



Flash Reports on Labour Law March 2019

Summary and country reports

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Executive Summary

1 National level developments

In March 2019, 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:

Wages

In **Belgium**, a so called 'Mobility Budget' for employees provides three options for employees: an environmentally friendly company car paid by the employer, the financing of sustainable means of transport, or cash for cars within the framework of an advantageous system of income tax and compulsory social security contributions. Moreover, an Intersectoral Agreement between the social partners, regarding, among others, maximum wage increases, has been accepted, except for the increase of the intersectoral minimum wage. In **Cyprus**, the Administrative Court has ruled that the salary of public sector workers is a property right protected by the Constitution of the Republic of Cyprus, the ECHR and the European Charter of Fundamental Rights and EU law. In **Ireland**, the Low Pay Commission has voiced concerns about planned legislation on tips. In **Luxembourg**, a bill on social minimum wage has been deposited. In **Slovakia**, an amendment to the Constitution has introduced the right to minimum wage as a fundamental right.

Annual leave

In **Germany**, the Federal Labour Court decided that an employer can reduce annual leave entitlement for the period an employee is on parental leave. The same Court ruled that where a worker is on special unpaid leave, the calculation of the duration of this leave shall take the fact into account that the parties to the employment contract have temporarily suspended their main obligations by agreeing to the special leave. In **Luxembourg**, a law adding an additional

annual day of leave has been passed. In **Latvia**, the Supreme Court has adopted a decision that is in line with CJEU case law on the applicability of a carry-over period for the right to compensation for unused paid annual leave and thus 'corrects' its previous ambiguous application of EU law.

Work on Sundays and holidays

In **Austria**, amendments to the Rest Act following the CJEU's ruling in *Cresco Investigation* entered into force on 03 April 2019. In **Luxembourg**, a law adding a public holiday has been passed. In **Poland**, a draft law on the principles of work performance in commercial establishments regulating Sunday work was subject to early stages of legislative proceedings in Parliament.

Other working time issues

In **Finland**, a new Working Hours Act has been enacted. In **Germany**, an initiative of the state of North Rhine-Westphalia aimed at amending the existing Working Time Act failed to garner sufficient support. In **Spain**, an obligation for employers to record working time has been introduced. In the **UK**, the Court of Appeal ruled that compensatory rest breaks could consist of shorter breaks throughout shifts.

Brexit

In the **Czech Republic**, the act on provisional arrangements for the eventuality of a 'no-deal Brexit' has been published. In **Luxembourg**, several bills have been deposited and laws voted on to prepare for a no-deal Brexit, particularly regarding social security entitlements of British nationals. In **Portugal** as well, contingency measures for a 'no-deal' Brexit scenario were approved to safeguard some rights of UK nationals and their family members who are resident in the country, and similar measures have been taken in **Spain**. In the **UK**, legislation to attract migrant workers post-Brexit has

been passed, as well as several changes to employment rights post-Brexit.

Equal treatment of men and women

In the **Czech Republic**, changes to the Discrimination Act include procedural issues such as the introduction of an *actio popularis* and conditions for a shift of burden of proof. In **Portugal**, a recommendation has been issued by Parliament for the adoption of measures to promote equal pay between men and women. In **Spain**, several amendments of equal treatment legislation were introduced to achieve greater equality between women and men, inter alia, to achieve a more equitable distribution of men and women in terms of family care.

Information and consultation

In **France**, a new obligation to provide information has been introduced in the Labour Code for temporary work. In **Germany**, the Federal Labour Court held that the works council may require the employer to inform it of accidents at work suffered by employees of another company in case the employer's operational infrastructure was being used. In the **UK**, new rules on information and consultation have entered into force.

While the law prescribes that previous work experience and education is to be taken into account up to a certain extent when calculating the 25 years, generally only those workers who have worked for the same employer for 25 years or have not changed jobs frequently earn the entitlement to an additional week of paid annual leave (the sixth week).

In the present case, the works council at the employer argued that the Act on Paid Annual Leave constitutes indirect discrimination as well as an obstacle to the free movement of workers. The Court, however, as well as its Advocate General, concluded that there is no indirect discrimination, and that the Act on Paid Annual Leave does not deter Austrian workers who wish to leave their current employer to work for an employer in another Member State, while at the same time, planning to subsequently return to their initial employer. This proposed scenario was deemed to be set on too uncertain terms and based only on hypothetical circumstances.

The **Austrian** Act on Paid Annual Leave hence remains in force unchanged as the provision is considered to be in line with EU law. **Similar provisions in several other countries' laws and collective agreements** have been confirmed in their conformity with the principle of free movement of workers.

2 Implications of CJEU or EFTA-Court rulings and ECHR

Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

On 13 March 2019, the CJEU delivered its judgement in C-437/17, *Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach GmbH v EurothermenResort Bad Schallerbach GmbH*. The case concerned a provision in the Austrian Act on Paid Annual Leave ('*Urlaubsgesetz*'), which grants workers the right to an additional week of paid annual leave after working for an employer for 25 years.

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

Topic	Countries
Working Time	AT DE ES FI LU LV PL UK
Wage	BE CY IR LU SK
Brexit	CZ ES LU PT UK
Annual leave	DE LU LV
Equal treatment (sex)	CZ ES PT
Holiday/Sunday work	AT LU PL
Information and consultation	DE FR UK
Collective agreements	ES LI
Employment information	PL UK
Migrant workers	FR UK
Minimum wage	LU SK
Procedural law	CZ IR
Strike	IS SE
Unemployment benefit	ES HR
Workers' representatives	FR LU
Confidentiality	DE
Collective redundancies	NO
Data protection	CZ
Dismissal protection	FR
Employee benefits	FR
Employment status	UK
Environment-friendly employment	BE
Equal treatment (religion)	AT
Freedom of association	UK
Health and safety	HR
Job adverts	PL
Mobility allowance	BE
Parental leave	ES
Profit sharing	FR
Seasonal work	HR
Temporary Agency Work	UK
Tips	IR
Training	ES
Trainees	ES
Transfer of Undertakings	UK
Whistle-blowers	CZ

Austria

Summary

(I) The amendments to the Austrian Rest Act ('*Arbeitsruhegesetz*', ARG) following the CJEU's ruling in *Cresco Investigation*, entered into force on 03 April 2019.

(II) The initial *Cresco Investigation* ruling was decided by the Austrian Supreme Court, referring it back to the labour court of first instance for additional collection of evidence.

(III) The CJEU's ruling in the case *Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach* confirms the conformity of Austrian law with the principle of free movement of workers.

1 National Legislation

1.1 Personal Public Holiday – Amendment of the Rest Act

The amendments described in the previous Flash Report (see also March 2019 Flash Report) passed the Federal Assembly on 14 March and have been published in the [National Gazette](#). They entered into force on 03 April 2019.

2 Court Rulings

2.1 Discrimination on grounds of religion

Supreme Court, No. 9 Ob A 11/19m, 27 February 2019, Cresco Investigation

The initial case for the CJEU's ruling in case C-193/17, *Cresco Investigation*, was decided by the Austrian Supreme Court by referring it back to the labour court of first instance for additional collection of evidence.

The plaintiff had asked for additional remuneration for his work on Good Friday in the amount of EUR 109.09. His Protestant colleague was granted such additional remuneration due to the discriminatory provision in the Austrian Rest Act ('*Arbeitsruhegesetz*', hereinafter ARG). The CJEU decided that until compliant legislation is introduced, employers must, pursuant to Article 21 of the Charter, recognise that employees who are not members of any of the churches covered by the ARG are entitled to a public holiday on Good Friday, provided that, prior to that day, those employees have informed their employer that they do not wish to work on that day (CJEU *Cresco Investigation*, paragraph 85). Further, it follows that an employee who does not belong to any of the churches covered by the ARG has the right to receive the pay referred to in Paragraph 9(5) of the ARG from his employer, where that employer refuses to approve his request to be absent from work that day (paragraph 86).

The Austrian Supreme Court decided that accordingly, the plaintiff was only entitled to such additional public holiday pay if he had previously requested to be absent from work on Good Friday, 03 April 2015, and if the employer did not comply with this request. Since the relevance of this aspect had not yet been taken into account by the lower courts and the parties, no evaluations or findings were available. In accordance with established jurisprudence, courts may not surprise the parties with a legal opinion that they have not observed and which they have not been made aware of by the court. The court may base its decision on a legal component that a party visibly overlooked or considered to be irrelevant only if it gave the parties the opportunity to issue a statement in this regard. Since even the Supreme Court may not surprise the parties



with a legal opinion that has not yet been presented by any party, an additional collection of evidence on this question in the first instance was necessary.

The decision is not final, as the case will very likely be decided in the labour court of first instance. Its decisions are not officially published, but it is to be expected that one of the parties will make it available to the public.

The judgment is available [here](#).

3 Implications of CJEU rulings and ECHR rulings

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

On 13 March 2019, the CJEU delivered its judgment on C-437/17, *Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach GmbH v EurothermenResort Bad Schallerbach GmbH*. The case concerned a provision in the Austrian Act on Paid Annual Leave ('*Urlaubsgesetz*'), which grants workers the right to an additional week of paid annual leave after working for an employer for 25 years. While the law prescribes that previous work experience and education shall be taken into account up to a certain extent when calculating the 25 years. This regulation generally only applies to those workers who have not changed jobs or have not changed jobs frequently, i.e. only such workers earn this entitlement to an additional week of paid annual leave (sixth week).

In the present case, the works council established at the employer's premises argued that the Act on Paid Annual Leave constitutes indirect discrimination as well as an obstacle to the free movement of workers. The court, however, as its Advocate General, concluded that there was no indirect discrimination, and that the Act on Paid Annual Leave does not deter Austrian workers who wish to leave their current employer to work for an employer in another Member State, while at the same time, hoping to subsequently return to their original employer. This proposed scenario was deemed too hypothetical and based on indirect circumstances only.

The Austrian Act on Paid Annual Leave hence remains in force unchanged, as the provision is considered to be in line with EU law.

4 Other relevant information

Nothing to report.

Belgium

Summary

(I) The so called 'mobility budget' offers the employee three options: an environmentally friendly company car paid by the employer, the financing of sustainable means of transport, or cash for cars within the framework of an advantageous system of income tax and compulsory social security contributions.

(II) The freedom of movement of workers within the European Union does not preclude national rules that resemble the Austrian ones at issue in case C 437/17.

(III) The intersectoral agreement between the social partners on, among others, maximum wage increases, has been accepted with the exception of the increase of the intersectoral minimum wage.

1 National Legislation

1.1 Mobility budget

The Law of 17 March 2019 introduces a mobility budget ([see here](#) for '*Moniteur belge*', 29 March 2019, p. 31 781), and the Law of 29 March 2019 amends certain provisions on the mobility allowance ([see here](#) for '*Moniteur belge*', 29 March 2019, p. 31 788).

Since 2018, an employee with a company car may exchange her vehicle for a mobility allowance ('cash for cars'). An employee who exchanges his company car for cash receives an additional net amount with favourable tax and parafiscal treatment. Because the mobility allowance is an 'all or nothing' scheme, i.e. either returning or keeping the company car, the legislator has now introduced a second alternative to the company car, namely the 'mobility budget'. An employee who benefits from the mobility budget can still choose a company car that must be environmentally friendly and she can supplement it with additional means of transport.

Since 01 March 2019, employees may choose the mobility budget. The mobility budget is based on three pillars. The employee can choose one of the three 'mobility pillars'. The employee can choose an environmentally friendly company car. This car must either be an electric car or a car that meets rigid conditions (CO₂ emissions, emission standards, electric battery, etc.), which will gradually become more restrictive. The budget that remains after a possible spending in pillar 1 can be spent by the employee in pillar 2 and/or 3 by the employee.

The part of the mobility budget that the employee does not use to finance a company car (and related costs) can be used throughout the year to finance sustainable means of transport. Pillar 2 is the collective term for a number of alternative and sustainable means of transport, including public transport, bicycles, shared cars, etc. The term 'sustainable means of transport' refers to a number of alternative and sustainable means of transport, including public transport, bicycles, shared cars, etc. Also, 'moving closer to work' is equated with a sustainable mode of transport. The employee can then use all or part of his mobility budget for his housing costs, i.e. rent or interest on a mortgage loan for a residence that is located within a 5 km radius of the place of employment.

After deductions of any expenses under the first and second pillars, any remaining budget not used by the employee cannot be used for the third pillar. This balance is paid into the employee's account once a year. The mobility allowance is favoured in terms of income tax and compulsory social security contributions.

Management of the mobility budget was further elaborated in a Royal Decree of 17 March 2019 ([see here](#) for '*Moniteur belge*', 29 March 2019, p. 31 826). Among other

things, the Royal Decree specifies the procedure by which the employer must inform the employee. It also stipulates that the employer must create a mobility account for each beneficiary (employee). To set up this mobility account, the employer can call on the services of a third party. However, the employer remains responsible for the account, even if the creation and management of the mobility account has been assigned to a third party.

The purpose of the mobility budget, just like the mobility allowance, aims to change the mentality of employees in terms of their commute to work. By offering alternatives that are fiscally and socially equivalent to a company car, the federal government is convinced that many employees—considering the ever-increasing traffic jams—are looking for other modes of transport, particularly for their daily commute. The objective focuses primarily on forms of mobility which in the long term will undeniably have a positive impact on the environment and the employee's health ([see here](#) for Memory of Understanding, 'Parliamentary Documents', Chamber of representatives, 2018-2019, No. 54-3381/001, p. 5).

