European Employment Law Cases

2016 | 1

POLAND	Transferee may pay acquired staff less than 'own' staff
NETHERLANDS	Does Acquired Rights Directive apply to 'pre-pack'?
UK	Victimisation may be associative
GERMANY	Heirs inherit claim for compensation in lieu of paid leave

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EELC

European Employment Law Cases (EELC) is a legal journal that is published four times per year. Its principal aim is to publish judgments by **national** courts in Europe that are likely to be of interest to legal practitioners in other European countries. To this end, EELC has a *national correspondent* in almost every country within the EU (plus Norway), who alerts the Editorial Board to such judgments within his or her own jurisdiction. A case report describes the facts of the case and the main aspects of the judgment. It also includes a Commentary by the author and, in many cases, comments on the case by lawyers in other jurisdictions. Readers are invited to submit case reports, preferably through the national correspondent in their jurisdiction. Guidelines for authoring a case report are available from the Editorial Board. The names and contact details of the national correspondents are listed on the inside of the back page. Besides case reports, EELC publishes the occasional article.

EELC also publishes summaries of recent judgments by the Court of Justice of the EU (the ECJ) that are relevant to practitioners of European employment law, as well as Advocates-Generals' opinions and brief summaries of questions that have been referred to the ECJ for a preliminary ruling.

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Contents

Editorial

Something old, something new, something borrowed, something blue

No, this bridal rhyme doesn't announce a marriage. It does, however, befit the copy of the magazine in front of you.

May the rights to vacation accrued during the illness of a dead man be denied by his employer? Can limited liability companies (as opposed to natural persons) pursue claims for discrimination? Which elements are to be taken into consideration when determining whether a transfer of undertaking has occurred? Can victimisation be 'associative'? These are just a few of the issues (18 in all) that are addressed in this copy of EELC. They are surely relevant in most, if not all, jurisdictions within the EU. Similar issues have been addressed in this magazine for over five years – 'something old' – and will continue to be its main ingredient.

The cover, however, is 'something new'. So is the publisher. And more things will change during the course of this year in order to further improve the magazine. Of course, we have 'borrowed something' from the previous set-up, as the team of contributors continues to work hard to create a selection of national case law to interest lawyers from other jurisdictions. 'Something blue' refers to loyalty and purity, so I'm told. I'm afraid that the colour style doesn't include blue, and therefore you will have to take our word for it that the magazine remains loyal to our readers. It will follow national case law on EU topics closely and scrutinise the results.

And undoubtedly there will be numerous interesting new cases to come. Perhaps they will differ somewhat in the future, as important changes are taking place in EU employment law. An important one is the position of the UK. What will its role in the EU be? How will that role impact EU law? How will that in turn influence national case law on EU topics? Only time will tell.

But now it is time to enjoy this issue of the magazine. Dig in!

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2016/1

Do the rules on transfer of undertaking apply in a 'pre-pack' insolvency? A Dutch court asks the ECJ for guidance (NL)

CONTRIBUTOR Peter Vas Nunes*

Summary

A day care provider, Estro Groep B.V., ('Estro') went into pre-arranged ('pre-pack') receivership. Immediately afterwards, a large part of its business was taken over by another day care provider, Smallsteps B.V. ('Smallsteps'). The latter did not offer employment to all of Estro's employees, taking the position that the takeover did not constitute the transfer of an undertaking. This position was based on the fact that Estro was in receivership at the time of the takeover. According to the Dutch law transposing the Acquired Rights Directive, such takeovers are exempted from the rules on transfers of undertakings. A union and five of the employees whom Smallsteps had not offered jobs, relying on the wording of Article 5(1) of the Directive ("*insolvency proceedings which have been instituted with a view to the liquidation of the assets*"), claimed that they had become Smallsteps employees. The court referred questions to the ECJ for a preliminary ruling.

Background

Article 5(1) of Acquired Rights Directive 2001/23 states:

> *"Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking […] where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority […..]".*

The Netherlands have not provided otherwise within the meaning of this Article 5(1). Hence the Dutch law transposing the Acquired Rights Directive (Article 7:666(1)(a) of the Civil Code) provides that it does not apply where the transferor is in receivership. This is relevant because of the following.

Under Dutch employment law, it is frequently difficult and/or costly for an employer to terminate the employment contracts of permanent staff. An exception is where the employer is in receivership (*faillissement*). Where an individual has been declared bankrupt, or a court has issued a receivership order in respect of a legal entity (e.g. a company or association), the court appoints a receiver (*curator*), whose task it is to satisfy the debts of the business (to the extent possible), as a rule by liquidating the assets and closing down the business. The receiver operates under the supervision of a judge (*rechter commissaris*) who is appointed for that purpose. The receiver is not bound by the normal rules of employment law and can, and usually does, dismiss all of the employees within the business quickly, without formalities and without paying them severance compensation.

Staffing costs are an important reason why companies in The Netherlands go out of business.

The foregoing has for many years led to the use or, as some would say (and as in some instances courts have held[1]), the abuse of insolvency law for the purpose of circumventing the normal rules for dismissal. The traditional way to do this is as follows. A company wishing to shed staff ('Oldco') applies for receivership. If nobody files an objection, the application is routinely granted within a few days. The court-appointed receiver dismisses the entire staff and sells the business, without staff, to a third party, not infrequently the former owner ('Newco'). Newco hires those of the former staff that it wishes, often without regard to the normal rules of redundancy selection, for instance, hiring the youngest, cheapest and healthiest of them. Needless to say, this Dutch version of what in the UK is sometimes known as

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1. Where the sole reason to apply for receivership is to separate from surplus staff, the courts may find this to constitute abuse and refuse to grant, or withdraw, the insolvency status. However, in most cases, the desire to shed staff is not the sole motive, there being real financial difficulties.

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phoenixism (the Dutch expression is *doorstart*) can give Newco a competitive advantage over other companies in the same line of business. However, this advantage is in many cases outweighed by certain disadvantages. One is that when a company has been ordered to wind up, the receiver needs time to get acquainted with the business and to look for potential buyers, during which time the business loses value rapidly.

A few years ago, employers wishing to make use of insolvency proceedings in order to shed staff started to employ a method that lacks this drawback. Borrowing from the UK, where the method was invented, it is known a 'pre-pack'. The essence of a pre-pack operation is that Oldco, before applying for receivership, identifies Newco, i.e. a party willing to take over at least a major part of its business. A contract is negotiated, but not yet executed, in which Oldco and Newco spell out in detail what will happen immediately after the court has issued the receivership order. The parties ask the court to identify the individuals who will be appointed as the receiver and the *rechter commissaris* if and when Oldco goes into receivership (respectively, the 'proposed receiver' and the 'proposed *rechter commissaris')*. The receiver-to-be acquaints himself with Oldco and prepares the dismissal of its staff. Newco prepares the employment contracts of the individuals to whom it will be offering jobs as soon as Oldco has gone into receivership. Once these preparations and the paperwork have been completed, Oldco applies for receivership and literally one minute after the court has issued the receivership order, the (now) receiver dismisses the employees and Newco offers the pre-selected lucky ones new contracts (in many cases, on less favourable terms).

There is presently no legal basis for the pre-pack procedure. However, a Bill is pending in Parliament that will provide a legal basis.

For the sake of completeness, it should be noted that there is a milder form of insolvency under Dutch law, known as *surseance* (debt moratorium). It is not aimed at liquidation but at continuation of the business and it does not offer the above-mentioned advantages of receivership.

Facts

Estro, which consisted of several companies, was the largest day care provider in The Netherlands. It had 380 day care centres employing a total of 3,600 employees. Smallsteps was incorporated on 20 June 2015 with a view to taking over part of Estro's business. Its main shareholders and financial backers were the private equity companies KKR and Bayside. Its management was partly identical to that of Estro. Following the latter's receivership on 5 July 2015, Smallsteps took over 251 day care centres and about 2,600 of Estro's former employees.

Five of the plaintiffs in this case were employees who were not offered employment by Smallsteps. The sixth plaintiff was a trade union.

The plaintiffs brought legal proceedings against Smallsteps in which they asked the court, *inter alia*, (i) to issue a declaratory judgment that the rules on transfers of undertakings apply to the takeover of the 251 day care centres by Smallsteps, (ii) to order Smallsteps, on pain of a penalty of € 250 per day per employee, to inform all former Estro employees that they had transferred into the employment of Smallsteps on 5 July 2015, with retention of all their existing terms of employment and (iii) to order Smallsteps to pay the employees that it did not consider as having transferred certain arrears of salary.

The plaintiffs based their request on two arguments. The first was that a pre-pack, such as the one at issue, does not meet the requirements of Article 5 (1) of The Acquired Rights Directive, given that it was not instituted with a view to the liquidation of Estro's assets but, on the contrary, was instituted with a view to the continuation of (part of) Estro's business. Therefore, there is no "bankruptcy" or "analogous insolvency" situation within the meaning of the Directive, and, as Dutch law is to be construed in line with the Directive, there is a transfer within the meaning of Dutch law. The plaintiffs referred to the ECJ's judgments in *Abels (C-135/83), D'Urso* (C-362/89), *Spano* (C-472/93) and *Dethier* (C-319/94).

In the alternative, the plaintiffs based their claim on the argument that, although technically the transfer did not occur until after Estro had gone into receivership, in reality it had taken place before that time. The plaintiffs referenced the ECJ's judgment in *Celtec* (C-478/03), in which the ECJ interpreted Article 3(1) of the Acquired Rights Directive *"as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee".*

Smallsteps argued that the relevant provision of the Acquired Rights Directive is so clear, and has been so clearly interpreted by the ECJ in favour of its position, that it constitutes an *acte clair* within the meaning of the ECJ's case law or, alternatively, an *acte éclairé*.

Judgment

The court (one judge sitting alone), referencing the ECJ's judgment in *Europièces* (C-319/94) as well as national precedent, found there to be sufficient doubt as to the correct interpretation of the Acquired Rights Directive to warrant asking the ECJ the following questions:

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1. Is the Dutch *faillissement* procedure compatible with the aim and intended meaning of Directive 2001/23 and is Article 7:666(1)(a) of the Dutch Civil Code (still) compatible with that directive, if the transfer of the business in receivership is immediately preceded by a pre-pack that is under judicial supervision and is explicitly aimed at continuation of (parts of) the business?
2. Does Directive 2001/23 apply where, prior to the receivership order, a 'proposed receiver', identified as such by a court, acquaints himself with the debtor's situation, explores the possibilities of continuation of the business by a third party immediately after the receivership order and prepares the actions that need to be taken immediately after that order in order for the continuation of business by means of an asset transfer to be successful (transfer of the debtor's business or a part thereof as per the date of the receivership order or soon thereafter and (almost) uninterrupted continuation of the activities)?
3. Should distinction be made between (i) the situation where continuation of the business is the pre-pack's primary goal; (ii) the situation where the 'proposed receiver', by executing a pre-pack and selling the business on a 'going concern' basis immediately after the receivership order, aims primarily to maximise the revenue collected on behalf of the debtor's creditors; and (iii) the situation where agreement is reached in respect of an asset transfer (in the form of continuation of the business) before the receivership order and that agreement is formalised and/or put into effect afterwards? What if the aim is both continuation of the business and revenue maximisation?
4. For the purpose of Directive 2001/23 and the Dutch law transposing it, is the point in time where a transfer of an undertaking occurs in a pre-pack situation prior to a receivership order (i) the moment, before that order, when the parties reach agreement on the terms of the transfer or (ii) the moment in which the transferee actually acquires the status of manager of the relevant entity?

Author's Commentary

A somewhat similar case was reported in EELC 2014/37. In that case, the court held that there was a transfer of the undertaking. The Commentary in EELC 2014/37 describes how Article 5 of the Acquired Rights Directive came into being following the ECJ's judgment in *Abels* (C-3430/01), which judgment was codified by Directive 98/50 in 1998 (the forerunner of what is now Directive 2001/23). It is worth repeating the following portion of that Commentary:

> "The first time a pre-pack construction was used in The Netherlands was, to my knowledge, in 2011. It is said that the construction was imported from the UK, where pre-packs have been in common use for many years.[2] Since 2011, pre-packs have become increasingly popular in The Netherlands. In 2013, the government announced that it was preparing legislation that will regulate the use of pre-packs."

Not surprisingly, the unions as well as some politicians and scholars are up in arms. One of the many arguments they advance against pre-packs is that the 'mirroring' method of selecting redundant employees is not used, thus opening the door to arbitrary redundancy selection. In their resistance to the spread of pre-packs, the unions are now arguing that a transaction between a pre-pack receiver and a Newco qualifies as a transfer of an undertaking within the meaning of Directive 2001/23 and the Dutch implementing legislation. I see two lines of argument that could support such a stance:

a. although the documents selling the business are not executed (signed) until after the court has declared the transferor to be insolvent, the actual agreement is entered into - verbally, at least - before that time, so the exception under Article 5 of the Directive does not apply;
b. the insolvency is not really an insolvency, in that its purpose is not to liquidate the business but to enable the business to continue. It is in fact, if not in theory, more like a *"surséance"* procedure (i.e. a debt moratorium designed to enable continuation of the business).

Technically, argument a. is not strong because, even supposing it can be argued that the actual agreement to sell the business was entered into before the court order had been delivered, that agreement was conditional and does not come into effect until the condition precedent – the court order – has been satisfied. However, in practice the condition is usually no more than theoretical. This is particularly the case where the new owner is none other than the old owner in the form of a new legal entity. As the UK Insolvency Service noted[3], *"Pre-packs have attracted criticism because it can appear that an insolvent company has reformed without any redress to its creditors - a concept known commonly as 'phoenixism'"*.

Argument b. is based on the distinction in Dutch law between – on the one hand – insolvency *(faillissement)*, which is designed with liquidation of the assets on behalf of the creditors in mind and, on the other hand, debt moratorium *(surséance)*, which is designed with continuation of the business and an arrangement with the creditors in mind. In practice, however, this distinction is not a bright line one. Receivers frequently sell a business rather than liquidating its assets, and debt moratoria more often than not evolve into insolvency.

2. In 2011, it was estimated that 25% of the 2,808 companies that entered administration in the UK in that year used the pre-pack procedure and that nearly 80% of pre-pack sales were to connected parties: see the Insolvency Service's 2011 Annual Report.
3. House of Commons, The Insolvency Services, Sixth Report of Session 2012-2013.

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As Professor Catherine Barnard (EU Employment Law, 4th edition (2012), page 621) notes, the distinction drawn by the ECJ between insolvency and pre-insolvency proceedings may be based on a false premise. Professor Barnard analyses four ECJ judgments with a view to determining *"on which side of the line the national rules fall"*: *d'Urso* (C-362/89), *Spano* (C-472/93), *Dethier* (C-319/94) and *Europièces* (C-399/96), but she does not provide an answer.

The UK Court of Appeal has tried to find the answer. Reference is made to its eminently readable judgment in *Key2Law (Surrey) LLP* – v – *Gaynor De' Antiquis* [2011] EWCA Civ 1367 delivered on 20 December 2011, in which it analysed the distinction between, on the one hand, *"bankruptcy proceedings or any analogous insolvency proceedings …."* within the meaning of Article 5(1) of Directive 2001/23 and, on the other hand, other types of insolvency proceedings. The case involved a law firm 'DK' that became the subject of an 'administration order' under the UK Insolvency Act (as amended in 2003). The court appointed two administrators, who proceeded to liquidate the law firm and to sell its assets, by entering into a 'management agreement' with another law firm (Key2), under which Key 2 was to collect DK's unbilled work in progress on behalf of the administrators in consideration of commission equal to 25% or 50% of the sums collected. A few days before going into administration, DK dismissed one of its solicitors, Ms De' Antiquis. She claimed that the agreement between (the administrators acting on behalf of) DK and Key2 qualified as a transfer of the undertaking within the meaning of the UK legislation transposing Directive 2001/23 ('TUPE') and that, therefore, Key2 was liable to her under various heads, including unfair dismissal and sex discrimination.

Key2 based its defence on Regulation 8(7) of TUPE which, almost literally repeating the wording of Article 5 of Directive 2001/23, provides:

> *"Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."*

The central issue in the case was whether the proceedings that led to DK going into administration qualified as 'analogous insolvency proceedings' within the meaning of Regulation 8(7) of TUPE and, hence, Article 5 of Directive 2001/23. In view of the ECJ's rulings in *Abels*, *D'Urso*, *Spano*, *Dethier* and *Europièces*, this issue boiled down to determining the *purpose* of the administration order.

Paragraph 3(1) of Schedule B1 to the UK Insolvency Act provides:

> *"The administrator of a company must perform his functions with the objective of:*
> *(a) rescuing the company as a going concern, or*
> *(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or*
> *(c) realising property in order to make a distribution to one or more secured or preferential creditors."*

Paragraphs 3(3) and 3(4) add that the administrator may only perform his functions with objective (b) if objective (a) cannot be achieved or if objective (b) would achieve a better result for the company's creditors, and he may only perform his functions with objective (c) if objectives (a) and (b) cannot be achieved. In other words, there is a hierarchy: first (a), then – if (a) is not the best option – (b) and finally – if neither (a) nor (b) are achievable – (c).

In the case at hand, DK argued that it was clear from the outset that objective (a) was not realistic. It was hoped that the administrator would be able to sell the law firm (= objective b), but as it turned out, this proved impossible and, instead, the law firm was liquidated (= objective c). Therefore, in DK's view, the proceedings that led to the administrative order were *"instituted with a view to the liquidation"* of its assets and, hence, the exemption under Regulation 8(7) of TUPE applied.

It is worth reading the Court of Appeals' entire judgment, which can be accessed on www.bailii.org/ew/cases/EWCA/Civ/2011/1567. In brief, the court rejected DK's argument, finding it:

> *"unsatisfactory in principle that the determination of whether or not administration proceedings are, in any particular case, to be characterised as 'analogous insolvency proceedings' should depend on the evidence leading up to the making of the appointment of administrators. That is because an inquiry of that nature may well produce an uncertain picture as to the objective, or the predominant objective, intended to be achieved by any appointment …"*

Secondly, the court regarded:

> *"it as in principle anyway wrong to identify the purpose of an appointment of administrators by reference to pre-appointment considerations as to the particular objective or objectives that it is foreseen that an appointment is reasonably likely to achieve."*

Back to The Netherlands. There have been several pre-pack cases recently that have caught the attention of the media and Parliament. The most publicised of these is the *Estro* case, where hundreds of child care centres were transferred to a phoenix company and thousands of employees were involved. The case is controversial and is sure to influence the coming debate on a Bill that the government plans to introduce into Parliament

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modernising the Insolvency Act. The government aims to codify the currently informal *pre-pack* practice".

The case reported in EELC 2014/37 was commented on by authors from Germany and Slovakia. German law does not exempt insolvency situations from the rules on transfers of undertakings, so this issue does not exist in Germany. The Slovakian author remarked that in Slovakia, contrary to The Netherlands, the insolvency process can take a long time, so a pre-pack operation would not be effective in Slovakia. However, there is an alternative, being that Oldco rearranges its assets and staff in such a way that only those assets and those staff that Newco wishes to take over are transferred as a separate part of the business.

Pre-pack is but one of many creative legal constructions that have been devised, essentially, to circumvent the rules that make terminating employment contracts under Dutch law so difficult. As long as nothing is done to tackle the root cause of the problem by making termination easier, employers will continue to think up new mechanisms.

Comments from others

The Netherlands (Zef Even): I have two additional remarks. First, one of the issues at hand is that in The Netherlands the difference between the level of employee protection during receivership and outside receivership is so large, that the incentive to reorganise after being declared bankrupt is hard to deny. There are three solutions for that situation: lowering the general level of employee protection, increasing the level of employee protection during receivership or a combination of both. In a fairly recent study (March 2015), scholars concluded that compared to other jurisdictions the level of employee protection during receivership is very low ('Employees and insolvency: a comparative study of the legal position of employees in case of insolvency of their employer'). It therefore makes sense to invest in increasing the level of employee protection in the insolvency stage. Second, the somewhat paradoxical role of this employee protection in the pre-pack procedure is worth mentioning. Although the proposed receiver found that the phase before Oldco went bankrupt fell short in carefulness because the take-over had only been negotiated with Newco – a company that is to be regarded a so-called connected party – and not with other (third) parties, it still continued the pre-pack process. The reason for that decision (taken together with the proposed *rechter commissaris*) was that a successful pre-pack would benefit a great number of parties, such as the 2,600 employees who could continue their employment, the parents, the body responsible for social benefits, the landlords and the banks. This same paradox is to be found in the already mentioned *Abels* ruling. Although employees are to be protected under the Acquired Rights Directive, which therefore may seem a good argument to actually offer such protection in case the employees are particularly vulnerable as is the case in a bankruptcy situation, this protection is however not granted, as such protection might dissuade a potential buyer from acquiring the undertaking entailing the loss of all jobs in the undertaking. In other words, the ECJ ruled that by not protecting the employees under the Directive, it in fact protects these employees. Normally, such arguments fall short in court (for instance, the argument that the employment position of young employees is promoted by not offering them the protection under the collective dismissal directive – an argument along the lines of the Abels case – was rejected by the ECJ in the *Confédération générale du travail*, case C-385/05).

Subject: transfer of undertakings

Parties: *Federatie Nederlandse Vakvereniging* and five individuals – v – *Smallsteps B.V.*

Court: *Rechtbank Midden-Nederland, locatie Almere* (District Court in Almere)

Date: 24 February 2016

Case number: 3821875/MC EXPL 15-951

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2016/2

Transfer of undertaking requires overall assessment (DK)

CONTRIBUTOR Mariann Norrbom*

Summary

The Danish Supreme Court recently affirmed that the transfer of a canteen contract to another operator following a tender process did not fall within the scope of the Danish Transfer of Undertakings Act.

The Danish Transfer of Undertakings Act applies to the transfer of an undertaking or part of an undertaking, meaning an economic entity which retains its identity. In the test of whether a transfer is a transfer within the meaning of the Act, an overall assessment of all facts surrounding the transfer must be made. This was the issue in this case before the Supreme Court.

Facts

The case concerned a large accountancy firm with a lunch canteen operated by an external canteen operator. The canteen was primarily meant for the 600-700 employees of the accounting firm, but it was also used by the employees of the other firms located in the same building.

In connection with relocating to a new domicile, the accountancy firm invited tenders for the canteen contract. A new canteen operator won the contract to operate the canteen at the new premises with effect from the date of the accountancy firm's relocation.

However, the original canteen operator continued operating the canteen at the accountancy firm's former address without any changes, a canteen that also served other businesses with hungry employees and customers.

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The original canteen operator used the same kitchen and the same facilities – only a mixer and a vending machine were brought along to the new domicile.

The accountancy firm's relocation resulted in an 80% loss of revenue for the original canteen operator at the former address. The original canteen operator therefore had to dismiss a number of employees. This resulted in discussion about whether dismissing the employees was in conflict with the Danish Transfer of Undertakings Act.

One of the affected employees believed that the situation constituted a transfer within the meaning of the Danish Transfer of Undertakings Act, given the fact that the regular customers, the operation of the canteen and the task of serving lunch to 600-700 people had transferred to the new canteen operator. According to the employee, this made it a case of unfair dismissal. The employee brought proceedings against the original canteen operator as well as the new canteen operator.

The original and the new canteen operator did not agree that the employee was protected under the Danish Transfer of Undertakings Act, since there had been no transfer of operating equipment or employees. Instead, it argued, the deciding factor should be the fact that the canteen as such had relocated and that the former canteen kitchen was still being used by the former canteen operator.

Judgment

The Supreme Court sided with the two canteen operators, thus affirming the judgment of the Danish Maritime and Commercial High Court. The Supreme Court first stated that the Danish Transfer of Undertakings Act must be interpreted in accordance with the Transfer of Undertaking Directive (2001/23/EC).

Further, the Supreme Court noted that the test of whether or not the Act applies must be based on well-established case law from the ECJ, including the ECJ's ruling of 9 September 2015 in case C-160/14 (*Da Silva e Brito*), paragraphs 26-27, which provides that all facts surrounding the transfer must be taken into account.

Paragraph 26 of the ruling in C-160/14 states:

> *"In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including in particular the type of*

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undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (…)"

The Supreme Court emphasised that the original canteen operator had continued providing its canteen services without any changes, using the same operating equipment as before, and that there had been no transfer of assets or employees (except for an employee who had now become a waiter). Accordingly, the Supreme Court found that there was no transfer within the meaning of the Danish Transfer of Undertakings Act.

Commentary

With this judgment, the Supreme Court has emphasised that the test of whether a transfer is within the meaning of the Danish Transfer of Undertakings Act must include an overall assessment of all facts surrounding the transfer.

As has already been established under Danish case law, the judgment once again confirms that the transfer of a contract is not in itself sufficient to qualify as a transfer within the meaning of the Danish Transfer of Undertakings Act.

Comments from other jurisdictions

Belgium (Isabel Plets): In order to determine whether a transfer of undertaking has taken place, Belgian Courts will also assess all concrete facts characterizing the transaction in question. No single factor is decisive.

Elements that are taken into account are:
- the type of undertaking or business;
- whether or not the business's tangible assets are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of its employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, during which those activities were suspended.

Belgian courts tend to give a very broad interpretation to the concept of transfer of undertaking. Therefore, a large number of operations are qualified as transfer of undertaking.

Subject: transfer of undertakings

Parties: 3F representing A against the Confederation of Danish Industry representing ISS Facility Services A/S

Court: *Højesteret* (Danish Supreme Court)

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Case number: 23/2015

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2016/3

Supreme Court allows transferee to differentiate between 'own' and acquired employees (PL)

CONTRIBUTOR Marcin Wujczyk*

Summary

Paying employees acquired by way of the transfer of an undertaking less than the transferee's original staff not discriminatory. The Supreme Court recently came to this conclusion based on a rather daring interpretation of a provision of national law aimed at transposing an EU directive. Although Polish law obligates employers to treat employees who perform the same work equally regardless of personal characteristics, the provision at issue should be read more narrowly.

Facts

The plaintiff in this case was W.G. He was originally an employee of a company called P.PR. On 1 September 2009, the part of this company in which W.G. was employed was transferred to another company, P.I.

Before the transfer, W.G.'s terms of employment were governed by the collective agreement in force at P.PR. Following the transfer, P.I. initially continued to apply that collective agreement to the employees it had taken over from P.PR. However, it stopped doing this from 1 January 2011, when the term of the P.PR collective agreement expired. As from that date, P.I. applied its own collective agreement to all of its employees, i.e. both to the transferred staff and the staff it had employed before the transfer. It did this in such a way that the transferred employees were paid a lower salary than that of the original staff employed in the same positions. For example, where the collective agreement set the salary that goes with a certain position at between € 1,000 and € 1,200 per month, the transferred employees would be paid according to the minimum of this range, whereas the original staff were paid at a higher level within that range. This was possible because the basic pay of both groups of employees, as provided in their contracts, differed.

Although the differential remuneration of the two groups of employees was in line with the collective agreement, W.G. believed it to be in breach of Article 18(1)(c) of the Labour Code which transposes Directive 2000/78. It provides that *"Employees have the right to equal remuneration for equal work or work of equal value"*. He brought a case before the court of first instance.

Both the court of first instance and the appellate court found in favour of P.I., denying W.G.'s claim. He appealed to the Supreme Court.

Judgment

The Supreme Court noted that Article 18(1)(c) of the Labour Code forms an integral part of a set of provisions of which Article 18(1)(a) is the first. It prohibits employers from treating their employees unequally on the basis of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation or employment status (i.e. full versus part time and fixed versus permanent contract). Given this fact, the court interpreted Article 18(1)(c) purposively, not literally, holding that it deals only with differential remuneration on the said protected grounds. Differentiating between employees on the basis of their employment history (in this case, on whether they were transferred employees or original staff) is not discriminatory.

The court noted that there are two types of criteria that might be recognised as discriminatory: (i) unequal treatment on the grounds of personal characteristics or traits (e.g. race or gender) and (ii) unequal treatment on the grounds of being employed on a part-time basis or on the basis of a fixed-term contract. Differential payment based on any of these criteria is prohibited. Differential remuneration on other grounds is not prohibited by anti-discrimination law.

