



Flash Reports on Labour Law August 2017

Summary and country reports

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Executive Summary

In August 2017, important developments in labour law took place in many Member States and European Economic Area (EEA) countries (see Table 1). Legislative initiatives and case law focused specifically on the following issues:

- Working time
- Temporary agency work
- Transfer of undertakings.

Working time

In **Denmark**, the Committee on revising the Holiday Act has submitted its report, recommending the right to take holidays simultaneously while accruing annual leave. The suggested amended Holiday Act thus changes the existing principle of accruing holidays in one year, and taking the accrued leave in the following reference year. In **France**, Law 2015-990 created a system of exemption from Sunday rest in three types of geographical areas, one of these being commercial zones. The *Conseil d'Etat* now held that one of the criteria enabling the definition of a commercial zone – the requirement that the zone is located in an urban area with a population of more than 100,000 inhabitants – does not respect the requirement of taking into account all proper social and economic considerations within the meaning of the International Labour Organisation's Convention 106. In **Latvia**, amendments to the Labour Law covering areas such as overtime and rest, extra annual leave, and breaks were adopted by Parliament. In **Lithuania**, secondary legislation has been adopted to implement the provisions of the new Labour Code. The resolution of the government simply repeats the previously effective legislation in most cases, but not as regards working time. It instead contains important deviations from the Labour Code provisions. In **the Netherlands**, employees may accumulate more working hours on a full-time contract than in any other EU country, namely 60 hours a week (if the average working time does not exceed 48 hours a week over a 16-week period). Recent research of Eurofound, however,

found that full-time employees, on average, work around 39 hours a week, which is less compared to the EU average of 40.4 hours a week. In **Portugal**, the CJEU's ruling in case C-175/16 does not require any legislative changes, but will be an important instrument to construe Portuguese labour law accordingly. In the **United Kingdom**, the Employment Appeal Tribunal has stated that voluntary overtime, out of hours standby allowances and call-out payments count towards holiday pay, if sufficiently regular, even though there was no obligation for workers to accept the offer of overtime or to participate in the on-call rota.

Temporary agency work

In **Austria**, the Supreme Court held that legally binding agreements with the works council on working time and pay, which are only legally relevant as amendments to the individual employment contracts are also included in the notion of "binding general provisions", as otherwise the equal pay principle would not be followed. In the **Czech Republic**, Act No. 206/2017 Coll., amending Act No. 435/2004 Coll., on Employment, and other related acts – transposing Directive 2008/104/EC on temporary agency work – was published together with a draft of a related government decree setting out the professions excluded from temporary agency work. In **Denmark**, the courts were concerned with the question of transfer of seniority in the context of conflicting provisions in collective agreements where a former temporary agency worker was directly employed with the user undertaking following consecutive assignments. In **Germany**, a new Section 1 subs. 4 has been added to the Act on Temporary Agency Work, stating that the Act will be applicable to nurses of the German Red Cross with the exception of Section 1 subs. 1 sentence 4 of the Act. The latter provides that temporary assignments of agency workers are admissible if they do not exceed the maximum length laid down in subsection 1b (which is 18 months). In **Slovenia**, the Supreme Court held that the provision of incorrect information by the user

undertaking on the (non)existence of exceptional grounds on its part for the conclusion of a fixed-term contract between the temporary agency worker and the agency may influence the relationship between the agency and the user undertaking, but not the relationship between the agency and the agency worker.

Transfer of undertakings

In **Germany**, the Federal Labour Court, in its judgement of 30 August 2017, followed the CJEU's reasoning in case C-680/15 and C-681/15 on 'dynamic' clauses in the context of transfers of undertakings. In **Hungary**, the Supreme Court decided a case on employer obligations as regards changes in employment conditions, as well as possible grounds for dismissal in the context of a transfer of undertaking. In **Latvia**, the CJEU judgement in case C-416/16 will have implications as far as it provides for an interpretation of the concepts of 'undertaking', 'legal transfer' and 'employee', since the relevant provisions of the Latvian Labour Law are of rather general nature. In **Lithuania**, the Court of Appeals issued a ruling in a case where a trade union challenged the applicability of the rules of public procurement, arguing that the municipality by initiating the purchase of the transport services by way of public procurement, violated Directive 2001/23/EC on transfers of undertakings. In **Spain**, the Supreme Court concluded that no transfer of undertaking takes place in a situation where a contractor company replaces the previous one without a transfer of material means, even if the workers are kept. The Court underlined that collective agreements in the cleaning sector often require the new employer to keep the workers who worked for the previous one.

Table 1. Main developments

Topic	Countries
Working time	DK, FR, LV, LT, NL, PT, UK
Temporary agency work	AT, CZ, DK, DE, SI
Transfer of undertakings	DE, HU, LV, LT, ES
Minimum wages	CZ, EE, SK
Employer insolvency	CZ, PL
Worker representation	PT, ES
Fixed-term work	FI, DE
Free movement of workers	LI
Posting of workers	NO
Collective redundancy	FR
Termination of employment	EL
Whistleblowing	BE
Undeclared work	RO
Occupational Health and Safety	AT
Sick leave	MT
Educational leave	DE
Child-rearing allowance	RO
Employment of persons with disabilities	RO
Gig economy	UK
Strike	ES

Austria

Summary

(I) Amendments to the Act on Occupational Health and Safety entered into force on 1 August 2017, but no new laws in the field of labour law have been passed due to the parliamentary summer break and the upcoming elections on 15 October 2017.

(II) The Austrian Supreme Court issued a judgement on the issue of equal pay for temporary agency workers.

1 National Legislation

1.1 Early parliamentary elections

On 13 July 2017, the National Assembly passed a law bringing the current legislative period to an end. New elections will be held on 15 October 2017. Due to the planned early election and the parliamentary summer break, during which only exceptional sessions may be held, no new laws in the field of labour law have been passed.

1.2 De-bureaucratisation in the area of occupational health and safety

Amendments to the [Act on Occupational Health and Safety](#) to de-bureaucratise occupational health and safety entered into force on 1 August 2017 as planned (for more information on the content of the Act, see the June 2017 Flash Report).

2 Court Rulings

2.1 Temporary agency work

On 28 June 2017, the Supreme Court issued a judgement in case [No. 9 ObA 15/17x](#) on temporary agency work, equal pay and the reduction of working time with full compensation of pay.

Section 10 subs. 1 of the [Act on Temporary Agency Work](#) (*Arbeitskräfte-überlassungsgesetz*) states:

'The worker is entitled to an adequate pay common in the place of work (...). Collective agreements which the temporary work agency is subject to remain unaffected. To establish what constitutes adequate pay during the assignment, the remuneration provided for by statute or collective agreements paid to comparable workers directly employed by the user undertaking must be taken into account. Furthermore, the remuneration provided for in other binding general provisions in force in the user undertaking, which are paid to comparable workers directly employed by the user undertaking, must be taken into account, unless a collective agreement is applicable to the temporary work agency and a regulation of pay based on a collective agreement, a regulation or statute applies to the user undertaking.' (author's translation)

For working time and holiday entitlements, section 10 subs. 3 sets out:

"During the assignment, provisions laid down by legislation, regulations, collective agreements and/or other binding general provisions in force in the user undertaking relating to working time and holidays applicable to comparable

workers directly employed by the user undertaking also apply to temporary agency workers.” (author’s translation)

The collective agreement for temporary agency (blue collar) workers provides for a regular weekly working time of 38.5 hours (full-time) and, if the temporary agency worker is assigned to a user undertaking with a shorter weekly working time, the reduction of pay is prohibited, i.e. the worker will have to be paid for 38.5 hours per week, even if he/she works fewer hours due to the reduced working time laid down by regulations, collective agreements and/or other binding general provisions in force in the user undertaking.

The employment contracts of temporary agency workers, who were the claimants in the present case, provided for a weekly working time of 36 hours, although the regular weekly working time of the applicable collective agreement for temporary agency (blue collar) workers is 38.5 hours (see above). The temporary agency workers had been assigned to a user undertaking where, pursuant to an agreement with the works council, the regular weekly working time had been reduced to 36 hours with full compensation, meaning pay for 38.5 hours albeit only working 36 hours.

The temporary agency workers claimed remuneration for 38.5 hours arguing that the part-time agreements were only concluded to circumvent full compensation for working reduced hours. The employer as well as the labour court and the court of appeals rejected the claim, asserting that an applicable collective agreement exists for both the temporary work agency as well as for the user undertaking and that the binding general provisions providing for full compensation despite reduced working time therefore do not apply to them.

The Austrian Supreme Court, however, ruled differently and resolved an issue that has been disputed in the Austrian legal literature. It concerns the notion of “binding general provisions” and whether or not legally binding agreements with the works council on working time and pay that are only legally relevant as amendments to the individual employment contracts are also included in this notion. The question was answered positively, as otherwise the equal pay-principle would not be followed; this apparently also applies to long standing employment practices in the user undertaking.

Concerning the claim itself, the Supreme Court considered the part-time agreements a circumvention of the compensation for the reduction of working time as it ‘synchronises’ the reduced working time in the user undertaking and the contractual working time. It therefore avoids the application of the works council agreement on reduced working time and the application of the collective agreement for blue collar workers in temporary work agencies.

According to the Supreme Court, real part-time agreements (e.g. 20 hours per week) are still possible nonetheless. However, in this case, compensation for the reduction of working hours in the user undertaking has to be taken into account.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Belgium

Summary

(I) A new law on the supervision of financial institutions prohibiting retaliation, discrimination and any other form of unfair treatment or adverse action against employees who report infringements of financial legislation in good faith was adopted on 31 July 2017.

(II) A new Flemish decree amends the Dutch Language Decree so that invoices may now also be legally enacted in another EU language apart from Dutch.

1 National Legislation

1.1 Law of 31 July 2017 on the supervision of the financial sector

Directive 2014/65/EU of 15 May 2014 on financial instruments markets requires Member States to ensure that there is appropriate protection against retaliation, discrimination or other types of unfair treatment of employees of financial institutions who report, in good faith, infringements of financial legislation.

A new law, the Law of 31 July 2017 on the supervision of the financial sector (*Moniteur belge* 11 August 2017), has now been adopted, prohibiting retaliation, discrimination and any other form of unfair treatment or adverse action against employees who report infringements of financial legislation in good faith.

Retaliation, discrimination and any other form of unfair treatment or adverse action against those reporting employees, as a result of or in connection with the notification of infringements, is prohibited.

The protection of whistleblowers includes protection against dismissal. In case of dismissal against this legal protection, the whistleblower has the right to request the employer to reinstate him/her in the company under the conditions that existed before the termination of the employment contract. Alternatively, the whistleblower can opt for compensation.

S/he is also entitled to this compensation if the employer, after the dismissed employee's request, refuses to reinstate him/her. The amount of dismissal compensation is, depending on the employee's choice, either a lump sum that corresponds to the gross salary for six months, or an amount equal to the proven actual damage suffered by the employee (Article 13, paragraph 3).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

4.1 Decree of the Flemish Community of 7 July 2017 containing various provisions relating to the policy area of labour and social economy

The Belgian labour lawyer knows that it is mandatory to use Dutch for social relationships with employees associated with an operating site in the Dutch language area on the basis of the Dutch Language Decree.

What is perhaps less known is that the Dutch Language Decree of 19 July 1973 also requires the use of Dutch for invoices.

As a result of the judgement of the Court of Justice of 21 June 2016 in case C-15/15, *New Valmar*, a new Flemish decree (*Moniteur belge*, 1 August 2017) amends the Dutch Language Decree.