The second law determines the mobility allowance by analogy to the mobility budget, also open to employees who do not have a company car but are eligible for one in accordance with the employer's company car policy. An employee should not be forced to first spend 12 months driving around in a company car before she can claim the mobility allowance ([see here](#) for Memory of Understanding, 'Parliamentary Documents', Chamber of representatives, 2018-2019, No. 54-3382/001, p. 4).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The CJEU ruled that Article 45 TFEU precludes rules which could penalise citizens wishing to pursue an activity in the territory of a Member State other than their Member State of origin. However, the free movement of workers cannot guarantee that a movement to another Member State is neutral in social matters, since, taking account of the differences between the laws and regulations of the Member States, as the case may be, such a movement may be more or less advantageous in that area for the person concerned (CJEU case C-566/15, 18 July 2017, *K. Erzberger/TUI AG*). Workers who pursue an activity in the territory of a Member State other than their Member State of origin must be subject to the same conditions as workers from that other Member State. The Austrian holiday scheme has the same consequences for a worker who wishes to leave an Austrian employer as for a worker, a national of another Member State, interested in a job in Austria. The holiday scheme is not contrary to the free movement of workers.

This decision of the Court of Justice is relevant for Belgium. The extension of the entitlement to paid annual leave on the basis of the employee's long-term seniority with the same employer is not provided for in the federal legislation on annual leave, but it is provided for in a number of sectoral collective bargaining agreements (CBA), for example, in the [Joint Committee on Textile Industry No. 120](#) and in the [Joint Committee 306 for Insurance Companies](#). CBAs or the work rules at company level provide for a right to additional leave in case of long-term seniority with the same employer. An extra



day of leave for every five years of seniority is a typical example. Against this backdrop, the judgment of the Court of Justice is of similar significance for Belgium's legal order.

4 Other relevant information

4.1 Intersectoral professional agreement on wage moderation

As mentioned in the Flash Report of February 2019, the social partners concluded a draft intersectoral professional agreement for the period 2019-2020. The biggest trade union, the Christian ACV-CSC, and the liberal trade union, ACLVB-CGSLB accepted the draft. But the second largest trade union, the socialist trade union ABVV-FGTB, rejected this agreement on 26 March 2019.

Nonetheless, the federal government took the initiative to introduce this wage margin. On 02 April 2019, the FGTB socialist trade union abandoned its earlier resistance, although a raise of the minimum wage will be postponed. The social partners will only make a decision on the minimum wage on 15 June, after the general elections. This gives the ABVV-FGTB the opportunity to increase the pressure even further. The FGTB advocates a minimum wage of EUR 14. On 14 May, they will announce a day of action for more purchasing power.

Bulgaria

Summary

Case C-437/17 has little relevance for Bulgarian labour law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

This case does not have any implications for Bulgarian legislation. The Bulgarian Labour Code explicitly provides (Article 151) that the total duration of employment in another EU Member State is recognised in Bulgaria. Pursuant to Article 151, the total duration of employment refers to the entire period the worker has worked under an employment relationship, unless otherwise provided for in the Labour Code or in another law, as well as the period during which the employee worked as a civil servant.

The total duration of employment shall also refer to the period of civil service in a state institutions or to a period the employee worked under an employment relationship in accordance with the legislation of another Member State of the European Union, in another state that is party to the Agreement on the European Economic Area or in the Swiss Confederation, as well as the period of holding office at an institution of the European Union, as certified by an act attesting to the establishment and termination of employment relationships. These periods are to be established on the basis of acts for the establishment and termination of the corresponding relationship issued by the competent body in the other EU Member State (Article 13 of the Ordinance for work and length of employment service).

4 Other relevant information

Nothing to report.

Croatia

Summary

- (I) Case C-437/17 has no implications on Croatian law.
- (II) A number of regulations on the rights of unemployed persons has been issued.
- (III) A new regulation on the content and form of seasonal work in agriculture has been issued.
- (IV) The government has ordered the establishment of a National Committee for Occupational Health and Safety.

1 National Legislation

1.1 Regulations on unemployment

A number of regulations on the rights of unemployed persons has been issued by the Ministry of Labour and Pension System ([Official Gazette No. 28/2019](#)):

- Regulation on Active Job Search and Availability for Work;
- Regulation on the Croatian Employment Service's Records;
- Regulation on Conditions and Manner of Unemployment Benefits Paid as a One-time Amount;
- Regulation on Adequate Accommodation;
- Regulation on Activities Related to Employment;
- Regulation on Financial Assistance and Subsidies for Travel and Moving Costs.

1.2 Contracts for Seasonal Work in Agriculture

The Ministry of Labour and Pension System has issued the [Regulation on the Content and Form of Contract for Seasonal Work in Agriculture](#) (Official Gazette No. 28/2019).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

A provision contained in the Austrian Law on Holidays provides that for the purposes of determining whether a worker with a 25-year seniority is entitled to an increase in her paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker's period of service with her current employer account for only a maximum of five years of professional experience, even if the actual number is more than five. This provision, according to the CJEU, is in line with Article 45 TFEU and Article 7(1) of Regulation No. 492/2011.



Croatian labour law does not regulate the duration of annual leave in the same manner as the Austrian law does. According to Article 77 of the Labour Act of 2014 (as amended in 2017), which regulates the duration of annual leave, states

“(1) The worker shall be entitled to annual leave of at least four weeks in each calendar year, and a minor or a worker exposed to hazardous materials in the workplace despite the implementation of health and safety at work protection measures shall be entitled to at least five weeks of annual leave.

(2) A period of annual leave that is longer than the minimum period laid down in paragraph 1 of this Article may be defined in a collective agreement, in an agreement between the works council and the employer, in the work regulations or employment contract.

(3) A worker who has taken his first job or a worker with interruptions between two employment relationships exceeding eight days shall be entitled to annual leave in accordance with paragraphs 1 and 2 of this Article after six consecutive months of employment with that employer.”

An employee who has worked for six consecutive months obtains the right to full annual leave. When the interruption between two employment relationships is less than eight days, it is considered an uninterrupted period of employment. A worker who does not meet this condition for entitlement to annual leave assumes the right to a share of the annual leave, namely one-twelfth of the annual leave for each elapsed month of employment (Article 78(1) of the Labour Act).

According to Articles 82 (1) and 82(2) of the Labour Act, in case of termination of the employment contract, the employer is required to compensate a worker who has not used his annual leave an allowance in lieu of annual leave. The allowance is based on the proportion of the number of days of unused annual leave.

4 Other relevant information

4.1 National Committee for Occupational Health and Safety

The Government of the Republic of Croatia has issued the [Decision on the Establishment of the National Committee for Occupational Health and Safety](#) (Official Gazette No. 27/2019). Its function, among others, is to advise the government on the system of occupational health and safety, to analyse the effects of application of the Occupational Health and Safety Act, to give opinions on the drafts of new acts in this regard, etc.

Cyprus

Summary

(I) The Administrative Court has ruled that the salary of public sector workers is a property right protected by the Constitution of the Republic of Cyprus, the ECHR and the European Charter of Fundamental Rights and EU law.

(II) Trade unions have published their position on salary cuts.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Salary

Administrative Court in joined cases No. 98/2013 et al, 29 March 2019, Nikolaidis and others v Republic

In the judgment of the joined cases [Nikolaidis and others v Republic](#), 29 March 2019, the applicants, who are civil servants, and other workers of the wider public sector who challenged the decision before the Administrative Court to reduce their salaries following the introduction of two laws as part of the austerity measures taken after the financial and banking crisis in 2012 (Law 168(I)/2012). They argued that the law was unconstitutional for violating the following rights:

- The right to property as enshrined in Article 23 of the Constitution of the Republic of Cyprus.
- Article 26 of the Constitution, which protects the right to freedom of contract when, upon recruitment of the applicants to the state service, a contractual relationship with specific terms and conditions of employment and salary as provided for in the service plans is regulated and therefore, the Law violates an existing contractual relationship. Additionally, any interference with the contractual relationship occurs unilaterally.
- The provisions of Article 28 of the Constitution, which protects equal treatment, since it only imposes a reduction in emoluments for civil servants and pensioners who worked in the state service and the broader public sector, but does not impose similar measures on employees or pensioners in the private sector.
- Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in Cyprus by Ratification Act 39/1962, since the disputed measure did not respect the principle of equitable balance and proportionality with the payment of compensation to offset the loss of property.
- In Case No. 244/2013, additional claims were raised by the applicant's advocate, namely that the measure imposed by the Law constitutes a devastating and cumbersome measure, taking into account the other financial charges imposed on the same class of workers, there is no adequate statement of reasons and there is no proper investigation in relation to the appropriateness of the measures that should be taken to achieve the desired objective.
- In Cases No. 98/2013 and 290/2013, the applicants' lawyers furthermore claimed that Article 3 of the Law is contrary to Article 9 of the Constitution, as

the salary cuts are not linked to the determination of a minimum amount of remuneration or pensions which guarantees the right to a dignified life.

The Court decided that it is a violation of the right to property, as the above benefit amounts to a property right protected by Article 23 of the Constitution. The court relied on decisions of the Supreme Court of *Charalambous v The Republic* (Χαραλάμπους κ.ά. v. Δημοκρατίας, Υπόθεση Αρ. 1480/2011 κ.ά., 11 June 2014) which has also dealt with the salaries of public sector employees and *Koutselini and others v The Republic* (Κουτσελίνη v. Δημοκρατίας, Υπόθεση Αρ. 740/2011 κ.ά., 07 October 2014). In *Charalambous v The Republic*, the Court ruled that the Law on the Extraordinary Contribution of Officials, Employees and Pensioners of the State Service and the Public Sector of 2011 (Law 114 (I) / 2011), which stipulates that the monthly deductions of pensions and of the gross earnings of officials and employees in the public sector and the pensions of pensioners as an extraordinary contribution falls under Article 23.1 of the Constitution as salary and is therefore a movable property.

The Court ruled that salary cuts cannot be linked to public benefits, since Article 23.3 of the Constitution links the promotion of public benefits to the imposition of conditions, commitments or restrictions on ownership for the purposes of town planning or the development and use of property. As regards the right to pay specifically, the Court concluded that what Article 23 of the Constitution primarily intends to protect is the arbitrary (and without interference of any legislative regulation) essence of the right to pay or its arbitrary substantial reduction. Hence, reference was made to the jurisprudence of the ECtHR and decisions of the Greek High Court.

It is clarified that property rights in their usual form relate to existing property and do not extend to the right to acquire property in the future unless, as a pecuniary right or other right, it is a legally enforceable payment in the future, as is the case with certain categories of pensions (*Marckx v. Belgium*, App. No. 6833/74, [1979] ECHR 2, para. 50, *Vilho Eskelinen and Others v. Finland*, App. No. 63235/00, [2007] ECHR 314, and *Tushaj v. Albania*, App. No. 13620/10, HEJUD [2013] ECHR 49, para. 21)

As explained in *Zelca and others v. Romania*, App. No. 65161/10, 06 September 2011:

"18. The Court notes at the outset that Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable (see, for example, Koivusaari and others v. Finland (dec.), no.20690/06, 23 February 2010). However, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see Kopecký v. Slovakia [GC], no.4491/98, § 52, ECHR 2004-IX)."

In this sense, income or salary in the case of a civil servant as legally acquired property or property, constitutes a right when it is earned and the beneficiary acquires a legal right to recover it. However, the Court noted that this property right does not extend to a right to a salary of a certain amount. *Koufakis v. Greece* repeats the same principle that the right to property does not confer a right to a certain amount of remuneration, unless there is a 'risk to a dignified life'.

3 Implications of CJEU Rulings and ECHR

Nothing to report.



4 Other relevant information

4.1 Trade union position on salary cuts

The leader of the largest civil servant union noted that the Administrative Court's decision in the case [Nikolaidis v Republic](#), 29 March 2019, is a vindication for the position of the union that the salary cuts were illegal and unconstitutional. It marks a major victory for workers and urges the government to reinstate the salaries and pay back the unduly deduction of salaries to public sector workers. He pointed out that the government is operating on a public sector surplus this year and that according to the Auditor General's Report, there over EUR 2.5 billion in public contributions that have not been collected. There is therefore no justification to not retrospectively reimburse the salary cuts.

The President of the Republic, however, stated that the government would appeal the decision of the Administrative Court, noting that there no public funds are available to reimburse the salary cuts. He warned that a payback may undermine the recovery of the economy and threaten the possibility of a new austerity package and a return of the Troika to Cyprus. The government asserted that the austerity measures were a matter of necessity and consequently would not retrospectively reimburse the salary cuts.

Czech Republic

Summary

- (I) An act on provisional arrangements for the eventuality of a 'no-deal Brexit' has been published.
- (II) An act transposing Directive (EU) 2016/680 and an adjustment of the national legislation to Regulation (EU) 2016/679 has been passed.
- (III) Changes to the Discrimination Act include the introduction of an *actio popularis* and conditions for a shift of burden of proof.
- (IV) Draft legislation aims to protect whistleblowers.
- (V) Case C-437/17 will have no implications on national law.

1 National Legislation

1.1 Provisional arrangements for the eventuality of 'no-deal Brexit'

[Act No. 74/2019 Coll.](#), on adjustments of certain relationships in connection with the United Kingdom of Great Britain and Northern Ireland leaving the European Union, has been published. For information on the Draft Act, see also the January and February 2019 Flash Reports. Act No. 74/2019 Coll. was published on 14 March 2019 with the effective date set to 'the day upon which the TEU and TFEU cease to be applicable, under the condition that no deal is reached between the EU and the UK'.

1.2 Personal data processing

[Draft Act on Personal Data Processing](#) for transposition of Directive (EU) 2016/680 and adjustment of national legislation to Regulation (EU) 2016/679 is in the legislative procedure (the Draft Act, with amendments by the Senate, has been adopted by the Chamber of Deputies; the Draft Act will now be submitted to the President for signature). For information on this piece of legislation, see also the October 2017, March 2018 and January 2019 Flash Reports. The Draft Act has been adopted by the Chamber of Deputies (with amendments previously submitted by the Senate). The preliminary effective date is the date of its publication.