However, there is also the more general doctrine of equal rights in employment, as provided in Article 11(2) of the Labour Code. It states that *"Employees have equal*

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rights for equal performance of the same duties". An employee claiming infringement of this obligation need not allege detriment on the grounds of any personal characteristic such as age or sex. However, the snag is that infringement of Article 11(2) carries no sanction, other than that the employee has the right to resign for cause, but that is rarely a practical solution. In any event, the Supreme Court did not elaborate on this. It merely made a distinction between discrimination on a protected ground on the one hand and the general doctrine of equal treatment on the other.

Commentary

The position adopted by the Supreme Court should be recognised as the correct one. The Supreme Court rightly narrowed the catalogue of discriminatory criteria to only specifically determined situations. Such an interpretation allows the erroneous implementation of an EU directive by the Polish legislator to be 'repaired'. The EU directives on equal treatment establish a closed catalogue of discriminatory premises, whereas the Polish law transposing them has formulated an open catalogue of prohibited differentiation criteria which result in discrimination. The position taken by the Supreme Court, which allows differential pay between employees of an acquiring employer and those of an acquired employer after the transfer of the enterprise, should be recognised as extremely courageous. Simultaneously, it should be noted that the Supreme Court did not mention the issue of the length of time such a differentiation could persist. Undoubtedly, a difference in pay should not exist for an unlimited period of time.

Subjects: transfer of undertakings, terms of employment

Parties: W.G. – v – P. I. SA

Court: *Sąd Najwyższy* (Supreme Court)

Date: 4 November 2015

Case Number: II PK 36/15

Publication: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20PK%2036-15-1.pdf

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2016/4

Transferee liable for transferor's overdue pension contributions (NL)

CONTRIBUTOR Zef Even*

Summary

If both the transferor and transferee are affiliated to one and the same mandatory industry-level pension fund, the transferee is liable vis-à-vis that pension fund for *pension contributions (premiums) due but not paid to that fund prior to the date of transfer*. A judgment to this effect, which was reported in EELC in 2013/35, was recently confirmed on appeal.

Facts

Cleaning companies must by law participate in a specific industry-level pension scheme that is managed by an independent pension fund. On 21 May 2008, the cleaning company GOM purchased the business of the cleaning company VBG, taking over its staff. The transferee VGB was in arrears with the payment of its pension contributions. At the time of the acquisition there was an overdue payment amounting to nearly € 2 million. In the purchase contract, GOM and VBG had agreed that all claims of third parties, such as pension funds and insurers, regarding periods predating the transfer of undertaking would remain for the risk and expense of VBG and were excluded from the acquisition. Following the transfer, the pension fund, however, demanded full payment from GOM of the said sum. GOM countered this claim with two arguments. The first was that, in the case at hand, the requirement to pay pension contributions was based on statute (compulsory affiliation to an industry-level pension fund, no agreement between employer and employee being required) rather than on an agreement between employer and employee. Therefore, the employer's obligation to pay pension contributions did not constitute a right of the employees that transfers upon the transfer of an undertaking. GOM's second argument was that, even if there was a right that transferred, the pension fund was not entitled to autonomously collect the contributions predating the transfer, since the law on transfers of undertakings provides rights to employees and not to third parties such as pension funds.

First instance judgment

The court of first instance ruled that, according to the Dutch Pension Act, mandatory affiliation to an industry-level pension fund is to be treated in the same manner as a pension arrangement agreed directly between employer and employee. The fact that affiliation to an industry-level pension fund has been made compulsory by law rather than in an employment contract does not alter the conclusion that the rights deriving from the mandatory affiliation can be regarded as rights arising from the employment agreement. The rights and obligations under a compulsory industry-level pension scheme therefore transfer, including entitlements predating the transfer of the undertaking.

The court of first instance furthermore held that the law on transfers of undertakings aims to protect employees. Pension entitlements are amongst the rights to be protected. Non-payment of pension contributions adversely affects those rights. If all employees individually had to claim payment of the outstanding contributions, that would entail all employees having to combine their rights in order to claim. This cannot have been the legislator's intention. Moreover, as non-payment of contributions to the pension fund does not result in the employees losing their pension entitlements, the employees may not be very keen to start litigation against their new employer. This does not mean that they lack interest in payment of these contributions, as non-payment of contributions would eventually impact on their pension entitlements. Based on this reasoning, the court of first instance ruled that, given the aim of the law on transfers of undertakings, a reasonable interpretation of that law is that a pension fund has an independent right to collect payment of outstanding pension contributions predating the transfer of undertaking from the transferee.

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Court of Appeal's judgment

The Court of Appeal addressed three issues: (i) does a pension based on mandatory affiliation to an industry-level pension fund qualify as a "right or obligation arising from a contract of employment" within the meaning of the Dutch legislation transposing the Acquired Rights Directive? If so (ii) does the obligation incumbent on VBG to pay the pension contributions predating the transfer of the undertaking, transfer to GOM? If so (iii) does the pension fund have an independent right to claim payment of overdue pension premiums from GOM?

After extensively quoting the parliamentary history of the Pensions Act, the Court of Appeal drew the conclusion that pension is a right arising from a contract of employment, i.e. a term of employment, regardless whether it arises as a result of mandatory affiliation to an industry-level pension or from an individual contract. It therefore is a right that transfers. GOM's argument that pension contributions are on a par with income tax and social insurance contributions – which according to Dutch practice do not transfer - does not alter that conclusion. According to the Court of Appeal, income tax and social insurance contributions, unlike pension, cannot be regarded as terms of employment, but rather as obligations deriving from law.

The Court of Appeal also held that an obligation in respect of pension contributions that became due before the date of a transfer of an undertaking, goes across to the transferee. It based this finding on a provision of Dutch law under which, for a period of one year following the transfer, the transferor is liable *along with the transferee* for obligations relating to the employment agreement that arose before the transfer of the undertaking. In consequence, GOM is liable as well. The fact that non-payment of contributions to the pension fund does not result in the employees losing their pension entitlements, does not alter this conclusion.

With regard to the final issue, the Court of Appeal argued that, prior to the transfer, the pension fund was entitled to claim (overdue) pension contributions from VBG. Given that the obligation incumbent on VBG to pay these contributions transferred to GOM, the 'corresponding' right of the pension fund to collect those contributions also transferred. The Court of Appeal furthermore noted that, according to the pension fund's Articles of Association ('statutes'), both VBG and GOM were obliged to pay the contributions at issue. In consequence, based on the law on transfers of undertakings, the pension fund had the right to collect the (overdue) pension contributions from the transferee.

Commentary

In my commentary of the first instance judgment in this case, in EELC 2013/35, I argued why also in my view it appears logical that pension entitlements deriving from a mandatory industry-level pension fund should be considered rights as referred to in Article 3(1) of the Acquired Rights Directive. Unfortunately, the Court of Appeal made a slight mistake where it held that payment of social security contributions does not qualify as a right under the Acquired Rights Directive. The European Court of Justice recently ruled that these payments do qualify as such (ECJ 28 January 2015, C-688/13, *Gimnasio Deportivo San Andrés*).

It makes sense that the transferee is liable for overdue pension premiums. Long ago, in the *Abels* case (ECJ 7 February 1985, C-135/83), the ECJ ruled that obligations of the transferor resulting from a contract of employment and arising before the date of the transfer, transfer to the transferee. As in the judgment reported above, the ECJ based its decision (in part) on the fact that the Member States are entitled to provide that the transferor continues to be liable after the date of transfer, in addition to the transferee. This indicates that it is the transferee that is primarily liable for bearing the burdens resulting from employees' rights existing at the time of the transfer.

But can a third party - a pension fund – autonomously, that is to say, in its own right, claim payment of overdue pension premiums from the transferee that were to be paid by the transferor? Here, the ruling reported above is not persuasive. There is no national statute granting the pension fund the right to collect overdue payments from the transferee. The Acquired Rights Directive itself primarily focuses on, grants rights to and imposes obligations on the 'direct stakeholders': the transferor, transferee and employees concerned. Third parties tend to remain unaffected by a transfer of an undertaking. The transfer does not impose obligations on them. The mere fact that prior to the transfer there was an obligation upon the transferor to pay pension premium and a corresponding right for the pension fund to collect these premiums, whilst the pension rights transfer to the transferee, does not automatically mean the pension fund has a right to claim these old premiums due from the transferee. The same applies to the argument that both the transferee and transferor are bound by the same statutes vis-à-vis the pension fund. After all, the fact that before the transfer there are mutual rights and obligations between the transferor and the pension fund, whilst after the transfer of undertaking there are mutual rights and obligations between the pension fund and the transferee, does not logically require that the pension fund can treat the transferor and transferee as one and the same party.

Having said that, I understand that the result reached is practical from the pension fund's point of view. At the

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same time, however, it introduces a lot of uncertainty. There are of course many obligations incumbent on the transferor towards a third party arising from an employment contract, and corresponding rights of this third party towards the transferor. For example, the obligation to pay for study for the employee and the right of the institute providing this education to collect that money, or the obligation to pay the mobile phone bill of an employee, and the right of the phone company to collect. Are all these third parties entitled to claim the costs predating the transfer of undertaking directly from the transferee? Such questions remain unanswered.

Subject: transfer of undertakings, pension

Parties: *GOM Schoonhouden BV* – v – *Stichting Bedrijfstakpensioenfonds voor het Schoonmaak- en Glazenwassersbedrijf*

Court: *Gerechtshof Arnhem-Leeuwarden* (Court of Appeal Arnhem-Leeuwarden)

Date: 1 September 2015

Case number: ECLI:NL:GHARL:2015:6384

Publication: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2015:6384

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2016/5

Government order to suspend civil servants' pension payments discriminatory (HU)

CONTRIBUTOR Ildiko Ratkai*

Summary

The European Court of Human Rights (ECtHR) has recently ruled on a Hungarian law suspending payment of civil servants' pensions for the period during which they are employed in certain areas of the public sector. The ECtHR found this law to be discriminatory as it breaches Article 14 of the European Convention on Human Rights (ECHR) read in conjunction with Article 1, Protocol 1. Hungary, as the respondent State, is to pay pecuniary and non-pecuniary damages and procedural costs and expenses to the applicant, Mr Gyula Fábián. The judgment was delivered on 15 December 2015 and, if not appealed to the Grand Chamber, will cease to be appealable on 15 March 2016.

Facts

Mr Fábián, born in 1953, was employed by the Budapest municipality. He was hired in 2012 at age 59. At that time he was already in receipt of early retirement benefits accrued under the social security system.

At the end of 2012 the Hungarian Government introduced measures to reduce the number of people who have retired under the social security pension scheme but who are simultaneously employed in the public sector.

First, the government issued a normative action plan[1] with three objectives: (i) the existing employment contracts of civil servants who had reached their pension age[2] and had the necessary number of pensionable service years[3], were to be terminated; (ii) the vacancies thus created were to be blocked; and (iii) no employment, assignment or subcontract agreement was to be concluded with those described in point (i).

Secondly – in line with the said action plan – the Act on Pensions[4] was amended as of 1 January 2013. According to this new law, retirement benefits (old-age pensions) must be suspended while a civil servant is employed within certain categories of the public sector (e.g. teachers, doctors, judges or servants in municipalities). The new law provided a grace period of six months for those already employed in the public sector when the new law entered into force.

The objective of the new pension policy was threefold. First, it was necessary to reduce public debt. Given that out of a total population of just under ten million and a total of 4.2 million active employees, no fewer than 2.9 million individuals are in receipt of a social security pension[5], the measure was designed to generate substantial savings. The government calculated that it would save between 23 and 27 million Euro annually[6]. The second reason for the new pension policy was that it would reduce the number of retired employees on the government's payroll (e.g. teachers, doctors, judges or members of the armed forces). Thirdly, it would free up jobs for young people and thus help reduce unemployment amongst young people, which in Hungary is estimated to lie around at 15%[7].

The measure described above presented Mr Fábián with a difficult choice: either give up his job or accept that the retirement benefits he had accrued in a previous

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1. Government Decision 1700/2012. (XII. 29.) on pension politics principles in the civil sector, issued on 29 December 2012.
2. In Hungary the pension age is gradual for those who were born between 1952 and 1956 (62 years to 64 years). For those born in or after 1957, the pension age is 65 years.
3. At least 20 years of service.
4. Section 83/C of the Act LXXXI of 1997 on Social Security Pensions (applicable as of 1 January 2013).
5. In Hungary it was not uncommon for large groups of government employees, such as the military, to retire in their forties or fifties. Approximately 29% of all pensioners are under retirement age. Although, in order to become eligible for retirement benefits, it is necessary to lose one's job, nothing is to prevent an employee from taking up a new job after having become eligible for pension benefits and thus having two incomes.
6. The actual savings in 2013 and the first half of 2014 totalled 31 million euro.
7. The overall unemployment rate is around 6% in Hungary.

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job would not be paid out as long as he worked as a civil servant. Either way he stood to lose about half of his income.

Mr Fábián decided to retain his job. Accordingly, his pension disbursement was suspended as from 2 July 2013. He filed a complaint in relation to the suspension of his retirement benefits. Unsurprisingly, given that both the pension authorities (first and second instance) and the reviewing court had to apply the new law, which was clear, he lost his case in three instances. He then applied to the European Court of Human Rights (ECtHR).

Before continuing, it should be noted that, while Mr Fábián's case was ongoing, the Commissioner for Fundamental Rights lodged a complaint in relation to the new law with the Constitutional Court for constitutional review. This was based on Articles XII and XIII of the Fundamental Law (the Constitution of Hungary), which provides that everyone shall have the right to freely choose his or her work and that everyone shall have the right to own and inherit property. The complaint was also based on the requirement of proportionality, which is violated if significant changes are introduced into the pension system in short order. The Constitutional Court is expected to rule on the matter soon.

Judgment

Mr Fábián advanced two arguments as to why the new law violated the European Convention on Human Rights (the ECHR): it robbed him of property and it was discriminatory.

The first argument rested on Article 1 of the First Protocol to the ECHR. It provides that every person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. As Mr Fábián saw it, he had accrued certain pension rights during his previous job and these were being taken away from him retroactively, hence in breach of Article 1. He referenced ECtHR case law to the effect that any encroachment on property must be convincingly justified, a mere reference to the general interest without concrete facts or circumstances justifying the restriction being insufficient. Moreover, given that the number of people affected by the new law was no more than a fraction of the overall number of pensioners in Hungary, any savings made on the pension of such a small group could not substantially reduce the public debt.

Mr Fábián's second argument rested on Article 14 ECHR[8]: *"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*. Mr Fábián pointed out that the new law was discriminatory in several ways. First, it treated workers in the public sector and workers in the private sector unequally[9]. Second, the new law did not apply to everyone in the public sector, for example, ministers and mayors were exempted. Thus, there was unequal treatment between different groups of public servants.

The Hungarian government defended the new law by arguing that it did not place a disproportionately heavy burden on employees such as Mr Fábián, as they are free to retain their pension and seek alternative employment in the private sector. Strangely, the government did not put forward any argument for exempting certain categories of civil servant from the new law.

The Court held that being denied payment of pension on grounds of being simultaneously employed in the public sphere can be considered as *"other status"* within the meaning of Article 14. It went on to note that, according to its previous case law, a difference of treatment is discriminatory if it has no objective and reasonable justification. That is the case where the differential treatment does not have a legitimate aim or *"if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised"*. In this regard, the Court observed that the Hungarian government had failed to explain why not all public employees were subject to the new law (ministers and mayors, for instance, being exempted, despite being in an analogous position). Although reducing public expenditure has been accepted by the ECtHR as a legitimate interest, in this case, the Court could not see any justification for the difference in treatment.

Finally, the Court considered that while it is true that only public employees are susceptible to receiving double income from public sources, the government's core argument that no social security pension should be paid to those who are employed and therefore have no need of a substitute salary, should in fact hold equally true for those retirees who then take up employment in the private sphere. Seen from that angle, pensions paid out to retirees employed in the private sphere may also be regarded as redundant public expenditure.

The Court's conclusion was that Hungary has breached Article 14. In the light of this finding, it was not necessary to examine whether Hungary had also violated Article 1, Protocol 1.

8. More precisely: Article 1 of the First Protocol read in conjunction with Article 14.

9. A similar rule prohibiting being simultaneously employed and drawing a retirement pension also existed in the private sector, but only in respect of employees with a salary in excess of 12 times the statutory minimum wage. This was later raised to 18 times the minimum wage.

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Commentary

In recent years, Hungary has been criticised repeatedly for violating human rights. In 2011, the Constitutional Court annulled a law that allowed civil servants to be dismissed without reason[10,11], which was also confirmed in 2012 by the ECtHR, holding that that law violated Article 6 (1) ECHR, which entitles everyone to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law[12]. In the same year, 2012, the Constitutional Court annulled a law that allowed judges to be dismissed at age 62; the law had to be withdrawn and the judges who lost their positions were reinstated. Also in 2012, the ECJ held that law to be incompatible with Directive 2000/78[13].

The everyday effects of the Fábián – v – Hungary case are not yet known, as the mandatory suspension of pension payments to individuals employed as civil servants is still in force. The judgment of the ECtHR is not yet final and the Government is weighing up whether to file an appeal to the Grand Chamber. Further, the Constitutional Court has not yet made its decision on the new law.

Subject: discrimination, other grounds

Parties: *Gyula Fábián* – v – Hungary

Court: European Court of Human Rights

Date: 15 December 2015

Case number: 78117/13

Publication: http://hudoc.echr.coe.int/eng?i=001-159210

10. Decision of the Constitutional Court Nr. 29/2011 (IV. 7.) AB
11. See ECJ 10 October 2013 in joined cases C-488/12 to 491/12 and C-526/12 (ECJ lacks jurisdiction to answer questions on the interpretation of the Charter).
12. See ECtHR 19 November 2012 K.M.C. – v – Hungary.
13. See ECJ 6 November 2012 in case C-286/12 for failure to fulfil obligations; European Commission – v – Hungary.

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2016/6

An employee's salary may be above the equal treatment standards if there is a material reason (CZ)

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Summary

The employer may unilaterally stipulate or agree a salary with an employee that goes beyond the equal treatment standards, to the employee's benefit if there is a material reason. The reason must either represent a competitive advantage compared to other employees, or the unequal treatment must be a substantial requirement necessary for the particular work.

Facts

Article 110 of the Czech Labour Code, which transposes the EU rules on equal pay, provides that all employees with the same employer are entitled to the same salary for the same work or work of equal value. Thus, the prohibition of unequal treatment is not limited to specific grounds such as race, gender or age.

In the employment contract between the plaintiff (the employee) and the Cultural House in Liberec (the employer), which was the defendant in this case, the parties agreed the employee would work as a cook and be paid a salary of CZK 15,000. On the same day, the employer agreed another employment relationship with another employee for a cook, with a salary of CZK 17,000. The second employee then also signed an agreement about guiding students and was described as their instructor. The second employee was also older and had more experience of the job and had passed his final exams at school.

The plaintiff claimed unequal treatment in remuneration, arguing that both cooks were performing the same type of work and should have been entitled to the same salary. He wanted the employer to pay him additional salary of CZK 48,000 to cover almost two years of employment.

The court of first instance refused the action on the basis that there was no discrimination by the employer, since the two cooks were not performing the same work. This was because the second cook also had an agreement with the employer to guide students, as he had completed high school and had more experience of the job. The difference in salary was to reward him for guiding the students.

The plaintiff disagreed with the court's decision and appealed to the second instance court.

The appellate court acknowledged the decision of the first instance court, saying that the two cooks could not possibly be performing work of equal value, if one took into account the agreement on guiding the students that the more experienced cook had made. According to the appellate court, the difference in the cooks' salaries ensued from their different positions.

Again disagreeing with the court's opinion, the plaintiff filed an extraordinary appeal with the Supreme Court, arguing that the difference in the workload of the two cooks should have been accounted for in the employment contract. By making almost identical employment contracts, with the only difference being the amount of salary, the employer was in breach of his obligation to give the same amount to employees performing the same work.

Judgment

The Supreme Court upheld the judgment of the lower instance courts, justifying its decision as follows:

An employer may only pay one employee more than others for equal work if there is a reason, as provided in subsections 3-5 of Article 110 if the Labour Code:

> "*(3) The complexity, responsibility and difficulty of work shall be assessed according to the education and practical knowledge and skills required for the performance of this work, the complexity of the subject of the work and working activity, the organisational and management difficulty, the degree of liability for damage and responsibility for health and safety, the physical, sensory*

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and mental load and influence of adverse effects of the work.
(4) Working conditions shall be assessed according to the difficulty of work regimes based on the distribution of working hours, for example into shifts, non-working days, night work or overtime work, the harmfulness or difficulty caused by other adverse effects of the working environment and the risks associated with the working environment.
(5) The working performance shall be assessed according to the intensity and quality of the performed work, working abilities and working capacity, and the results of work shall be assessed according to quantity and quality."

At the same time, the reason must either represent a competitive advantage when compared to other employees, or the unequal treatment must be a substantial requirement necessary for the performance of the particular type of work.
The Supreme Court felt that simply having the same job title is not enough to cause an automatic breach of the principle of equal treatment.
All the courts considered the factual reasons for paying the second employee more: he was older and had more experience and had passed the final exams in the subject. He also turned out to be reliable and performed at a high level. All these factors combined to the effect that the second employee could legitimately be paid more than the plaintiff. It is notable that the courts also took into account the fact that the plaintiff had received a warning letter from the employer for wilfully leaving the workplace.

Commentary

Although not very surprising in the end, this decision is important for Czech labour law mainly for its subject matter. Until this decision, there was no Czech case law in the field of equal pay. In this case, the Supreme Court gave a valuable example of possible derogation from the equal treatment principle where there is a material reason on the employer's side.

According to the decision, the position of each employee at the employer must be regarded, both in relation to other employees and with respect to the individual qualities of each employee, such as education, previous practice, experience and reliability.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The Czech courts in this case concluded that although both cooks held the same job title of 'cook', their work was not of equal value and they therefore could not be compared to one another. This reminds me of the *Brunnhofer* case (C-381/99), in which the ECJ held that:

> "*as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay*".

The claimant in *Brunnhofer* was a female employee in a bank who held the same position as a male comparator but worked under different conditions (i.e. more frequent overtime, larger clients and more authority to represent the employer) and performed better than the claimant. In this regard, the facts in *Brunnhofer* are reminiscent of those in this Czech case, despite the fact that *Brunnhofer* was about sex discrimination, which this case is not.

There is another aspect to the case reported above that brings to mind what the ECJ had to say in *Brunnhofer*:

> "*in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague*".

The Czech Supreme Court "took into account the fact that the plaintiff had already received a warning letter from the employer for wilfully leaving the workplace". This warning must have been given **after** the two cooks had been hired and after the employer had decided to pay them different salaries. How then could the warning justify paying the plaintiff less than the comparator?

Dutch statute only prohibits unequal treatment on certain prohibited grounds, such as race, sex, age and disability. It does not prohibit 'general' unequal treatment as such. However, the courts have applied the 'good employer' provision in the Civil Code to develop a doctrine that employees who perform the same work should be rewarded similarly, even where there is no discrimination based on any of the protected characteristics. The snag is that judicial review in such cases is limited. Only where the differential treatment is manifestly unfair will the courts intervene. The result is that the protection against unequal treatment in general is weak-

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er than the protection against unequal treatment on the grounds of a protected characteristic.

Subject: discrimination, remuneration

Parties: *J. H. (employee) – v – Dům kultury Liberec, s.r.o.*

Court: *Nejvyssi soud* (Supreme Court)

Date: 6 August 2015

Case number: 21 Cdo 3976/2013

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2016/7

The prohibition against gender-based discrimination applies to self-employed contractors (HU)

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Summary

In accordance with EU law, the prohibition against gender-based discrimination (in this case: dismissal relating to pregnancy) cannot be limited to employment relationships as defined in national law: it must also apply to other types of legal relationship, where one party provides services to another party for consideration, for an open-ended period of time under the supervision of a principal.

Facts

The defendant in this case was an international law firm. It engaged the claimant, a lawyer. It did so based on an agreement which was not an employment agreement, but under which the claimant agreed to perform services for the defendant in consideration of a monthly service fee. In 2004 the claimant became a partner at the defendant firm. She became entitled to a certain share of the profit in addition to her monthly fee. The parties' agreement provided that it could be terminated at six months' notice as at the end of any calendar half-year.

In 2006, the claimant announced that she was pregnant. Due to the pregnancy, she did not provide any services from the second quarter of 2006. In 2008 the defendant asked the claimant to provide office management services, but the claimant had to refuse this due to the birth of her second child.

In 2009 the claimant informed the defendant that she was ready to return and provide services again after her absence. On or about 2 December 2009 the defendant verbally informed the claimant that it did not intend to continue the arrangement with the claimant.

The claimant brought an action, claiming her service fee for the duration of the notice period (€ 73,500) and her share in the profit for the year 2006 (€ 22,458).

The defendant argued that the parties had terminated their service relationship with mutual consent in 2006, when the claimant informed the defendant that she was discontinuing her services due to pregnancy. Consequently, in the defendant's view, there no longer was any contractual relationship.

Judgments

The first instance court rejected the claim, stating that, since the claimant had not provided any services to the defendant since mid-2006, she could prove neither the legal ground for, nor the amount of her claim. The claimant filed an appeal.

The second instance court accepted the claim and ordered the defendant to pay the total amount claimed, being € 95,958 with interest for late payment. The court stated that the service relationship between the parties had not terminated based on a mutually agreed separation, but as a result of the defendant's termination notice communicated on 2 December 2009. Therefore, given the contractual notice period of six months, the contract terminated on 30 June 2010. Even though the defendant did not request services to be performed during the notice period, this did not affect the obligation to pay the service fee, seeing that the claimant had offered to perform her contractual services and that the non-performance of those services was a result of the defendant's failure to make use of that offer. Therefore, the court found that the claimant was entitled to the contractual service fee for six months and to profit sharing based on the results in her last active year.

The defendant submitted a claim for extraordinary review to the Hungarian Supreme Court (Curia), in which it requested the court overturn the judgment of the second instance court and reject the claim. One of the defendant's arguments was that the service agreement had terminated in 2006, since the claimant had not provided any services to the defendant since that time.

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The parties had not agreed on suspension of their service agreement, hence they must be deemed to have agreed that the relationship terminated with mutual consent, even if this was not agreed in writing.

Alternatively, the claimant argued that, if the court were to find that the defendant's verbal statement made on 2 December 2009 was a notice to terminate the agreement, that statement must be considered to have constituted termination with immediate effect. In that case, since the defendant did not ask the claimant to provide any services during the notice period, the claimant was not entitled to any service fee, and she was also not entitled to any profit sharing.

The Curia rejected the extraordinary review. It reasoned as follows.

The service agreement was not terminated in 2006, since the parties did not make any statement to that effect. Additionally, the fact that in 2008 the defendant asked the claimant to provide office management services indicated that even the defendant considered that the service relationship between the parties still existed. The Curia found that the service relationship had been terminated by the defendant's termination notice served on 2 December 2009. The service contract is clear about the termination conditions which must apply. The fact that the claimant did not provide any services during the notice period has no relevance regarding her entitlement to the service fee and therefore the claimant is entitled to the service fee for the notice period.

The Curia went on to observe that, since the service relationship was only terminated after the end of the claimant's absence due to childbirth the defendant's practice regarding pregnant partners and partners who are absent due to childbirth is also relevant. As highlighted by ECJ case law, the prohibition of discrimination and the rules on protection of pregnant women must apply during the whole term of the pregnancy and maternity leave. Dismissal due to pregnancy or another pregnancy-related reason can only affect women; therefore, it always means a direct gender-based discrimination (*Paquay, C-460/06*). The court argued that under EU law, the term 'worker' is wider than the definition of 'employee' in the national laws: the essential point is that the person provides services during a given time for and under the direction of another person in return for remuneration (except for minor, supplementary activities) (*Lawrie-Blum, case 66/85; Collins, C-138/02*). This applied in the present case.

Continuing, the Curia observed that the ECJ applies the requirement of equal treatment not only in employment relationships but also in legal relationships similar to legal relationships such as in the given court case. Based on the practice of the ECJ, direct or indirect gender-based discrimination (including dismissal) is prohibited in both the public and private sectors (*Danosa, C-232/09*). The ECJ provides the same protection to employees and self-employed persons (i.e. Maternity Directive 92/85; Equal Treatment Directive 76/207; Directive on Equal Treatment of Self-Employed Workers 86/613). The dismissal of an employee on account of pregnancy, or related to pregnancy, can affect only women and therefore constitutes direct gender discrimination. Regarding the rights of pregnant women and women who have given birth, the purpose of EU law governing equality between men and women is to protect those women before and after they give birth. This purpose could not be achieved if the protection against dismissal granted to pregnant women under EU law were to depend on the formal categorisation of their employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another. (*Danosa*).

