Flash Reports on Labour Law October 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 October 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

In the **Czech Republic**, a new draft act amending the Labour Code will introduce changes in the calculation of minimum salary and minimum guaranteed wage (the amount of minimum salary is to be directly tied to the average gross monthly salary in the national economy for the previous calendar year). In **Germany**, the Financial Court Baden-Württemberg has ruled that the Act on Minimum Wage applies to any employment of employees in Germany, irrespective of the legal system applicable to the respective employment contract. In **Ireland**, the Minister for Employment Affairs and Social Protection has promulgated the National Minimum Wage Order 2018, which establishes an increase in the minimum wage from EUR 9.55 to EUR 9.80, following the recommendations of the Low Pay Commission. In **Luxembourg**, in the context of the mandatory re-evaluation of the social minimum wage every two years, the minimum wage is projected to rise by 1.1 per cent. This re-evaluation mechanism comes in addition to the automatic adaptation of all wages—including the legal minimum wage—to the cost of living index. In **Slovakia**, the government adopted a decree on minimum wage for the year 2019, establishing an increase of 8.33 per cent in minimum salary, up to EUR 520 per month.

Transfer of undertakings

In **Denmark**, a new proposal currently being debated in preparation for the second and third reading in Parliament, aims to accelerate the payment of salaries to employees in cases of ambiguous transfers of undertakings prior to a declaration of bankruptcy. In **Finland**, the Supreme Court issued several rulings in which the termination of service contracts by public bodies (municipalities) with a company in favour of another one or for organisational reasons did not prevent the existence of a transfer of undertaking. The Court therefore ordered payment of compensation to the employees that had been dismissed as a result. In **Malta**, the Industrial Tribunal concluded that, in line with CJEU case law, the taking up of a lease agreement by one company following a tendering procedure, this company having a third shareholding in the previous leasing company after the expiry of a lease agreement, constituted a transfer of undertaking. In **Norway**, the Supreme Court found that in a case of transfer of undertaking, which triggered the loss of an early retirement scheme for the employee and caused a likely loss of EUR 130 000, the worker was entitled to retain her employment with the transferor. According to Norwegian law, employees have the right to retain their employment with the transferor if the transfer has an extremely negative impact on the employee's situation.

Working time

In **Belgium**, the *Cour de Cassation* ruled in 2014 that the derogations to Sunday rest permitted by royal decrees determine the number of Sundays an employer may employ one or more employees, but do not determine the number of Sundays an individual employee is permitted to work. A new law of 11 October 2018 now determines the number of days an individual may work on Sundays: employees in seaside resorts, health resorts and tourist centres can be employed on Sundays in retail businesses and hair salons, provided that the Sunday employment of each individual employee is limited to 39 Sundays per calendar year. This regulation allows such enterprises to employ workers on Sundays throughout the year. In **Germany**, the Federal Parliament passed a law that considerably modifies the existing rules on part-time

work. In addition to the existing entitlement to part-time work, which is not limited in time, the law introduces a new general statutory entitlement to part-time work that is limited in time (so-called 'bridge part-time work'). If an employer generally employs more than 45 employees in total, the employee can, if her employment relationship has lasted longer than six months, request her contractually agreed working hours (full-time or part-time work) to be reduced for a period of between one year and five years, to be determined in advance. In **Poland**, a draft on an additional formal holiday connected to the 100th anniversary of Poland's independence was submitted to Parliament. In **Iceland**, the Court of Appeal decided that a former worker who claimed remuneration from his former employer because he had neither received minimum daily rest periods on specific dates, nor had he enjoyed his weekly free day on certain occasions, but had been awarded remuneration for the daily rest periods in accordance with the relevant collective agreement and for the loss of his weekly free days, was entitled to additional pay as though he had taken a paid day of leave.

Discrimination

In **Germany,** the Federal Labour Court, in line with the CJEU, case C-414/16, 17 April 2018 *Egenberger*, has ruled that church employers in Germany may no longer state the requirement in job advertisements that applicants must be members of a Christian church. In **Hungary**, the Supreme Court ruled that the employer had not discriminated certain employees in a case involving different salaries for employees of different ages on the grounds that it is not generally prohibited to pay different amounts of remuneration for equal work; it is only prohibited if it is based solely on a protected characteristic, which has no objective related to the employment relationship. In **Spain**, the region of Galicia granted some of its employees two additional days of personal leave if 24 and 31 of December fall on a Saturday or Sunday. Unions challenged this measure, claiming that the difference in treatment discriminated the other workers. The Supreme Court affirmed that there was no violation of the principles of equality and non-discrimination, because the workers who benefitted from this measure did not perform the same functions as the excluded workers, and the difference in treatment was based precisely on that difference in functions.

2 Implications of CJEU and EFTA Court rulings

CJEU case C-12/17, 04 October 2018, *Dicu*

According to the CJEU ruling in case C-12/17, 04 October 2018, *Dicu*, Article 7 of the Working Time Directive must not be interpreted as precluding a provision of national law, which, for the purpose of determining a worker's entitlement to paid annual leave, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

In **Belgium**, this ruling is of direct relevance for legislation on paid annual leave. As is the case in Romania, the legislation on paid annual leave does not regard the parental leave period as one that is equivalent to days of actual performance of work. In **Croatia**, Article 32 of the Croatian Labour Act provides for a higher level of protection: during the period of parental leave, the presumption is that the employee is working full time. National law hence provides for a higher level of employee protection than EU law in this regard. In **Latvia**, the ruling will probably have no impact on labour law. It follows from the regulation of labour law that parental leave is not taken into account for the purposes of acquiring entitlement to paid annual leave. In **Romania**, the CJEU's solution will have an impact, and will result in uniform court practices on this issue in Romania. In **Spain**, it is likely that before this ruling, the Spanish courts could have reached a positive answer in accordance with the previous case law of the CJEU on sick leave and maternity leave. However, after this

ruling, the odds have changed dramatically, even if Spanish law does now preclude taking a more generous approach.

CJEU case C-331-17, 25 October 2018, *Sciotto*

According to the CJEU ruling in case C-331/17, 25 October 2018, *Sciotto*, clause 5 of the Fixed-term Work Directive, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration, if the employment relationship exceeds a specific date, are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.

In **Belgium**, there are no broad legal exclusions of restrictions on successive fixed-term employment contracts for an entire economic sector as is the case in Italy. According to case law, 'a good reason' for consecutive employment contracts for fixed-term work may be the fact that the conclusion of successive contracts is customary in the given branch of industry, such as port work performed by dockers. The Belgian court(s) will have to provide additional objective reasons why the renewal of fixed-term contracts in a given sector such as port work is justified**.** In **Croatia**, the Theatre Act provides for some specificities for fixed-term contracts with theatre employees. The Theatre Act regulates the employment relationship of artists employed in public theatres. They can either be employed on the basis of a fixed-term contract or an open-ended contract, in line with the theatre director's staff management plan**.** In **Latvia**, the protection of employees against abusive fixed-term contracts applies, in principle, to all employees: Latvian law does not exclude any major group of employees from such protection, since Latvian labour law is applicable to all persons who are in an employment relationship, except some groups of state officials and civil servants who are covered by specific laws. However, on the other hand, some groups of employees are excluded from the general legal regulation prohibiting the abuse of fixed-term employment. Some laws provide for systemic election/re-election/conclusion of fixed-term contracts. Latvian law, therefore, does not fully comply with the CJEU's findings in case C-331/17 as well as in earlier judgments. In **Spain**, this ruling has no impact because Spanish rules intended to penalise the misuse of successive fixed-term contracts applies to all sectors. There are no exclusions like the one addressed by this ruling.

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

Topic	Countries
Minimum wage	CZ, DE, IE, LU, SK
Transfer of undertakings	DK, FI, MT, NO
Working time	BE, DE, PL, IS
Discrimination	DE, HU, ES
Health and safety	HR, DK
Severance pay	FR, NL
Annual leave	AT, CZ
Social security law	DK, FR
Child care benefit	AT
Employment contract	BE
Labour migration	BG
Flexibility	HR
Protection of employees	CZ
Temporary agency work	BE
Data protection	EE
Wages	EE
Disability	EE
Training	FR
Dismissal law	FR
Collective labour relationships	FR
Part-time employment	DE
Equal treatment	HU
Work accident	IS
Inland waterways	LI
Termination of employment	MT
Employment policies	ES
Collective dismissal	ES
Collective bargaining	ES
Freedom of association	ES
Definition of worker	UK
Agency work	UK
Brexit	UK

Austria

Summary

(I) No new legislation in the field of labour law has been passed.

(II) A decision of the Austrian Supreme Court dealing with the issue of the possibility of an entitlement to paid annual leave to become time barred during court proceedings to challenge a dismissal is of interest from an EU labour law perspective.

(III) An amendment on the law on child care benefits (*'Familienlastenausgleichsgesetz'*) has passed the National Assembly.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Annual leave

Supreme Court, No. 8 ObA 47/18x, 28 August 2018

An employee was dismissed and challenged the termination in court. In such a case, the employment relationship is terminated but the termination will be retroactively rescinded if the court decides in favour of the employee. In the present case, the employee was successful and she was reinstated retroactively. As the employment relationship was terminated a second time during the court proceedings and the employee did not challenge the second dismissal, she was entitled to back-pay only from the first dismissal date until the second dismissal date. She also claimed compensation for unused paid annual leave accrued during this period. The employer argued that annual leave was time barred and that no compensation had to therefore be paid.

The courts did not follow this line of argument and ruled that the entitlement to paid annual leave only accrued from the date the ruling in favour of the employee concerning the first dismissal took legal effect. The employee could only claim it then and the limitation period of two years started to run.

3 Implications of CJEU rulings and ECHR rulings

Nothing to report.

4 Other relevant information

4.1 Child care benefits

Current EU law guarantees that EU citizens can receive social benefits from the Member State they live and work in. This includes family allowances and child care benefits, regardless of whether the child lives in the respective Member State or not. Austria has unsuccessfully pushed for a change in EU law to allow such child care benefits to be reduced if a child lives in a Member State with a cost of living that is lower than in Austria.

The Austrian national assembly has passed a national law that allows the calculation of child care benefits (*'Familienbeihilfe'*) in accordance with the cost of living of the Member

State the child resides in (so-called indexation). In addition, child care benefits for development aid workers who work abroad have been abolished altogether. The law will enter into force the day after the legislative process is completed. The European Commission previously expressed that it is of the opinion that such an index violates fundamental internal market rules. It has announced that infringement proceedings will be initiated once the law has passed the legislative process.

Sources:

More information relating to the legislative process is available here.

A newspaper article by Kurier of 25 October 2018 is available here.

A newspaper article by Euractiv.com of 06 March 2017 is available here.

4.2 Initiative to credit parental leave

The gender pay gap is in part explained by the time women spend raising their children. The Directive on Parental Leave 2010/18/EU states that workers on parental leave maintain the rights they have acquired. The Directive has been fully transposed. There has been criticism, however, that workers who are on parental leave (predominantly women, as well as men who choose to take up their part of the responsibility) are unable to accrue further rights and entitlements during their parental leave.

According to the Austrian government as well as all parties represented in the national assembly, this lack of recognition of parental leave periods should be modified, specifically with regard to the entitlement to wage raises, the increase of notice periods for termination and entitlement to paid leave. The government has proposed to the social partners to amend collective agreements accordingly, otherwise it will propose an amendment to the current legislation.

Sources:

The suggested amendment is available here.

A newspaper article by Kurier of 25 October 2018 is available here.

Belgium

Summary

(I) Employees in seaside resorts, health resorts and tourist centres can be employed on Sundays in retail businesses and hair salons, provided that the Sunday employment for each individual employee is limited to 39 Sundays per calendar year.

(II) The Constitutional Court has ruled that the individual termination clause regarding the period of notice of a so-called higher employee, which is more favourable than the applicable law, must be applied to the first part of the legal notice period after the introduction of a single status between workers and employees on notice periods, namely the notice period with regard to seniority acquired before 01 January 2014.

(III) A provision of national law, which determines the duration of paid annual leave a worker is entitled to, does not include the period of parental leave taken by that worker and is in compliance with EU law.

(IV) Workers engaged in the sector of activity of operatic and orchestral foundations cannot be excluded from protection against the abuse of fixed-term employment contracts.

1 National Legislation

1.1 Working time

It is in principle prohibited to employ workers on Sundays. A series of exceptions to this prohibition do, however, exist. One of the exceptions to Sunday rest relates to employment in seaside resorts, spas and tourist centres. Retail businesses or hair salons may, under certain conditions specified in royal decrees, employ employees on Sundays in those three sectors. Sunday work is also permitted from 01 May to 30 September, during the Christmas and Easter holidays, and outside the periods mentioned above for a maximum of 13 Sundays per calendar year.

On 10 November 2014, the *Cour de Cassation* ruled that the derogations to Sunday rest permitted by royal decrees determine the number of Sundays an employer may employ one or more employees but do not determine the number of Sundays an individual employee is permitted to work.

This position of the *Cour de Cassation* was surprising considering that Sunday rest is a measure introduced to guarantee employees one day of rest each week.

The new law of 11 October 2018 (published in *Moniteur belge*, 31 October 2018, first edition) now determines the number of days an individual employee may work on Sundays. From now on, employees in seaside resorts, health resorts and tourist centres can be employed on Sundays in retail businesses and hair salons, provided that Sunday employment of each individual employee is limited to 39 Sundays per calendar year. This regulation allows such enterprises to employ workers on Sundays throughout the year.

The new rule will enter into force on 10 November 2018.

2 Court Rulings

2.1 Dismissal law

Constitutional Court, No. 140/2018, 18 October 2018

In its ruling of 07 July 2011, No. 125/2011 (published in *Moniteur belge*, 18 October 2011), the Belgian Constitutional Court had given the Belgian Parliament a period of two years, namely until 08 July 2013, to abolish discrimination between white collar and blue collar workers, while the new legislation entered into force with a delay on 01 January 2014.

The new regulation in the Law of 26 December 2013 on the introduction of a single status between blue collar workers and white collar employees as regards notice periods is in principle applicable to workers dismissed after 01 January 2014. Dismissals prior to the entry into force of the new legislation retain their legal consequences. The periods of notice for employees whose employment commenced before 01 January 2014 are calculated on the basis of the sum of two parts. The first part is based on the seniority acquired up until 31 December 2013 and, in principle, the law on dismissals in force at that time.

