Flash Reports on Labour Law September 2018

Summary and country reports

Written by The European Centre of Expertise (ECE), based on reports submitted by the Network of Labour Law Experts

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Executive Summary

1 National level developments

In September 2018, 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:

- Minimum wage
- Parental leave
- Dismissal law

Minimum wage

In **Germany**, the Federal Labour Court declared that a forfeiture clause in the employment contract (establishing that all mutual claims arising from the employment relationship lapse if they are not asserted in writing against the other contracting party within three months), which was pre-formulated by the employer and which covered all mutual claims from the employment relationship without any restriction, and thus also the minimum wage guaranteed by the Minimum Wage Act, violates the transparency requirement of the Civil Code and is therefore, altogether invalid. In **Estonia**, the Estonian Trade Unions' Confederation and the Estonian Employers' Association have concluded an agreement on the new monthly minimum wage. The new monthly minimum wage starting from 01 January 2019 will be EUR 540 per month (EUR 3.20 per hour). In **Greece**, an amendment has been submitted and voted in Parliament to shorten the consultation procedures for determining the minimum wage. In **Poland**, a new regulation has introduced a raise of the statutory minimum remuneration for work in 2019, as has been the case in previous years. In **Slovakia**, the social partners involved in the tripartite social dialogue could not reach an agreement on the minimum wage for 2019, and the Ministry of Labour, Social Affairs and Family of the Slovak Republic has therefore submitted a proposal for a Government Decree to set down the amount of the minimum wage for the following year. The proposal recommends increasing the monthly minimum wage for the year 2019 by 8.33 per cent up to EUR 520 per month.

Parental leave

In **Belgium**, a new law has been introduced allowing parents to take parental leave in the form of either half a day per week or one full day every two weeks for 40 months. In addition, the possibility of a half-time parental leave per month has been added. Both arrangements require the employer's agreement. In **Luxembourg**, a new special leave, of up to eight days per year has been introduced for parents working in the private sector, who are members of the newly created national parent representation in education. The salary of these workers during those days of leave will be paid from public funds. In **Romania**, a new government ordinance allows those parents who take child care leave to include any income derived from intellectual property in the calculation of their earning-related child care allowance, thus amending the fiscal changes introduced in the beginning of 2018. In the **United Kingdom**, the Parental Bereavement (Leave and Pay) Act 2018 has now received Royal Assent. It will give all employed parents a right to two weeks paid leave if they lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy. Parents will be able to claim statutory parental bereavement pay for this period if they meet the eligibility criteria.

Dismissal law

In **Hungary**, the Supreme Court has confirmed the previous decision of the Appeal Court that the mandate of an executive officer, which terminated by revocation of the general assembly without justification and without notice, is unlawful. The Supreme Court highlighted that the employment relationship of this executive officer could be terminated by revocation. However, if the revocation does not comply with the labour law provisions applicable to executive officers (notice and justification), the termination is unlawful. In **Italy**, the Constitutional

Court has declared Article 3 para. 1 Legislative Decree No. 23 of 2015 contrary to the reasonableness and equality principles and to the right and protection of work as foreseen in Articles 4 and 35 of the Italian Constitution. The Court has grounded its decision on the remark that the Article of the Legislative Decree predetermines the amount of indemnity to be paid to the worker in case of unlawful dismissal according to the worker's seniority within the company, without leaving to the judge any further assessment of the situation at stake. In **Portugal**, the Lisbon Court of Appeal has ruled that absences from work due to preventive suspension from work imposed by a criminal court do not qualify as unjustified absences for dismissal purposes. In **Spain**, the Supreme Court has ruled that the dismissal of a pregnant worker who was affected, among other workers, by a collective dismissal, was null and void because the selection of the pregnant worker among the workers to be dismissed would have required specific information about the reasons for her termination (beyond the reasons for the collective dismissal).

2 Implications of CJEU and EFTA Court rulings

CJEU case C-466/17 of 20 September 2018, *Motter*

This case originated in a preliminary ruling regarding the interpretation of Clause 4 of the framework agreement on fixed-term work concerning the calculation of the period of service completed at the time the employee had concluded a contract of indefinite duration with the *Provincia autonoma di Trento*. The CJEU responded that Clause 4 of the framework agreement on fixed-term work must be interpreted as not precluding, in principle, national legislation, which for the purpose of classifying a worker in a salary grade at the time of her recruitment on the basis of qualifications as a career civil servant takes full account of only some years of service completed under fixed-term contracts (resulting in the present case that only two-thirds of the employee's subsequent periods of service were taken into consideration).

In **Latvia**, this decision will not have an impact because the law does not provide for differentiated conditions to calculate seniority in case of fixed-term contracts as opposed to contracts of indefinite duration. Latvian law also does not provide a *pro rata temporis* principle for the calculation of seniority for part-time employees in comparison to full-time employees. In **Norway**, no amendments to Norwegian law will be necessary, since the Working Environment Act states that direct and indirect discrimination on the basis of political views, membership of a trade union or age is prohibited, these provisions being applicable in cases of discrimination of an employee who works part time or on a temporary basis. In **Spain,** the ruling will not have a direct impact, but could be viewed as a minor turning point. Under Spanish law, 'public employee' refers to both civil servants and workers/employees with an employment contract who have been hired by the public administration. Civil servants are not workers and labour law does not apply to them. They have to comply with administrative law. According to the Spanish Constitution, the selection process to become a career civil servant is governed by the principles of equality, merit and ability. The rules on career civil servants usually begin to apply immediately, i.e. as soon as they have been selected. It could be held that this situation does not seem to comply with the Framework Agreement, nor with the CJEU ruling in the joined cases C-302/11, C-303/11, C-304/11, C-305/11, 18 December 2012, *Valenza et al*. where seniority, that is, the individual's previous uninterrupted performance of work for an employer, is important to determine the classification at work. However, the *Motter* ruling seems to apply a more flexible approach when 'the national legal system places particular importance on administrative competitions'.

CJEU case C-17/17 of 06 September 2018, *Hampshire*

This case originates in a request for a preliminary ruling concerning the interpretation of Article 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer. The request concerns the calculation of the former's entitlement to old-age benefits. The CJEU held in its response that Article 8 of Directive must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50 per cent of the value of her accrued entitlement under a supplementary occupational pension scheme in the event of the employer's insolvency and that, in circumstances such as those in the main proceedings, Article 8 has direct effect and may, therefore, be invoked before a national court by an individual employee in order to challenge a decision of a body such as the Board of the Pension Protection Fund.

In **Latvia,** although the Law on the Protection of Employees in the Event of Employer Insolvency does not provide for entitlement to benefits under occupational social security schemes from the Latvian Guarantee Institution, the case will not have a major impact. This is so because Latvia complies with the obligations under Article 8 since under Latvian law, the services of occupational pension schemes may only be provided by joint stock companies that have obtained a license from the Financial and Capital Market Commission, an institution supervising all banks and companies providing financial services in Latvia. It follows that, in principle, the insolvency of an employer has no impact on the already acquired rights of employees under such schemes.

In **Sweden** the *Hampshire* ruling on occupational benefit pension schemes is important, since these are a type of pension scheme that has historically played a significant role. The Swedish occupational benefit pension schemes are developed by the industrial partners and regulated in collective agreements. The influence of the legislator is very limited and the liabilities in case of insolvency are managed by guarantee funds, set up by the pension organisations that have been established by the industrial partners. The guarantee fund should cover cases of employer bankruptcy in which payment of the employees' pension contributions in full is not possible. However, such payments are closely connected to the provisions in the Wage Guarantee Act and the Rights of Priority Act.

For the current and future labour market, it is worth monitoring occupational pension schemes (second pillar pensions) in the private sector, which for a number of years have been defined contribution schemes with a continuous payment of contributions paid by the employers to pension funds. Defined benefit schemes are still applied in the public sector, but are being replaced with defined contribution schemes for younger employees. The shift to defined contribution schemes (as has been the case in the private sector already and seems to be increasingly the case in the public sector as well) will limit any exposure to employees' future pensions in the event of employer bankruptcy.

Table 1. Main developments (excluding implications of CJEU or EFTA-Court rulings)

Topic	Countries
Minimum wage	DE, EE, EL, PL, SK
Parental leaves	BE, LU, RO, UK
Dismissal law	ES, HU, IT, PT
Temporary work	BE, ES, FR
Working time	FI, FR, LU, PL
Third-country nationals	ES, IT, LU
Discrimination	BE, LU
Transfer of undertakings	EL, UK
Strike	CY, DE
Pensions	CZ, SE
Platform economy	DK, ES
Harassment	FR, LU
Collective bargaining	AT
Temporary agency work	BE
Sick pay	CZ
Working environment	DK
Gender pay gap	EE
On-call periods	FR
Trade unions	DE
Works councils	DE
Social dumping	IS
Insolvency law	LU
Labour Inspectorate	LT
Seafarers	RO
Employment agencies	RO
Compensation in case of illness	SI
Disability	ES
Health and safety	ES
Brexit	UK

Austria

Summary

Recent amendments to working time legislation affect the start of annual collective bargaining in the metal sector.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR rulings

Nothing to report.

4 Other relevant information

4.1 Start of Collective Bargaining in the Metal Sector

The recent amendments on the working time legislation continue to affect the ongoing social dialogue. Currently, the collective agreement in the metal industry is being negotiated. This usually marks the start of the annual collective bargaining rounds. The trade unions want to address working time issues and are requesting compensation for the recent amendments that were passed in Parliament by the parties of the centre-right government. Specifically, trade unions demand paid in-work breaks, an enforceable right to a four-day work week and specific additional protection against termination for those who refuse to work overtime. The employers' organisations have rejected these demands. The negotiations in the metal industry traditionally set the tone for the negotiations in all other sectors and are, consequently, of high importance.

In general, trade unions have agreed on anticipatory strike resolutions, and are currently conducting training courses for works council members to prepare for strike action if necessary.

A press article relating to this issue is available here.

Belgium

Summary

(I) In addition to the existing forms of parental leave, the Law of 02 September 2018 also introduces a right to 1/10th parental leave. This measure allows parents to take half a day a week of parental leave for 40 months or one full day of parental leave every two weeks.

(II) Another Law of 02 September 2018 provides more flexible forms of take-up of so-called 'thematic leave': palliative care leave, leave for assistance or care of a seriously ill family member and parental leave.

(III) An employee who adopts a child shall be entitled to six weeks adoption leave from 01 January 2019, regardless of the age of the adopted child. For the first time in Belgian labour law, employees will be entitled to a six-week foster care leave, if providing long-term foster care. In the period 2019-2027, the duration of adoption and foster leave will be systematically increased.

(IV) The social partners concluded intersectoral Collective Bargaining Agreement No. 108/2 in the National Labour Council, limiting the misuse of successive daily temporary agency employment contracts.

(V) The Law of 30 July 2018 on the protection of business secrets provides for the transposition of Directive 2016/943/EU 'on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure'.

(VI) Articles 2(1) and 3 of the 'lex specialis' of 24 February 1978 concerning employment contracts for paid athletes do not violate Articles 10 and 11 of the Belgian Constitution regarding the prohibition of discrimination in the law, whereas the larger definition of 'pay' as pay within the meaning of the Wages Protection Law of 12 April 1965 results in an athlete being regarded as a 'paid' athlete, if her pay within the meaning of the Wages Protection Law reaches the threshold specified in Article 2(1) of the Act of 24 February 1978, even if this pay is not a salary within the meaning of the general Law on Employment Contracts of 03 July 1978, and even if the legal presumption of the existence of an employment contract for paid athletes only applies if the minimum wage limit specified in the Law of 24 February 1978 is exceeded.

(VII) A suspension of operations of a music school five months before the start of a new academic year does not, under certain circumstances, preclude a transfer of undertaking. Moreover, the impossibility to pay employees may constitute ETO reasons for dismissal, provided that this is not caused by a deliberate measure to deprive the employees from protection against dismissal in Directive 2001/23/EC.

1 National Legislation

1.1 National Legislation

1.1.1 Parental leave

The new Law of 02 September 2018 amending the Law of 22 January 1985 on social provisions concerning parental leave (published in *Moniteur belge* (the Belgian Official Gazette) 26 September 2018, p. 73773) is part of the political agreement reached this summer, the so-called labour deal (see also July 2018 Flash Report).

In addition to the existing forms of parental leave, this law introduces an additional right to 1/10th parental leave. This measure allows parents to take half a day of parental leave per week for 40 months or one full day of parental leave every two weeks.

A royal decree can make the possibility of 1/10th parental leave dependent on the employer's agreement (Article 3, Law of 02 September 2018 amending the Law of 22 January 1985 on social provisions concerning parental leave). This also seems to be the intention of the legislator: 1/10th parental leave cannot be taken without the employer's consent.

With reference to the flexibility of the take-up of the thematic leave law to reduce working hours to provide palliative care to a terminally ill person, to assist or care for a seriously ill family member and for parental leave (published in *Moniteur belge* 26 September 2018), the law provides an explicit provision to schedule a reduction of working hours in accordance with the employee's choice.

The employer's agreement is, however, necessary. Moreover, the reduction must correspond to an average reduction of 1/2th and 1/5th, respectively, over the period concerned. The complicated legal principles of part-time work must, of course, also be respected.

This is not new, but the legislator deems that this provides both the employer and the employee with more legal certainty.

The Law of 02 September 2018 amending the Recovery Law of 22 January 1985 on social provisions adds the possibility of half-time parental leave per month. The employer's consent is again required in this case.

The law entered into force on 06 October 2018. The royal decrees for the laws' practical implementation have not yet been issued**.**

An employer is not yet able to respond to any questions by employees on these new rules on thematic leaves, as the 1/10th parental leave and the flexible forms of take-up of thematic leave still need to be laid down in a royal decree.

1.2 Adoption leave and foster care leave

A legislative act of 06 September 2018 (published in *Moniteur belge* 26 September 2018, p. 73774) amends the Employment Contracts Law of 03 July 1978. This amendment strengthens adoption leave and introduces foster care leave.

1.2.1 Adoption leave

Before the new law was adopted, a right to adoption leave of maximum six weeks per parent when the child was 'younger than three years of age' existed. For children between three and eight years, the former adoption leave was limited to four weeks per parent. There was no entitlement to adoption leave for children that were older than eight years. If a disabled child was adopted, adoption leave was doubled. The maximum period was 12 or eight weeks, depending on the child's age (Article 30ter of the Employment Contracts Law of 03 July 1978, introduced by the Programme Law of 09 July 2004).

From 01 January 2019, labour law provides for an extension of the duration of adoption leave in the amended Article 30ter of the Employment Contracts Law of 03 July 1978.

From next year, adoption leave will be maximum six weeks per parent, regardless of the child's age. The maximum age limit of eight years will be abolished. The child must nevertheless be a minor. The doubling of adoption leave in case of adoption of a disabled child has been retained. Adoption leave then amounts to a maximum of 12 weeks.

In addition, there is a provision to gradually extend adoption leave in coming years.

This means that in the period 2019-2027, an additional week of adoption leave will be introduced every two years. If there are two adoptive parents, the additional weeks will be divided between them.

As a result, by 2027, adoption leave will be 17 weeks, of which six weeks can be taken by each parent separately and an additional five weeks can be shared between the two adoptive parents.

In case of simultaneous adoption of several minors, the maximum duration of adoption leave is extended by two weeks per adoptive parent.

The new law also provides for an entitlement to remuneration and benefits during adoption leave. During the first three days of adoption leave, the employee is entitled to her normal salary. Thereafter, she will receive a benefit from the health insurance fund within the social security insurance for sickness and invalidity scheme. This was also the case in the past.

What is new is that in the event of an international adoption, the employee will also be able to receive the benefit four weeks before the child arrives in Belgium. This is possible on condition that the employee uses this period to prepare for the reception of the child in Belgium. The employee can thus use adoption leave to pick up the child abroad.

The same rights for social security benefits exist for self-employed persons during adoption leave (Article 4 of the Law of 06 September 2018 amending the legislation with a view to strengthening adoption leave and introducing foster care leave).