Based on the above, the Curia found that the claimant was entitled to the service fee and profit sharing based on her results in her last active year.

Commentary

In practice, contracting parties often decide to conclude a service relationship instead of an employment relationship in order to have more flexibility. This court decision is significant since it highlights that such fundamental principles as the prohibition of gender-based discrimination and equal treatment apply, not only to employment relationships, but also to similar contractual relationships. Therefore, parties cannot 'contract out' these principles by choosing another form of legal relationship.

It is, however, not clear why the Curia needed to refer to gender-based discrimination, since the claimant did not claim damages and did not argue that the decision to terminate her contract was discriminatory. She merely requested payment of her service fee for the notice period and profit sharing for the first part of 2006. The notice period was regulated in the contract between the parties and the profit sharing depended on the defendant's results in the year 2006. The claimant did not claim dismissal protection in the given case.

It is questionable how the court would have decided if the claimant had claimed compensation for damages caused by the defendant's breach of the prohibition of gender-based discrimination by terminating the service relationship. Article 2(2)(c) of Equal Opportunities Directive 2006/54 states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Maternity Directive 92/85. The defendant, however, did not provide any reasoning for the termination, nor did it need to. Therefore, it is not clear what the reason for the termination was. In addition, at the time of communicating the termination notice, the claimant was neither pregnant nor on maternity leave; she was simply

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informing the defendant that she was back from her leave and ready to provide services again. In our view, without at least arguing that the reason for the termination was the claimant's previous pregnancy and/or maternity leave, it is unlikely that gender-based discrimination could be argued.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is likely that a German court would have come to the same conclusion, but with a different reasoning. As both the Hungarian and Dutch commentaries point out, the claim was not based on discrimination but on non-payment of (1) fee during the notice period and (2) bonus for the last active year. The bonus was something the claimant had already worked for. Within the statute of limitation she was within her rights to claim the bonus from her partners/the other contracting party, a claim resulting directly from the contract. The payment of the notice period was also directly based on the contract. The parties had agreed on this rather longer notice period in the contract. The contracting party was well in their contractual rights to terminate the relationship under observance of the notice period. Any other form of termination would probably present a breach of contract with the effect that the contracting party was bound by the contract until the first possible termination date under observance of the notice period. Hence, a German Court would have based its reasoning on the contractual provisions and not on discrimination. Nevertheless, had there been an unequal treatment of the lawyer because of her pregnancy, the majority of legal opinion tends towards applying the Equal Treatment Act also to corporate relationships, not only employees. Following the ECJ's *Danosa* decision, self-employment within a partnership or corporate relationship between shareholders falls within the scope of the protection against discrimination as well.

Although it might seem that the termination was based on the pregnancy, it seems to me that the problem did not arise with the pregnancy itself but only when the plaintiff decided to come back to the firm. The plaintiff, from what I derive from the case report, did not claim damages for discrimination. This raises the question of whether this case really was based on a pregnancy-related issue or whether the Hungarian Court had a more political agenda, as the author implies.

The Netherlands (Peter Vas Nunes): It is indeed surprising, as the author of this case report notes, that the Hungarian Supreme Court found reason to introduce the equal treatment doctrine into a dispute in which the claim was not based on discrimination. Perhaps it did this to send a message to employers in Hungary where, according to the author, parties *"often choose to conclude a service relationship instead of an employment relationship to have more flexibility"*.

It is also surprising to see how the court underpins its findings on equal treatment. It does so by referring to three EU directives:

- Maternity Directive 92/85 ;
- the 1976 Gender Equal Treatment Directive 76/207 (now part of Recast Directive 2006/54)
- the Self-Employed Gender Equal Treatment Directive 86/613.

and to four ECJ judgments:
- *Lawrie-Blum (1986);*
- *Collins (2004);*
- *Paquay (2007);*
- *Danosa (2010).*

Lawrie-Blum and *Collins* had nothing to do with sex discrimination. The issues were whether a teacher (*Lawrie-Blum*) and an unemployed job-seeker (*Collins*) are 'workers' within the meaning of the free movement provisions of the EC Treaty. Directive 92/85, which was the subject of *Paquay* and *Danosa*, applies to employees, not to self-employed workers such as (ostensibly) the claimant in the case reported above. The same applies to Directive 76/207 (and its successor 2006/54). Directive 86/613 does apply to self-employed workers, but as I read it, it does not cover dismissal. Article 4 provides: *"As regards self-employed persons, Member States shall take the measures necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC […]"* The latter directive defines the principle of equal treatment as *"equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions […]"* In brief, the Hungarian Supreme Court seems to have had difficulty, understandably, in identifying EU legislation or case law that prohibits the termination of a self-employed worker's contract. The court seems to have struggled, creatively and commendably, to find reasoning on which to base the message that such terminations should not be sex-discriminatory.

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Subject: sex discrimination

Parties: not known

Court: *Kuria* (Hungarian Supreme Court)

Date: not known

Case number: Pfv.V.21.851/2014. or EBH2015.P.7.

Publication: www.kuria.hu → Föodal → Joggyakorlat egységesítő tevékenység → Elvi bírósági határozatok → in the search box: évszám: '2015' szakág: 'Polgári' then click: Alkalmaz → Select the decision: 7/2015. számú polgári elvi határozat

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2016/8

A limited company that was a member of an LLP was allowed to bring a claim alleging direct discrimination by the LLP (UK)

CONTRIBUTOR Florence Chan*

Summary

Mr Abrams was a member of a limited liability partnership (LLP) and was due to retire. For tax reasons, shortly before retirement Mr Abrams decided to set up a limited company to take his place as a member of the LLP. This was accepted by the LLP. Mr Abrams's employment by the LLP was stopped and he no longer had a continuing contractual relationship with it. The limited company, as a member of the LLP, was entitled to receive the profit share that Mr Abrams would have received had he continued as a member. It was also agreed that this limited company would supply the services of an appropriate fee-earner to the LLP (which was, in practice, Mr Abrams).

When Mr Abrams reached retirement age, the LLP tried to terminate his services on the basis that he had reached retirement age and the LLP objected to Mr Abrams's limited company continuing to be a member of the LLP.

Mr Abrams and his company brought a claim of age discrimination against the LLP at the Employment Tribunal (ET) and the ET had to decide if a limited company could bring such a claim, which was effectively that it had suffered detrimental treatment because of a protected characteristic of someone with whom it was associated. The ET decided it could and the respondent appealed to the Employment Appeal Tribunal (EAT).

Background law

By section 4 of the Limited Liability Partnership Act 2000, a corporate body may be a member of an LLP. Section 45(2) of the Equality Act 2010, specifies as follows:

> *"(2) An LLP (A) must not discriminate against a member (B) – (a) as to the terms on which B is a member; … (c) by expelling B; (d) by subjecting B to any other detriment."*

Schedule 1 of the Interpretation Act 1978 was raised in the arguments as it states that *"A person"*, includes *"a body of persons corporate or unincorporate."*

Facts

Mr Garry Abrams was a member of and fee earner for EAD Solicitors LLP (EAD), a limited liability partnership. On 30 November 2011, Mr Abrams decided to step down as a member and made an arrangement with EAD to accept Garry Abrams Limited (GAL), which he had created shortly before stepping down, to become a member in his place.

GAL is a limited company that was established by Mr Abrams on the advice of his accountants. It allowed him to manage the payment of dividends from the limited company in the most tax effective way and enabled him to set up the gradual payment of retained sums over a long period of time, even after he was to retire.

GAL was admitted as a member of EAD on the basis that it would provide a solicitor to participate in management decisions and to generate fee income. Whilst it was envisaged by all parties to the agreement that Mr Abrams would continue to be the solicitor provided, this was not contractually stipulated. GAL could supply any suitably qualified and experienced solicitor to fulfil this role.

During 2013 EAD made it known to Mr Abrams that it expected him to cease working at the end of the financial year in which he turned 62, that being 2014. At the end of the 2014 LLP Year, EAD stopped paying GAL its profit share[1].

Subsequently, Mr Abrams on behalf of GAL, brought a claim before the ET seeking payment of its profit share alleging that all 'members' are entitled to a share of the

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1. It is not known whether GAL continued to provide EAD with Abrams' services (or offered to do so).

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profits and denying GAL its profit share because Mr Abrams had reached the age of 62 was unlawful direct discrimination. EAD denied GAL's claims and sought a preliminary hearing to have the claim struck out on the basis that a company cannot bring a claim for discrimination.

ET decision

The ET held that the limited company was entitled to bring a claim that it had been subjected to discrimination.
EAD appealed the ET decision.

EAT decision

On appeal, the main submission by EAD was that discrimination must be an act against a natural person (because only a natural person could have protected characteristics, such as age, race or gender). As a company cannot have the characteristics protected under the Equality Act 2010, it was not possible to discriminate against it.
Mr Justice Langstaff considered the cases of *Showboat – v – Owens* [1984] ICR 65, *Weathersfield – v – Sargent* [1995] ICR 425 and *EBR Attridge Law LLP – v – Coleman* [2010] ICR 242. These were all cases where claimants had succeeded despite not personally having the relevant protected characteristic but rather because they were associated with someone else who had them.
Mr Justice Langstaff also rejected the appellant's submissions that because section 27(4) of the Equality Act 2010, which relates to victimisation, specifically excluded victimisation claims from persons who are not individuals, that must apply to other types of discrimination (such as direct and indirect discrimination) as well. He considered that section 27(4) conferred a specific exclusion which would not have been necessary if the draughtsman had not thought that the meaning of "person" was capable of including a company throughout the rest of the Equality Act 2010.
In conclusion, Mr Justice Langstaff listed five specific examples where companies could be discriminated against and where if those parties discriminating could not be liable, it would be "*plainly contrary to public policy*". These examples were:

1. A company being shunned commercially because it is seen to employ a Jewish or ethnic workforce;
2. A company that loses a contract or suffers detriment because of pursuing an avowedly Roman Catholic ethic;
3. One that suffered treatment because of its financial support for the Conservative Party, or say for Islamic education;
4. A company not favoured because it offered employment opportunities to those who had specific disabilities;
5. A company that suffered detriment because of an openly gay chief executive.

Therefore, it was held that there is nothing in the wording of the Equality Act 2010 to prevent a corporation bringing a discrimination claim and the appeal by EAD was disallowed.

Commentary

Prior to this decision it was accepted that the Equality Act 2010 should only apply to natural persons, however companies and other legal persons can now pursue claims for discrimination in circumstances where they suffer detriment because of a protected characteristic.
The Equality Act 2010 makes it unlawful to discriminate in the supply of goods and services. The decision in this case could mean that it would, for example, be unlawful to refuse to purchase from or supply goods and services to a company because of a protected characteristic. The protected characteristics covered by the Equality Act are extremely wide ranging and include age, disability, sex, race, religion or belief and sexual orientation. Therefore, this case law development may have potentially far-reaching applications within the commercial context.
Employers should therefore take care not to discriminate because of a protected characteristic when selecting or determining arrangements with their contractors.
Businesses who supply goods or services, or dispose of property will need to take measures to guard against discrimination in doing so. They will need to ensure that decisions taken in relation to other companies with which they do business (such as service providers, customers and/or potential customers) are based on legitimate commercial reasons, and not influenced by the protected characteristic(s) of someone with whom a company is associated.
This decision also raises further issues around whether a company's right to protection against discrimination would extend to indirect discrimination and how any award of injury to feelings could or would be made to a company.

Subject: associative age discrimination

Parties: EAD Solicitors LLP – v – Abrams

Court: Employment Appeal Tribunal

Date: 5 June 2015

Case number: UKEAT/0054/15/DM

Publication: http://www.bailii.org/uk/cases/UKEAT/2015/0054_15_0506.html

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2016/9

Employee lawfully dismissed for poor behaviour during investigation of her harassment claim (CY)

CONTRIBUTOR Panayiota Papakyriacou*

Summary

An employee's behaviour during the investigation of a sexual harassment complaint that she had made against her manager was a crucial factor in the Court's decision to dismiss her application for damages for unlawful termination and discrimination.

Facts

The applicant was employed by the Union of Technical Personnel of the Electricity Authority since 1 November 2000. On 19 June 2008 she submitted a sexual harassment complaint against her manager (the respondent) to the employer's executive committee. The applicant's manager was also a member of the executive committee, but was excluded from the examination of the complaint made against him.

After considering the complaint, the executive committee asked the applicant to provide evidence in writing to support the allegations, but she refused, stating that she was not required to produce evidence in writing. A repeated request to provide evidence was also met with a refusal. Despite the executive committee's assurances that the matter would be examined confidentially and objectively, in accordance with the employer's code of conduct in place at the time, the applicant was unconvinced by the executive committee's intentions and said she would only provide evidence in the presence of three persons of her choice. The reason for her request to be accompanied by three people was to ensure that no bribery took place. The executive committee refused to accept this condition, which it said was not acceptable and the behaviour and attitude shown by the applicant towards the examination of her complaint was unjustified and/or unreasonable.[1] The applicant's behaviour was so abusive and she behaved so disrespectfully towards the committee that the executive committee considered it impossible to investigate the complaint in her presence. As a result, the applicant was suspended for six weeks, during which time the complaint was investigated.

The executive committee informed the respondent of the sexual harassment complaint filed against him and asked for his position regarding the allegations to be submitted in writing. The respondent submitted his reply on 2 July 2008. He denied the allegations, supporting the denial with evidence obtained by third parties. The executive committee forwarded the respondent's reply to the applicant with a letter dated 10 July 2008, again requesting her to provide evidence in support of her complaint. The committee repeated its request in a letter dated 22 July 2008. However, the applicant ignored the executive committee's requests.

As a result, on 22 July 2008 the executive committee examined the complaint without the applicant's evidence and dismissed it on the grounds that it was false, unfounded and unsubstantiated. The applicant was called to appear before the executive committee on 31 July 2008 to apologise for the false complaint, but she refused. It was decided to fire the employee without notice, i.e. with effect from 31 July 2008, for:

- denouncing an executive member of her employer without any supporting evidence;
- refusing or ignoring requests to provide evidence in support of her complaint; and
- behaving in an abusive and unacceptable manner when asked to provide supporting evidence.

The applicant brought proceedings before the Court of Industrial Disputes, claiming damages on the basis of sex discrimination within the meaning of Law 205(I)/2002 on the equal treatment of men and women in employment, which transposes Directives 76/207 and 97/80.

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1. In fact, the employer had no sexual harassment code in place. It had made up its own rules of procedure.

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Judgment

In reaching its decision, the Court of Industrial Disputes examined whether:

– the applicant's termination was due to the sexual harassment complaint that she had submitted or due to her abusive behaviour in refusing to appear before the executive committee and provide further supporting evidence; and
– the applicant had been discriminated against under Law 205(I)/2002.

Unlawful termination

In considering the lawfulness of the termination, the court referred to the principle of mutual trust and confidence which underpins an employment relationship. The court specifically highlighted the employee's duty to behave in a way that facilitates mutual cooperation with the employer, which is achieved by displaying good faith and proper manners and showing respect to company executives.

Further, the court applied the reasonable employer test based on the circumstances. With reference to case law, the court confirmed that abusive behaviour on the part of an employee can justify the termination of employment without notice. On this ground, the court was satisfied that the applicant's refusal to provide supporting documentation amounted to abusive behaviour and breached the duty of mutual trust and confidence required for the employment relationship to continue. Hence, the harassment complaint was not the cause of the termination.

On this reasoning, the termination of the applicant's employment was found to be lawful and the applicant was not entitled to damages for unlawful dismissal.

Discrimination

In deciding whether the applicant had been a victim of sexual harassment that amounted to discrimination, the court referred to European Court of Justice case law, which confirms that sexual harassment constitutes:

– unwanted behaviour of a sexual nature with the purpose or effect of offending a person's dignity; and
– the creation of an intimidating, hostile, humiliating, degrading or offensive environment during employment, vocational training or efforts to access employment or enrol in training.

These elements must coexist for sexual harassment to be proven.

According to the evidence before the court, the applicant had accepted the respondent's behaviour for several years and did not file the harassment complaint until after something personal happened in her relationship with the respondent. On this ground, no incidence of sexual harassment or discrimination against the applicant had been proven and the application was dismissed.

Commentary

Sexual harassment claims are rare in Cyprus. Although the allegedly harassed lady in this case was dismissed and subsequently lost her case, this judgment is a welcome precedent for victims of sexual harassment, because they now know that the courts in Cyprus apply the EU definition, currently in Article 2(1) of Directive 2006/54: *"where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment"*. This judgment should warn employers that they need to have a sexual harassment code in place.

The decision to dismiss the applicant was based on three reasons, briefly:

1. denouncing her manager without evidence;
2. refusing to provide evidence;
3. behaving abusively.

If I had had to advise the employer in this case, I would have thought twice before mentioning the first reason as a ground for dismissal. Admittedly, Directive 2006/54 on Equal Treatment of men and women in employment does not include an explicit prohibition against 'victimization', such as in Article 9 of the Race Directive 2000/43 and Article 11 of Framework Directive 2000/78. The latter provision states, *"Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment"*. However, I would say that any form of victimization is unlawful. Of course, one can wonder how far this goes. In this case it would appear that an employee had intentionally accused her manager falsely. Should such behaviour be protected under the guise of victimization? A negative answer is risky. Surely an employee should feel free to lodge a harassment complaint without fear of being unable to substantiate the complaint with solid evidence and then losing her or his job. The court in this case did not rule explicitly on the subject of victimization.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Although the prohibition against (sexual and other forms of) harassment at work, including a prohibition against victimization, are included in the Dutch anti-discrimination laws, harassment is generally dealt with in the context of the rules on occupational health and safety. Those rules require employers to (i) have and publish a harassment policy; (ii) provide training aimed at preventing harassment; (iii) have a sufficient number of adequately

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trained harassment counsellors; and (iv) have a complaints procedure that includes effective sanctions.

Subject: sexual harassment

Parties: *Vasso Papagregoriou* – v – Union for Technical Personnel of the Electricity Authority and *Iakovos Charalambous*

Court: Court of Industrial Disputes

Date: 29 January 2015

Case number: 273/2009

Publication: none (Cypriot judgments other than those of the Supreme Court are not published)

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2016/10

Associative victimisation claim allowed to proceed (UK)

CONTRIBUTOR Anna Bond*

Summary

The Employment Appeal Tribunal ('EAT') has allowed a claim of 'associative victimisation' to proceed, reversing an Employment Tribunal ('ET') judge's decision to strike it out. Victimisation occurs where someone is subjected to a detriment because of a 'protected act' (such as alleging discrimination). In this case, the claimant claimed he had been subjected to a detriment because someone else associated with him had alleged discrimination. The second ET judge to hear the case held that there was not a close enough connection between the claimant and those who made the allegation of discrimination, and struck out the claim. The EAT held that the judge was wrong to find that Mr Thompson was required to show some particular relationship to the person whose protected act was relied upon, and in fact the association could be entirely in the mind of the employer. Association will be a question of fact in each case.

This was the first case in the UK to find that it is possible to bring a claim of victimisation by association, and could represent a significant development in UK discrimination law.

Background

The EU Racial Discrimination Directive 2000/43/EC has been implemented in the UK by the Equality Act 2010. Section 39(4)(d) of the Equality Act makes it unlawful for an employer to victimise an employee by subjecting them to any detriment. Section 27(1) sets out that a person (A) victimises another person (B) by subjecting them to a detriment because B has done or A believes B has done or may do a 'protected act'. 'Protected act' is defined in section 27(2) and includes bringing proceedings under the Equality Act, giving evidence or information in connection with such proceedings, doing any other thing for the purposes of or in connection with the Equality Act and making an allegation that another person has contravened the Equality Act. Under the Equality Act, therefore, the individual claiming victimisation has to do (or be believed to have done) the protected act.

The 2008 CJEU case of *Coleman – v – Attridge Law*, a reference from the UK ET, held that a person could be directly discriminated against on the grounds of disability because of their association with a disabled person, i.e. the claimant need not hold the relevant protected characteristic. Coleman, who was not disabled, brought a successful claim that she had been discriminated against on the basis of her son's disability when her flexible working request was rejected. Discrimination against an individual due to their association with a person who holds a protected characteristic is commonly referred to as 'associative discrimination'. Following this case, the EAT gave effect to the ECJ decision by reading words into the Disability Discrimination Act 1995 (a precursor of the Equality Act) to prohibit direct discrimination by association. Wording prohibiting associative discrimination was subsequently included in the Equality Act in connection with direct discrimination and harassment but not in connection with victimisation.

Rule 37(1)(a) of the Employment Tribunal Regulations 2013 states that a claim may be struck out on the grounds that it has *"no reasonable prospect of success"*.

Facts

Mr Thompson was employed as a bus driver by London Central Bus Company Ltd ('LCBC'). He was dismissed following an incident in which he gave away his high-visibility jacket without authorisation. He successfully appealed against this decision to dismiss him and returned to work. Whilst his appeal was on-going, he had issued an ET claim against LCBC, including a claim of associative victimisation, which he continued after his reinstatement. It was based on the following facts.

Mr Thompson had overheard a conversation between other employees of LCBC, in which they claimed that LCBC had boasted about exiting employees who opposed racism. Mr Thompson belonged to the same

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trade union as these other employees, a small union which is not recognised by LCBC. Mr Thompson had then shared the details of what he had heard with his manager. It was his contention that LCBC had dismissed him (to his detriment) as a result of the protected act (stating that LCBC had breached the Equality Act 2010 by dismissing employees who opposed racism) of the other employees. He claimed that he was associated with the other employees, at least in the mind of his employer, due to their shared trade union membership. In effect, Mr Thompson reasoned: I was dismissed because I am a member of the same trade union as people who made a protected disclosure.

In a Preliminary Hearing on 8 April 2014, the ET judge held that a claim of associative victimisation could in theory be brought, even though it was not permitted on the face of section 27(1) of the Equality Act. The ET held that victimisation by association was not permitted under the Race Directive and that in order to comply with the EU position on associative discrimination, section 27(1)(a) must be read as making unlawful any detriment applied "because of a protected act", rather than because the claimant did a protected act. This was not challenged by LCBC.

At a second ET Preliminary Hearing on 17 June 2014, however, a second judge struck out the claim on the basis that the link between Mr Thompson and the other employees was "tenuous" and could not "give rise to the form of association necessary" for a successful claim of associative victimisation, even if such a claim could theoretically be brought. The judge therefore felt the claim had "no reasonable prospect of success". Mr Thompson appealed this decision.

EAT Judgment

The EAT agreed with Mr Thompson that the claim should not have been struck out. It reiterated that a case can only be struck out in the most exceptional circumstances and that the ET was wrong to conduct "an impromptu trial of the facts".

The EAT held that the second ET judge appeared to have had the wrong test in mind when he considered the 'form of association' between Mr Thompson and the other employees whose conversation he had overheard. He emphasised that it is not the tribunal's role to decide whether something is in principle likely to constitute association; this should in each case be decided on the facts. It was conceivable that LCBC may have been moved to treat Mr Thompson differently due to his association with the Trade Union, and as such the judge's decision that this link was necessarily too tenuous constituted an error of law. The appeal was therefore allowed.

The case has subsequently been remitted for hearing at the ET.

Commentary

This case is significant for two reasons. It is the first case in which the concept of associative victimisation has been tried at a tribunal. Until 2015, the only successful claims of associative discrimination were direct discrimination and harassment claims. The pivotal case in the area of associative discrimination, *Coleman*, first held that the Directive against discrimination *"applies not to a particular category of person but by reference to [discriminatory grounds]"*, i.e. not only to those who themselves hold the protected characteristic. While *Coleman* concerned a case of direct associative discrimination on grounds of disability, the judgment has since been held to apply to all protected characteristics, and the Equality Act accordingly provides for this by making any direct discrimination 'because of' a protected characteristic unlawful rather than requiring a claimant to hold that protected characteristic.

However, the wording relating to victimisation is not as wide. The decision in this case to interpret the wording of the Equality Act widely to reflect the intention of the Directive is a new development. It comes in the same year as the ECJ decision of *Chez Razpredelenie Bulgaria (C-83/14)*, which held that indirect discrimination can be by association. The judgment in *Chez* concerned a shopkeeper in a district of a Romanian town that was inhabited largely by people of Roma origin. The local electricity company had treated the inhabitants of this district less favourably than those of other districts by fixing their electricity meters at a greater height – allegedly to avoid tampering, although there was no evidence of more meter tampering in that district. This constituted indirect discrimination on the basis of ethnic origin. The shopkeeper could not read her meter, however, the shopkeeper herself was not of Roma origin, so the issue was whether she could claim to have suffered indirect discrimination. The ECJ replied affirmatively. Being an inhabitant of the district in question, she was discriminated against indirectly *because of* ethnic origin, albeit not her own ethnic origin. This was an example of indirect associative discrimination and marks a shift towards a broader interpretation of associative discrimination.

The second point of interest is the ET judge's error in looking at whether there had been "the form of association necessary" between Mr Thompson and the employees he overheard to found a complaint of associative victimisation. When *Coleman* returned to the EAT following the ECJ judgment, the EAT's judgment explicitly stated that while the word 'associative' makes a useful shorthand, association is not at the heart of the matter. Instead, what matters is that the adverse treatment has been suffered *because of* a prescribed ground. The judgment even states that tribunals should not *"become bogged down in…what does or does not amount to an 'association'"*. The strength of the association between Mr Thompson and the other employees, then, is immaterial provided that Mr Thompson suffered a detriment because of the protected acts of others.

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Indeed, the EAT's judgment even stated that the association could be entirely in the mind of the employer.
It is worth noting that Mr Thompson's association with the individuals who made the protected disclosure does appear to be particularly weak; Mr Thompson simply belonged to the same trade union as the individuals in question and overheard their conversation. As the first ET judge stated, *"there is a rather loose association which might render the causal connection hard to establish… the Claimant will have an uphill struggle"*. Even in such a case, the EAT held that to strike the claim out on the basis of a weak association was the incorrect decision. Practitioners should therefore be aware that, even where association of any kind seems unlikely, this may not be sufficient to conclude a matter before all the facts have been established at a full tribunal hearing. The EAT reiterated that a claim can only be struck out in the most exceptional circumstances so perhaps, given the breadth of interpretation applied to associative discrimination, such a case is unlikely to fall into this category.

Subject: associative victimisation

Parties: Mr G Thompson v London Central Bus Company Ltd

Court: Employment Appeal Tribunal

Date: 20 July 2015

Case number: UKEAT/0108/15/DM

Publication: http://www.bailii.org/uk/cases/UKEAT/2015/0108_15_2007.html

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2016/11

Less favourable treatment over a series of fixed term contracts is sufficiently linked to amount to a 'series of similar acts' despite no continuity of employment (UK)

CONTRIBUTOR Helen Coombes*

Summary

The Employment Appeal Tribunal ('EAT') held that a university lecturer's complaints of less favourable treatment over a series of fixed term contracts were sufficiently linked to amount to 'a series of similar acts' and therefore could fall within the time limit of three months for bringing a claim in the Employment Tribunal.

Background

Under Regulation 3 of the Fixed-term Employees Regulations 2002 and Regulation 5 of the Part-time Workers Regulations 2000 (which implement the Fixed-term Workers Directive (99/70/EC) and the Part-time Workers Directive (97/81/EC)), eligible employees and workers are protected from less favourable treatment. The appropriate comparator is a full-time worker or a permanent employee performing the same or similar work.

Under Regulation 7(2)(a) of the Fixed-Term Employees Regulations (and an identical provision in the Part-Time Workers Regulations), claims for less favourable treatment must be brought within three months of the date on which the alleged detriment occurred. However, where the less favourable treatment occurs as '*part of a series of similar acts or failures comprising the less favourable treatment*', the claim must be brought within three months of the last act of the series.

Facts

Dr Ibarz taught at Sheffield University between 2004 and 2013, and was engaged on a new fixed-term contract for each semester he worked. There were gaps between each fixed term contract to allow for the university holiday period when his services were not engaged. Dr Ibarz sought to bring claims for less favourable treatment as a result of his status as a fixed-term worker and a part-time employee for the entire duration of the nine-year period. The less favourable treatment complained of related to holiday pay arrangements, pension access, salary and hours.