The ruling of the Belgian Constitutional Court deals with the transitional law which slightly amended the former dismissal law on the length of service period of white collar employees prior to 01 January 2014. Before the entry into force of the Law of 26 December 2013 on the introduction of a single status for both white collar and blue collar workers as regards notice periods, their notice periods differed depending on whether they were blue collar or white collar workers. The employees were divided into three categories according to the amount of their annual salary. Lawyers used to speak of 'lower', 'higher' and 'highest' employees: 'lower' employees are those with an annual salary less than EUR 32 354, 'higher' employees have an annual salary that is higher than that of 'lower' employees but less than EUR 64 508, and 'highest' employees have an annual salary that is higher than EUR 64 508.

The notice periods for the first category of employees were laid down in the Employment Contracts Law of 03 July 1978. The notice periods for the 'higher' and 'highest' employees could be determined by the parties on the understanding that the agreement on the period of notice between the employer and the higher employee could not be lower than that of 'lower' employees.

Article 68 of the Uniform Statute Act of 26 December 2013 regulates the first part of the notice period related to seniority acquired up until 31 December 2013. For 'higher' employees whose annual salary exceeds EUR 32 254, the notice period shall be set at one month per (started) year of seniority, with a minimum of three months (third paragraph). The case that has come before the Constitutional Court involves a 'higher' employee who wanted to invoke a termination clause that guaranteed him a more favourable notice period than that based on Article 68, paragraph 3 of the Uniform Statute Act of 26 December 2013.

Prior to the introduction of a uniform status for both blue and white collar workers, the notice period for 'higher' and 'highest' employees was generally determined by means of an agreement between the employer and employee. In practice, such a termination clause was included in the individual agreement (employment contract) at the beginning of the employment relationship. Since the introduction of the uniform status of employees on 01 January 2014, there has been uncertainty and disagreement in the case law of the labour courts about the validity of such termination clauses which had been legitimately concluded in the past.

The Explanatory Memorandum to the Draft Act on the Uniform Statute (see *Parliamentary Documents*, Chamber of Representatives, 2013-2014, No. 3144/001, p. 44 and 121) and the Report of the Parliamentary Chamber of Representatives

Committee on Social Affairs (see *Parliamentary Documents*, Chamber of Representatives, 2013-2014, No. 3144/004, p. 37) asserted that it was the legislator's intention for such valid individually agreed clauses on the notice period that existed on 31 December 2013 to remain in force unchanged.

The Constitutional Court is of the opinion that the text of Article 68 is clear and does not allow for an interpretation of Article 68 of the Uniform Statute Act of 26 December 2013 according to the intention of the legislator.

In its judgment No. 140/2018 of 18 October 2018, the Constitutional Court ruled that Article 68 of the Uniform Statute Act can only be read in such a way that this article rejects termination clauses 'higher' white collar workers concluded before 01 January 2014.

However, the Court ruled that the distinction between 'higher' white collar employees depending on whether or not they concluded a valid notice clause prior to 01 January 2014 was irrelevant in the light of the actual objectives. The legal regime of notice periods also applies to 'higher' level white collar workers with a valid notice clause, although contractual certainty about the applicable notice period has been established.

The Court therefore concluded that the disputed provision is contrary to the constitutional principle of non-discrimination enshrined in Articles 10 and 11 of the Constitution. It held that, pending legislative action, the referring court must end the breach of the principle of equality. In practical terms, this means that the court can apply the favourable standard notice clause.

3 Implications of CJEU rulings and ECHR

3.1 Working Time

CJEU case C-12/17, 04 October 2018, Dicu

The Working Time Directive 2003/88/EG provides that Member States shall take the measures necessary to ensure that all workers are granted paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. In addition, the Framework Agreement on Parental Leave states that rights acquired or in the process of being acquired by the worker on the date on which parental leave commences shall remain unchanged until the end of parental leave. At the end of parental leave, these rights, including changes resulting from law, collective agreements and/or national practice, shall apply.

Following a Romanian magistrate who had taken parental leave and who subsequently wanted to take her entire 35-day annual leave thereafter, the Court of Justice was asked whether or not the duration of the parental leave already taken by the worker should be regarded as a period of actual work for the purposes of establishing the employee's entitlement to annual leave. In other words, the question was raised whether a worker accrues rights to annual leave during a period of parental leave.

According to the Court of Justice, entitlement to annual leave is based on the premise that the worker actually worked during the reference period. The objective of enabling the worker to rest presupposes that she has carried out an activity that justifies taking a period of rest, recreation and leisure to ensure the protection of the employee's health and safety, which is the Working Time Directive's objective. Entitlement to paid annual leave is, in principle, calculated on the basis of the periods of actual work performed under the contract of employment.

The case law of the Court of Justice on the maintenance of the right to leave in the event of incapacity for work due to sickness or maternity leave cannot be applied mutatis

mutandis to parental leave. As regards sickness, the Court notes, *inter alia*, that the onset of an incapacity for work due to sickness is in principle unforeseeable, unlike parental leave, which is not unforeseeable. The purpose of maternity leave, in turn, is to protect the health of the woman during and after pregnancy and to protect the special relationship between mother and child in the period after pregnancy and childbirth.

Periods of parental leave should therefore not be treated as work for the purposes of determining entitlement to annual leave.

3.2 Fixed-term work

CJEU case C-331/17, 25 October 2018, Sciotto

One of the pillars of protection found in Directive 1999/70/EC on fixed-term work concerns the prevention of abuse of fixed-term employment contracts. Clause 5 provides that to prevent abuse arising from the use of successive fixed-term employment contracts, Member States shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- objective reasons justifying the renewal of such contracts or relationships;
- the maximum total duration of successive fixed-term employment contracts or relationships;
- the number of renewals of such contracts or relationships.

Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC, must be interpreted as precluding national legislation such as that at issue in the main proceedings, according to which the general rules relating to employment relationships intended to penalise abuse arising from the use of successive fixed-term employment contracts by automatically converting a fixed-term employment contract into a contract of indefinite duration if the employment relationship continues after a certain date do not apply to the activities of operatic and orchestral foundations, for which no other effective measures exist under national law to penalise abuse in that sector.

4 Other relevant information

Nothing to report.

Bulgaria

Summary

Two agreements on migration have been concluded between the Republic of Bulgaria and the Republics of Moldova and Armenia.

1 National Legislation

1.1 Migration

An Agreement was concluded between the Government of the Republic of Bulgaria and the Government of the Republic of Moldova on Regulation of Labour Migration (State Gazette, No. 82 of 05 October 2018, page 3). It regulates employment of both countries on the territory of the other. Moldova is considered a third country.

An Agreement was also concluded between the Republic of Bulgaria and the Republic of Armenia on Regulation of Labour Migration (State Gazette, No. 90 of 30 October 2018, page 52). It also regulates employment of both countries on the territory of the other. Armenia is considered a third country.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Croatia

Summary

(I) An Amendment to the Act on Occupational Health and Safety on the protection of employees exposed to dangerous chemicals at work has been adopted.

(II) The CJEU's judgments C-12/17, *Dicu* and C-331/17, *Sciotto* and their impact in Croatia are analysed.

1 National Legislation

1.1 Health and safety

The Amendment to the Act on Occupational Health and Safety (Official Gazette No. 94/2018) has been adopted. Its objective is, among others, to clarify the obligations of employers in the event of severe and fatal injuries at work and to harmonise the Act on Occupational Health and Safety with the provisions of the Labour Act and the Act on Restricting the Use of Tobacco and Related Products. It transposes Directive 92/57/EEC into domestic law.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Working Time

CJEU case C-12/17, 04 October 2018, Dicu

The CJEU ruled that Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 on certain aspects of the organisation of working time is to be interpreted as not precluding a provision of national law which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

However, Article 32 of the Croatian Labour Act provides for a higher level of protection. During the period of parental leave, the presumption is that the employee works full time. Article 32 states:

> *"Where the previous duration of the employment relationship is of relevance for acquiring certain rights arising from the employment relationship or pertaining thereto, periods of maternity, parental or adoption leave, part-time work, periods of short-time work due to intensified child care, the leave of pregnant women or of a breastfeeding mother, and the periods of leave or short-time work having to care for a child with serious developmental disabilities shall be regarded as full-time work."*

The employee who took parental leave can carry over annual leave to the following calendar year. Article 84(5) of the Labour Act stipulates:

> *"the employee shall be entitled to use the annual leave or a share thereof, which, due to maternity leave, parental or adoption leave, or child care leave for a child with serious developmental disabilities, he was unable to use or was not allowed*

by the employer to use the annual leave days by 30 June of the following calendar year, by the end of the calendar year in which he returns to work."

National law hence provides for a higher level of protection of employees in this context than the EU law.

3.2 Fixed-term work

CJEU case C-331/17, 25 October 2018, Sciotto

According to the judgment of the CJEU in case C-331/17, *Sciotto*, Italian law is not in line with Directive 1999/70/EC because it does not provide for an effective measure penalising the misuse of successive fixed-term contracts in the sector of operatic and orchestral foundations. The Croatian Theatre Act provides for some specificities for fixed-term contracts of employees of theatres. The Theatre Act regulates the employment relationship of artists employed in public theatres. They can either be employed on the basis of a fixed-term contract or an open-ended contract, in line with the staff management plan of the theatre director. According to Articles 41(2) and 43(2), they are regularly employed as fixed-term employees. When the permissible four-year period expires, they can be offered either another fixed-term contract or an open-ended one. Article 43(3) of the Theatre Act entitles the director of a theatre to offer ballet and other dancers open-ended contracts of employment. However, directors of theatres are required to offer them employment contracts of indefinite duration if they have been working for the theatre for 16 years (ballet and other dancers) or for 20 years (other artists). Although the Theatre Act provides for specificities of fixed-term employment contracts in this sector, the work rules of theatres (for instance, the Work Rules of the Croatian National Theatre of 2015 as amended in 2018, Article 18) and the collective agreements (for instance, Collective Agreement for Employees employed in the institutions of culture of the City of Zagreb, Official Gazette of the City of Zagreb 26/2015, Article 37) regulate fixed-term employment in this sector in the same way as it is regulated in the common law rules governing employment relationships (the Labour Act).

4 Other relevant information

4.1 Health and safety

The Regulations on the protection of employees exposed to dangerous chemicals at work, limit values for exposure and biological limit values (Official Gazette No. 91/2018), as an occupational health and safety mechanism, has been issued by the Minister of Labour with consent of the Minister of Health. Its objective is to transpose the following Directives into national law: 98/24/EC, 2004/37/EC, 2017/2398, 2007/30/EC, 2014/27/EU, 91/322/EEC, 2000/39/EC, 2006/15/EC, 2009/161/EU and 2017/164/EU.

Czech Republic

Summary

(I) A draft act amending the Labour Code is currently in the legislative process.

(II) Cancellation of 3-day waiting period in the event of sick leave.

1 National Legislation

1.1 Labour Code Amendments

The Draft Act amending Act No. 262/2006 Coll., the Labour Code, as amended, and other related acts is currently in the legislative process (at the government level).

The government recently started deliberating amendments to the Labour Code to deal with issues that often arise in practice. The purpose of these amendments is to introduce more flexibility to employment and, at the same time, to ensure the protection of employees.

The Draft Act aims to bring about the following changes:

- more flexibility in assignments between the employer (agreement on assignment can be concluded as soon as 1 month after the conclusion of the employment relationship; previously it was 6 months);
- facilitation of the employee's return to the same job following a period of parental leave (formerly only applied to employees returning to work after maternity leave);
- simpler rules for termination of employment contracts in case of transfers of undertaking (to ensure legal certainty for the transferee);
- managerial employee ceases to perform work in the employer's workplace on the same day on which she was recalled by the employer or delivers her resignation to the employer (formerly the day after);
- the maximum duration of the compensatory period for work performed based on an agreement to perform work shall be set at 26 weeks (instead of 52 weeks);
- obligation of employers to provide guaranteed wages to employees employed based on agreements to perform work outside employment law relationships and the obligation to register their working time;
- the term '3-shift regime' shall be replaced with a new term, 'multiple-shift regime', under which employees regularly take turns working in 3 or more shifts within 24 consecutive hours;
- setting minimum times for the employee to be acquainted with the work schedule (minimum of 2 days in advance);
- changes in the calculation of minimum salary and minimum guaranteed wage (the amount of minimum salary should be directly tied to the average gross monthly salary in the national economy for the previous calendar year);
- adjustment of salary and extra pay for work under difficult working conditions in connection with the valorisation of minimum wage;
- explicit inclusion and specification of long-term care as an impediment to work on the part of the employee (and the employer's obligation to provide

the employee with time off);

- new approach to calculating annual leave (based on hours, not days) and introduction of the possibility to transfer annual leave to the following calendar year (with certain restrictions);
- new rules of curtailment of annual leave (1 day of unexcused leave = one day less of annual leave; introduction of stricter restrictions on curtailment);
- increase in the reimbursement of funeral costs in case of death of an employee as a result of a work accident and increase in the compensation payable to survivors of the deceased employee;
- confirmation of employment shall no longer be issued to employees who perform work based on agreements to complete a job (with certain exceptions);
- introduction of job sharing (shared work positions) – employment arrangement where two people are retained to perform work normally performed by one person working full time;
- changes in calculating time limits (in case of obstacles to time limits);
- changes in delivering documents to employees;
- establishing binding criteria under which transfers of undertaking (of rights and obligations in employment) occurs.

As the Draft Act is currently at the very beginning of the legislative process, only a brief summary of the main proposed changes has been presented. The Draft Act is currently being prepared by the Ministry of Labour to be delivered to the government and will thereafter be submitted to Parliament for a first reading. The preliminary effective date is set to 01 July 2019 (with exceptions).

More information relating to the Draft Act is available here.

1.2 Sick leave

The Draft Act amending Act No. 262/2006 Coll., the Labour Code, as amended, has been passed in the Chamber of Deputies. The bill will now be deliberated in the Senate. The Draft Act aims to cancel the initial 3-day waiting period before benefits are paid when an employee becomes 'temporarily unfit for work' - that is, when she is absent from work due to illness or injury, as the employee has no statutory entitlement to sick pay from the employer or to state sickness benefits. This waiting period before sick pay is payable is subject to a maximum of 24 hours of missed working time (see also September 2018 Flash Report).