1.2.2 Foster care leave

Currently, an employee who has been approved as a foster parent has the right to be absent from work for a maximum of six days per calendar year for the fulfilment of her obligations and tasks in relation to foster care. If the family consists of two employees, both of whom have been appointed as foster parents, these six days must be divided between them (Article 30quater, introduced in the Employment Contracts Law by the Programme Law of 27 April 2007). There was no entitlement to leave for foster care duties in the past.

From 01 January 2019, the Law of 06 September 2018 creates an extended right to foster care leave.

From next year, in addition to the right to a maximum of six days of absence per year, the right to a maximum of six weeks of foster leave will be introduced. This right will exist in the event of long-term foster care for a child in the employee's family. Long-term foster care refers to care based on which it is clear from the start that the child will stay with that foster family for at least six months.

Note that foster care leave can only be taken as part of the foster care for children. On the other hand, the six days of absence for the completion of formalities can be claimed within the framework of the placement of minors as well as within the framework of the placement of disabled persons.

The foster care leave of six weeks per parent will be gradually increased by several additional weeks just as is the case for adoption leave. If two foster parents have been appointed as foster parents, the (future) additional weeks will have to be divided between them.

The new Law of 06 September 2018 creates an entitlement to benefits during foster care leave. During the six calendar days per year that a foster parent may be absent to complete formalities and assignments, she is entitled to a form of daily fixed unemployment benefits/allowance of EUR 113.68 within the social security scheme of the National Unemployment Office (Royal Decree of 27 October 2008). During the foster

leave (six weeks plus the additional weeks), the employee will be entitled to benefits that are identical to those in the case of adoption leave.

1.3 Temporary work and temporary agency work

Collective Bargaining Agreement (CBA) No. 108/2 between the social partners concluded in the National Labour Council on 24 July 2018, amending CBA No. 108 of 16 July 2013 on temporary work and temporary agency work

In certain cases, companies may make use of successive daily contracts for temporary agency work. These are employment contracts for temporary work with a maximum duration of 24 hours that succeed each other immediately or are separated at most by a public holiday or by the normal days of inactivity within the company. The applicable conditions and obligations are amended from 01 October 2018.

The social partners aim to fight the abusive use of successive daily contracts and to achieve a significant reduction in the share of such contracts in the total number of temporary employment contracts from 2018 onwards.

Under certain conditions and subject to compliance with a number of obligations, companies may make use of successive daily contracts for temporary work. The relevant conditions and obligations are included in CBA No. 108 of the National Labour Council (NLC). With a view to reducing the number of consecutive daily contracts and their improper use, the NLC adopted CBA No. 108/2 on 24 July 2018, amending these conditions.

Thus, successive daily contracts for temporary work can only be used if the user (i.e. the company that uses the temporary workers) proves that there is a 'need for flexibility' to this end. This need is proven if the user proves that her work volume is (a) dependent on external factors, (b) highly fluctuating, or (c) linked to the nature of the assignment.

Furthermore, the works council (or in its absence, the trade union delegation) must be informed and consulted when successive daily contracts are used. This consultation and information obligation was considerably extended by CBA No. 108/2. For example, the following information must be provided at the beginning of each semester:

- Detailed information on the number of successive daily contracts in the previous semester and the number of temporary agency workers employed under successive daily contracts;
- Proof of the above-mentioned 'need for flexibility';
- If explicitly requested by the employee representatives, information on the number of temporary workers per tranche of successive daily contracts.

If there is no works council or trade union delegation within the company, the above information must be provided by the temporary work agency to the Social Security Fund for temporary agency workers.

In addition, the works council (or in its absence, the union delegation) must be consulted annually (coinciding with one of the two semester statements) about the use of successive daily contracts for temporary work and the motivation to make permanent use of successive daily contracts.

CBA No. 108/2 enters into force on 01 October 2018.

1.4 Protection of business secrets

The Law of 30 July 2018 on the protection of business secrets (published in *Moniteur belge* 14 August 2018) provides for the transposition of Directive 2016/943/EU 'on the

protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure'.

A small part of the Law amends Article 17 of the Employment Contracts Act. It now refers to Article XI. 332/4 of the Economic Law Code, regarding the protection of business secrets. This article describes the conditions for unauthorised acquisition, use and disclosure of trade secrets.

In Book XI of the Economic Law Code, Article XI. 332/2 states in paragraph 2 that the provisions on trade secrets should not be construed as a ground for restricting the mobility of workers or the free movement of workers. In particular, these provisions do not provide any ground for restricting, firstly, employees in the use of information which does not constitute trade secrets, secondly, employees in the use of experience and skills honestly acquired in the normal exercise of their duties and, thirdly, employees in their employment contracts to be subject to additional restrictions other than those imposed in accordance with European or national law.

Any request to apply measures, procedures and remedies concerning trade secrets will be rejected if it concerns the disclosure of business secrets by workers to their representatives in the legitimate exercise of their representative functions. This is on condition that such disclosure was necessary for the exercise of those functions. Moreover, without prejudice to the powers of the Labour Court and even if the parties are not undertakings, the Commercial Court shall be competent to hear and determine all claims relating to the unlawful acquisition, use or disclosure of a trade secret, irrespective of the amount of the claim. Without prejudice to Article 15 of the Employment Contracts Law on prescription, claims relating to trade secrets shall be prescribed after five years.

2 Court Rulings

2.1 Principle of equality and non-discrimination

Constitutional Court, No. 89/2018, 05 July 2018

This judgment of the Belgian Constitutional Court concerns a preliminary question as to whether or not Articles 2(1) and 3 of the Act of 24 February 1978 on the employment contract of paid athletes violate Articles 10 and 11 on the principle of equality and non-discrimination in the Constitution, because the broader definition of 'salary' as a wage within the meaning of the Wage Protection Law of 12 April 1965 results in an athlete being regarded as a 'paid' athlete, when her salary, within the meaning of the Wage Protection Law, reaches the threshold laid down in Article 2(1) of the Law of 24 February 1978, even though the salary due, within the meaning of Employment Contracts Law of 03 July 1978, is lower than that limit and even if no salary is owed at all in that sense

The principle of equality and non-discrimination in the Constitution does not preclude the application of a difference in treatment between certain categories of persons, provided that this difference is based on an objective criterion and is reasonably justified. According to the Court, the legislature's choice to depart from the broader wage concept of the Wage Protection Law and to apply a minimum limit for the delimitation of the personal scope of the Law of 24 February 1978 on the employment contract for paid athletes is based on an objective criterion which is, moreover, consistent with the objective of the Act to grant professional athletes, namely athletes who earn a living from sport, a social status and, consequently, social protection. In addition, the Court also notes that the use of this wage concept and the wage limit set by the King does not have disproportionate consequences. After all, athletes whose 'salary' as referred to in the Wage Protection Law is lower than the set salary limit are not deprived of social security protection. They are still deemed to be linked by an employment contract and to fall within the scope of the relevant legislation, i.e. the

Employment Contracts Law, if it is demonstrated that the constitutive elements of an employment contract exist, including a salary in return for work (Point B.5.5). The Court concludes that the mere fact that in that case there is no legal presumption of the existence of an employment contract does not constitute an infringement of Articles 10 and 11 of the Constitution (Point B.6.3).

The webpage of Belgian courts is available here.

3 Implications of CJEU rulings and ECHR

3.1 Transfer of undertaking

CJEU case C-472/16, 07 August 2018, Jorge Luís Colino Sigüenza

On 31 March 2013, a few months before the end of the academic year, a municipal music school ceased its activities. All music school employees were dismissed with effect from 08 April 2013 and the municipal school was declared insolvent on 30 July 2013. In August 2013, the Administration of the School assigned the management of the school to a new contractor (In-pulso Musical), which took over the activity at the beginning of the next academic year.

In *Colino Sigüenza v Ayuntamiento de Valladolid and others*, the CJEU examined whether a five-month gap between the contracts to manage the municipal school of music prevented the case from being a transfer of undertaking, and whether the dismissals of the outgoing contractor's employees were made for an economic, technical or organisational reason entailing changes in the workforce (point B.5.5).

According to its judgment of 07 August 2018, the CJEU held:

- *"Article 1(1) of Directive 2001/23/EC on the transfers of undertakings, be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that Directive;*
- *Article 4(1) of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23, which it will be for the referring court to ascertain".*

The CJEU held that the circumstances of the case could not preclude a transfer of undertaking for the following reasons:

The CJEU considered that the material resources, such as musical instruments, facilities and premises, appeared to be essential to the activity in question (namely the

management of the music school) and that these had been made available to the new contractor (Point 35).

As the activity did not appear to be based essentially on manpower, since it requires a significant amount of equipment, the fact that the new contractor In-pulso Musical did not hire the workers did not preclude that a transfer had taken place (Point 36).

The fact that ownership of the tangible assets that were essential for the performance of the activity always belonged to the municipal administration of Valladolid was not relevant (Point 37).

Under these circumstances, as there was a gap of five months between the dismissal and the resumption of the management of the school, it follows that a temporary suspension of an undertaking's activities could not preclude the possibility that the economic entity had retained its identity (Point 41).

The fact that the undertaking was temporarily closed at the time of the transfer and had no employees were factors to be taken into account but did not by themselves preclude the possibility of a transfer of undertaking. It is particularly relevant that three of the five months' closure were school holidays (Point 43).

The case was therefore remitted to the Spanish court to determine whether, under the given circumstances, a transfer of undertaking had taken place.

4 Other relevant information

Nothing to report.

Croatia

Summary

The CJEU's judgment in case C-41/17, 19 September 2018, *González Castro* has no implications on Croatian law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Night work and nursing

CJEU case C-41/17, 19 September 2018, González Castro

In its judgment in case C-41/17, 19 September 2018, *González Castro*, the CJEU asserts that a worker who is nursing and works in shifts shall be considered a night worker even if only part of her duties are performed at night. She is protected by the Pregnant Worker's Directive 92/85/EEC. Furthermore, the CJEU ruled that Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 05 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) must be interpreted as applying to a situation in which a worker, who has been refused a medical certificate indicating the existence of a risk to nursing that is related to her work and who consequently based on this risk challenges the risk assessment before a court or other competent authority of the Member State concerned, provided that that worker adduces factual evidence to suggest that that the assessment did not take her individual situation into account, and thus permits the presumption that it is a case of direct discrimination on the grounds of gender within the meaning of Directive 2006/54/EC, which is for the referring court to ascertain. It is then for the respondent to prove that that the risk assessment did actually include the employee's specific situation and that, accordingly, the principle of non-discrimination was not infringed**.**

The definition of night worker in Croatian law (Article 69(5) of the Labour Act) is broad enough and workers whose work is organised in shifts which include night work enjoy special protection (Article 71(3) of the Labour Act), i.e. a change of shifts is ensured to limit the uninterrupted work in night shifts to a maximum of once per week. The employer's obligations towards shift and night workers are regulated in Article 72 of the Labour Act. The employer has the obligation to adapt the organisation of work and ensure the employees' protection of safety and health, particularly of night or shift workers. The employer must ensure that night workers undergo regular health assessments. Furthermore, the employer must ensure a pattern of working time that enables the worker to perform her job during the day in case when the night worker suffers from health problems connected with the fact that she performs night work. It is worth noting that regulations exist on the content, manner and terms of the health assessments of night workers (Official Gazette No. 32/2015) which guarantee night workers a right to appeal to the second instance when the worker disagrees with the results of the health assessment (Article 5). Apart from this, night work of workers who

are nursing is regulated in Article 20(6) of the Maternity and Parental Benefits Act (Official Gazette No. 85/2008, 110/2008, 34/2011, 54/2013, 152/2014, 59/2017) in line with Article 7 of the Pregnant Workers Directive. A shifting of the burden of proof is regulated in Article 20 of the Anti-discrimination Act (Official Gazette No. 85/20018, 112/12) and must be read in line with CJEU case law.

4 Other relevant information

Nothing to report.

Cyprus

Summary

Mass mobilisations and strike actions of primary and secondary school teachers raised serious questions about labour laws during the industrial action relating to the social dialogue and the right of unions to be consulted, the right to assembly and free trade unionism and the right of unions to take strike action or other forms of industrial action.

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 Working conditions of teachers in the public sector and collective rights

The major development in September 2018 were mass mobilisations and a 48-hour long strike of primary and secondary school teachers. The strike took place on 18 and 19 September 2018. The conflict arose in July 2018, when the Ministry of Education proposed to change the terms and conditions of work for thousands of teachers working in the public education sector without prior consultation (a press report by the European Trade Union Committee for Education, ETUCE, is available here). The primary and secondary school unions took action against the unilateral decision taken by the government (an ETUCE press report is available here). The Cypriot government issued an ultimatum for teachers to accept the following terms:

- An increase in teaching time of education staff at all levels;
- Partial and/or complete elimination of special programmes aiming at supporting disadvantaged students, students with foreign citizenships or with a migrant background;
- Remove the exemption from teaching for trade union duties and activities.

After the first industrial action on 13 July, the trade unions (OELMEK, POED and OLTEK, which are ETUCE member organisations in Cyprus) went on strike to defend their right to be consulted. After the strike action, a mediation proposal was put forward by one of the other trade unions, SEK, which allowed the lifting of the unilaterally imposed measures and paved the way for negotiations between the unions and the Cypriot government.

The following major labour law issues were debated during the industrial action:

- Social dialogue and the right of unions to be consulted;

- The right to assembly and free trade unionism;
- The right of unions to take strike action or other forms of industrial action.

The unions accused the government of violating institutional dialogue and for attempting to unilaterally impose changes to the working conditions and terms of employment, violating basic labour practices of consultation, and reported the matter as a major anti-labour conduct case to the International Labour Organization (ILO) and the European Trade Union Confederation (ETUC). They raised the issue before Parliament; they questioned the legality of the decisions taken by the government and threatened to take legal action unless the government backtracked.

The government and Education Minister, on the other hand, rejected the unions' claims asserting that they had fully respected union rights and the right to strike. They claimed that the proposed cuts were part of the rationalisation and modernisation plan and called for further dialogue on the basis of the Minister's proposals.

One important issue that was raised related to the right of teachers to take collective action other than strike action, and whether this would make individual teachers liable to disciplinary action. This issue was raised when the teachers' unions called on their members to take action, which amounted to a partial refusal to perform specific tasks contained in their duties derived from the regulations and their job description. The matter became confusing when an old letter (dated 02 November 2011 by the Ministry) was referred to on a popular education website, invoking an opinion from the General Attorney (No. 46 (A) / 1967/45, 11710/2011), which threatened disciplinary action against teachers who do not perform their duties as instructed by the Ministry. This was presented somewhat misleadingly on the grounds that supposedly 'the Ministry has an obligation to act on the basis of legality and to impose it where it is violated'. In the posted letter, the Ministry stated that whilst it fully respects the constitutionally guaranteed right to strike, any other measure aside from strike action was not legal and was not protected by the Constitution.

However, this information is not completely accurate.

Firstly, the Cyprus Constitution protects the right to strike (Article 27), which is the refusal of employees to provide contractually owed work on the basis of a collective request and purpose. The right to strike is a means of participating in a collective process of taking measures to promote workers' rights and interests, which is but one form of action among numerous other measures in the context of trade unionism and free industrial action. It is therefore an integral part of more general rights such as the right to freedom of expression (Article 19 of the Constitution and Article 10 ECHR) and the right to peaceful assembly (Article 21 of the Constitution and Article 11 of the ECHR). It is also enshrined in an explicit reference to the Charter of Fundamental Rights (CED), which is superior to the Cyprus Constitution, since European law overrides the application of European law to Cypriot law. In particular, Article 28 of the DSB, which deals with the right to negotiate and collective actions, states:

> *"Employees and employers or their respective organisations have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in the event of a conflict of interests, resort to collective action to defend their interests, including strikes."*

Second, European Regulation (EC) No. 2679/98 (the 'Monti Regulation') enshrines the right of workers to take collective action as a protected fundamental right in national law, including the right to strike (interpreted in the context of important principles and conventions such as the International Labour Organization Convention 97 and 98 and ECHR decisions such as *Denir* and *Energji Yap-Yol*, and the CJEU in *Viking* and *Laval*).