1.3 'Actio popularis' and burden of proof

[Draft Act amending Act No. 198/2009 Coll.](#), the Anti-Discrimination Act, and other related acts, is in the legislative procedure (the Draft Act was sent to the government for its opinion on 15 March 2019). The Draft Act introduces the following changes:

- 'Actio popularis' in discrimination matters
 - The Draft Act amends Act No. 198/2009 Coll., the Anti-Discrimination Act (the 'Anti-Discrimination Act'). It introduces the possibility of taking legal action in matters of discrimination (public / popular legal action) on behalf of a 'larger or indeterminate number of persons' or in cases of public interest. Such legal action can only be undertaken by certain (juridical) persons established explicitly for the purpose of protection against discrimination (NGOs). Popular legal action can either pursue an end to the discriminatory practice or behaviour or remedy the resulting impacts and effects.

- This development is similarly reflected in administrative judicial proceedings as well (in Act No. 150/2002 Coll., the Administrative Judicial Procedure Code). Legal action for the protection of public interest can be submitted by NGOs explicitly established for the purpose of protection against discrimination (see above).
- Burden of proof in discrimination disputes
 - Furthermore, the Draft Act also amends Act No. 99/1963 Coll., the Civil Procedure Code (the 'Civil Procedure Code'). The Civil Procedure Code provides for a 'shared' or 'shifted' burden of proof in certain matters (in prima facie cases of discrimination). So far, the shifted burden of proof has basically only applied in cases required by EU legislation. The Draft Act broadens the scope of application of such burden of proof to areas such as healthcare, social security, education, etc. Grounds of discrimination differ depending on the given area (e.g. in connection with the free movement of workers, the shifted burden of proof only applies in discrimination cases on grounds of nationality), but this is not at variance with EU legislation.

The Draft Act is in the legislative procedure. Its preliminary effective date is the 15th day following its publication.

1.4 Whistleblowing

Two Draft Acts

- on the Protection of Notifiers; and
- [on Amending Certain Acts in Connection with the Adoption of the Act on Notifiers;](#)

are in the legislative procedure (recently discussed by government commission). Both Draft Acts aim to establish a system of protection of whistleblowers and to facilitate the process of notification on illegal activities taking place within the employer's organisation in both the private and public spheres.

- The Draft Act on the Protection of Notifiers regulates the legal framework for employees to notify authorities in cases of illegal activity within the employer's organisation and aims at providing a certain standard of protection to such employees ('notifiers'). The Draft Act, among other things, introduces an obligation for certain employers (larger undertakings, public contracting authorities under certain conditions, and others) to establish an 'internal notification system' and to process notifications on illegal activities. The employer must also keep records of notifications submitted. The Draft Act has also established the Agency for the Protection of Notifiers which creates an 'external notifying system' that should be used in cases where no internal notification system exists at the employer or where such a system cannot be used by the employee. Apart from accepting notifications on illegal practices or behaviours, it also provides information and counselling services.
- The Draft Act provides for certain procedural advantages for notifiers (e.g. in civil proceedings, the Draft Act introduces a 'shifted' burden of proof in cases in which notifiers were negatively affected / disadvantaged in connection with having submitted a notification pursuant to the Draft Act on the Protection of Notifiers; it's also easier for interim measures to be adopted by courts in such matters, etc.). The Draft Act also introduces administrative offences and corresponding sanctions for violating provisions of the Draft Act on the Protection of Notifiers.
- The Draft Acts are in the legislative procedure. The preliminary effective date for both Draft Acts is 01 January 2021.



2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The CJEU has ruled that

“Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his paid annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker’s period of service with his current employer account for only a maximum of five years of professional experience, even if their actual number is more than five”.

In Czech national law, the amount of annual paid leave does not depend on the employee’s length of service. A legal minimum of 4 weeks of annual paid leave is uniformly set for all employees (5 weeks in the public sector or 8 weeks for teachers and other pedagogical staff) – annual leave beyond these minimum standards may be provided by employers based on individual or collective agreements. The CJEU ruling, therefore, has no implications for national legislation.

4 Other relevant information

Nothing to report.

Estonia

Summary

Case C-437/17 has little relevance for national law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

The case dealt with the calculation of annual leave. The main question concerned how an employee's length of service is calculated by each employer to determine that employee's number of annual leave days.

The case and its circumstances are of little relevance for Estonian labour law. The Estonian Employment Contracts Act contains the regulations on annual leave. According to these rules, only the period of employment by the current employer will be taken into account. Any periods of previous employment are not be taken into account. When a European Works Council is established in Estonia, only the period of employment in Estonia is taken into account. The Estonian Employment Contracts Act does not envisage any rules about how and under what circumstances the working period for other employers will be taken into account. Anyone who has worked for an employer for a full calendar year (01 January - 31 December) is entitled to 28 calendar days of leave. No differences are made between full-time and part-time employees.

4 Other relevant information

Nothing to report.

Finland

Summary

- (I) Parliament has confirmed a new Working Hours Act.
- (II) Following the prime minister's resignation, snap elections will be held in April.

1 National Legislation

1.1 Working hours

Parliament confirmed a new Working Hours Act on 13 March 2019 (Government Proposal 158/2018 vp is available [here](#), the unofficial version of the text in Finnish is available [here](#)). The new Act will come into force on 01 January 2020.

Working hours in Finland are currently regulated in the [Working Hours Act \(605/1996\)](#). The purpose of the new Act is to modernise the regulations on new forms of work and the significant developments in technology. The idea is also to support the work-life balance. EUC practice has been taken into account (the directive itself was integrated into the current Act).

A new component has been introduced: flexible working time. If an employee works at least 50 % of her working hours outside the regular workplace, the parties can agree on flexible working hours. The weekly working hours are defined in the agreement, but the employee is allowed to decide when to perform the work, and reports his working hours to the employer. There are also other possibilities to organize work in a flexible way. Temporary night work is allowed in all sectors (in the current WHA, it is only possible in some sectors). If night work is continuously performed, a licence must be obtained from the occupational health and safety authorities. In certain sectors, periodic work can be used, making this a much more flexible system. These sectors include bakeries, transport, hospitals, industries with three-shift-work, etc.

It will be possible for the two parties to agree on a 'work time bank'. Work time banks have been included in collective agreements before, and the experiences have been positive. A work time bank is a combination of working hours, earned free time (e.g. by working overtime), and additional payments that have been transformed into free time.

The current Working Hours Act does not include an opt-out possibility as regulated in Article 22 WHA. The Act will now include a very restricted possibility to opt out. It will apply to medical doctors working in hospitals and veterinarians working in veterinary hospitals, if agreed in nationwide collective agreements. The opt-out possibility is restricted in situations in which the maximum working hours are exceeded due to on-call work, which is counted as working hours. The regulation concerning medical doctors and veterinarians is the same. The regulation is based on Article 6 WTD, and the conditions are regulated in Article 22 WTD. Firstly, the opt-out possibility is only available if nationwide parties to collective agreements have agreed on it. Secondly, it can only be used when the excess in working hours is due to on-call work. The opt-out clause only applies to daily working hours, and the working hours must be compensated. The employer and employee must agree on the compensation. Daily and weekly minimum rest periods must be guaranteed for all employees. The opt-out clause does not affect the rest periods.

2 Court Rulings

Nothing to report.



3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Dissolution of government

Prime Minister Juha Sipilä resigned on 08 March 2019. The reason is that the government's main objective, the reform of health and social care, has failed because it did not garner sufficient support. The government will function as a caretaker government until the current parliamentary period comes to an end. Parliamentary elections will take place on 14 April 2019.

France

Summary

- (I) Legislation on parental leave has been passed.
- (II) A decree on favourable conditions for hiring migrant workers in 'young innovative companies' has been passed.
- (III) An ordinance on the posting of workers transposes Directive 2018/957.
- (IV) The Court of Cassation has ruled on rights in case of economic dismissal, severance pay entitlements after an accident at work, the revocation of the mandate of a union delegate, and the application of changed methods for calculating the profit-sharing entitlement of employees under a company agreement.
- (V) Case C-437/17 implies conformity of French law with the principle of free movement of workers.

1 National Legislation

1.1 Parental leave

An employee may benefit from parental leave if his child is suffering from an illness, a disability or had an accident of a particularly serious nature, requiring sustained presence and care (Article [L. 1225-62 to L. 1225-65](#) of the Labour Code). Such leave may be granted for a maximum of 310 working days over a period of three years. It entitles the employee to a daily parental allowance paid by the Family Allowance Fund (Article [L. 544-1 et seq.](#) of the Social Security Code). [Law No. 2019-180](#), published on 10 March in the Official Journal, includes several measures dedicated to employees with family care duties, facilitates access to parental leave and stipulates that a daily parental allowance shall be paid.

To become entitled to parental care leave and the daily parental allowance, a medical certificate from the child's physician must attest the particular gravity of the situation and the need for sustained presence and care for the child. This certificate also determines the foreseeable duration of the benefit, and therefore the initial duration of the parental leave.

To extend the leave, the employee, i.e. parent of the sick child, had to re-apply for the benefit every six months and renew the medical certificate specifying the foreseeable duration of the treatment. To simplify this procedure, the law now allows the physician to specify a deadline between six months and one year in the certificate, when the foreseeable duration of the treatment will be reviewed. If the foreseeable duration exceeds one year, the review shall take place after one year (Article [L. 1265-62](#) of the Labour Code; [Article L. 544-2](#) of the Social Security Code). The leave and right to the daily allowance may be extended beyond the maximum period of 310 days, not only in the event of a relapse or recurrence of the child's pathology but also if the severity of the pathology continues to require the employee's sustained presence and care (Article [L. 1225-62](#) of the Labour Code; [Article L. 544-3](#) of the Social Security Code).

The law improves the situation of employees who take parental leave and interrupt their careers. Previously, the law provided that only half of the duration of parental leave was to be taken into account to determine the employee's seniority and the rights associated with it. The amendments now state that this period must be taken into account in its entirety (Article [L. 1225-65](#) of the Labour Code).

1.2 Migrant workers

Foreign workers hired by young innovative companies have benefited from easier access to the 'talent passport' card since the Asylum and Immigration Act of 10 September 2018 was introduced. [Decree 2019-151](#) of 28 February 2019 sets out the criteria for a company to be granted this status.

The Asylum and Immigration Act of 10 September 2018 simplified access to the multi-year 'talent passport' residence permit for foreign workers who are recruited by a 'young innovative company'. Initially, this category of foreigners could only obtain the talent passport if they could prove they had the taxation status of a 'young innovative company'. Now, a foreigner can obtain the talent passport as soon as she is hired 'by an innovative company recognised by a public body'. An implementing [Decree 2019-152](#) of 28 February 2019, published in the Official Journal, specifies how companies can be granted this status. An innovative company is thus considered an innovative company if it meets one of the following criteria:

- the company is, or has been, a beneficiary of public support for innovation over the last five years and appears on a list established by an Order of 28 February 2019;
- the company's capital is partly held by a legal entity or an alternative investment fund, the main purpose of which is to finance or invest in innovative companies whose shares are not listed. The list of these legal entities and investment funds is established by a decree of the same day;
- the company is or has been supported by a support structure over the past five years dedicated to innovative companies.

The Ministry of Economy is responsible for recognising the innovative nature of a company. It must issue a certificate for the company establishing recognition of its innovative nature. The implementation of these criteria is subject to a joint annual evaluation by the Ministry of the Interior and the Ministry of Economy and Finance.

A second decree of 28 February 2019 clarifies the list of foreign persons for whom this employment situation cannot be invoked as long as they can prove that they have an employment contract with a remuneration that is at least equal to one and a half times the minimum monthly remuneration:

- a student, holder of a provisional residence permit, who presents an employment contract that relates to his training;
- a student who has obtained a diploma that is at least equivalent to a master's degree, and has an employment contract that relates to her training;
- the holder of a temporary residence permit who intends to complete his training to gain initial professional experience, without limitation to a single job or employer.

1.3 Posting of workers

Ordinance 2019-116 of 20 February 2019 transposes European Directive 2018/957 of 28 June 2018 into French law, which strengthens the system of posting of workers in France. These new rules will come into force on 30 July 2020.

1.3.1 Obligation to provide information in the event of posting by a temporary work agency

A new obligation to provide information on temporary work has been introduced in the Labour Code:



- If the user company is established in France, it must inform the foreign temporary work agency of the applicable remuneration rules in France during the posting period. In the event of failure to comply with this information obligation, the user company may be ordered to pay an administrative fine if the temporary work agency fails to comply with the applicable rules on remuneration. The amount of the fine shall be equal to a maximum of EUR 4 000 per posted employee and a maximum of EUR 8 000 in the event of repetition within two years of the date of notification of the first fine, up to a maximum of EUR 500,000 in total;
- If the user company is established abroad and occasionally carries out an activity in France, it must inform the foreign temporary work agency of the applicable rules in France prior to the posting of workers. The list of information to be provided will soon be specified by order of the Minister of Labour. In the event of a check, the user company must be able to verify before the labour inspectorate by any means that this obligation has been complied with.

1.3.2 Enhanced equal treatment

From 30 July 2020, the employer must guarantee that the posted worker will be paid the same remuneration as a local employee in an equivalent position. Before the new regulations came into force, only the minimum wage was guaranteed to the posted employee. It is also clearly specified that the employer must reimburse any professional expenses related to transport, meals and accommodation that correspond to special charges inherent to the function or employment incurred by the posted employee in the performance of his duties .