A preliminary date of entry into force has been set on the first day of the third calendar month after publication.

More information relating to the Draft Act is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Denmark

Summary

(I) A number of proposed amendments to employment and social security regulations has been introduced. Three of these could potentially be of interest in an EU law context.

(II) The new political year 2018/19 started in the first week of October.

1 National Legislation

1.1 Transfers of undertaking

A new Proposal aims to accelerate the payment of salaries to employees in cases of ambiguous transfers of undertakings prior to a declaration of bankruptcy.

The proposal is being debated in the Parliamentary Committee for Employment Matters, in preparation for the second and third negotiation by Parliament.

1.2 Social security benefits

A new Proposal aims to increase the period of time an employee must have been working and residing in Denmark (or another EU Member State) to be eligible for several forms of social security benefits, up to 7 years. The same rule will apply to workers posted to countries outside the EU, if they have worked outside the EU for over 2 years. Exceptions apply to posted workers for Danish companies/Danish state/similar Danish entities, and the family of the posted worker.

The proposal is being debated in the Parliamentary Committee for Employment Matters, in preparation for the second and third negotiation in Parliament.

Consultations referring to the proposal are available here.

1.3 Sickness Benefits

A new Proposal aims to adjust the right of the employer to obtain information about the health and medical status of the employee in situations in which the employee's case is being dealt with by the local municipality for sickness benefits and programmes assessing the capacity for work of sick employees. The proposal aims to balance the employee's interests in keeping health and medical information confidential from the employer, and the interests of the employer in looking after its own interests as regards reimbursement from the local municipality for salaries paid during periods of sick leave. The employer can only receive the requested information if it has a significant impact on the employer's right to receive reimbursements. The employer cannot obtain this information if the employee has a crucial interest in keeping this information confidential due to the special circumstances of the situation.

The proposal has been submitted to the Parliamentary Committee for Employment Matters, in preparation for the second and third negotiation in Parliament.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Agenda for the political year 2018/19

The government's programme was published on 02 October 2018. This is the government's political agenda for the new political year which started on the first weekend of October. It is not yet very elaborate and has not yet been definitively agreed to by the political parties outside government. Several of the proposals have been initiated and have entered the legislative procedure.

The full programme is available here.

Estonia

Summary

(I) The case law of the Estonian Supreme Court has stated that the data on employee wages in the public service is public information. Data protection for such employees is limited compared to private sector employees.

(II) Employers should enhance employment opportunities for people with disabilities. This is not only the responsibility of the state, but also of employers who must take more initiative.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Employees and data protection

Supreme Court, No. 3-15-3228, 17 October 2018

According to Estonian legislation, employers who process the personal data of employees must observe the legislative framework that protects personal data. The Employment Contracts Act states that the employer does not have the right to publish the wage data of a single employee without her consent. The employer does not need the consent of employees if hshe plans to publish the wage data of a group of workers.

According to the Public Service Act and the Public Information Act, the wage data of officials is public information that should be published on the official website. So far, legislation has not specified whether wage data of employees, working in the public service under an employment contract should be publicly accessible or not.

The Estonian public service has followed the German system: there are officials appointed for public service and officials who have a special relationship with the state. Such officials execute public authority. Public sector employees are not appointed, they work under an employment contract and do not execute public authority.

In the case law of the Estonian Supreme Court, the issue was raised whether the wage data of employees in the public service should be publicly accessible or not, and whether employees are entitled to increased protection compared to officials.

The Estonian Supreme Court ruled that although the information on the wages of employees is protected by the data protection regulations and that the publication of wage data generally requires the consent of the employee, this principle does not apply in public service. This means that wage data for both categories of employees, i.e. officials and employees in the public service are public. The public interest, in this case, is more important than such employees' personal privacy.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 People with special needs and the labour market

There is a workforce shortage in several sectors in Estonia. To deal with this shortage, the Estonian government has initiated a reform of the labour market policies for persons with disabilities. The main idea behind the reform is to find more possibilities to employ people with disabilities. To achieve this goal, the state, employers and organisations for people with disabilities need to collaborate more closely. Although there was serious resistance against the employment of people with disabilities in earlier years, it seems that employers have understood the potential and importance of hiring people with disabilities.

It is not only the state's responsibility to help people with disabilities find a job. Employers must find solutions to fill vacancies and to find the workforce they need among people with disabilities.

Estonian legislation does not envisage any sanctions for employers who do not employ people with disabilities. The advantages when employing people with disabilities are modest as well. An initiative by employers to hire people with disabilities is therefore more than welcome. It is also a step towards meeting the targets set by the European Pillar of Social Rights.

More information relating to the employers' initiative is available here.

Finland

Summary

The Supreme Court has issued three judgments on transfers of undertakings involving public sector services.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Supreme Court, Record Number S2016/922, 64, 18 October 2018

A city and an association (B) had agreed that the city would purchase school children's afternoon activities from the association. A had worked for association B as a club leader. The city terminated the contract with association B, which in turn dismissed A. The city concluded a new contract with another association C and did not offer any work to A.

The Supreme Court ruled that a transfer of undertaking had taken place. C was thus required to pay A compensation (vote 3-2).

In its reasoning, the Supreme Court referred to CJEU cases C-509/14, 26 November 2015, *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual and Others;* C-200/16, 19 October 2017, *Securitas v ICTS Portugal*; case C-340/01, 20 November 2003, *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH;* C-463/09, 20 January 2011, *CLECE SA v María Socorro Martín Valor and Ayuntamiento de Cobisa*; C-13/95, 11 March 1997, *Ayse Süzen gegen Zehnacker Gebäudereinigung GmbH Krankenhausservice;* C-127/96, 10 December 1998, *Hernández Vidal* concerning the significance of the property used in the operation, and the identity of the business.

Supreme Court, Record Number S2017/1, 65, 18 October 2018

Company X had provided care services for a federation of municipalities. Company X operated a property rented from the federation of municipalities. Nurse A had worked for Company X.

The federation of municipalities terminated the service contract and began providing its own care services. Company X terminated Nurse A's employment contract which was to cease on the date of the transfer of the business.

The Supreme Court ruled that a transfer of undertaking had taken place. The federation of municipalities was therefore required to pay compensation to Nurse A.

Supreme Court, Record Number S2017/88, 66, 18 October 2018

Company X had provided care services and food services in a home managed by the city. The provision of services was based on an agreement between Company X and the city from the year 2003. In 2011, the agreement was amended and Company X provided its services for only part of the home, as the city provided the services for the other part.

In the beginning of 2012, the city took responsibility for the entire operation of the home. The type of care and food services offered was similar as the previous services. Company X gave Nurses A, B and C notice and their employment contracts ceased on 31 December 2011.

The Supreme Court ruled that a transfer of undertaking had taken place. The city was ordered to pay Nurses A, B and C compensation.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

France

Summary

(I) The Law on Freedom to choose one's professional future is analysed.

(II) A draft law for the financing of social security has been presented.

(III) The relevant case law of the Court of Cassation is analysed.

1 National Legislation

1.1 Freedom to choose one's professional future

Law No. 2018-771 '*pour la liberté de choisir son avenir professionnel*' of 05 September 2018 contains several measures; some of them relate to vocational training. These are analysed in the following paragraphs.

1.1.1 Vocational training

The categories of measures that fall within the scope of provisions relating to vocational training are currently found in Articles L. 6313-1 to L. 6313-14 of the Labour Code. These articles have been completely rewritten by the Law of 05 September 2018 'for the freedom to choose one's professional future'. From 01 January 2019, four measures contributing to the development of skills will fall within the scope of vocational training (Labour Code, Article L. 6313-1):

- training activities;
- skills assessments;
- activities to validate prior experience (VAE);
- the learning activities carried during the learning contract.

A new definition of training measures is included in the Labour Code. According to Article L. 6313-2, this measure is defined as 'an educational path to achieve a professional objective'.

According to procedures to be determined by decree, the training measures may be carried out in whole or in part at an educational institution, as is currently already the case or now also in a work environment.

1.1.2 A reorganised training plan

On 01 January 2019, the training plan will become the skills development plan. The employer remains responsible for ensuring that employees can adapt to the needs of their workplace and to maintain their ability to hold a job.

Employers will no longer have to build their plan around the two categories, 'adaptation and employability' and 'skills development'. From now on, the system (working time and remuneration) will differ when it comes to 'compulsory' or 'non-compulsory' training.

Thus, any training measure that 'conditions the exercise of an activity or function, pursuant to an international convention or legal and regulatory provisions' is considered 'mandatory'. This 'compulsory' training measure constitutes effective working time and warrants the continuation of remuneration (Labour Code, Article L. 6321-2).

Other so-called 'non-compulsory' training courses may take place outside of working hours in accordance with the following procedures (Labour Code, Article L. 6321-6):

- Training measures determined by a company agreement or, failing that, by a branch agreement, may take place, in whole or in part, outside of working hours within the time limit set by the agreement (or a limit corresponding to a fixed percentage for employees in annual fixed amounts in days or hours);
- In the absence of a collective agreement and with the employee's agreement, training may take place, in whole or in part, outside of working hours, within a limit that is set at 30 hours per year and per employee or at 2 per cent of the fixed price per employee.

The employee's agreement must be formalised and may be terminated. The employee's refusal to participate in training measures outside of working hours or the termination of her agreement shall not constitute a fault or reason for dismissal (Labour Code, Article L. 6321-7).

1.2 Social Security Financing Draft Law

A draft law proposal (*Projet de loi*) on the financing of social security has been presented.

1.2.1 Exemption of employee contributions on overtime (Article 7)

At the end of the summer, the Prime Minister announced the introduction of an exemption of employee contributions on overtime and overtime hours worked as of 01 September 2019, which is reflected in Article 7 of the law proposal on financing social security.

This measure only concerns employee contributions for old-age insurance and supplementary pension schemes. The CSG (*Contribution sociale généralisée*) and CRDS (*Contribution au remboursement de la dette sociale*) and the contributions applicable to all income will remain due.

The flat-rate deduction of EUR 1.50 from employer contributions available to companies with less than 20 employees will remain applicable.

1.2.2 Modulation of sanctions in the event of hidden work (Article 17)

Companies that resort to hidden work shall lose the benefit of total or partial exemption from social security contributions and contributions due to social security bodies. According to the bill, the amount of the cancellation may be adjusted according to the situation of the company and the seriousness of the offence committed.

The application of this measure is subject to the publication of a decree determining the conditions under which concealment may be considered limited. It will also define and set the maximum threshold below which the volume of the hidden activity may be considered limited, the law providing that this threshold may not be less than 10 per cent of the activity.

In addition, late payment surcharges will be reduced if the amounts due are paid promptly. On the other hand, the amount of these increases will be higher if a new infringement is found within five years of the first offence involving hidden work.

The measure will be applicable to controls and adjustments for which a hidden work report will be issued as of 01 January 2019. The measures allowing for a modulation of penalties will, for their part, be applicable not only to the controls in progress but also

to any cancellation of reductions or exemptions from social security contributions or social contributions that have not given rise to a final court decision.

1.2.3 Complementary social protection (Article 33)

Responsible supplementary health insurance policies, both individual and collective, taken out or renewed as of 01 January 2020 must cover the entire '100 per cent health basket, which will include optical costs, hearing aids and dental prostheses. The decree adapting the content of these contracts will be amended in accordance with the '100 per cent health' basket resulting from the consultation.

It should be recalled that non-compliance with these contracts could lead companies to challenge the exemption from social security contributions applicable to employer contributions financing collective pension benefits.

1.3 Mobility leave and collective bargaining termination

Ordinance No. 2017-1387 of 22 September 2017 created two mechanisms to organise voluntary departures on the basis of collective agreements and without economic difficulties: mobility leave (Labour Code, Article L. 1237-18 et seq.) and collective bargaining termination (Labour Code, Article L. 1237-19 et seq.).

In both cases, the employer must send the Directorate a report of the termination that occurred under the collective agreement in accordance with the following procedures:

- For mobility leave, the employer shall provide an information document every six months from the date of filing the agreement on disruptions ordered pursuant to the agreement (Labour Code, Article D. 1237-5);
- For collective bargaining terminations, the employer shall forward the balance sheet no later than one month after the end of the implementation of the measures to facilitate the external reclassification of employees (Labour Code, Article D. 1237-12).

To simplify this transmission, an Order of 08 October 2018 (Arr. 08 October 2018, NOR: MTRD1827497A) sets out a procedure for each of these documents, specifying the elements that must be included. These reports must, in particular:

- Identify the 'beneficiaries' of the agreement according to the age group to which they belong (under 35 years old, 36 to 45 years old, 46 to 57 years old and 57 years old and over);
- Specify the number of hirees to replace voluntary departures, also broken down by age (in the case of CCR);
- Indicate the number of employees affected by each accompanying measure implemented;
- Inform about the situation of each employee at the end of the mobility leave or, in the event of CCR, at the end of the termination of the employment contract (broken down according to whether or not the mobility leave scheme is in place).

Reference shall therefore now be made to the procedures set out in the Annex to the abovementioned Order.

2 Court Rulings

2.1 Employee dismissal

Labour Division of the Court of Cassation, No. 17-16.474, 03 October 2018

An employee was hired as a supervisor on 02 May 1991. He suffered a work accident on 25 February 2012 and stopped working. The employee was dismissed on 30 January 2014, for economic reasons.

An employee who is on leave due to an accident at work benefits from special protection against dismissal: she can only be dismissed for serious misconduct or if it is impossible to maintain the employment contract for reasons unrelated to the accident (Labour Code, Article L. 1226-9).

The Court of Cassation ruled that the existence of an economic reason does not suffice to claim impossibility of maintaining the employment contract, even in the event of applying the criteria of the order of dismissals to the employee.

The Court of Cassation adopted a coherent reasoning in this case. The economic difficulties the company faced at the time of the employee's dismissal did not justify the claim of impossibility of maintaining the employment contract, and the application of the order criteria could not be used as justification for dismissing the employee, either.