Third, a number of relevant authorities have reiterated that the right of workers to take measures that include industrial action up to full abstention from work lies at the core of the right to collective bargaining between two unequal parts, the employer (public or private) and the worker (private or public sector) with the ultimate measure being strike actions. The International Labour Office has stated that 'the strike cannot be addressed individually by labour relations as a whole' (see p. 61, International Labour Office, Freedom of Association and Collective Bargaining, International Labour Committee Office). The right to collective action, including the last resort, i.e. the right to strike, is a cornerstone of the fundamental rights of a free society (Waas, 2012).

In this sense, any threat of disciplinary action against teachers participating in their union's industrial action would violate the right to free trade unionism and the freedom of thought and assembly, as international, European and Cypriot law enshrine the right of partial or total abstention from work. Since the teachers' unions legally decided to take strike actions, the teachers taking part in such activities were protected by exercising their fundamental rights. Any disciplinary action would amount to serious misconduct and a violation of fundamental rights.

In the end, no disciplinary action was taken.

Reference:

- Bernd Waas (2012) 'The Right to Strike: A Comparative Overview, Studies in Employment and Social Policy Series and 'Strike as a Fundamental Right of Workers and its Risks of Conflict with Other Fundamental Rights of Citizens' - XX World Congress, Santiago de Chile, September 2012, General Report III

Czech Republic

Summary

(I) The government has set new parameters for the calculation of pensions for 2019.

(II) The Draft Act amending Act No. 262/2006 Coll., is currently being debated in the Chamber of Deputies. It aims to cancel the initial three-day waiting period before benefits are paid when an employee is 'temporarily unfit for work'.

1 National Legislation

1.1 Rise of Pensions in 2019

Government Regulation No. 213/2018 Coll. (published on 27 September 2018 with the effective date set for 01 January 2019) on the amount of the general assessment basis for the year 2017, the recalculation coefficient for the amendment of the general assessment basis for year 2017, the reduction limit for the determination of the calculation basis for the year 2019 and the basic assessment of pensions for 2019 and on the increase in pensions in the year 2019 has been published.

The government has set new parameters for the calculation of pensions for 2019. The general assessment basis for 2017 rose to CZK 30 156. The recalculation rate for its adjustment for 2017 is 1.0843. The first reduction limit determining the calculation basis in 2019 will be CZK 14 388 and the second reduction limit will be CZK 130 796.

The amount of the basic assessment of the above-mentioned pensions (i.e. the amount of old-age, invalidity, widow's, widower's and orphan's pension, which applies to all recipients in the same amount, regardless of income) will rise to CZK 3 270 per month. In addition, the percentage assessment of pensions will also increase — by 3.4 per cent.

1.2 Sick pay

The Draft Act amending Act No. 262/2006 Coll., the Labour Code, as amended, is being debated in the Chamber of Deputies.

The Draft Act aims to cancel the initial three-day waiting period before benefits are paid when an employee is 'temporarily unfit for work' - that is, absent from work owing to illness or injury. The employee has no statutory entitlement to sick pay from the employer or to state sickness benefits in that period. This waiting period before sick pay is payable is subject to a maximum of 24 hours of missed working time.

The aim of the Draft Act is to partially enhance the social situation of low-income employees and socially disadvantaged employees (particularly, single mothers or disabled employees) and prevent employees from coming to work while they are sick, which may cause less productivity, exhaustion and workplace epidemics.

The Draft Act is being deliberated in the Chamber of Deputies. The preliminary effective date is set to the first day of the third calendar month after publication.

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 Supreme Court has confirmed previous judgments condemning Uber drivers for breaching several laws.

(II) A committee of experts has issued 18 recommendations for the improvement of the working environment.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Platform economy

Supreme Court, No. 62/2018, 13 September 2018

A number of cases against Uber drivers (test cases) found that the drivers were in breach of the Danish Act on Taxi Driving (*'Lov om taxikørsel'*), the Act on Public Traffic, (*'Færdselsloven'*), as well as the Taxation Law before the Municipal Court in Copenhagen in August 2017 and later in appeal to the Eastern High Court in January 2018. The Supreme Court examined some procedural issues Uber claimed that apparently invalidated the abovementioned rulings. However, the Supreme Court confirmed the ruling of the Eastern High Court, and the Uber drivers will have to pay fines for breaches of the Taxi Act and the Act on Public Traffic for illegal transportation (approx. 5 200 transportations per person), and will pay taxes as well as a fine for withholding taxes.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Parliamental Expert Committee on Work Environment submits recommendations

The Expert Committee submitted 18 recommendations to the government for improving the work environment. The government now assesses the recommendations and plans for future adjustments.

Estonia

Summary

(I) Trade unions and employers have agreed on a new monthly minimum wage.

(II) Employers must collect data on female and male workers and on the wages paid and wage differences.

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 Monthly minimum wage

The Estonian Trade Unions' Confederation and the Estonian Employers' Association have concluded an agreement on the new monthly minimum wage. The new monthly minimum wage starting from 01 January 2019 will be EUR 540 and EUR 3.20 per hour. The new monthly minimum wage will take into account economic growth. Before the agreement was signed, it was published for public consultations.

In 2018, the monthly minimum wage is EUR 500 gross and the average wage in June 2018 was EUR 1 321 gross. The new monthly minimum wage is applicable to every employer in Estonia in both the private and the public sector.

A press release of the Estonian Employer's Confederation is available here.

4.2 Wage gap and employers' obligations

The Estonian government has initiated a new draft law to close the wage gap between women and men. The planned amendments in the Gender Equality Act will grant the labour inspectorate the required authority to request the necessary data about the number of male and female employees and the wages they are paid. All public sector employers have an obligation to forward all the requested data to the labour inspectorate. The labour inspectorate will publish an annual survey on the wages of male and female employees.

The obligation to share data about the wages for male and female employees has been foreseen for the public sectors. It is planned that by 2024, this obligation will also be applicable to the private sector.

The draft of the amendments should come into force on 01 July 2020.

More information by the Ministry of Social Affairs is available here.

Finland

Summary

The government has presented a Law Proposal on the Working Hours Act in Parliament.

1 National Legislation

1.1 Working time

The government has presented a proposal on the Working Hours Act (HE 158/2018 vp) in Parliament. The proposal includes an entirely new Act that would abolish the present Working Hours Act (605/1996).

The main purpose of the new legislation is to modernise the law to contain new forms of work and reflect the massive change that has been taking place in working life for a long period of time. The legislation also takes into account certain factors arising from the Working Time Directives (93/104/EC, 2000/34/EC and 2003/88/EC).

The new Act would introduce far more flexibility in working time. The parties to an employment contract will be able to agree on a flexible working time, if the work is primarily performed elsewhere than in a traditional setting (work place), and the employee will be entitled to decide her working schedule independently. There will also be a possibility for the parties to agree on a working hours reserve (working hours bank), which has presently only been possible between an employer and an employee representative.

The Act is expected to come into force on 01 January 2020.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

France

Summary

(I) A new law on the freedom to choose one's professional future has been approved.

(II) An analysis of Articles 53 and 116 of Law No. 2018-771 is provided.

(III) Law No. 2018-703 on sexual and gender-based violence has been approved.

(IV) A number of court rulings are analysed.

1 National Legislation

1.1 Freedom to choose one's professional future

Law No. 2018-771 of 05 September 2018 contains two practical provisions concerning precarious contracts. It provides for flexibility, on an experimental basis, in the management of successive fixed-term contracts and the securing of permanent temporary contract.

1.1.1 Successive fixed-term contracts

Article 53 of Law No. 2018-771 introduces flexibility in the management of successive fixed-term contracts. On an experimental basis, it allows a single fixed-term contract or a single temporary employment contract to replace several employees. Thus, in practice, it will now be possible to conclude a single fixed-term contract or a single temporary employment contract to replace several employees who are absent, successively, or over two half-time periods, for example.

However, this experiment will only be open to sectors that will be defined by a decree still to be published. The period of experimentation is set from 01 January 2019 to 31 December 2020.

However, the law specifies that this experiment may not have the purpose or effect of permanently filling a job related to the normal and permanent activity of the company.

The measure is presented as a means to fight precariousness and too short contracts. The law provides that the government will submit an evaluation report of the experiment to Parliament before 01 June 2021. This report should, in particular, evaluate the experiment's effects on the frequency of conclusion of fixed-term contracts in the sectors determined by decree.

This new legal possibility allows for derogations from Articles L. 1251-6, 1 of the French Labour Code on temporary work and L. 1242-2, 1 of the same Code on fixed-term contracts, which provide for the conclusion of fixed-term contracts to replace a single employee in the event of absence.

This provision challenges previous case law, which stated that using a single fixed-term contract to replace several absent employees in succession was contrary to Article L. 1242-2, 1:

> "*Attendu qu'il résulte de ce texte que le contrat de travail à durée déterminée ne peut être conclu que pour le remplacement d'un seul salarié en cas d'absence*".
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 28 June 2006, n°04-40.455

And:

"*Mais attendu qu'il résulte de l'article L. 1214-12 du code du travail que le contrat de travail à durée déterminée ne peut être conclu que pour le remplacement d'un seul salarié en cas d'absence ; qu'il ne peut donc être conclu pour le remplacement de plusieurs salariés absents, que ce soit simultanément ou successivement ; que le moyen n'est pas fondé*".

Labour Division (*Chambre sociale*) of the Court of Cassation, 18 January 2012, n°10-16.926

1.1.2 Permanent temporary contract

Reminder about permanent temporary contracts

Permanent temporary contracts allow a temporary work agency to conclude an open-ended contract with the employee for the performance of successive assignments.

Each mission gives rise to:

- The conclusion of a secondment contract between the temporary employment agency and the user customer, known as the 'user company';
- The establishment, by the temporary work company, of an engagement letter.

The permanent temporary contract is governed by the provisions of the French Labour Code on employment contracts of indefinite duration, subject to specific provisions.

The contract may provide for periods without the performance of duties, which shall be treated as effective working time for the purpose of determining entitlement to paid leave and seniority.

The permanent temporary contract must be concluded in writing and includes the following information:

- The identity of the parties;
- Conditions relating to working time, in particular night work;
- The hours during which the employee must be reachable during periods when she is not involved in an assignment;
- The scope of mobility within which the assignments are carried out, which takes into account the specific nature of the jobs and the nature of the tasks to be performed, while respecting the employee's personal and family life;
- A description of the jobs corresponding to the employee's qualifications;
- If applicable, the duration of the probation period;
- The amount of guaranteed minimum monthly wage;
- The obligation to provide the employee with an engagement letter for each assignment she performs.

The permanent temporary contract must provide for the payment of a guaranteed minimum monthly wage that is at least equal to the amount of minimum wage multiplied by the number of hours corresponding to the legal weekly working time for the month in question, taking into account remuneration of the missions paid during that period.

By way of derogation from Article L. 1251-12-1 of the French Labour Code, the total duration of the assignment of an employee who has concluded an open-ended contract with the temporary work agency may not exceed 36 months.

Securing of the permanent temporary contract by Law No. 2018-771 of 05 September 2018

Article 116 of Law No.2018-771 incorporates the permanent temporary contract into the French Labour Code and defines its legal regime.

The experiment with this type of contract, introduced by Rebsamen Law No. 2015-994 of 17 August 2015, expires on 31 December 2018. In addition, this amendment makes it possible to secure permanent temporary contracts concluded prior to the *Rebsamen* law (more precisely, those concluded between 06 March 2014 and 19 August 2015).

In a case of 12 July 2018, the Court of Cassation ruled that the social partners, by signing an agreement on permanent temporary contracts on 10 July 2013, had exceeded their powers. They had created the permanent temporary contract before the *Rebsamen* law of 2015 allowed such experimentation. The Court of Cassation found that the introduction of a new category of employment contract derogates from the rules of 'absolute public policy' relating to contracts of indefinite temporary duration and assignment contracts:

> "*Qu'en statuant ainsi, par des motifs inopérants tirés de la loi n° 2015-994 du 17 août 2015, laquelle ne dispose que pour l'avenir, et alors que l'accord collectif du 10 juillet 2013, en instaurant le contrat à durée indéterminée intérimaire permettant aux entreprises de travail temporaire d'engager, pour une durée indéterminée, certains travailleurs intérimaires, crée une catégorie nouvelle de contrat de travail, dérogeant aux règles d'ordre public absolu qui régissent, d'une part, le contrat de travail à durée indéterminée, d'autre part le contrat de mission, et fixe, en conséquence, des règles qui relèvent de la loi, le tribunal de grande instance a violé le texte susvisé*".
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 12 July 2018, n°16-26.844

1.2 Sexual and gender-based violence

1.2.1 A new offence: gender-based contempt

Law No. 2018-703 of 03 August 2018 has introduced the new offence of sexist insults (French Penal Code, Article 621-1, I) which, like sexual harassment, can occur in the workplace. Sexist insults are defined as any sexual or sexist comment or conduct that violates the other's dignity because of its degrading or humiliating nature or that creates an intimidating, hostile or offensive situation against the other.

No repetition of the facts is required and this type of offence does not need to be accompanied any act of sexual violence or exhibition, or any act of sexual or moral harassment.

Sexist insults are punishable by a fourth class fine (EUR 750). In the event of aggravating circumstances (if the offence is committed, for example, by a person abusing her authority conferred on her by her duties), the fine may be increased to EUR 1 500 (fifth class fine). In the event of a repeat offence, it is increased to EUR 3 000.

Additional penalties can also be pronounced, such as the obligation for the offender to complete, at her own expense, a training course to fight sexism and raise awareness of equality between women and men.

1.2.2 Sexual harassment

The definition of sexual harassment in the French Penal Code has been modified. It is described as 'repeatedly making statements or conduct with a sexual or sexist connotation' and 'violating her dignity because of their degrading or humiliating nature, or creating an intimidating, hostile or offensive situation against him/her'.

Sexual harassment may now also include 'such statements or conduct against the same victim by several persons, in a concerted manner or at the instigation of one of them, even though each of these persons has not acted repeatedly'.

Only the definition of sexual harassment given by the French Penal Code has been amended, not that of the French Labour Code (Article L. 1153-1). However, the provisions of the French Penal Code also apply to companies.

2 Court Rulings

2.1 Information and consultation of employees

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-13.306 and No. 17-11.829, 05 July 2018

A health, security and working conditions committee decided, following deliberation, to use experts in the context of an important project. The employer referred the case to the High Court in the form of summary proceedings. According to him, to be valid, the deliberation had to expressly designate a specialist firm, select an expert(s) and define the assignment.

In cases No.17-13.306 and No.17-11.829, the Court of Cassation stated that Article L. 4614-13 of the French Labour Code does not preclude the use of experts from being the subject of two different deliberations. The deliberation was therefore valid on this point:

> "*Mais attendu que le président du tribunal de grande instance a décidé à bon droit que l'article L. 4614-13 du code du travail alors applicable ne s'oppose pas à ce que le recours à l'expertise et la désignation de l'expert fassent l'objet de deux délibérations distinctes ; que le moyen n'est pas fondé*".
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 05 July 2018, No.17-13.306 and No.17-11.829

This decision has consequences on the contestation of experts by the employer. Indeed, the employer has 15 days from the date of the health, security and working conditions committee's decision to contest the need for experts, the appointment of the expert(s), the estimated cost and the scope of the assignment (see French Labour Code, Article L. 4614-13).

However, the law does not require the deliberation to contain all of these elements. To remedy this, the Court of Cassation asserted that the employer had 15 days from the notification of the estimated cost to contest it (see Labour Division, *Chambre sociale*, of the Court of Cassation, No. 16-28.561). The same difficulty arises in contesting the choice of expert. If the employer is not aware of which consulting firm has been selected on the day of the deliberation, it will be difficult for him/her to contest this choice within 15 days. In the present case, the employer did not know the choice of expert on the day of the first deliberation.

This decision should also apply to the Social and Economic Committee, which may choose to hold at least two separate deliberations on the experts. It should be recalled that the Social and Economic Committee has two months from the date on which the information necessary for the consultation was made available to deliver its opinion (see French Labour Code, Article R. 2312-6).

The difficulties encountered in challenging the health, security and working conditions committee's choice of experts should cease to exist within the framework of the Social and Economic Committee. Indeed, for each constituent element of the use of experts,

the starting point of the time limit for contestation differs. Thus, the employer will have 10 days from:

- The deliberations of the Social and Economic Committee deciding on the use of experts if she intends to contest the need for expertise;
- The appointment of the expert by the Social and Economic Committee if she intends to contest the choice of the expert;
- Notification of the employer of the specifications and information provided in Article L. 2315-81-1 of the French Labour Code if she intends to dispute the estimated cost, scope or duration of the expertise;
- Notification of the employer of the final cost of the expertise if she intends to contest this cost.