The adjustment provides that for invoices addressed to a natural person or enterprise located in one of the EU Member States, an "additional" legal version of the invoice may be issued in another official EU language.

Czech Republic

Summary

(I) Act No. 206/2017 Coll., amending Act No. 435/2004 Coll., on Employment, and other related acts, transposing Directive 2008/104/EC on temporary agency work, was published together with a draft of a related government decree setting out the professions excluded from temporary agency work.

(II) The draft of the Decree on the adjustment of conditions for asserting employees' wage claims in the event of employer insolvency has entered the legislative procedure.

(III) The draft of the Decree amending the Decree on Minimum Wage has entered the legislative procedure.

(IV) The draft of the Act introducing a long-term care allowance is ready to be signed by the President.

1 National Legislation

1.1 Transposition of Directive 2008/104/EC on temporary agency work

Act No. 206/2017 Coll., amending Act No. 435/2004 Coll., on Employment, and other related acts, was published on 14 July 2017 and entered into force on 29 July 2017.

The Act underwent many changes during the legislative procedure (for more information on the previous stages of the legislative procedure, see also the January, March, April and June 2017 Flash Reports). The following is a final comprehensive overview of the individual legislative changes introduced.

The Act amends primarily the Act on Employment, the Labour Code and the Inspection of Labour with regard to temporary work agencies.

a. Act on Employment

One of the major changes introduced by the Act is the re-implementation of the possibility to post foreign workers (who obtained a so-called employee card, a blue card, or a work permit) to the Czech Republic via temporary work agencies. Regarding this change, it should be noted that a Government Decree further limiting the posting of foreign workers had been issued based on the delegatory provision of Act No. 435/2004 Coll., on Employment, as currently only foreign workers of certain professions are permitted to be posted through temporary work agencies. The Decree is expected to be amended (see below).

Employment agencies will no longer have to file applications for a permit every three years in order to offer their services. Based on the new rules, the first permit will be valid for only three years, but the following permit will be issued for an indefinite period, provided that it was not revoked during the previous period.

Each legal or natural person that applies for a permit will have to put down a deposit in the amount of CZK 500,000. The aim of this new measure is to prevent purpose-driven establishments of employment agencies with the goal of circumventing certain laws, especially in the areas of health insurance and social security. The obligation to put down this deposit will also apply to already existing employment agencies. The deposit will have to be paid within three months from the date the Act comes into effect, otherwise the permit will become void.



The amendment officially adds a definition of disguised employment agency (an employment agency that does not adhere to the requirements set forth in the Act on Employment). A corresponding fine for such misdemeanour in the amount of CZK 10,000,000 has been added to the Act on Labour Inspection.

All employment agencies must appoint a “responsible representative”. This function can only be performed on the basis of an employment relationship agreed upon with a minimum extent of 20 working hours per week – with the exception of persons that are also members of the company’s statutory body, for who compliance with this condition is not expected. This condition will also have to be fulfilled by existing, already authorised, employment agencies within three months from the date the amendments come into effect.

b. Labour Code

The amendment to the Act on Employment also brings changes to the Labour Code, specifically regarding the following two proscriptions:

Employees of work agencies will no longer be permitted to be assigned to user undertakings, if:

- they are already in a basic employment law relationship with the employer (i.e. not only on the basis of an employment law contract, but on the basis of both types of agreements on the performance of work), regardless of the position in which the employee works in or is assigned to (it can be the same position or a completely different position); or
- they have already performed work for the employer in the same calendar month on the basis of a temporary assignment by another employment agency – not only concurrently, but also in sequence, e.g. by performing work for agency A for the first 15 days of the month, and performing work for agency B for the final 5 days of the month.

This will result in more administrative work for employers as regards the connecting of registries of their permanent staff and with that of temporarily assigned employees. This may result in major complications, especially for employers who are active across entire regions or even the entire territory of the Czech Republic. Financial penalties may then be imposed on both the employment agency as well as the employer to which the employee was temporarily assigned. After all, the employer has more control over compliance with the above prohibitions than the agency.

c. Act on Labour Inspection

The amendment implements new sanctions to cover the violation of duties newly introduced in the Labour Code (see above).

The amendment also implements new reporting obligations for employers when, for example, installing camera systems or implementing new internal regulations regarding the use of the internet, accompanied by fines of up to CZK 100,000.

1.2 Professions excluded from temporary agency work

The draft of the Decree amending Decree No. 64/2009 Coll., on defining professions which are excluded from temporary agency work, has entered the legislative procedure. Specifically, the draft has just passed through the amendment procedure and is awaiting approval by the government. The anticipated date of effect is 15 days after it is published.



Based on the delegatory provision of Act No. 435/2004 Coll., on Employment, the government is authorised to determine which professions (i.e. which types of work) are to be excluded from temporary agency work.

Decree No. 64/2009 Coll. delegates legislation mandated by the provision of the Act on Employment, which sets forth requirements for foreign workers who are posted to the Czech Republic through temporary work agencies. Only foreign workers of certain professions are permitted to be posted through temporary work agencies.

The draft, if passed, would amend Decree No. 64/2009 Coll. — the permitted professions for the purpose of posting foreign workers through temporary work agencies would then either be those that have higher education as a requisite qualification or the professions listed as exceptions in the annex to the Decree.

The draft takes into account the recent amendment of the Act on Employment (see above) which allows foreigners (who have obtained either employee cards, blue cards, or work permits) to be posted through temporary work agencies, while, at the same time, the policy responds to the current changes in the labour market — the Decree is tailored to satisfy the demand for certain types of work.

1.3 Protection of employees in the event of employer insolvency

The draft of the Decree on the adjustment of conditions for asserting employees' wage claims in the event of employer insolvency is in the legislative procedure. Specifically, the amendment procedure has just been completed and the draft of the Decree is awaiting approval by the government. The anticipated date of effect is 15 days after it is published.

Recently, Act No. 118/2000 Coll., on the protection of employees in the event of employer insolvency has been amended, giving the government the authority to specify certain aspects of the Act.

The Act provides that certain claims will be subject to the protection of the Act — specifically those claims acquired by employees within a so-called "relevant period", i.e. three months before and three months after the month in which a moratorium has been declared or in which an insolvency proposal was submitted.

The Decree is a secondary piece of legislation mandated by a delegatory provision of the Act. Based on this delegatory provision, the government set the relevant period to three months before and 27 months after the month in which the moratorium has been declared or in which an insolvency proposal was submitted for employees of employers that have at least 500 employees.

The Act also states that employees can submit a claim against the employer within five months and 15 days after the Labour Office publishes the notice of the employer's insolvency. In the draft of the Decree, the government prolonged this period to 29 months and 15 days for employees of employers that have at least 500 employees.

The Act is applicable even to claims that arose before the Act came into effect.

1.4 Increase of the minimum wage

On 21 August 2017, the government adopted a new amendment to Government Regulation No. 567/2006 Coll., on the minimum wage. The Decree has not yet been published, but it is planned to enter into force on 1 January 2018.

Based on this amendment, the monthly minimum wage will rise to approximately EUR 467 (CZK 12,200) and the hourly minimum wage will reach approximately EUR 2.80 (CZK 73.20), effective as of 1 January 2018. Aside from the increase of the minimum



wage, we will also see an increase in the guaranteed wage, which will range between EUR 467 and EUR 934 (CZK 12,200 to 24,400) per month.

An increase in the minimum wage will also affect other areas. First, it is necessary to point out that along with the minimum wage increase, there will also be an increase of the minimum assessment basis for the health insurance, the amount of which corresponds to the minimum wage.

Additionally, the minimum wage will influence the incorporation allowance obtained by the employer from the Labour Office for hiring an applicant who was granted additional care. The amount of this allowance is one half of the minimum wage, at most. Moreover, one half of the minimum wage is the maximum amount of money that a job applicant can earn without being removed from the list of candidates (however, entitlement to unemployment benefits is not granted, even with such a low income).

1.5 Long-term care allowance

The [draft](#) amending Act No. 187/2006 Coll., on Sickness Insurance, and No. 262/2006 Coll., the Labour Code, is in the legislative procedure. The draft was recently approved by the Senate and was sent to the President for signature. Following that, it shall enter into effect on the first day of the ninth month after it was published (see also the February and July 2017 Flash Reports).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Denmark

Summary

(I) The Committee on revising the Holiday Act has submitted its report, recommending the right to take holidays simultaneously while accruing annual leave.

(II) Seniority from a temporary work assignment was not allowed to be transferred to a permanent post with the same user undertaking, due to a 10-day break between assignments.

1 National Legislation

1.1 Recommendation for new Holiday Act

The Committee on the revision of the Holiday Act presented its final report with recommendations to the government on 22 August 2017.

The Committee consisted of the former President of the Supreme Court (Chair) and 10 social partner representatives, five from employers' associations and five from workers' organisations.

The Danish Holiday Act dates back to 1938. The Holiday Act has been regularly adjusted and updated. The principle of accrued paid holidays allows for an accrual period of 12 months running from 1 January to 31 December, and a reference period in which to take the accrued holiday running from 1 May (the following year) to 30 April (the second year). In some cases, this principle means that a person entering the labour market may have to wait up to 16 months before she/he can take the accrued paid holidays. This principle has not changed since the Holiday Act was first introduced. The European Commission stated in its communication that this principle is not in compliance with Article 7 of [Directive 2003/88/EC](#) on working time.

The recommended new system entails that the employee has the right to take paid holiday simultaneously while accruing the right to paid annual leave. The year of accrual is suggested to be changed to run from 1 September to 31 August, i.e. 12 months. The reference period in which to take the holiday is suggested to be changed to start on the same date, 1 September, and run for 16 months until 31 December the following year.

The Committee suggests a transition period to implement the new system as of 1 September 2020.

The report has been submitted to the government. The government will now prepare a proposal for a new Holiday Act which will be presented to Parliament. There is no indication regarding the date for presenting the proposal.

2 Court Rulings

2.1 Temporary agency work

Industrial arbitration ruling of 31 July 2017

In the present case, a temporary agency worker employed by a temporary work agency had been assigned to a user undertaking, where he had performed work as a temporary agency worker for 3.5 years. After a break of 10 days, he was assigned to the user undertaking again, and after two months, he was permanently employed.

The question was one of seniority and of conflicting provisions in collective agreements. In the agreement between the parties on temporary agency work, the Protocol on



Temporary Agency Workers, it is stated that when a temporary agency worker has been working for the user undertaking for more than six months, and the temporary agency worker is employed by that user undertaking in direct continuance of the work, the seniority of the temporary agency work can be transferred to the permanent position. Only the latest work period with the user undertaking is transferred. In the ordinary collective agreement between the parties, an employee who is dismissed for legitimate reasons by the company but who is re-employed within nine months, retains his/her original seniority earned during the prior employment at the company. The temporary agency worker stated that the provision in the protocol on only transferring seniority from the latest working period should be overruled by the provision in the ordinary collective agreement, as the situation was most similar to the situation presented in the ordinary agreement. The court stated that the Protocol on Temporary Agency Workers is *lex specialis*, and hence overrules the provision in the ordinary collective agreement. The employee was only allowed to transfer the seniority for the two months of assignment and not the 3.5 years of the assignment.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Estonia

Summary

(I) As the agreement between the Estonian Trade Unions' Confederation and the Estonian Employers' Association on the monthly minimum wage will come to an end this year, the Estonian Trade Unions' Confederation has already expressed its view that during the next three years, the monthly minimum wage has to increase to EUR 650 gross.

(II) The monthly average wage has increased according to recent data of the Estonian Statistical Board, reaching EUR 1242 gross in the second quarter of 2017.