The Employment Tribunal determined that Dr Ibarz was an employee of Sheffield University when he was teaching under the separate contracts but this did not amount to continuous employment as there were no arrangements with Dr Ibarz during the holiday periods. On this basis, the Employment Tribunal held that Dr Ibarz's claims for less favourable treatment were only in time in relation to his final fixed term contract between February and May 2013. The alleged detriments in regard to the contracts he had signed between 2004 and 2012 were found to be out of time as they were outside of the three month limit. Interestingly, the claimant did not attempt to argue that there was a 'just and equitable' reason to extend the time limit, under a provision in both sets of Regulations that permits a complaint to be considered even if it is brought out of time if 'in all the circumstances of the case' the Tribunal considers it is 'just and equitable' to do so. This may be because the earliest claims dated back to 2004 and there was no good explanation for such a lengthy delay in bringing the claims.

The Tribunal held that Dr Ibarz's series of fixed-term contracts were not capable of constituting '*a series of similar acts*'. Given this finding, the Tribunal did not go further and consider if the University's consistent application of rules, policies and practices (as applied across all of Dr Ibarz's contracts) constituted '*a series of similar acts*'. Dr Ibarz did not seek to challenge the Tribunal's finding about the lack of continuity of employment.

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However, Dr Ibarz did appeal the Tribunal's determination that he was out of time to bring the vast majority of his claims.

Judgment

The EAT held that the Tribunal had erred in law by finding that the succession of fixed term contracts did not fall within the meaning of a 'series of similar acts'. The EAT found that the Tribunal should have considered whether or not the University's application of rules, practices, schemes or policies throughout the entire nine year period of engagements comprised a series of similar acts, irrespective of the fact that Dr Ibarz's engagements were separate contracts.

The EAT considered that the Tribunal had misinterpreted the case of *Arthur – v – London Eastern Railway* [2006] EWCA Civ 1358. The Tribunal had mistakenly decided that because there was a series of separate fixed-term contracts without any continuity of employment, the consistent application of the rules, policies and practices throughout the separate contracts was not capable of falling within the definition of 'a series of similar acts'.

The case was remitted to the Employment Tribunal to consider whether or not the alleged less favourable treatment had amounted to 'a series of similar acts or failures'.

Commentary

Further clarification of what can constitute 'a series of similar acts' for the purposes of time limits under the Regulations is a welcome decision. Employers need to be aware that they do not have the option of hiding behind non-continuous employment to provide them with relief from claims for less favourable treatment. The case should also act as a warning to employers that older complaints of less favourable treatment could fall within the jurisdiction of the Tribunal if they can be said to be a 'series of similar acts'.

The case is also a prompt for employers who employ both permanent, full time staff and those on less typical temporary or part-time arrangements to ensure that they treat both sets of staff equally to avoid the Tribunal in the first place.

Subject: Fixed-term discrimination

Parties: Ibarz v University of Sheffield

Court: Employment Appeal Tribunal

Date: 7 May 2015

Case number: UKEAT/0018/15/JOJ [UKEAT 0018_15_2306]

Publication: http://www.employmentappeals.gov.uk/Public/Upload/15_0108fhwwATDM.doc

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2016/12

'Independent contractors' working in a subordinate relationship may in reality be employees (FR)

CONTRIBUTOR Charles Mathieu*

Summary

An 'independent contractor' working for a company in a subordinate relationship should be considered as a *de facto* employee. In such a situation, the company and its legal representatives can be held liable for 'concealed work' and be subject to criminal penalties.

Facts

The appellants in this case were a telemarketing company, its Director Ms X and its Manager Mr Y.

In 2011, the Labour Inspection (*Inspection du travail*) conducted an investigation at the company's premises. It concluded that several individuals who were performing work there (the 'workers') held contracts as independent contractors (*auto-entrepreneurs*) whereas in reality, in the opinion of the Labour Inspection, they were employees. In fact, the individuals in question had originally been hired as employees but, at a later date, changed their status while continuing to perform their duties as 'independent contractors'. X and Y were then prosecuted for *travail dissimulé* (i.e. concealed work). The *tribunal correctionnel* found them guilty and sentenced them to fines of € 15,000 each.

They appealed to the Court of Appeal in Amiens, basing their argument on Article L8221-6 of the Labour Code, as it read at the time, which provided that a worker registered with the Commercial Register as an independent contractor is presumed not to be an employee, but that this presumption may be rebutted if it is demonstrated that the worker performs his work *"in conditions that place him in a position of permanent legal subordination vis-à-vis the party for whom he works"*. 'Concealed work' shall be taken to exist if, and only if, the party for whom the work is performed (the principal) has intentionally failed to fulfil the legal formalities required when hiring and paying staff. At least one of the accused made no effort to deny that the failure to fulfil those formalities was intentional.

The appeal was without success. In a judgment dated 2 July 2014, the Court of Appeal upheld the conviction, reasoning as follows.

- the workers carried out the same activities as they did when they were still employed;
- their terms and conditions were determined unilaterally by the company;
- they worked for no other company;
- the company helped them to complete the paperwork required to register themselves as independent contractors;
- they performed the same work as was being done by the company's own employees;
- they were not able to determine their working hours;
- the company treated them as 'independent contractors' in order to avoid having to pay social insurance contributions.

Based on these circumstances, the Court of Appeal held that whatever the parties' contract stated, it was overruled by the fact that there was clear evidence of subordination.

Judgment

The Supreme Court confirmed the Court of Appeals' decision. It found that the workers were in a subordinate relationship vis-à-vis the company and that therefore, their 'independent contractor' status was a misnomer. This meant that those responsible within the company were criminally liable.

Commentary

In France, misrepresentation of worker status is a huge problem. Indeed, the reality is that many workers are performing paid work for others as de facto employees without having been officially accorded the status of

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employee. Such misclassifications raise serious issues for affected workers, employers and the entire economy. When employers improperly treat employees as independent contractors, the employees may not receive protections such as the minimum wage, overtime compensation or unemployment insurance. In addition, employee misclassification generates substantial losses to the French social security system, as companies do not pay social security contributions for these workers. This undermines the French economy.

In this case, it was clear that the company's failure to fulfil the legal formalities required when hiring and paying employees was intentional. Hence this aspect was not subject to debate. Had the prosecutor not been able to establish intent, it would not have been possible to find the accused criminally liable. In such a case, however, civil liability would still have been a possibility.

Under French employment law, employers who employ workers without declaring them as such are in breach of the employment relationship and may face both criminal and civil prosecution. Many companies have already faced claims from independent contractors asking to be treated as employees. There is a large body of case law on this issue, mainly in the civil courts.

The case law on this subject holds that "*the judge is not bound by the treatment of their contract offered by the parties*"[1]. In other words, the existence of an employment contract does not depend on the parties' wishes but on the relationship itself. This derives from the general principle that, even though a relationship is considered by the parties to be an independent one, the labour courts have the ability to test this against the evidence and reclassify an 'independent contractor' as an employee.

Central to the test is whether the party providing the work to be done (the principal) has control over when, where and how the work is performed, in other words: is the parties' relationship one of 'subordination'? Must the worker follow detailed orders given by the principal? Indeed, in characterizing employment contracts, the labour courts systematically refer to a 'subordinate relationship', as this is the prevailing criterion by which an independent contractor can be distinguished from an employee. As soon as it becomes clear that an independent contractor is in a subordinate position vis-à-vis the principal, the labour courts will reclassify the independent contract into an employment contract.

In the case at issue, the Supreme Court availed itself of a number of factors cited by the Court of Appeal to hold the two individuals criminally liable, and found that the workers in question were in a subordinate relationship towards the company. The Supreme Court then found, *inter alia*, that the independent contractors were performing the same duties as they had performed when they were employees, meaning that they were performing salaried tasks for the company. This led the Supreme Court to confirm the decision of the Court of Appeal.

More generally, in order to avoid an independent contract being wrongly classified as such, employers should ensure that, during the performance of his or her duties, the worker should remain fully independent and not be required to work in a subordinate position. This includes consideration of the company's policies, the working conditions and in particular, working hours.. Further, the contract should focus on the specific tasks to be completed and the remuneration provided for in the agreement should not be based on the number of hours worked by the independent contractor. The tasks to be undertaken should also require specific expertise or know-how which the company's employees do not possess.

Where misclassification is confirmed, the labour courts will most likely award the worker the entire legal package (i.e. severance pay calculated in accordance with the applicable collective bargaining agreement, pay in lieu of notice and pay in lieu of leave). In addition, the courts may award damages for abusive dismissal (i.e. a minimum of six months' gross salary) and damages for concealed employment (i.e. a lump sum of six months' gross salary[2]).

Further, as a *de facto* employer, the company would be required to pay social security contributions on compensation paid to the worker throughout the employment relationship, as well as penalties for late payment of these (i.e. 10% of the sum owed to the French Social Security Authority plus 2% per quarter, if payment is more than three months late).

'Independent contractor' status was created in 2008[3] to improve the economy by facilitating entrepreneurship. Unlike an employee, an independent contractor is meant to perform his or her duties without the framework of a subordinate relationship with the principal, so as to enable him or her to act on an independent basis. Thus, according to Article L. 8221-6 of the French Labour Code, an independent contractor that has duly registered as a company with the Commercial Register (*registre du commerce et des sociétés*) is presumed not to be an employee[4].

However, the Supreme Court has not changed its position despite the introduction of the statutory presumption in favour of independent contractors. Therefore, it is important for employers to be aware that even if individual contractors are presumed not to be employees, this does not preclude misclassification occurring at some later point: i.e. as soon as subordination enters into the relationship. In the case at issue, the Supreme Court

1. Plenary section of the Supreme Court, 4 March 1983, *Bull*. 1983, Ass. plen., n° 3.
2. Article L. 8223-1 of the French Labour Code.
3. Law n° 2008-776 dated 4 August 2008.
4. Law n° 2014-626 dated 18 June 2014.

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was able to deduce intention from several factors, including the existence of a subordinate relationship. This is unusual, because the workers in this case had registered themselves with the Commercial Register and it implies that it is no more difficult to obtain a misclassification than it was before the new legal presumption.

Usually it is the worker who claims that he or she is not really an independent contractor, and the dispute is litigated before a civil (labour) court. However, misclassification is also a criminal offence, attracting a three-year term of imprisonment and a € 45,000 fine (€ 225,000 for legal entities). Fines are doubled in the case of repeated offences. Additional criminal and administrative sanctions may be imposed on those responsible for the offence, including dissolution or shutdown of the business for a maximum of five years.

In regard to this decision of the Supreme Court it is important to stress that although some employers misclassify their workers as independent contractors in error, many employers do so intentionally in order to reduce labour costs and avoid paying social contributions. If so, termination of the independent contract will be held to be wrongful termination of an employment contract, as it will have been carried out in breach of the procedural rules governing termination of employment contracts in France.

What makes this case most notable is that it was a criminal case, whereas misclassification issues are usually judged by the employment section of the Supreme Court.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): In The Netherlands, the issue of work being performed under the guise of contracting rather than as employment has yielded countless judgments, both civil and administrative (not criminal), over the past six or seven decades. It has recently come to the forefront (again) in connection with a change of law that will be taking effect on 1 May 2016 and that has attracted a great deal of criticism by employers and organisations representing self-employed persons. The debate focusses on the repeal of a certificate known as VAR. A VAR is a certificate issued by the tax administration to individuals who consider themselves to be independent contractors. The individual obtains the certificate by completing and submitting a digital questionnaire that asks him questions such as: what sort of activities are you planning to perform, for how many hours per year do you expect to perform those activities, for how many customers do you expect to work the coming year, do you have the right to let someone else perform the work, which party carries the loss in the event the principal is not satisfied with the work, and have you previously worked for any of those principals as an employee? If the tax administration is satisfied that the answers to these questions indicate independent contractor status, it as a rule issues a VAR with a validity of one calendar year. The effect of a VAR is that, should it later turn out that the individual to whom it was issued was in fact an employee and not an independent contractor, the employers for whom he worked are not liable for the tax and social insurance contributions that should have been paid, unless the work was performed at variance with the answers provided on the questionnaire.

Although a VAR is not a guarantee for the principal that it will on no account be held liable for the relevant taxes or contributions, neither that the worker who initially gives himself out to be a contractor will not later turn round and claim to be an employee, VARs are very popular, and they have helped to increase the number of self-employed entrepreneurs. In fact, VARs became so popular that the legislator decided to replace the VAR regime by a more restrictive regime, under which principals cannot be so sure that they will not be hit (retroactively) by tax or social insurance claims. The new system is likely to dampen enthusiasm for entrepreneurship.

Subject: employment status

Parties: *Nord Picardie santé, Mme Carole X and M. Thierry Y -v- France* (public prosecution)

Court: *Cour de cassation, chambre criminelle* (Supreme Court)

Date: 15 December 2015

Case number: 14-85638

Publication: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658343&fastReqId=996574821&fastPos=1

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2016/13

Compensation for wrongful dismissal includes loss of equity income (LU)

CONTRIBUTOR Michel Molitor*

Summary

The compensation for an employee who is a victim of unlawful dismissal should be as comprehensive as possible, but only harm that is directly linked to the dismissal should be compensated. Material damage suffered by an employee in a senior position may include benefits such as profit shares received in his or her position as an equity partner. In this case, the Court of Appeal ordered a firm to pay a former employee the exceptional amount of more than one million Euros in compensation for wrongful dismissal.

Facts

The claimant had worked for 17 years in an auditing firm, where he had advanced quickly in his career. He had started working as an auditing assistant and, step by step, had become an 'equity partner'. The published judgment does not reveal the exact status of an equity partner, but it is most likely that the claimant acted in two capacities: he was an employee and held a certain percentage of his employer's share capital, on which he received dividends. His total remuneration averaged in the region of € 930,000 per year. The claimant was dismissed with immediate effect for alleged misconduct. He brought a claim for unlawful dismissal.

In an interim judgment, the Court of Appeal found that the claimant had been dismissed unlawfully and that he was therefore entitled to compensation. The issue before the court was how to calculate the compensation. The claimant, who was 44 at the time of his dismissal, argued that he was unable to find a new equivalent job following termination of his employment contract because his former employer had made negative statements about him in order to protect the firm's image and had blamed the employee for everything that had gone wrong. Although the claimant had found a consulting position for a particular project and had set up a business of his own, on balance he earned much less than he had earned before. The claimant also argued that the dismissal had caused him to lose, not only his salary with the defendant, but also the profit share he received as an equity partner, which he considered to be part of his remuneration.

Judgment

The Court of Appeal began by reiterating the legal doctrine that compensation for material damage should be as complete as possible. According to this doctrine, the employee can only be indemnified for damages that have a direct causal link with the dismissal. The losses incurred must relate to the period that is reasonably necessary to find an equivalent position (the so-called 'reference period'), taking into account that the employee is obliged to make all possible efforts to find a new job.

In this case, the Court of Appeal found that there was a direct link between the dismissal and the loss claimed by the claimant. The employer had responded that the claimant could have tried to work for another firm instead of setting up his own business with a poor turnover. However, the Court of Appeal ruled that an employee is free to choose to create his own business rather than seeking a new, similar job. It took into account that an employee who is dismissed after 17 years of work, after having invested a lot of energy in his career at the expense of his health and his personal life, need not necessarily search for a new job immediately after having been dismissed. Further, the Court considered that his acceptance of a consulting job and the fact that he set up his own business showed that the employee had not remained inactive after his dismissal.

With regard to the amount of the loss, the Court of Appeal rejected the employer's objection that the employee's errors had to be taken into account when determining the loss. According to the Court, if a dismissal is considered unlawful, the employer must bear the consequences, in other words, it is obliged to pay full compensation.

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The Court of Appeal considered that the profit share that the claimant received as an equity partner was part of his income and its loss must be compensated for. The Court of Appeal did not agree with the employer's view that the employee's removal as an equity partner must be distinguished from his dismissal as an employee. In the Court's view, the removal as an equity partner and the dismissal were closely linked. The dismissal procedure had started on the same day as the decision to remove the employee from his position as an equity partner was taken.
Taking into account the nature and quality of the position as an equity partner, in this particular case, the Court of Appeal estimated that the reference period was 18 months. This period, multiplied by the balance of lost and actual earnings, led to an award of over one million Euros.
In addition, the claimant was awarded € 25,000 in moral damages.

Commentary

This decision attracts attention because of the exceptional amount that the employer had to pay its former employee for unlawful dismissal. It gives us the opportunity to explain some particularities of Luxembourg law and to reflect on the financial costs of dismissal for employers.

In Luxembourg, an employer can dismiss an employee without initially giving reasons. However, upon request, the employer must provide the reasons for the dismissal within one month. At that point, the employee has two options: (i) he can challenge the grounds of his dismissal within three months after receipt of the reasons, in which case he has one year to launch proceedings against his former employer for unlawful dismissal; or (ii) he can directly bring a claim to the Labour Court within three months after the receipt of the reasons, to examine whether they are well-founded.
In both cases, if the court finds that the reasons are not serious, real, precisely formulated and proven, the dismissal is considered to be unlawful. In such a case, the Court, under certain conditions, will order the employer to pay the employee compensation for the material and moral damage suffered. The Court will examine if there is direct causal link between the dismissal and the damage alleged. In this context the employee has to prove that he has made all possible efforts to find a new job. Having established the causal link between the dismissal and the alleged damage, under Luxembourg law, compensation for unlawful dismissal is calculated as follows. First, the court determines the 'reference period'. This is the length of time that the employee reasonably needs to find an equivalent job. This time depends on a number of variables, such as age, qualifications and the condition of labour market. The second step is to estimate the balance between (i) what the employee would in all likelihood have earned during the reference period had he kept his job and (ii) what he has actually earned and/or is likely to earn during that period. In other words, in order to determine the amount of the material damages, the Court will compare the employee's new financial situation with what his financial situation would have been if the employment contract had been maintained.
In the judgment commented on here, two elements led to the high amount of compensation: the judge fixed a long reference period – 18 months – that exceeds the 6 to 12 months that are normally considered necessary to find an equivalent job, and the judge considered the profit shares that the employee received as an equity partner as part of his remuneration. It seems that considering profit shares as part of the remuneration is not a new development, but apparently employers tend not to be fully aware of it when dismissing employees in senior positions.

This decision provides the following lesson to employers and their counsel: the determination of the amount of damages (material and moral) is delicate. In order to assess the financial risk, the employer must take into account the entire remuneration, including any additional benefits. Therefore, employers should be cautious before dismissing an employee in a senior position who is entitled to valuable benefits. In some cases, a settlement may be preferable, in order to avoid legal action for unlawful dismissal.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): How to calculate compensation for unlawful or unfair dismissal? Is it possible to answer this question without first identifying the reason why an employee who has been dismissed (fairly or not) should be paid anything at all? Dutch courts and scholars have debated this fundamental, almost philosophical question for decades without reaching consensus, and it is not my intention to summarise the debate in this commentary. The reason I mention it is that the debate was reignited, with a new twist, as a result of a change of law that took effect on 1 July 2015.

Under the old law, it was more or less up to the courts' discretion whether to award compensation to an employee whose contract had been or was about to be terminated and, if so, how much. An award of one million Euros, as in this Luxembourg case, would not have been exceptional for a 44 year old employee with 17 years of service and an annual income of € 900,000.

Barring a few exceptions, the new law entitles every employee who loses his or her job involuntarily to a 'transition award', based on a certain formula (around a third and one half of one month's average salary for

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every year of service). The courts may not award more than this unless the employer is guilty of 'seriously reprehensible' conduct. In such a case, the employer may be ordered to pay additional compensation. The law does not specify what such additional compensation aims to compensate, let alone how to calculate it. This was purposely left vague. Some argue that the aim of additional compensation cannot be to compensate for lost income as a result of the termination, because that is what the transition award is meant to do. However, if this is so, what is additional compensation for? Is it, perhaps, to compensate, not for the termination as such, but for the unfairness of the termination? The problem with this theory is that the compensation would basically be for immaterial loss, such as damaged reputation or injured feelings, and Dutch courts tend to be reluctant to award serious sums for such immaterial loss. A third theory holds that an award of additional compensation is essentially a punitive award. The problem with this theory is that, although punitive damages are not wholly unknown in Dutch law, the concept of punitive damages is generally seen to be alien to Dutch law and practice. In brief, nobody knows for sure what an award for unfair dismissal aims to compensate.

Subject: unlawful dismissal

Parties: unknown

Court: *Cour d'appel* (Court of Appeal)

Date: 3 December 2015

Case number: 38355

Publication: not openly accessible

doi: 10.5553/EELC/187791072016001001014

2016/14

Compensation in lieu of paid leave, if not time-barred, can be inherited by a deceased employee's heirs (GE)

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Summary

An employee who does not recover from illness during the calendar year in which he accrues paid leave (the 'leave year') and who continues to be incapable of taking that leave, loses the right to take it 15 months after the end of the leave year, i.e. on March 31 of the second calendar year following the leave year. If his employment terminates within that 15 month period, his entitlement to leave converts into a claim for payment in lieu, and as such, can be claimed by his heirs if he dies.

Facts

The plaintiffs were the heirs of Mr M, who died in 2013. Mr M had been employed by the defendant as a full-time teacher. The terms of his employment included the terms of a collective agreement for the public sector (the 'TV-L'). Consistent with this collective agreement, Mr M was entitled to 30 days of paid leave annually. This is more generous than the German Federal Vacation Act (*Bundesurlaubsgesetz;* BUrlG), which grants employees 20 days of paid leave per year, unless they are severely disabled, in which case they are entitled to 25 days per year. These 20 or 25 days are referred to here as 'statutory days'. The balance between the 20/25 statutory days and the number of days of paid leave to which an employee is entitled on the basis of an individual or collective contract are referred to as 'contractual extra days'.

M became disabled and was granted permanent disability benefits in March 2011. Pursuant to the collective agreement, his employment relationship ended on 17 March 2011.

The BUrlG provides that annual leave is to be granted and taken in each calendar year and lapses if not taken. As an exception to this rule, it can be taken until 31 March of the next year if "*urgent operational reasons or reasons concerning the person of the employee justify this*". This period 1 January – 31 March, during which paid leave can be taken after the end of a calendar year, is known as the 'carry-over period'. The collective agreement in this case stipulated that vacation which could not be taken by the employee due to illness would not lapse until 31 May of the next calendar year. Thus, the statutory carry-over period was extended by two months.

Mr M claimed compensation for 95 unused vacation days as per 17 March 2011. The defendant only paid compensation for 40 days. Mr M then filed a claim for compensation for 26 outstanding days (it is not clear why he did not claim the full balance of 95 minus 40 days).

The court of first instance awarded Mr M compensation for 14.33 vacation days (why this number, is not clear from the published judgment). The defendant appealed, without success. The defendant then appealed to the Federal Labour Court (*Bundesarbeitsgericht*). As Mr M died during the court proceedings, his heirs pursued the action.

Judgment

The Federal Labour Court (BAG) rejected the appeal, reasoning as follows. The carry-over period under the collective agreement applies in full to the contractual extra days. Therefore, Mr M lost these days on 31 May 2010. As for the statutory days, the dispute centered on the vacation entitlements for the calendar year 2009.

In its 2009 judgment in *Schultz-Hoff* (C-350/06), the ECJ held that Directive 2003/88 precludes national legislation or practices which provide that the right to paid leave (or to payment in lieu in the event of untaken leave on termination) extinguishes at the end of the leave year

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and/or a carry-over period where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship. In its 2011 judgment in *Schulte* (C-214/10), the ECJ refined this doctrine, holding that Directive 2003/88 does not preclude national legislation or practices which limit the accumulation of entitlement to paid annual leave of a worker who is unfit for several consecutive reference periods by means of a carry-over period of 15 months, on the expiry of which the right to such leave lapses. In 2012, the BAG, applying *Schulte*, held that paid leave that could not be taken due to sick leave does not extinguish until 15 months following the end of the leave year[1].

Based on *Schulte*, the court established that the statutory leave days Mr M had accrued in 2009 had not lapsed on 17 March 2011, the date on which his employment ended and on which he had asked for compensation in lieu of unused annual leave. They would have lapsed two weeks later had Mr M still been in the defendant's employment at that time, but this was not the case.

In its 2014 judgment in *Bollacke*, the ECJ held that Directive 2003/88 precludes national legislation or practice which provides that the entitlement to paid annual leave is lost without compensation where the employment relationship is terminated by the death of the worker. Therefore, upon the termination of Mr M's employment his entitlement to paid leave converted into a claim for monetary compensation. That claim was an asset which does not differ from any other pecuniary claim of the employee against his employer upon termination of the employment (e.g. for outstanding salary or overtime).This meant that the claim was part of his estate, which passed with the rest of his property to his heirs.

Commentary

"Don't deny a dead man his right to annual leave" is how the legal press in Germany has characterized this recent judgment. As surprising as a German lay person would find this decision, it was only a matter of time before the Court was going to have to rule in a case of this kind and apply the findings of the ECJ. Contrary to the former belief that a deceased person could not use his annual leave to recuperate after he had passed away and should therefore not benefit from it, the decision means that employers can be pursued by heirs for compensation for annual leave that employees themselves could not use. The decision seems logical from a legal point of view, but many employers might find it hard to understand. Not only can the employer not benefit from the employees' service but in addition it has to pay for outstanding annual leave days.

There has recently been some discussion in Germany about whether it is possible to give employees different tasks that their illness does not prevent them from doing. For example, someone with a broken hand might not be able to type but could still take calls in a call centre. There is a question as to whether this would have to be on a voluntary basis, but there is no consensus around this as yet.

Subject: paid leave

Parties: unknown

Court: *Bundesarbeitsgericht* (Federal Labour Court)

Date: 22 September 2015

Case number: 9 AZR 170/14

Publication: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2015-9-22&nr=18359&pos=2&anz=3

1. BAG 7 August 2012, case number 9 AZR 353/10.

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2016/15

Former CEO awarded € 1,250,000 compensation for unfair dismissal (IR)

CONTRIBUTOR Orla O'Leary*

Summary

Under Irish law, an employee claiming compensation for constructive dismissal bears a high burden of proof. Failure to exhaust the employer's grievance procedure before bringing such a claim to court is generally a recipe for failure. However, a CEO who brought such a claim without first going through the grievance procedure was recently awarded record compensation of € 1.25 million.

Facts

Mr Philip Smith commenced employment with RSA (one of Ireland's largest insurance providers) in 2006 and was promoted to the position of Group CEO in 2007. During the six-year period between 2007 and the termination of his employment, Mr Smith had been offered a number of promotional opportunities within the wider RSA Group, however he turned them down for family reasons.

In November 2013 Mr Smith along with two other senior officers were suspended (with pay) as part of an investigation by RSA into financial concerns relating to the large insurance claims process and motor claims within the organisation. It was alleged by RSA that between 2008 and 2013 there was a practice of under-reserving large losses, which had the effect of artificially improving RSA's business results. In August 2013, it transpired that the motor claim reserves needed to be increased by € 40,000,000 and there were concerns as to why this had not been identified earlier. During the investigation process, Mr Smith resigned from his role as CEO and subsequently claimed he was constructively dismissed in breach of the Unfair Dismissals Acts 1977-2014 (the 'UD Acts').

In summary, Mr Smith's claim was based on:

- the public way in which he was suspended;
- the content of a draft report sent by RSA to the Central Bank of Ireland (Financial Regulator); and
- the coupling together of difficulties with motor claims and separate issues relating to large insurance claims reserves as part of the investigation.

Judgment

Constructive Dismissal – 'Very High' Burden of Proof

Under the UD Acts, where an employee is dismissed by his employer, the onus is on the employer to demonstrate that the dismissal was fair. In a constructive dismissal claim however, the burden of proof is on the employee to demonstrate that his resignation was not voluntary but due to the employee's position becoming untenable and, as the Employment Appeals Tribunal ('EAT') noted, this burden "*is a very high one*".

The EAT confirmed that the test for a constructive dismissal claim is an 'and / or test' as follows:

- did the employer's conduct amount to a significant breach of the employee's contract of employment going to the root of the contract; and/or
- taking into account all of the circumstances, was it reasonable for the employee to terminate his or her contract of employment?