In the present case, in the presence of the Social and Economic Committee, the employer would have had 10 days from the second deliberation to contest the choice of the consulting firm.

2.2 Working time

Labour Division (Chambre sociale) of the Court of Cassation, No. 16-27.825, 11 July 2018

In the present case, an employee took parental education leave from 01 August 2008 to 29 January 2011 with one-fifth reduction in her working hours. She was dismissed for economic reasons on 06 December 2010 in the context of a collective dismissal and accepted a nine-month reclassification leave. On 01 January 2011, she ended the reduction in her working hours and left the company on 07 September 2011. She challenged her dismissal and submitted various claims, in particular concerning dismissal compensation and her reclassification leave allowance.

French law applies a principle of proportionality for the calculation of severance pay and retirement pay for the determination of remuneration during a reclassification leave (for the period exceeding the notice period), on the basis of time spent and remuneration previously received.

Thus, for the calculation of severance pay and retirement pay, the former Article L. 3123-13 of the French Labour Code (replaced by Article L. 3123-5 of the French Labour Code) provided that the allowances for employees with alternate periods of full-time and part-time work in the same company were to be calculated 'in proportion to the periods of employment completed under either of these two methods'.

The same principle of *pro rata* calculation is applied to the calculation of remuneration during the period of reclassification leave, exceeding the duration of the notice period for which it is provided that the employee shall receive monthly remuneration equal to at least 65 per cent of her gross monthly wage subject to the contributions mentioned in Article L. 5422-9 of the French Labour Code for the last 12 months preceding the notification of dismissal (see French Labour Code, Article R. 1233-35).

The Court of Cassation referred the following two questions to the European Court of Justice:

> "*1°) la clause 2, § 4 et § 6 de l'accord-cadre sur le congé parental, qui figure en annexe de la directive 96/34/CE du Conseil, du 3 juin 1996, concernant l'accord-cadre sur le congé parental conclu par l'UNICE, le CEEP et la CES, doit-elle être interprétée en ce sens qu'elle s'oppose à l'application à un salarié en congé parental à temps partiel au moment de son licenciement d'une disposition de droit interne telle que l'article L. 3123-13 du code du travail, alors applicable, selon lequel 'L'indemnité de licenciement et l'indemnité de départ à la retraite du salarié*

ayant été occupé à temps complet et à temps partiel dans la même entreprise sont calculées proportionnellement aux périodes d'emploi accomplies selon l'une et l'autre de ces deux modalités depuis leur entrée dans l'entreprise' ?

2°) la clause 2, § 4 et § 6 de l'accord-cadre sur le congé parental, qui figure en annexe de la directive 96/34/CE du Conseil, du 3 juin 1996, concernant l'accord-cadre sur le congé parental conclu par l'UNICE, le CEEP et la CES, doit-elle être interprétée en ce sens qu'elle s'oppose à l'application à un salarié en congé parental à temps partiel au moment de son licenciement d'une disposition de droit interne telle que l'article R. 1233-32 du code du travail selon lequel, pendant la période du congé de reclassement excédant la durée du préavis, le salarié bénéficie d'une rémunération mensuelle à la charge de l'employeur, dont le montant est au moins égal à 65 % de sa rémunération mensuelle brute moyenne soumise aux contributions mentionnées à l'article L. 5422- 9 au titre des douze derniers mois précédant la notification du licenciement ?"

According to the plaintiff and the Court of Cassation, these rules contravene Clause 2 of the framework agreement on parental leave annexed to Council Directive 96/34/EC of 03 June 1996 in two points. § 4 of the clause states that 'Member States must take measures to protect workers against dismissal because of the request to or the taking of leave'. The application of the disparity between employees on part-time parental leave and other full-time employees would likely encourage the employer to dismiss workers who are on parental leave (since employees on part-time parental leave receive lower compensation).

§ 6 provides for the retention of rights acquired or in the process of being acquired by the worker from the date on which parental leave begins until the end of parental leave, as well as the application of these rights at the end of the said leave. Here again, the application of the European rule could prevent the amount of severance pay or the remuneration of reclassification leave from being increased for employees on part-time parental leave once they have been hired on a full-time basis.

This is what has been retained by the Court of Justice of the European Union on several occasions. In a case concerning the payment of severance pay to an employee on part-time parental leave, the employee had been dismissed without meeting the legal notice period. The CJEU in case C-104/09, 22 October 2009, *Roca Álvarez*, stated that the allowance should be calculated on the basis of full-time contractual remuneration and not on that resulting from parental leave:

> "*in the event of unilateral termination by the employer without serious reason or without respecting the legal notice period of the employment contract of the worker engaged on an indefinite and full-time basis, while he benefits from part-time parental leave, the compensation to be paid must not be determined on the basis of the reduced remuneration he receives when the dismissal takes place*", based on clauses 2 § 6 and 7.

The Court of Justice of the European Union pointed out that the fact that a worker does not work the same number of hours as a full-time employee on account of parental leave does not mean that both are in a different situation from the initial contract between them and the employer. It also pointed out that the objective of Clause 2 § 6 was that at the end of this leave, the employee should find him-/herself in the same situation in terms of rights derived from the employment relationship she was in before taking leave.

Furthermore, the Court of Cassation submitted the following question to the Court of Justice of the European Union:

> "*3°) dans l'hypothèse où une réponse affirmative serait apportée à l'une ou l'autre des deux questions précédentes, l'article 157 du Traité sur le fonctionnement de l'Union européenne doit-il être interprété en ce sens qu'il s'oppose à des*

dispositions de droit interne telles que celles des articles L. 3123-13 du code du travail, alors applicable, et R. 1233-32 du même code, dans la mesure où un nombre considérablement plus élevé de femmes que d'hommes choisissent de bénéficier d'un congé parental à temps partiel et que la discrimination indirecte qui en résulte quant à la perception d'une indemnité de licenciement et d'une allocation de congé de reclassement minorées par rapport aux salariés n'ayant pas pris un congé parental à temps partiel n'est pas justifiée par des éléments objectifs étrangers à toute discrimination ?"

Given that a large majority of part-time parental leave is taken by women, the application of this principle of proportionality could lead to indirect discrimination that is not justified by objective factors. According to Article 157 of the Treaty on the Functioning of the European Union, 'each Member State shall ensure the application of the principle of equal pay for men and women for equal work of equal value'. Pay is to be understood as the salary and any other benefits paid by the employer to the worker by reason of the latter's employment, and that it is therefore necessary to apply it to allowances granted to the worker on the occasion of her dismissal (see CJEU case C-262/88, 17 May 1990, *Barber*). The application of these provisions of national law results in lower amounts of compensation being (primarily) paid to women.

However, the Court of Cassation recalled that the Court of Justice of the European Union recognises the existence of indirect discrimination when the application of a national measure, although formulated in a neutral way, actually disadvantages a much higher number of women than men (see CJEU case C-7/12, 20 June 2013, *Riežniece*).

2.3 On-call work

Labour Division (Chambre sociale) of the Court of Cassation, No. 17-13029, 12 July 2018

In this case, an employee was promoted to branch manager on 01 January 2009. Because of his promotion, he had been subjected to the emergency call management system by the agency directors.

According to an internal note, managers were required to leave their mobile phones on at all times outside their working hours in order to be able to intervene or give instructions in the event of an emergency.

This employee was dismissed at the end of December 2011 and claimed backpay considering that the fact that he had had to leave his mobile phone on at all times constituted on-call periods.

At the time of the events, the collective agreement applicable to the company defined the on-call period as a period during which the employee had to ensure she was at home. In the present case, the employee was not required to stay close to his home.

This definition was in accordance with the French Labour Code, which specified that the on-call period was a period during which the employee, without being at the permanent and immediate disposal of the employer, had the obligation to remain at or near her home in order to be able to intervene and perform work for the company (see French Labour Code, Article L. 3121-5, applicable until 09 August 2016).

However, in this case, the Court of Cassation considered that these periods were on-call periods. Indeed, an internal document provided that the contact details of the branch managers were communicated to the company in charge of emergency calls and that in the event of a call, these managers had to take necessary measures. They had to remain permanently available on their mobile phones to meet any needs and be ready to intervene if necessary.

The Court emphasised the obligation of employees to remain at the employer's disposal at all times and considered that the requirement of proximity to the home was not a decisive factor for on-call periods.

> *"Mais attendu qu'ayant relevé qu'en application d'un document intitulé 'procédure de gestion des appels d'urgence', les coordonnées des directeurs d'agence étaient communiquées à la société en charge des appels d'urgence et que ces directeurs d'agence devaient en cas d'appel prendre les mesures adéquates, et qu'à partir du moment où le salarié a été promu directeur d'agence, sans être à la disposition permanente et immédiate de l'employeur, il avait l'obligation de rester en permanence disponible à l'aide de son téléphone portable pour répondre à d'éventuels besoins et se tenir prêt à intervenir en cas de besoin, la cour d'appel a légalement justifié sa décision"*.
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 12 July 2018, No. 17-13.029

This decision is consistent with the previous case law of the Court of Cassation:

> "*Mais attendu que, selon l'article L. 3121-5 du code du travail constitue une astreinte la période pendant laquelle le salarié, sans être à la disposition permanente et immédiate de l'employeur, a l'obligation de demeurer à son domicile ou à proximité afin d'être en mesure d'intervenir pour effectuer un travail au service de l'entreprise, la durée de cette intervention étant considérée comme un temps de travail effectif ; qu'ayant constaté que le salarié était tenu durant les périodes litigieuses de pouvoir être joint téléphoniquement en vue de répondre à un appel de l'employeur pour effectuer un travail urgent au service de l'entreprise, la cour d'appel, sans avoir commis la dénaturation alléguée, a pu décider que les périodes litigieuses constituaient des périodes d'astreintes"*.
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 02 March 2016, No. 14-14.919

The Court of Cassation states that a real obligation must be imposed on the employee by the company. The fact that a remote monitoring company has several telephone numbers that can be called does not create an on-call period for the employee, even if he could be disturbed or contacted outside his working hours:

> "*Qu'en se déterminant ainsi, par des motifs impropres à caractériser l'existence d'une obligation pour le salarié de tenir une permanence téléphonique à son domicile ou à proximité, la cour d'appel a privé sa décision de base légale au regard du texte susvisé".*
>
> Labour Division (*Chambre sociale*) of the Court of Cassation, 25 January 2017, n°15-26235

It should be recalled that Law No. 2016-1088 of 08 August 2016 made the definition of the on-call period more flexible (see French Labour Code, Article L. 3121-9). Since 10 August 2016, an on-call period is a period during which the employee, without being at her place of work and without being permanently available to meet the employer's immediate needs must be able to intervene to perform work at the service of the company. The condition of location in or near the home has been removed. As this definition is a matter of public order, no derogation is possible.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) According to the Federal Labour Court, a pre-formulated forfeiture clause covering all mutual claims from the employment relationship without any restriction and thus also the statutory minimum wage is null and void.

(II) According to the Higher Regional Court Frankfurt, a union must expel a member within a reasonable period of time after becoming aware of the grounds for expulsion.

(III) According to the Federal Civil Court, in case of a strike, an airline can avoid paying compensation to passengers only if the consequences of the suspension could not be averted by taking reasonable measures.

(IV) According to the State Labour Court Hesse, the flight personnel of SunExpress Deutschland GmbH may not elect a works council for the time being.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Statutory minimum wage

Federal Labour Court, No. 9 AZR 162/18, 18 November 2018

In the underlying case, the plaintiff was a flooring specialist with an hourly wage of EUR 11.10 gross and a working time of 8 hours daily. The employment contract of 01 September 2015 stipulated, among other things, that all mutual claims arising from the employment relationship lapse if they are not asserted in writing against the other contracting party within three months.

The Federal Labour Court held that a forfeiture clause like the one in the underlying case which was pre-formulated by the employer and which covered all mutual claims from the employment relationship without any restriction and thus also the minimum wage guaranteed by the Minimum Wage Act (‘*Mindestlohngesetz*’) of 01 January 2015, violates the transparency requirement of section 307(1) sentence 2 of the Civil Code (‘*Bürgerliches Gesetzbuch*;) and is therefore altogether invalid. This applies, in any event, if the employment contract was concluded after 31 December 2014.

Section 307(1) of the Civil Code reads as follows:

> *“Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract. An unreasonable disadvantage may also arise if the provision is unclear and incomprehensible.”*

A press release of the Federal Labour Court is available here.

2.2 Expulsion of a trade union member

Higher Regional Court Frankfurt, No. 4 U 234/19, 20 August 2018

In the underlying case, the plaintiff was a member of the defendant union and had been one of its two deputy federal chairmen since 2012. In September 2015, the trade union expelled the plaintiff from the union for 'persistent and seriously damaging conduct'.

According to the Higher Regional Court, a trade union can only expel a member for good cause if it gives notice within a reasonable period of time after becoming aware of the grounds for expulsion. In this respect, the Court was of the opinion that a lapse of half a year was too long a period in this respect.

A press release of the Higher Regional Court Frankfurt is available here.

2.3 Civil compensations due to strike action

Federal Civil Court, No. 4 U 234/19, 20 August 2018

According to the Federal Civil Court, passengers of a cancelled flight may be entitled to compensation even if the passenger controllers at the departure airport were on strike and it was therefore not ensured that all passengers could reach the flight. In the view of the Court, an airline cannot justify the cancellation of a flight by referring to safety concerns without actual evidence of a concrete safety risk. It is true that a strike is, in principle, a reason justifying exceptional circumstances that could exempt an airline from the obligation to financially compensate passengers affected by the cancellation. However, under the Flight Compensation Regulation 261/2004, this presupposes that the consequences of the suspension cannot be averted by taking reasonable measures.

The judgment of the Federal Civil Court is available here.

2.4 Works council elections

State Labour Court Hesse, No. 4 U 234/19, 20 August 2018

In the underlying case, an election committee was elected at SunExpress Deutschland GmbH on the initiative of a trade union, to conduct a works council election for flight operations. The employer objected to this by applying for a temporary injunction.

In the interim legal protection proceedings, the State Labour Court Hesse held that according to section 117(2) of the Works Constitution Act ('*Betriebsverfassungsgesetz*), the flight personnel of SunExpress Deutschland GmbH may not elect a works council for the time being. According to section 117(2), a collective agreement must regulate how the employees are represented and which participation rights apply. Such a collective agreement did not exist at SunExpress Deutschland GmbH. The election committee of the SunExpress flight operations was therefore not authorised to conduct an election to represent the interests of flight personnel.

Section 117 of the Works Constitution Act reads as follows:

> *"1) This Act shall apply to the ground establishments of aviation companies. (2) A body representing the flight personnel of aviation companies may be set up by the collective agreement. The collective agreement may derogate from this Act with respect to the collaboration of such a body with the bodies to be established under this Act for the representation of the employees of the ground establishments of the aviation company."*

A press release of the State Labour Court Hesse is available here.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Greece

Summary

(I) A new law on the procedure to adopt the minimum wage has been passed

(II) The Supreme Court has issued a preliminary ruling in a case of a transfer of undertaking.

1 National Legislation

1.1 Minimum wage

Traditionally, national minimum collective bargaining was endorsed by a National General Collective Employment Agreement signed by the leading organisations of workers and employers. An important development in the way the national minimum wage is determined was created by Law 4093/12, which provides that the minimum wage will be established by law following basic consultations with the social partners.

Law 4174/2013 describes the procedure for determining the minimum wage. It specifically provides for consultations between the 'social partners' and the government, which will lead to the drafting of a plan of the results of consultations, which together with the relevant documents will be submitted to the Minister of Labour, Social Security and Welfare, who will then submit a proposal to the Cabinet for an opinion. Finally, the Minister of Labour, Social Security and Welfare, after obtaining the Cabinet's opinion, shall take a decision in accordance with this opinion, setting the minimum salary or wage. This system has not, however, been applied yet.

An amendment was recently submitted and voted on in Parliament (Article 2 of Law 4564, 21 September 2018) to shorten the above consultation procedures.