(III) Young people are in favour of practical training and apprenticeships according to a survey that was conducted by the Estonian Employers' Association.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Negotiations on new monthly minimum wage

The agreement between the Estonian Trade Unions' Confederation and the Estonian Employers' Association on the monthly minimum wage will come to an end this year. The two-year agreement had foreseen that the monthly minimum wage will increase from EUR 435 to EUR 470. New negotiations will continue in autumn. The Estonian Trade Unions' Confederation has argued that over the next three years, the monthly minimum wage has to increase to reach EUR 650 gross. Also, the trade unions have expressed their view that the monthly minimum wage should be at least half of the average monthly wage. The Estonian Employers' Association has not yet expressed its point of view. The current monthly minimum wage is EUR 470 gross.

4.2 Monthly average wage has increased

According to recent data of the [Estonian Statistical Board](#), the monthly average wage in Estonia has increased. In the second quarter, the average monthly wage was EUR 1,242 gross. Compared to the same period of 2016, the average wage has increased by 6.8 percent. In April, it was EUR 1,120, in May EUR 1,201 and in June EUR 1,311 gross. The higher monthly average wage is mainly connected with payments of annual leave compensations. The average wage per hour in the second quarter was EUR 7.50 (gross).

The highest monthly average wages were found in the information and communications sector and in the finance and insurance sector (EUR 2,135 and EUR 2,052, respectively).



4.3 Young people in favour of practical training and apprenticeships

Young people are in favour of practical training and apprenticeships according to a [survey](#) that was conducted by the Estonian Employers' Association. They find that the share of practical training during studies has to increase. For the most part, students at universities are in favour of increasing the share of practical training during their studies. Approximately 60 percent of the respondents are in favour of such opportunities, whereas the majority state that learning will be done through apprenticeships.

The respondents also stated that it has become easier to find an employer where they can obtain training and that the knowledge about possible practical trainings and apprenticeships has increased.

Finland

Summary

The Supreme Court has issued a remarkable ruling on the employer's obligation to consider whether an employee with a fixed-term contract can be offered work once the fixed term ends.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term contracts

Supreme Court, judgement KKO 2017:55, Record Number S 2015/615

On 11 August 2017, the Supreme Court handed down its judgment No. KKO 2017:55, Record Number S 2015/615.

In the present case, an employee had a total of 16 employment contracts for a fixed term between 3 March 2003 and 31 December 2011. The dispute concerned firstly whether there were legal grounds for the fixed-term contracts. Secondly, the dispute concerned whether the employer should have offered the employee work when the last fixed-term contract ended.

There is no regulation in the Finnish [Employment Contracts Act](#) on this type of obligation, as long as grounds exist to conclude fixed-term contracts according to chapter 1, section 3 of the Act.

The Supreme Court held that lawful grounds existed for concluding the fixed-term contracts. The employee did not have the legal competence to perform the job, this requirement being regulated in the legislation.

However, the Supreme Court stated that the employer should have clarified whether the employee could have been offered a job when the last fixed term ended. The Supreme Court based its judgement on Union law on the rights of employees with fixed-term contracts and the equality obligation. The employee had been treated less favourable than an employee with a contract of indefinite duration.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

France

Summary

(I) The *Conseil d'Etat* dealt with the French exemption to weekly rest against the background of ILO Convention C106 on Weekly Rest.

(II) The *Conseil d'Etat* has, moreover, decided a case concerning the Employment Safeguard Programmes in the context of collective redundancies.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Decision of the Conseil d'Etat (French administrative jurisdiction), 28 July 2017, No. 394732 and 394735

Law 2015-990 on growth, activity and equal economic opportunities of 6 August 2015 created a system of exemption from Sunday rest in three types of geographical areas:

- international tourism zones delimited by the labour, tourism and trade ministers, taking into account the international significance of these areas, the exceptional number of tourists from outside of France and the importance of their purchases (Article L. 3132-24 of the French Labour Code);
- tourist zones delimited by the Prefect of the district, which are characterised by a particularly large influx of tourists (Article L. 3132-25 of the French Labour Code) [A Prefect is the State's representative in a department or district.];
- and commercial zones, also delimited by the Prefect of the district, which are characterised by a particularly large potential of commercial supply and demand, taking into account the proximity of a border zone (Article L. 3132-25-1 of the French Labour Code).

The criteria for the delimitation of these zones were defined by [Decree No. 2015-1173](#) of 23 September 2015.

In the present case, trade unions claimed the annulment of Decree No. 2015-1173 before the *Conseil d'Etat*.

They argued that the Decree violated Articles 6 and 7 of the International Labour Organisation's Convention 106 of 26 June 1957 ([Weekly Rest \(Commerce and Offices\) Convention, 1957 \(No. 106\)](#)), which requires the ratifying States to organise a weekly rest period coinciding with the day of the week recognised as a day of rest by the tradition or customs of the country or district.

The ILO Convention 106 also limits the exemptions that can be made to this principle in accordance with the following criteria:

"1. Where the nature of the work, the nature of the service performed by the establishment, the size of the population to be served, or the number of persons employed is such that the provisions of Article 6 cannot be applied, measures may be taken by the competent authority or through the appropriate machinery in each country to apply special weekly rest schemes, where appropriate, to specified categories of persons or specified types of establishments covered by

this Convention, regard being paid to all proper social and economic considerations.

2. All persons to whom such special schemes apply shall be entitled, in respect of each period of seven days, to rest of a total duration at least equivalent to the period provided for in Article 6." (Article 7 of the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106))

In [Decision No. 394732 and 394735 of 28 July](#), the *Conseil d'Etat* considered that the criteria defined in Decree No. 2015-1173 on international tourism and tourist zones respect the requirement of taking into account all proper social and economic considerations within the meaning of the International Labour Organisation's Convention 106 (notably, with respect to the development of international tourism in a context of competition in major European cities and changes in consumer practices).

Moreover, the criteria defined in Decree No. 2015-1173 allow for verification whether the implementation of a derogatory weekly rest scheme in these areas is justified.

Regarding commercial zones, Article R 3132-20-1 of the French Labour Code deriving from the contested Decree No. 2015-1173 provided that this weekly rest exemption must respect the following criteria:

- set up in a commercial complex with a total sales area of more than 20 000 m²;
- have an annual number of customers of over 2 million or be located in an urban area with a population of more than 100,000 inhabitants;
- be equipped with the appropriate infrastructure and accessible by individual and collective means of transport – for areas located within less than 30 km from a border area, some of these thresholds are lowered.

The *Conseil d'Etat* noted, first of all, that these criteria allow for an exemption scheme to be applied in 61 urban areas, comprising some 30 million inhabitants.

Secondly, the *Conseil d'Etat* considered that the claim according to which this exemption scheme would respond to new consumer practices in large urban areas, with shop owners asserting that sales being spread out to both Saturdays and Sundays is insufficient for establishing Sunday shopping in all urban areas with a population of more than 100,000 inhabitants.

The commercial zones' exemption thus does not respect the requirement of taking into account all proper social and economic considerations within the meaning of the International Labour Organisation's Convention 106.

The *Conseil d'Etat* therefore annulled the criterion according to which the commercial zone must be located in an urban area with over 100,000 inhabitants.

However, the other criteria enabling regional Prefects to define commercial zones remain in force. Thus, the exemption to Sunday rest is still possible on the basis of a commercial zone being fixed by the Prefect.

"15. En premier lieu, aux termes des dixième et onzième alinéas du Préambule de la Constitution d 27 octobre 1946 : « La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement. / Elle garantit à tous (...) la protection de la santé, la sécurité matérielle, le repos et les loisirs (...) ». Le décret attaqué se borne, ainsi qu'il a été dit, à préciser les critères de délimitation des trois types de zones régies par les articles L. 3132 24 à L. 3132-25-4 du code du travail, dans lesquelles le repos hebdomadaire peut être donné par roulement à tout ou partie du personnel. D'une part, il ne porte ainsi par lui-même aucune atteinte au principe du repos hebdomadaire, qui est l'une des garanties du droit au repos reconnu aux salariés par le onzième alinéa du Préambule de la Constitution de 1946. D'autre part, par les précisions qu'il apporte aux critères

retenus par le législateur pour permettre de déroger au principe du repos dominical, il ne méconnaît pas les exigences constitutionnelles résultant du dixième alinéa de ce Préambule.

16. En deuxième lieu, les articles L. 3132-24 à L. 3132-25-4 du code du travail dérogent à l'article L. 3132-3 du même code, selon lequel : « Dans l'intérêt des salariés, le repos hebdomadaire est donné le dimanche ». Par suite, les requérants ne peuvent utilement soutenir que le décret attaqué, pris pour l'application des articles L. 3132-24 à L. 3132-25-4, méconnaît les dispositions de l'article L. 3132-3.

17. En dernier lieu, s'il appartient aux ministres chargés de la délimitation des zones touristiques internationales d'apprécier, dans le respect des engagements internationaux de la France et sous le contrôle du juge de l'excès de pouvoir, les situations de fait répondant aux conditions de « rayonnement international en raison d'une offre de renommée internationale en matière commerciale ou culturelle ou patrimoniale ou de loisirs », d'« affluence exceptionnelle de touristes résidant hors de France » et de « flux important d'achats effectués par des touristes résidant hors de France, évalué par le montant des achats ou leur part dans le chiffre d'affaires total de la zone », les dispositions du II de l'article R. 3132-21-1 inséré dans le code du travail par le décret attaqué, qui ne sont pas équivoques, ne méconnaissent pas l'objectif de valeur constitutionnelle d'accessibilité et d'intelligibilité de la norme ni, en tout état de cause, le principe de sécurité juridique.

18. Il résulte de tout ce qui précède que la Fédération CGT des personnels du commerce, de la distribution et des services, la Fédération des employés et cadres Force ouvrière, le Syndicat des employés du commerce et de l'industrie UNSA, l'Union syndicale CGT, le Syndicat SUD commerces et services et l'Union départementale CFTC de Paris sont fondés à demander l'annulation du décret qu'ils attaquent en tant seulement qu'il comprend, au I de l'article R. 3132-20-1 qu'il insère dans le code du travail, les mots : « ou être située dans une unité urbaine comptant une population supérieure à 100 000 habitants. » (Decision of the Conseil d'Etat (French administrative jurisdiction), 28 July 2017, n°394732 and 394735).

2.2 Collective redundancies

Decision of the Conseil d'Etat (French administrative jurisdiction), 19 July 2017, No. 391849

In case of a collective redundancy due to economic difficulties (Article L. 1233-3 of the French Labour Code), the employer has establish an Employment Safeguard Programme (*PSE*) aiming to preserve work and ensure redeployment (see Article L. 1233-61 of the French Labour Code).

The measures of the *PSE* can either be included in a collective agreement or issued by unilateral decision of the employer. The *PSE* must be accredited by the French labour administration in case of a unilateral decision of the employer.

Some employees benefit from protection against dismissal (staff representatives, union delegates, etc.; see Article L. 4211-1 of the French Labour Code) and their dismissal must also be accredited by the French labour administration (Article L. 2421-1 of the French Labour Code).

In [Decision No. 391849 of 19 July 2017](#), the *Conseil d'Etat* clarified the structuring of both accreditation processes by the French labour administration in a case where the dismissal of a protected employee was implemented in the context of a *PSE* and collective redundancy case.

In the present case, the judicial liquidation of the company led to 163 collective redundancies. A decision of the French labour administration of 10 October 2013 accredited the *PSE* and a decision of the Labour Inspector of 6 November 2013 authorised the dismissal of a protected employee who was one of the employees made redundant.

Two judgements of the Administrative Court of 4 March 2014 annulled the approval decision of the *PSE* and, consequently, the authorisation to dismiss the protected employee.