Investigation – Procedurally Flawed

The EAT accepted that procedures relating to an investigation or a disciplinary matter do "*not have to be perfect*". However, it considered whether any failings in the process could lead an employee to believe that the employer was merely "*paying lip service to the process in order to disguise its predetermined result, i.e. dismissal.*"

Confirming that Mr Smith was entitled to the principles of natural justice at an investigation stage, the EAT held that he was entitled to know the precise nature of the matters being investigated. It expressed concern that a letter inviting Mr Smith to a disciplinary meeting was not only sent prior to the finalisation of the investigation report but also contained findings which it would expect

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to see at the conclusion, and "*most definitely not at the beginning*" of the disciplinary process. The EAT also found that one of the investigators should not have been part of the investigation as he had previously been involved in related matters. Therefore, it was reasonable for Mr Smith to be concerned that he would not receive a fair hearing during the investigation.

Suspension

The EAT was highly critical of Mr Smith's suspension by RSA, which was announced on national television just moments after Mr Smith was informed. The decision of the EAT referred to examples set out in the recent High Court decision of Bank of Ireland – v – Reilly[1], where suspension by an employer might be justified:

- to prevent repetition of the conduct complained of;
- to prevent interference with evidence;
- to protect individuals at risk from such conduct; or
- to protect the employer's business and reputation.

In circumstances where prior to his suspension Mr Smith's licence (which was necessary for carrying out his role) was revoked, and he was advised to stay away from RSA premises and not to talk to colleagues about the on-going investigation, the EAT found that it was "*hard to understand why he was suspended when all the possible risks were covered*."

However, it was the manner in which Mr Smith was suspended that the EAT was most critical of, noting that the televised announcement was "*the equivalent to taking a sledge hammer to his reputation, to his prospects of ever securing employment in this industry again… and it sealed his fate with [RSA]*." The EAT found that Mr Smith's suspension was "*in fact a dismissal, disguised as a suspension*."

Failure to exhaust RSA's grievance procedure

The Workplace Relations Commission (previously the EAT) has issued a Code of Practice which states that employers should have a written grievance procedure in place and that a copy of this should be provided to employees at the start of their employment. Generally speaking, an employee must exhaust the employer's internal grievance procedure before resigning in order to be successful in a claim for constructive dismissal. Case law has shown that it is extremely difficult to prove that there was no other option but to terminate an employment relationship in circumstances where the employee did not attempt to resolve the difficulties at a local level through the employer's own grievance procedure.

In this case, Mr Smith did not raise a grievance in relation to RSA's conduct prior to his resignation and on that basis RSA argued that it was unreasonable for Mr Smith to resign when he did. Whilst accepting that an employee's resignation prior to exhaustion of the grievance procedure would "*generally*" be found by the EAT to be unreasonable, the EAT stated that "*each case must be assessed on its own facts*." In these circumstances, the EAT found that Mr Smith was entitled to believe his grievance would not receive a fair hearing and was therefore justified in not engaging RSA's grievance procedure.

Award of €1.25 million – Reflective of Reputational Damage

While the EAT accepted that Mr Smith was responsible for ensuring that practices such as RSA's reserve practice did not develop and continue, the practice was known for a long period of time by "*too many company employees to lay the blame solely at the feet of [Mr Smith]*." This fact contributed to Mr Smith being awarded € 1.25 million.

Commentary

In making the award, the EAT reiterated that the manner in which Mr Smith's suspension was publicly announced entirely destroyed his reputation and his prospects of securing employment in the industry again.

The most significant aspect of this case is the award of €1.25 million made by the EAT in favour of Mr Smith. The amount was the largest monetary award made by the EAT to date and represents close to the maximum award of two years' gross remuneration under the UD Acts. It is highly unusual for the EAT to award the maximum relief available and this case garnered widespread media coverage as a result.

The EAT has no jurisdiction under the UDA to make awards for reputational damage. As such awards made under the UDA are compensation for loss of earnings and are taxable in the normal course.

Following the case, RSA Group General Counsel Derek Walsh stated that RSA was "*astonished*" by the amount of the award made by the EAT, adding that the finding created "*a dangerous precedent*".

It is unclear as yet whether Mr Walsh's prediction will come true, however, it is unlikely. I believe the level of the award was based on the manner in which RSA acted, which actions the EAT deemed were prejudicial and highly inappropriate in the circumstances of the case. The RSA's actions also appear to have had a detrimental impact on Mr Smith seeking alternative employment within the industry. It is unlikely, in my opinion, that this type of award will become the norm in most unfair or constructive dismissal cases going forward.

RSA previously indicated its intention to appeal the EAT decision to the Circuit Court, however, on 12 January 2016 it was announced by RSA that the case had settled and that the appeal would not be going ahead.

1. EELC 2015/35.

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Unfortunately, the details of the settlement have not been made public.

Subject: unfair dismissal

Parties: *Smith – v – RSA Insurance Ireland Limited*

Court: Employment Appeal Tribunal

Date: June 2015

Case number: UD1673/2013

Publication: https://www.workplacerelations.ie/en/Cases/2015/July/UD1673_2013.html

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2016/16

'Too conspicuous' hairstyle was no reason for dismissal during parental part-time (AT)

CONTRIBUTOR Christina Hießl*

Summary

Austrian law permits the dismissal of an employee during parental leave only in cases where the employer cannot reasonably be expected to continue the contractual relationship. The colour of a hair ribbon does not justify the termination of a young father's employment as a bus driver.

Facts

The defendant in the proceedings at issue had been employed by the plaintiff, a limited company in charge of a town's public transport network, for more than five years before taking part-time parental leave as from 6 June 2014. About the same time he incurred the disapproval of his superiors by a change in his outer appearance: instead of tying up his long bushy hair with a plain black hairband, he started using a pink ribbon for that purpose. Asked to remove this accessory at several instances, he replied rudely that he wouldn't.

In response, the plaintiff sought a judicial order approving the dismissal of the defendant, as required under the special dismissal protection provisions established by Austrian law for employees on parental leave. The relevant provision instructs the courts to authorise the dismissal of such an employee, for example, where the employee is likely to compromise the legitimate interests of the employer, but only if the likely harm is significant enough that the employer could not reasonably be expected to continue the employment relationship.

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Both the Landesgericht Linz as court of first instance and the Oberlandesgericht Linz, to which the defendant appealed, considered the employee's refusal to comply with the order to remove the ribbon to be a sufficiently significant reason. The first instance court based its reasoning mainly on the employer's legitimate interest in staff having a uniform appearance, particularly as appearences were important in conveying authority in emergencies. The second instance court emphasised how important it was that passengers should have confidence that bus drivers were professional and trustworthy. Both courts acknowledged that the defendant had fully complied with the plaintiff's written order of March 2009 which set out the clothing rules for staff (though this did not make any provision about hairstyles or accessories). However, this did not prevent the plaintiff from giving additional oral instructions in line with its legitimate economic interests. By contrast, the defendant was found not to have any comprehensible interest in wearing his conspicuous ribbon while working.

With permission for his dismissal granted on 16 December 2014 and confirmed by the second instance court on 7 May 2015, the defendant's only remaining option was an extraordinary appeal to the Supreme Court.

Judgment

In its judgment delivered on 24 September 2015, the Supreme Court dismissed the argumentation of the lower instance courts, recalling that even the formulation of dismissal protection during parental leave – stricter than other standards for dismissal justification under Austrian law – implies the need for a particularly significant reason making a resumption of the contractual relationship manifestly unacceptable for the employer. In the case at hand, rather than satisfying itself with a one-sided consideration of the employer's economic interests, the courts should have taken into account the interference with personality rights that the employee suffered. The Supreme Court referred to Austrian and German literature highlighting the fundamental rights aspects of restricting free determination of one's outer appearance.[1]

1. Although Austria lacks specific provisions similar to the German Basic Law (*Grundgesetz*), the literature cited by the Court found a similar right to self-determination from the effect of Article 8 ECHR on civil law contracts in Austria.

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Although the plaintiff did not dispute the basic functionality of the pink ribbon in preventing the bus driver's sight being impaired by hair falling on his face, the Supreme Court considered it had failed to establish sufficiently significant grounds to justify its interference with the employee's personality rights. Moreover, the alleged impact on customer trust and the potential consequences of this for the use of public transport were not borne out by common sense and were therefore manifestly insufficient as a justification.

Commentary

The Supreme Court's decision was based on domestic Austrian law that predated Austria's membership of the EU. Given that, the court was able to find in favour of the employee based purely on domestic law, with no need to consider EU law.

However, it is worth exploring what might have happened had the Supreme Court agreed with the lower courts that domestic law warranted the dismissal of the bus driver. Clause 5(4) of Framework Agreement on parental leave (annexed to Directive 2010/18) provides that Member States:

> *"shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave […]".*

This formulation is less strict than that of Article 10 of Maternity Directive 92/85, which requires Members States to:

> *"take the necessary measures to prohibit the dismissal of workers […] during the period from the beginning of their pregnancy to the end of the maternity leave […], save in exceptional cases not connected with their condition […]".*

Considering this differing formulation, interpreting Austrian law in line with the Framework Agreement would not have benefitted the bus driver, seeing that his dismissal was not on the grounds of an application for, or the taking of, parental leave.

However, the defendant might perhaps have referred to the ECJ's 2014 ruling in *Lyreco* (C-588/12, reported in EELC 2014-1). In that case, the ECJ held (at § 36): *"Having regard to the objective pursued by the Framework Agreement […] to offer both men and women an opportunity to reconcile their work responsibilities with family obligations, clause 2.4 [the predecessor of what is now Clause 5(4), CH] must be interpreted as articulating a particularly important European Union social right and it may not, therefore, be interpreted restrictively".*

Whether or not an interpretation is too restrictive in this sense would probably need to be assessed with an eye to the principle of effectiveness, which, as a general principle of EU law, must be decisive also for the interpretation of the Framework Agreement. It could therefore be assumed that considering national law permitting termination without the employer having to state *any* reason (as is possible in other cases in Austria) would amount to interpreting Clause 5(4) too restrictively, because it would offer no *effective* protection against dismissal on grounds of taking parental leave. But then, might the same not be said about national legislation allowing the employer to rely on reasons that should not be of any relevance for the employment relationship and are therefore likely to be no more than a pretext? Should an effective implementation of Clause 5(4) therefore require, not an 'exceptional case' like the Maternity Directive, but at least a serious and relevant reason unrelated to the taking of parental leave to be established by the employer? And could a bus driver's hairstyle meet this threshold?

An interpretation as outlined in the preceding paragraph, departing from considerations of effectiveness, might also be supported by reference to the protection of fundamental rights. Article 30 of the EU Charter of Fundamental Rights reads, *"Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national law and practices"*; Article 33 declares also the right *"to parental leave following the birth or adoption of a child"* a fundamental right of the Union. Article 51 of the Charter clarifies that its provisions are binding on Member States *"when they are implementing Union law"*. This would imply that the Austrian legislator, when implementing the Framework Agreement and its Clause 5(4), had to make sure that the national law thereby enacted was fully in line with the Charter. It could therefore be argued that all provisions which (materially) constitute a transposition of the Framework Agreement (even if they were not meant to because they actually predate the Directive) need to comply, notably, with the standard of Article 30 of the Charter and make sure that no 'unjustified' dismissal is permitted by the law. When following the reasoning of the Supreme Court set out above, it can be considered questionable whether disagreement about the appropriateness of a bus driver's hairstyle could suffice to make the dismissal 'justified'.

The ECJ's case law also shows that, when it comes to general principles such as the principle of effectiveness and fundamental rights, the Court requires their horizontal application in individual cases, so that an employee can rely on them directly against an employer, defying national law provisions to the contrary (see e.g. paragraph 45 *et seq.* of the judgment in *Kücükdeveci*, ECJ, 19 January 2010, Case C-555/07). Another aspect that might work to the benefit of the employee is the ECJ's approach to the burden of proof in discrimination cases. Although the Framework Agreement on parental leave does not deal with questions of proof, the provisions which at present require a conditional shift of the burden of prove in other directives (e.g. Article 19 of Directive 2006/54/EC on gender discrimination, or Article 8 of Directive 2000/43/EC on racial discrimination) are

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actually a mere codification of much older case law,[2] in which the Court has deduced such a shift in favour of the employee from the principle of effectiveness. This actually makes it likely that similar standards would apply in relation to the non-discrimination provisions of the Revised Framework Agreement. As a consequence, by analogy, the employee would only need to establish 'facts from which it may be presumed' that the dismissal amounted to discrimination on grounds of parental leave, thereby compelling the employer to prove the opposite.

Whether any of the described two lines of argumentation (effectiveness-based or fundamental rights-based) could have succeeded in a case such as the one at issue would ultimately depend on whether the employer is found to have any genuine and legitimate interest in a change to the employee's hairstyle, so that relying on the employee's refusal could be a reason preventing the dismissal from being unjustified or discriminatory. As the diverging reasoning of the Austrian courts shows, opinions on this question might differ greatly.

Importantly, the fundamental rights aspect invoked by the Austrian Supreme Court when referring to the defendant's 'personality rights' is equally relevant under EU law, in which Article 8 of the ECHR is given the status of a general principle by Article 6 TEU. The jurisdiction of the ECtHR leaves no doubt that Article 8 ECHR obliges the member states of the Convention to ensure the protection of the right to respect for private life also vis-à-vis a private employer (see ECtHR, 12 January 2016, *Bărbulescu v. Romania*, paragraph 35 *et seq.*), and that clothing regulations constitute an interference with that article and need to be justified as envisaged by its paragraph (2) (ECtHR, 1 July 2014, *S.A.S. v. France*, paragraph 106). Whether or not an order to remove a hair ribbon could actually amount to a violation of Article 8 ECHR, the fact that at the very least it touches on a 'human rights-sensitive' area indicates that strict standards should be applied where an employer intends to rely on it for justification of dismissal – be it in the context of Clause 5(4) of the Framework Agreement (as interpreted by standards of effectiveness) or Article 30 of the EU Charter.

At any rate, questions about the scope of dismissal protection during parental leave are almost certain to reappear in case law, most notably if we are to see an increased take-up by men – who can rely neither on the Maternity Directive nor on indirect discrimination on grounds of sex.

Comments from other jurisdictions

Germany (Nina Stephan): This case would likely have been decided the same way in Germany. A dismissal based on a 'too conspicuous' hairstyle without particularly serious reasons would have been invalid regardless of whether it is a dismissal during parental leave or a dismissal for reasons of conduct.

German law usually permits dismissals during parental leave only in cases where a business closes or where contractual obligations have been seriously violated. In addition, it is a requirement that continued employment cannot be reasonably expected from the employer. Dismissal based on an employee's outer appearance is only permissible under exceptional circumstances.

In principle, the employee is free in his decision on how to look or dress. This is an aspect of each employee's personal rights. As a result, German case-law places high demands on restrictions regarding the outer appearance of an employee. Therefore, a court must determine whether there are circumstances which, after careful consideration of the interests of both sides, justify giving the employer's interests priority over the employee's personal rights.

Please note that the employer - based on his right to give instructions regarding the performance of work - may instruct the employee to comply with a dress code. However, German case-law, for example, negates the employer's legitimate interests relating to the employee's outer appearance in the following cases: single-coloured fingernails, natural hair dress and the prohibition of wearing jewellery, watches and piercings. Any regulation to the contrary only apply if it is necessary to ensure compliance with the relevant national occupational health and safety regulations as well as accident prevention regulations.

Slovenia (Petra Smolnikar): Slovenian employees on parental leave receive similar protection prior to dismissal. Employers are prohibited to terminate the employment contract of a pregnant or breastfeeding worker or of parents during the uninterrupted use of their parental leave in the form of full absence from work, as well as during the period of one month after the end of such leave, unless grounds for extraordinary termination exist or due to the initiation of the winding-up of the employer. In both cases, preliminary consent of the labour inspector must be obtained. Under Slovenian law it is to assume that the colour of a hair ribbon would not, respectively should not, represent a just reason for the termination of an employee. Following the general principal of prohibition of unfounded dismissals, the employer has to thoroughly state the termination reason(s) in order to justifiably dismiss its employees. According to case-law, Slovenian courts have not yet dealt with a similar occasion. However, under national rules it seems unrealistic that the employee's refusal to remove his pink ribbon, bearing in mind the lack of internal clothing/outer appearance regulations by the employer, could constitute a sufficient termination ground. This would represent clear discrimination. Only if clear (strict) rules (and supporting clarifications)

2. Starting with the judgment in *Danfoss (*CJEU, 17 October 1989, Case 109/88).

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had been established regarding the outer appearance of the employee, which all employees should have abided by, a termination due to culpability reasons (ie. not fulfilling the obligations stemming from the employment relationship) could be seen as lawful. Nonetheless, such internal regulation of the employer would strongly prejudice the employee's fundamental personality rights, which would be weighed against employers' (legitimate) interests in case of judicial dispute.

Subject: parental leave – dismissal protection

Parties: L.GmbH (employer) – v – A.K. (employee)

Court: *Oberster Gerichtshof* (Supreme Court)

Date: 24 September 2015

Case Number: 9ObA82/15x

Publication: http://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=9ObA82%2f15x&VonDatum=24.09.2015&BisDatum=24.09.2015&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1

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2016/17

Court order for reinstatement not satisfied by placing employee on garden leave (LI)

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Summary

An employer was ordered to reinstate an employee they had wrongly dismissed. The employer reinstated him, putting him back on the payroll, but simultaneously placed him on involuntary garden leave. The employee sought and got a second court order that this was not real reinstatement. The employer was ordered to allow the employee to return to the office and perform his habitual work there on pain of a penalty of € 100 for each day of non-compliance. The employer challenged this penalty, but without success.

Facts

Mr U was a senior executive at a company called UAB Samsonas. He was dismissed. He challenged the dismissal successfully. The court ordered the employer to reinstate him. The bailiff served the order on the employer on 4 February 2015. That same day, the employer "reinstated" Mr U by putting him back on the payroll. However, he was prohibited from coming in to the office and performing his work. He was suspended ("garden leave"). The reason for the suspension was none other than the reason he had been dismissed, which the court had found to be a wrongful reason. The bailiff, acting on Mr U's instructions, applied to the court for an order against the employer to allow Mr U to come in to the office in order to perform his normal duties there, as before his dismissal. On 10 March 2015, the court granted this request, rejecting the employer's argument that suspension is not incompatible with reinstatement and that Mr U's rights had not been violated, merely restricted. The court ordered the employer to allow Mr U to perform his work in the usual manner on pain of a penalty of € 100 for each day of non-compliance. The employer appealed without success. He appealed to the Supreme Court.

Judgment

The central question for the Supreme Court was whether an enforceable judgment to reinstate an employee to his office may be considered exercised where the employer issues an order to reinstate, but simultaneously suspends the employee from his duties for the same reasons as the dismissal which a court held to be unlawful.

The Supreme Court held that enforcement of a judgment for wrong dismissal and an order for reinstatement implies that the employment relationship existing before the dismissal should be reinstated with the meaning of the actual notion of the employment contract as laid down in Article 93 of the Labour Code. That Article provides, *inter alia*, that the employer shall provide the employee with the work as agreed in the employment contract. If the employment is partly restored, for instance where the employer pays salary without granting the work agreed in the employment contract, the judgment for reinstatement is considered fulfilled partially. In this case, where the employer, in issuing an order to reinstate the employee to his office, ordered the suspension of the employee's duties based on the same factual grounds as the dismissal, which had been recognized as unlawful, the courts needed to assess whether the employer had sought to avoid execution of the judgment and whether the employer's behavior was not an abuse of the employee's statutory right.

The Supreme Court held that the lower instance courts had performed this assessment correctly. It agreed with Mr U that his employer had not fully complied with the judgment to reinstate him to his former office. The Court emphasized that the suspension was based on the same cause and arguments as the order to dismiss which had been recognized illegal, therefore the penalty to the employer had been imposed justly.

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Commentary

I have difficulty with this judgment. An order to reinstate an employee who has been dismissed goes against the basic freedom to decide whether or not to enter into an agreement with a certain person. Obligating an employer, not only to enter into a new employment contract with a former employee (which is what a reinstatement order does), but also to actually admit that former employee to its premises and to provide him with work, seems to me to breach an employer's fundamental rights.

On a more practical level, the Supreme Court did not hold that suspension of an employee as such is prohibited. It merely held that in this particular case suspension did not constitute full compliance with the order for reinstatement. The employer in this case could have resolved the situation by suspending the employee for a different reason than the reason it had given for the previous dismissal. Had the employer done that, I consider it likely that the courts would have found in its favour.

Comments from other jurisdictions

Belgium (Isabel Plets): The two main elements of this judgement do not exist in Belgian labour law. The first is that reinstatement is normally not a sanction for unfair or irregular dismissal, except where a 'protected' employee (a (candidate) employee representative in a works council or a health and safety committee) is dismissed. With this one exception, the sanction for an irregular or unfair dismissal is purely financial. The sanction can take the form of a severance payment and/or other compensation.

The second element that is alien to Belgian law is that involuntary garden leave is not possible. Garden leave can only be applied if both parties agree.

Germany (Nina Stephan): In contrast to Lithuanian legislation, an employee in Germany is not only entitled to reinstatement in the case of a wrongful dismissal, but is also entitled to continued employment during an action against unfair dismissal. Apart from that, the decision of the Supreme Court of Lithuania corresponds to German legislation in several respects.
First, an employee's claim for continued employment implies employment under unchanged working conditions. Moreover, German legislation does not allow the employer to suspend an employee, even with continued payment of his monthly salary, unless the employer's reasons for a release trump the employee's right to work.
Often, a claim can take several years until the highest court has delivered judgement. An employee who has not worked for several years in his trained occupation, will lose his competences and it becomes increasingly difficult for him to find employment. As a result, actions against unfair dismissals without the opportunity of continuous working experience would make it impossible to find a new job. Because of that, continuous employment is necessary for the professional future and the career of a person.
Furthermore, German legislation allows the employee to enforce the right of continued employment. Where an employer continues to violate an employee's rights, the German courts have consistently recognized the legitimacy of threatening financial sanctions for each day of non-compliance.
This applies irrespective of whether the employer suspends the employee again for the same reason or for a different reason. A unilateral suspension which prohibits the employee from performing his work is only possible in exceptional cases. It is a strong breach of the personal rights of an employee, which German legislation tries to protect. Therefore, the court usually will order coercive measures, regardless of the reason of suspending the employee contrary to his obligation, to help the employee enforce his rights.

Latvia (Andis Burkevics): Latvian law also provides that an employee whose dismissal has been anulled by a court must be reinstated in his/her previous position. In practice, this means that the employee's employment continues on the same terms and conditions as before, there being no need for a new contract.

It is likely that a Latvian court, as in the judgment reported above, would have ruled that suspension from work for the same reason that the employee was wrongfully dismissed is illegal. However, in that case, the employee in Latvia would have to challenge the legality of the order suspending him/her from work. It is unlikely that, in circumstances where the employee has been reinstated in his/her previous work (i.e. the judgment has been enforced) and on the same day suspended from work (for whatever reason), the employee could claim that the employer has in fact failed to comply with the judgment ordering reinstatement.

Further, Latvian labour law provides that if an employer has delayed the execution of a judgment regarding reinstatement of an employee in his/her previous work, the employee shall be paid average earnings for the whole period of delay from the date of the judgment until the day of its execution.

Also, freedom to enter or to not enter into a contract is not absolute and can be restricted if needed in the interest of protection a weaker party, i.e. the employee. For example, the Latvian Supreme Court has held that the Latvian State Labour Inspectorate has the right to impose on a company a penalty for concluding a self-employment service contract with a person in circumstances where the relationship was *de facto* one of employment (even though the individual in question had not objected to his self-employed status).

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Romania (Andreea Suciu): It is interesting to see that Romania is not the only jurisdiction that allows reinstatement of employees in case a court holds their dismissal to be void.

The Romanian Labour Code provides that the court which ordered cancellation of a dismissal shall, if so requested, order reinstatement of the employee in his or her previously held position (*restitutio in integrum*). In such a case, the employer must reinstate the employee, even though it may be hard to resume the employment relationship without resentments and confrontations.

The Romanian Constitutional Court has, in the course of many years, ruled several times that a court order to reinstate an employee does not impede in any way the employer's right to property. Moreover, without reinstatement, a violation of an employee's right to work would not be remedied and there would be no way to ensure employment security.

What the Labour Code has failed to regulate is the scenario where a reinstatement is objectively impossible, for example where, prior to the final court ruling, the employment terminates by law, the employee loses the requirements needed to legally exercise his previously held position, or the company or the relevant branch has ceased to exist. Thus, in the absence of any express legal provisions, the doctrine and the courts have no other option but to turn to the provisions of the Romanian Civil Code as well as to ILO Convention No. 158 and to the European Convention on Human Rights, which essentially reveal that, in case reinstatement becomes impossible, one should consider granting an equivalent position and/ or compensation.

It is undeniable that the provision of the Romanian Labour Code which obliges the court to a *restitutio in integrum* (in place since 1973) flagrantly contradicts the needs of the current practice. If and when the Labour Code will be aligned to the needs of the practice and to the legislation of most EU countries is unknown.

The Netherlands (Peter Vas Nunes): Ever since 1940, Dutch law has accepted that a dismissal may be void. In many jurisdictions, void dismissal is an alien concept, but the Dutch have got so used to it after over seven decades that they find it perfectly normal.

Where a court finds a dismissal to be void, the employment relationship continues. The employer must continue to pay the employee his full salary and continue to abide by the other terms of the employment contract (paid leave, pension, company car, etc.). Moreover, if the employee demands to return to his work (either because he really wants to resume work or because he thinks this will strengthen his negotiating position in the event the employer offers a settlement), the employer is as a rule obligated to comply. Until the law on dismissal was amended with effect from 1 July 2015, court rulings obligating an employer to actually take back an employee they had dismissed, although by no means exceptional, were infrequent. This was because in most cases the court considered that forcing an employer to continue working with someone they did not want to work with is usually not a very practical solution. What happened in most cases was that the court terminated the employment relationship and, where the employer was the party responsible for the breakdown of the working relationship, awarded the employee substantial compensation. That way, both parties got something they wanted: the employer got rid of the employee and the latter got compensation. This practical approach was possible thanks to a combination of two factors: (i) the courts had the ability to terminate an employment contract for any "serious" reason, which, in practice, gave the courts discretionary power; and (ii) the courts had the discretionary ability to award employees severance compensation, which in practice meant that employees were usually awarded something in the region of one to two months of salary per year of employment.

All this has changed. The courts have lost the power to terminate an employment contract for any reason they deem "serious", the law now listing eight defined reasons for termination, which in practice means that employers' applications for termination must be turned down more frequently. Moreover, the courts have also lost their ability to award discretionary compensation, the law now setting a standard amount that is significantly lower than what the courts used to award.

The result of all this is that the situation described in the Lithuanian case reported above, where the employer is stuck with an unwanted employee, occurs more often than it used to before 1 July 2015. This has raised considerable protest and there is pressure in Parliament to consider amending the law so as to regain at least some of the flexibility that was lost last year.

Subject: dismissal, suspension

Parties: R. S. *–v– UAB Samsonas*

Court :*Lietuvos Aukščiausiasis Teismas* (Supreme Court of Lithuania)

Date: 4 January 2016

Case number: 3K-3-45-469/2016

Publication: http://www2.lat.lt/lat_web_test/getdocument.aspx?id=ca67436b-c91a-4555-9e46-6404dad8cc2c

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2016/18

Legislation that increased the statutory retirement age violates ECHR (NL)

CONTRIBUTOR Peter Vas Nunes*

Summary

A 60-year old widow with a house but without income other than a small widow's pension has successfully challenged legislation that moved the qualification age for state pension benefits from 65 to 67. A court has found that, in her particular case, the legislation constitutes an "individual and excessive burden" within the meaning of ECtHR case law on the First Protocol to the ECHR. The government was ordered to start paying the widow state pension from age 65 despite and contrary to the wording of the law.

Facts

Until 2013, the statutory retirement age in The Netherlands was 65. It had been that way since 1947. The law provided that each resident begins to accrue the right to State-paid retirement benefits ('AOW benefits') at age 15 and continues to accrue this right annually for forty years as long as he is a resident (or is otherwise insured), at a rate of 2% per year, until retirement at age 65, at which point he receives AOW benefits for the remainder of his life. In 2013 the statutory retirement age was raised from 65 to (at least) 67, with transitional provisions in favour of those who were already close to retirement. In 2015, these transitional provisions were amended. Under the law as it now stands, the retirement age is:

- in 2016: 65 and 6 months;
- in 2017: 65 and 9 months;
- in 2018: 66;
- in 2019: 66 and 4 months;
- in 2020: 66 and 8 months;
- from 2012: 67;
- from 20122: over 67, depending on average life expectancy.