On this point, the Court of Cassation asserted that:

> *"Attendu, cependant, qu'aux termes de l'article L. 1226-9 du code du travail, au cours des périodes de suspension ducontrat de travail, l'employeur ne peut rompre ce dernier que s'il justifie soit d'une faute grave de l'intéressé, soit de son impossibilité de maintenir le contrat pour un motif étranger à l'accident ou à la maladie ; que ni l'existence d'une cause économique de licenciement ni l'application des critères de l'ordre des licenciements ne suffisent à caractériser l'impossibilité de maintenir le contrat pour un motif non lié à l'accident ;*
>
> *D'où il suit qu'en statuant comme elle l'a fait, la cour d'appel a violé les textes susvisés ;"*

Labour Division of the Court of Cassation, No. 17-16.474, 03 October 2018

2.2 Severance pay

Labour Division of the Court of Cassation, No. 17-11.102, 26 September 2018

In the present case, the employee was hired as an engineer by Dassault Aviation on 01 December 1977. She alternated periods of full-time and part-time work. The employee was dismissed on 21 January 2011. The employee brought a claim before the Labour Court for payment of additional contractual severance pay.

Severance pay is calculated in proportion to the part-time and full-time periods an employee has worked (Labour Code, Article L. 3123-5).

The collective agreement stipulates that the contractual severance pay is higher for dismissed employees who are between the ages of 55 and 60—which was the case—without exceeding a maximum of 18 months' remuneration.

Having calculated the severance pay pro rata in accordance with the employee's full-time and part-time work periods, the employer had also calculated a specific ceiling, taking into account the employee's average working time over her entire career.

This last calculation was annulled by the Court of Appeal, whose decision was confirmed by the Court of Cassation.

It was only necessary to compare the compensation due to the employee with the value of the non-proportional ceiling 'in the absence of contractual provisions to the contrary'.

On this point, the Court of Cassation stated that:

> *"Mais attendu que si le principe d'égalité entre travailleurs à temps complet et travailleurs à temps partiel, posé par l'article L. 3123-13 du code du travail, dans sa rédaction applicable, impose de calculer l'indemnité conventionnelle de licenciement en tenant compte, à défaut de dispositions conventionnelles contraires, proportionnellement des périodes d'emploi effectuées à temps plein et à temps partiel, la règle de proportionnalité ne trouve pas à s'appliquer, sauf disposition contraire de la convention collective, au plafond qui a un caractère forfaitaire;*
>
> *Et attendu qu'ayant constaté que l'article 29 de la convention collective nationale des ingénieurs et cadres de la métallurgie du 13 mars 1972 institue, pour la détermination du montant de l'indemnité conventionnelle de licenciement, un plafond égal à dix-huit mois de traitement, la cour d'appel, qui a préalablement appliqué la règle de proportionnalité pour le calcul de l'indemnité théorique de licenciement, en a, à bon droit, limité le montant par application du plafond conventionnel, non proratisé;*
>
> *D'où il suit que le moyen n'est pas fondé;"*

Labour Division of the Court of Cassation, No. 17-11.102, 26 September 2018

2.3 Bonus and remuneration

Labour Division of the Court of Cassation, No. 17-15.101, 26 September 2018

In the present case, forty employees working for Cooper Sécurité brought an action before the Labour Court seeking to obtain a bonus in the amount of a monthly salary based on the principle of equal treatment. This benefit was only granted to management staff.

For the Court of Cassation, regardless of the terms of payment of a 13th salary, whether remuneration is distributed across 13 months or is paid as an annual bonus, this particular 13th salary did not have a specific objective 'unrelated to the work being performed' and did not compensate for a 'particular subjection', it was 'part of the annual remuneration paid, on the same basis as the basic salary, in return for the work' of executives.

The justification for this payment is based on the difference in the situation of employees which, according to the Court of Cassation, distinguishes between managers and non-managers.

On this point, the Court of Cassation stated that:

> *"Qu'en statuant ainsi, alors que, quelles que soient les modalités de son versement, une prime de treizième mois, qui n'a pas d'objet spécifique étranger au travail accompli ou destiné à compenser une sujétion particulière, participe de la rémunération annuelle versée, au même titre que le salaire de base, en contrepartie du travail à l'égard duquel les salariés cadres et non-cadres ne sont pas placés dans une situation identique, la cour d'appel a violé, par fausse application, le principe susvisé; "*

Labour Division of the Court of Cassation, No. 17-15.101, 26 September 2018

2.4 Collective labour relationship

2.4.1 Pre-electoral memorandum

Labour Division of the Court of Cassation, No. 17-21.836, 03 October 2018

In the present case, based on a collective agreement of 24 June 2010, an economic and social unit was created by 15 companies of Group J and involved the establishment of two central works councils. On 21 April 2011, a pre-electoral memorandum of understanding was signed between the representatives of the ESCU and the central trade union organisations for the establishment of the Central Works Council of the dermo-cosmetic branch (the CCE). This protocol provided in particular that in case a full member of the CCE ceases to hold office during the year, she would be replaced by an alternate. An employee, a member of the CCE as a representative of a works council, resigned in February 2015. His replacement was elected by the works council in March 2015. Representatives of the central management of the ESCU contested this election in July 2015.

A pre-electoral memorandum of understanding is subject to specific majority rules. Its validity is subject to a double majority requirement (Labour Code, Article L. 2324-4-1).

Amendments to this protocol may be made by negotiation between the company manager and the trade unions concerned, subject to the same conditions of validity as the protocol itself (Labour Division of the Court of Cassation, No. 10-27.134, 26 October 2011).

> *"Mais attendu que si des modifications négociées entre le chef d'entreprise et les organisations syndicales intéressées peuvent être apportées à un protocole préélectoral, ces modifications, y compris lorsqu'elles portent sur le calendrier électoral, ne peuvent résulter que d'un avenant soumis aux mêmes conditions de validité que le protocole lui-même;"*

On this point, the Court of Cassation stated that:

> *"Attendu que pour débouter les représentants de l'UES de leur demande, la cour d'appel retient, d'une part que le choix du chef d'entreprise de procéder au remplacement d'un titulaire au comité central d'entreprise par voie d'élection, en l'absence d'opposition des représentants élus ou des organisations syndicales, ne peut être en soi sanctionné alors qu'il est plus favorable à l'expression de la démocratie dans l'entreprise ; d'autre part que dès lors qu'ils avaient reçu sans réagir les procès verbaux de réunion du comité d'établissement du [...] en mars 2015, les membres de la direction centrale, qui n'ont réagi qu'en juillet 2015, lors de la préparation de la réunion du CCE, ont de fait renoncé à agir ; enfin, que la désignation du remplaçant n'a été effective que pour la durée du mandat en cours qui s'est achevé en octobre 2016;*
>
> *Qu'en statuant ainsi alors, d'une part que l'intérêt à agir doit être apprécié lors de l'engagement de l'action, et d'autre part qu'il n'était ni invoqué ni justifié d'un accord entre les représentants de l'UES et les organisations syndicales centrales intéressées, aux conditions de double majorité exigées par l'article L. 2324-4-1 du code du travail, pour modifier les conditions de remplacement d'un membre titulaire du CCE par son suppléant, la cour d'appel a violé le texte susvisé;"*

Labour Division of the Court of Cassation, No. 17-21.836, 03 October 2018

2.4.2 Staff delegate

Labour Division of the Court of Cassation, No. 17-60.285, 03 October 2018

In this case, a member of the *Délégation unique du personnel* (DUP) resigned from office in October 2015. On 28 April 2017, he was appointed as a trade union

representative by the trade union *'force ouvrière'*. He requested the court of first instance to annul this designation. He claimed that by resigning, he had not retained the vote he had acquired during the election. The law's reference to the votes obtained ensures that during the election, the person has a certain popularity. This one was no longer valid following the resignation.

Each trade union organisation in the company or establishment with at least 50 employees, which constitutes a trade union section, shall appoint a trade union representative from among the candidates for professional elections, who have received at least 10 per cent of the votes cast in the first round of elections to the Social and Economic Committee in their personal capacity and in their college (Labour Code, Article L. 2143-3). For the Court of Cassation, this does not require any elective functions by the interested party. This is the first time to our knowledge that the case law has so explicitly stated this principle.

According to the Court of Cassation, the obligation for trade unions to select among the candidates for professional elections, who received at least 10 per cent of the votes in the last election, does not require them to hold elective office. In short, once an employee has obtained 10 per cent of the votes, she may, in the event of resignation from office, continue to exercise her mandate as a union delegate or be appointed as a union delegate during the electoral cycle.

On this point, the Court of Cassation stated that:

> *"Attendu que pour annuler la désignation de M. Y…, le 28 avril 2017, en qualité de délégué syndical Force ouvrière de l'établissement E… , le jugement retient qu'il ressort des pièces produites aux débats que M. Y… a donné sa démission de son mandat de membre de la Délégation unique du personnel par lettre remise en main propre le 14 octobre 2015 au représentant de l'entreprise E… , que M. D…, en qualité de suppléant, a ainsi remplacé M. Y… dans ses fonctions conformément à l'article L. 2314-30 du code du travail de sorte que M. Y… ne pouvait être désigné en qualité de délégué syndical Force ouvrière au sein de l'établissement E… le 28 avril 2017, qu'ainsi, contrairement à ce que soutient l'Union départementale Force ouvrière du Loiret, M. Y… n'a pas conservé son suffrage après sa démission, qu'en effet, si l'article L. 2143-3 du code du travail fait référence au suffrage recueilli personnellement lors de l'élection, cela n'a pas pour effet de faire conserver le mandat de délégué syndical après la démission de l'intéressé mais simplement de s'assurer lors de l'élection que la personne présente une certaine popularité dans l'entreprise comme ce fut le cas pour M. Y…, que cette référence à la popularité dans l'entreprise du délégué élu n'implique pas en revanche qu'il puisse conserver ses fonctions après qu'il y ait lui-même mis fin par sa démission, qu'il résulte de ce qui précède que M. Y… ne pouvait être désigné en qualité de délégué syndical Force ouvrière de l'établissement E… après sa démission;*
>
> *Qu'en statuant ainsi, le tribunal a violé le texte susvisé ;"*

Labour Division of the Court of Cassation, No. 17-60.285, 03 October 2018

2.5 Social protection

Labour Division of the Court of Cassation, No. 16-28.110, 26 September 2018

In the present case, the employer had not given his employee detailed information on the pension contract he had signed in 2001. In 2006, the employer changed insurer and the pension contract, but did not inform the employee of this change and did not notify him. The employee's claim was successful. The Court of Appeal acknowledged the employer's failure to fulfil its duty to provide information and advice but did not order the employer to pay damages, considering that this failure was not the actual reason

for the damage suffered by the employee. The difficulties the latter had encountered were attributable to a disagreement between the insurers on the calculation of pensions and revaluing them.

When setting up pension coverage, the employer must provide each employee with detailed information (drawn up by the insurer) defining the pension guarantees and their application procedures, failing of which will incur employer financial responsibility. The employer must also inform employees in advance, in writing, of any changes planned to their rights and obligations (change of insurer, new coverage, etc.).

The provision of this information implies that the employer must:

- Verify that the guarantees described in the notice are sufficiently detailed and correspond to those described in the contract;
- Give the employee notification, before or at the time of accession, with supporting evidence: this evidence may be provided by any means (discharge, personal delivery against discharge, etc.).

For the Court of Cassation, the judges in appeal did not draw the legal consequences from their finding. If a breach of the obligation to provide information is determined, the information is incomplete and the employer is liable for the consequences of incomplete information that led the employee to remain unaware of the extent of the coverage taken out. The case will have to be retried for compensation.

On this point, the Court of Cassation stated that:

> *"Attendu que pour rejeter la demande du salarié au titre du manquement de l'employeur à ses obligations d'information et de conseil, l'arrêt retient que l'employeur n'établit pas avoir remis à l'adhérent, en 2001, la notice détaillée de la garantie Capricel puis celle de l'organisme Mercer ni l'avoir informé du changement d'organisme de prévoyance à compter du 1er janvier 2006 ainsi que du maintien de ses garanties à l'identique, qu'il a manqué à son devoir d'information au moment de la souscription successive des différents contrats d'assurance, que toutefois cette faute n'était susceptible d'engager sa responsabilité que si elle est la cause du préjudice du salarié , que les difficultés que celui ci a rencontrées dans l'application de ses droits avaient pour origine le désaccord des organismes de prévoyance sur l'assiette de calcul des rentes et de leur revalorisation et que le respect par l'employeur de son obligation de remise des notices de garanties, n'aurait en rien évité ce désaccord;"*

Labour Division of the Court of Cassation, No. 16-28.110, 26 September 2018

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) A new law was passed which enshrines a new general statutory entitlement to part-time work limited in time (so-called 'bridge part-time work').

(II) According to the Financial Court Baden Württemberg, the Minimum Wage Act is applicable to foreign employers to the extent that their employees, beyond pure transit journeys, provide transport services from or to another Member State, loading or unloading in Germany or cabotage operations.

(III) According to the Federal Labour Court, church employers in Germany may no longer state the requirement in job advertisements that applicants must be members of a Christian church.

(IV) According to the same Court, if the employer temporarily sends an employee abroad, the return trips to the external workplace are made exclusively in the employer's interest and must therefore be remunerated as work.

(V) The Federal Labour Court requested the CJEU to give a preliminary ruling on the interpretation of Directive 2001/23/EC and on the interpretation and direct application of Directive 2008/94/EC.

(VI) According to the State Labour Court Berlin, a taxi company cannot require a taxi driver to press a signal button every three minutes while waiting for passengers to document his readiness for work.

1 National Legislation

1.1 Modification of Part-Time Law

On 18 October 2018, the Federal Parliament passed a law that considerably modifies the existing rules on part-time law as laid down in the Part-Time and Fixed-Term Contracts Act ('*Teilzeit- und Befristungsgesetz*').

In addition to the existing entitlement to part-time work that is not limited in time, the new law, among other things, introduces a new general statutory entitlement to part-time work limited in time (so-called 'bridge part-time work'). If an employer generally employs more than 45 employees in total, the employees can, if their employment relationship has lasted longer than six months, request their contractually agreed working hours (full-time or part-time work) to be reduced for a period of between one year and five years, to be determined in advance. The new entitlement—as well as the entitlement to part-time work not limited in time—is not linked to the existence of specific reasons (e.g. caring for children or for relatives). When the bridge part-time work ends, the employee returns to the initially contractually agreed working time. For employers who employ 46 to 200 workers, a 'limit of reasonableness' is introduced.