However, the Administrative Appeal Court disagreed and dismissed the application to quash the decision authorising the dismissal. The Appeal Court held that the two procedures are distinct (Administrative Court of Appeal, 7 June, 2015, No. 14MA02021).

Nonetheless, the *Conseil d'Etat* rejected the Court of Appeal's reasoning. The *Conseil d'Etat* decided that the invalidation of the decision to approve the *PSE* consequently entails the illegality of the authorisation of the dismissal of the protected employee included in the collective economic dismissal.

The *Conseil d'Etat* then explained that in order to be valid, the authorisation of the dismissal of the protected employee within the context of a collective redundancy must be based on an accrediting decision of the *PSE*.

Therefore, the quashing of the *PSE* results in the illegality of the accrediting decision for the dismissal of the protected employee.

However, the *Conseil d'Etat* clarified that in case the approval decision of the *PSE* is quashed "*due to inadequate grounds, the administrative authority shall take a new decision, sufficiently grounded, within 15 days of the notification of the judgement*" (Article L. 1235-16 of the French Labour Code).

Once the French labour administration has issued its new accrediting decision of the *PSE* within 15 days and which must be sufficiently grounded, protected employees will no longer be able to claim the quashing of their dismissal authorisation decision of the French labour administration on the basis that the first accrediting decision of the *PSE* has been quashed.

"6. Considérant, toutefois, que les deux derniers alinéas de l'article L. 1235-16 du code du travail introduits par la loi du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, ainsi que les deux derniers alinéas de l'article L. 1233-58 du même code introduits par la même loi, ont prévu, dans des termes identiques pour les entreprises qui sont en liquidation ou redressement judiciaire et pour les entreprises qui ne le sont pas, que : " En cas d'annulation d'une décision de validation mentionnée à l'article L. 1233-57-2 ou d'homologation mentionnée à l'article L. 1233-57-3 en raison d'une insuffisance de motivation, l'autorité administrative prend une nouvelle décision suffisamment motivée dans un délai de quinze jours à compter de la notification du jugement à l'administration. (...) / Dès lors que l'autorité administrative a édicté cette nouvelle décision, l'annulation pour le seul motif de l'insuffisance de motivation de la première décision de l'autorité administrative est sans incidence sur la validité du licenciement (...) " ; que ces dispositions sont applicables aux décisions d'annulation prononcées par le juge de l'excès de pouvoir à compter du 8 août 2015, date de l'entrée en vigueur de cette loi;

7. Considérant, dès lors, que, par exception à ce qui est dit au point 5, l'annulation d'une décision d'homologation ou de validation d'un plan de sauvegarde de l'emploi prononcée à compter du 8 août 2015 et pour le seul motif d'une insuffisance de motivation n'entraîne pas, par elle-même, l'illegalité des autorisations de licenciement accordées dans le cadre de ce licenciement



collectif, sous réserve que l'autorité administrative ait pris, dans le délai prévu par le texte cité ci-dessus, une nouvelle décision suffisamment motivée;

[...]

11. Considérant que, par un arrêt du 1er juillet 2014, la cour administrative d'appel de Marseille a rejeté les appels formés contre le jugement n° 1308064 du 4 mars 2014 par lequel le tribunal administratif de Marseille a annulé la décision d'homologation du plan de sauvegarde de l'emploi de la société Milonga ; que, par une décision du 30 mai 2016, le Conseil d'Etat, statuant au contentieux, a rejeté les pourvois dirigés contre cet arrêt ; qu'ainsi, eu égard à l'effet rétroactif des annulations contentieuses, aucune décision d'homologation du plan de sauvegarde de l'emploi n'était en vigueur à la date à laquelle l'inspecteur du travail a autorisé le licenciement de M.B... ; que, cette autorisation ne pouvant, par suite, être légalement accordée, la société J.P Louis et A. Lageat et le ministre chargé du travail ne sont pas fondés à soutenir que c'est à tort que, par le jugement attaqué, le tribunal administratif de Marseille a annulé la décision du 6 novembre 2013 autorisant le licenciement de M. B...;

12. Considérant qu'il y a lieu, dans les circonstances de l'espèce, de mettre à la charge de l'Etat et de la société J.P Louis et A. Lageat, tant pour l'instance d'appel que pour l'instance de cassation, une somme de 2 500 euros chacun à verser à M. B...au titre des dispositions de l'article L. 761-1 du code de justice administrative ; qu'en revanche, ces mêmes dispositions font obstacle à ce que soit mise à la charge de M.B..., qui n'est pas la partie perdante, la somme que demande au même titre la SCP J.P Louis et A. Lagea." (Decision of the Conseil d'Etat (French administrative jurisdiction), 19 July 2017, n° 391849).

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) A modification of the Act on Temporary Agency Work, taking into account both the judgements of the CJEU in the case *Ruhrlandklinik* and of the Federal Labour Court of 21 February 2017, entered into force on 26 July 2017.

(II) According to the Federal Labour Court, the fixing of the term of a contract of employment between an actor and a film production company can be justified by the 'nature of the work' if the actor has been engaged over many years for the same role.

(III) The Federal Labour Court followed the ruling of the CJEU in case *Asklepios*.

(IV) The State Labour Court Baden-Württemberg held that the state law on educational leave must be interpreted in light of ILO Convention 140.

1 National Legislation

1.1 Modification of the Act on Temporary Agency Work

On 26 July 2017, a new provision of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*) entered into force (see BT-Plenarprotokoll 18/237 of 01 June 2017; [BR-Drs. 448/17 of 16 June 2017](#)). This provision is part of a legislative package tackling pension insurance issues and thus passed widely unnoticed. According to the new law, Section 1 of the Act on Temporary Agency Work will be amended. According to a new Section 1 subs. 4, the Act on Temporary Agency Work will be applicable to nurses of the German Red Cross with the exception of Section 1 subs. 1 sentence 4 of the Act. According to Section 1 subs. 1 sentence 4, temporary assignments of agency workers are admissible if they do not exceed the maximum length laid down in subsection 1b (which is 18 months).

Section 1 subs. 4 takes into account both the judgements of the CJEU (of 17 November 2016 – *C-216/15 Ruhrlandklinik*) and of the Federal Labour Court (of 21 February 2017 – 1 ABR 62/12). The CJEU had ruled that Article 1 para. 1 and 2 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that the scope of that Directive covers the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his/her main occupation and under the direction of that user undertaking, work in return for remuneration, where that member is protected on that basis in the Member State concerned, this being a matter for the referring court to determine, even if that member does not have the status of worker under national law on the ground that s/he has not concluded a contract of employment with that association. Section 1 subs. 4 clearly aims at restricting the consequences of both decisions. However, there are doubts as to whether the new section 1 subs. 4 is in conformity with EU law, (see, in particular, *Mestwerdt*, [jurisPR-ArbR 23/2017](#), note 2 and *Düwell*, [jurisPR-ArbR 36/2017](#), note 1).

2 Court Rulings

2.1 Fixed-term contracts

Federal Labour Court judgement of 30 August 2017 - 7 AZR 864/15

According to the [Federal Labour Court judgement of 30 August 2017 - 7 AZR 864/15](#), the fixing of the term of a contract of employment between an actor and a film production company can be justified by the 'nature of work' within the meaning of Section 14 subs. 1, sentence 1, No. 4 of the Act on Part-Time and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz*), if the actor has been engaged over many years for the same role (inspector in a crime series).

Under German law, the term of a contract of employment can, in principle, only be fixed if such fixing is justified on objective grounds. This is laid down in Section 14 subs. 1, sentence 1 of the Act on Part-Time and Fixed-Term Employment. According to Section 14 subs. 1, sentence 2, an objective ground, for instance, exists if: the need for certain manpower is only temporary (No. 1); the term is fixed to make it easier for an apprentice or post-graduate to get subsequent employment (No. 2); a worker is employed to substitute another worker (No. 3); the nature of work justifies the fixing of the term (No. 4); the fixing of the term serves the purpose of testing the worker (No. 5). Section 14 subs. 2 contains an exception to the principle enshrined in Section 14 subs. 1 according to which the fixing of a term requires an objective ground. Under Section 14 subs. 2, sentence 1, the fixing of a term according to the calendar is admissible without the existence of objective grounds, if the duration of the contract does not exceed two years.

The ruling is in line with earlier judgements. The objective ground of the 'nature of the work' within the meaning of Section 14 subs. 1, sentence 1, No. 4 is difficult to grasp. In essence, Section 14 subs. 1, sentence 2, No. 4 covers so-called 'issues of attrition' (*Verschleißtatbestände*). 'Attrition' within this meaning refers, in particular, to situations where there is an extraordinary weakening of the capacities of a worker in his or her job. Employment contracts with artists may be particularly illustrative in this regard – because there is a certain need of alternation in this area and because there is according corresponding need on the part of the employer to enjoy some flexibility, there must be certain room for the fixing of terms with artists.

2.2 Transfer of undertakings

Federal Labour Court judgement of 30 August 2017 - 4 AZR 95/14

In its [judgement of 30 August 2017 - 4 AZR 95/14](#), the Federal Labour Court followed a recent ruling of the CJEU according to which in the case of a transfer of undertaking, the continued observance of the rights and obligations of the transferor arising from a contract of employment extended to a 'dynamic' clause, pursuant to which their employment relationship was governed not only by the collective agreement in force on the date of the transfer, but also by amending agreements subsequent to the transfer, provided that the national law allowed the possibility for the transferee to make adjustments both consensually and unilaterally (CJEU of 27 April 2017 – C-680/15 and C-681/15 – *Asklepios Kliniken Langen-Seligenstadt GmbH v Felja*).

2.3 Educational leave

State Labour Court Baden-Württemberg of 9 August 2017 - 2 Sa 4/17

According to a [ruling of 9 August 2017 - 2 Sa 4/17](#) of the State Labour Court Baden-Württemberg, the notion of 'further education on political matters' (*politische Weiterbildung*) in Section 1 subs. 4 of the Act on Educational Leave of the State Baden-



Württemberg (*Bildungszeitgesetz Baden-Württemberg*) is to be interpreted extensively. Accordingly, a mechanic enjoyed the right to attend a course on 'Workers in business, economy and society'. The Court also relied on international law and, in particular, on ILO Convention 140 on paid educational leave.

The legal field of educational leave is the domain of the *Länder* (German states), most of which have enacted similar legislation. One of these states is the southern state of Baden-Württemberg. The ruling of the State Labour Court confirms the judgement of the previous instance (see Labour Court Stuttgart of 7 April 2017 - 26 Ca 1506/16, notes 33 et seq. on the importance of ILO Convention 140).

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Greece

Summary

According to the new Article 56 of Law No. 4487/2017, an important delay in paying an employee's salary constitutes a unilateral harmful change of the labour conditions irrespective of the cause of the delay.

1 National Legislation

The terms of the labour relationship cannot be modified unilaterally without considering the law, the collective agreement, the internal labour codes, or the individual labour contract. Such a unilateral change is considered harmful when the worker not only suffers material damage but also ethical injury.

Unilateral harmful changes to the terms of the labour contract by the employer does not, in itself, entail the termination of the employment relationship. However, the worker has various options to protect his/her interests and is entitled to consider this change a termination of the contract by the employer (s/he can then claim payment of legal severance pay, if the contract is of indefinite duration (Article 7 of Law No. 2112/1920)).

According to Greek law, a delay in paying an employee's salary does not constitute a unilateral harmful change unless it is deliberately made to force the employee to resign.