1.3.3 Fixing a maximum duration of posting

While the posting of employees to France must necessarily be temporary, the Labour Code does not currently provide for a maximum duration. It is contractually determined separately with each posted employee. From 30 July 2020, a different legal regime will apply to posting, depending on whether its duration exceeds 12 months or not.

The posting of workers regime, with the derogation of its rules from the Labour Code, will only apply to postings with a maximum duration of 12 months. Nevertheless, where justified by the performance of the service, the employer may extend the posting to 18 months, after issuing a reasoned declaration to the administrative authority before the expiry of the 12-month period.

Failure by the employer to comply with the obligation to declare the extension of the posting for cause will be ordered to pay an administrative fine. When the employer temporarily posts an employee to France for more than 12 months, she must apply all of the Labour Code's provisions from the 13th month onwards, with the exception of the regulations on the conclusion and termination of the employment contract.

2 Court Rulings

2.1 Dismissal

2.1.1 Information and consultation of employees

Labour Division of the Court of Cassation, No. 17-27.796, 30 January 2019

An employee dismissed for economic reasons is given priority in recruitment. The employee must, however, still need to be informed of this. Therefore, this right and its conditions of implementation must be indicated in the dismissal letter ([Articles L. 1233-42](#) and [L. 1233-45](#) of the Labour Code). The employee may be eligible for compensation for the damage suffered if this requirement is not met.

Until now, the Court of Cassation considered that such an omission necessarily caused prejudice to the employee who was automatically entitled to damages ([Cass. soc., 26 June 2008, No. 07-42.355](#)). Such damage is no longer automatic today, [as the Court of Cassation asserted](#) in a judgment of 30 January. Request for payment of damages due to failure to inform the employee of the existence of her right of priority in recruitment must be rejected if the employee does not provide proof of existence of a damage distinct from that resulting from the dismissal itself.

“Attendu que la salariée fait grief à l’arrêt de la débouter de sa demande relative au défaut d’information sur la priorité de réembauche alors, selon le moyen que la lettre de licenciement doit indiquer la priorité de réembauche et ses conditions de mise en oeuvre pour permettre au salarié d’en bénéficier s’il en fait la demande dans le délai fixé ; que l’omission de ces mentions cause nécessairement un préjudice que le juge doit réparer par une indemnité ; qu’en statuant comme elle l’a fait, la cour d’appel a violé l’article L. 1233-45 du code du travail ;

Mais attendu que l’existence d’un préjudice et l’évaluation de celui-ci relèvent du pouvoir souverain d’appréciation des juges du fond ; que la cour d’appel, qui a constaté que la salariée ne démontrait pas l’existence d’un préjudice distinct de celui résultant du licenciement, a, par ces seuls motifs, légalement justifié sa décision ;”

The Court’s solution is in line with its case law on the abandonment of the concept of necessary harm, established in a judgment of 13 April 2016 ([Cass. soc., 13 Apr. 2016, No. 14-28.293](#)) and supplemented since. Indeed, the existence of a prejudice must now be demonstrated by the employee in the following cases:

- unlawful non-competition clause ([Cass. soc., 25 May 2016, No. 14-20.578](#));
- failure to submit the certificate of the employment centre ([Cass. soc., 22 March 2017, No. 16-12.930](#)).

2.1.2 Legal severance pay

Labour Division of the Court of Cassation, No. 17-17.744, 20 February 2019

[In this case](#), an employee complaining of various breaches by her employer of the safety obligations, brought an action before the labour court for judicial termination of the employment contract. Before the decision was taken, she was declared incapacitated for work by the occupational physician, and was then dismissed for incapacity and impossibility of reclassification. The Court of Appeal pronounced that the judicial termination of the employment contract was to the detriment of the employer. Such a termination shall have the effect of dismissal without real and serious cause. For its part, the employer asserted that the special termination indemnity only had to be paid

in case of dismissal because of impossibility of reclassification and not in case of judicial termination.

Article [L. 1226-14](#) of the Labour Code provides that when an employee is declared incapacitated for work following an accident at work or an occupational disease and is dismissed, he is entitled to a special dismissal indemnity which, unless otherwise provided by more favourable agreements, is equal to twice the amount of dismissal indemnity.

"Mais attendu qu'ayant constaté que l'incapacité de la salariée était consécutive à un accident du travail, la cour d'appel qui a prononcé la résiliation judiciaire du contrat de travail et dit que celle-ci produisait les effets d'un licenciement sans cause réelle et sérieuse, a décidé à bon droit que l'employeur était redevable de l'indemnité spéciale de licenciement prévue par l'article L. 1226-14 du code du travail ; que le moyen n'est pas fondé ;"

Since the Court of Appeal had found that the employee's incapacity was due to an accident at work and had ordered judicial termination of the employment contract and stated that it produced the effects of dismissal without real and serious cause, the Court of Cassation deemed that the special dismissal compensation should have been paid.

2.2 Trade union law

Labour Division of the Court of Cassation, No. 18-15.238, 06 March 2019

[In this case](#), the Ile-de-France interdepartmental trade union (SCID), affiliated to the trade union CFDT, was recognised as representative. The union appoints representatives to the works council (RS to the works council). In January 2016, SCID left the CFDT. The CFDT services federation took over and appointed its own SR to the Carrefour hypermarket EC. The question put to the labour court was whether this last trade union designation was valid, and if so, whether it entailed a revocation of the RS mandate given to the works council by the union before its disaffiliation.

On these two points of the law, the Court of Cassation responded in the affirmative. After reiterating that the confederal acronym is what counts in the employee's mind when voting in professional elections, the High Court decided that in the event of disaffiliation of a trade union which has obtained at least 10 per cent of the votes in the first round of professional elections, the confederation or one of its federations or unions to which that trade union was previously affiliated with may appoint a trade union representative to the works council. This appointment terminates the mandate of the employee appointed by this union before her disaffiliation. Consequently, only the most recent SR to the EC mandate at the initiative of the CFDT federation is therefore valid within the company.

"Attendu que pour dire que le mandat de M. T... n'a pas été révoqué et annuler ces désignations, le jugement retient, d'une part, qu'aucun élément versé aux débats ne permet d'établir que la confédération a manifesté sa volonté de mettre fin au mandat de M. T... qui représente désormais la confédération et non plus le syndicat désaffilié l'ayant désigné, d'autre part, que l'article L. 2324-2 du code du travail prévoit que chaque organisation syndicale représentative dans l'entreprise ou l'établissement peut désigner un représentant, que la confédération et les organisations qui lui sont affiliées ne peuvent désigner ensemble un nombre de représentants syndicaux supérieur à celui prévu par la loi ou par un accord collectif plus favorable, que la fédération des services CFDT ne pouvait dès lors procéder ni à une nouvelle désignation d'un représentant syndical ni au remplacement d'un représentant syndical précédemment désigné par le syndicat SCID ;

Qu'en statuant ainsi, alors que le syndicat SCID avait recueilli au moins 10 % des suffrages en étant affilié à la CFDT et s'était ensuite désaffilié de cette confédération, en sorte que la fédération des services CFDT pouvait procéder à la désignation d'un représentant au comité d'établissement laquelle a mis fin au mandat du salarié précédemment désigné par ce syndicat, le tribunal d'instance a violé le texte susvisé;"

The Court of Cassation has already ruled that a trade union that disaffiliates can no longer appoint a trade union delegate or trade union representative to the works council ([Cass. soc., No.10-60.406, 18 May 2011](#)). Similarly, the confederation of origin the union has disaffiliated itself from may revoke the mandate of the union delegate previously appointed by the union ([Cass. soc., No. 12-60.281, 16 Oct. 2013](#)). These solutions remain fully applicable within the framework of the Social and Economic Committee (ESC).

2.3 Profit-Sharing

Labour Division of the Court of Cassation, No. 18-10.615, 06 March 2019

[In this case](#), the employee had signed an amendment to his employment contract after agreeing to join an early retirement scheme as part of a job protection plan. He had been informed that this period of exemption from activity corresponded to 77 per cent of his full-time working hours for the calculation of the profit-sharing. Three months later, a new profit-sharing agreement was concluded. This was much less favourable than the previous regulation, since the activity exemption period was now only taken into account for one-third of full-time employees. The employee therefore attempted to request a reminder of profit-sharing, considering that the previous calculation methods were applicable to him since they were included in his employment contract. He asserted that:

- the modification of his contractual remuneration required his agreement; otherwise, it could not be imposed on him;
- the more favourable clauses of the employment contract should apply if they were more favourable than those resulting from the collective agreement.

The Court of Appeal, like the Court of Cassation, considered that the reference in an employee's employment contract to the methods of calculating the profit-sharing bonus as provided for in the collective agreement then in force does not imply that this method of calculation is contractualised for the benefit of the employee. However, as a new agreement had replaced the one in force at the time of signing the amendment to the employee's employment contract, the new methods of calculating the profit-sharing were applicable to the employee.

"Mais attendu qu'il résulte des articles L. 3312-2 et L. 3313-2 du code du travail que la référence dans le contrat de travail d'un salarié aux modalités de calcul de la prime d'intéressement telles que prévues par l'accord collectif alors en vigueur n'emporte pas contractualisation, au profit du salarié, de ce mode de calcul ;

Et attendu que c'est à bon droit que la cour d'appel, qui a constaté que l'accord d'intéressement du 29 juin 2012 s'était substitué à celui en vigueur au moment de la signature de l'avenant au contrat de travail du salarié, a dit applicables à ce dernier les nouvelles modalités de calcul de l'intéressement;"



3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

Article 45 of the TFEU enshrines the fundamental principle of the free movement of workers within the Union. This principle is implemented by prohibiting any discrimination on grounds of nationality between workers of different Member States. In this case, the Court stated that the Austrian legislation in question does not infringe the principle of free movement of workers.

In France, the Labour Code does not contain any provisions similar to those applicable in Austria. However, in some collective agreements, there may be seniority leave. This is the case e.g. in the collective agreement for distance trading companies (compare [here](#)) and some other branch collective agreements. In these companies, employees are granted additional leave based on their seniority. In the event that a worker resigns from her initial employment, provides services to another national employer and subsequently re-enters her initial employment, her periods of service completed prior to her first resignation, just like the periods of service completed for the second employer, are taken into account as long as the two employers apply the same collective agreement. Periods of service in another sector than the one applying the said collective agreement and employment in a foreign country are not taken into account.

These provisions do not seem contrary to the principle of free movement of workers. Indeed, as soon as an employee works in the relevant branch, all employees, regardless of their nationality, are considered equal. A migrant worker benefits as much from these provisions as a national worker in accordance with the principle of equal treatment.

4 Other relevant information

Nothing to report.

Germany

Summary

(I) Parliament has adopted the Business Secrets Act which will implement Directive 2016/963.

(II) The state of North Rhine-Westphalia's initiative aimed at amending the existing Working Time Act has failed to garner sufficient support.

(III) According to the Federal Labour Court, an employer can reduce an employee's entitlement to annual leave for the period of parental leave.

(IV) The Federal Labour Court also ruled that where a worker is on special unpaid leave, the calculation of the duration of the leave shall take into account the fact that the parties to the employment contract have temporarily suspended their main obligations by agreeing on the special leave.

(V) The Federal Labour Court held that the works council may also require the employer to inform it of accidents at work suffered by employees of another company in relation to the use of the employer's operational infrastructure.

(VI) The ruling of the CJEU in case C-437/17 is unlikely to have an impact on German law.

1 National Legislation

1.1 Adoption of Business Secrets Act

On 21 March 2019, the German Bundestag adopted the draft bill submitted by the Federal Government for the implementation of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure in the version amended by the Legal Committee in a second and third reading.

The so-called Business Secrets Act (*'Geschäftsgeheimnisgesetz'*, hereinafter *GeschGhG*), serves the protection of trade secrets against unauthorised acquisition, use and disclosure (section 1 (1) *GeschGhG*). The exercise of the right to freedom of expression and information, the autonomy of the social partners and their right to conclude collective agreements (section 1 (3) No. 3 *GeschGhG*) and the rights and obligations arising from the employment relationship as well as the rights of employee representatives (section 1 (3) no. 4 *GeschGhG*) remain unaffected by this.

Further information is available [here](#).

1.2 No Amendment of Working Time Act

An [initiative](#) by North Rhine-Westphalia in the Federal Council (*'Bundesrat'*) to make working hours more flexible did not receive the absolute majority required in the plenary vote on 15 March 2019. Through this initiative, North Rhine-Westphalia wanted to call on the Federal Government to adapt the Working Hours Act to the EU Working Hours Directive and thus take into account the increasing digitalisation of the working world. In concrete terms, the parties to the collective bargaining agreement should be enabled to agree on a maximum weekly working time instead of a daily working time. North Rhine-Westphalia also wanted to adapt the provisions on rest periods by permitting a reduction of the prescribed 11 hours if the employees concerned received equivalent compensatory rest periods.

2 Court Rulings

2.1 Reduction of holiday entitlement

Federal Labour Court, No. 9 AZR 362/18, 19 March 2019

According to the Federal Labour Court, an employer can reduce the employee's entitlement to annual leave for the period of parental leave. Though the right to paid annual leave also exists for the period of parental leave according to sections 1, 3 (1) of the Federal Holidays Act ('*Bundesurlaubsgesetz*'), it may be reduced by the employer pursuant to section 17(1) sentence 1 of the Federal Parental Benefit and Parental Leave Act ('*Bundeselterngeld- und Elternzeitgesetz*', hereinafter BEEG). This, in the view of the Court, this regulation is in accordance with EU law.

