/93 – *Z. v. Finland*.

As regards the disclosure of the results of the examination to the employer, the Court points out that employers may have a legitimate interest in information about the physical health of their employees, particularly when it concerns their performance in relation to certain activities, responsibilities or competences. Nevertheless, the collection and processing of the relevant information must be lawful and suited to balancing the interests of the employer with those of the employee in the protection of their personal data.[52] Even if one assumes in the present case that there was a legal basis for the disclosure of the test result to the employer on the basis of a regulation, this regulation is contrary to national law, according to which HIV-positive persons are entitled to special data protection. However, such an inconsistency arising from domestic law was not foreseeable for the complainant and therefore violates the right to respect for private life. The Court found a violation of Article 8 ECHR by four votes to three and awarded the applicant compensation in the amount of €5,000 for non-pecuniary damage.

In a dissenting opinion, Judge *O'Leary* and Judges *Chanturia* and *Bårdsen* held that, while no fault can be found with the principles established by the Court of Justice for the protection of sensitive medical data, in the present case, according to the findings of the national courts, the complainant had consented to the disclosure of the results of the examination. It was not the Court's task to subject the findings of fact of the national courts to its own assessment.

Judgment (4th Section) of 30 August 2022 – No. 47358/20 – *C. v. Romania*

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

Keywords: Sexual harassment in the workplace – significant flaws in criminal investigation – positive obligation of the state

Core statement: In order to achieve the essential object of Article 8 ECHR, which is to protect (among other things) the physical and mental integrity of a person, including from harassment in the workplace, there is a positive obligation on state authorities to take measures to ensure effective protection to respect private life.

Notes: The complainant was employed from 2014 to 2017 by a cleaning company providing cleaning services for the State Railway Company at the railway station in *Timişoara.* After her employment ended, she reported an employee of the station where she worked for continued sexual harassment during the last two years of the employment relationship. In the course of the investigation by the public prosecutor's office, the allegations made by the complainant were established, but the proceedings were discontinued on the grounds that the acts committed did not constitute a criminal offence. The complainant unsuccessfully appealed against the decision of the public prosecutor's office.

The complainant alleges that the state authorities failed to investigate or to respond appropriately to the harassment suffered during the employment relationship. As a result, she was deprived of the possibility to defend herself against the humiliation by means of the rule of law, which had negative consequences for her private life, for her relationship with her colleagues at work and for her health in general.

According to the case law of the Court of Justice, the concept of private life within the meaning of Article 8 ECHR includes the physical and mental integrity of a person. States must create and apply a legal framework that provides protection against acts of violence by private individuals, including in the context of harassment, particularly in the workplace.[53] The concept of private life within the meaning of Article 8 ECHR may extend to areas relating to a

[52] ECtHR of 26 January 2017 – No. 42788/06 – *Surikov v. Ukraine.*
[53] ECtHR of 9 November 2021 – No. 31549/18 – *Špadijer v. Montenegro.*

person's professional or business activities which are outside his or her home or private premises.[54] Thus, the workplace in an employer's premises also falls within the scope of protection of Article 8 ECHR. In order to protect a person against attacks on his or her physical integrity, effective criminal law provisions must be made, whereby the possibility of a private or secondary action by the aggrieved person can be added to the state criminal prosecution.[55] Although the essential object of Article 8 ECHR is to protect the individual from arbitrary interference by state authorities, there is also a positive obligation on the state to take measures to ensure this protection in relation to the relationship between individuals. [56]

The Court stresses that the issue in the present case is whether the domestic legal system established to protect against sexual harassment in the workplace was effectively applied. The complainant had first informed her superiors of the incidents, who in turn apprised the harasser's employer, the railway company, of the facts. The latter, according to the Court, as a public employer under the responsibility of the State, was under the obligation to take measures to prevent, or at least to investigate, the incidents.[57] Insofar as the state prosecuting authorities failed to investigate the complainant's allegations or judged the findings to be conduct not worthy of punishment, the Court finds that the investigation of the complainant's case was so seriously flawed as to constitute a breach of the state's positive obligations under Article 8 ECHR. In doing so, the Court emphasises that sexual harassment must be unequivocally condemned at the international level and urges States to effectively punish perpetrators and put an end to impunity for such acts. International conventions, such as the Istanbul Convention[58] or the European Social Charter[59] oblige parties to take necessary legislative or other measures to protect the rights and interests of victims. Such measures also include protection against secondary victimisation, which was not the case here. The Court therefore found a violation of Article 8 ECHR and ordered the respondent government to pay the complainant compensation in the amount of €7,500.

New pending cases (notified to the respective government)

No. 46238/20 – *Morawiec / Poland* (1st section) – lodged on 20 October 2020 – communicated on 4 July 2022

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

Keywords: Removal from the judiciary – subsequent lifting of the suspension – legality of the interference with private life

Notes: The complainant is a judge and was President of the Regional Court of *Krakow*. In connection with the controversial judicial reform of 2017, the complainant was initially dismissed from her post as court president. Due to alleged misconduct in the service, she was dismissed from the judiciary in 2020 on the basis of a decision of the Disciplinary Chamber of the Supreme Court and her remuneration was reduced by 50%. An appeal

---

54 ECtHR of 9 January 2018 – Nos. 1874/13 and 8567/13 – *López Ribalda and Others v. Spain*; ECtHR of 28 January 2003 – No. 44647/98 – *Peck v. United Kingdom*; ECtHR of 17 July 2003 – No. 63737/00 – *Perry v. United Kingdom*; ECtHR of 16 June 2009 – No. 38079/06 – *Benediktsdóttir v. Island*.