Pursuant to a new provision, Article 56 of [Law No. 4487/2017](#), an important delay in paying the salary will constitute a unilateral harmful change in labour conditions, irrespective of the cause of the delay, e.g. even if the delay is due to financial difficulties of the company. In that event, the employee will be entitled to severance pay. As it is not entirely clear when the delay is "*important*", the interpretation of this term will be provided by case law.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

The Supreme Court decided a case on employer obligations as regards changes in employment conditions, as well as possible grounds for dismissal in the context of a transfer of undertaking.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Decision of Kúria Mfv. I. 10.697/2016.

The plaintiff (employee) was employed as an administrator under a contract of indefinite duration by the legal predecessor of the defendant (employer). The defendant's predecessor merged with another company. The defendant informed the employee about the transfer of employment and changes in the working conditions, meeting the requirements of Act I of 2012, the Labour Code (LC). Section 38 subs. 1 of the LC states that '*within fifteen days following the time of transfer, the receiving employer shall inform in writing the employees affected concerning the transfer of employment upon the transfer of the enterprise, disclosing the employer's identification data, and on changes in working conditions (...)*'. The date of this notification was 18 December 2014.

The defendant terminated the plaintiff's employment relationship on 14 January 2015. According to the justification of dismissal, the defendant had to reorganise the company due to the integration process that took place following the transfer. The administrative tasks the employee had carried out had, for these reasons, ceased. The employer offered the defendant another job which the employee did not accept. Further employment was thus not possible.

The plaintiff applied for a declaration of unlawfulness of the dismissal.

The court of first instance accepted the applicant's request. The Labour Court stated that the dismissal was unlawful. The Court referred to Section 66 subs. 3 of the LC which states that the transfer of employment may not in itself serve as grounds for termination. The court of second instance confirmed the judgement of the court of first instance.

The defendant submitted a request for review. The *Kúria* (Supreme Court) held that the request for review was justified. The *Kúria* referred to previous practice. Under Section 36 subs. 1 of the LC, rights and obligations arising from employment relationships, existing at the time of the transfer of an economic entity (organised grouping of material or other resources) by way of legal transaction, are transferred to the transferee employer. However, this automatic transfer does not result in the possibility to amend the contract of employment. The amendment can, however, be caused by the transfer. Although the receiving employer is obliged to employ the employees affected by the transfer under an unchanged contract of employment, s/he may initiate an amendment to the contract of employment if the tasks or other relevant contractual working conditions change.



The amendment of the contract of employment also includes the offering of part-time employment. The employee can decide whether she/he wishes to continue her/his employment under the changed conditions. In case of a negative reply, the successor employer may terminate the employment relationship by reference to the reason for its operation. Under Section 66 subs. 2 of the LC, an employee may be dismissed only for reasons in connection with his/her behaviour in relation to the employment relationship, with his/her ability or in connection with the employer's operations.

The plaintiff was informed about the change in working conditions. S/he did not accept the employer's offer. An amendment of the contract of employment therefore had not taken place. The employer emphasised that he could not employ the employee under the original conditions. For these reasons, the dismissal was not evaluated as an abuse of rights.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

Following the election of a new Prime Minister (*Taoiseach*), a number of government departments have been renamed and reorganised.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Following the election of a new Prime Minister (*Taoiseach*), some government departments have been renamed and some ministerial responsibilities have been transferred. The government department that was previously responsible for labour and employment law matters was the Department of Jobs, Enterprise and Innovation. Following [Order 2017 \(S.I. No. 364 of 2017\)](#), the Department has now been renamed the Department of Business, Enterprise and Innovation.

According to the [Transfer of Departmental Administration and Ministerial Functions Order 2017 \(S.I. No. 361 of 2017\)](#), the functions of the Department of Business, Enterprise and Innovation under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997, the Protection of Employees (Part-Time Work) Act 2001, the Protection of Employees (Fixed-Term Work) Act 2003, the Protection of Employees (Temporary Agency Work) Act 2012 and the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 have been transferred to the Minister for Employment Affairs and Social Protection.

Responsibility for the Protection of Young Persons (Employment) Act 1995, the Transnational Information and Consultation of Employees Act 1996 and the Employees (Provision of Information and Consultation) Act 2006 remains with the Department of Business, Enterprise and Innovation.

Latvia

Summary

(I) Recent amendments to the Labour Law covering areas such as working time and annual leave as well as the transposition of Directive 2015/1794/EU on seafarers were adopted by Parliament on 27 July 2017.

(II) The CJEU judgement in case C-416/16 will have implications on the interpretation of Latvian labour law transposing Directive 2001/23/EC on transfer of undertakings.

1 National Legislation

On 27 July 2017, Parliament adopted amendments to the Labour Law (Darba likums, Official Gazette No. 105, 6 July 2001; the respective amendments: [Official Gazette No.152, 2 August 2017](#)). These amendments entered into force on 16 August 2017. Some of the amendments relate to EU labour law, some transpose the new Directive 2015/1794/EU on seafarers (see also the February 2017 Flash Report). An Explanatory Note to the Amendments (Legislative Proposal No.968/Lp12) has also been published.

Some amendments relate to overtime work and rest periods. Article 136 of the Labour Law regulating overtime work in general was amended by paragraphs 9, 10 and 11. The amendments stipulate that in case of overtime work, the extra pay (200 percent according to Article 68 para. 1 of the Labour Law) may be replaced by paid leave if the employee and the employer have agreed so in writing. This means that to date, if an employee was normally entitled to EUR 10 remuneration per hour, s/he was entitled to EUR 20 remuneration per hour of overtime. The amendments now provide the employee with an opportunity to choose – s/he can either earn more by receiving overtime pay or s/he can get additional time off work, i.e. s/he can receive EUR 10 per hour for overtime and have the right to a paid hour of rest in the amount of EUR 10. Article 136 para. 11 stipulates that if the employment relationship is terminated before an employee has used her/his right to paid rest hours on account of overtime work, s/he is entitled to compensation in lieu. This amendment provides more flexibility for both the employer and the employee in organising working time and rest periods, and consequently, more room for planning financial flows for the employer and private life for the employee.

Another amendment covers the procedure for the use of the right to extra annual leave. According to Article 151 para. 1 of the Labour Law, specific groups of employees are entitled to extra annual leave. Article 151 para. 2 allows the provision of extra annual leave by way of a collective agreement. Until the present amendments were adopted, there was no specific regulation on the procedure or, in other words, on time limits within which extra annual leave had to be granted. Now, the new paragraphs 4 and 5 of Article 151 explicitly state that extra annual leave must be provided prior to the next paid annual leave and that compensation in lieu of extra paid annual leave is not allowed except in case of termination of the employment relationship. Such regulation is similar to the existing one on the procedure of granting paid annual leave under the Labour Law (Article 149) and the Law on Remuneration to the Employees and State Officials of the State and Municipal Institutions (*Valsts un pašvaldību institūciju amatpersonu un darbinieku atlīdzības likums*, [Official Gazette No.199, 18 December 2009](#)).

One amendment implements the finding of the Supreme Court Senate in [case No. SKA-347/2016](#) (decision of 16 June 2016). The Senate found that breaks during work have to be considered working time if an employee is not allowed to leave her/his workplace and s/he has to be ready to take up his/her duties at any moment (see also the October

2016 Flash Report). Article 145 para. 3 of the Labour Law (*Darba likums, Official Gazette No.105, 6 July 2001*) provided that an employee has the right to leave her/his workplace during a break, unless provided otherwise in an employment agreement, internal organisational rules or collective agreement. It raised the question whether the break - in case an employee is not allowed to leave her/his workplace - has to be considered as time off or working time, because according to the interpretation given by the CJEU (e.g. in *Jaeger*, case C-151/02), time spent on the employer's premises and at its disposal has to be considered as working time. A similar problem was raised in the dispute brought by firefighters, who were not allowed to leave their workplace during breaks while at the same time, the time spent on breaks was not considered working time and thus not paid. The Senate of the Supreme Court, on the basis of Directive 2003/88/EC on working time and the case law of the CJEU, ruled that the non-inclusion of breaks, during which the firefighters were not allowed to leave their workplace in their overall working time, is contrary to the law. Article 145 of the Labour Law has now been amended by paragraph 3 stipulating that in case an employee is not allowed to use breaks for what s/he wants to, then such breaks have to be considered as working time.

The amendments also implement Directive 2015/1794/EU of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC on seafarers. Article 117 on the concept of an 'undertaking' within the meaning of a transfer of undertakings has now been amended by paragraph 3 stipulating that in certain instances, protection in case of a transfer of an undertaking is applicable, also with regard to seagoing vessels (Article 5 of the Directive). The amendments also delete Article 105 para. 3 sentence 1 of the Labour Law - a provision which stipulated that specific rights in case of collective redundancies are not applicable to the crew of seagoing vessels - thus implementing Article 4 of Directive 2015/1794/EU.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

CJEU case C-416/16 Piscarreta Ricardo

The concept of an 'undertaking' and a 'legal transfer' has been transposed by Article 117 of the Labour Law, while the rights and duties of the employees and employers in case of a transfer of undertaking are regulated in Article 118 of the Labour Law (*Darba likums, Official Gazette No.105, 6 July 2001*). These provisions state rather general obligations as provided in Articles 1 and 3 para. 1, 2, and 3 of Directive 2001/23/EC. The CJEU judgement in case C-416/16 will therefore have implications on Latvian law as far as it provides for an interpretation of the concepts of 'undertaking', 'legal transfer' and 'employee'. It is on account of the facts that the Labour Law does not provide an extended explanation or indicators on what must be considered an 'undertaking' and a 'legal transfer'. The present decision of the CJEU also clarifies that the employees covered by protection in case of a transfer of an undertaking include those on leave, since Latvian law, similarly to Portuguese law, does not envisage the suspension of an employment contract while an employee is on leave.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

The Government of Liechtenstein has produced a report and motion for Parliament regarding the amendment of the Civil Code and further acts in order to implement Directive 2014/54/EU concerning measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

1 National Legislation

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers has been inserted into the EEA Agreement ([Decision of the EEA Joint Committee No. 219/2015 of 25 September 2015](#) amending Annex V (Free movement of workers) to the EEA Agreement [2017/526]). As a member of the EEA, Liechtenstein is thus required to transpose the Directive into national law. In order to transpose the mandatory amendments to Liechtenstein law, the government has published a proposal to amend the Civil Code and further acts.

The main objectives of the planned legislative amendments are:

- to allow associations, organisations or comparable groups, *either* to represent employees or their family members – who have initiated legal proceedings and given their consent – *or* to intervene as a third-party at the litigation pursuant to the Civil Procedure Code;
- to ensure that employees and their family members do not suffer discrimination or reprisals in response to their complaint or the initiation of proceedings to ensure the enforcement of their rights.

These objectives will have to be achieved not only in private labour law, but also in public service law, namely at the state and municipality level. Amendments to the following pieces of legislation are therefore necessary: *Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB, LR 210.0)*; *Law of Persons and Companies (Personen- und Gesellschaftsrecht, PGR, LR 216.0)*; Public Officials Act (*Gesetz über das Dienstverhältnis des Staatspersonals, Staatspersonalgesetz, StPG, LR 174.11*); Teachers Act (*Gesetz vom 26. November 2003 über das Dienstverhältnis der Lehrer, Lehrerdienstgesetz, LdG, LR 411.31*); Municipalities Act (*Gemeindegesetz, GemG, LR 141.0*).

The government has now produced a report and motion ("*Bericht und Antrag*") for Parliament regarding the amendment of the Civil Code and further acts (*Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Allgemeinen bürgerlichen Gesetzbuchs (ABGB) und weiterer Gesetze*).