The public consultation process on the new level of minimum wage has already started and will be completed by end of December, while the requisite ministerial decision for that purpose will be issued in the latter half of January 2019.

2 Court Rulings

2.1 Transfer of undertakings

Greek Supreme Court, No. 1833/2017

The Supreme Court ('*Areios Pagos*'), by its Decision No. 1833/2017, dealt with the issue of employee protection in case of a transfer of undertaking. The Court ruled that transfers take place on the initiative of the employer without the need for the consent of the workers, and therefore does not constitute a unilateral change in the working conditions.

An interpretative discourse on the meaning of the term 'economic entity' also took place, which is a prerequisite for declaring that the transfer of undertaking is valid based on the application of the relevant laws. The first question was whether the transfer of tangible assets which are essential for pursuing an identical activity is a relevant factor for determining that the identity of the transferred entity has been preserved and whether the identity of the transferred entity is excluded or not when the successor uses factors of production from the initial establishment after the transfer.

The second question was whether the existence of a transfer depends on the existence of a prospect—on the part of the transferor or the transferee—of a successful

continuation of operations under the new entity, and whether the prospect of a future closure and liquidation of the particular business excludes the transfer.

The Court suspended the final judgment until a preliminary ruling is issued by the CJEU on a relevant request on the meaning of the term 'economic entity' which was submitted by a previous decision of the same Court ('*Areios Pagos*' No. 1831/2017).

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

In a recent judgment, the Supreme Court analysed the legal consequences of unlawful dismissal and the different legal statuses between executive officers and executive employees, as well as the relationship between the Labour Code and Civil Code.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal law

Supreme Court ('Kúria'), No. Mfv.I.10.530/2017, 25 September 2018

The facts for the decision of the '*Kúria*' (Supreme Court) were as follows. The plaintiff had been employed by a publicly owned company. This company operates as a single member share company. The plaintiff (as an employee) had been elected executive officer indefinitely by the general assembly of the owner (local government) from 15 February 2015. Under his contract of employment, he was employed as an executive employee. This legal status is regulated in Act I of 2012 of the Labour Code (hereinafter LC).

The general assembly of the share company decided on his revocation without justification and without notice on 28 April 2016. The plaintiff brought an action before the Labour Court against the revocation. He claimed that the termination of his employment was unlawful with its legal consequences.

The application was rejected by the Labour Court. This decision was overturned by the Court of Appeal. The Court of Appeal decided that the decision of the general assembly of the local government (as an owner) was unlawful.

The defendant's review request was to repeal this decision. The '*Kúria*' stated that this review request was unjustified. It referred to Section 3:25 Sub 1. in Act V of 2013 on the Civil Code (hereinafter CC). Under this provision, the mandate of an executive officer shall be terminated by revocation. The '*Kúria'* highlighted that the employment relationship of this executive officer could be terminated by revocation (the '*Kúria*' referred to the previous decision: BH1995.253). However, if the revocation does not comply with the labour law provisions applicable to executive officers, the termination is unlawful.

The employer terminated the employment relationship without notice. Since the executive officer qualified as an executive employee and his position was based on an employment relationship, the termination did not have to be justified. See Section 210 Sub 1 of the LC. *"When an employment relationship is terminated by the employer, the following shall not apply Section 66 Sub 1. Under this provision, 'employers' are required to justify their dismissals."*

In this context, the '*Kúria*' stated that the revocation was similar to an ordinary dismissal.

However, the employer terminated the employment relationship without notice, which is regulated in Section 78-79. The employer is required to justify such terminations in each case. Consequently, the '*Kúria*' confirmed the decision of the Court of Appeal.

This decision highlights the problem of the different legal statuses between an executive officer and an executive employee. The legal status of an executive officer is regulated in the CC. Chapter XX of the CC regulates the organisational structure of companies. The function and legal status of companies' management is also regulated in this framework. Section 3:112 states that the executive officer shall manage the operations of the business under a personal service contract or under a contract of employment, as agreed with the company. Sub 2 emphasises that the executive officer shall manage the operations of the business independently, based on the primacy of the business's interests. In this capacity, the executive officer shall carry out her duties in due compliance with the relevant legislation and the company rules. The executive officer may not be instructed by the members of the business association and her competence may not be negated by the board of directors.

This solution is discussed in Hungarian Labour Law. The existence of an employment relationship and the legal status of executive officers is difficult to reconcile. As far as the termination of an executive officer is concerned, these provisions did not initially cover the termination of such employment relationships. The overlap between the revocation in the CC and dismissal in the LC was developed by the judiciary.

However, consistency is not provided because the legal status of executive officers (managers) and executive employees are essentially different. The executive employee is covered by the LC. Section 208 Sub 1 states that the 'executive employee' shall refer to the employer's director and any other person under her direct supervision and authorised—in part or in whole—to act as the director's deputy (hereinafter referred to collectively as 'executive employee').

This concept is extended by Sub 2. Under this provision, contracts of employment may invoke provisions on executive employees if the employee is in a position considered to be of considerable importance from the point of view of the employer's operations, or if she fills a post of trust and her salary exceeds seven times the mandatory minimum wage.

As far as the termination of the position of managers (executive officer) and of executive employees is concerned, there are no interfaces between the two systems. Unless otherwise agreed, terminations do not, as a general rule, include a notice period in the CC. The owner is not required to justify the termination. The termination without notice is regulated in Section 78 of the LC (formerly extraordinary dismissal). Under this provision, the employer or employee may terminate the employment relationship without notice if the other party:

- Wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship; or
- Otherwise engages in conduct that would render the employment relationship impossible.

The parties are required to justify the dismissal/termination. For this reason – among others – the legal status of executive officers (managers) as executive employees is an unfortunate solution.

The so-called extraordinary 'revocation' should be interpreted within the scope of liability of the management.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Iceland

Summary

The government will assign a group of experts to analyse measures to fight labour market violations.

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 Expert group on social dumping

In mid- September, the government announced that it would assign a group of experts from the social partners as well as other government bodies to assess the need for amendments and other methods to prevent social dumping in the labour market in addition to other violations of labour and tax law.

The announcement of the government ('*Víðtækt samstarf gegn félagslegum undirboðum á vinnumarkaði*') of 18 September 2018 is available here.

Italy

Summary

(I) The Constitutional Court has declared Article 3 para. 1 Legislative Decree No. 23 of 2015 contrary to the reasonableness and equality principles and to the right and the protection of work as foreseen in Articles 4 and 35 of the Constitution. The Court has grounded its decision on the remark that Article 3 para. 1 predetermines the amount of indemnity to be paid to the worker in case of unlawful dismissal according to the worker's seniority within the company without leaving to the judge any further assessment of the situation at stake. The decision will be published in the weeks to come.

(II) The Law Decree 04 October 2018, No. 113 concerning, among others, urgent measures on international protection and immigration, has been published in the Italian Official Journal No. 231/18 on 04 October 2018, coming into force one day later.

1 National Legislation

1.1 Law on urgent measures on international protection and immigration

The Law Decree 04 October 2018, No. 113 concerning, among others, urgent measures on international protection and immigration, has been published in the Italian Official Journal No. 231/18 on 04 October 2018, coming into force one day later.

Article 1 para. 1 lett. f) n. 2 modifies Article 18-*bis* Legislative Decree n. 286 of 1998, recognising the right to a one-year residence permit for 'specific cases' to victims of domestic violence or abuse. That residence permit can be converted into a work permit.

Article 1 para. 1 lett. f) adds Article 20-*bis* to Legislative Decree No. 286 of 1998, which regulates the release of a six-month calamity residence permit. Such residence permits cannot be converted into a work permit.

Article 1 para. 1 lett. i) n. 2 modifies Article 22 Legislative Decree No. 286 of 1998, by adding para. 12-*sexies*, according to which a foreigner who submits a claim against her employer for exploitation or has helped in the investigation thereof, is entitled to a six-month residence permit for 'specific cases' which can be converted into a work permit.

Article 1 para. 1 lett. q) adds Article 42-*bis* into Legislative Decree No. 286 of 1998, which regulates the release of a two-year 'civilian valour' residence permit to be released in case of meritorious actions by the foreigner. That permit can be converted into a work permit.

Article 1 para. 1 lett. i) n. 2 modifies Article 22 Legislative Decree No. 25 of 2008, by substituting para. 3. The new paragraph introduces an annually renewable 'special protection' residence permit for foreigners who cannot be expelled due to persecution in their home country. Foreigners entitled to such permits can work, but the permit cannot be converted into a work permit.

2 Court Rulings

2.1 Dismissal law

Constitutional Court (not yet published)

The Constitutional Court has declared Article 3 para. 1 Legislative Decree No. 23 of 2015 contrary to the reasonableness and equality principles and to the right and the protection of work as foreseen in Article 4 and 35 of the Constitution. The Court has grounded its decision on the remark that Article 3 para. 1 predetermines the amount of indemnity to be paid to the worker in case of unlawful dismissal according to the worker's seniority within the company without leaving to the judge any further assessment of the situation at stake. The decision will be published in the weeks to come.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Latvia

Summary

The decisions of the CJEU in cases C-17/17 and C-466/17 have no implications on Latvian law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term workers in Public Administration

CJEU case C-466/17, 20 September 2018, Motter

The decision in CJEU case C-466/17 has no impact on Latvian labour law because the law does not provide for different conditions concerning the calculation of seniority in cases of fixed-term contracts as opposed to contracts of indefinite duration. Latvian law also does not provide a *pro rata temporis* principle for the calculation of seniority for part-time employees in comparison to full-time employees. The prohibition of differential treatment between fixed-term and part-time employees in comparison to permanent and full-time employees is provided in Articles 44(6) and 134(3) of the Labour Law.

3.2 Insolvency law

CJEU case C-17/17, 06 September 2018, Hampshire

The Law on the Protection of Employees in the Event of Employer Insolvency (see Official Gazette No.188, 28 December 2001) does not provide for entitlement to benefits under occupational social security schemes from the Latvian Guarantee Institution. However, Latvia complies with the obligations under Article 8 of Directive 2008/94/EC. Under Latvian law, the services of occupational pension schemes may only be provided by joint stock companies that have obtained a license from the Financial and Capital Market Commission (see Law on Private Pension Funds, *'Likums Par privātajiempensiju fondiem'*, Official Gazette No.150/151, 20 June1997) – an institution supervising all banks and companies providing financial services in Latvia. It follows that in principle the insolvency of an employer has no impact on the already acquired rights of employees under such schemes. It follows that Latvia complies with the requirements of Directive 2008/94/EC and the decision in the present case does not have an impact on Latvian law.

4 Other relevant information

Nothing to report.

Lithuania

Summary

The monitoring of the application of the new Labour Code has revealed that the new legislation opened more possibilities to initiate labour disputes over rights. The new channel of employee representation is growing in importance and the number of collective agreements is slowly increasing. The parties do not use the possibilities to conclude new types of employment contracts, but the number of fixed-term contracts is rising. In the vast majority cases, it is still the employee who initiates the termination of the contract.

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 New Labour Code's impact

During the process of adoption of the new Labour Code, the State Labour Inspectorate was assigned to monitor the practical application of the new legislation. The social partners and politicians were persuaded not to introduce amendments to the Labour Code before an in-depth analysis of the practical impact of the new Labour Code is completed. The Inspectorate provided first insights in February 2018, but more details were made available in September 2018. The Inspectorate noted that in the first year since the entry into force of the new Labour Code, there were 25 per cent less cases of infringement of legislation than in the preceding year. Meanwhile, the number of protocols of administrative offences grew by 19 per cent.

The new Labour Code facilitates access to justice. The scope of competences of the Labour Dispute Commission has been expanded (including new types of disputes on redundancy, non-pecuniary damage, non-competition clauses, possible discrimination), which is the reason why the number of litigations in the pre-trial instance of the Labour Disputes Commission grew by 24 per cent.

After the entry into force of the new Labour Code, the Commission achieved twice as many peaceful settlements between the parties than in previous years, and 50 per cent of all employee requests were fully or partially fulfilled. According to the Inspectorate, these facts indicate that the resolution of labour disputes has become more cost-effective and efficient. It is worth mentioning that only 9 per cent of cases previously dealt with by the commissions were later litigated at the level of the courts. An appeal to the courts was only successful in 12 per cent of the cases.

The Inspectorate provides consultations on the implementation of the new Labour Code. It states that the majority of questions and problems arose in relation to the Labour

Code's provisions on working hours and rest periods (night work, holidays, non-competition clause and protection of confidential information, etc.) as well as the activities of the works councils. The majority of questions from employers arose in relation to the new regulation on the termination of employment contracts, the conclusion and content of individual employment contracts, work schedules and the working time regime. Employers submitted the lowest number of questions on the social partnership and collective agreements.

The significance of elected employee representatives is growing. Following the entry into force of the new Labour Code, 3 665 new works councils were established, with the total number of members equalling 13 505. In 15 842 legal entities (39 per cent of all companies), employees were represented by shop stewards (some of the companies also have trade union representation). According to data until 30 June 2018, 3 140 legal entities have signed collective agreements, 411 of them have concluded branch collective agreements.

Since the entry into force of the new Labour Code, 623 857 different types of employment contracts have been concluded. 124 353 of these contracts (20 per cent) were fixed-term employment contracts (6 487 of which were signed with foreigners) and 23 457 other types of fixed-term employment contracts were concluded (e.g. temporary employment, seasonal employment contracts, etc.). New types of employment contracts (apprenticeship, project work and job-sharing contracts) comprised only 0.6 per cent of all concluded employment contracts.

During the one-year reference period, 599 540 contracts were terminated, 73 per cent of which were terminated on the initiative of the employee, 5 per cent were terminated on the employer's initiative, 13 per cent because the contract's term had ended, 5 per cent by agreement of the parties and 4 per cent on other grounds.

According to the available data, the summary working time regime (the regime allowing a flexible number of working hours with the calculation of the average number of hours during a reference period) was applied by approximately 30 per cent of employers.

Luxembourg

Summary

(I) The law implementing Directive 2016/701/EU on the work of third-country nationals has been adopted.

(II) A new special leave has been introduced.

(III) A grand-ducal decree defining the electoral procedure for employee delegates ('delegation du personnel') has been published.

(IV) Several case law decisions on moral harassment, discrimination, oral warnings, working time, insolvency, insertion contracts and class actions are analysed.

1 National Legislation

1.1 Work of third-country nationals

As mentioned earlier (see also October 2017 Flash Report), Bill No. 7188 was deposited to implement Directive 2016/801/EU. The law has now been voted on. As far as employment contracts are concerned, it is a nearly verbatim implementation of the Directive's text. On the State Council's advice (see also February 2018 Flash Report), some changes have been made to the initial bill to guarantee full conformity with the Directive. Concerning economic activities by students, the law does not to go beyond the minimum of 15 hours per week (which is less than the threshold required for entitlement to unemployment benefits).

The law is available here.

1.2 New special leave for parents

A new special leave called '*Congé de représentation des parents*' has been introduced for parents working in the private sector, who are members of the newly created national parent representation in education ('*représentation nationale des parents des élèves*'). This leave can last up to eight days per year; their salary will be paid by public funds. Obviously, this only affects a handful of employees, as the council consists of only 12 members.

The law is available here.

1.3 Electoral procedure of employee representatives

A grand-ducal decree defining the electoral procedure for employee delegates ('*delegation du personnel*') has been published. This procedure had to be adapted within the context of social dialogue reform (2016), as the next social elections to which the new legislation will fully apply will be held in spring.

The law is available here.

2 Court Rulings

2.1 Moral harassment

Court of Appeal, No. 3e 41981, 14 June 2018

In general, it is very difficult for employees to prove that they are victims of moral harassment, as they bear the full burden of proof. Furthermore, judges frequently consider that difficult working conditions may also be the result of a heavy work load, relational problems at work or the employee's private problems, and thus do not qualify as harassment. Most courts in the first and second instance thus reject the claim. Therefore, three recent decisions of the Court of Appeal acknowledging moral harassment and ordering damages to be paid to the employees are of particular interest. It might be pure coincidence, but these decisions could indicate a change in judges' approach.