In the legislator's view, the fact that workers can voluntarily work on a part-time basis, but do not have to remain in part-time work involuntarily is important in terms of work, equality and family policy. For those who wish to reduce their working hours for a limited period of time, the Part-Time and Fixed-Term Contracts Act ensures that after the expiration of the time limitation of part-time work, they can return to their initially agreed working time (see '*Entwurf eines Gesetzes zur Weiterentwicklung des Teilzeitrechts – Einführung einer Brückenteilzeit*', Bundestags-Drucksache 19/3452 of 19 July 2018, page 1).

2 Court Rulings

2.1 Applicability of Minimum Wage Act

Financial Court Baden-Württemberg, No. 11 K 544/16 and 11 K 2644/16, 22 August 2018

According to the Financial Court Baden-Württemberg, the order of an audit within the meaning of the Minimum Wage Act ('*Mindestlohngesetz*'), which serves to monitor compliance with the provisions of the Act, may also apply to an internationally active logistics company with its registered office in the Slovak Republic and which employs employees in Germany. In the view of the Court, it does not matter whether the employment relationship is based on an employment contract under German law since the Minimum Wage Act applies to any employment of employees in Germany, irrespective of the legal system applicable to the respective employment contract. Moreover, the Court held that the obligation to pay the minimum wage that arises from section 1 and 20 of the Act must not be interpreted in a restrictive way in view of the fact that in the field of transport of goods and persons, the posted employees may only work in Germany for a short period. Foreign employers are in any case subject to the provisions of the Minimum Wage Act to the extent that their employees, beyond pure transit journeys, provide transport services from or to another Member State with loading or unloading in Germany or cabotage operations. In its decision, the Court also deals in detail with the question whether the German law conforms with EU law (Judgment, notes 43 et seq.). The Court concluded that the inspection powers of the customs administration and the employer's corresponding obligations to cooperate under the Minimum Wage Act are not objectionable under European law (Judgment, note 62).

Revision before the Federal Financial Court is pending.

2.2 Discrimination on the grounds of religion

Federal Labour Court, No. 8 AZR 501/14, 25 October 2018

According to the Federal Labour Court, church employers in Germany may no longer state the requirement in job advertisements that applicants must be members of a Christian church. Different treatment on the grounds of religion is only permissible under section 9(1) alt. 2 of the General Equal Treatment Act ('*Allgemeines Gleichbehandlungsgesetz*') if religion constitutes an essential, legitimate and justified occupational requirement in view of the ethos of the religious community or institution according to the nature of the activities or the circumstances in which they are carried out. In the underlying case, the Court had considerable doubts as to the materiality of the professional requirement. In any event, the professional requirement was not justified because there was no probable and substantial risk in the specific case that the ethos of the defendant would be compromised. Justification of different treatment under section 9(1) alt. 1 of the Act, which underlines churches' right to self-determination, did not apply to this case, as this provision—in the view of the Court—could not be interpreted in conformity with EU law and its application must therefore be avoided in future.

The Court followed the earlier decision of the CJEU, in case C-414/16, 17 April 2018, *Egenberger*.

A press release relating to the judgment is available here.

2.3 Travel time as working time

Federal Labour Court, No. 5 AZR 553/17, 17 October 2018

In the underlying case, the plaintiff was employed by the defendant construction company as a technical employee. He was required in accordance with his employment contract to work on various construction sites at home and abroad. From August to October 2015, the plaintiff was sent to a construction site in China. At the plaintiff's request, the defendant booked a business class flight with a stopover in Dubai instead of a direct economy class flight for the outward and return journey. For the four days of travel, the defendant paid the plaintiff the remuneration agreed in the employment contract for eight hours each. In his complaint, the plaintiff claimed remuneration for an additional 37 hours on the ground that the entire travel time constituted working time.

The Federal Labour Court held that if the employer temporarily sends an employee abroad, the return trip to the external workplace is undertaken exclusively in the employer's interest and must therefore be remunerated as work. In principle, however, only the travel time required for an economy class flight had to be taken into account.

A press release relating to the judgment is available here.

2.4 Insolvency

Federal Labourt Court, No. 3 AZR 139/17 (A) et al, 16 October 2018

In two proceedings, the Third Senate of the BAG requested the CJEU to give a preliminary ruling on the interpretation of Article 3(4) and Article 5(2)(a) of Directive 2001/23/EC and on the interpretation and direct application of Article 8 of Directive 2008/94/EC. The background to the submissions was the question of liability of the business acquirer in the event of insolvency.

A press release relating to the judicial decision is available here.

2.5 Minimum wage

State Labour Court Berlin, No. 26 Sa 1151/17, 30 August 2018

The underlying case concerned a taxi company and a driver. The latter was obliged to press a button every three minutes, indicated by an acoustic as well as a visual signal, to record his time in the taxi while waiting for customers. If the plaintiff did not press the button, the subsequent time was not recorded as working time, but as unpaid break time. The plaintiff asserted that he was also entitled to the statutory minimum wage for times recorded as break times due to failure to press the signal button.

The Court held that a taxi company cannot require a taxi driver employed as an employee to press a signal button every three minutes while waiting for passengers in order to document his readiness for work. In this respect, the taxi driver is entitled to minimum wage even during standstill periods without having pressed the signal button.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Hungary

Summary

The Supreme Court has issued an interesting ruling on non-discrimination on grounds of age.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Equal Treatment

Supreme Court ('Kúria'), No. Mfv.III.10.707/2017/7

The decision of the *Kúria* (Supreme Court) was based on the following facts: the plaintiff had employed the defendant for 11 years. He belonged to the older generation. A new employee, a 27-year old woman, was hired. She had studied public management but did not graduate. Both employees had the same job, tasks and responsibility. The young women earned HUF 100 000 more than the older employer (ca. EUR 300). The plaintiff brought an action before the Labour Court, referring to Section 12 of Act I of the Labour Code (hereinafter: LC) of 2012. Under this provision in connection with employment relationships, such as remuneration for work, the principle of equal treatment must be strictly observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other employees. The application was rejected by the Labour Court. The court stated that the application had not been adequately proven.

The *Kúria* decided that the application was justified. It stated that the LC regulates the general principle and requirement of equal treatment. The detailed rules are contained in Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: ET). The provisions of both acts should jointly apply. Section 12 Sub 3 specifies the criteria that must be taken into account to determine whether the work is equal in value. Under this provision, the equal value of work for the purposes of the principle of equal treatment shall—in particular—be determined on the basis of the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labour market conditions. As regards equal remuneration for equal work, unjustified (undue) differentiation between employees is prohibited. The equality of work between two employees must be assessed by evaluating all of the circumstances of the case.

Section 19 in the ET regulates the provision of the burden of proof. Under this rule, in procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to assert claims of public interest must prove that

- The injured person or group has suffered a disadvantage, and
- the injured party or group possesses characteristics defined in Article 8 in this Act.

If the above mentioned facts seem likely, the other party shall prove that:

- The circumstances that seemed likely according to the injured party or the party entitled to assert claims of public interest do not exist, or

- within the relevant relationship, was not required to observe the principle of equal treatment.

The parties may freely determine the elements of the employment contract when concluding it. This follows from the principle of freedom of contract. Nevertheless, the employer must take the requirement of equal treatment into account.

It is not generally prohibited to pay different amounts of remuneration for equal work, but only if it is solely based on a protected characteristic, which has no objective related to the employment relationship. The plaintiff has claimed that his age is a protected characteristic and that he was disadvantaged compared to the younger workers. The defendant could not prove the reason for the difference in remuneration.

The *Kúria* referred cases C-555/07, 19 January 2010, *Kücükdeveci*; C-297/10 and C-298/10, 08 September 2011, *Henning and Mai*; C-17/05, 03 October 2006, *Cadman*; C-427/11, 28 February 2013, *Kenny* and C-381/99, 26 June 2001, *Brunnhofer* to the CJEU.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Iceland

Summary

The courts of first and second instance have issued rulings on the interpretation of 'work accident', a worker's inaction to redeem alleged unpaid salary and remuneration for violation against a worker's daily and weekly rest period. Additionally, the social partners have published their position for the coming collective agreement negotiations.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Work Accident

Supreme Court, No. 434/2017, 04 October 2018

In Supreme Court ruling No. 434/2017, the interpretation of the term 'work accident' in Icelandic collective agreements was debated. An employee got into a traffic accident on the way to work. Accidents on trips to and from work are interpreted as work accidents in collective agreements of general and specialised workers in Iceland. The Court did not deem it a necessity for the worker to have taken the shortest route to and from work in order for the accident to be considered a work accident. Therefore, the worker received pay, just as she would have for any other work accident.

2.2 Unpaid salaries

Supreme Court, No. 848/2017, 04 October 2018

In Supreme Court ruling no. 848/2017, a former worker demanded *inter alia* alleged unpaid salary from 2012. The Court rejected his claim on the grounds of his inaction to act on the claim sooner.

Court of Appeal, No. 185/2018, 12 October 2018

In Court of Appeal ruling no. 185/2018, a former worker demanded remuneration from his former employer since he had not received minimum daily rest periods on specific dates, nor had he enjoyed his weekly free day on certain occasions. The worker was awarded remuneration for the daily rest periods according to the relevant collective agreement, and for the loss of his weekly free days, the Court awarded him additional pay as though he had taken a paid day of leave.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Collective bargaining

In October, the social partners released their position paper for the upcoming collective agreement negotiations. They will focus on reducing the work week from 40 hours, including coffee breaks, down to 32 daytime hours for the Federation of General and Specialised Workers in Iceland, and 35 hours for commercial workers and on raising the minimum wage from ISK 300 000 to ISK 425 000 over three years. In addition, general and specialised workers have, amongst other things, called for an equality index to be included in the collective agreements as well as increased workplace democracy. Commercial workers are placing emphasis on education, calling for the provision of vocational training for commercial and store workers. The social partners have also demanded government authorities to step in in certain areas such as housing, extending maternity and paternity leave, lowering taxes to ensure minimum wage earners are not taxed, and taking steps to reduce violations against workers. On the other hand, the employers associations, through Business Iceland, are focusing on increased flexibility and a more family friendly labour market, increased productivity, and assistance for those with decreased working capacity. They have stated the importance of the housing market and helping those in need, in particular low wage workers and foreign workers. Furthermore, they have reaffirmed that the margin for high wage increases is next to none.

Ireland

Summary

The national minimum hourly rate of pay is to increase to EUR 9.80.

1 National Legislation

The Minister for Employment Affairs and Social Protection has promulgated the National Minimum Wage Order 2018 (Statutory Instruments No. 402 of 2018) which provides that, as and from 01 January 2019, the national minimum hourly rate of pay will be EUR 9.80. This Order gives effect to the recommendations of the Low Pay Commission that the rate will be increased by EUR 0.25, from EUR 9.55 to EUR 9.80. The Low Pay Commission was established in 2015 and its principal function is to make recommendations to the Minister regarding the national minimum hourly rate of pay that

- is designed to assist as many low paid workers as is reasonably practicable;
- is set at a rate that is both fair and sustainable;
- over time, is progressively increased;
- without creating significant adverse consequences for employment or competitiveness.

2 Court Rulings

Nothing to report.

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-12/17, 04 October 2018, *Dicu* and C-331/17, 25 October 2018, *Sciotto* are analysed.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU Case C-12/17, 04 October 2018, Dicu

The decision in case C-12/17 has no impact on Latvian labour law. It follows from the regulation of the labour law that parental leave is not taken into account for the purposes of acquiring the right to paid annual leave – first, Article 152(1) provides for specific periods which must be taken into account for the purposes of the acquisition of the right to annual leave, which, among others, includes periods of sick and pregnancy/maternity leave and does not mention parental leave, and, secondly, Article 152(2) explicitly provides that paternal leave is not to be taken into account for the purposes of the acquisition of the right to paid annual leave if it lasts for no longer than 4 weeks within a one-year period.

3.2 Fixed-term work

CJEU case C-331/17, 25 October 2018, Sciotto

The decision of the CJEU in case C-331/17 has implications on Latvian law.

On the one hand, the protection of employees against abusive conclusions of fixed-term contracts applies to all employees in principle. Latvian law does not exclude any major group of employees from such protection, since Latvian labour law is applicable to all persons in an employment relationship, except some groups of state officials and civil servants who are covered by specific laws.

However, on the other hand, some groups of employees are excluded from the general legal regulation prohibiting the abuse of fixed-term employment. Some laws provide for systemic election/re-election/conclusion of fixed-term contracts. This concerns, in particular, directors of state institutions who are appointed for 5 years (Article 11(2) of the State Civil Service Law, *Valsts Civildienesta likums*), directors of state agencies, who are appointed for 5 years (Article 9(4) of Public Agency Law, *Publisko aģentūru likums)* and academics in establishments of higher education, who are elected and re-elected to academic posts every 6 years (Article 27(5) of the Law on Higher Education Establishments, *Augstskolu likums*).

Latvian law, therefore, does not fully comply with the CJEU's findings in case C-331/17 and in earlier judgments as well.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

Liechtenstein has acceded to the agreement on the determination of the applicable legal provisions for Rhine boatmen by way of an additional agreement of 07 August 2018. It entered into force in Liechtenstein on 01 September 2018. The applicable law must be the law of the signatory state with which the professional activity of the Rhine boatman has the closest connection.

1 National Legislation

1.1 Inland waterways

On 23 December 2010, the agreement on the determination of the applicable legal provisions for Rhine boatmen—pursuant to Article 16 para. 1 of Regulation 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems—was concluded in Strasbourg. Liechtenstein acceded to this agreement by way of an additional agreement of 07 August 2018. This agreement entered into force in Liechtenstein on 01 September 2018. The following principles apply:

- All social partners have jointly requested that all Rhine boatmen working on the same vessel be subject to the same legislation;
- The applicable law must be the law of the signatory state with which the professional activity of the Rhine boatman has the closest connection;
- The law with which this professional activity has the closest connection shall be considered to be the law of the signatory state in whose territory the seat or branch of the company actually operating the vessel is located.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

The re-evaluation of the social minimum wage has taken place, resulting on an increase for year 2019.

1 National Legislation

1.1 Minimum wage

Bill No. 7381 on minimum wage has been introduced. In the context of the mandatory re-evaluation of the social minimum wage every two years, the minimum wage is projected to rise by 1.1 per cent. It must be remembered that this re-evaluation mechanism comes in addition to the automatic adaptation of all wages, including the legal minimum wage, to the cost of living index. The purpose of this re-evaluation is to adapt the development of the minimum wage to the average development of salaries in 2016 and 2017.