The next steps will be consultation in Parliament and the adoption of the relevant legislative amendments. To date, it is not possible to predict when the amendments will be passed.

2 Court Rulings

Nothing to report.



3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Lithuania

Summary

(I) Secondary legislation has been adopted by the government to implement the provisions of the new Labour Code. The resolution of the government contains important deviations from the Labour Code provisions on working time.

(II) The Court of Appeal rejected the claim of a local trade union aimed at halting public procurement procedures due to the employer's alleged unfamiliarity of the labour law provisions on transfers of undertakings.

1 National Legislation

The new Labour Code entered into force on 1 July 2017. The Government of Lithuania had just recently adopted secondary legislation, as required by the provisions of the Labour Code. Resolution No. 496 of 21 June 2017 (Registry of Legal Acts, 2017, No. 2017-10853), amending Resolution No. 534 of 28 June 2017 (Registry of Legal Acts, 2017, No. 2017-11190), regulates:

- the procedure for establishing the rate of employees' average pay (which is important for determining pay during holidays as well as severance pay);
- the working time regime in state and public institutions;
- the particularities of seasonal work;
- the procedure of organising open competitions in the public sector;
- the entitlement to special paid breaks during the working day;
- a list of employees entitled to prolonged annual paid leave and the duration thereof (e.g. medical employees, pedagogical workers, etc.);
- entitlements to additional holiday in case of a long-term employment record or hazardous working conditions;
- the particularities of working time and rest periods in various sectors of the economy (mobile workers).

In most cases, the Resolution simply repeats the previously effective legislation and brings no novelties. In some cases, the secondary legislation contains important deviations from the general rules established by the Labour Code. In other words, the content of the applied working time regimes (and therefore conformity with EU law) will be established not by the Code, but by secondary legislation. This is particularly the case for agriculture workers, mobile workers, medical and pedagogical workers.

2 Court Rulings

The Court of Appeals issued a ruling (ruling of 9 June 2017 in case No. 2A-763-381/2017) in a legal dispute between a municipality and the enterprise-level trade union of the municipal public transport company, which is fully owned by the municipality. The trade union challenged the applicability of the rules of public procurement, arguing that the municipality by initiating the purchase of the transport services by way of public procurement, violated Directive 2001/23/EC on transfers of undertakings. In the view of the trade union, the planned re-distribution of routes and itineraries previously operated by the municipal company to private service providers should be considered outsourcing, which would amount to a transfer of undertaking. They submitted the



action before the court, arguing that the acts of the municipality (which is also the sole owner of the municipal public transport company) violated the rights of the employees of the municipal company. The preventive action was dismissed. The court held that the trade union had no procedural and no materially legitimate interest to contest the public procurement procedures, as it does not intend to be a service provider. The ruling seems to be convincing, as it does not preclude the possibility to challenge the employer's actions on the basis of labour legislation.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Malta

Summary

The Malta Employers' Association has proposed introducing a waiting day before sick leave is paid. The first day of sick leave would then be unpaid.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

The Malta Employers' Association has issued a number of recommendations to the Government of Malta in relation to the budget for 2018. One of the recommendations suggests for the first day of sick leave of any employee to be treated as a waiting day and, hence, shall be unpaid, in order to curb sick leave abuse.

The national media was all agog. The unions were up in arms and warned that treating employees with suspicion is clearly not the way forward.

The Malta Employers' Association stuck to its guns and held that sick leave is being abused to the detriment of employers and that such abuse is widespread.

Needless to say, both the employers and employees have differing arguments. On the one hand, it is important for the employee to enjoy a protected sick leave regime. On the other hand, the employer cannot keep footing the bill for rampant abuse and consequent absenteeism.

Indeed, this is not the first time that sick leave abuse has been addressed by the Malta Employers' Association. However, nothing has changed so far.

The matter that needs to be analysed is whether the current system, whereby an employee has to present a medical certificate, commonly known as the "blue certificate" (a small, blue form which is filled in by the medical practitioner chosen by the employee), needs an overhaul. Sick leave is essentially available only to those employees who, for medical reasons, are unfit to work. Hence, the medical examination that needs to be carried out when the employee is sick and claims sick leave has to determine whether the employee is in a medical condition preventing him/her from performing the particular job for which s/he is employed. One matter that needs to definitely be addressed is sick leave which is required for reasons based on the employee's excesses. The question is whether alcohol abuse over the weekend, a sunstroke and to a lesser extent, cosmetic surgery and similar surgeries which are not strictly necessary should be covered by paid sick leave in such circumstances.

It is submitted that one way of ensuring that sick leave is not abused is for the employer to engage the services of a medical practitioner who visits the employee. If the medical



practitioner reports that the employee is not fit to work, then the employee should be deemed to be eligible for sick leave. If it is clear, however, that there is no basis for sick leave, or that sick leave is indeed necessary but that the cause is the employee's carelessness (due to a hangover, for example), the law should address such situations. Firstly, if there clearly is no case for sick leave, then the employee should be disciplined (by means of a written warning, for example), made to pay the costs of the medical practitioner's visit, and moreover, required to go to work. If the employee is not fit to work due to some excess (hangover, sunstroke or any other whim), the employee can take unpaid leave.

Needless to say, it is important to ensure that all measures aimed at curbing abuse do not in any manner whittle away the rights that workers have painstakingly gained and maintained over the years. It is crucial for a balance to be struck between the rights of the employees and those of the employers.

Sources:

The Employers' Association proposal is available [here](#).

Newspaper articles respectively from 24 August 2017 and 26 August 2017 on the Employers' Association proposal are available [here](#) and [here](#).

Newspaper articles respectively from 24 August 2017 and 26 August 2017 on the unions' reaction to the Employers' Association proposal are available [here](#) and [here](#).

Netherlands

Summary

(I) The growth in jobs over the last three quarters has been the strongest since the economic boom in 2007-2008.

(II) Although the law in theory allows for a maximum of 60 working hours a week, the average working time of full-time employees is about 39 hours a week in practice.

(III) The number of full-time working women has risen to a record high.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 The strongest growth in jobs since 2008

The number of jobs in the Netherlands keeps increasing. The Central Bureau of Statistics (CBS) [reported](#) that the number of jobs in the second quarter of 2017 came down to a total of 10.2 million. Over the last three quarters, approximately 50,000 jobs have been added on average. In the second quarter of 2017, 51,000 jobs were added. This represents the strongest growth in jobs since the period of the economic boom in 2007-2008, prior to the financial and economic crisis. This growth is the strongest among temporary employment agencies (*'uitzendbureaus'*), where 20,000 jobs were added in the last quarter. The growth has been witnessed in nearly all industries, except for financial services, agriculture and fishery. The number of vacancies has also risen. All of this has resulted in a further decline in the unemployment rate according to the ILO definition.

Source:

The latest data on the (un)employment rate can be found [here](#).

4.2 Dutch people may work (a maximum of) 60 hours a week, but work only 39

In theory, employees may accumulate more working hours on a full-time contract in the Netherlands than in any other EU country. While the maximum number of working hours is set at 48 hours a week in almost all other EU countries (including overtime hours), the Netherlands has a maximum of 60 working hours a week (also including overtime hours). It should be noted that under Article 5:7 of the Working Time Act, a working



week of 60 hours is only allowed if the average working time does not exceed 48 hours a week over a 16-week period.

Recent research of Eurofound, however, shows that the possibility of working these extra hours is not used extensively. The average working time is far below the maximum of 48 hours. On average, full-time employees work around 39 hours a week in the Netherlands, while the average for EU Member States is 40.4 hours a week. Only Denmark and Italy have shorter average working weeks than the Netherlands.

4.3 The number of full-time working women rises to record high

For the first time, more than 1 million women are working full-time in the Netherlands. Recent figures of the Central Bureau of Statistics (CBS) show that their number has been on the rise for some time. The increase is the strongest among young women who have completed a higher education. Almost half of this group works 35 hours a week or more. Among low and middle-skilled women, the vast majority has a working week that does not exceed 20 working hours. Despite the recent increase, a huge difference continues to exist between the number of full-time working men and full-time working women. Only 25 percent of all women work full-time, while 74 percent of all men work full-time.

Source:

A newspaper article from 10 August 2017 on the number of full-time working women is available [here](#).

Norway

Summary

The Regulation on Posted Workers has now also been amended to transpose Directive 2014/67/EU.

1 National Legislation

1.1 Posted workers

Following amendments to the Working Environment Act to transpose Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC on the posting of workers (see also the April and July 2017 Flash Reports), [changes](#) have also been made to the Regulation on Posted Workers of 16 December 2005, No. 1566. The amendments include provisions on strengthened cooperation with competent authorities in other EEA states. The amendments entered into force on 1 July 2017.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

The amendment to the Law on the Protection of Employees claims in the event of employer's insolvency has been published in the Journal of Laws and enters into force on 5 September 2017.

1 National Legislation

The Law of 20 June 2017 amending Law of 13 July 2006 on the protection of employee claims in the event of employer insolvency (consolidated text: [Journal of Law 2016, item 1256](#)) has been published in the [Journal of Laws 2017, item 1557](#) (for more information on the content of the Act, see also the June 2017 Flash Report). The amendment takes effect on 5 September 2017.

Sources:

Information on the legislative process is available [here](#).

Recent information of the Ministry of Labour, Family and Social Policy is available [here](#).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

(I) A recent amendment to the Labour Code expands the concept of “moral harassment”.

(II) The CJEU’s ruling in case C-175/16 on the applicability of Article 17 (1) of Directive 2003/88/EC to ‘relief parents’ will also be of importance for the interpretation of Portuguese labour law.

(III) The CJEU’s ruling in case C-566/15 on the employees’ right to participate in the supervisory board of a parent company located in another Member State serves as good guidance for similar situations, e.g. where subsidiaries are located in Portugal with the parent company being based in Germany.

1 National Legislation

1.1 Moral harassment

Law No. 73/2017 foresees a new amendment to the Portuguese Labour Code (approved by Law No. 7/2009, of 12 February) and to the General Law of Work in Public Functions (approved by Law No. 35/2014, of 20 June), expanding the concept of “moral harassment” and reinforcing the legal protection granted to employees who are victims of such practices. The Act will enter into force on 1 October 2017.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU Case C-175/16 Hälvä and Others

The appellants in the main proceedings of case C-175/16 were employed as ‘relief parents’ by SOS-Lapsikylä ry.

SOS-Lapsikylä ry is a Finnish child protection association providing accommodation for children in care. The staff at the children’s villages of SOS-Lapsikylä ry consisted of a director, ‘foster parents’, ‘relief parents’ and other professionals. The children’s houses were home to the children in care, and housed three to six children and one or two ‘foster parents’ (or ‘relief parents’ for the time the ‘foster parents’ are absent).

As ‘relief parents’, the appellants’ main duty was to relieve the ‘foster parents’ while the latter were absent (justified by days off, annual leave or sick leave). They lived with the children and attended to that house on their own. They also did the shopping and accompanied the children on trips outside the complex.

The appellants brought an action before the Finnish courts seeking: (a) a declaration that their work for SOS-Lapsikylä ry constituted ‘work’ within the meaning of Paragraph 1 of the Law on Working Time; and (b) an order for compensation payment in respect of overtime and work in the evening, at night and at weekends in accordance with that law and the collective agreement for the respective sector.

Considering the above, the CJEU had to assess whether Article 17(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time was applicable to the situation of the appellants. Article 17(1) states:

“With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers¹; or

(c) workers officiating at religious ceremonies in churches and religious communities.”

Therefore, the question was whether this provision should be interpreted as meaning that it could also apply to paid employment, which consisted of looking after children in a family environment, relieving the person principally responsible for them.