The AOW benefits are paid by a government agency known as the SVB (an abbreviation of Social Insurance Bank).

The plaintiff in this case is a widow born on 21 February 1956. Under the old law, she would have started to accrue AOW benefits on 21 February 1971 (at age 15) and would have become eligible to receive AOW benefits from 21 February 2021, at age 65. Under the new law, she is deemed to have started accruing benefits at age 17 and will not start receiving benefits until 21 February 2023 at age 67.

Her circumstances were that she was in poor health (she suffers from a progressive chronic ailment) that prevents her from working in gainful employment. Her sole income consists of widow's benefits. Her former husband purchased additional widow's benefits that will cease at age 65 and although she will then be entitled to welfare, a condition for receiving welfare is that she sells her house. She would therefore be faced with two years without any income other than a small bridging allowance of € 500 to € 600 per month.

The plaintiff therefore filed an objection against a statement issued by the SVB confirming her rights under the new law. Her complaint was rejected, following which she appealed to the local administrative court. She based her appeal on Article 1 of the First Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (ECHR), which reads:

> "*Every natural or legal person in entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*".

The SVB argued that the increase of the statutory qualification age for state pension benefits, i.e. the statutory retirement age, satisfied the requirements formulated in this 'Article 1 FP'. The plaintiff allowed that, on a liter-

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al reading of Article 1 FP, this was the case, but denied that there was a 'fair balance' between the public interest and the protection of her fundamental right not to be deprived of her possessions, within the meaning of the ECtHR's case law on Article 1 FP, given that she is being deprived of two years of AOW benefits.

Judgment

The court began by examining the SCB's contention that the plaintiff does not have an 'existing right' to AOW benefits. This argument rested on the ECtHR's ruling in the *Bladh* case (10 November 2009, appl. 46125/06). In that case, the applicant, Peter Bladh, had worked in Sweden as a trainee. At the time he started his traineeship, Swedish law provided that a person who had worked for at least a certain length of time, either as a regular employee or as a trainee, was eligible for unemployment benefits. The day before Mr Bladh's traineeship ended, the law was amended in such a way that periods of employment as a trainee no longer counted for the purpose of qualifying for unemployment benefits. The ECtHR, referencing its previous case law, held that *"claims, in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right"* constitute *"possessions"* within the meaning of Article 1 FP. However, the ECtHR found that, under the circumstances of the case, Mr Bladh did not have a legitimate expectation within this meaning.

The court agreed with the SVB that at present the plaintiff does not (yet) have a right. She will not have a right until she reaches retirement age, which is an uncertain future event. However, the ECtHR has consistently held that a conditional future right can constitute a 'possession'. It referred to the ECtHR's ruling in the *Jantner* case (4 March 2003, appl. 39050/97) in which the court held more or less as in *Bladh*, quoted above. Literally, the ruling states: *"The Court recalls that the Convention institutions have consistently held that 'possessions' within the meaning of Article 1 of Protocol No. 1 can be either 'existing possessions' or assets, including claims, in respect of which an applicant can argue that he has at least a 'legitimate expectation' that they will be realised"*. Based on this ECtHR precedent, the court found that the plaintiff had a legitimate expectation that she would start receiving AOW benefits from age 65.

The court proceeded to investigate whether the new law satisfied the condition of "public interest and subject to the conditions provided for by law". In particular, it investigated whether there was proportionality between the public interest (budgetary constraints and the need to safeguard the continued existence of AOW benefits for future generations), which the court found to be legitimate, and the plaintiff's fundamental right to the enjoyment of her possessions. The ECtHR has held that the requirement of proportionality has not been satisfied where a State's interference with an individual's possessions constitutes an "individual and excessive burden".

The court found that in the situation of the plaintiff there was an individual and excessive burden, given (i) that her age and poor health (she suffers from a progressive chronic ailment) prevent her from working in gainful employment, (ii) that her sole income consists of widow's benefits, (iii) that her former husband purchased additional widow's benefits that will cease at age 65, (iv) that although she will then be entitled to welfare, a condition for receiving welfare is that she sells her house and (v) that she will therefore be faced with two years without any income other than a small "bridging allowance" of € 500 to € 600 per month.

Based on the above, the court found that Article 1 FP has been breached and ordered the SVB to disapply the law inasmuch as it denies the plaintiff AOW benefits between the ages of 65 and 67. The SVB has appealed. The appeal procedure is anticipated to take about one year.

Commentary

Although this case turns upon a specific set of facts and circumstances (60-year old widow who would not pass a means test but has very little income), this judgment certainly raises eyebrows. By applying an international convention on human rights, a court has succeeded in eroding the legislator's power to determine the qualification age for what effectively are state benefits.

Seeing that The Netherlands is by no means the only European country where the statutory retirement age has been or is being raised, this judgment could inspire individuals or organisations elsewhere to challenge cuts in social benefits and is therefore one to be watched.

Comments from other jurisdictions

Greece (Harry Karampelis): This judgment is a commendable one, since it seems to take into consideration the ECtHR's jurisprudence regarding pension entitlements, as well as expectancies falling under the scope of the right to property according to Article 1 of Protocol 1 of the European Convention on Human Rights ("Protocol 1"). The following commentary refers to the already existing jurisprudence of the ECtHR as to the matter under discussion, trying thus to "predict" the future outcome of the case should it reach the ECtHR, as well as to the procedure a Greek Court would follow in this matter, since retirement ages have been raised following the obligations of the Greek State arising out of the Memoranda signed with the Troika.

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Pension entitlements fall within the scope of the right to property. Article 1 of Protocol 1 does not entail a right to receive a pension or other benefits, nor does it enshrine that a pension has to reach a certain amount. Contracting states enjoy a wide margin of appreciation with regard to the granting of social benefits. If, however, pension entitlements have been conferred, they constitute a possession (*Valkov v Bulgaria*, para 84). Consequently, pension entitlements have to be treated in accordance with the requirements of Article 1 of Protocol 1 (*Lakicevic and others v. Montenegro and Serbia)*. Accordingly, interferences have to be based on law, they must pursue a legitimate aim and strike a fair balance between the interests of the individual and those of the public. They must not impose a heavy and disproportionate burden on citizens.

Moreover, claims or expectations, i.e. the prospect of a future gain, enjoy the protection of Article 1 to Protocol 1 if they are legitimate. Expectations are legitimate if they have a basis in national law (*N.K.M v Hungary*, para 35). In contrast, mere hopes or unfounded expectations without sufficient legal basis are not protected under Article 1 of Protocol 1, nor are conditional claims which lapse, because the condition is not fulfilled or the hope of revival of property rights which could not be exercised for a long time (*Hans Adam v Czech Republic*). Expectations are usually legitimate if they are in line with long-standing case-law of national courts.

More specifically, the reduction or discontinuation of pension entitlements may constitute an interference with the right to peaceful enjoyment of possessions (*Wieczorek v. Poland*, para 57). The Court usually does not consider such interferences as deprivation of property or the control of use of property, but scrutinizes them in light of the first sentence of Article 1 of Protocol 1. When examining whether a fair balance has been struck between the interests of the public and the interests of the individual, the Court considers among other factors to what extent the interference diminishes the applicant's entitlement. It also attaches importance to the question of whether the forfeiture of pension entitlements was decided upon in a procedure, in which the affected person was heard, or whether the deprivation of pension rights leaves the affected person entirely without financial means (*Azinas v Cyprus*).

In *Apostolakis v. Greece (*ECtHR case 39574/07), the applicant had been working for the Greek Artisan and Tradesmen's Insurance Fund since the age of eighteen, reaching the position of Pensions Director. In the end he was forced to resign on account of criminal proceedings instituted against him. In 1998 the Court of Appeal convicted him of aiding and abetting the falsification of pay books to the detriment of the Fund and sentenced him to eleven years' imprisonment. He was conditionally released that year, the period of pre-trial detention having been deducted from his sentence. Prior to that, in 1988, a right to a retirement pension had been conferred on the applicant after more than thirty years of service. In 1999 the Social Security Fund revoked the decision of 1988 and transferred part of the pension to his wife and daughter, on the basis of the criminal conviction and in accordance with the Pensions Code. The withdrawal of Mr Apostolakis' pension also caused him to lose his personal social-security rights. The applicant unsuccessfully appealed against those measures. The ECtHR ruled that on joining the Greek civil service the applicant had acquired a right that constituted a "possession" within the meaning of Article 1 of Protocol 1. The withdrawal of the applicant's pension had amounted to an infringement of his right of property that was neither an expropriation nor a control of the use of property. Following his conviction the applicant had been automatically deprived of his retirement pension for the rest of his life. Aged sixty-nine, and unable to start a new professional occupation, he was personally deprived of any means of subsistence. Whilst the applicant's conduct had been criminally culpable, it had had no causal link with his retirement rights as a socially insured person. Moreover, the fact that the pension had been transferred to the applicant's family – the applicant being married and having children – did not suffice to offset that loss. In that connection it should be noted that the transfer had been effected in the same way as if the applicant had died, which meant that the pension amount had been reduced: seven-tenths of the initial sum, according to the applicant. Above all, there was nothing to rule out the possibility of the situation continuing in the future, as the applicant might become a widower or get divorced, for example, which would result in the loss of all means of subsistence. To that was added the fact that the withdrawal of the applicant's pension resulted in the loss of his social-security rights. Such an effect was compatible neither with the principle of re-socialisation governing the criminal law of the Contracting States nor with the spirit of the Convention. Accordingly, the applicant had been obliged to bear an excessive and disproportionate burden which, even if account was taken of the wide margin of appreciation to be afforded to States in the area of social legislation, was not justified on the grounds relied on by the Government, namely, the proper functioning of the administration or the credibility and integrity of the public service.

Following the above, the writer is of the opinion that the case under discussion shall be ruled according to the aforementioned case-law. Should a similar case reach a Greek Court, following the continuous amendment of the social security legislative context and taking into consideration that the principle of proportionality is a principle protected and defined by the Greek Constitution (Article 25), any court of any jurisdiction, irrespective of degree, may exercise its judicial power to perform the so called "constitutional control" of the law (Greece lacks a Constitutional Court for the time being). Constitutional control of a law in Greece has a declaratory nature. This means that the diagnosis of unconstitutionality does not lead to the annulment of the relevant norm (whose unconstitutionality has been ascertained), whereas it is just being set aside and is not being implemented only for the purposes of this specific case.

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Last but not least, one should note that the Higher Administrative Courts in Greece have already ruled on the unconstitutionality of decreasing retroactively the amount of pensions and very recently the First Instance Administrative Court of Athens ruled on the unconstitutionality of the obligatory registration of trainee lawyers to the Lawyers' Health Fund before their official registration to the Bar Association as its Members, which was imposed on them by Law 3996/2011, accepting thus the recourse of a former trainee lawyer who was summoned to retroactively pay social contributions covering his traineeship period.

Subject: human rights

Parties: X – v – *Sociale verzekeringsbank*

Court: *Rechtbank Noord-Nederland* (District Court, North Netherlands)

Date: 25 November 2015

Case number: Awb 15/29

Publication: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNNE:2015:5585

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ECJ 17 November 2015, case C-115/14. (Regio Post), Social Dumping

RegioPost GmbH & Co. KG –v– Stadt Landau in der Pfalz, German case

Summary

This case concerns a German province ("State") that issued a call for tenders to provide postal services. Such a tender may include the condition that the contractor and its subcontractors pay their workers the provincial minimum wage. The ECJ distinguishes the case from that in its 2008 judgment in *Rüffert*.

Facts

In 2013, the town of Landau in the State of Rhineland-Palatinate issued an EU-wide call for tenders in respect of postal services. The call for tenders included the provision that the successful tenderer shall submit a declaration that it and its subcontractors shall comply with the State's law on minimum wage (paragraph 3 of the "LTTG") and the federal law on working conditions concerning cross-border services (the "AEntG"). One of the tenderers was RegioPost, a German company. It refused to submit a declaration that it would comply with the State's minimum wage law, claiming that this was contrary to public procurement law. As a result, it was excluded from the tender process and the contract was awarded to competitors.

National proceedings

RegioPost filed a complaint with the State's Public Procurement Board. It ruled against RegioPost, which appealed to the *Oberlandesgericht Koblenz*. That court referred two questions to the ECJ. The questions concerned the interpretation of Article 26 of Directive 2004/18 on the coordination of procedures for the award of public contracts, which reads: "Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law [.....] The conditions governing the performance of a contract may, in particular, concern social and environmental considerations". The issue was whether the condition regarding the payment of minimum wages was "compatible with Community law" within the meaning of this Article 26 and, in particular, with Article 56 TFEU on the freedom to provide services and Article 3(1) of Posting Directive 96/71, which provides: "Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision, and/or
– by collective agreements or arbitration awards which have been declared universally applicable [.....], insofar as they concern the activities referred to in the Annex:

  …

  (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

  …

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."

The referring court noted that the case at hand differed from the 2008 case on which the ECJ ruled in *Rüffert* (C-346/06). In that case, the ECJ held that Directive 96/71, interpreted in the light of the EC Treaty, precludes legislation requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed. The collective agreement in the *Rüffert* case had not been declared universally applicable (*erga omnes*). It applied solely to the construction sector and it did not cover private contracts. Moreover, the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to the construction sector under the AEntG.

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ECJ's findings

1. The ECJ rejects the defence of inadmissibility on the ground that as both RegioPost and the other tenderers are German, the case lacks a cross-border element (§ 44-52).
2. A national provision which requires all tenderers and subcontractors to undertake to the contracting authority to pay staff called upon to perform the public contract concerned a minimum wage established by law, must be regarded as a 'special condition relating to the performance of a contract' concerning 'social considerations', within the meaning of Article 26 of that directive (§ 54).
3. In examining whether the national measure at issue is compatible with EU law, it is necessary to determine whether, in cross-border situations in which workers from one Member State provide services in another Member State for the purpose of performing a public contract, the minimum conditions laid down in Directive 96/71 are observed in the host member State in respect of posted workers. In this case, the referring court raises the question of the effects of the national measure at issue on undertakings established outside Germany that may have been interested in participating in the procedure for the award of the public contract in question and envisaged posting their workers to that territory, on the ground that those undertakings may have decided not to participate because of the obligation placed on them in respect of the minimum wage imposed by the LTTG. Therefore, it is necessary to examine that national measure in the light of Article 3(1) of Directive 96/71 (§ 60-61).
4. A provision such as Paragraph 3 of the LTTG must be regarded as a 'law', for the purposes of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, laying down a 'minimum rate of pay', within the meaning of point (c) of the first subparagraph of Article 3(1) thereof (§ 62).
5. Contrary to the legislation at issue in *Rüffert*, paragraph 3 of the LTTG itself lays down the minimum rate of pay (§ 62).
6. The legality of the measure in question cannot be called into question on the basis that it applies to public contracts and not to private contracts. The limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18 (§ 63-65).
7. It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers (see *Laval un Partneri*, C-341/05, paragraphs 74, 80 and 81) (§ 66).
8. According to the case-law of the Court, the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU. Such a national measure may, in principle, be justified by the objective of protecting workers (see to that effect, judgment in *Bundesdruckerei*, C-549/13, paragraph 30 and 31) (§ 69-70).
9. However, as the referring court has observed, the question arises whether it follows from paragraphs 38 to 40 of the judgment in *Rüffert* that such a justification cannot be accepted on the grounds that the minimum wage imposed by Paragraph 3(1) of the LTTG applies to public contracts only, and not to private contracts. That question calls for a negative answer (§ 71-72).
10. In *Rüffert*, the Court based its conclusion on certain characteristics specific to that measure, which clearly distinguish that measure from the national measure at issue in the main proceedings. Thus, in the judgment in *Rüffert*, the Court based its conclusion on the finding that what was at issue in that case was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable. Furthermore, the Court observed that the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to that sector under the AEntG. The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the *Land* of Rhineland-Palatinate, irrespective of the sector concerned. Furthermore, that legislative provision confers a minimum social protection since, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower minimum wage for the postal services sector (§ 73-76).

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Ruling (judgment)

1. Article 26 of Directive 2004/18/EC [.....] must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.
2. Article 26 of Directive 2004/18 [....] must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

ECJ 17 December 2015, case C-407/14. (Arjona Camacho), Discrimination – Sanction

María Auxiliadora Arjona Camacho –v– Securitas Seguridad España SA, Spanish case

Summary

Directive 2006/54 requires Member States to ensure that victims of sex discrimination are compensated in a way that is "dissuasive". This means that compensation must be full, but not that, where punitive damages do not form part of a country's legal tradition, the courts have a duty to award such damages.

Facts

Ms Arjona Camacho was employed as a security guard, to work full-time within a juvenile detention centre in Cordoba (Spain). She was dismissed on 24 April 2014. She brought an action before the *Juzgado de lo Social No 1 de Córdoba*, contesting her dismissal and claiming that it should be declared invalid. She submitted, principally, that her dismissal constituted, in particular, discrimination on grounds of sex. She requested that damages of € 6,000 be awarded for the loss and damage sustained.

National proceedings

The referring court accepts that Ms Arjona Camacho's dismissal constitutes discrimination on grounds of sex. It adds that its forthcoming judgment will also specify the reasons for its view that the sum of € 3,000, by way of damages, is sufficient to compensate Ms Arjona Camacho in full for the loss and damage which she sustained by reason of her dismissal on grounds of sex. However, the referring court expresses uncertainty as to whether, pursuant to Article 18 of Directive 2006/54, according to which the loss and damage must be the subject of compensation or reparation in a way which is dissuasive, it must award Ms Arjona Camacho damages which go beyond full compensation for the loss and damage which she sustained, in the form of punitive damages, in order to serve as an example to her former employer and others. The referring court states that the concept of 'punitive damages' does not exist in Spanish law. In those circumstances the court stayed the proceedings and refer the following question to the ECJ for a preliminary ruling:

> 'May Article 18 of Directive 2006/54, which refers to the dissuasive (in addition to real, effective and proportionate) nature of the compensation to be awarded to a victim of discrimination on grounds of sex, be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others (in addition to the person responsible for the damage), provided that the amount in question is not disproportionate, that also being the case even when the concept of punitive damages does not form part of the legal tradition of that national court?'

ECJ's findings

1. Under Article 18 of Directive 2006/54, Member States are required to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as they so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered, that compensation not being restricted by the fixing of a prior upper limit, except in the case of refusal to take that person's job application into consideration. That provision reproduces the wording of Article 6(2) of Directive 76/207, as amended by Directive 2002/73 (§ 26-27).
2. According to the Court's case-law, Article 6 of Directive 76/207 does not prescribe a specific measure to be taken by Member States in the event of a

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breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of the directive, depending on the different situations which may arise. However, the measures appropriate to restore genuine equality of opportunity must guarantee real and effective judicial protection and have a genuine deterrent effect on the employer (see *von Colson and Kamann*, 14/83, paragraphs 23 and 24; *Draehmpaehl*, C-180/95, paragraph 25; and *Paquay*, C-460/06, paragraph 45). Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained (§ 30-32).

3. It followed from Article 6 of Directive 76/207, both in its original version and as amended, and from the case-law of the Court, that the genuine deterrent effect sought by Article 6 did not involve awarding, to the person injured as a result of discrimination on grounds of sex, punitive damages which go beyond full compensation for the loss and damage actually sustained and which constitute a punitive measure (§34).
4. There has been no substantive change in EU law which might lead to an interpretation of Article 18 of Directive 2006/54 differing, in that regard, from that of Article 6 of Directive 76/207. Therefore, it is appropriate to hold that, like Article 6 of Directive 76/207, and in order for the loss and damage sustained as a result of discrimination on grounds of sex to be the subject of genuine and effective compensation or reparation in a way which is dissuasive and proportionate, Article 18 of Directive 2006/54 requires Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained, but does not provide for the payment of punitive damages (§ 36-37).
5. Article 25 of the Directive regarding the rules on penalties allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex. Likewise, Article 27(1) states that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive (§ 40-41).

Ruling (judgment)

Article 18 of Directive 2006/54 [.....] must be interpreted as meaning that, in order for the loss and damage sustained as a result of discrimination on grounds of sex to be the subject of genuine and effective compensation or reparation in a way which is dissuasive and proportionate, that article requires Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained.

ECJ 17 December 2015, joined cases C-25/14 and C-26/14. (UNIS), Free Movement – Social Insurance

Union des syndicats de l'immobilier (UNIS) –v– Ministre du Travail, de l'Emploi, de la Formation professionnelle et du Dialogue social, Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL –v– Ministre du Travail, de l'Emploi, de la Formation professionnelle et du Dialogue social, Confédération nationale de la boulangerie et boulangerie-pâtisserie française, Fédération générale agroalimentaire FGA – CFDT and Others, French case

Summary

The obligation of transparency precludes Member States from extending to all employers and employees within a sector a collective agreement, under which a single insurance company, selected by the social partners, manages a compulsory supplementary social insurance scheme, unless this is done in a completely transparent manner.

Facts

This case concerns two collective agreements, one for the real property sector and one for the bakeries and pastry-making sector. The collective agreements include supplementary social insurance schemes. In 2011, the government issued orders (the "extension decision")

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making these schemes binding on all employers and employees in the said sectors and, at the request of the social partners in those sectors, appointed one insurance company for each sector to operate the schemes, respectively IGPM for the real property scheme and AG2R for the bakeries and pastry-making scheme. Two parties, respectively UNIS and an individual employer, brought actions before the *Conseil d'Etat*, seeking annulment of the government's orders appointing IGPM and AG2R as the sole insurers of the respective schemes. They argued that the appointment of those insurers without a call for tenders and without giving competing insurers an opportunity to vie to become the operator of the schemes in question.

National proceedings

The *Conseil d'Etat* referred the following question to the ECJ: 'Is compliance with the obligation of transparency flowing from Article 56 TFEU a mandatory prior condition for the extension, by a Member State, to all undertakings within a sector, of a collective agreement under which a single operator, chosen by the social partners, is entrusted with the management of a compulsory supplementary social insurance scheme for employees?'

ECJ's findings

1. The referring court has not established the facts needed to enable the Court to ascertain whether, in the cases in the main proceedings, there is certain cross-border interest. Therefore, the Court's answer is given subject to the proviso that the referring court establishes that there is certain cross-border interest in the case in the main proceedings. Accordingly, the following statements are made on the premiss that the grant of the right to manage each of the supplementary social insurance schemes at issue in the main proceedings for all employers and employees within the sectors concerned presents certain cross-border interest, a matter which must, however, be determined by the referring court (§28-32).
2. Where a public authority renders binding, for all employers and employees in a sector, a collective agreement appointing a single body to manage a compulsory social insurance scheme throughout a given period, that decision also binds those who, since they are not members of an organisation which is a signatory to that agreement, were not represented when the agreement in question was negotiated and concluded (§33).
3. Where a public authority creates an exclusive right, the obligation of transparency is, in principle, to be complied with (see *Sporting Exchange*, C-203/08, paragraph 47). Accordingly, where a public authority exercises its power to extend the binding nature of a collective agreement appointing a single body to manage a supplementary social insurance scheme, it must previously have given potentially interested operators other than the one appointed an opportunity to express their interest in providing such management and must have acted with full impartiality when appointing the operator entrusted with management of that supplementary scheme (§35).
4. The extension decision is not exempt, because of its subject-matter (an agreement concluded following collective bargaining between organisations representing respectively employers and employees within a sector), from the requirements of transparency resulting from Article 56 TFEU (§ 37).
5. According to the case-law, the obligation of transparency stems from the principles of equal treatment and non-discrimination, compliance with which is required by the freedom to provide services guaranteed by Article 56 TFEU. Indeed, in the absence of all transparency, an award to an undertaking located in the Member State in which the award procedure takes place, amounts to a difference in treatment which operates mainly to the detriment of all undertakings which might be interested but which are located in other Member States, since those undertakings have had no real opportunity of expressing their interest, and that difference in treatment amounts, in principle, to indirect discrimination on grounds of nationality, which is, in principle, prohibited by Article 56 TFEU (§ 38).
6. Although the obligation of transparency does not necessarily require there to be a call for tenders, it does require there to be a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed. In principle, therefore, a Member State may create an exclusive right for an economic operator by rendering binding for all employers and employers in a sector a collective agreement under which that operator, chosen by the social partners, is entrusted with the management of a compulsory supplementary social insurance scheme established for the employees in that sector, but may do so only if the adoption of the decision extending the collective agreement appointing a single managing body is conditional upon the obligation of transparency being complied with (§ 39-41).
7. Neither the referring court nor the French Government has mentioned any possible justification for the fact that the exclusive right to manage a supplementary social insurance scheme is awarded without any form of publicity (§ 42).
8. The following factors, even if taken together, do not represent a degree of publicity sufficient to ensure that interested operators may express their interest in managing the social insurance scheme at issue in the main proceedings, before an extension decision is adopted with full impartiality: (i) the fact that the collective agreements and the addenda thereto have been filed with an administrative authority and may

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be consulted on the Internet, (ii) the fact that notice is published in an official journal of the intention to start the procedure for extending such an addendum and (iii) the fact that any interested party has an opportunity to submit observations following that publication. Indeed, interested parties have only 15 days within which to submit their observations, an appreciably shorter time than the periods laid down, except in urgent cases, in Articles 38, 59 and 65 of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which is not applicable in the present case but which may serve as a reference point in this regard. Furthermore, according to the observations made by the French Government at the hearing before the Court, the competent Minister merely conducts a review of legality. It thus appears to be the case that the fact that a more advantageous offer exists and that an interested party has informed the Minister about it cannot prevent the extension of that agreement, this being a matter which the referring court must determine (§ 45).

9. In the specific circumstances of the cases in the main proceedings, it must be held that the effects of the present judgment will not concern the collective agreements under which a single body was appointed to manage a supplementary social insurance scheme and which a public authority has, before the date of delivery of the present judgment, made binding on all employers and employees within a sector, without prejudice to legal proceedings brought before that date (§ 53).

Ruling (judgment)

The obligation of transparency, which flows from Article 56 TFEU, precludes the extension by a Member State, to all employers and employees within a sector, of a collective agreement concluded by the employers' and employees' respective representatives for a sector, under which a single economic operator, chosen by the social partners, is entrusted with the management of a compulsory social insurance scheme established for employees, where the national rules do not provide for publicity sufficient to enable the competent public authority to take full account of information which has been submitted concerning the existence of a more favourable offer.
The effects of the present judgment do not concern the collective agreements under which a single body was appointed to manage a supplementary social insurance scheme and which a public authority has, before the date of delivery of the present judgment, made binding on all employers and employees within a sector, without prejudice to legal proceedings brought before that date.

ECJ 25 February 2016, case C-292/14. (Stroumpoulis), Insolvency

Elleniko Dimosio –v– Stefanos Stroumpoulis and six others, Greek case

Summary

Seamen living in a member state, engaged in that state by a company that has its registered office in a non-member country but its actual head office in that member state, who work as employees on board of a cruise ship that is owned by that company and flies under the flag of the non-member country, under the employment contract designating the law of the non-member country as the law applicable, must be eligible for the protection of Directive 80/987 as regards their outstanding wage claims against the company that has been declared insolvent.

Facts

The defendants in this case were Greek seamen living in Greece. In 1994 they concluded contracts, in Greece, with a Maltese company having its registered office in Malta (at that time, not yet a Member State of the EU), under which they were engaged to work on board a cruise ship flying the Maltese flag. The contracts contained a clause to the effect that they were governed by Maltese law. At the time they were hired, the cruise ship was detained in the port of Piraeus (Greece) as a result of an attachment order. The ship was planned to set sail in the summer of 1994. In anticipation of this, the defendants remained on board the ship. However, the shipping company did not pay them any wages, and in December 1994, the defendants resigned. The brought a claim before the Greek court of first instance, which ordered the shipping company to pay them their wages and other items. The judgment could not be enforced, because the shipping company was declared insolvent in 1995.
The defendants then applied to the Employment Agency for the protection available to employees in the event of their employer's insolvency. They were refused that protection on the ground that, as seamen covered by other forms of guarantee, they fell outside the scope of Directive 80/987 on the protection of employees in the event of the insolvency of their employer and also that of the Greek law transposing that directive, Law 1220/1981 and Presidential Decree 1/1990.