In the underlying case, the plaintiff was employed by the defendant as an assistant to the management. After she had been on parental leave for about two years, she terminated the employment relationship. She applied for leave during the period of notice, taking into account her leave entitlements accrued during parental leave. The defendant granted the plaintiff compensation for her other days of leave, but refused to grant annual leave accumulated during her parental leave period.

In the view of the Federal Labour Court, the employer was allowed to reduce the entitlement to annual leave that was accumulated during the plaintiff's parental leave by one-twelfth for each full calendar month of parental leave in accordance with section 17(1) sentence 1 BEEG. The Court further held that if the employer wishes to reduce the claim, it suffices that the employee is made fully aware that the employer wishes to make use of this reduction option. The plaintiff could check this by verifying the annual leave days credited to her.

In the view of the Court, the reduction of the statutory minimum annual leave entitlement neither infringes Article 7(1) of Directive 2003/88/ nor Article 5(2) of the Framework Agreement on Parental Leave in the Annex to Directive 2010/18/EU. Union law does not require employees who were not obligated to work during the reference period because they were on parental leave to be treated in the same way as employees who actually worked during that period.

Section 17(1) sentence 1 BEEG reads as follows:

"The employer may reduce by one-twelfth the employee's holiday entitlement for each full calendar month of parental leave."

A press release on the judgment is available [here](#).

2.2 Unpaid leave

Federal Labour Court, No. 9 AZR 315/17, 19 March 2019

Where a worker is on special unpaid leave, in whole or in part, during the year, the calculation of the duration of the leave shall take into account the fact that the parties to the employment contract have temporarily suspended their main obligations by agreeing on special leave. As a result, an employee is not entitled to paid annual leave for a calendar year in which she is on unpaid special leave.

A press release dealing with the judgment is available [here](#).

2.3 Duties of the works council

Federal Labour Court, No. 1 ABR 48/17, 12 March 2019



According to the Federal Labour Court, the works council may also require the employer to inform it of accidents at work suffered by employees of another company in relation to the use of the employer's operational infrastructure. In the view of the Court, occupational accidents suffered by external personnel can provide information relevant to occupational health and safety for the employees belonging to the company for whom the works council is responsible.

Section 89 (2) of the Works Constitution Act (*Betriebsverfassungsgesetz*) reads as follows (translation provided by the Language Service of the Federal Ministry of Labour and Social Affairs):

“(2) The employer and the bodies referred to in the second sentence of subsection (1) shall be obliged to invite the works council or the members it delegates for that purpose to participate in all inspections and issues relating to safety and health at work or the prevention of accidents and inquiries into accidents. The employer shall also consult the works council concerning all inspections and issues relating to environmental protection in the company, and shall immediately inform it of any conditions imposed and instructions given by the competent bodies relating to safety and health at work, the prevention of accidents, or environmental protection in the establishment.”

A press release on the ruling is available [here](#).

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

The ruling is unlikely to have an impact on German law since under statutory law, no additional leave is foreseen, in any case, in relation to length of service.

4 Other relevant information

Nothing to report.

Greece

Summary

Case C-437/17 clarifies compliance of national law with the principle of free movement of workers.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

Pursuant to the Greek National Interprofessional Collective Agreement, entitlement to paid annual leave increases to five weeks after 10 years of service if the period of service was performed for the current employer, or after 12 years of service for any employers. The National Interprofessional Collective Agreement does not only refer to previous periods of service completed within 'the national territory'. Relevant case law on this issue does not exist.

The judgment in case C-437/17 contributes to the clarification of the issue. However, there are no major implications for Greece of the judgment in the case.

4 Other relevant information

Nothing to report.

Hungary

Summary

Case C-437/17 has little relevance for national law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

The CJEU issued a decision in case C- 437/17, 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH v. EurothermenResort GmbH*. The relevant provision concerning paid annual leave is regulated in Act I of 2012 of the Labour Code (hereinafter LC). Section 115 Sub 1 defines the legal basis and composition (component) of paid annual leave. Under this provision, ‘Employees are entitled to paid annual leave based on actual working hours, and comprises vested vacation time and extra vacation time’.

Section 115 Sub 2 defines the concept of ‘actual working hours’. Under this rule, ‘in the application of Sub 1 [Section 115], actual working hours shall include:

- any duration of exemption from work as scheduled;
- any duration of paid leave;
- any duration of maternity leave;
- the first six months of leave of absence without pay to care for a child (Section 128);
- any duration of incapacity for work;
- any duration of leave taken up to three months for the purpose of voluntary reserve military service;
- the duration of exemption from work specified in paragraphs b)-k) of Sub (1) of Section 55.

[Section 55 Sub 1 points b)-k) are as follows:

‘Exemption from work duty

Employees shall be exempt from the requirement of availability and from work duty:

- ...
- when receiving treatment in a healthcare institution related to a human reproduction procedure, as specified in the relevant legislation; and

- for the duration of mandatory medical examination; furthermore
- for the length of time required to donate blood for a period of at least four hours;
- for one hour twice daily for nursing mothers, or for two hours twice daily in the case of twins during the first six months, and thereafter for one hour daily, or two hours daily in the case of twins until the end of the child's ninth month;
- for two working days upon the death of a relative;
- for the duration of the completion of secondary school classes in the case of employees, for the duration of training if participating in initial and continuing training by agreement between the parties;
- for the duration of engagement in firefighting operations in a voluntary or industrial fire brigade;
- when called upon by a court or authority, or for the duration of participating in proceedings in person;
- for any duration of absence due to personal or family-related reasons deserving special consideration, or justified by unavoidable external reasons; furthermore
- for any duration specified in the employment regulations'.]

It should be emphasised that the above mentioned 'actual working hours' is not identical with 'length of service'. The legislator has specified that the employee is entitled to the right to paid annual leave within the scope of her 'actual working hours'.

Under Section 116, the amount of paid annual leave shall be 20 working days. This is a so-called basic period of paid annual leave. The 'extra vacation time' consists of two parts as well. The first component depends on the employee's age and is regulated in Section 117 Sub 1. Under this provision, 'Employees shall be entitled to extra vacation days as follows:

- one working day over the age of 25;
- two working days over the age of 28;
- three working days over the age of 31;
- four working days over the age of 33;
- five working days over the age of 35;
- six working days over the age of 37;
- seven working days over the age of 39;
- eight working days over the age of 41;
- nine working days over the age of 43;
- ten working days over the age of 45'.

The second component of 'extra vacation time' depends on different circumstances or the employee's health status. Under Section 118 Sub 1 'Employees shall be entitled to extra vacation days as follows:

- two working days for one child;
- four working days for two children;
- a total of seven working days for more than two children under the age of 16 years'.

Section 119 Sub 1 states that 'Young workers shall be entitled to five extra vacation days each year. The last year this benefit applies shall be the year the young worker



reaches 18 years of age'. Under Sub 2 'Employees who work under ground or spend at least three hours a day on a job exposed to ionizing radiation shall be entitled to five extra working days of vacation annually'.

Section 120 states that 'Employees:

- with reduced ability to work;
- with eligibility for disability allowance, or
- with eligibility for special aid for the blind,

shall be entitled to five working days of extra vacation days a year'.

The problem discussed in the Court's decision is thus not relevant for Hungarian labour law. The legal basis and the length of paid annual leave do not depend on the employee's period of service and do not discriminate between domestic and foreign workers.

4 Other relevant information

Nothing to report.

Iceland

Summary

The legality of two work stoppages was evaluated by the Labour Court.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Legality of Work-Stoppages

Two judgments were issued by the Labour Court on the legality of work stoppages, namely the types of strikes of a general workers' union. Both cases concerned, inter alia, Article 11 of the European Convention of Human Rights as well as Article 6 of the European Social Charter and were for the most part without precedent in Icelandic law.

Labour Court, No. 2/2019, 07 March 2019

The judgment of the Labour Court in case No. 2/2019, 07 March 2019 concerned the voting procedures on a work stoppage of the trade union, namely Article 15 of Act No. 80/1938, on trade unions and industrial disputes and Article 11 on the regulation of The Confederation of Trade Unions of Iceland on secret ballots. The trade union had called a vote on a strike amongst housekeepers working at specific hotels but allowed everyone covered by the collective agreement to vote on the work stoppage, not only those actually striking. The voting on the strike was electronic, but trade union employees also drove to different hotels to personally collect votes. The parties disputed, inter alia, whether such an election process counted as an electronic election in accordance with the law, meaning that there would be no participation thresholds. The Labour Court determined that such a procedure of holding electronic elections in addition to letting the trade union conduct absentee voting at the union's office as well as using trade union representatives who collected votes in person, was in line with the provisions of the aforementioned Act and the regulations on electronic elections and the participation threshold did not apply therefore.

Labour Court, No. 5/2019, 15 March 2019

In the Labour Court's judgment in case No. 5/2019, 15 March 2019, the same trade union had organised a strike amongst bus drivers and hotel employees. The strike was meant to apply to certain areas of the employees' jobs, for instance, they were told to not work in any jobs outside their job description, to not clean toilets, check passengers bus tickets, clean the busses and to stop the buses for five minutes at 16:00. One strike action included the possibility for employees to temporary stop working to distribute written material. According to the Labour Court, what precisely is meant by only performing work tasks included in the employees' job description was not sufficiently defined and clear since some workers did not have a job description and some had oral while others had written job descriptions. It was thus unclear to what components of work the strike would actually apply to and was therefore deemed to not be in line with Act No. 80/1938 on trade unions and industrial disputes. The same principle applied to interrupting work to distribute written material. As regards checking bus tickets, the Court concluded that this task was an essential part of a bus driver's job and could not



be separated from his other duties. The strike did not apply to a sufficiently specific part of the job and was therefore deemed to not be in line with the law.

3 Implications of CJEU Rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Ireland

Summary

(I) The Supreme Court has allowed a constitutional challenge to proceed questioning the powers of the Workplace Relations Commission.

(II) Case C-437/17 has little relevance for national law.

(III) The Low Pay Commission has voiced concerns about planned legislation on tips.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Challenge on constitutionality of Workplace Relations Act

Supreme Court, No. 45/2018, 20 March 2019, Zalewski v Adjudication Officer [2019] IESC 17

The Supreme Court [has allowed a challenge to the constitutionality of certain sections of the Workplace Relations Act 2015](#) to proceed: *Zalewski v Adjudication Officer* [2019] IESC 17. The applicant is seeking declarations that the powers and functions granted to a Workplace Relations Commission Adjudication Officer, particularly when adjudicating on an unfair dismissal complaint, constitute the administration of justice and/or the discharge of powers of a judicial nature that are not 'limited' within the meaning of [Article 37 of the Irish Constitution](#) such that the relevant provisions of the 2015 Act are invalid.

The Supreme Court ruled that the applicant had sufficient standing to challenge the legislation because he was in danger of being adversely affected in the prosecution of his unfair dismissal and other complaints by the operation of the impugned provisions of the 2015 Act.

The grounds on which the applicant challenges the 2015 Act include:

- the absence of any requirement of a legal qualification for a person who might be appointed as an Adjudication Officer;
- the fact that proceedings are to be held otherwise than in public;
- the absence of any provision for the taking of sworn evidence or any penalty for giving untrue evidence; and
- an appeal process to a body (the Labour Court) which does not include persons required to be legally qualified.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The decision of the CJEU in case C-437/17, *Eurothermen* (13 March 2019) has no implications for Ireland as there is no variation in statutory annual leave entitlements depending on length of service: see [section 19 of the Organisation of Working Time Act](#)



[1997](#). Consequently, Irish law does not place workers from different Member States at any disadvantage and cannot give rise to discrimination based on nationality.

4 Other relevant information

4.1 Report on legislation proposal on tips

The [most recent Report from the Low Pay Commission](#) has advised against legislating on tips for workers as the administrative and compliance costs involved would not be justified. An unintended consequence might be that low-paid workers, particularly in the hospitality sector, would end up with a reduction in their take home pay. The Commission took considerable account of submissions from the Workplace Relations Commission and its concerns around adjudicating upon and enforcing complaints under any new legislation in this area.

Latvia

Summary

(I) The Supreme Court has adopted a decision corresponding to CJEU case law on the applicability of carry-over periods for the right to compensation for unused paid annual leave and has thus 'corrected' its previously likely inaccurate application of EU law.

(II) The decision of the CJEU in case C-437/17 has no implications on Latvian law.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Annual leave

Supreme Court, No. SKC-62/2019, 29 March 2019

As reported earlier (see February 2019 Flash Report), on 30 November 2016, the Supreme Court (decision in case No. SKC-2009/2016) [ruled](#) that the new legal regulation on the non-applicability of any carry-over period on the right to paid annual leave and compensation in lieu in case of termination of the employment relationship ([Amendments to the Labour Law](#) ('*Grozījumi Darba likumā*'), Official Gazette No.225, 12 November 2014) is only applicable to those cases where the employment relationship is terminated after 01 January 2015. Previous Flash Reports have reported that such a finding by the Supreme Court may contradict the finding of the CJEU that carry-over periods for the right to annual leave or compensation in lieu of unused leave may not be applicable if an employee did not have the actual possibility to use such leave.

On 29 March 2019, the Supreme Court 'corrected' this problematic interpretation. In its [decision](#) in case SKC-62/2019, the Supreme Court made reference to the decision of the CJEU in case C-619/16 by citing paragraph 55 that the interpretation of Article 7 of Directive 2003/88/EC may not as such be

'to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable reference or authorised carry-over periods in order to increase his remuneration upon termination of the employment relationship.'

Further it made reference to the decision in case C-684/16 (paras. 45-47) and stated that, first, in order to apply carry-over periods, it must be established whether an employee has actually had the possibility to use her right to paid annual leave. Secondly, it stated that it is for the employer to prove that an employee was provided the opportunity to use his right to paid annual leave and, third, that the employer had duly informed the employee about the consequences of not using his right to annual leave within the carry-over period.