In this regard, the CJEU stated firstly that any period during which the worker was at work, at the employer’s disposal and carrying out his/her activity or duties had to be ‘working time’ within the meaning of Article 2(1) of Directive 2003/88/EC.

Secondly, the CJEU concluded that the periods of inactivity within the 24-hour periods during which the ‘relief parent’ oversaw the children’s home were considered part of the performance of that worker’s duties and were working hours since the ‘relief parent’ was required to be physically present at the place determined by the employer and to be available to the employer to provide the appropriate services immediately in case of need.

Since such periods of inactivity were considered part of the working time of ‘relief parents’, the option they had to determine when those periods began and ended should therefore not be equivalent to the opportunity for those workers to freely determine when their working time began and ended.

For these reasons, and according to settled case law, the CJEU concluded that the derogation laid down in Article 17(1) of Directive 2003/88/EC had to be interpreted restrictively to what was strictly necessary to safeguard the interests whose protection the derogation permitted.

Hence and considering the specific characteristics of the activity under assessment, the Court ruled that the working time of the ‘relief parents’ was not measured or predetermined by the ‘relief parent’ himself/herself. In fact, the CJEU stated that this finding was not even called into question by the fact that in the periods during which the ‘relief parents’ were responsible for running the children’s home, they had a certain degree of autonomy in the organisation of their time and, more specifically, in the organisation of their daily duties, their movements and their periods of inactivity, without there appearing to be any supervision by their employer.

Attention should be paid to the fact that the Court stated that the difficulties that an employer may face regarding the supervision of the daily exercise of the activities of its employees are not, in general, sufficient for finding that their working time as a whole

¹ Emphasis inserted by author.



is not measured or predetermined, since the employer stipulates in advance both the beginning and the end of the working time.

In conclusion and having regard to all these considerations, the CJEU's answer to the question referred was that Article 17(1) of Directive 2003/88/EC had to be interpreted as meaning that it could not be applicable to paid work such as that at issue in the main proceedings.

Given that working time raises increasingly topical questions, this decision is also an important instrument to construe Portuguese labour law accordingly.

3.2 Employee participation

CJEU Case C-566/15 Erzberger

In case C-566/15, the CJEU decided that Articles 18 (non-discrimination on grounds of nationality) and 45 (free movement of workers) of the Treaty on the Functioning of the European Union had to be interpreted as not precluding Member State legislation, such as that at issue in the main proceedings (Germany), which provided that the employees of a group of companies employed in subsidiaries located in the territory of other Member States do not have the right to vote and to stand as a candidate in the election of workers' representatives to the supervisory board of the parent company of the group.

This decision is not only relevant to German but also to Portuguese law, since it stands for similar situations where parent companies have headquarters in Germany and a subsidiary in other countries, herein including Portugal.

4 Other relevant information

Nothing to report.

Romania

Summary

- (I) The Labour Code has been amended with the particular aim of tackling undeclared work.
- (II) New rules on the employment of persons with disabilities have been adopted.
- (III) The capping of the allowance due to workers on child care leave has been re-introduced.

1 National Legislation

1.1 Amendment of the Labour Code

The draft amendment to the Labour Code, subject to public debate over the past months (see also the June 2017 Flash Report), was adopted. [Government Emergency Ordinance No. 53/2017](#), amending and supplementing the Labour Code, brought a series of legislative changes. These mainly concern the more effective definition and sanctioning of undeclared work as well as a correlation of sanctions applicable in this case.

The new version of the Labour Code defines undeclared work and introduces severe sanctions for the failure to conclude the employment contract in writing.

Undeclared work is:

- the employment of a person without the conclusion of an employment contract in written form on the day before the start of the activity;
- the employment of a person without recording the employment relationship in the general register of employees;
- the employment of a worker while his/her employment contract is suspended;
- receiving work from a part-time worker outside the working hours established under the part-time employment contract.

One of the most important changes to the provisions of the Labour Code is the form required by law for the conclusion of the employment contract. In 2011, the employment contract had been declared a solemn contract (the written form was requested *ad validitatem*) by Law No. 40/2011 amending the Labour Code (published in the Official Gazette of Romania No. 225 of 31 March 2011). Consequently, if it was not concluded in writing, it would be considered absolutely null. Thus, a verbal contract would have no effect, because Article 16 para. 1 of the Labour Code stated: "the written form is mandatory for the valid conclusion of the contract".

Six years later, this provision has been removed. According to Government Emergency Ordinance No. 53/2017, an employment contract is again consensual. The parties will be penalised for undeclared work, but the existence of the contract can be recognised and proven by any means of evidence.

On the other hand, the administrative sanctions applicable in case of non-conclusion of a written contract have been tightened by the new regulation. Thus, according to Article 260 para. 1 lit. e) of the Labour Code, the employment of a person without the conclusion of a written employment contract shall be sanctioned with a fine of RON 20,000 (approximately EUR 4,350) for each identified person.

Prior to the change of August 2017, the Labour Code provided for a dual system: an administrative sanction in case of less than five people working illegally and criminal proceedings in case of five or more undeclared workers. The new regulation removes

the criminal proceedings and reinforces the administrative sanction, which also corresponds to the opinion of the labour inspectors in this respect. Indeed, in the [explanatory memorandum](#) to Governmental Emergency Ordinance No. 53/2017, this legislative option is justified as follows:

"From the analysis of the way these criminal cases were solved, in the majority of the cases, the criminal investigating body and the court issued decisions not to initiate the criminal prosecution or acquittal, as the case may be, considering the lack of social danger of the deed. Thus, the impact of establishing a criminal offence in employing more than 5 people without a written employment contract was not the one expected, which has led to a deprivation of regulatory effects."

Beside the conclusion of a written contract, the employer now also has the obligation to keep a copy of the employment contract for the workers who work in that place. The amendment was issued in the context of a decision of the High Court of Cassation and Justice ([Decision No. 56 of 15 January 2014](#)), which stated that in the case of a contravention consisting in the employment of persons without the conclusion of a written employment contract, the place where the offence is committed is the place where the persons actually work, not the employer's headquarters. According to Article 260 para. 1 lit. q) of the Labour Code, the violation of this provision shall be sanctioned by a fine of RON 10,000 (approximately EUR 2,200).

In addition, new sanctions have been introduced for acts such as:

- the employment of a person without recording the employment relationship in the General Register of Employees – sanctioned with a fine of RON 20,000 for each identified person (Article 260 para. 1 lit. e¹);
- the employment of an employee during the period when his/her employment contract is suspended – with a fine of RON 20,000 for each identified person (Article 260 para. 1 lit. e²);
- receiving work from a part-time worker outside the working hours established under the employment contract – with a fine of RON 10,000 for each identified person (Article 260 para. 1 lit. e³).

1.2 Employment of persons with disabilities

[Government Emergency Ordinance No. 60/2017](#) (published in the Official Gazette No. 648 of 7 August 2017) amends and supplements Law No. 448/2006 on the protection and promotion of the rights of persons with disabilities. It introduces a series of new measures aimed at encouraging the employment of this category of persons, given that by the end of 2016, the number of persons with disabilities employed was less than 35,000.

Among these changes, the new regulation introduces a provision that sparked reactions in civil society. Companies with more than 50 employees have, as was previously the case, the obligation to ensure that disabled employees represent at least 4 percent of the total number of employees. If they do not fulfil this obligation, under the new regulation, they will have to pay a sum in the amount of the minimum monthly salary multiplied by the number of jobs in which they did not employ disabled persons to the state budget on a monthly basis. Until now, companies where disabled employees did not represent at least 4 percent of the total number of employees had the opportunity to choose between:

- paying an amount representing 50 percent of the minimum monthly salary multiplied by the number of jobs for which they had not employed persons with disabilities to the state budget on a monthly basis;

- purchasing products or services made by persons with disabilities employed in authorised protected facilities (working with persons with disabilities) on a partnership basis with an amount equivalent to the amount due to the state budget.

There is a fear that the removal of the opt-out to purchase products from protected undertakings, which stimulated their sales, would discourage the activity of the protected units. These legislative measures would affect 700 protected units in the country, employing 3,900 workers, of whom 2,000 are disabled. Certain associations of disabled persons organised protest actions against the new provision. The Ministry of Labour published an [explanation](#) of the new regulations, pointing out that they are, on the contrary, intended to encourage the employment of people with disabilities and that there were many protected undertakings created just to take advantage of the tax benefits offered by legislation.

Sources:

A newspaper article from 16 August 2017 on the removal of the opt-out to purchase products from protected undertakings is available [here](#).

A newspaper article from 21 August 2017 on the protest against the new regulations is available [here](#).

1.3 Child-rearing allowance

According to [Government Emergency Ordinance No. 55/2017](#) (published in the Official Gazette No. 644 of 7 August 2017), amending and supplementing Government Emergency Ordinance No. 111/2010 on child care leave and monthly allowance, the monthly allowance is capped – the new regulation setting a maximum limit of RON 8,500 per month (about EUR 1,800).

The amount of the child care allowance has continuously been subject to legislative changes. Thus, until 2016, the child care allowance was set at 85 percent of the average monthly income of the parent in the 12 months preceding the birth of the child, being capped at RON 3,400.

Subsequently, Law No. 66/2016 amending and supplementing Government Emergency Ordinance No. 111/2010 removed the maximum ceiling. This has, as stated in the [explanatory memorandum](#) of the new Emergency Ordinance No. 55/2017, led to an increase in the number of beneficiaries, but also in the amount of the allowance and, implicitly, to an increase in budget expenditures. At the beginning of 2017, allowances of up to 130 times the minimum allowance were paid, for example.

As a result, Government Emergency Ordinance No. 55/2017 reintroduced the capping of this benefit, taking into account some European patterns in providing support for child care leave.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.



4 Other relevant information

Nothing to report.

Slovakia

Summary

The Economic and Social Council of the Slovak Republic discussed the new minimum wage level for the year 2018, without reaching an agreement.

1 National Legislation

1.1 Remuneration - Minimum wage

Discussions on the minimum wage for the year 2018 should, according to Act No. 663/2007 Coll. on the minimum wage, start with negotiations between the social partners at the national level. This year, as in the previous 10 years, the social partners involved in the tripartite social dialogue could not reach an agreement. The Confederation of Trade Unions of the Slovak Republic submitted a proposal suggesting to set the minimum wage for 2018 at EUR 492 per month.

Employers' representatives (the Federation of Employers' Associations of the Slovak Republic - AZZZ SR, the National Union of Employers – RUZ, and the Association of Towns and Communities of Slovakia – ZMOS) agreed that the traditional negotiations on the minimum wage for the next year are unnecessary at this point, as the government will decide the amount of minimum wage at its own discretion. As the Federation of Employers' Associations of the Slovak Republic (AZZZ SR) stated in its opinion, the best solution would, in their view, be to end the negotiations, which would de-politicise the entire process. The Federation wants to negotiate with the social partners about a new mechanism whereby the minimum wage would be regularly adjusted on the basis of predefined indicators.

The minimum wage was discussed at the meeting of the Economic and Social Council of the Slovak Republic on 14 August 2017. The Ministry of Labour, Social Affairs and Family prepared a proposal for a Government Decree suggesting to increase the monthly minimum wage for the year 2018 from EUR 435 (in 2017) to EUR 480 (which would be an increase by EUR 45, equalling 10.34 per cent) and the hourly minimum wage from EUR 2.50 to EUR 2.759 (an increase by EUR 0.259). The social partners did not reach an agreement with the Ministry on the new level of minimum wage.