Source : Projet de loi n° 7381 modifiant l'article L.222-9 du Code du travail.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Malta

Summary

Termination of one lease term and subsequent commencement of another lease amounts to a transfer of undertaking.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Court of Appeal, No. 16/2018, 05 October 2018, Antoinette Farrugia vs Optical (CCSG)

On 14 February 2018, the Industrial Tribunal concluded in case *Antoinette Farrugia vs Optical (CCSG) Company Limited & Classic Group* that the taking up of a lease agreement by one company following a tendering procedure (Classic Group), which had a third shareholding in Optical (CCSG) Company Limited (hereinafter: Optical (CCSG), the other co-defendant) after the expiry of a lease agreement, which Optical (CCSG) had with the Landlord (Malta International Airport plc), constituted a transfer of undertaking.

The facts of the case were, briefly, that the worker had been terminated due to redundancy, but the worker contested this fact because, according to her, the termination was not due to redundancy but to a transfer of business. The defendants argued that no transfer of business had taken place but that a redundancy had in fact taken place in accordance with the law.

The worker had been engaged by the defendant Optical (CCSG) on 01 January 2010 as an optical sales assistance. Optical (CCSG) was operating from a concession at the Malta International Airport, which had been leased to Optical (CCSG) by Malta International Airport plc, to sell a specific category of products. The applicant's employment (with Optical (CCSG)) had been terminated due to redundancy on 26 April 2015 and this was due to the fact that Malta International Airport plc had not extended the lease agreement for the property from where Optical (CCSG) was operating.

Subsequently, the concession was taken up by Classic Group which was one of the shareholders of Optical Co. Ltd. Classic Group Limited had won this concession via a tendering procedure which it embarked upon independently from Optical (CCSG).

Hence, Optical (CCSG), which had lost the concession agreement and tendering procedure, and hence which would no longer be operating its business from Malta International Airport, sent a letter to all its employees informing them that the concession had expired and that they were consequently being terminated due to redundancy.

The evidence indicated the fact that Optical (CCSG) had been placed in liquidation and the fact that Classic Group had completely distinct operations were unrelated (different VAT numbers, different employees, different directors, etc.).

It also transpired that Malta International Airport plc no longer had a legal relationship with Optical (CCSG) and, furthermore, it was very clear that the new concession granted to Classic Group Limited was distinctly different and separate from that of Optical (CCSG). Indeed, there was no continuation of business. It was a brand new operation.

The worker's premise that a transfer of business had taken place was only built on the fact that Classic Group had a third shareholding in Optical (CCSG) However, Malta International Airport had granted the concession to Classic Group not because it had any relationship with Optical (CCSG) but only because its offer was much better than that of Optical (CCSG).

The Industrial Tribunal ruled that the situation had all the elements clearly indicating that a transfer of business had indeed taken place and, hence ordered that the case be heard to determine whether an actual transfer of business had occurred.

The decision was appealed and the appeal was decided on 05 October 2018 (Court of Appeal (Inferior Jurisdiction), appeal number 16/2018, *Antoinette Farrugia vs Optical (CCSG)*). The Court of Appeal stated that, taking into consideration all the abovementioned elements, a transfer of undertaking had indeed taken place.

In the reasoning of the court, the transfer occurred in two stages: the first stage was that Optical (CCSG) ended the lease and the second stage was that Classic Group entered into a new lease agreement with the landlord. According to the case law of the Court of Justice of the European Union, it clearly transpired that the fact that the transfer took place in two stages did not preclude the fact that the transfer of business was indeed one that falls within the remit of the Regulations. There was no evidence that the directors of Classic Group were the directors of Optical (CCSG) but this does not exclude that a transfer of business occurred.

Consequently, the Court decided the appeal by rejecting it and confirming that the transfer was indeed a transfer of undertaking.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Netherlands

Summary

In two recent rulings, the Netherlands' Supreme Court has extended the right to so-called 'transition allowance' to cases of 'part-time dismissal' and has clarified that the right to this allowance is not dependent on the employee's actual loss of income.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Severance payments

Supreme Court, Case 17/02712, 14 September and Case 17/04833, 05 October 2018

On 14 September and 05 October 2018, the *Hoge Raad* (Netherlands' Supreme Court) ruled on the transition allowance, a severance payment to be paid by the employer upon termination of the employment contract or non-continuation of a temporary contract. The amount is calculated on the basis of the duration of the contract and wages; 1/3 of the monthly salary per year of service for the first 10 years of service and ½ monthly salary per year for the 11th year of service and above.

The transition allowance was introduced on 01 July 2015 and is laid down in Art. 7:673 et seq. BW (Netherlands Civil Code). The objective of this allowance is twofold: to enable employees to find other gainful employment (transition) and compensating the loss of income due to termination. The calculation of the allowance is a flat-rate; the wages and time of service determine its amount, not the actual loss of income, transition cost or other factors. Employers may, in very specific circumstances, deduct some of the costs associated with training of the employee with a view to making her transition to another post easier.

In line with the flat rate or lump sum character of the allowance, the *Hoge Raad* held on 05 October that an employer had to pay the full amount (approx. EUR 75 000 in this case), even though the employee was dismissed two years before reaching statutory pension age, was permanently invalid and received disability benefits. The Court held that there is no statutory basis for taking into account the actual loss of income due to dismissal, or in this case rather, the lack of it.

However, just a few weeks earlier, the *Hoge Raad* ruled that an employee is eligible for a transition allowance as well if and when her working time is substantially reduced (> 20 per cent) due to circumstances beyond the employee's control, such as disability or a restructuring of the enterprise. Furthermore the *Hoge Raad* held that it is irrelevant how the reduction in working time is implemented. It could be termination of the full-time contract replaced by a new contract for reduced hours, a reduction of working hours by mutual consent or even a unilateral adaptation of the working time by the employer.

In cases of reduction of working time, the transition allowance needs to be calculated *pro rata*: e.g. a reduction of 20 per cent would lead to an allowance of 20 per cent of the regular amount of the employee's salary. The underlying idea is that the employee continues to work 80 per cent of her working time and therefore only 'needs' 20 per cent.

The *pro rata* allowance lies in stark contrast to the measures for employees who lose their job altogether and are not rehired. Employees who terminate their contracts by mutual consent (or unilaterally) are not entitled to any transition allowance. They are only entitled to a transition allowance if the employer terminates the contract.

The ruling of 14 September is crucial. The Supreme Court, without any statutory basis whatsoever, found that an 'involuntary' reduction of working time entitles an employee to a *pro rata* severance payment.

In earlier case law, pre-packs tended to be accepted and acknowledged as 'legitimate' insolvencies, exempt from the protection prescribed by Directive 2001/23/EC 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.

The consequences are still unclear. A lot of questions have been raised. To name but a few examples:

- When is a reduction of hours involuntary?
- Does a claim to allowance exist if a reduction of hours results in a high income loss because the new position pays less (10 per cent less hours but 25 per cent less wages)?
- Is it fair to keep excluding employees whose contract is terminated completely by mutual consent?
- Does the rule also apply when an employee is terminated by a company and is rehired for a part-time post by a subsidiary company?
- To what extent can employers and employees deviate from the *pro rata* transition payment in their contracts? (They cannot deviate from the statutory allowance, but does this apply to the allowance based on the *Hoge Raad's* ruling?)

This might be the start of the possibility of part-time termination, a concept—at least formally—unknown in the Netherlands' dismissal law until a few weeks ago.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Norway

Summary

The Supreme Court has ruled that an employee was entitled to retaining her employment with the transferor in a transfer of undertaking due to the loss of early pension rights.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court ruling HR-2018-1944-A

Under Norwegian law, employees have the right to retain their employment with the transferor in a transfer of undertaking situation, if the transfer has a negative impact that is quite significant. In the present case, the Supreme Court found that the transfer had triggered the loss of an early retirement scheme for the employee, which caused her a likely loss of MNOK 1.3/EUR 130 000. As a consequence, the Supreme Court found that she was entitled to retain her employment with the transferor.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

The draft on establishing a one-time additional formal holiday on 12 November 2018 was submitted to Parliament. The draft has given rise to several reservations and implies practical difficulties with regard to working time.

1 National Legislation

1.1 Working time

On 22 October, a draft on an additional formal holiday connected to the 100th anniversary of Poland's independence was submitted to Parliament. Poland's Independence Day, commemorating the end of World War I and the reestablishment of Poland is celebrated on 11 November. In 2018, this day falls on a Sunday. Taking into account the importance of the 100th anniversary of Poland's independence, it was suggested to establish an additional holiday to celebrate this special national holiday.

The draft provides that 12 November 2018 is the formal national holiday and businesses are closed. However, the provisions on the limitations to work on Sundays and holidays in the commercial sector (shops, supermarkets, etc.,) do not apply to this day. In addition, hospitals and health care centres must continue to carry out their activities in accordance with a predetermined schedule.

On 23 October, the draft was accepted by the *Sejm* (the lower chamber of Parliament), and on 24 October, the draft was passed to the Senate. The higher chamber of Parliament suggested amendments to the draft with regard to the proposed exceptions. The Senate submitted that workers employed in shops and health care centres should also have the right to a free day on 12 November.

The final Parliament's decision and the President's acceptance are expected during the first week of November.

The draft, its substantiation and information on the legislative process can be found here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Portugal

Summary

Two new draft laws seeking to amend the Labour Code are being discussed in the Portuguese Parliament.

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

Draft Law No. 136/XIII is still being discussed in the Portuguese Parliament. It should be recalled that this Draft Law implements the new social agreement signed on 18 June 2018, by and between the Portuguese government and the majority of the social partners (UGT, CIP, CCP, CAP and CTP), introducing, among others, the following amendments:

- elimination of a special fixed-term contract for workers who are looking for their first job or long-term unemployed persons and, as compensation, the application of a trial period of 180 days for permanent employment contracts signed with such workers (Article 112 (1) (b) of the Labour Code);
- strong restriction to the rule on fixed-term contracts through collective labour instruments (e.g. collective labour agreements) (Article 139 of the Labour Code);
- limitation to fixed-term contracts to newly established companies or to companies launching a new activity and which have less than 250 workers (Article 140 (4) (a) of the Labour Code);
- broadening the scope of fixed-term employment contracts for a very short duration (which does not require a specific justification) (Article 142 of the Labour Code);
- reduction of the maximum duration of fixed-term contracts from 3 to 2 years (certain term) and 6 to 4 years (uncertain term) (Article 148 (1) and (5) of the Labour Code);
- elimination of the bank of working hours established by an individual agreement signed by and between the employer and the worker (Article 10 (a) of Draft Law No. 136/XIII).

Draft Law No. 1025/XIII, presented by the Portuguese Communist Party was submitted to Parliament; it proposes new amendments to the Portuguese Labour Code, restoring the principle of more favourable treatment and regulating the succession of collective bargaining agreements.

Romania

Summary

The CJEU has ruled that Article 7 of the Working Time Directive is to be interpreted as not precluding a provision of national law which, for the purpose of determining a worker's entitlement to paid annual leave, does not treat parental leave during the reference period as a period of actual work (Case C-12/17, 04 October 2018, *Dicu*). This decision will lead to uniform court practice in Romania on this issue.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-12/17, 04 October 2018, Dicu

Initially, the Romanian Labour Code provided that paid annual leave is granted to workers, in all cases, in proportion to their actual working time. Subsequently, following the case law of the Court of Justice of the European Union on interpreting the provisions of Article 7 of the Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, this approach has started to change. The Court of Justice of the European Union has established with regard to entitlement to paid annual leave, that workers who are absent from work on sick leave during the reference period are to be treated the same way as those who have worked during that same period (see, inter alia, CJEU, case C-350/06, *Schultz-Hoff and Others*, and C-520/06, *Stringer and Others v Her Majesty's Revenue and Customs*). The practice of the Romanian courts was adjusted accordingly. They began recognising the right of employees to annual leave for periods during which they were on sick leave, stating that the duration of annual leave would not decrease if the employee was on sick leave during that year.

Eventually, the text of the law was changed. Thus, Law No. 12/2015, amending and supplementing Law No. 53/2003 - Labour Code, published in the Official Gazette No. 52 of 22 January 2015, amended Article 145 of the Labour Code, to the effect that annual leave was no longer granted in proportion to the work performed within a calendar year. Moreover, the text deems that periods of activity are those periods during which the contract was suspended for temporary leave for incapacity, maternity leave, maternity risk leave and leave for caring for a sick child.

In all these suspension cases, annual leave is calculated as though the activity had been performed uninterruptedly.

Recently, however, in practice, the question has arisen whether, by analogy, the periods of parental leave should also be taken into account in the establishment of paid annual leave. In other words, the question has been raised whether a parent who returns to work after two years of parental leave is entitled to annual leave for that period. The Romanian courts have settled disputes on this issue in a non-uniform manner.

Concerning this particular issue, the Cluj Court of Appeal referred a question to the Court of Justice of the European Union on how to interpret the provisions of the European Working Time Directive, 2003/88/EC (Case C-12/17, 04 October 2018, *Dicu*). The referring court sought to ascertain, in essence, whether Article 7 of Directive 2003/88/EC is to be interpreted as precluding a provision of national law, such as the provision at issue in the main proceedings, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not regard the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

The Court of Justice of the European Union considered that the situation of a worker on parental leave was different to that of a worker who has exercised her right to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by ensuring that the relationship is not disturbed by the need to perform multiple tasks which would result if the woman continued to work at the same time. It follows that the period of parental leave taken by the worker concerned during the reference period cannot be treated as a period of actual work for the purpose of determining that worker's entitlement to paid annual leave under Article 7 of Directive 2003/88/EC.

Therefore, Article 7 of Directive 2003/88/EC on working time is to be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

The CJEU's solution will lead to uniform court practice in Romania on this issue.

4 Other relevant information

Nothing to report.

Slovakia

Summary

(I) In this reporting period, the Slovak government adopted a Decree on Minimum Wage for the year 2019.

(II) On 23 October 2018, the Slovak National Council (Slovak Parliament) adopted an amendment of Act No. 91/2010 Coll. on promotion of tourism. The adopted amendment introduced a new institution into the Labour Code - a contribution for employee recreation.

1 National Legislation

1.1 Remuneration - Minimum wage

Discussions on the minimum wage for the year 2019 started based on Act No. 663/2007 Coll. on minimum wage with negotiations between the social partners at the national level. They did not reach an agreement (the situation has been the same in over ten years - see also September 2018 Flash Report).