55 ECtHR of 24 July 2014 – No. 7446/12 – *Remetin v. Croatia*; ECtHR of 5 March 2009 – No. 38478/05 – *Janković v. Croatia*; ECtHR of 25 April 2013 – No. 36337/10 – *M.S. v. Croatia*.

56 ECtHR of 12 November 2013 – No. 5786/08 – *Söderman v. Sweden*; ECtHR of 09 November 2021 – No. 31549/18 – *Špadijer v. Montenegro*.

57 ECtHR of 22 February 2018 – No. 508/13 – *Libert v. France*.

58 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011.

59 European Social Charter (revised) of 3 May 1996.

against this led to the lifting of the suspension and reinstatement after 235 days. The complaint alleges a violation of the right to respect for private and family life under Article 8 ECHR by the temporary suspension. In addition, the Court will examine the question of whether Article 6 ECHR applies to proceedings concerning suspension from judicial office.[60]

No 32947/20 – *Kiūdytė v.Lithuania* (2nd section) – lodged on 8 July 2020 – communicated on 23 August 2022

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

Keywords: Prohibition of secondary employment – proportionality of the interference

Notes: The complainant is a civil servant and works as a department head at the state tax authorities. She applied to her employer for a secondary employment permit in order to work in a private company as a managing director in addition to her work for the tax inspectorate. Her employer refused on the grounds that the secondary employment would interfere with her duties as a civil servant. The complainant challenged this decision before the domestic courts. The administrative courts upheld the employer in all instances. The complainant alleges a violation of Article 8 ECHR and Article 14 ECHR and considers the ban on secondary employment to be disproportionate. The question here is whether the interference with the complainant's right to respect for private and family life was provided for by law and necessary in a democratic society.[61]

→ back to overview

6. Protection of property

(In)admissibility decision

Decision (2nd Section) of 5 July 2022 – No 11944/16 – *Milivojević v. Serbia*

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

Keywords: Calculation of pension – ratio of old-age pension and invalidity pension – lack of proof of discriminatory treatment

Core statement: A violation of the prohibition of discrimination requires proof that the complainant is in a similar situation to those persons who are treated differently, given the particular nature of his or her complaint.

Notes: The complainant was a colonel in the Army of the Republic of Serbia for 30 years. On 16 April 2005, he retired due to permanent invalidity. At that time, he had acquired rights to a disability pension and was able to decide whether he wanted to receive an early retirement pension or a disability pension at the time of his retirement. He opted for the latter. After leaving military service, he was appointed deputy public prosecutor. He held this position until 30 June 2010. During this time, he made compulsory contributions to the state pension

[60] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 23 May 2017 – No. 33392/12 – *Paluda v. Slovakia*; ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

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

fund. Upon retirement, the complainant requested that his pension be calculated taking into account his years of service as a deputy prosecutor. This request was rejected on the grounds that only recipients of a retirement pension, not a disability pension, were entitled to have their pension recalculated. As a result, the complainant only received the invalidity pension without account being taken of his years of service with the public prosecutor's office. He brought an action against the relevant decisions before the administrative courts, which was dismissed in 2013. A constitutional complaint filed against this in 2015 was unsuccessful.

The complainant claims that the granting of the lower disability pension violated his right to the protection of property within the meaning of Article 1 of Protocol No. 1, since, although he paid compulsory contributions into the pension reform during his service for the public prosecutor's office, he did not benefit from these contributions. In this respect, he was disadvantaged compared to those who could claim an old-age pension because of his limited earning capacity, which also constituted discrimination within the meaning of Article 14 ECHR.

The Court first points out that a prerequisite for discrimination under Article 14 ECHR is a difference in treatment of persons only if they are in comparable or similar situations.[62] The complainant has to prove this where applicable.[63] Not every difference in treatment constitutes a violation of Article 14 ECHR, because it must be based on a characteristic or status mentioned in Article 14 ECHR. Moreover, unequal treatment is not discriminatory if it is objectively justified, i.e. if it pursues a legitimate aim or is proportionate between the means used and the aim pursued.[64] With regard to this assessment, states have a wide margin of discretion, especially when it comes to measures of economic or social significance.[65] As far as the burden of proof is concerned, it is up to the government to prove that the difference in treatment is justified once the complainant has substantiated it.[66]

Since the present case concerned the calculation of the complainant's old-age pension, i.e. a question of social security, the state authorities had a wide margin of discretion with regard to the question of discrimination. In this respect, the complainant did not succeed in proving that he was in a group of persons affected by a discriminatory measure. Due to the obvious unfoundedness of the complaint, it had to be declared inadmissible pursuant to Article 35(3) and (4) ECHR.

→ back to overview

62 ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*.
63 ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*.
64 ECtHR of 7 February 2013 – No. 16574/08 – *Fabris v. France*; ECtHR of 31 March 2009 – No. 44399/05 – *Weller v. Hungary*.
65 ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary* .
66 ECtHR of 30 June 2020 – No. 26944/13 – *Popović and Others v. Serbia*.

Contact and Copyright
Hugo Sinzheimer Institute for Labour and Social Security Law (HSI)
of the Hans-Böckler-Foundation
Wilhelm-Leuschner-Strasse 79
60329 Frankfurt / Main, Germany
Phone +49 69 6693-2953
hsi@boeckler.de
www.hugo-sinzheimer-institut.de
You can also find us on Twitter: https://twitter.com/ArbeitsrechtHSI