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National proceedings

In 1999, the defendants applied to the Administrative Court of First Instance in Athens with a view to establishing the liability of the Greek State as a result of its alleged failure to provide the crew of sea-going vessels with access to a guarantee institution, as required under Directive 80/987 or, in the absence thereof, with equivalent protection to that afforded by the directive. Their application was dismissed. The defendants appealed. The Administrative Appeal Court set aside the first instance judgment. It found, first, that Directive 80/987 was applicable to the case, as the shipping company had been operating in Greece, where its actual head office was located, and that the vessel in question had been flying a flag of convenience. Second, the appeal court considered that, when Directive 80/987 was transposed into national law, the Greek State had erred by failing to provide employees such as the defendants in the main proceedings with the protection afforded by the directive. In that regard, that court took the view, in particular, that, contrary to what was required under Article 1(2) of the directive, Article 29 of Law 1220/1981 did not provide the persons concerned with protection equivalent to that afforded by the directive.

The Greek State lodged an appeal in cassation before the Council of State. It decided to stay proceedings and to refer two questions to the ECJ for a preliminary ruling. The first was whether Directive 80/987 is to be interpreted as meaning that seamen living in a Member State who have been engaged in that State by a company that has its registered office in a non-member country but its actual head office in that Member State, to work as employees on board a cruise ship that is owned by that company and flies the flag of the non-member country, under an employment contract designating the law of that non-member country as the law applicable, must be eligible, after the company has been declared insolvent by a court of the Member State concerned in accordance with its law, for the protection afforded by the directive as regards their outstanding wage claims against the company. The second question related to the interpretation of Article 1(2) of the Directive, which allows Member States to exclude from the scope of the Directive claims by certain categories of employee in the event they have "equivalent protection".

ECJ's findings

1. It is settled case-law that Directive 80/987 has a social objective, which is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (§ 30-33).
2. A person falls within the scope of Directive 80/987, first, if he is an employed person under national law and is not excluded on any of the grounds set out in Article 1(2) of the directive and, second, if the person's employer is in a state of insolvency within the meaning of Article 2 of the directive. In this case, the requirements in respect of being an employee employed by an insolvent employer have been satisfied (§ 34-38).
3. Contrary to the European Commission's contention, the guarantee covering wage claims established by Directive 80/987 must be provided irrespective of the maritime waters (the territorial sea or exclusive economic zone of a Member State or a non-member country or, indeed, the high seas) on which the vessel on which the defendants in the main proceedings worked ultimately sailed. This assessment is not affected by any of the particular circumstances mentioned by that court in its question, which relate, respectively, to the fact that the employment contracts at issue in the main proceedings are subject to the law of a non-member country, the fact that the vessel on which the defendants in the main proceedings were required to work flew the flag of that country, the fact that the employer's registered office was located in that country or the fact that the Member State concerned was not in a position to oblige such an employer to contribute to the financing of the guarantee institution referred to in Article 3(1) of Directive 80/987 (§ 39-52).
4. It is settled case-law that the mere fact that an employee's activities are performed outside the territory of the European Union is not sufficient to exclude the application of the EU rules on the freedom of movement for workers, as long as the employment relationship retains a sufficiently close link with the territory of the European Union (§ 53).
5. The defendants concluded an employment contract in the territory of a Member State where they lived with an employer that was subsequently declared insolvent by a court of that Member State on the ground that the employer had been operating in that State and had its actual head office. These circumstances indicate that there is a sufficiently close link between the employment relationships in question and the territory of the European Union (§54-55).
6. Interpreting Directive 80/987 as providing protection ins a situation such as that at issue does not conflict with the UN Convention on the Law of the Sea (UNCLOS) (§ 56-65).
7. The introduction of a mechanism such as that provided for by Directive 80/987 does not prevent the State whose flag such a vessel is flying from effectively exercising its jurisdiction over that vessel or its crew as regards social matters concerning the vessel, as provided for by UNCLOS (§ 66).
8. The fact that, in the present case, the Greek State is not able to require the employer to pay contributions to the guarantee fund, is not relevant (§ 67-70).

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9. Article 29 of Law 1220/1981, which provides seamen with a certain protection in the event that they are abandoned abroad, does not constitute 'protection equivalent to that resulting from [the] Directive', because the protection afforded by that provision is available only where seamen are abandoned abroad and not, as required under Directive 80/987, as a result of the insolvency of the employer (§ 72-79).

Ruling (judgment)

1. Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that, subject to the possible application of Article 1(2) of the directive, seamen living in a Member State who were engaged in that State by a company with its registered office in a non-member country but its actual head office in that Member State to work as employees on board a cruise ship owned by the company and flying the flag of the non-member country under an employment contract designating the law of the non-member country as the law applicable must, after the company has been declared insolvent by a court of the Member State concerned in accordance with the law of that State, be eligible for the protection conferred by the directive as regards their outstanding wage claims against the company.
2. Article 1(2) of Directive 80/987 must be interpreted as meaning that, as regards employees in a situation such as that of the defendants in the main proceedings, protection such as that provided in Article 29 of Law 1220/1981 supplementing and amending the legislation relating to the Piraeus port authority in the event that seamen are abandoned abroad does not constitute 'protection equivalent to that resulting from [the] Directive' within the meaning of that provision.

ECJ 3 March 2016, case C-12/14. Free Movement – Social Insurance

European Commission –v– Republic of Malta

Summary

Some retired Maltese citizens receive both a Maltese retirement pension and a UK supplementary civil-service pension. The Maltese government deducts the amounts received under the UK pension scheme from the old-age pension. In the opinion of the European Commission, the Maltese government does not comply with the rules on ''overlapping benefits of the same kind'' as stated in Regulation 883/2004 and the Commission brings action against Malta. The ECJ dismisses the action.

Facts

Regulation 883/2004 (which in 2009 replaced Regulation 1408/71) (both regulations jointly: the "Regulation") contains rules on "overlapping benefits of the same kind", that is to say, benefits "calculated on the basis of periods of insurance and/or residence completed by the same person". The competent institution of a Member State may take such benefits into account subject to certain rules and limitations. The rules on overlapping benefits only apply to benefits within the meaning of the Regulation, such as State pensions. They do not apply to supplementary pensions. The Regulation provides that each Member State shall inform the European Commission, by means of a formal "declaration" which benefits under its own law it considers to fall within the scope of the Regulation. The UK has not made such a declaration in respect of three types of old-age pension. These are the pensions payable under the National Health Pension Scheme, the Principal Civil Service Pension Scheme and the Armed Forces Pension Scheme 1975 (together: the "UK pension schemes"). The UK considers these pensions to be supplementary pensions and therefore excluded from the Regulation's scope. Pursuant to Article 56 of the Maltese Social Security Act, Malta deducts the amounts received under the UK pension schemes from Maltese State pensions. This impacts many retired Maltese citizens who, as they had worked for the British services in Malta prior to 31 March 1979 – the date on which the last British forces left the island – receive both a Maltese retirement pension and a 'supplementary' civil-service pension from the United Kingdom, which, under a provision against overlapping contained in Maltese legislation, is deducted from the Maltese old-age pension.

The action

In 2010, prompted by petitions by Maltese citizens, the European Commission sent the Maltese government a formal notice that it considered said Article 56 to be incompatible with the Regulation. In the Commission's opinion, the amounts paid under the UK pension schemes are benefits covered by the Regulation. The Maltese government contested the Commission's opinion, arguing that the amounts paid under the UK pension schemes are not old-age benefits within the meaning of the Regulation. The Commission brought an

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action against Malta. The governments of Austria and the UK intervened in support of Malta.

ECJ's findings

1. The Regulation imposes on Member States a duty to declare the laws and schemes relating to social security benefits which fall within the scope of the Regulation and with which the Member States are required to comply, while respecting the principle of sincere cooperation laid down in Article 4(3) TEU. It follows that every Member State, for the purposes of the declarations covered by the Regulation, must carry out a proper assessment of its own social security regimes and, if necessary, following that assessment, declare them as falling within the scope of the Regulation. It also follows from this principle that the other Member States are entitled to expect that the Member State concerned has fulfilled those obligations. Where a Member State has refrained from declaring a national law under the Regulation, the other Member States can, generally, infer from it that that law does not fall within the material scope of those regulations (§36–38).
2. This finding does not, however, mean that a Member State is denied any chance of responding when it is aware of information that raises doubts regarding the declarations made by another Member State. In the first place, if the declaration raises questions and if the Member States cannot reach agreement, in particular regarding the classification of laws or schemes within the scope of the Regulation, they may turn to the Administrative Commission. In the second place, if that commission does not succeed in reconciling the points of view of the Member States on the question of the legislation applicable in the case in point, it is, where appropriate, for the Member State doubting the correctness of a declaration by another Member State to tell the Commission or, as a last resort, bring proceedings under Article 259 TFEU in order for the Court to examine, in the context of those proceedings, the question of the applicable legislation (§40–41).
3. The finding that a Member State must take into account the declaration made by another Member State is not contrary to the case-law of the Court, according to which the fact that a Member State has included a national law or a national regulation in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of those regulations, whereas the fact that a national law or a national regulation has not been the object of such a declaration is not, of itself, proof that that law or that regulation does not come within the scope of those regulations (§42).
4. It does not follow that it is the duty of the Member States, other than that which introduced that law or regulation but did not declare it, to determine on their own initiative whether that law or regulation must be regarded as falling within the material scope of the regulations concerned (§44).
5. It follows from the foregoing that the Commission was wrong to take as a basis for the present action for failure to fulfil obligations the existence of a general duty for the Member States to ascertain whether the laws of the other Member States, notwithstanding the fact that they were not the object of a declaration, fall within the material scope of those regulations (§45).

Ruling (judgment)

The ECJ dismisses the action.

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Opinion of Advocate-General Bot of 25 November 2015 in case C-441/14. (Ajos), Age Discrimination

Dansk Industri, acting on behalf of *Ajos A/S –v– Estate of Karsten Eigil Rasmussen*, Danish case

Summary

Mr. Rasmussen was dismissed by Ajos and was, in principle, entitled to a statutory severance allowance equal to three months' salary. Mr. Rasmussen also satisfied the criteria in order to receive an old-age pension payable by Ajos. According to Danish case law, an employee in receipt of old-age pension is not eligible for a severance allowance. Mr. Rasmussen claimed a severance allowance, relying on the ECJ's judgment in *Andersen*. Ajos argued that any interpretation of Danish law consistent with *Andersen* would be *contra legem*. In the opinion of Advocate-General Bot, the existence of national case law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's obligation to interpret national law in conformity with EU law. Moreover, under the circumstances of this case, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

Facts

Mr Rasmussen was dismissed from Ajos and his employment relationship terminated at the end of June 2009. Having been with the company since 1 June 1984, he was, in principle, entitled to a severance allowance equal to three months' salary, pursuant to Article 2a(1) of the Law on salaried employees. However, since he had reached 60 years of age on the date of his departure and was entitled to an old-age pension payable by the employer under a scheme which he had joined before reaching 50 years of age, Article 2a(3) of the said law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure. Said Article 2a(3) provides: "No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching 50 years of age".

In March 2012, Mr Rasmussen's union brought an action on his behalf against Ajos claiming payment of a severance allowance equal to three months' salary as provided for in Article 2a(1) of the Law on salaried employees. The union relied on the ECJ's judgment in the *Andersen* case (C-499/08, officially known as *Ingeniørforeningen i Danmark*).

National proceedings

On 14 January 2014, the *Sø- og Handelsretten* (Maritime and Commercial Court) upheld the claim brought by the legal heirs of Mr Rasmussen, since deceased, for payment of the severance allowance. That court held that it was clear from the judgment in *Andersen* that Article 2a(3) of the Law on salaried employees was contrary to Directive 2000/78 and that the previous national interpretation of that provision was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.

Ajos brought an appeal against that judgment before the Højesteret (Supreme Court). In support of its appeal, it argues that any interpretation of Article 2a(3) of the Law on salaried employees that was consistent with the judgment in *Andersen* would be *contra legem*. It also argues that the application of a rule as clear and unambiguous as Article 2a(3) of the Law on salaried employees could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of legal certainty and the protection of legitimate expectations.

Opinion

1. In the view of the referring court, giving effect to the solution identified in *Andersen* in disputes between private persons raises certain difficulties, and these difficulties led it to make the present request for a preliminary ruling. According to the referring court,

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giving effect to that solution poses no problem where the employer is a public-sector body. In such a case, the inconsistency of Article 2a(3) of the Law on salaried employees with Directive 2000/78 may, in its view, be resolved by the employee's invoking the directive and relying on its provisions, provided that they appear to be unconditional and sufficiently precise, with the result that the application of Article 2a(3) of the Law on salaried employees may be precluded in specific cases. The national court points out that, in relationships between private persons, on the other hand, the provisions of a directive may not be given direct effect. It states that, in such a situation, any inconsistency between a provision of national law and a directive may be resolved, in so far as is possible, by interpreting the provision of national law at issue in a manner consistent with the directive concerned, in such a way as to attenuate the apparent contradiction between the two. The national court states, however, that the principle of consistent interpretation is subject to certain limits and, in particular, that it cannot serve as the basis for a *contra legem* interpretation of national law (§36-38).

2. According to the *Højesteret*, a limitation of that kind presents itself in this case and it is necessary, in accordance with the case-law in *Mangold* (C-144/04) and *Kücükdeveci* (C-555/07), to have recourse to the principle prohibiting discrimination on grounds of age in order to resolve the dispute between the two private parties to the main proceedings. Having recourse to that principle would then present the referring court with the problem of weighing the principle of non-discrimination against the principles of legal certainty and the protection of legitimate expectations (§39).
3. The requirement to interpret national law in conformity with EU law requires 'national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it'. It is only when it proves impossible for the national courts to give effect to an interpretation of domestic law in conformity with Directive 2000/78 that the principle prohibiting discrimination on grounds of age becomes the rule of reference enabling the court to resolve disputes between individuals by neutralising the application of the domestic law that is inconsistent with EU law. This principle then acts as a palliative for the lack of horizontal direct effect of Directive 2000/78 and for the inability of national courts to interpret national law in conformity with that directive. I would also note that, in the most recent case-law, the Court has clearly emphasised the primary role which it intends to ascribe to the obligation to interpret national provisions in a manner consistent with EU law. Before resorting to the principle prohibiting discrimination on grounds of age as the ultimate solution for resolving inconsistencies between national law and EU law, national courts must, therefore, duly ascertain that their national law is incapable of being interpreted in conformity with Directive 2000/78 (§46-48).
4. In the present case, the national court states that it cannot give an interpretation of national law in conformity with Directive 2000/78 other than one which is *contra legem*. Of course, in accordance with consistent case-law, the interpretation of domestic law is a task that falls exclusively to national courts. It is therefore for that court to decide, ultimately, whether their domestic law can be interpreted in conformity with EU law. Having said that, I take the view that, if it is apparent from the information provided to the Court with a request for a preliminary ruling that the only reason for which it is impossible to interpret a national provision in conformity with EU law is that national case-law exists which conflicts with EU law, it then falls to the Court of Justice to inform the national court whether or not it may take that factor into account. In other words, it falls squarely within the jurisdiction of the Court of Justice, in my opinion, for it to clarify the precise parameters of a limit on the obligation of consistent interpretation which it has itself identified, in this case the limit being the interpretation of national law *contra legem*. The spirit of cooperation between the Court of Justice and national courts which governs the preliminary ruling mechanism under Article 267 TFEU, the effectiveness of that procedure and the effective application of EU law thus demand that the Court of Justice indicate to the national court how it should proceed, in order to avoid improper reliance on the limit on the obligation of consistent interpretation represented by the *contra legem* interpretation of national law. It is for that reason that I recommend that the Court should consider very carefully the reasons for which the referring court considers that it cannot give an interpretation of national law in conformity with Directive 2000/78 (§ 51-54)..
5. The legal heirs of Mr Rasmussen state that, in the national case-law, Article 2a(3) of the Law on salaried employees has been interpreted in the sense that the words 'will receive' (*vil oppebære*') in fact mean 'can receive' ('*kan oppebære*'). Underlying that interpretation is the idea that it cannot depend solely on the decision of the dismissed employee either to activate, if he so wishes, his retirement pension and thus lose his entitlement to a severance allowance or to defer his retirement pension and thus preserve his entitlement to the severance allowance. The courts have therefore taken into consideration the presumed intention of the national legislature to take as an objective criterion the moment when liability to pay the severance allowance falls away as a result of the employee's entitlement to receive a retirement pension on termination of the employment relationship. The legal heirs of Mr Rasmussen dispute the national court's conclusion that an interpretation of

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Article 2a(3) of the Law on salaried employees according to which that provision might be consistent with Directive 2000/78, as interpreted by the Court in *Andersen*, would be *contra legem*(§ 59-60).

6. It does not follow from *Andersen* that the very wording of Article 2a(3) of the Law on salaried employees is inconsistent with Directive 2000/78. On the contrary, in that judgment, the Court acknowledged that the provision, read literally, could be justified by the objective of protecting employment. It was the extension of that rule in the case-law to employees who were merely entitled to receive an old-age pension, without ascertaining whether they actually did, that the Court regarded as being contrary to Directive 2000/78. By implication, the Court's reasoning also called into question the logical coherence of the provision of national law as interpreted by the national courts: why indeed should employees who defer their old-age pension in order to continue their careers be deprived of the benefit of a measure whose very purpose is to help them find employment? Against that background, the implementation by the referring court of an interpretation of its national law that is in conformity with Directive 2000/78 is the most appropriate means of resolving the conflict between its national law and EU law, since it makes it possible to neutralise the meaning given in the national case-law to Article 2a(3) of the Law on salaried employees, which has proved to be inconsistent with the directive, and to give that provision of national law a meaning which not only accords with its wording but is also in conformity with the directive (§ 65-66).
7. It is important to circumscribe the situations in which a consistent interpretation is impossible and, more specifically, to define what *contra legem* interpretation actually means. The Latin expression '*contra legem*' literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority. The referring court is very clearly not in that sort of situation. Indeed, were it to interpret Article 2a(3) of the Law on salaried employees in conformity with Directive 2000/78, that would in no way compel it to re-write that provision of national law. The national court would not, therefore, be making any incursion into the sphere of competence of the national legislature. The implementation by the national court of an interpretation in conformity with EU law would merely require it to change its case-law so that the interpretation which the Court gave of Directive 2000/78 in *Andersen* is given full effect in the national legal system, not only in relationships between employers and employees that are governed by public law, but also in such relationships governed by private law (§ 67-70).
8. In a situation such as that in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate interests militates against the national court's giving effect to an interpretation of Article 2a(3) of the Law on salaried employees that is consistent with Directive 2000/78(§ 74).
9. In its judgment in *Andersen*, the Court did not restrict the temporal effects of the interpretation which it gave of Directive 2000/78 in relation to Article 2a(3) of the Law on salaried employees. In the context of the present request for a preliminary ruling, the Court is not called upon to give a fresh ruling on that provision's consistency with Directive 2000/78; it is simply asked to clarify how an inconsistency between EU law and national law is to be resolved in a dispute between individuals. The Court could not therefore, in the context of this request for a preliminary ruling, restrict the temporal effects of its judgment in *Andersen* even if it had been asked to do so, which it has not (§ 81).

Proposed reply

It is for the national court before which a dispute between individuals falling within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation has been brought, when applying provisions of national law, to interpret those provisions in such a way that they can be applied in a manner which is consistent with the wording and objective of that directive. The existence of national case-law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's fulfilment of its obligation to interpret national law in conformity with EU law. Moreover, in circumstances such as those of the case in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

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Case C-454/15. Insolvency Protection

Jürgen Webb-Sämann –v– Christopher Seagon acting as liquidator in the insolvency of *Baumarkt Praktiker DIY GmbH*, reference lodged by the German *Hessisches Landesarbeitsgericht* on 24 August 2015

Is a national understanding of a rule under which outstanding salary claims which were deposited with the employer in order to be paid over to a pension fund by a particular date but which were not paid by that employer into a separate account and therefore did not come within the scope of a right to have those claims excluded from insolvency proceedings in respect of the employer's assets (*Aussonderungsrecht*) pursuant to Paragraph 47 of the German Insolvency Regulation contrary to Article 8 of Directive 2008/94/EC (on the protection of employees in the event of the insolvency of their employer) or to other EU law?

Case C-508/15. Free Movement

Sidika Ucar –v– Land Berlin, reference lodged by the German *Verwaltungsgericht Berlin* on 24 September 2015

Is the first indent of the first paragraph of Article 7 of EEC-Turkey Association Council Decision No 1/80 of 19 September 1980 to be interpreted as meaning that the conditions governing application of that provision are also met in the case where the three years of legal residence of the member of the family of the Turkish worker duly registered as belonging to the labour force were preceded by a period in which the principal person entitled, after having been joined by the family member authorised to do so in accordance with that provision, was no longer duly registered as belonging to the labour force of that Member State?
Is the first paragraph of Article 7 of Decision No 1/80 to be interpreted as meaning that the extension of a residence permit is to be regarded as constituting the authorisation specified in that provision to join a Turkish worker duly registered as belonging to the labour force in the case where the family member concerned has lived continuously, since being authorised to join the Turkish worker within the meaning of that provision, together with that person but the latter, following a period of temporary absence therefrom, is duly registered as belonging afresh to the labour force of the Member State only at the date on which the residence permit is extended?

Case C-509/15. Free Movement

Recep Kilic –v– Land Berlin, reference lodged by the German *Verwaltungsgericht Berlin* on 24 September 2015

Can the extension of the residence permit of a family member – who was permitted to join the principal person entitled at a time when the latter was not duly registered as belonging to the labour force – at a date on which the principal person entitled, with whom the family member is lawfully resident, has become an employed person be regarded as constituting an 'authorisation to join' for the purposes of Article 7 of EEC-Turkey Association Council Decision No 1/80 of 19 September 1980?

Case C-518/15. Working Time

Ville de Nivelles –v– Rudy Matzak, reference lodged by the Belgian *cour du travail de Bruxelles* on 28 September 2015

Must Article 17(3)(c)(iii) of Directive 2003/88/EC concerning certain aspects of the organisation of working time be interpreted as enabling Member States to exclude certain categories of firefighters recruited by the public fire services from all the provisions transposing that Directive, including the provision that defines working time and rest periods?
Inasmuch as Directive 2003/88 of 4 November 2003 concerning certain aspects of the organisation of working time provides for only minimum requirements, must it be interpreted as not preventing the national legislature from retaining or adopting a less restrictive definition of working time?

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Taking account of Article 153(5) TFEU and of the objectives of Directive 2003/88 concerning certain aspects of the organisation of working time, must Article 2 of that Directive, in so far as it defines the principal concepts used in the Directive, in particular those of working time and rest periods, be interpreted to the effect that it is not applicable to the concept of working time which serves to determine the remuneration owed in the case of home-based on-call time?
Does Directive 2003/88 of 4 November 2003 concerning certain aspects of the organisation of working time prevent home-based on-call time from being regarded as working time when, although the on-call time is undertaken at the home of the worker, the constraints on him during the on-call time (such as the duty to respond to calls from his employer within eight minutes) very significantly restrict the opportunities to undertake other activities?

Case C-531/15. Sex Discrimination

Elda Otero Ramos –v– Servizo Galego de Saúde, Instituto Nacional de la Seguridad Social, reference lodged by the Spanish *Tribunal Superior de Justicia de Galicia* on 8 October 2015

Are the rules on the burden of proof laid down in Article 19 of Directive 2006/54/EC applicable to the situation of risk during breastfeeding referred to in Article 26(4), in conjunction with Article 26(3), of the Law on the Prevention of Occupational Risks, which was adopted to transpose into Spanish law Article 5(3) of Council Directive 92/85/?
If question 1 is answered in the affirmative, can the existence of risks to breastfeeding when working as a nurse in a hospital accident and emergency department, established by means of a report issued by a doctor who is also the director of the accident and emergency department of the hospital where the worker is employed, be considered to be facts from which it may be presumed that there has been direct or indirect discrimination within the meaning of Article 19 of Directive 2006/54/EC?
If question 2 is answered in the affirmative, can the fact that the job performed by the worker is included in the list of risk-free jobs drawn up by the employer after consulting the workers' representatives and the fact that the preventive medicine/prevention of occupational risks department of the hospital concerned has issued a declaration that the worker is fit for work, without those documents including any further information regarding how those conclusions were reached, be considered to prove, in every case and without possibility of challenge, that there has been no breach of the principle of equal treatment within the meaning of Article 19 of Directive 2006/54/EC?
If question 2 is answered in the affirmative and question 3 is answered in the negative, which of the parties – the applicant worker or the defendant employer – has, in accordance with Article 19 of Directive 2006/54/EC, the burden of proving, once it has been established that performance of the job creates risks to the mother or the breast-fed child, (1) that the adjustment of working conditions or working hours is not feasible or that, despite such adjustment, the working conditions are liable to have an adverse effect on the health of the pregnant worker or breast-fed child (Article 26(2), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(2) of Directive 92/85/EEC), and (2) that it is not technically or objectively feasible to move the worker to another job or that such a move cannot reasonably be required on substantiated grounds (Article 26(3), in conjunction with Article 26(4), of the Law on the Prevention of Occupational Risks, which transposes Article 5(3) of Directive 92/85/EEC)?

Case C-539/15. Age Discrimination

Daniel Bowman –v– Pensionsversicherungsanstalt, reference lodged by the Austrian *Oberster Gerichtshof* on 15 October 2015

Is Article 21 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 2(1) and (2) and Article 6 of Council Directive 2000/78/EC, 1 and also having regard to Article 28 of the Charter of Fundamental Rights, to be interpreted as meaning that

a. a provision in a collective agreement which provides for a longer period for incremental advancement for employment at the start of a career, thereby making it more difficult to advance to the next salary step, constitutes an indirect difference in treatment based on age,
b. and, if such is the case, that such a rule is appropriate and necessary in the light of the limited professional experience at the start of a career?

Case C-566/15. Nationality Discrimination

Konrad Erzberger –v– TUI AG, reference lodged by the German *Kammergericht Berlin* on 3 November 2015

Is it compatible with Article 18 TFEU (non-discrimination) and Article 45 TFEU (freedom of movement for workers) for a Member State to grant the right to vote and stand as a candidate for the employees' representa-

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tives in the supervisory body of a company only to those workers who are employed in establishments of the company or in affiliated companies within the domestic territory?

Case C-569/15. Free Movement – Social Insurance

X –v– Staatssecretaris van Financiën, reference lodged by the Dutch *Hoge Raad* on 5 November 2015

Must Title II of Regulation (EEC) No 1408/71 be interpreted as meaning that a worker residing in the Netherlands who normally works in the Netherlands and who takes unpaid leave for three months is deemed to continue to be (also) employed in the Netherlands during that period if (i) the employment relationship continues during that period and (ii) for purposes of the application of the Dutch *Werkloosheidswet* (Law on unemployment) that period is considered to be a period of employment?

a. What legislation does Regulation (EEC) No 1408/71 designate as applicable if during the unpaid leave that worker is employed in another Member State?
b. Is it still important in that regard that the person concerned was employed in the same other Member State twice in the following year and for periods of approximately one to two weeks during the subsequent three years, without any mention in the Netherlands of unpaid leave?

Case C-570/15. Free Movement – Social Insurance

X –v– Staatssecretaris van Financiën, reference lodged by the Dutch *Hoge Raad* on 5 November 2015

What standard or standards should be used to assess what legislation is designated by Regulation (EEC) No 1408/71 as applicable in the case of a worker residing in Belgium who performs the bulk of his work for his Dutch employer in the Netherlands, and in addition performs 6.5 per cent of that work in Belgium in the year in question, at home and with clients, without there being a fixed pattern and without any agreement having been made with his employer with regard to the performance of work in Belgium?

Case C-614/15. Fixed Term Work

Rodica Popescu –v– Directia Sanitar Veterinara si pentru Siguranta Alimentelor Gorj, reference lodged by the Romanian *Curtea de Apel Craiova*

Is the fact that the activity of the staff specifically responsible for inspections in the veterinary health sector is intrinsically linked to the continuation of the activity of the type of establishments mentioned in paragraph [5] [of the order for reference] sufficient grounds for the repeated conclusion of fixed-term contracts, by way of derogation from the general rule adopted in order to transpose Directive 70/1999?
Does the retaining in national legislation of special provisions permitting the repeated conclusion, for a period such as that described [in the order for reference], of fixed-term employment contracts in the veterinary health inspection sector constitute a failure to fulfil an obligation of the State when transposing Directive 70/1999?