On 10 October 2018, in accordance with Act No. 663/2007 Coll. on minimum wage, the Slovak government adopted a decree on minimum wage for the year 2019 (not yet published in the Collection of Laws). It will enter into force on 01 January 2019.

The minimum wage for the year 2019 will be:

- the gross monthly minimum wage - EUR 520.00;
- the gross hourly minimum wage - EUR 2.989;
- increase in minimum wage - + 8,33 per cent.

The minimum wage for the year 2018 is:

- the gross monthly minimum wage - EUR 480.00;
- the gross hourly minimum wage - EUR 2.759.

More information is available here.

The subject matter is neither covered by European Union law, nor by the case law of the Court of Justice of the European Union.

1.2 Contribution for recreation (holiday) of employees

On 23 October 2018, the Slovak National Council (Slovak Parliament) adopted an amendment to Act No. 91/2010 Coll. on promotion of tourism as amended, and on amendments of certain acts. Within the scope of this new Act, the Labour Code (Act No. 311/2001 Coll.) was also amended.

The proposal was submitted by a group of members of the National Council. According to the explanatory memorandum, the aim of the act is to promote domestic tourism through the introduction of new tourism development financing instruments. The proposed tourism financing instruments also include a recreational voucher.

A recreational voucher in connection with the introduction of a new institute into the Labour Code (employee recreation contribution) creates the possibility and increases motivation for economically active residents and their immediate family members to spend their holidays in the Slovak Republic on financially advantageous terms. The employee recreation contribution shall also apply to public sector employees under Act

No. 553/2003 Coll. and employees in civil service (five acts regulating civil service were also amended).

The adopted amendment introduces a new institution into the Labour Code - a contribution for employee recreation. According to the new Article 152a (Recreation of employees) of the Labour Code, an employer employing more than 49 employees shall, at the employee's request, provide those employees who have had an employment relationship with the employer for a continuous period of at least 24 months, a recreational contribution amounting to 55 per cent of the reasonable expenditure, but not more than EUR 275 per calendar year. For employees with shorter working hours, the maximum amount of the recreational contribution per calendar year under the first sentence shall be reduced in proportion to the shorter working hours. A recreation contribution may be granted under the same conditions and to the same extent to an employee by an employer employing less than 50 employees. Article 152a also provides further details, e.g. defining what can be considered reasonable expenditure (paragraphs 4 and 5).

The proposed act has triggered some discussion and disagreement among employers and has met with opposition in Parliament. According to the proposers, the Act is in line with European Union law. The adopted Act was not yet been published in the Collection of Laws. It shall enter into force on 01 January 2019.

More information is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Slovenia

Summary

(I) The planned amendments to the Employment, Self-employment and Work of Foreigners Act are analysed. The amendments are intended to bring the Act in compliance with the Directive 2016/801/EC.

(II) The collective bargaining in the public sector has been restored.

(III) There is a shortage of labour inspectors in Slovenia.

1 National Legislation

1.1 The Employment, Self-employment and Work of Foreigners Act

The Ministry of Labour, Family, Social Affairs and Equal Opportunities prepared a draft amendments to the Employment, Self-employment and Work of Foreigners Act (Official Gazette of the RS, No. 31/18- official consolidated text-ZZSDT). The draft amendments were under public discussion until mid October 2018. On the basis of the comments and proposals received the Ministry shall formulate the text of the formal proposal of the amendments and send it to the Government for further legislative procedure.

The draft amendments are supposed to bring the ZZSDT in force in compliance with Directive 2016/801/EC of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary services, pupil exchange schemes or educational projects and au paring and to introduce a few improvements of the wording in order to abolish certain deficiencies which were established in the implementation of the ZZSDT (it shall be amended in connection with the amendments to the Aliens Act).

The core amendments of substantial nature relate to Article 5 on the scope of the ZZSDT. While paragraph 1 of Article 5, which provides that the application of the Act to all aliens unless otherwise provided by the Act or an international Treaty binding for Slovenia, shall remain unchanged. It is proposed to supplement paragraph 2 providing the categories of aliens to whom the Act shall not apply. Two categories were intended to be included: aliens who are volunteering in accordance with the act regulating the voluntary work (indent 20), and aliens engaged in lighter work performed for a household and in au pairing (indent 21). To understand better the legal situation relating the scope of the ZZSDT, it might be necessary to point out that paragraph 4 of Article 5. This paragraph, which shall remain unchanged, that provides that aliens referred to in paragraph 2 shall be entitled to take up employment, self-employment or work if they have arranged residency in accordance with regulation governing the residence of aliens.

The inclusion of the 'au pairs' into the draft amendments to the Act raised strong opposition among the representatives of the civil society. They maintained that RS is introducing the category of right less housemaids in the legal system. It is not acceptable to legalize additional form of precarious work. An immediate statement was given by a representative of the Ministry explaining that au pairs were included in the draft amendments because it was foreseen that the amendments to the Aliens Act shall also cover them. As it was established that the Aliens Act shall not cover au pairs, the amendments to the ZZSDT shall not cover them as well.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Collective bargaining in the public sector restored

In spring the collective bargaining in the public sector had, due to the resignation of the Prime minister and the early general elections, been suspended. As soon as the new Government has been elected, the collective bargaining (the increase of wages is the core issue) has been restored. Despite this, several trade unions called a strike for the 05 December.

4.2 The Yearly Report of the Labour Inspectorate for 2017

In October 2018 the Parliamentarian Committee competent for the issues of labour and social matters discussed the Report. It paid special attention to the problem related to the shortage of the inspectors in the Inspectorate. The Committee members consented that it is urgent to ensure the finance resources to employ larger number of inspectors (about 80 in the next two years).

Spain

Summary

(I) Some legal developments establishing measures to promote the employment of rural women and young workers have been adopted.

(II) A law on transparency a good governance in the region of Asturias has been adopted.

(III) The resolutions with the catalogue of jobs difficult to fill and the resolution with the public holidays for 2019 have been presented by the Employment Services and the Ministry of Labour, respectively.

(IV) Several Supreme Court judgments with impact in labour law are analysed.

(V) Two cases of the Constitutional Court with an impact in labour law are analysed.

(VI) CJEU cases C-12/17, *Dicu* and C-331/17 *Sciotto* are analysed.

1 National Legislation

1.1 Promotion of employment of rural women

Royal Decree 1268/2018 provides grants to associations of rural women that promote public utility activities to incorporate women in rural areas' economic activity and to enhance their access to ownership of agricultural holdings.

These grants are related to the principles of equality and non-discrimination; the objective is to promote the incorporation of women in a sector in which they have not traditionally played a major role, or at least not a very visible role.

1.2 Promotion of youth employment

Royal Decree 1234/2018 of 05 October regulates grants to local municipalities for the financing of employment, self-employment and collective entrepreneurship projects, aimed at tackling the demographic challenge in smaller municipalities, within the framework of the Programme Youth Employment Operative of the European Social Fund (EMP-POEJ grants).

With a similar purpose as the Royal Decree mentioned in 1.1, this regulation, although it is not labour law per se, aims to promote the employment of a group that faces numerous difficulties in accessing the labour market, such as young people. The Royal Decree expressly mentions EU Regulations 1303/2013 and 1304/2013.

1.3 Transparency and good governance

Law 8/2018 of 14 September approves standards of transparency and good governance in the Asturias region.

Law 19/2013 of 09 December approved measures of transparency and good governance for the entire Spanish territory. Many regions have since approved similar regulations within the basic framework regulated by that Spanish law. Law 8/2018 does it for Asturias.

These rules refer mainly to the activity of public entities and policymakers, but also affect the activity of trade unions and business associations as recipients of public aid. These organisations therefore also assume information obligations and must comply with a transparency plan regarding their activity and budget management.

1.4 Employment of foreigners

In accordance with the provisions of the legislation on the employment of foreigners, this Resolution published the 'Catalogue of jobs difficult to fill' in Spain for the last quarter of 2018. As follows from its name, this catalogue lists the occupations or jobs every three months that do not usually get coverage from Spanish workers, and the recruitment of foreign workers is therefore allowed.

The 'Catalogue of jobs difficult to fill' is approved by the government every quarter, hence it is not a major development. It is an implementation of the Law on Foreigners. For several years (since the start of the economic crisis), these occupations have been very few, and are currently reduced to the professional sports sectors (both for athletes and coaches) and to work at sea.

1.5 Public holidays

The Ministry of Labour has published the Resolution of 16 October 2018, which includes the list of work holidays for the year 2019.

Spanish labour law stipulates that workers are entitled to 14 days of public holiday per year (all paid), some of a religious and others of a secular or institutional nature. Some of these public holidays are common throughout the Spanish territory, and others vary depending on the region or municipality. The Ministry of Employment has the legal mandate (Article 37.2 of the Labour Code) to develop the full public holiday calendar in advance, a task that has been accomplished for 2019 by this Resolution. The regions can add a 15th public holiday (unpaid). Collective agreements can also raise the number of public holidays.

2 Court Rulings

2.1 Collective dismissal

Supreme Court, No. 3463/2018, 25 September 2018

Factual part

The Supreme Court in this this judgment sed a collective dismissal decided by an undertaking that was part of a group of companies. The undertaking alleged economic and production-related problems and the dismissal affected 33 workers.
The Supreme Court recalled that the undertaking must in its proposal for collective dismissal provide the general criteria used for the selection of workers to be dismissed, but a nominative list of these is not required. The proposal must also provide the

necessary documentation and information so that the employee representatives are informed about the causes for the dismissal and can design an adequate strategy for negotiations with the employer. When the undertaking belongs to a group of companies, it must also provide information about the group, even if it is not pathological or fraudulent.

The ruling also recalls the obligation to negotiate in good faith, which is met when there is willingness to negotiate without fixed positions, but this does not guarantee that an agreement will be reached.

Finally, the Court noted that there is sufficient economic cause to dismiss employees when losses are proved or reasonably foreseen with a consequent impact on employment, and that there is no discrimination when the dismissed workers are selected according to qualification criteria and professional skills.

Find more information here.

2.2 Freedom of association

Supreme Court, No. 3559/2018, 26 September 2018

In this case, a confederal union dissolved the executive committee of one of its federations, and claimed that this entailed the termination of the mandate of its general secretary.
The acts that prevent the general secretary from continuing to perform its functions could constitute a violation to freedom of association. However, this is not the case when the loss of that position and those functions is based on the provisions of the union's internal rules or, at least, when that is the consequence of a reasonable interpretation of those rules.

2.3 Equality and non-discrimination

Supreme Court, No. 3565/2018, 02 October 2018

The region of Galicia granted some of its employees two additional days of leave for private matters if the 24 and 31 of December fell on a Saturday or Sunday. Unions challenged this measure, claiming that the difference in treatment was discriminatory for the other workers.

The principle of equality and non-discrimination can only be applied in comparable situations and it allows differences in treatment for objective, reasonable and non-arbitrary reasons. The differences in treatment are more frequent in private companies than in the public sector, because the general mandate of equality that the law imposes on public authorities differs. Equality is not the same as non-discrimination according to the Spanish Constitutional Court, because non-discrimination allows for differences in treatment when they are not discriminatory, but does not require equal treatment.

The Supreme Court affirmed that there was no violation of these principles in the present case, because the workers who benefitted from the measure did not perform the same functions as the others, and the difference in treatment was based precisely on that difference in functions.

2.4 Freedom of association

Supreme Court, No. STS 3571/2018, 02 October 2018

In the present case, a union was excluded from the decision-making bodies of a commission created within the framework of a collective agreement that that union had signed.
Spanish legislation for the protection of freedom of association transfers to the defendant the burden of proof when the plaintiff provides reasonable evidence of a violation of the freedom of association. The Supreme Court states that the mere assertion that the right has been violated does not suffice, but that the plaintiff must provide evidence that convinces the judge that this violation is likely to have occurred. The union had not provided any evidence in this case.

2.5 Freedom of association

Constitutional Court, No. 89/2018, 06 September 2018

In this case, the employee, a member of the works council, worked for a contractor company that performed the surveillance and security functions for a City Council. The worker interrupted a meeting of the City Council, along with other workers of the company, carrying images and messages that referred to acts of corruption in that entity and the impact they were having on labour relations in the contractor undertaking. He also attended a press conference convened by a union proclaiming those same messages. The worker was dismissed by the contractor, but took legal action because he claimed that the decision to dismiss him violated the fundamental rights to freedom of association and freedom of expression.

The Constitutional Court began its assessment with a number of general considerations:

- The employment contract does not deprive workers of the rights as citizens recognised by the Constitution, and the freedom to conduct business does not imply that the workers have to endure unjustified limitations to their fundamental rights;

- The object of the right to freedom of expression is the free expression of thoughts, ideas and opinions, and includes criticism even if it is unwelcome and can disturb, disquiet or displease the person it is addressed to. As regards employment relationships, they may be curbed by the structure of reciprocal rights and obligations of the worker and the employer;

- When freedom of expression is exercised by employee representatives, it must be taken into account that demonstrations or criticism that would not be acceptable in another context may be admissible as a way to defend workers, given that representatives require a greater scope of freedom and protection in their representative function;

- It is necessary to verify whether the balance between the fundamental right at stake and the obligations that can curb it is appropriate, in light of the specific circumstances of the case.

Regarding the specific case, the Constitutional Court recalls that:

- The dismissed worker acted as a member of the works council together with other employee representatives, and participated in a protest action organised and promoted by a union;

- The objective of the protest was to demand more energetic action by the administration for the contractor undertaking's breaches regarding wages;
- Criticism was directed against political leaders, and in this area, the permissible limits are broader due to the public nature of this activity;
- Criticism of the action of the municipal corporation was voiced outside the contractual link between the employer and the worker;
- The expression used by the worker ('corrupting security company') considered in itself and in relation to the relevant circumstances of the case and the scope, place and moment in which it is carried out, cannot be considered seriously offensive or vexatious, nor unnecessary or gratuitous, nor disconnected from the existing labour dispute between the parties, nor does it violate another fundamental right or constitutionally relevant interest;
- The protest sought no other purpose than to draw attention to the working conditions that were considered infringed.

Therefore, the Constitutional Court concluded that the dismissal violated the right to freedom of association in relation to the right to freedom of expression, since the behaviour of the appellant remained within the margins that define the legitimate exercise of those fundamental rights.