The Supreme Court's latest decision brings national law into line with EU law by recognising the applicability of the carry-over period for the right to paid annual leave and compensation in lieu of paid annual leave in case of termination of the employment relationship.



3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

Latvian law does not provide for the right to additional paid annual leave based on seniority, thus, the decision in case C-437/17 has no implications on Latvian law.

4 Other relevant information

Nothing to report.

Liechtenstein

Summary

The social partners have concluded new collective agreements, which have been declared generally applicable by the government. They cover 12 different areas.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Collective agreements

The social partners have concluded 12 new collective agreements, which have been declared generally applicable by the government. They concern the following areas: [car industry](#), [master builders and pavers](#), [retail trade](#), [electric/electronics and radio/TV](#), [gardeners and florists](#), [cleaning and caretaking industry](#), [information technology industry](#), [metal industry](#), [oven builders and tilers](#), [temporary agency work](#), [carpenters](#), [master carpenters and roofers](#).

The collective employment agreements were declared generally applicable on 12 March 2019; this was published in the Liechtenstein Landesgesetzblatt of 18 March 2019, No. 65–76.

Lithuania

Summary

Under Lithuanian law, rights to additional paid annual leave depend on an employee's uninterrupted period of service with the same employer. This complies with the principle of free movement of workers as interpreted in case C-437/17.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

Lithuanian legislation also requires employers to reward employee loyalty by granting employees additional days of paid annual leave (in Lithuanian '*papildomos atostogos*'). In accordance with Article 138 (2) of the Labour Code and Government Resolution No. 496 of 21 June 2017 (Registry of Legal Acts, 2017, No. 10853), employees with more than 10 years of uninterrupted service with the same employer are entitled to three additional days of paid leave and to one additional day for each subsequent five-year period of uninterrupted service with the same employer. The provision explicitly refers to the period of work within the 'establishment' (in Lithuanian '*darbovietė*') (which is *stricto sensu* not the employer, in Lithuanian '*darbdavys*'), but the general notion is that the period of work for the same employer should be counted and not the work performed in the individual establishments of that employer.

It is clear that periods of work for another employer, regardless of the length of the service or the nature of the relationship between the two employers (e.g. the fact that the current employer belongs to the same group of undertakings as the previous employer) are irrelevant to qualify for this additional social benefit.

4 Other relevant information

Nothing to report.

Luxembourg

Summary

- (I) A law adding a public holiday and an additional annual leave day has been voted.
- (II) A bill on social minimum wage has been deposited.
- (III) Social elections took place and might affect the third most representative trade union.
- (IV) Case C-437/17 has little relevance for national law.

1 National Legislation

1.1 Public holidays and annual leave

As announced in the January 2019 Flash Report, the law implementing an additional day of annual leave (from 25 to 26 days per year) and an additional public holiday (09 March, Europe Day) has been voted on but not yet published. The idea behind these two additional leave days is to implement the 'reduction of working time' that was a central promise of the Social Democrat party.

1.2 Social minimum wage

The new government's coalition agreement states that the social minimum wage (*'salaire social minimum'*) will increase by EUR 100 per month. The costs are to be shared between the employers and the government. Under the existing legislation, the social minimum wage is adapted based on two mechanisms:

- an automatic adaptation to the cost of living index, as is the case for all remunerations in Luxembourg;
- a biannual review carried out by Parliament; the practice is to adapt the social minimum wage to the general development of salaries.

A recent bill (*'Projet de loi n° 7416'*) has been deposited to implement the coalition agreement. According to this bill:

- In addition to the biannual review, the government is entitled to deposit a bill for a structural adaptation (*'adaptation structurelle'*) of the social minimum wage. The legal advantage of this text is unclear. The government is in any case entitled to introduce bills on any subject; it is thus rather a political statement only;
- An additional raise of 0.9 per cent will be introduced, to be added to the 1.10 per cent already decided in December 2018. The minimum wage for unqualified workers will change from EUR 2,048.54 to EUR 2,089.75 (+ EUR 41.21)

A bill implementing an additional tax credit (*'credit d'impôt'*) was announced to supplement the missing part of the promised EUR 100, i.e. the part to be financed by the State.

1.3 Brexit

As regards Brexit, several bills have been deposited and laws have been voted on. The practical impact of these laws will depend on the negotiations. Two of these laws affect labour law:

- Bill No. 7421 aims to regulate entitlement to social inclusion income (*'revenue d'inclusion sociale'*) and the revenue paid to severely disabled persons (*'revenue pour personnes gravement handicapées'*) for British nationals;
- Bill No. 7412 modifies the law on third-country nationals to implement the Conclusions of the European Council of 25 November 2018, especially the transitional period ending on 31 December 2020. A special section covers the "no deal" case and grants the right to British nationals to get residence permits.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

CJEU C-437/17 has no major implications for Luxembourg's law. Luxembourg grants the same number of annual leave days to all workers, regardless of their seniority. Some collective agreements (e.g. pharmacists) do provide additional leave days, and to some extent, state workers are also granted a fictive seniority; these regulations differentiate the weighting of work performed at national or international level.

Furthermore, in the specific situation of Luxembourg, it is unclear whether a legal differentiation between work performed in Luxembourg or abroad would be deemed indirect discrimination by having a greater effect on workers who are nationals of other Member States than on national workers. Indeed, 47,9 per cent of the population are not nationals (see [STATEC, 'Le Luxembourg en chiffres', 2018](#)), of which 85 per cent are EU nationals. Of the active population, over 50 per cent are not nationals.

4 Other relevant information

4.1 Social elections

Social elections were held in March, both for employee delegates (*'délégués du personnel'*) within companies and for the public law professional chamber representing workers' interests (*'Chambre des salariés'*).

'Délégués du personnel'

In this year's elections, the 2016 reform on social dialogue within companies comes into full effect. The changes have been reported in earlier Flash Reports. The main modification is that the mixed committee (*'comité mixte'*), which was mandatory in companies with 150 employees or more, has been abolished to simplify social dialogue; its competences have been transferred to the delegates. [The main results](#) are:

- As in the past, a small majority of delegates are 'independent', meaning they are not elected from the list of one of the main representative unions. Such delegates are frequently found in smaller companies (< 100 employees) and represent 75 per cent of the delegates;
- The two main national trade unions would for the most part keep their influence (OGBL: 25 per cent, LCGB: 15 per cent).



'Chambre des salaries'

All trade unions can participate in the [elections for the 'Chambre des salaries'](#). The outcome of elections provides an important indication of each union's strength. Furthermore, the number of votes is a major criterion for determining whether a union is regarded as 'representative' or not, which influences its right to negotiate collective agreements:

- A union must achieve at least 20 per cent of the votes at the national level to be representative at the national level. The status quo, which has existed for decades, was confirmed in the elections, i.e. the OGBL and the LCGB continue to be the two most representative unions at national level; however, the OGBL lost 3 of a total of 60 seats;
- A union must achieve at least 50 per cent in its sector/branch to become sectorially representative. Until now, there has only been one union (ALEBA in the insurance and banking sector) that was sectorially representative. [It reached 49.22 per cent](#) in its sector/group, so it may lose its representativeness.

Malta

Summary

Case C-437/17 has little relevance for national law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/2017, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The decision of the CJEU *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH v EurothermenResort Bad Schallerbach GmbH (C-437/2017)* dealt with specific legislation, Paragraph 2(1) of the 'Urlaubsgesetz' (Law on holidays) of 07 July 1976 (BGBl. 1976/390, as published in the BGBl. I, 2013/3), which increases employees' holiday allowance depending on their length of service. There is no such law in Malta. Paid vacation allowance is not calculated on the basis of any duration of service, irrespective of the location of engagement.

However, the point is not entirely irrelevant, of course. The judgment of the CJEU must also be seen with reference to whether Maltese employers may (in terms of Maltese labour law) discriminate against workers on the basis of their nationality for any reason whatsoever. This could be sick leave allowance, or indeed, any other allowance paid to Maltese and other EU workers. Any such discrimination is prohibited under Maltese law. Article 26(1)(b) of the Employment and Industrial Relations Act, 2002 ([Chapter 452](#) of the Revised Edition of the Laws of Malta) states the following: -

"In regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment or dismissal."

Hence, no employer would be able to subject any worker to any discriminatory treatment in relation to their nationality or origin or any other reason.

4 Other relevant information

Nothing to report.

Norway

Summary

The Supreme Court ruled that a collective dismissal was invalid due to unlawful selection criteria.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancies

Supreme Court, No. HR 2019-424-A, 28 February 2019

In March 2019, the Supreme Court [ruled](#) in a case involving a downsizing. In spring 2016, Skanska had downsized significantly. The workforce was reduced by around 100 workers in two units in the civil engineering division. Among the affected employees were three formwork carpenters and three construction equipment operators. The judgment pertained to these six employees. Many employees with shorter seniority than these six employees were not laid off. The employees contested their dismissals and brought their claim before the court. The employees claimed that Skanska had not appropriately applied the principle of seniority. When choosing which employees to lay off, Skanska had attached greater importance to other criteria, such as competencies and professional skills.

The District Court found that there were justified grounds for dismissal of these employees and acquitted Skanska. The employees appealed this ruling to the Court of Appeal.

Section 8-2, first paragraph, of the Basic Agreement between the LO trade union confederation and the NHO employers' organisation stipulates: *'If notice of dismissal is given because of cutbacks or restructuring, the seniority principle may be departed from when there is due reason for this.'*

The Court of Appeal held that Skanska had not applied the principle of seniority correctly. It concluded that the seniority principle was *the main rule* when selecting which employees to dismiss, and that there must be relatively strong reasons to diverge from the seniority principle when determining the order of layoff. The Court of Appeal also emphasised that Skanska had committed serious procedural errors in the dismissal process. The dismissals were overruled as being invalid, and the employees were awarded compensation.

Skanska appealed the ruling to the Supreme Court, and judgment was handed down on 28 February 2019. The Supreme Court undertook a lengthy, thorough analysis of the principle of seniority. It stated:

"Pursuant to section 8-2 of the LO–NHO Basic Agreement, the principle of seniority is 'the point of departure' (...). In other words, the assessment must start there. [...] However, at the same time, it is clear that the employer can also base the selection on other criteria, typically: qualifications, professional skill and competencies. [...] The selection must be based on an overall assessment, where the length of the employee's seniority and the difference in seniority, on the one hand, will be weighed against the strength of the other criteria that the employer



has chosen to use. The weight of the latter criteria will vary according to the enterprise's situation and needs".

Moreover, the Supreme Court stated that for this reason, characterising the principle of workplace seniority as a 'main rule', as the employees and their intervener LO had claimed, could provide 'misleading associations'. It then concluded:

"(...) The Court of Appeal has demanded more for Skanska to be able to depart from the seniority principle in section 8-2, first paragraph, of the LO–NHO Basic Agreement than the rule provides grounds for. There is, in view of the circumstances, due reason to depart from the order of seniority when selecting employees for discharge without significant differences in competencies and skills".

The decision that the Court of Appeal's assessment of the seniority principle was incorrect was nevertheless not directly decisive for the outcome of the case. The Supreme Court agreed with the Court of Appeal that there had been serious procedural errors in Skanska's handling of the downsizing procedure, rendering the dismissals invalid. The Supreme Court stated that there is no doubt that the employer must adhere to a well-founded, verifiable procedure as a basis for selecting which employees to discharge in connection with cutbacks. Skanska had used secondary criteria such as creativity, independence and reputation. The Court of Appeal stated that attaching importance to less formal competencies when downsizing was not a problem in itself, but that an assessment of these very discretionary criteria would have to be "accompanied by robust documentation". This is especially important if the employer had not previously warned the employees about their unsatisfactory performance. The Supreme Court agreed with this and stated that 'the more discretionary and subjective the criteria, the greater the need for clear documentation'. Skanska could not document why these employees had been assessed as weak on these points.

Skanska's appeal was therefore denied. The dismissals were ruled to be invalid, and the employees were awarded compensation. The employees were also allowed to keep their jobs.

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

Nothing to report.

Poland

Summary

(I) A draft of the Law on the Principles of Work Performance in Commercial Establishments was subject to early stages of legislative proceedings in Parliament.

(II) A draft bill on disclosing the amount of remuneration for work in job offers was brought before Parliament.

(III) Case C-437/17 has little relevance for national law.

1 National Legislation

1.1 Ban to work on Sundays in commercial establishments

On 06 March, the [Draft Law on the Principles of Work Performance in Commercial Establishments](#) was submitted for discussion in the parliamentary commission. The draft was submitted on 20 February by the deputies from the political party 'Modern One' (pol. 'Nowoczesna'). It intends to repeal the Law of 10 January 2018 limiting trade on Sundays, public holidays and some other days (Journal of Laws 2018, item 305), which plans to introduce a complete prohibition of work in shops on Sundays (with few exceptions) as of 01 January 2020. The draft also intends to grant employees and civil law contactors who work in a commercial establishment at least two Sundays off within a four-week period (under the Labour Code, each employee who works on Sundays should be granted one free Sunday at least once within a four-week period).

The draft was introduced and evaluated in previous reports (see also February 2019 Flash Report, point 1.1).

The consolidated text of the Labour Code (Journal of Laws 2018, item 917) is available [here](#).

It should be emphasised that another draft on trade activities on Sundays is currently subject to legislative proceedings, i.e. the draft to amend the Law on Limiting Trade on Sundays, public holidays and some other days (see also November 2018 Flash Report, point 1 B.). Further developments on the limitation of trade activities on Sundays can be expected in the near future.