Case C-620/15. Free Movement – Social Insurance

A-Rosa Flusschif GmbH –v– Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales d'Alsace, Sozialsversicherungsanstalt des Kantons Graubünden, reference lodged by the French *Cour de cassation* on 23 November 2015

Is the effect of an E 101 certificate issued, in accordance with Articles 11(1) and Article 12a(1a) of Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 by the institution designated by the competent authority of the Member State whose social security legislation remains applicable to the situation of the employee, binding, first, on the institutions and authorities of the host Member State and, secondly, on the courts of that Member State, where it is found that the conditions under which the employee carries out his activity clearly do not fall within the material scope of the exceptions set out in Article 14(1) and (2) of Regulation No 1408/71?

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ECtHR 26 November 2015, application 64846/11. (Ebrahimian), Religious Discrimination

Christiane Ebrahimian –v– France, French case

Summary

A French hospital did not renew the fixed-term contract of a social worker because she refused to remove her headscarf. The domestic courts rejected her complaint that the hospital had violated her right under Article 9 ECHR to freedom of religion by wearing a headscarf. The ECtHR, distinguishing from Eweida, concluded, by six votes to one, that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9.

Facts

Ms Ebrahimian, a French national living in Paris,was recruited on a fixed-term contract within the public hospital service as a socialworker in the psychiatric department of Nanterre Hospital and Social Care Centre ("HSCC"), a public health establishment administered by the City of Paris. Her contract, which ran from 1 October to 31December 1999, was extended for one year from 1 January to 31 December 2000.

On 11 December 2000 the Director of Human Resources informed the applicant that her contract would not be renewed, on account of her refusal to remove her headscarf and following complaints from patients.

The Director of Human Resources sent Ms Ebrahimian a written reminder of the *Conseil d'État's* opinion of 3 May 2000, to the effect that while the freedom of conscience of public officials was guaranteed, the principle of the secular character of the State prevented them from enjoying the visible symbol of religious affiliation constituted a breach of a public official's duties.

Ms Ebrahimian applied to the Paris Administrative Court to set the decision of 11 December 2000 aside. On 15 and 28 February 2001 she was informed by letter of the decision by the Director of Human Resources of the HSCC to include her on the list of candidates for a competition to recruit social assistants. Ms Ebrahimian did not sit the competition. On 17 October 2002 the Administrative Court found that the decision not to renew her contract had been in accordance with the principles of secularism and neutrality of public services.

In a judgment of 2 February 2004 the Paris Administrative Court of Appeal found that the decision complained of related to a disciplinary matter and set it aside on grounds of a procedural flaw as Ms Ebrahimian had not been able to consult her file before the decision was made. In accordance with that judgment, the Director of Human Resources invited Ms Ebrahimian to consult her file and, in a reasoned decision of 13 May 2005, confirmed to her that her contract would not be renewed.

National proceedings

Ms Ebrahimian applied to the Versailles Administrative Court to set that decision aside, but her application was rejected. The Administrative Court of Appeal upheld that judgment. An appeal on points of law by Ms Ebrahimian was declared inadmissible by the *Conseil d'Etat*.

Ms Ebrahimian lodged an application with the European Court of Human Rights (ECtHR). Relying on Article 9 of the European Convention on Human Rights (the "Convention), Ms Ebrahimian complained that the decision not to renew her contract as a social worker was in breach of her right to freely manifest her religion. Article 9 of the Convention states:

> "1. Everyone has the right to freedom of thought, conscience and religion [.....]
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

ECtHR's findings (taken from the Court's press release)

The Court noted that the reason for the decision not to renew Ms Ebrahimian's contract was her refusal to remove her veil, an expression of her affiliation to the

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Muslim faith. That measure had to be regarded as an interference with her right to freedom to manifest her religion as guaranteed by Article 9 of the Convention.

The Court observed that the interference was prescribed by law. Whilst Article 1 of the French Constitution and the case-law of the *Conseil d'État* and of the Constitutional Council constituted a sufficiently strong legal basis on which to restrict Ms Ebrahimian's religious freedom, they did not enable her to foresee that the refusal to remove her veil amounted to misconduct exposing her to a disciplinary penalty as the content of the requirement of neutrality did not include a specific provision governing the profession exercised by Ms Ebrahimian. That said, the Court considered that from the time of publication of the *Conseil d'État*'s opinion of 3 May 2000, rendered more than six months prior to the decision in question, the requirement that public officials observe religious neutrality in discharging their functions had been foreseeable and accessible.

The Court accepted that the interference in question had pursued the legitimate aim of protecting the rights and freedoms of others.

With regard to the question whether the interference was necessary in a democratic society for the protection of the rights and freedoms of others, the Court found that the requirement of neutrality of public officials could be regarded as justified in principle: the State, as employer of the applicant in a public hospital, could consider it necessary that she refrain from expressing her religious beliefs in discharging her functions in order to guarantee equality of treatment of patients.

Turning next to an examination of the proportionality of that prohibition in relation to the aim pursued, the Court reiterated that while public officials enjoyed total freedom of conscience, they were prohibited from manifesting their religious beliefs in discharging their functions. Such a restriction derived from the principle of the secular nature of the State, and that of the neutrality of public services, principles in respect of which the Court had already approved a strict implementation where a founding principle of the State was involved.

The Court considered that the fact that the national courts had afforded greater weight to the principle of secularism-neutrality and the State's interest than to Ms Ebrahimian's interest in not having the expression of her religious beliefs restricted did not cause a problem with regard to the Convention.

It was not the Court's task to rule, as such, on the French model. There was nothing in any text or decision of the *Conseil d'État* to say that the requirement of neutrality could be modulated according to the officials and the functions they carried out. It was a strict requirement which had its roots in the relationship established between the secular nature of the State and the freedom of conscience, as stated in Article 1 of the Constitution. That being said, the Court found that it was the administrative courts' task to ensure that the authorities did not disproportionately interfere with the freedom of conscience of public officials where State neutrality was invoked. In that context the disciplinary consequences of the applicant's refusal to remove her veil had been assessed by the authorities having regard to the ostentatious nature of the religious sign and "other circumstances". The administrative court had relied on the French conception of public service and the ostentatious nature of the religious sign worn, and had judged the penalty proportionate. Accordingly, the impact of wearing the veil in discharging her functions had been taken into account in assessing the seriousness of the applicant's misconduct and deciding not to renew her contract. The Court found that the national authorities were better placed to assess the proportionality of the disciplinary penalty, which had to be determined with regard to all the circumstances in which a breach of the requirement of neutrality had been found in order to be compatible with Article 9 of the Convention.

With regard to Ms Ebrahimian, for whom it was important to visibly manifest her religion, she had exposed herself to the serious consequence of disciplinary proceedings. However, following the opinion of 3 May 2000 she had been aware that she had to observe a neutral dress code in discharging her functions. Owing to her refusal to comply with that obligation, and irrespective of her professional qualities, disciplinary proceedings had been instituted against her. She had then had the benefit of the safeguards relating to disciplinary proceedings and remedies before the administrative courts. She had also chosen not to sit the competition to recruit social assistants organised by the HSCC. In those circumstances the Court held that the national authorities had not exceeded their margin of appreciation in finding that there was no possibility of reconciling Ms Ebrahimian's religious convictions with the obligation to refrain from manifesting them, and in deciding to give precedence to the requirement of neutrality and impartiality of the State.

The Court concluded that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9 of the Convention.

Judgment

Article 9 of the Convention has not been violated (six votes against one, with one dissenting and one partly dissenting opinion). Editorial note: seeing that neither party referred the matter to the Grand Chamber, the judgment became final on 26 February 2016.

Judge O'Leary's partly dissenting opinion:

"The Court concluded that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9 of the Convention.

[…..]

Nevertheless, all of the cases cited, bar one, involved restrictions on the individual's right to manifest their freedom of religion in an educational context. As

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regards teachers, the Court in each case examined whether the correct balance had been struck between, on the one hand, the right of the latter to manifest their religious beliefs and, on the other, respect for the neutrality of public education and the protection of the legitimate interests of pupils and students, ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others. In these cases, the Court's reasoning, when finding no violation or rejecting the complaints as manifestly unfounded, was intimately linked to the role of education and teachers in society, the relative vulnerability of pupils and the impact or influence which religious symbols might have on the latter. In the case-law regarding pupils, the same concerns with the neutrality of state education and the need to protect susceptible and easily influenced pupils and students from pressure and proselytization emerge. In only one of these cases, Kurtulmuş v. Turkey, the Court expressed itself in broader terms, not apparently limited to the specificities of the educational sector, when it found that the applicant teacher had chosen to become a civil servant and the dress code with which she did not wish to comply applied equally to all public servants, irrespective of their functions or religious beliefs.

The only other Article 9 case on the wearing of religious symbols in employment is Eweida and others v. the United Kingdom, which is both relevant to the present case (see below) and entirely distinguishable. The latter is because, as regards Ms. Eweida, the first applicant, the Court found a violation of Article 9, upholding the applicant's private sector employer's wish to protect its own brand as legitimate but regarding the interference with the applicant's right as disproportionate. As regards Ms. Chaplin, the second applicant, who was a nurse in a public hospital, the prohibition on her wearing a cross was for public health reasons and related to clinical safety. In those circumstances, the Court was unable to conclude that the measures in question were disproportionate.

An overview of existing case-law thus reveals clear instances, in cases involving Turkey and France, where the Court has allowed principles of secularism and neutrality to justify bans on the wearing of religious symbols. However, a careful reading of those cases reveals also that those abstract principles were, in each case, translated into a more concrete form than is the case in the present judgment, before they were allowed to defeat the individual applicant's fundamental right to manifest his or her religious beliefs. In addition, in all of these cases, and notwithstanding the broad reference to civil servants in Kurtulmuş, the Court's decisions and judgments were carefully tailored to the educational context involved.

[….]

In Eweida and others, as regards the first applicant, the Court found that the employer's legitimate aim to protect a certain corporate image was accorded too much weight in circumstances where "there was no evidence of any real encroachment on the interests of others" (Eweida and others, §§ 94 and 95). As regards the second applicant, the very concrete and legitimate aim of protecting health and safety on a hospital ward outweighed the individual right of that applicant to wear her cross (Eweida and others, §§ 99-100). In the instant case, given the nature and context of the applicant's work in a psychiatric hospital, the Government could have relied on such a concrete, legitimate aim, expressly provided by Article 9 § 2. It sought instead to rely on abstract principles in support of a blanket ban applicable to all employees of public bodies.

It is uncontested that secularism and neutrality in this context are essential principles whose importance has already been recognized by the Court, and repeatedly by the Grand Chamber. In France, the neutrality of the public service is recognized as a constitutional value. Nevertheless, such recognition does not release the Court from the obligation under Article 9 § 2 to establish whether the ban on wearing religious symbols to which the applicant was subject was necessary to secure compliance with those principles and, therefore, to meet a pressing social need. When it comes to the chamber's assessment of proportionality (see below), it can be seen that the abstract nature of the principles relied on to defeat the right under Article 9, tended also to render abstract this assessment. The risk is therefore that any measure taken in the name of the principle of secularism-neutrality and which does not exceed a State's margin of appreciation – itself very wide because what are at issue are choices of society – will be Convention compatible."

Judge Gaetano's dissenting opinion:

"I have had the benefit of reading the separate opinion of Judge O'Leary. I share entirely the concerns that she expresses so eruditely regarding the reasoning in the judgment.

However, those very same concerns lead me ineluctably to the conclusion that in this case there has been a violation of Article 9. The thrust of the judgment is to the effect that the abstract principle of laïcité or secularism of the State requires a blanket prohibition on the wearing by a public official at work of any symbol denoting his or her religious belief. That abstract principle becomes in and of itself a "pressing social need" to justify the interference with a fundamental human right. The attempt to hedge the case and to limit its purport to the specific facts applicable to the applicant is, as pointed out by Judge O'Leary, very weak and at times contradictory. The judgment proceeds from and rests on the false (and, I would add, very dangerous) premise, reflected in paragraph 64, that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation – even though quite often, from the very name of the official displayed on the desk or

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elsewhere, one can be reasonably certain of the religious affiliation of that official.
Moreover, it would also seem that what is prohibited under French law with regard to public officials is the subjective manifestation of one's religious belief and not the objective wearing of a particular piece of clothing or other symbol. A woman may wear a headscarf not to manifest a religious belief, or any belief for that matter, but for a variety of other reasons. The same can be said of a man wearing a full beard, or a person wearing a cross with a necklace. Requiring a public official to "disclose" whether that item of clothing is a manifestation or otherwise of his or her religious belief does not sit well with the purported benefits enjoyed by public officials as mentioned in paragraph 66 of the judgment.
While States have a wide margin of appreciation as to the conditions of service of public officials, that margin is not without limits. A principle of constitutional law or a constitutional "tradition" may easily end up by being deified, thereby undermining every value underpinning the Convention. This judgment comes dangerously close to doing exactly that."

ECtHR 12 January 2016, application 61496/08. (Bărbulescu), Fundamental Rights

Bărbulescu –v– Romania, Romanian case

Summary

An employee was dismissed for using a professional Yahoo account privately in breach of his employer's regulations, which strictly prohibited personal use of the company's resources. The domestic courts dismissed his complaint regarding breach of Article 8 ECHR. The ECtHR, distinguishing the case from those in its judgments in Halford and Copland, agreed with those courts by six votes to one. A partly dissenting opinion provides an in-depth analysis of the rules on interception of private emails by employers.

Facts

The applicant, Bogdan Mihai Bărbulescu, is a Romanian national who was born in 1979 and lives in Bucharest. From 1 August 2004 until 6 August 2007 Mr Bărbulescu was employed by a private company as an engineer in charge of sales. At his employers' request, he created a Yahoo Messenger account for the purpose of responding to clients' enquiries. On 13 July 2007 Mr Bărbulescu was informed by his employer that his Yahoo Messenger communications had been monitored from 5 to 13 July 2007 and that the records showed he had used the internet for personal purposes. Mr Bărbulescu replied in writing that he had only used the service for professional purposes. He was presented with a transcript of his communication including transcripts of messages he had exchanged with his brother and his fiancée relating to personal matters such as his health and sex life. On 1 August 2007 the employer terminated Mr Bărbulescu's employment contract for breach of the company's internal regulations that prohibited the use of company resources for personal purposes.

National proceedings

Mr Bărbulescu challenged his employer's decision before the courts complaining that the decision to terminate his contract was null and void as his employer had violated his right to correspondence in accessing his communications in breach of the Constitution and Criminal Code. His complaint was dismissed on the grounds that the employer had complied with the dismissal proceedings provided for by the Labour Code and that Mr Bărbulescu had been duly informed of the company's regulations. Mr Bărbulescu appealed claiming that e-mails were protected by Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention and that the first-instance court had not allowed him to call witnesses to prove that his employer had not suffered as a result of his actions. In a final decision on 17 June 2008 the Court of Appeal dismissed his appeal and, relying on EU law, held that the employer's conduct had been reasonable and that the monitoring of Mr Bărbulescu's communications had been the only method of establishing whether there had been a disciplinary breach. Furthermore, the Court of Appeal held that the evidence before the first-instance court had been sufficient.
On 15 December 2008, Mr Barbulescu lodged an application with the ECtHR, complaining that his employer's decision to terminate his contract had been based on a breach of his privacy and that the proceedings before the domestic courts had been unfair.
Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

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protection of health or morals, or for the protection of the rights and freedoms of others."

Mr Bărbulescu (the applicant) complained that his employer had also accessed his personal Yahoo Messenger account, which had a different ID from the one he had registered for professional purposes. Moreover, the transcript of his communications had been made available to his colleagues who had discussed it publicly.

Relying on the case of Niemietz v. Germany, the applicant contended that denying the protection of Article 8 on the grounds that the measure complained of related only to professional activities could lead to inequality of treatment in that such protection would be available only to persons whose professional and non-professional activities were so intermingled that they could not be distinguished.

The applicant insisted that the Yahoo Messenger software was by its nature designed for personal use and that the nature of the instant messaging service had entitled him to expect that his communications would be private. Had he not expected privacy, he would have refrained from disclosing intimate information. He had felt reassured by his employer instructing him to protect his Yahoo Messenger account by choosing his own password. He denied having been given proper prior notice of his employer's monitoring; he argued that the general prohibition in the employer's internal regulations could not have amounted to prior notice of monitoring.

The Romanian government submitted that Article 8 of the Convention was not applicable in the present case. They noted that the applicant had set up the Yahoo Messenger account for professional use and he furthermore claimed that he had only used it for this purpose; the Government inferred that the applicant could not claim an "expectation of privacy" while at the same time denying any private use.

ECtHR's findings

1. The Court noted that it was not disputed that the applicant's employer's internal regulations strictly prohibited employees from using the company's computers and resources for personal purposes. It follows that the case is different from the Halford and Copland cases, in which the personal use of an office telephone was allowed or, at least, tolerated (§ 38-39).
2. The Government claimed that the applicant had been given proper prior notice that his employer could have monitored his communications, but the applicant denied having received such specific prior notice (§ 43).
3. Both the County Court and the Court of Appeal attached particular importance to the fact that the employer had accessed the applicant's Yahoo Messenger account in the belief that it had contained professional messages, since the latter had initially claimed that he had used it in order to advise clients. It follows that the employer acted within its disciplinary powers since, as the domestic courts found, it had accessed the Yahoo Messenger account on the assumption that the information in question had been related to professional activities and that such access had therefore been legitimate (§ 57).
4. As to the use of the transcript of the applicant's communications on Yahoo Messenger as evidence before the domestic courts, the Court does not find that the domestic courts attached particular weight to it or to the actual content of the applicant's communications in particular. The domestic courts relied on the transcript only to the extent that it proved the applicant's disciplinary breach, namely that he had used the company's computer for personal purposes during working hours. There is, indeed, no mention in their decisions of particular circumstances that the applicant communicated; the identity of the parties with whom he communicated is not revealed either. Therefore, the Court takes the view that the content of the communications was not a decisive element in the domestic courts' findings (§58).
5. While it is true that it had not been claimed that the applicant had caused actual damage to his employer, the Court finds that it is not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours (§59).
6. In addition, the Court notes that it appears that the communications on his Yahoo Messenger account were examined, but not the other data and documents that were stored on his computer. It therefore finds that the employer's monitoring was limited in scope and proportionate (§60).
7. Furthermore, the Court finds that the applicant has not convincingly explained why he had used the Yahoo messenger account for personal purposes (§61).
8. Having regard to the foregoing, the Court concludes in the present case that there is nothing to indicate that the domestic authorities failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for his private life under Article 8 and his employer's interests. There has accordingly been no violation of Article 8 of the Convention (§62-63).
9. As for the applicant's complaint that the domestic proceedings had been unfair, he was able to raise this argument before the Court of Appeal, which ruled, in a sufficiently reasoned decision, that hearing additional witnesses was not relevant to the case. The decision was delivered in a public hearing conducted in an adversarial manner and does not seem arbitrary. It follows that this complaint is manifestly ill-founded and must be rejected (§64-66).

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Judgment

The ECtHR held, by six votes to one, that there has been no violation of Article 8 of the Convention.

Judge Pinto de Albuquerque's partly dissenting opinion:

"Bărbulescu v. Romania concerns the surveillance of Internet usage in the workplace. The majority accept that there has been an interference with the applicant's right to respect for private life and correspondence within the meaning of Article 8 of the European Convention on Human Rights ("the Convention"), but conclude that there has been no violation of this Article, since the employer's monitoring was limited in scope and proportionate. I share the majority's starting point, but I disagree with their conclusion.

[….]

The case presented an excellent occasion for the European Court of Human Rights ("the Court") to develop its case-law in the field of protection of privacy with regard to employees' Internet communications[1]. The novel features of this case concern the non-existence of an Internet surveillance policy, duly implemented and enforced by the employer, the personal and sensitive nature of the employee's communications that were accessed by the employer, and the wide scope of disclosure of these communications during the disciplinary proceedings brought against the employee. These facts should have impacted on the manner in which the validity of the disciplinary proceedings and the penalty was assessed. Unfortunately, both the domestic courts and the Court's majority overlooked these crucial factual features of the case.

[….]

Internet surveillance in the workplace is not at the employer's discretionary power. In a time when technology has blurred the diving line between work life and private life, and some employers allow the use of company-owned equipment for employees' personal purposes, others allow employees to use their own equipment for work-related matters and still other employers permit both, the employer's right to maintain a compliant workplace and the employee's obligation to complete his or her professional tasks adequately does not justify unfettered control of the employee's expression on the Internet. Even where there exist suspicions of cyberslacking, diversion of the employer's IT resources for personal purposes, damage to the employer's IT systems, involvement in illicit activities or disclosure of the employer's trade secrets, the employer's right to interfere with the employee's communications is not unrestricted. Given that in modern societies Internet communication is a privileged form of expression, including of private information, strict limits apply to an employer's surveillance of Internet usage by employees during their worktime and, even more strictly, outside their working hours, be that communication conducted through their own computer facilities or those provided by the employer.

The Convention principle is that Internet communications are not less protected on the sole ground that they occur during working hours, in the workplace or in the context of an employment relationship, or that they have an impact on the employer's business activities or the employee's performance of contractual obligations. This protection includes not only the content of the communications, but also the metadata resulting from the collection and retention of communications data, which may provide an insight into an individual's way of life, religious beliefs, political convictions, private preferences and social relations. In the absence of a warning from the employer that communications are being monitored, the employee has a "reasonable expectation of privacy". Any interference by the employer with the employee's right to respect for private life and freedom of expression, including the mere storing of personal data related to the employee's private life, must be justified in a democratic society by the protection of certain specific interests covered by the Convention, namely the protection of the rights and freedoms of the employer or other employees (Article 8 § 2) or the protection of the reputation or rights of the employer or other employees and the prevention of the disclosure of information received by the employee in confidence (Article 10 § 2). Hence, the pursuit of maximum profitability and productivity from the workforce is not per se an interest covered by Article 8 § 2 and Article 10 § 2, but the purpose of ensuring the fair fulfilment of contractual obligations in an employment relationship may justify certain restrictions on the above-mentioned rights and freedoms in a democratic society.

Other than the Court's case-law, the international standards of personal data protection both in the public and private sectors have been set out in the 1981 Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data. In this Convention the protection of personal data was for the first time guaranteed as a separate right granted to an individual. Specific rules for data protection in employment relations are contained in the Council of Europe Committee of Ministers Recommendation Rec(89)2 to member states on the protection of personal data used for employment purposes, 18 January 1989, recently replaced by Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment. Also extremely valuable in this context are Recommendation No.R(99) 5 for the protection of privacy on the Internet, adopted on 23 February 1999, and Recommendation CM/Rec(2010)13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling, adopted on 23 November 2010.

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In the legal framework of the European Union (EU), respect for private life and protection of personal data have been recognised as separate fundamental rights in Articles 7 and 8 of the EU Charter of Fundamental Rights. The central piece of EU legislation is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Employment relations are specifically referred to only in the context of the processing of sensitive data. Regulation (EC) No 45/2001 lays down the same rights and obligations at the level of the EC institutions and bodies. It also establishes an independent supervisory authority with the task of ensuring that the Regulation is complied with. Directive 2002/58/EC concerns the processing of personal data and the protection of privacy in the electronic communications sector, regulating issues like confidentiality, billing and traffic data and spam. The confidentiality of communications is protected by Article 5 of the Directive, which imposes on Member States an obligation to ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular they are to prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so. The interception of communications over private networks, including e-mails, instant messaging services, and phone calls, and generally private communications, are not covered, as the Directive refers to publicly available electronic communications services in public communication networks. Also relevant is Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, which specifies that Member States may not impose general monitoring obligations on providers of internet/email services, because such an obligation would constitute an infringement of freedom of information as well as of the confidentiality of correspondence (Article 15). Within the former third pillar of the EU, Framework Decision 2008/977/JHA dealt with the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. Finally, Article 29 Working Party Opinion 8/2001 on the processing of personal data in the employment context, adopted on 13 September 2001, the Working Document on the surveillance and the monitoring of electronic communications in the workplace, adopted on 29 May 2002, the Working Document on a common interpretation of Article 26(1) of Directive 95/46/EC, adopted on 25 November 2005, and Article 29 Working Party Opinion 2/2006 on privacy issues related to the provision of email screening services, adopted on 21 February 2006, are also important for setting the standards of data protection applicable to employees in the EU. In its 2005 annual report, the Working Party affirmed that "[i]t is not disputed that an e-mail address assigned by a company to its employees constitutes personal data if it enables an individual to be identified".

Finally, both the 1980 Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, and the International Labour Office's 1997 Code of Practice on the protection of workers' personal data, provide important soft-law guidance to employers, employees and courts.

From this international legal framework, a consolidated, coherent set of principles can be drawn for the creation, implementation and enforcement of an Internet usage policy in the framework of an employment relationship. Any information related to an identified or identifiable employee that is collected, held or used by the employer for employment purposes, including with regard to private electronic communications, must be protected in order to respect the employee's right to privacy and freedom of expression. Consequently, any processing of personal data for the purposes of recruitment, fulfilment or breach of contractual obligations, staff management, work planning and organisation and termination of an employment relationship in both the public and private sectors must be regulated either by law, collective agreement or contract. Particular forms of personal data processing, for example of the employees' usage of Internet and electronic communications in the workplace, warrant detailed regulation.

Hence, a comprehensive Internet usage policy in the workplace must be put in place, including specific rules on the use of email, instant messaging, social networks, blogging and web surfing. Although policy may be tailor-made to the needs of each corporation as a whole and each sector of the corporation infrastructure in particular, the rights and obligations of employees should be set out clearly, with transparent rules on how the Internet may be used, how monitoring is conducted, how data is secured, used and destroyed, and who has access to it.

A blanket ban on personal use of the Internet by employees is inadmissible, as is any policy of blanket, automatic, continuous monitoring of Internet usage by employees. Personal data relating to racial origin, political opinions or religious or other beliefs, as well as personal data concerning health, sexual life or criminal convictions are considered as "sensitive data" requiring special protection.

Employees must be made aware of the existence of an Internet usage policy in force in their workplace, as well as outside the workplace and during out-of-work hours, involving communication facilities owned by the employer, the employee or third parties. All employees should be notified personally of the said

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policy and consent to it explicitly. Before a monitoring policy is put in place, employees must be aware of the purposes, scope, technical means and time schedule of such monitoring. Furthermore, employees must have the right to be regularly notified of the personal data held about them and the processing of that personal data, the right to access all their personal data, the right to examine and obtain a copy of any records of their own personal data and the right to demand that incorrect or incomplete personal data and personal data collected or processed inconsistently with corporation policy be deleted or rectified. In event of alleged breaches of Internet usage policy by employees, opportunity should be given to them to respond to such claims in a fair procedure, with judicial oversight.

The enforcement of an Internet usage policy in the workplace should be guided by the principles of necessity and proportionality, in order to avoid a situation where personal data collected in connection with legitimate organisational or information-technology policies is used to control employees' behaviour. Before implementing any concrete monitoring measure, the employer should assess whether the benefits of that measure outweigh the adverse impact on the right to privacy of the concerned employee and of third persons who communicate with him or her. Unconsented collection, access and analysis of the employee's communications, including metadata, may be permitted only exceptionally, with judicial authorisation, since employees suspected of policy breaches in disciplinary or civil proceedings must not be treated less fairly than presumed offenders in criminal procedure. Only targeted surveillance in respect of well-founded suspicions of policy violations is admissible, with general, unrestricted monitoring being manifestly excessive snooping on employees. The least intrusive technical means of monitoring should be preferred. Since blocking Internet communications is a measure of last resort, filtering mechanisms may be considered more appropriate, if at all necessary, to avoid policy infringements. The collected data may not be used for any purpose other than that originally intended, and must be protected from alteration, unauthorised access and any other form of misuse. For example, the collected data must not be made available to other employees who are not concerned by it. When no longer needed, the collected personal data should be deleted.

Breaches of the internal usage policy expose both the employer and the employee to sanctions. Penalties for an employee's improper Internet usage should start with a verbal warning, and increase gradually to a written reprimand, a financial penalty, demotion and, for serious repeat offenders, termination of employment. If the employer's Internet monitoring breaches the internal data protection policy or the relevant law or collective agreement, it may entitle the employee to terminate his or her employment and claim constructive dismissal, in addition to pecuniary and non-pecuniary damages.

Ultimately, without such a policy, Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labour, but also their personal lives to employers. In order to avoid such commodification of the worker, employers are responsible for putting in place and implementing consistently a policy on Internet use along the lines set out above. In so doing, they will be acting in accordance with the principled international-law approach to Internet freedom as a human right."

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