A decision of June 2018 is especially relevant in this regard. Until then, case law did not consider moral harassment to be an issue of occupational health and safety, and hence national and European rules did not apply. As a clear legal framework on moral harassment is missing in Luxemburg, the judges based their decisions on the general contractual obligation of good faith ('*obligation de bonne foi*'). The Court of Appeal now states that in addition to this legal basis, 'the employer has also failed to fulfil his obligation to protect the employee's health'. The decision is not entirely clear, but could indicate that occupational health may be related to moral harassment.

> "*Si un harcèlement est avéré et a porté atteinte à la santé de la salariée, l'employeur a failli à son obligation d'assurer la santé dechambre sa salariée au travail, respectivement à son obligation d'exécuter de bonne foi le contrat de travail, et est partant tenu de l'indemniser du préjudice subi en conséquence*".

Other references of decisions acknowledging moral harassment: CSJ, 3e, 18.1.2018, 41738 ; CSJ, 8e, 11.1.2018, 44637.

2.2 Discrimination on grounds of disability

Court of Appeal No. 8e 44354, 05 July 2018

In a recent case, an employee was dismissed; he argued that his dismissal was discriminatory on the grounds of his disability. According to the employee, the real grounds for his dismissal were his allergies. The Court stated that this was not a case of discrimination on the grounds of disability, because only officially recognised disabled workers benefit from this protection.

2.3 Discrimination on the grounds of health

Court of Appeal, No. 8e 44354, 05 July 2018

In Luxembourg, numerous dismissals are the result of employees' frequent sick leaves and can thus no longer be assigned to carry out useful tasks. If the number of sick leave days reaches a certain threshold and affects business operations, the labour courts accept this as valid grounds for dismissal.

In the present case, the employee argued that his dismissal was discriminatory based on the grounds of health or disability, especially with regard to Directive 2000/78/EC.

The Court of Appeal argued that this was not a case of discrimination, because the dismissal was not based on sickness as such, but on the disruption it caused for the employer. The question of indirect discrimination was not addressed in this decision.

> *"ce texte (de la Directive 2000/78/CE) ne s'oppose pas au licenciement motivé, non pas par l'état de santé du salarié, mais par la situation objective de l'entreprise qui se trouve dans la nécessité de pourvoir au remplacement définitif d'un salarié dont l'absence prolongée ou les absences répétées perturbent son fonctionnement. En effet, le licenciement d'un salarié en raison de son état de santé est discriminatoire et seules les perturbations dans le fonctionnement de l'entreprise engendrées par l'absence prolongée ou les absences répétées du salarié pour maladie peuvent constituer une cause de licenciement dès lors qu'elles rendent nécessaire le remplacement définitif de l'intéressé".*

2.4 Oral warnings

Court of Appeal, No. 8e 43047, 05 July 2018

Luxembourg's Labour Code contains nearly no provisions on disciplinary procedures or sanctions, and there is not much case law on this issue. One of the basic principles recognised by case law is the principle of 'non bis in idem', meaning that the same misconduct cannot be sanctioned twice.

In the present case, the employee first got a telephone call from his employer followed by a written warning letter ('*lettre d'avertissement*'). He argued that he got an oral warning during the phone call, so the written warning was not valid because it sanctioned the same misconduct.

The Court of Appeal developed a definition of 'warning', which must be differentiated from a simple 'call to order' ('*rappel à l'ordre*'). An oral warning only counts as a real sanction if the employer precisely describes the facts and gives a warning for the future. Thus, the phone call was not an actual sanction, and the warning letter did not violate the principle of 'non bis in idem'.

> "*Un avertissement oral ne constitue un véritable avertissement que s'il comporte la description exacte des faits reprochés au salarié ainsi qu'une mise en garde quant à l'avenir en cas de récidive de la part du salarié. Il faut que les reproches aient ci aient fait l'objet d'un exposé détaillé pour pouvoir être considérés, par la suite, comme ayant déjà été sanctionnés par l'employeur."*

2.5 Working time: overtime work

Court of Appeal, No. 8e 38954, 12 July 2018

The Court of Appeal decided that even if the employer fails to fulfil her obligation to keep a register on overtime work, the employee still bears the full burden of proof if she submits a claim for overtime payments.

> "*L'absence de tenue d'un registre spécial ou encore l'absence d'un décompte détaillé quant au mode de calcul de son salaire n'a pas d'incidence au niveau de la charge de la preuve et n'est pas de nature à rendre impossible la preuve du salarié quant au bien-fondé de ses prétentions relatives à la rémunération d'heures de travail supplémentaires.*"

2.6 Insolvency and collective dismissals

Court of Appeal, No. 8e 44477, 19 April 2018

In a recent case, the Court of Appeal reminded that according to European case law (CJEU joined cases C-235/10 to C-239/10, 03 March 2011, *Claes et al*), in case of insolvency, the procedure for collective dismissals applies. In this specific case, no new social plan had to be negotiated with the social partners, as such a plan had recently

been signed and was valid for one year. Thus, the employees whose contract was terminated due to insolvency procedures benefited from the same social plan as their colleagues who had been dismissed several months earlier.

2.7 Insertion contracts

Court of Appeal, No. CAL-2018-00426, 12 July 2018

A recent decision of the Court of Appeal confirmed existing case law, stating that the various special contracts offered by the Job Centre ('*ADEM*') for professional (re)insertion of jobseekers (in this case, a '*contrat d'inition à l'emploi*') cannot be qualified as 'employment contracts' ('*contrat de travail*') within the meaning of the Labour Code. Therefore, many provisions of the Labour Code do not apply. This approach could be problematic with regard to European law, as the European concept of the employment relationship is autonomous and broader than Luxembourg's definition of the employment contract. Thus, many Directives should also apply to workers who have (re)insertion contracts.

2.8 Class actions

Court of Appeal, No. 3e 44673, 22 March 2018

Luxembourg's civil procedure, which also applies to labour law cases, does not provide for group or class actions. Every employee must file an individual claim, and each claim remains an autonomous procedure. This was now confirmed in a series of 450 cases dealing with minimum wage in the cleaning sector. The lawyers decided to bring to an end a limited number of cases as 'pilot cases' (*'affaires pilotes*') and asked for suspension of all other cases.

However, a general rule of civil procedure is that if the litigation parties did not take procedural action for more than three years, any party can request discontinuation of the case ('*péremption d'instance*'). As in most of the 450 cases, the suspension had lasted for more than three years, and the employer had requested discontinuation of the cases. The Court of Appeal confirmed that every procedure is autonomous, and procedural acts in similar or 'pilot' cases have no impact.

> *"Les actes posés dans d'autres instances où les problèmes en fait et en droit des deux litiges sont identiques n'ont pas d'incidence si les rapports d'instance ont trait à des contrats individuels et qu'ils peuvent et doivent donc être toisés séparément."*

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Norway

Summary

Nothing to report on national law. One CJEU ruling was issued that will not require any amendments of Norwegian legislation.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term workers in public administration

CJEU case C-466/17, 20 September 2018, Motter

No amendments to Norwegian law are necessary following the CJEU ruling in case C-466/17. Section 13-1(1) of the Working Environment Act states:

> *"1) Direct and indirect discrimination on the basis of political views, membership of a trade union, or age is prohibited".*

Section 13-1(3) stipulates:

> "*The provisions of this chapter shall apply correspondingly in the case of discrimination of an employee who works part-time or on a temporary basis*".

In future cases, Norwegian courts will interpret Section 13-1(3) in line with the ruling.

4 Other relevant information

Nothing to report.

Poland

Summary

(I) The minimum wage for 2019 has been settled by the government.

(II) Parliament adopted an amendment to the law on minimum wage in the health care sector.

(II) The law on limiting the trade on Sundays, public holidays and some other days is subject to a discussion on potential amendments.

(III) The amendment to the Labour Code that would require employers to indicate the amount of remuneration they will pay in the job offer was submitted to Parliament.

1 National Legislation

1.1 Minimum wage in 2019

On 11 September, the Regulation of the Council of Ministers on minimum wage for work and the amount of the minimum hourly rate for 2019 was signed by the Prime Minister (Journal of Laws 2018, item 1794). Next year, minimum wage will amount to PLN 2 250 for employment contracts (around EUR 530), and PLN 14.70 per hour for civil law contracts. The change introduces a raise in the minimum wage in comparison to PLN 2 100 and PLN 13.70, respectively, in 2018. The new regulation will take effect on 01 January 2019.

The legal basis of the regulation is the Law of 10 October 2002 on minimum remuneration for work.

The new regulation introduces a raise of the statutory minimum remuneration for work in 2019, as has been the case in previous years. Thus, the tendency to raise the minimum wage continues.

A consolidated text of the Law of 10 October 2002 on minimum remuneration for work is available here.

1.2 Minimum wage in the health care sector

On 13 September, the amendment to the Law of 08 June 2017 on the method of calculating the minimum basic wage for employees who perform medical professions in medical institutions was enacted by the '*Sejm'*, which is one of the two chambers of the Polish Parliament. On 04 October, the Law was signed by the President. It should soon be published in the Journal of Laws and will take effect 14 days after this date.

The amendment extends the personal scope of application of the Law. It will apply not only to persons who perform medical activities, but also to some other employees of the health care sector. Thus, new groups of employees in the health care sector would be guaranteed the statutory level of minimum remuneration, as well as the mode of its adjustment, which would be more favourable than the general provisions on minimum wage.

Information on the legislative process and the amendment is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Discussion on the prohibition of trade on Sundays

The Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (Journal of Laws 2018, item 305) is subject to public debate as regards possible amendments.

The Law took effect on 01 March 2018. It prohibits trade activities on Sundays. In 2018, shops are closed every second Sunday. After 01 January 2019, shops will only be opened on one Sunday per month. After 01 January 2020, there will be a general prohibition to carry out any trade activities on Sundays (see also January 2018 Flash Report point 1.B with further references).

The Law introduces several exceptions. The 'Solidarity' trade union suggested amendments that would clarify the text of the Law and limit its abuses. They propose extending the temporal scope of application of the Law. According to the preliminary proposal, trade activities would be prohibited after 10 p.m. on Saturdays until 6 a.m. on Mondays. The prohibition would cover a 31-hour-period instead of a 24-hour-period. Such an amendment could be a compromise that instead of working on Sundays, employers could demand longer working hours on Saturdays and Mondays.

Another proposal is to limit the scope of exceptions provided by the Law. Some shop chains claim they are 'postal service points', since—alongside trade activities—they offer the possibility to pick up a consignment at their premises. Consequently, they claim they should not to be covered by the statutory exceptions and that they should be able to carry out trade activities on Sundays. Trade unions intend to expressly prohibit such activities.

Sources:

Further information is available here and here.

4.2 Amount of remuneration for work in job offers

On 30 August, the '*Nowoczesna'* political party ('Modern Party') submitted a draft amendment of the Labour Code, which was submitted to further parliamentary proceedings on 12 September. The amendment proposes requiring employers to indicate the amount of remuneration to be paid for work in job offers.

According to the draft, the suggested Article 18^{3f} of the Labour Code (hereinafter: LC) would have the following content:

- The job offer should contain the information on the gross basic remuneration for work (§ 1);
- If the minimum and maximum limit of remuneration is indicated, information on the possibility of negotiations should be provided (§ 2);
- The proposed remuneration cannot be lower than the minimum statutory remuneration for work (§ 3).

Moreover, under the new Article 281 point 8 LC, concluding an employment contract with a remuneration below the amount indicated in the job offer, or failing to provide such information, should constitute a violation of employee rights and be subject to a pecuniary fine.

Sources:

A consolidated text of the Labour Code is available here.

The draft and information on the legislative process are available here.

Portugal

Summary

(I) The suspension from work resulting from the enforcement of a criminal measure cannot be considered unjustified absence from work.

(II) The draft for a new labour law reform is still being discussed in Parliament.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal law

Court of Appeal, No. 11462/17.7T8LSB.L1-4, 12 September 2018

The Lisbon Court of Appeal ruling of 12 September 2018 established that absences from work (161 consecutive working days) due to the preventive suspension from work imposed by the criminal court are not unjustified absences.

The employee was complying with a legal obligation and further to Article 249 (2) (d) of the Labour Code, such absences shall be deemed as justified. This decision could be considered in line with Article 6 (2) of the European Convention on Human Rights.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Amendment to the Labour Code

Draft Law No. 136/XIII is still being discussed in the Portuguese Parliament (see also July 2018 Flash Report), but we expect that the new law will be passed in the following month.

Romania

Summary

(I) Romania has transposed Directive 2015/1794 on seafarers.

(II) A new way of calculating the allowance for child care leave has been introduced.

(III) Additional rules were adopted to monitor employment agencies for Romanians working abroad.

1 National Legislation

1.1 Seafarers

Law No. 127/2018 amending and supplementing certain normative acts regarding seafarers (published in the Official Gazette of Romania, No. 491 of 14 June 2018) has transposed Directive 2015/1794/EU of the European Parliament and of the Council, 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 into Romanian law.

The new legislation amends:

- Law No. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims (published in the Official Gazette of Romania, No. 453 of 25 May 2006, as amended, which transposed Directive 2008/94/EC on the protection of employees in the event of insolvency of the employer);
- Law No. 217/2005 on the establishment, organisation and functioning of the EWC (republished in the Official Gazette of Romania, No. 889 of 15 December 2011, which transposed Directive 2009/38/EC of the European Parliament and of the Council of 06 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast));
- Law No. 467/2006 on establishing the general framework for information and consultation of employees (published in the Official Gazette of Romania No. 1006 of 18 December 2006, which transposed Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community and republished in the Official Gazette of Romania No. 345 of 18 May 2011, as amended, which had transposed Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies);
- Law No. 67/2006 on the protection of employees' rights in case of transfers of undertakings, of the unit or parts thereof (published in the Official Gazette of Romania, No. 276 of 28 March 2006, which transposed Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses). Three of the five national normative acts provided for the exclusion of seafarers from enforcement. These exclusions have been removed.

To properly transpose the Directive, a table of concordance has been developed on the alignment of Romanian and European legislation, taking into account both Directive 2015/94/EU and the previous directives, which it amends. According to the explanatory memorandum of Law No. 127/2018, the transposition of the Directive was made taking

into account the special nature of the maritime sector and the specific working conditions of the workers. In addition to eliminating the exclusions stipulated in Romanian law, the provisions of the Romanian legislation were also supplemented to meet the requirements of the new European regulation.

1.2 Child care leave

During the period of child care leave (until the child turns two), individuals receiving income from wages or self-employment are entitled to a monthly amount of earnings-related allowance. This allowance is calculated on the basis of the income earned prior to the date of childbirth. The fiscal changes that occurred at the beginning of 2018 affected many pieces of legislation on allowances and benefits. Among other changes, the income derived from intellectual property rights was no longer taken into account as a basis for establishing this allowance.

As a result, workers earning such an income could no longer use it to calculate their child care allowance. To remedy this situation, Government Emergency Ordinance No. 81/2018 (published in the Official Gazette of Romania, No. 792 of 17 September 2018) provides for the earnings derived from intellectual property rights to be taken into account when determining the level of child care allowance.

1.3 Employment of Romanian workers abroad

To properly monitor employment agencies, Government Decision No. 723/2018 was adopted (published in the Official Gazette No. 815 of 24 September 2018), by amending and completing the methodological rules for the implementation of the provisions of Law No. 156/2000 on the protection of Romanian citizens working abroad, approved by Government Decision No. 384/2001.

The normative act establishes the rules for registration and operation of employment agents who carry out agency activities on the territory of Romania, regardless of whether they are Romanian employers or providers of employment services based in a country of the European Union or the European Economic Area, which have registered a permanent office on the territory of Romania.

All job placement service providers have the obligation to notify the territorial labour inspectorate where they intend to carry out their activity five working days before the start of the job placement service. Job placement agents, as well as employment service providers that have a permanent registered office in Romania are required to submit quarterly reports to the territorial labour inspectorate on the persons recruited and employed abroad.

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 (without reaching an agreement) the proposal of the Government Decree on the amount of minimum wage for 2019.

1 National Legislation

1.1 Remuneration - Minimum wage

The minimum wage was discussed at the meeting of the Economic and Social Council of the Slovak Republic on 20 August 2018. The social partners involved in the tripartite social dialogue could not reach an agreement (see also August 2018 Flash Report). The same deadlock has occurred in the previous ten years.