1.2 Inclusion of amount of remuneration in job advertisements

On 15 March, the [draft on the amendment to the Labour Code requiring employers to indicate the amount of remuneration in job advertisements](#) was subject to parliamentary discussions. The idea behind the amendment is to require employers to indicate the amount of remuneration for the given job in job advertisements. The amendment was submitted on 30.08.2018 by the 'Nowoczesna' political party ('Modern One'). The draft was introduced and evaluated in Flash Report Poland 9/2018, point 4 B.

The draft intends to amend the provisions on the prohibition of discrimination in employment, which in practice will enhance the labour market's transparency. According to current regulations, there is no duty to indicate the amount of remuneration in job advertisements, not even a rough amount.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The case concerns the problem of only taking partial account of previous employment period(s) with other employers to calculate the right to additional paid annual leave. Since the ruling was delivered within the framework of the free movement of workers, the issue of indirect discrimination based on nationality with regard to periods of employment in other Member State(s) is of major significance.

Under Polish law, Article 154¹ § 1 LC provides that the periods of service on which the right to leave and its length depend, should include previous service periods, regardless of interruptions in employment and the manner of termination of the employment relationship. In other words, to determine the right to annual leave and its length (i.e. 20 or 26 working days), all periods of previous employment with the same or other employers are taken into account. Any breaks between subsequent employment contracts are irrelevant. The mode of termination of the employment contract is irrelevant. Although it is not expressly stipulated, all employment periods in other Member States should be fully taken into account.

The issue addressed in case C-437/17, *Gemeinsamer Betriebsrat* would not arise in Polish labour law.

4 Other relevant information

Nothing to report.

Portugal

Summary

(I) Contingency measures for a 'no-deal' Brexit scenario were approved to safeguard some rights of UK nationals and their family members who reside in Portugal.

(II) A recommendation has been issued by Parliament on the adoption of measures to promote equal pay between men and women.

(III) Case C-437/17 has little relevance for national law.

(IV) Labour Code amendments are still under discussion in Parliament.

1 National Legislation

1.1 Contingency measures for a 'no-deal' Brexit scenario

[Law No. 27-A/2019 of 28 March](#) approves contingency measures to be applied in Portugal in the event that the United Kingdom leaves the European Union without a deal, concerning, among others, certain rights related to residence, social security and the exercise of professional activity.

According to this law, UK nationals and their family members who have established residence in Portugal by the date of the United Kingdom's exit from the European Union, will continue to be considered residents without any change and, those who establish residence in Portugal until 31 December 2020, will not have to obtain a residence permit (Article 3(1) and (2)). Registration certificates, residence cards of family members of Union citizens who are nationals of third states, permanent residence certificates and permanent residence cards issued to UK nationals and their family members do not lose their validity following the United Kingdom's withdrawal from the European Union. The holders of such documents will, in the national territory and until 31 December 2020, maintain the same rights and obligations arising from [Law No. 37/2006 of 09 August](#), which transposed Directive 2004/38/EC (Articles 3 (3) and 4).

UK nationals and their family members who intend to continue residing in Portugal after the exit of the United Kingdom from the European Union may submit an application for a temporary or permanent residence permit until 31 December 2020 (Articles 5 and 6). The said law also recognises the social security rights of individuals who have complied with the periods of insurance in the United Kingdom, for the purpose of application of Regulation (EC) No. 883/2004, on the coordination of social security systems (Article 12). Furthermore, UK nationals who hold an administrative authorisation allowing them to exercise, for a certain period of time, a professional activity, will maintain the right to exercise that activity after the United Kingdom's exit from the European Union (Article 13). In addition, UK nationals who legally exercise a professional activity in Portugal will, on that date, maintain the right to recognition of their professional qualifications for the exercise of that activity under the same terms foreseen in Directive 2005/36/EC (Article 14).

The application of this regime assumes equal treatment for Portuguese citizens who reside in the United Kingdom. Otherwise, the application of this law will be fully or partially suspended (Article 19).

1.2 Recommendation of measures to promote equal pay between men and women

In [Resolution No. 40/2019](#), the Portuguese Parliament recommends the adoption of certain measures by the Portuguese government to promote equal pay between men and women, such as:

- carrying out a comprehensive survey of wage inequalities between women and men in the public and private sectors; and
- to develop measures to fight the gender pay gap and ensure the adoption of measures to promote the transparency of wages and of remuneration practices to eliminate the wage inequalities between women and men.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The CJEU ruled that

“Article 45 TFEU and Article 7(1) of Regulation (EU) no. 492/2011 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the purposes of determining whether a worker with 25 years of professional experience is entitled to an increase in his/her annual leave from five to six weeks, the years of service completed with one or more employers prior to the start of the worker’s period of service with the current employer account for only a maximum of five years of professional experience, even if their actual number is more than five”.

Portuguese legislation does not include a similar rule to that addressed in case C-437/17. According to Portuguese law, workers are entitled to a minimum annual leave period of 22 business days, regardless of their years of service (seniority) completed with either the current employer or other employers ([Article 238 of Labour Code](#)). Such a minimum period of annual leave may be extended by agreement of the parties or by collective bargaining agreement.

4 Other relevant information

4.1 Labour Code amendments

Further to previous Flash Reports, [Draft Law No. 136/XIII](#) and [1025/XIII](#) are still being discussed in the Portuguese Parliament.

Romania

Summary

(I) The Constitutional Court has confirmed the constitutionality of the suspension of employment in case a worker is being investigated for criminal offences incompatible with his position.

(II) Case C-437/17 has little relevance for national law.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Suspension of employment in case of criminal charges

Supreme Court, No. 844/2018, 21 March 2019

According to Article 52 (1) b) of the [Labour Code](#) (Law No. 53/2003, republished in the Official Gazette of Romania No. 345 of 18 May 2011) the employment contract can be suspended at the employer's initiative "if the employer has filed a criminal complaint against the employee or he/she has been sued for criminal offences that are incompatible with his/her position until the final ruling of the court". The Constitutional Court ruled in [Decision No. 279/2015](#) (published in the Official Gazette of Romania No. 431 of 17 June 2015) on the unconstitutionality of the first sentence. The Constitutional Court held that since Article 52 (1) (b) first sentence allows assessment of the ground for suspension to be entirely at the employer's discretion, a guarantee of the objectivity of the suspension decision may be called into question. According to that ruling, employers may be subjective and may in certain cases even deviate from the regulations, especially in the context of employment relationships which by their nature require significant human interaction. The Court held that following the proportionality test on the restriction of the right to work, the suspension of the employment contract as a result of a criminal complaint filed by the employer against the worker does not meet the condition of proportionality, the measure being excessive in relation to the objective to be achieved.

Recently, the Constitutional Court was submitted a request to review the constitutionality of the second sentence of Article 52 (1) b) of the Labour Code, i.e. situations in which the employee was sued for criminal offences that are incompatible with her position. The author of the request argued that since the employer was the one filing the criminal complaint against the employee in the first place, the suspension of the employment relationship would occur under circumstances similar to those based on which the Constitutional Court ruled four years ago when it declared that Article 52 (1) b), first sentence, was unconstitutional.

This time, in [judgment No. 844/2018](#) (published in the Official Gazette of Romania No. 220 of 21 March 2019), the Constitutional Court ruled that the second sentence of Article 52 (1) b) of Law No. 53/2003 differs from the situation previously declared unconstitutional. In the case of the second sentence, the cause for the suspension has an objective character, i.e. suing the employee for criminal acts that are incompatible with the position he holds. Even if, as in the present case, the initial criminal complaint was formulated by the employer, it should be noted that this time, the court itself ordered the prosecution of the employee for criminal offences that were incompatible with the position the employee held.



As a result, the Constitutional Court considered the legal provisions submitted for review as being constitutional.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

In case C-437/17, the question was raised whether any additional paid leave a worker is entitled to can be calculated by way of excluding all periods of service performed for other employers, i.e. to only include the length of service with the current employer in the calculation. The Court of Justice of the European Union ruled that this provision in national law is not contrary to Article 45 TFEU and Article 7(1) of Regulation (EU) No. 492/2011.

Romanian law envisages a different way of calculating entitlement for additional leave days. No difference is made between previous and the current employer. In the private sector, according to Article 145 of the Labour Code (Law No. 53/2003, republished in the Official Gazette of Romania No. 345 of 18 May 2011), the length of annual leave does not depend on the employee's length of service. Collective bargaining agreements occasionally introduce additional days of paid leave according to seniority, but without distinguishing whether the worker was in the service of the same employer or in that of another.

In the public sector, according to [Government Decision No. 250/1992](#) (republished in the Official Gazette of Romania No. 118 of 13 June 1995), the duration of paid leave depends on the employee's period of service, but no distinction is made with regard to the worker's service for the current or former employers.

4 Other relevant information

Nothing to report.

Slovakia

Summary

(I) An amendment to the Constitution has introduced the right to a minimum wage as a fundamental right.

(II) Case C-437/17 has little relevance for national law.

1 National Legislation

1.1 Remuneration - Minimum wage

The previous text of Article 36 of the Constitution will become paragraph 1 and will be supplemented by paragraph 2, which shall read as follows:

“ (2) Every employee has the right for his remuneration for work performed to not be lower than the minimum wage. The details of the minimum wage adjustment will be laid down by law. ”

More information is available [here](#).

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach

Slovakia's national law is in line with the judgment of the [CJEU in case C-437/17](#). According to Article 103 paragraph 1 of the Labour Code (Act No. 311/2001 Coll.), all employees are generally entitled to at least four weeks of paid annual leave. An employee who by the end of the relevant calendar year is at least 33 years old is entitled to at least five weeks of paid annual leave (Article 103 paragraph 2 of the LC). According to Article 103 paragraph 3 of the Labour Code, the paid annual leave of headmasters of schools, directors of a training and education facility, directors of a special educational facility and their deputies, teachers, teaching assistants, headmasters of vocational education, sports school coaches, sports trainers, répétiteurs (corepetitors), foreign lecturers, educators and professional employees according to a special regulation, shall be entitled to at least eight weeks of paid annual leave within a calendar year.

4 Other relevant information

Nothing to report.

Slovenia

Summary

Case C-437/17 confirms that Slovenian law, particularly regarding collective agreements on annual leave entitlements, is generally in compliance with the principle of the free movement of workers.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU Case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The Employment Relationships Act (ERA-1) contains provisions on the general prohibition of discrimination and retaliatory measures. Article 6 (1) provides:

'Employers must ensure that job seekers (candidates) being given access to employment or workers during employment relationship and in connection with the termination of employment contracts are afforded equal treatment, irrespective of their nationality, race or ethnic origin, national or social background, gender, skin colour state of health, disability, faith or beliefs, age, sexual orientation, family status, trade union membership, financial standing or other personal circumstances in accordance with this Act, regulations governing the implementation of the principle of equal treatment and the regulations governing equal opportunities for women and men.'

Workers who are nationals of an EU Member State are, as is well known, covered by Article 7(1) of Regulation No. 492/2011, which prohibits all discrimination based on nationality between workers of Member States as regards employment and the conditions of work and employment. As regards the right to paid annual leave, its duration and determination of extended annual leave, the relevant provision of Article 159(2) provides:

"A worker shall have the right to annual leave in an individual calendar year which may not be shorter than four weeks, regardless of whether he works full-time or part-time. The minimum number of days of a worker's annual leave shall depend on the distribution of working days within the week of an individual worker."

According to Article 160(1) of the ERA-1 'a longer duration of annual leave that stipulated in the preceding Article may be determined in a collective agreement or an employment contract.'

The legislation in force in Slovenia (ERA-1) provides for minimum duration of annual leave. The legal regulation is fairly broad and does not contain any precise provision on the employee's years of service on the basis of which a longer duration of annual leave



as defined in the ERA-1 may be determined. The determination of possible conditions on which a longer duration of annual leave depends on is left to collective agreements and the employment contract. In practice, the respective provisions can be found in branch collective agreements. The majority refer to certain numbers of 'years of service' (period of service completed with one or several employers) and only some to 'years of service with the current employer'. The regulation in collective agreements differs significantly. Annual leave can be extended by 1 day for 1-5 years of service, 2 days for 5-10 years of service, 3 days for 15-20 years, etc., or 1 day for 10-25 years of service and 3 days for 25 years and more. Some collective agreements, however, link the number of annual leave days that exceeds the statutory minimum number of annual leave days with the 'years of service completed with the current employer'.

In Slovenia, no dispute as the one case C-437/17 dealt with has been brought before the court. In this context, the following statement of the CJEU is important: 'EU law guarantees only that workers active in a Member State other than their Member State of origin are subject to the same conditions as workers of that other Member State.' Slovenian law meets this condition.

4 Other relevant information

Nothing to report.

Spain

Summary

(I) New laws have been passed on:

- Gender equality and parental leave;
- the obligation to record working time;
- the employment of dock workers, particularly with regard to collective agreements;
- precautions for a 'no-deal' Brexit;
- employment conditions of research personnel in training; and
- employment services and vocational training.

(II) An Employment Plan for 2019 has been published.

(III) Case C-437/17 has little relevance for national law.

1 National Legislation

1.1 Gender-based discrimination

[Royal Decree-Law 6/2019](#), of 01 March 2019, modifies the Organic Law 3/2007, on equality between women and men, and various articles of labour and social security legislation. The purpose is to achieve greater equality between women and men in employment and labour relationships. To this end, several measures have been introduced, and some aim to achieve a more equitable distribution between men and women with regard to family care.

The first of these measures affects the obligation to negotiate equality plans, which in the past was limited to companies with more than 250 workers. Following this amendment, this obligation has been extended to companies with more than 50 employees, which will now have to comply with this requirement within a period of one to three years, depending on the size of the undertaking. At the same time, the content of equality plans has been expanded, and they must now address, among other issues, measures taken to exercise the right to reconcile work and family life. A registry of equality plans has also been established to track their existence and compliance with legal obligations.