Source:

Information provided by the Economic and Social Council of the Slovak Republic is available [here](#).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Slovenia

Summary

The Supreme Court of Slovenia has issued a judgement on the conclusion of fixed-term contracts between temporary work agencies and agency workers, drawing attention to the fact that fixed-term contracts are permitted on the basis that the user undertaking, not the temporary work agency, fulfils the conditions under which such contracts are allowed under the ERA-1.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term employment in the context of temporary agency work

Judgement of the Supreme Court of the RS VIII Ips 8/2017

The plaintiff and the temporary work agency had concluded several fixed-term employment contracts on the basis of which the plaintiff worked for the user undertaking for a total of 21 consecutive months (in fact, within this period, she concluded an employment contract for a period of six months directly with the user undertaking). The defendant (the temporary work agency) had concluded fixed-term employment contracts based on reasons provided by the user undertaking. *Inter alia*, the following were mentioned: the temporarily increased scope of work at the user undertaking due to work orders, the temporary lack of workers to perform work at the user undertaking, and the seasonal nature of the work to be performed. When the last employment contract came to an end, the plaintiff claimed that the last contract and also all previous fixed-term employment contracts had been concluded contrary to the Employment Relationship Act (ERA-1). In such cases, the Act provides for the presumption that the employment contract has been concluded for an indefinite period. The plaintiff claimed reintegration and reparation.

The Labour Court of first instance decided that the employment contract between the temporary work agency and the plaintiff had been concluded for an indefinite period, as the grounds on the basis of which fixed-term employment contracts had been concluded were very general, fabricated or false. For this reason, the employment relationship between the parties still existed.

The Court of second instance upheld the judgement of the Court of first instance.

The revision against the two lower courts' judgements was rejected as unfounded by the Slovenian Supreme Court. The Supreme Court found no breaches of the law (of procedural and material nature) in the proceedings. It maintained that both courts correctly used the following legal provisions:

Article 60 of the ERA-1 which provides:

“(1) An employment contract referred to in the preceding Article [contains some general provisions regarding the employment contract between a worker and an employer providing work for the user undertaking] shall be concluded for an indefinite duration.

(2) A fixed-term employment contract may be concluded if the user undertaking fulfils the conditions laid down in the first paragraph of Article 54 of this Act and

taking into consideration the time limitations referred to in the second and fourth paragraphs of Article 55 of this Act.”

All three courts underlined that a fixed-term employment contract may only be concluded with a temporary agency worker if the fixed-term employment contract can be concluded on exceptional grounds (listed in Article 54 of the ERA-1) existing on the part of the user undertaking and not on the part of the temporary work agency.

The Supreme Court also pointed out that not only the last employment contract, but also all previous fixed-term employment contracts were concluded contrary to the ERA-1. As regards the issue raised during the proceedings, the question of who is responsible for respecting the legal provisions—the temporary work agency or the user undertaking—the Court underlined that if the user undertaking gives the agency incorrect information on the (non)existence of the conditions provided for in Article 54 of the ERA-1, this may influence the relationship between the agency and the user undertaking, which is the object of a written agreement between the two parties. It may not influence the relationship between the agency and the agency worker. Article 56 of the ERA-1 applies. It provides: *“If a fixed-term employment contract is concluded contrary to an Act or a collective agreement, or if the worker continues to work after the period for which he concluded the employment contract has expired, it shall be assumed that the worker has concluded an employment contract for an indefinite duration.”* According to the Supreme Court, it is important to take into consideration the legal regulation of temporary agency work, as does Directive 2008/104/EC, which emphasises that the assignment of workers to the user undertaking must be temporary, but workers must have a stable, lasting relationship with the agency.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) The Constitutional Court declared some articles of Royal Decree-Law 1/2013 void due to invasion of the powers constitutionally granted to the regions.

(II) The Supreme Court held that the new procedure of the University of Barcelona to make the delivery of money conditional on prior justification of the expenses is lawful.

(III) The Supreme Court stated that there is no transfer of undertaking in a situation where a contractor company replaces the previous one without a transfer of material means.

(IV) In a case on the consultation of workers' representatives, the Supreme Court stated that this time, the employer gave the unions all the information and documentation necessary to make a proper assessment of the situation.

(V) Several strike and collective action measures have been carried out by workers at the airport of Barcelona, demanding higher wages and changes in the organisation of service shifts.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Vocational education and training

The [Constitutional Court ruling 100/2017](#) of 20 July 2017 examines the appeal of unconstitutionality filed by the Government of the Basque Country in relation to several articles of Royal Decree-Law 1/2013 of 25 January 2013. That Royal Decree-Law extended the professional re-training programme for unemployed persons who no longer qualified for unemployment benefits. The re-training programme is called *Plan Prepara*.

Although *Plan Prepara* is a state programme, some implementing aspects fall under the competences of the regions. The appeal, therefore, seeks to clarify which bodies can exercise the different powers.

The Constitutional Court has now stated that the regions have the power to execute the acts and regulations dictated by the State in relation to the general planning of economic activity and particularly in relation to the programmes for employment, even though these programmes are paid by the State. The State has the competence to regulate the essential conditions for granting the subsidy, and may take over the management if this is essential to ensure the effectiveness of the measure, and its proper and homogeneous implementation throughout the national territory. Consequently, some articles of Royal Decree-Law 1/2013 were declared void due to invasion of the powers constitutionally granted to the regions.

2.2 Freedom of association

Workers' representatives argued that the change in the procedure for the granting of certain subsidies was a violation of the freedom of association. The undertaking (the University of Barcelona) traditionally delivered the money and then requested justification of the expenses. However, at a certain point, the University conditioned the delivery of money to the prior justification of the expenses. The Supreme Court has now [held](#) that this new procedure is lawful.

2.3 Outsourcing

This [ruling](#) analyses the rules on transfers of undertakings (Article 44 of the Labour Code), expressly referring to the case law of the CJEU, and concluded that no transfer of undertaking takes place in a situation where a contractor company replaces the previous one without a transfer of material means. In the cleaning sector, it is very common for the collective agreement to require the new employer to keep the workers who worked for the previous one. The Supreme Court now stated that this is not a situation of succession of staff, but an improvement in the collective agreement based on European Union law. Consequently, the rules on transfers of undertakings are not applied and the new employer is not responsible for the wage debts of the previous employer.

2.4 Collective dismissal

The labour reform of 2012 gave the employer more powers for internal reorganisation, but in return required negotiation in good faith before adopting measures, such as collective dismissals, reduction of wages or changing the working conditions. The employer must deliver all the information and documentation provided in the law to the workers' representatives, and all information and documentation necessary for a real negotiation. Otherwise, the measures must be declared null and void. In this case, the Supreme Court [stated](#) that the employer had given the unions all the information and documentation necessary to make a proper assessment of the situation.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Unemployment rates

The unemployment rate has declined again in July (by 26,887 persons). The total number of unemployed continued at their lowest levels over the last eight years, standing at 3,335,924 unemployed.

4.2 Strike at Barcelona's airport

During the months of July and August, several strike and collective action measures have been carried out by the workers of the company "Eulen" at the airport of "El Prat" (Barcelona). These workers are in charge of controlling passengers before they access boarding areas. In Spain, this service was previously provided through the security forces (national police and civil guard), but for several years now, it has been carried out by private security companies.



The strike of the employees of Eulen (who have the status of security guards) had two main causes: wages and the organisation of service shifts. The employees complained that their salaries were very low compared to the cost of living and that there was a shortage of staff. Their claims were formally directed against Eulen, but in the end, they also affected the airport management body (the Aena entity) and those responsible for that public service in the political sphere.

The negotiations failed. Spanish law, however, allows the government to impose compulsory arbitration in case this happens and results in a strike affecting public services. It is a procedure used frequently in Spain when the strike seriously affects the national economy, especially in the field of air navigation and garbage collection. The Constitutional Court has considered that it is a procedure that respects the Constitution, as long as the impartiality of the arbitrator is preserved.

The arbitration award was issued at the end of August, and essentially ruled in favour of a salary increase, an increase in the number of employees in charge of each shift and the cancellation of the disciplinary penalties that had been adopted in the context of the conflict.

The conflict at El Prat airport deserves two more comments. First, the security employees of other Spanish airports, and even the personnel that provides services at airports directly for AENA, have started complaining in similar terms. Second, it reveals the particularities of work and labour conflicts in services outsourced by the public administration, since workers formally belong to a company but their service provision, or their decision to halt their work, inevitably affects the activity of a third party, which in this case was the management body of the airport.

United Kingdom

Summary

(I) The Employment Appeal Tribunal issued a decision clarifying what can be counted as holiday pay.

(II) On 10 August 2017, following the Supreme Court's judgement in *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, an employment tribunal allowed a claim presented out of time after it was initially rejected for failure to pay the issue fee.

(III) Another case has been decided in which a cycle courier was found to be a worker and not self-employed.

(IV) A recent report by the National Crime Agency has highlighted the widespread scale of modern slavery in the UK.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Dudley (Dudley Metropolitan Borough Council v Willetts and others) UKEAT/0334/16)

In *Dudley (Dudley Metropolitan Borough Council v Willetts and others)* UKEAT/0334/16), the Employment Appeal Tribunal (EAT) has provided further clarification of the *Lock/Williams* line of case law. It has said that voluntary overtime, out of hours standby allowances and call-out payments count towards holiday pay, if sufficiently regular – even though there was no obligation for workers to accept the offer of overtime or to participate in the on-call rota.

2.2 Employment Tribunal fees

R (on the application of Unison) v Lord Chancellor [2017] UKSC 51

Last month, a highly significant case was reported *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51. It will be recalled that in judicial review proceedings brought by Unison, the Supreme Court unanimously declared that these Employment Tribunal fees are unlawful, under both domestic law on the grounds that it prevented access to justice, and EU law, on the grounds that the fees denied an effective remedy since the amount was disproportionate. The Supreme Court quashed the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) on the basis that it prevents access to justice. The judgement was implemented immediately and Employment Tribunals (ETs) are no longer accepting fees; the government must now also reimburse all fees paid since 29 July 2013. The logistics of this has already proved complex, but the administrative arrangements are to be announced "shortly" by the Ministry of Justice (MoJ) and Her Majesty's Courts and Tribunals Service (HMCTS). It has been reported that on 10 August 2017, an employment tribunal allowed a claim presented out of time after it was initially rejected for failure to pay the issue fee.

2.3 Gig economy

A number of recent cases have already been reported where the courts, mainly the first tier employment tribunals, have found those working in the gig economy to be workers, not self-employed persons, as the paperwork given to them claimed. *Gascoigne* (*Gascoigne v Addison Lee Ltd ET/2200436/2016*) is the latest example in this vein: an ET held that a cycle courier working for Addison Lee was a worker under the Working Time Regulations 1998 and the Employment Rights Act 1996, and that the contractual documentation did not reflect the reality of the relationship. The courier, who performed work personally for the company, was subject to a 'classic wage/work bargain'.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

A recent [report](#) by the National Crime Agency (NCA) has highlighted the widespread scale of modern slavery in the UK, where Eastern Europeans are particularly badly affected. Will Kerr, director of vulnerabilities, said:

"The more that we look for modern slavery the more we find the evidence of the widespread abuse of vulnerable."

"The growing body of evidence we are collecting points to the scale being far larger than anyone had previously thought. The intelligence we are gaining is showing that there are likely to be far more victims out there, and the numbers of victims in the UK has been underestimated."

In response, the NCA has initiated a new campaign focused on sexual and labour exploitation, explaining how the public can help stop it.

Over the next six months, the campaign will highlight the signs of modern slavery which people may encounter in their everyday lives, and encourage them to report it.

Source:

A newspaper article from 11 August 2017 on recent successful convictions is available [here](#).

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