In accordance with Article 7 paragraph 5 of the Act. 663/2007 Coll. on minimum wage, when no agreement can be reached, the Ministry of Labour, Social Affairs and Family of the Slovak Republic is required to submit a proposal for a Government Decree setting down the amount of the minimum wage for the following year pursuant to Article 8 paragraph 2 of the Act.

The proposal of the Government Decree specifying the amount of minimum wage for 2019 was discussed at the meeting of the Economic and Social Council of the Slovak Republic on 24 September 2018. The Ministry of Labour, Social Affairs and Family again proposed to increase the monthly minimum wage for the year 2019 from EUR 480 (in 2018) to EUR 520 (+ EUR 40, + 8.33 per cent) and the hourly minimum wage from EUR 2.76 to EUR 2.99. The social partners again did not reach an agreement with the ministry on the new level of minimum wage.

The government will thus determine the new level of minimum wage for 2018. The Ministry of Labour, Social Affairs and Family will prepare a proposal for a Government Decree [increase of minimum wage to EUR 520 (+8.33 per cent)].

The draft Government Decree will be discussed in the Legislative Council of the Government of the Slovak Republic on 09 October 2018 and will subsequently be submitted to the Government of the Slovak Republic.

The subject matter is not covered by European Union law, nor by the case law of the Court of Justice of the European Union.

The minimum wage in the year 2018 is:

- The gross monthly minimum wage - EUR 480;
- The gross hourly minimum wage - EUR 2.76.

The minimum wage in the year 2017 was:

- The gross monthly minimum wage - EUR 435;
- The gross hourly minimum wage - EUR 2.50.

The minimum wage in the year 2016 was:

- The gross monthly minimum wage - EUR 405;
- The gross hourly minimum wage - EUR 2.33.

The minimum wage in the year 2015 was:

- The gross monthly minimum wage - EUR 380;

- The gross hourly minimum wage - EUR 2.18.

Source:

Further information on the legislative process is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time and definition of 'worker'

CJEU case C-518/15, 21 February 2018, Matzak

On the issue of qualification of certain volunteers as 'workers' for the purpose of the Working Time Directive

Two acts have been adopted in Slovakia that related to the judgment in case C-518/15: Act No. 315/2001 Coll. on fire and rescue corps and Act No. 314/2001 Coll. on protection against fires. Act No. 315/2001 Coll. on fire and rescue corps also regulates the civil service and the legal relationships that are related to the establishment, changes and termination of the civil service of the members of the Fire and Rescue Corps. This Act does not regulate the activities of voluntary members of the fire corps. Act No. 314/2001 Coll. on protection against fires regulates some of the issues of voluntary membership of fire corps. It should be emphasised that according to Article 30 paragraph 1 of this Act, firefighting, i.e. rescue work, is carried out by the Fire and Rescue Corps, which consists of members and is established by a special regulation, Act No. 315/2001 Coll. on fire and rescue corps. According to Article 30 paragraph 2, the activities under paragraph 1 shall also be carried out by fire units:

- a fire unit (department) consisting of employees of a legal person or a natural person-entrepreneur;
- a fire corps consisting of employees of a legal entity or a natural person-entrepreneur;
- voluntary fire corps of the municipality.

According to Article 30 paragraph 3 of the Act, employees of a legal person or a natural person-entrepreneur included in the fire unit (department) referred to in paragraph 2 letter a/ perform activities in that unit as their employment ('the employee'). However, according to Article 30 paragraph 4, employees of a legal person or a natural person-entrepreneur included in the fire corps and referred to in paragraph 2 letter b/, and natural persons included in the voluntary fire corps of the municipality referred to in paragraph 2 letter c/ do not normally carry out activities in these corps as their regular employment (hereinafter referred to as 'member'); in the municipality's voluntary fire corps they are usually members of the Voluntary Fire Protection. Act No. 37/2014 Coll. on voluntary fire protection of the Slovak Republic does not regulate the factors addressed in of the *Matzak* ruling.

As regards the issue of qualification of some volunteers as 'workers' for the purposes of Directive 2003/88/EC, national legislation distinguishes between 'volunteers' and 'workers' ('employees'). The 'conversion' of a volunteer into an employee in relation with working time is not legally regulated. This would contradict the meaning, purpose, concept and logic of the legal regulation. If a volunteer, for example, agreed to or obligates herself to arrive at a certain place of work within 10 minutes, it does not make her an employee. If, for example, 3 hours of standby time go by without the need for

her to intervene and the volunteer is then fully inactive for 3 weeks, should she still be considered a worker? Or was she a worker for only 3 hours?

Regarding the question, if standby time is (or is not) counted under national law towards the maximum weekly working time and against minimum rest periods

The legal regulation of standby time in the Labour Code (Act No. 311/2001 Coll.) already takes into account certain conclusions stemming from the case law of the CJEU. The Labour Code regulates labour law relationships in the private (business) sphere and in public service (special regulations apply to civil service). The Labour Code distinguishes between standby time at the workplace and outside the employee's workplace.

According to Article 96 paragraph 2 of the Labour Code, if the employee remains at the workplace and is on standby but ultimately does not perform work, the time will be considered inactive standby time and is counted towards the employee's maximum weekly working time. According to Article 96 paragraph 6 of the Labour Code, if an employee who is on standby does perform work, the time she worked will be considered active standby time, which is treated as overtime work. The legislation on rest periods must be observed, which explicitly excludes standby time regulation (Articles 91-93 of the LC).

The time during which the employee remains at an agreed location outside the workplace and is prepared to perform work but is ultimately not called for work is considered inactive standby time and is not counted towards the employee's maximum working time (Article 96 paragraph 4 of the Labour Code). There is no detailed regulation in the Labour Code on the specific time within which the employee must arrive at the workplace.

The legal situation (performance of work is treated as overtime work) is similar for the professional members of the fire and rescue corps. According to Article 122 paragraph 3 of Act No. 315/2001 Coll. on fire and rescue corps, standby time during which civil services were performed is always deemed overtime state service.

The legislation on rest periods must also be observed, which explicitly excludes standby time (Articles 87-89 of Act No. 315/2001 Coll).

4 Other relevant information

Nothing to report.

Slovenia

Summary

The Draft Act on the Amendment of the Employment Relations Act has been published. The amendment relates to regulations on the right to wage compensation in case the worker is absent from work due to illness or injury not related to work.

1 National Legislation

1.1 Wage compensation in case of illness

Ministers and members of the new coalition government were appointed by Parliament on 13 September 2018.

In accordance with Article 88 of the Constitution, a group of seven members of the opposition proposed that the Employment Relations Act (ERA-1) should be amended on the basis of the regular legislative procedure. The proposal of the draft amendment from 11 September 2018 relates to the first sentence of paragraph 3 of Article 137 of the ERA-1, which provides that the employer is required to pay so-called wage compensation (wage) from her own resources in case of a worker's incapacity for work due to illness or injury not related to work, for a period of up to 30 working days for individual absences from work but for no more than 120 working days per calendar year. In the event of a longer absence from work, the employer shall pay wage compensation, which is covered by health insurance.

It is proposed to shorten the period for which the employer is required to pay wage compensation from her own resources in case of worker incapacity for work due to illness or injury not related to work from 30 to 15 working days for individual absences and from 120 to 60 working days per calendar year.

The explanation by the authors of the draft amendment for the proposal is the decrease in the financial burden on employers and to ensure that self-employed persons are treated equally when they are absent from work due to illness or injuries not related to work. The regulation on wage compensation in the said case involves costs that are too high and self-employed persons therefore often begin to work before their full recovery.

It is difficult to speculate what will happen to this draft amendment of the ERA-1. It must be taken into consideration that the proposed draft act has been prepared by the parliamentary opposition. On the other hand, it should be mentioned that the coalition government has underlined its intention to lower labour costs and to restructure the tax system. The proposed change within the wage compensation system represents, without a doubt, a measure that could contribute to the reduction of labour costs as such, but the overall impact of such a measure for the health insurance system is still missing.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) The Royal Decree Law 11/2018 implements Directive 2016/801/EU on the conditions of entry and residence of third-country nationals.

(II) The Royal Decree Law 13/2018 modifies the law of land transport.

(III) CJEU decisions will not have a significant impact on Spanish legislation.

1 National Legislation

1.1 Third-country nationals

Among other Directives, Royal Decree Law 11/2018 implements Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. To implement the Directive, the Royal Decree Law amended Law 14/2013, of 27 September on 'support for entrepreneurs and their internationalisation'.

The new regulation grants foreigners who are completing their studies and who reach at least level six according to the European Qualifications Framework, the possibility of remaining in Spain up to a maximum of 12 months to seek employment in relation to the studies completed, or to start a business.

In addition, the new Law allows foreigners to perform internships in companies if they obtained a higher education degree within the two years prior to the internship or who are studying to obtain a higher education degree in Spain or abroad, through the signing of an internship contract or an internship agreement. They must obtain a residence authorisation to be able to perform these internships.

1.2 VTC licenses

The Royal Decree Law 13/2018 amends the law of land transport to review the rules on granting VTC authorisations.

Private hire drivers need a licence to operate in Spain, but there is stiff opposition from taxi drivers. Their protest has led to the issuance of this Royal Decree Law. The new rules give these businesses a four-year period to keep operating, after which their current licenses will be subject to invalidation by the regional and local authorities. The current ratio of one VTC license for every 30 taxi licenses could be drastically reduced, or even eliminated altogether in some municipalities. This is not directly related to labour aw, but the activities of Uber, Cabify, etc. have only recently emerged in Spain. The discussion about the application of labour law will perhaps be one of the next steps.

2 Court Rulings

2.1 Fixed-term contracts

Supreme Court, No. STS 3218/2018, 19 July 2018

A worker with a fixed-term contract claimed the contract ought to be considered one of indefinite duration. The employee had worked for a subcontractor and the duration of the employment contract was linked to the duration of the subcontracting agreement. This agreement was renewed several times, meaning the fixed-term employment

contract was still a temporary one after 14 years. The Supreme Court concluded that this employment relationship had become a permanent one.

Under Spanish labour law, a fixed-term employment contract requires the existence of an objective reason justifying the temporal nature of the employment relationship. Therefore, it is said that fixed-term work is performed under a 'principle of causality', because the employer cannot freely choose to enter into a permanent contract or into a temporary one. A fixed-term contract is only allowed when an objective reason exists. It should be noted that the employer bears the burden of proof for the existence of an objective reason. One of these objective reasons is "*to complete a task which is specific, autonomous and separable from the undertaking's activities as a whole, the performance of which, while being limited in time, is in principle for an indefinite period*" (Article 15 of the Labour Code). The Supreme Court allows connecting the duration of the contract with the duration of a subcontracting agreement when the employee works for a subcontractor. However, a fixed-term contract is only allowed when the need is temporary and not permanent. If the facts prove that the need of the company is permanent, a fixed-term employment contract is not allowed. This happened in this case, because the excessive duration of the subcontractor agreement, with several renewals, proved that the need had become permanent and was not temporary.

2.2 Collective dismissal and pregnant workers

Supreme Court, No. STS 3248/2018, 20 July 2018

A pregnant worker was affected, among other workers, by a collective dismissal. The employer proved the grounds for dismissal (economic losses). The undertaking had over 400 employees of whom 48 were dismissed. The undertaking applied the relevant criteria to select ten of the 48 workers, while the other 38 employees were selected by the company directly (no criteria known). The pregnant worker was included in this list of 38 workers. The Supreme Court considered the pregnant worker's dismissal to be null and void.

According to Spanish labour law, the dismissal of a pregnant worker is null and void unless the employer can prove a justified reason for the dismissal. A pregnant worker can be included in a collective dismissal, but collective dismissal cannot be a pretext for dismissing a pregnant worker. This ruling refers to Directive 98/59/EC, because the employer did not provide reasons for the dismissal during the information and consultation period. Even if the employer can select the workers for collective dismissal, discrimination is not allowed. The selection of a pregnant worker would have required specific information about the reasons for termination. The employer did not prove any valid reasons for the dismissal of the pregnant worker, and it was hence declared null and void.

2.3 Grounds for collective dismissal

Supreme Court, No. STS 3153/2018, 02 July 2018

In the present case, a worker tried to prove that there were no valid grounds for his collective dismissal. The Court considered that Spanish law does not allow an individual worker to challenge the employer's decision when there is an agreement between the employer and the workers´ representatives during the information and consultation period. The grounds can be challenged through a collective proceeding before a court, but not through an individual one.

Spanish law allows two different ways of challenging a collective dismissal. On the one hand, the collective one, starting with the workers' representatives. On the other hand, a dismissed worked can also challenge the collective dismissal. If there is a collective

process, individual dismissals cease to avoid different results. Such individual processes will be affected by the collective one. If there are no collective proceedings, each worker can submit a claim individually. The Supreme Court does not allow challenging the grounds for dismissal in individual proceedings to avoid a lot of different and non-compatible results when both the workers´ representatives and the employer have agreed on the existence of grounds for dismissal during the information and consultation period.

2.4 Annual leave and temporary disability

Supreme Court, No. STS 3124/2018, 04 July 2018

In the present case, a worker suffered an illness before Christmas leave (nine days) and after her recovery, asked the company whether she could take those leave days. The company rejected her request because Christmas was over. The Supreme Court granted the worker the right to take the Christmas leave days.

The Supreme Court referred extensively to CJEU doctrine and insists that such types of leave (not only annual leave), which the worker could not take due to a temporary disability must be granted after recovery.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-time workers in public administrations

CJEU case C-466/17, 20 September 2018, Motter

According to this CJEU ruling, Clause 4 of the framework agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, which for the purpose of classifying a worker in a salary grade at the time of his recruitment on the basis of qualifications as a career civil servant, takes full account only of the first four years of service completed under fixed-term contracts, only two thirds of subsequent periods of service taken into consideration.

Under Spanish law, 'public employee' refers both to civil servants and workers/employees with an employment contract hired by the public administration. The Basic Statute of the Public Employee is a provision covering civil servants, while workers enjoy the protection of labour law, with further regulations included in the Basic Statute of the Public Employee. Civil servants are not workers and labour law does not apply to them. They have to comply with administrative law.

According to the Spanish Constitution, the selection processes to become a career civil servant must be governed by the principles of equality, merit and ability. The rules on career civil servants usually begin to apply immediately, i.e. as soon as they have been selected. As a general rule, this situation does not seem to comply with the Framework Agreement, nor with the CJEU ruling in the joined cases C-302/11, C-303/11, C-304/11, C-305/11, 18 December 2012, *Valenza et al*. The rules usually refer to seniority, that is, to the previous uninterrupted performance of work for the employer.

However, the CJEU *Motter* ruling seems to apply a more flexible approach when 'the national legal system places particular importance on administrative competitions' (the case comes from Italy, but Spain has a similar rule on this issue). Specifically, the Court states:

> *"national legislation such as that at issue in the main proceedings, which takes account of only two thirds of any period of service completed under fixed-term contracts that exceeds four years, cannot be considered to go beyond what is necessary to attain the objectives referred to above and to strike a balance between the legitimate interests of fixed-term workers and those of permanent workers, having due regard for meritocratic values and considerations relating to the impartiality and efficiency of the administrative authorities on which recruitment by way of competition is based*".

This doctrine requires clarification but it seems that the Court allows more flexibility than before and does not require the previous services under an employment contract, i.e. before the individual became a civil servant following a relevant competition, to be taken into account.

3.2 Health and safety at work: pregnant workers

CJEU case C-41/17, 19 September 2018, González Castro

The CJEU ruled:

> *"Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed".*

This ruling connects with the CJEU ruling in case C-531/15, 19 October 2017, *Otero Ramos*, also a Spanish case. The Court stated that the evaluation of occupational risks must take into account the risks that the work may entail for a worker who has just had a child and is nursing. Otherwise, it would be a case of discrimination based on gender. In addition, a reversal of the burden of proof applies in these cases.

The evaluation of occupational risks must of course take into consideration that the worker has a baby, and that discrimination based on gender comes into play (Article 14 of the Spanish Constitution). The reversal of the burden of proof is mandatory when a violation of a fundamental right is at stake, so the Spanish judge had all the tools to reach the same conclusion as the CJEU. The problem was the assessment of the facts, not poor regulation.