2.6 Discrimination on ground of sex

Consitutional Court, No. 111/2018, 17 October 2018

In this case, at the end of his paternity leave, which is currently shorter than maternity leave in accordance with Spanish law, a male worker requested an extension of the leave with the same duration as maternity leave, which lasts a minimum of 16 weeks. The claim was rejected by social security, and the worker claimed before the court that the difference in treatment between maternity and paternity leave constitutes discrimination against male workers on the ground of sex.

The Constitutional Court reiterated the arguments it already used in a previous ruling (75/2011 of 19 May). The Constitutional Court asserted that the difference in duration between maternity and paternity leave is the special circumstances of women who give childbirth and the purpose is to protect the health of working women. As the Court also stated on other occasions (ruling 109/1993 of 25 March), pregnancy and childbirth are a different biological reality that is related to the mandate of the Spanish Constitution to protect the family and that can justify differences in treatment between women and men.

The ruling refers to the doctrine of the CJEU according to which (from Directives 92/85/CEE and 76/207/EEC) a female worker who gives birth is in a situation of vulnerability that requires special protection, and it also refers to international regulations, in which it does not find any guideline or rule that guarantees equality in the duration between maternity and paternity leave.

For all these reasons, the ruling concluded that the Spanish regulation on paternity leave is not discriminatory. There is a dissenting opinion from one of the judges, in which the need to seek an equitable distribution of family responsibilities and a more up-to-date reconsideration of the interest protected by this kind of leaves is appealed.

3 Implications of CJEU rulings and ECHR

3.1 Working time

CJEU case C-12/17, 04 October 2018, Dicu

According to the CJEU ruling in case C-12/17, 04 October 2018, *Dicu*,

> *"Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time is to be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work."*

The Labour Code contains provisions for maternity leave and sick leave (Article 38) to comply with CJEU case law, but there is no provision connecting parental leave (Article 46.3) and annual leave. Parental leave can last three years and must be counted towards seniority, but it is not a period of actual work.

This problem has not been raised in Spain so far. It is likely that before this *Dicu* ruling, the Spanish courts could have reached a positive answer in accordance with the previous case law of the CJEU on sick leave and maternity leave. However, after this ruling, the odds have changed dramatically, even if Spanish law does now preclude a more generous approach.

3.2 Fixed-term work

CJEU case C-331/17, 25 October 2018, Sciotto

According to the CJEU ruling in case C-331/17, 25 October 2018, *Sciotto*,

> *"Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex 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 precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector."*

This ruling has no impact in Spain because Spanish rules intended to penalise the misuse of successive fixed-term contracts applies to all sectors. There are no exclusions like the one addressed by this ruling.

4 Other relevant information

4.1 Annual Budget 2019

The State Budget for 2019 is under negotiation. The government and its political allies have agreed to an increase in the minimum wage to EUR 900 and an extension of paternity leave to 16 weeks (compared to the currently four weeks), the same duration as maternity leave. However, it is uncertain whether that law will get the necessary support in Parliament.

Sweden

Summary

(I) The CJEU has ruled in a case on successive fixed-term contract in case C-331/17, 25 October 2018, *Sciotto*. The Court concluded that the Italian legislation applicable to performing artists at a theatre in Rome was not aligned with the Framework Agreement (and Fixed-term Directive 1999/70/EC). The Swedish Employment Protection Act, and corresponding collective agreements, allow successive fixed-term contract which might deviate from the position expressed by the CJEU in the case.

(II) The main Swedish industrial partners in the private sector have formed a joint council, the 'Labour Market EU Council', to contribute to common statements on legislation at EU level in order to contribute to the protection of the role of collective agreements and the Swedish labour market model.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Fixed-term work

CJEU case C-331/17, 25 October 2018, Sciotto

The CJEU ruled in an Italian case on fixed-term employment contracts in the Performing Arts sector, case C-331/17, 25 October 2018, *Sciotto*. In the case, the Italian court asked the CJEU to answer the following question:

> *"Are the national rules (in particular under Article 3(6) of Decree-Law No 64 of 30 April 2010 [laying down urgent measures regarding the entertainment industry and cultural sector], converted into law, with amendments, by Law No 100 of 29 June 2010, in so far as they determine that "the provisions of Article 1(01) and (2) of Legislative Decree [No 368/2001] shall not apply to operatic and orchestral foundations") incompatible with Clause 5 of the [Framework Agreement]?"*

The question related primarily to the understanding of the wording of Clause 5 p.1 of the Framework Agreement, which contains the following regulation on the (successive) use of fixed-term contracts:

> *"To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:*
>
> *(a) objective reasons justifying the renewal of such contracts or relationships;*

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships."

The CJEU concluded that the applicable Italian legislation did not entail such justifications or restrictions as provided for in the Framework Agreement and ruled that Clause 5 of the Framework Agreement must be interpreted as precluding such legislation, as long as it does not provide for effective measures to counteract the misuse of successive fixed-term employments.

The application of fixed-term and successive fixed-term employment contracts has been a long-standing debate in Swedish labour law for several years. This debate is closely related to the provisions in the Directive and Framework Agreement. Since 2016, the current legislation on fixed-term contracts, para 5a Employment Protection Act ('*lagen 1982:81 om anställningsskydd*') allows the conclusion of successive fixed-term contracts for up to 24 months (within a five-year period), the so-called 'ordinary fixed-term contract' ('*allmän visstidsanställning, ALVA*'). Under Swedish statutory law, the number or duration of such fixed-term contracts are of no relevance unless the maximum 24-month period is exceeded. An ordinary fixed-term contract exceeding that period will result in its transformation into a permanent contract. The application of this provision in itself appears to be in compliance with the Directive and Clause 5 of the Framework Agreement. However, para 5a of the Employment Protection Act also allows supplementary employment ('*vikariat*') as well as seasonal employment ('*säsongsanställningar*'), and the combination of these different forms of fixed-term contracts might result in much longer periods of successive fixed-term contracts. If the employer concludes such contracts 'wisely', the number of successive combined forms of fixed-term contracts can easily reach at least four, including 24 months of 'ordinary fixed-term' contracts followed by 24 months of supplementary employment, without triggering the provision for an automatic transformation into a permanent contract. If applicable, seasonal employment, and furthermore probationary employment of a maximum of six months, can be added, resulting in significant periods of different forms of successive non-permanent contracts.

Moreover, the statutory provisions on fixed-term contracts are 'semi-dispositive' and can be altered or even disposed by collective agreements. The Swedish collective agreements for theatre and performing arts provide other solutions than the statutory law, which results in a much less rigid, or protected, situation for performing artists (employees).

Since the CJEU decision in case C-331/17, 25 October 2018, *Sciotto* questions the statutory Italian law for not establishing relevant protection or justifications for diversion, the Swedish situation might come under scrutiny. As discussed above, the Swedish legislation offers opportunities for significant periods of successive fixed-term contract (at least if they are 'wisely' arranged) and allows exemptions in collective agreements. Such exemptions appear in many different collective agreements, also in relation to theatres and performing artists.

Sources:

The collective agreement for theatre and performing arts applying to institutional theatres is available here.

The collective agreement for theatre and performing arts applying to private theatres is available here.

4 Other relevant information

4.1 Collective bargaining

The main Swedish industrial partners in the private sector, on the employers' side the SN ('*Svenskt Näringsliv*') and on the employees' side the LO ('*Landsorganisationen*') and PTK ('*Privattjänstemannakartellen*') have formed a joint council, the 'Labour Market EU Council' ('*Arbetsmarknadens EU-råd*'). The main task of the new Council is to contribute to common statements on legislation at EU level. The focus is the protection of the role of collective agreements and the Swedish labour market model. The founding organisations conclude that there is an increase in EU legislation and other initiatives affecting the labour market. The deputy CEO of 'Svenskt Näringsliv' has stated that 'EU membership is positive for companies and the members, but the EU Commission's many legislative initiatives have exposed the Swedish model with its collective agreements to increasing tension' (quotation translated by the author). The president of the trade union federation LO, Karl-Petter Thorwaldsson, concludes that 'We have a very well-functioning Swedish model. Through this council, we can work towards the long-term protection of our common interests with regard to labour market issues at EU level' (quotation translated by the author).

The Council is scheduled to meet four times annually and work on a consensus basis.

A press release relating to the new joint Council is available here.

United Kingdom

Summary

(I) A new Act on the definition of worker has received its first reading.

(II) Two rulings in choice of law and agency work are analysed.

(II) A draft statutory instrument (SI), the Employment Rights (Amendment) (EU Exit) Regulations 2018 has been laid before Parliament, preparing employment legislation in Great Britain for Brexit.

1 National Legislation

1.1 Definition of worker

Chris Stevens MP has sponsored the Workers (Definition and Rights) Bill 2017-19. It received its first reading on 18 October 2018. The aim of the Bill is to introduce a single status covering workers and employees. For example, it reverses the burden of proof on definition and proposes the amendment of the classic definition of worker in, for example, section 230 Employment Rights Act to provide:

> *"230 Workers, employees etc.*
>
> *(1) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who—*
>
> *(a) seeks to be engaged by another to provide labour,*
>
> *(b) is engaged by another to provide labour, or*
>
> *(c) where the employment has ceased was engaged by another to provide labour,*
>
> *and is not genuinely operating a business on his or her own account.*
>
> *(2) In this Act 'employee' means an individual who—*
>
> *(a) seeks to be engaged by another to provide labour,*
>
> *(b) is engaged by another to provide labour, or*
>
> *(c) where the employment has ceased was engaged by another to provide labour,*
>
> *and is not genuinely operating a business on his or her own account.*
>
> *(3) In this Act a person is an 'employer' if he or she engages another to provide labour, whether directly or through another, and the person providing the labour is not genuinely operating a business on his or her own account.*
>
> *(4) In this Act 'employed' and 'employment' mean engaged—*
>
> *(a) as a 'worker' under subsection (1), or*
>
> *(b) as an 'employee' under subsection (2).*
>
> *(5) It shall be for the respondent to show in any legal proceedings that the applicant is not an employee, a worker, employed, or in employment as the case may be.*
>
> *(6) It shall be for the respondent to show in any legal proceedings that the respondent is not an employer."*

The Bill also:

- Requires employers to give reasonable notice of shifts or changes to shift patterns, and to pay double for cancelled shifts;
- Includes a right to regular fixed hours: "Every worker shall be entitled to fixed and regular weekly hours on commencing employment.";
- Gives rights in respect of overtime, and:
- A right for outsourced workers to seek their wages from the client if the contractor fails to pay (this section applies where the immediate employer (A) of a worker (B) is contracted to provide services on behalf of a third party (C))

Without government support, the Bill is unlikely to become law but it is a nudge to the government to act in the light of the Taylor review.

2 Court Rulings

2.1 Choice of law

Court of Appeal (Civil Division), No. A2/2016/3797 and A2/2017/1650, 16 October 2018, British Council v Jeffery and Green v SIG Trading Ltd

In The British Council v Jeffery and Green v SIG Trading Ltd [2018] EWCA Civ 2253, paras 50-60, the Court of Appeal said that an express choice of law clause in a contract of employment was a relevant factor in determining the strength of connection of the employment to Great Britain.

2.2 Agency work Regulations

Employment Appeal Tribunal, No. UKEAT/0311/17, 16 October 2018, Twenty-Four Seven Recruitment Services Limited and others v Afonso and others

In *Twenty-Four Seven Recruitment Services Limited and others v Afonso and others* (for the Employment Tribunal decision, see here) the Employment Appeal Tribunal (EAT) had to consider the operation of the Swedish derogation and the requirement of regulation 10 of the Agency Workers Regulations 2010 (AWR 2010). This case has not been properly reported yet but Lexology says the following:

> *"In Twenty-Four Seven Recruitment Services Ltd v Alfonso & 190 others, the Employment Appeals Tribunal found that the contracts used by the agency were inadequate.*
>
> *Facts*
>
> *The contracts said that workers would be paid at least the National Minimum Wage for their work. They would be offered at least 336 hours work over 12 months and the expected hours of work during each assignment were 'any 5 days out of 7'.*
>
> *Mr Afonso and 190 other agency workers argued that these terms were inadequate because it was impossible to work out, in advance, how much they would be paid per week when working.*
>
> *Decision*
>
> *Advising a worker that their hours during any assignment would be 'any 5 days out of 7' did not comply with the Regulations because it did not give the worker a figure for the expected number of hours to be worked per week (or any other period). The EAT said it was 'not for the agency workers to divine what the*

information meant in terms of expected hours per week, nor was it possible to do so with any degree of confidence'.

This meant that the Swedish Derogation contracts did not comply with the Regulations and were invalid. The 191 workers were therefore entitled to receive pay parity with comparable workers."

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Brexit

A draft statutory instrument (SI), the Employment Rights (Amendment) (EU Exit) Regulations 2018 has been laid before Parliament, preparing employment legislation in Great Britain for Brexit. The SI will come into force on exit day but may be revoked or amended if there is a withdrawal agreement. It is being enacted under powers in the EU (Withdrawal) Act; an earlier draft had been published in December 2017.

The SI repeals various powers of the Secretary of State in primary legislation dealing with parental leave, part-time work, fixed-term work and information and consultation obligations. It also removes references to EU legislation which will no longer be appropriate after Brexit.

It makes special provision for European Works Councils (EWCs), as summarised in the explanatory memorandum:

"7.5 Provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include:

- *the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council;*
- *the employee representative rights and protections, such as the rights to training and time off, and the protections from suffering detriment or unfair dismissal; and*
- *the protection for confidential information shared with the European Works Council or through the information and consultation procedure.*

7.6 However, the SI amends the TICE Regulations 1999 so that no new requests to set up a European Works Council or information and consultation procedure can be made. This removes the provisions covering:

- *requests for information on employee numbers;*
- *the right to request that a European Works Council or information and consultation procedure is set up;*
- *the negotiation process for establishing a European Works Council or information and consultation procedure, including setting up a special negotiating body; and*
- *the content of new European Works Council or information and consultation procedure agreements.*

7.7 However, provisions relevant to existing European Works Councils, which can continue to operate, are maintained. These include:

- *the enforcement framework, for example where there is a dispute about the operation of an existing European Works Council;*
- *the employee representative rights and protections, such as the rights to training and time off, and the protections from suffering detriment or unfair dismissal; and*
- *the protection for confidential information shared with the European Works Councils or through the information and consultation procedure."*

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