However, it seems that as a general rule, the actual problem in most of these cases is the compatibility of work and family life rather than the real harm to the health of the worker or her baby.

3.3 Religious enterprises

CJEU case C-68/17, 11 September 2018, IR

The CJEU stated in this ruling:

> *"1. The second subparagraph of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning:*
>
> - *first, that a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review to ensure that it fulfils the criteria laid down in Article 4(2) of that directive; and*
> - *second, that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.*
>
> *2. A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law".*

There are no legal rules on religious enterprises in Spain, but the Constitutional Court has been addressing this issue for decades. In 1985, the Constitutional Court used arguments that are fairly consistent with the ones used in this CJEU ruling. Therefore, this ruling does not have an impact on Spanish legislation, but confirms the criteria already being applied.

Source:

The decision of the Constitutional Court is available here.

4 Other relevant information

4.1 Unemployment

Unemployment rose in September (20 441 people). The total number of unemployed: 3 202 509 people. This is common in Spain due to the end of the summer period.

Sweden

Summary

The CJEU has ruled in case *C-17/17 Grenville Hampshire v. The Board of the Pension Protection Fund* involving employer insolvency and the protection of employees' rights to accrued old age pension schemes. The Court concluded that the insolvency protection of the employee's pension rights under Article 8 of Directive 2008/94/EC corresponds to at least 50 per cent of the value of the accrued entitlements under a supplementary occupational pension scheme. Moreover, the Court finds that Article 8 of the Directive has direct effect under the circumstances presented in the case.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Insolvency law

CJEU case C-17/17, 06 September 2018, Hampshire

In the present case, the CJEU decided on an increasingly important issue of insolvency and occupational retirement schemes. In the case, referred to the CJEU from the UK Court of Appeal, Mr Grenville Hampshire, had been employed by Turner & Newall plc between 1971 and 1998. After being made redundant in 1998 subject to a takeover and restructuring of Turner & Newall by an American company, Federal-Mogul Corporation, Mr Hampshire took an early retirement, aged only 51. He was informed by the T&N pension trustees that his per annum pension would be GBP 48 781, with an annual increase of at least 3 per cent under a defined benefit scheme. Federal-Mogul Corporation filed for bankruptcy protection in the US in 2001; the UK Pension Protection Fund initiated an assessment of the T&N scheme's assets in the UK as of July 2006. The UK Pension Protection Fund concluded that the assets in relation to the liabilities were sufficient for the future payment of the pensions and the Pension Protection Fund therefore decided not to assume responsibility for the scheme. The monthly sum paid to Mr Hampshire – with adjustment for the statutory pay cap under British law – decreased to GBP 19 819 per annum for Mr Hampshire, significantly lower than the 60 240 GBP he would have received had his employer not filed for insolvency, a decrease of 67 per cent. On appeal, Mr Hampshire argued that the decision to pay only 19 819 per annum did not comply with the Directive (Article 8) since the retirees received less than 50 per cent of their entitlements under the scheme.

The Court of Appeal referred the case to the CJEU and posted the following questions:

> *"1. Does Article 8 of [Council] Directive 80/987/EEC [of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p.23)] (now superseded by Article 8 of Directive [2008/94]) require Member States to ensure that every individual employee receives at least 50% of the value of his accrued entitlement to old-age benefits in the event*

that his employer becomes insolvent (with the sole exception of cases of abuse, to which Article 10(a) of that Directive applies)?

2. *Alternatively, subject to the findings of the national courts regarding the facts of the case, is it sufficient under Article 8 of Directive [80/987] for a Member State to have a system of protection where employees usually receive more than 50% of the value of their accrued entitlement to old-age benefits but some individual employees receive less than 50% by virtue of:*
    - *a financial cap on the amount of compensation paid to employees (in particular employees who have not reached their pension scheme's normal pension age at the time of the employer's insolvency); and/or*
    - *rules limiting the annual increases in the compensation paid to employees or the annual revaluation of their entitlements prior to pension age?*
3. *Is Article 8 of Directive [80/987] directly effective in the circumstances of the present case?"*

The CJEU concluded that the meaning of 'protecting the rights of the employees' would, in line with previous case law from the Court, represent at least 50 per cent of the value of the accrued entitlements under the occupational pension scheme and that this right refers to every individual (former) employee in the event of insolvency of the employer. The Court also finds that Article 8 of the Directive 2008/94/EC – in circumstances such as in the present case – has direct effect and can be invoked by individual employees challenging the decisions by organisations such as the Pension Protection Fund.

The issues addressed in the Insolvency Directive and monitored in case C-17/17, *Grenville Hampshire v. The Board of the Pension Protection Fund* is of major importance in relation to occupational defined benefit pension schemes, a type of pension scheme which, historically, has played a significant role in Sweden as well. The Swedish occupational pension schemes are developed by the industrial partners and regulated in collective agreements (which varies between sectors, but primarily between blue collar and white collar employees in the private sector and other schemes in the public sector). The influence of the legislator is very limited and the liabilities in case of insolvencies are managed by guarantee funds, set up by the pension organisations established by the industrial partners. For privately employed blue collar workers, this is arranged by FORA and for white collar workers in the private sector, the corresponding organisation is Collectum. The guarantee fund should cover events when the employer's bankruptcy prevents payments of the employees' pension contributions in full. However, such payments are closely connected to the provisions in the Wage Guarantee Act ('*Lönegarantilagen 1992:497*'), primarily paras 7 and 9, and the Rights of Priority Act ('*Förmånsrättslagen 1970:979*'), primarily para 12, (also Danhardt, E., *KonkursArbetsrätt, Om arbetsrätt och lönefordringar I konkurs och företagsrekonstruktion*, 5th edition, Jure, Stockholm 2013, p. 279 f.).

For the current and future labour market, it is worth monitoring the occupational pension schemes (the second pillar pensions) in the private sector, which for a number of years have been defined contribution schemes, with a continuous payment of contributions paid by the employers to pension funds. Defined benefit schemes are still applied in the public sector, but are being replaced with defined contribution schemes for younger employees. The shift to defined contribution schemes (as has been the case in the private sector already and seems to increasingly be the case in the public sector as well) will limit any exposure to employees' future pensions in the event of employer bankruptcy (see Inghammar, Brokelind, Norberg, 'Prolonged working life and flexible retirement in public and occupational pension schemes' in, Numhauser-Henning (ed) *Elder Law, Evolving European Perspectives,* Edward Elgar, Cheltenham, 2017, pp 229-256).

4 Other relevant information

4.1 General elections

The Swedish general election took place on 09 September 2018 and no new government has yet been inaugurated. It is currently difficult to see any solid political alliance which could obtain the relevant support in Parliament. Labour market or labour law reform was very scarcely monitored during the campaign and the situation in the new Parliament appears to offer limited possibilities for any major reforms.

United Kingdom

Summary

(I) The Parental Bereavement Leave Act 2018 has received Royal Assent.

(II) The Employment Appeal Tribunal decided on a case of transfer of undertaking limiting the administrative function's exclusion.

(III) Further analysis of the likely implications of Brexit is provided, including the content of a technical notice on employment rights.

1 National Legislation

1.1 Parental Leave

The Parental Bereavement (Leave and Pay) Act 2018 has now received Royal Assent. It will give all employed parents a right to two weeks' paid leave if they lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy. Parents will be able to claim statutory parental bereavement pay for this period if they meet the eligibility criteria (similar to those for statutory paternity pay). This right will come into force, probably in 2020.

2 Court Rulings

2.1 Transfer of Undertakings

Employment Appeal Tribunal, No. UKEAT/0003/18, 23 August 2018, Nicholls and others v London Borough of Croydon

In *Nicholls and others v London Borough of Croydon and others UKEAT/0003/18, 23 August 2018* the Employment Appeal Tribunal (EAT) had to consider whether the transfer of an NHS trusts public health functions to a local authority was a transfer of undertaking to which the Regulations applied or whether it fell within the administrative functions exclusion. The EAT provided a strong hint that because the team's services could be offered by non-state actors, this was an economic activity.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Brexit

4.1.1 Migration status

On 18 September 2018, the Migration Advisory Committee (MAC) published its long awaited report on the impact of EEA migrants on the economy and society of the UK. The report was intended to provide the basis for a new immigration system for the UK after the end of the transition period. The recommendations are:

- General principle behind migration policy changes should be to make it easier for higher-skilled workers to migrate to the UK than lower-skilled workers;

- No preference for EU citizens, on the assumption UK immigration policy not included in agreement with EU;
- Abolish the cap on the number of migrants under Tier 2 (General);
- Tier 2 (General) to be open to all jobs at RQF3 and above. Shortage Occupation List will be fully reviewed in our next report in response to the SOL Commission;
- Maintain existing salary thresholds for all migrants in Tier 2;
- Retain but review the Immigration Skills Charge;
- Consider abolition of the Resident Labour Market Test. If not abolished, extend the numbers of migrants who are exempt through lowering the salary required for exemption;
- Review how the current sponsor licensing system works for small and medium-sized businesses;
- Consult more systematically with users of the visa system to ensure it works as smoothly as possible;
- For lower skilled workers avoid Sector-Based Schemes (with the potential exception of a Seasonal Agricultural Workers scheme);
- If a SAWS scheme is reintroduced, ensure upward pressure on wages via an agricultural minimum wage to encourage increases in productivity;
- If a 'backstop' is considered necessary to fill low-skilled roles extend the Tier 5 Youth Mobility Scheme;
- Monitor and evaluate the impact of migration policies;
- Pay more attention to managing the consequences of migration at a local level.

4.1.2 Technical notice

The UK has published a number of notices in preparation for a no deal Brexit. I reproduce below the notice, which covers employment rights.

A scenario in which the UK leaves the EU without an agreement (a 'no deal' scenario) remains unlikely given the mutual interests of the UK and the EU in securing a negotiated outcome.

Negotiations are progressing well and both we and the EU continue to work hard to seek a positive deal. However, it's our duty as a responsible government to prepare for all eventualities, including 'no deal', until we can be certain of the outcome of those negotiations.

For two years, the government has been implementing a significant programme of work to ensure the UK will be ready from day 1 in all scenarios, including a potential 'no deal' outcome in March 2019.

It has always been the case that as we get nearer to March 2019, preparations for a 'no deal' scenario would have to be accelerated. Such an acceleration does not reflect an increased likelihood of a 'no deal' outcome. Rather it is about ensuring our plans are in place in the unlikely scenario that they need to be relied upon.

This series of technical notices sets out information to allow businesses and citizens to understand what they would need to do in a 'no deal' scenario, so they can make informed plans and preparations.

This guidance is part of that series.

Also included is an overarching framing notice explaining the government's overarching approach to preparing the UK for this outcome in order to minimise disruption and ensure a smooth and orderly exit in all scenarios.

We are working with the devolved administrations on technical notices and we will continue to do so as plans develop.

4.1.2.1 Purpose

This notice informs businesses, workers and citizens of the UK's plans to continue workplace protections in the unlikely event that the UK leaves the EU in March 2019 with no agreement in place. This government firmly believes in the importance of strong labour protections. Amendments we are putting in place will ensure legal certainty and clarity for stakeholders on their responsibilities and rights.

4.1.2.2 Before 29 March 2019

The workplace rights and protections covered in this notice come from EU law and include the following:

- The Working Time Regulations, which include provisions for annual leave, holiday pay and rest breaks;
- Family leave entitlements, including maternity and parental leave;
- Certain requirements to protect the health and safety of workers;
- Legislation to prevent and remedy discrimination and harassment based on sex, age, disability, sexual orientation, religion or belief, and race or ethnic origin in the workplace, and any resulting victimisation;
- The TUPE regulations, protecting workers' rights in certain situations when there is a transfer of business or contracts from one organisation to another;
- Protections for agency workers and workers posted to the UK from EU states;
- Legislation to cover employment protection of part-time, fixed-term and young workers; information and consultation rights for workers, including for collective redundancies;
- Legislation covering insolvency referred to in the Employment Rights Act 1996 and Pension Schemes Act 1993, administering redundancy related payments to employees in case of insolvency. The legislation that applies in Northern Ireland is the Employment Rights (Northern Ireland) Order 1996 and the Pension Schemes (Northern Ireland) Act 1993.

4.1.2.3 After 29 March 2019 if there's 'no deal'

The EU (Withdrawal) Act 2018 brings across the powers from EU Directives. This means that workers in the UK will continue to be entitled to the rights they have under UK law, covering those aspects which come from EU law (including those listed above except where caveated below). Domestic legislation already exceeds EU-required levels of employment protections in a number of ways. The government will make small amendments to the language of workplace legislation to ensure the existing regulations reflect the UK is no longer an EU country. These amendments will not change existing policy. This will provide legal certainty, allowing for a smooth transition from the day of EU exit, and will ensure that employment rights remain unchanged, including the employment rights of those working in the UK on a temporary basis, except where set out below.

The UK government will continue to work with the devolved administrations to ensure workers' rights continue to operate across the UK.

In the following cases, withdrawal from the EU in a 'no deal' scenario has impacts on participation in agreed arrangements with the EU which benefit all EU countries:

- Employer Insolvency: Currently, UK and EU employees working in the UK are protected under the Employment Rights Acts 1996 and Pension Schemes Act 1993 (or the relevant legislation in Northern Ireland on employment rights and pension schemes) implementing the Insolvency Directive, with procedures in place for making claims in the case of employer insolvency. Similarly, UK employees working in an EU country are protected by the laws of that country that implement the directive;
- European Works Councils: Currently EU law allows for workers to request, in certain circumstances, that their employer establishes a European Works Council to provide information and consult with employees on issues affecting employees across two or more European Economic Area states. These rules are set out in the European Works Council Directive (2009/38/EC). The statutory framework that applies to European Works Councils would require a reciprocal agreement from the EU for them to continue to function in their present form within the UK.

Implications

In a 'no deal' scenario, there are no expected financial implications or impacts for citizens or businesses operating in the UK (whether UK or EU-based) in regard to workplace rights. There are some implications in relation to European Works Councils and the insolvency of some employers, laid out below.

Employer insolvency

With regard to employer insolvency, in a 'no deal' scenario, people living and working in the UK for a UK or EU employer will continue to be protected under the same parts of the Employment Rights Act 1996 and Pension Schemes Act 1993 implementing the Insolvency Directive (or the relevant legislation in Northern Ireland on employment rights and pension schemes).

Employees will still be able to bring forward claims in the same way that they can currently. UK law provides protection for all UK, EU, and non-EU employees working in the UK, provided that certain other criteria are met. This will not change as a result of exiting the EU.

UK and EU employees that work outside the UK in an EU country for a UK employer may still be protected under the national guarantee fund established in that country. However, this may not always be the case, as there are variations in how each EU country has implemented the guarantee required by EU law.

European Works Councils

With regard to European Works Councils, in a 'no deal' scenario, the government will ensure the enforcement framework, rights and protections for employees in the UK European Works Councils continue to be available, as far as possible in a 'no deal' scenario. There are implications for UK businesses and trade unions with regards to their European Works Council agreements.

UK regulations will be amended so that:

- No new requests to set up a European Works Council or Information and consultation procedure can be made;
- Provisions relevant to the ongoing operation of existing European Works Councils will remain in force;

- Requests for information or to establish European Works Councils or Information and Consultation procedures made before EU exit but not completed by EU exit will be allowed to complete.

4.1.2.4 Actions for businesses and other stakeholders

- UK and EU employees working in an EU country: Employees should make themselves aware of the relevant implementing legislation in the EU country in which they work, to confirm whether they will still be protected under the national guarantee fund established in that country.
- UK businesses and trade unions: UK businesses with European Works Councils, and trade unions that are parties to European Works Council agreements, may need to review those agreements in light of there no longer being reciprocal arrangements between the UK and the EU.

4.1.2.5 More information

For further information about the EU (Withdrawal) Act and the statutory instruments for workplace rights, please see the below:

- Employment Rights Cover Note;
- Affirmative Employment Rights SI;
- Negative Employment Rights SI;
- Health and Safety SI.

Further information on how to make a claim to the Redundancy Payments Service is available here (or on the Northern Ireland website).

This notice is meant for guidance only. It is part of the government's ongoing programme of planning for all possible outcomes. We expect to negotiate a successful deal with the EU.

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