Secondly, the regulation on equal remuneration has been modified (Article 28 of the Labour Code) to define when a job has equal value and to impose on the employer the obligation to keep a record of the average wages of men and women. When the difference in average salary exceeds 25 per cent between the two genders, the reason must be justified.

Third, the regulation granting workers the right to adapt working hours to reconcile work and family life (Art. 34 of the Labor Code) has been modified with the aim of establishing a procedure within the company to respond to the worker's request in case no procedure has been specified in the collective agreement.

Fourth, the regulation on certain leaves granted to workers and civil servants for the purpose of reconciling work and family life has been modified to expand their possibilities of use and to ensure that both parents can take them.

Fifth, the regulation on maternity and paternity leave has been modified (for both workers and civil servants) to grant both parents equivalent rights. Therefore, maternity

and paternity leave has been replaced by a parental leave of 16 weeks for each parent. However, the parent which is not the biological mother, who thus far was able to take 5 weeks of parental leave, cannot take the 16-week leave immediately; the law provides for a gradual application. Under the new rules, such parental leave will be 8 weeks in 2019, 12 weeks in 2020 and 16 weeks after 2021. These new rules are supplemented with the relevant modifications in social security.

1.2 Recording of working time

[Royal Decree Law 8/2019](#) contains several measures. Some of them aim to address unemployment problems identified in certain population groups or in certain sectors of activity. These are protective measures for people over the age of 52 years or measures to encourage employment of long-term unemployed persons. The most important measure, however, is the new obligation to record working time.

So far, labour law did not require employers to record their employees' working time, with some exceptions. This amendment introduces the obligation to record the employee's daily working hours, indicating the start and end of each worker's working day. The terms of compliance with this obligation can be specified in collective bargaining, and the government can introduce special regulations in certain sectors of activity. The main purpose is to monitor compliance with the rules on overtime. According to the Labour Inspectorate, recording working time is necessary from a practical point of view, but the Supreme Court stated that there was no legal obligation for employers to record their employees' working times. Royal Decree Law 8/2019 imposes this obligation.

It is worth noting that in the near future, the CJEU will rule on this matter, since a preliminary ruling is pending (case C-55/18).

1.3 Stevedores (dock workers for cargo-handling services)

[Royal Decree Law 9/2019](#) supplements the regulation in Royal Decree Law 8/2017. The Decree contained two main measures. The first was recognition of the freedom of hiring of workers for dock-work undertakings, the only requirement being to ensure the 'professionalism' of dock workers. The second one was the elimination of the obligation to share capital in companies responsible for managing the stevedoring activity as a condition to provide port services involving the handling of goods. It also allowed the participation of temporary work agencies.

Royal Decree Law 9/2019 brings the regulation of this activity closer to that of temporary work agencies, which can also take a role in this sector. In addition, the amendment establishes four other provisions:

- Collective bargaining can provide rules on training and functions to be carried out by workers;
- Collective agreements may introduce port employment centres (similar to temporary employment agencies but specifically for dock workers) to be the new employer of the workers already contracted in this sector;
- Collective agreements must adapt to the new regulation within 9 months;
- The professionalism requirements to be a port stevedore are specified.

As stated in the May 2017 Flash Report, Spanish law forced dock-work undertakings operating in Spanish ports of general interest to register in a 'port stevedores anonymous management company' (SAGEP). These companies could thus not hire their own staff freely, permanently or temporarily, except if the workers proposed by the corresponding SAGEP were insufficient or not suitable.



The CJEU ruling in case C-576/13, 11 December 2014, *Commission v Spain* stated that Spain had infringed Article 49 TFEU. This ruling recalls that restrictions on the freedom of establishment are permissible provided that:

- they are applicable without distinction on grounds of nationality;
- they are justified by overriding reasons relating to the public interest (such as the protection of workers or the safety in port waters);
- such restrictions are indispensable for those purposes.

The CJEU pointed out that less restrictive measures could be adopted to reach the same objectives. That is the purpose of Royal Decree Law 8/2017 and Royal Decree Law 9/2019.

1.4 Brexit (contingency plan, public employees)

In the event of the withdrawal of the United Kingdom, and in accordance with the provisions of Spanish legislation for the selection of public employees, [the law](#) contemplates the implementation of selective processes in the bodies of public administration affected more extensively by Brexit, such as customs or certain activities in the field of commerce and public finance.

The UE have implemented a 'no-deal' Contingency Action Plan in specific sectors to deal with the impact of a 'cliff-edge' Brexit, and made recommendations to the Member States to do the same. Spain has approved several measures to this end.

1.5 Brexit (contingency plan, residence permits)

[This resolution](#) approves the procedures to be followed by British nationals living in Spain to obtain the relevant documents in case they want to stay in Spain after Brexit. The UE have implemented a 'no-deal' Contingency Action Plan in specific sectors to deal with the impact of a 'cliff-edge' Brexit, and made recommendations to Member States to do the same. Spain has approved several measures to this end.

1.6 Research personnel in training

[This regulation](#), which replaces the existing regulation of 2006, aims to regulate the employment contract between research staff in training (prior to obtaining a PhD) and the employer in accordance with science legislation.

This activity has not always been included in labour law. These researchers have been considered scholars. Right now, such staff conclude employment contracts (a training contract) with a duration of one to four years. The regulation establishes the applicable wage and other aspects of the employment relationship, usually through a referral to labour legislation and collective agreements. It also lists the rights and obligations of the researcher as a worker.

1.7 Employment services

[This Royal Decree](#) defines the potential members and partners of EURES in Spain and specifies the requirements the interested entities must meet to obtain the status of member or partner of EURES and the procedure to be followed for this purpose. The Royal Decree regulates the operating regime of the members and partners of EURES in Spain and establishes a coordination office of the EURES Network in Spain (inside the

Public State Employment Service). The public employment services of the autonomous communities are expressly declared members of EURES.

This reflects a development of Regulation (EU) 2016/589.

1.8 Vocational training

[This Royal Decree](#) configures the catalogue of training and expertise that can be offered through the vocational training system, and establishes the requirements of the form and content that the training must cover.

This regulation supplements the regulation of the vocational training system for employment implemented in Spain through Law 30/2015.

1.9 Employment Plan 2019

[The Employment Plan for 2019](#) contains an analysis of the context and situation of the labour market in Spain (considered positive), a strategic framework for action (on the premise of an expansive phase of the Spanish economy), a list of objectives and the identification of the services and programmes that will be part of the active employment policy. This Plan connects to the Plan for Youth Employment approved in December 2018.

The Plan has been approved in accordance with the provisions of Spanish Employment Law and the guidelines of the European Union.

The objectives of the Employment Plan are divided into three sections: key objectives (reduction of unemployment), strategic objectives (promotion of employment), and structural objectives (guidance, training and equal opportunities in access to employment).

2 Court Rulings

2.1 Fixed-term contracts

Supreme Court, 207/2019, 13 March 2019

[The Supreme Court states](#) that workers with a temporary replacement contract have no right to severance pay when the contract expires.

The first CJEU *De Diego Porras* ruling C-596/14, 14 September 2016, had a huge impact on the Spanish system. To date, the worker had the right to a severance pay of 12 days of salary per year at the end of the fixed-term contract, except in the case of fixed-term replacement contracts (interim contracts), which do not entitle the fixed-term employee to severance pay unless otherwise agreed. On the other hand, the termination of an employment contract (permanent or fixed-term) for objective reasons is a form of dismissal, and the worker has the right to a severance pay of 20 days of salary per year. The *De Diego Porras* ruling considered this differentiation to be prohibited in accordance with Article 4 of the Framework Agreement on Fixed-term Work.

CJEU *Montero Mateos* and *Grupo Norte Facility* rulings corrected the *De Diego Porras* ruling, and state (paragraph 62) that

“Spanish law does not treat fixed-term workers and comparable permanent workers differently, since Article 53(1)(b) of the Workers’ Statute provides for statutory compensation equivalent to twenty days’ remuneration per year of service with the employer to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration”.



The CJEU ruling of 21 November 2018 again addresses the *De Diego Porras* ruling, and confirms the doctrine of Montero Mateos. It seems that this specific problem should now be resolved. However, the Court made some assessments that could lead to different problems. The answers to the second and third questions were not entirely clear, because they apparently extend the scope of the Directive to compare between two fixed-term contracts, and not between a fixed-term contract and a permanent one. Finally, the Supreme Court, referring to those CJEU case law, states that a temporary replacement contract has no right to severance pay when the contract expires and does not consider this difference to be a discrimination of temporary workers.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH

This case will have no implication in Spain because of the configuration of the right to annual leave, which is very different. According to Article 38 of the Labour Code, workers will be entitled to a minimum of 30 days of annual leave, which can be increased by collective agreement or in the employment contract. The duration of annual leave is not extended in accordance with the worker's seniority. The problem addressed in this ruling could only hypothetically arise if the collective agreement or the employment contract extended the duration of the annual leave for workers with long seniority. However, there is no case law on this matter and the problem and its solution would depend on the wording of the agreement.

4 Other relevant information

4.1 General election

The President of the Spanish government has called general elections for 28 April 2019.

Sweden

Summary

(I) Case C-437/17 confirms the conformity of the Swedish Annual Vacation Act with the principle of free movement of workers.

(II) The long-lasting industrial conflict in Gothenburg Harbour has been settled.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU rulings and ECHR

3.1 Free movement of workers

CJEU case C-437/17, 13 March 2019, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach

The CJEU issued a decision in case [C-437/17](#) *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach*, which dealt with an increase in annual leave for employees with a length of continuous service of 25 years with the (same) employer. The Court of Justice concluded that the Austrian provision did not constitute a violation of Art. 45 TFEU or of Art. 7.1 Regulation 492/2011/EU, since there was neither any direct, nor any indirect discrimination of non-Austrian citizens. The application of a provision to award loyal staff, like the one in the present case, should not be considered an obstacle to the freedom of movement for employees.

Sweden's Annual Vacation Act (['Semesterlagen'](#) 1977:480) provides for a statutory annual leave of 25 days. Additional vacation for white-collar workers is regularly agreed in collective agreements but do not, to the author's knowledge, relate to accrued employment periods, as was the case before the CJEU. Other provisions seeking to award the loyalty of employees or long-term duration of employment exist for the calculation of redundancy (last-in first-out principle, hereinafter LIFO). The application of the Swedish LIFO-principle in cases of redundancy would not be jeopardised by the CJEU's decision in C-437/17.

4 Other relevant information

4.1 End of industrial conflict in harbours

The long-lasting industrial conflict, which has been reported on in previous Flash Reports, involving Swedish harbours is over. The conflict started in Gothenburg several years ago, intensified and spread to other ports in the country, but was finally settled with the conclusion of a secondary collective agreement with the same material content as the primary collective agreement. The industrial conflict has troubled the Swedish labour market and exposed issues on representation for 'the second' trade union which does not conclude collective agreements on workplaces. The preferential treatment of the 'primary' union, party to collective agreements, has been a continuous problem in the mediation of the conflict.

United Kingdom

- (I) Legislation to attract migrant workers post-Brexit has been passed.
- (II) Changes to employment rights post-Brexit have been passed.
- (III) The Employment Tribunal has ruled that art experts working at the National Gallery were 'workers'.
- (IV) The Court of Appeal ruled that compensatory rest breaks could be made up of shorter breaks throughout shifts.
- (V) The High Court rejected the judicial review of two Central Arbitration Committee decisions on statutory trade union recognition.
- (VI) New rules on employment information and information and consultation have entered into force.

1 National Legislation

1.1 New immigration rules following Brexit

On 07 March 2019, the government proposed a number of changes to the Immigration Rules, which 'further demonstrate its commitment to attracting leading talent, whilst also cracking down on abuse'. The government says the rules will do the following:

- The rules will provide skilled business people access to two new visa routes to set up businesses in the UK. The Start-up visa route will be open to those starting a business for the first time in the UK, while the Innovator visa route will be for more experienced business people who have funds to invest in their business.
- Both routes will see endorsing bodies and business experts – rather than the Home Office – assessing applicants' business ideas. This will make sure that the routes are focussed on only the most innovative, viable and scalable businesses.
- Alongside these new routes, the Home Office is also bringing forward reforms to the Tier 1 (Investor) route. The reformed route will better protect the UK from illegally obtained funds, whilst ensuring that genuine investors have access to a viable visa route. Applicants will be required to prove that they have had control of the required GBP 02 million for at least two years, rather than 90 days, or provide evidence of the source of those funds.
- The Home Office will also extend the salary exemption in the Tier 2 (General) visa so that the NHS and schools can continue to attract and hire experienced teachers, nurses and paramedics from overseas. The salary exemption applies to all nurses and paramedics, medical radiographers and secondary school teachers whose subjects are in maths, physics, chemistry, computer science and Mandarin.

The changes to the immigration rules can be found [here](#).

1.2 Employment rights following Brexit

The [Employment Rights \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 535/2019\)](#) and [The Employment Rights \(Amendment\) \(EU Exit\) \(No. 2\) Regulations 2019 \(SI 536/2019\)](#) have now been made. These will make various amendments to employment legislation in Great Britain if there is a no-deal Brexit. SI 535/2019 does the following:

- These Regulations are made in exercise of the powers conferred by section 8(1) of, and Schedule 7 to the European Union (Withdrawal) Act 2018 (c. 16) in order to address failures of retained European Union (EU) law to operate



effectively and other deficiencies (in particular under paragraphs (a), (d), (e) and (g) of section 8(2) of that Act) arising from the withdrawal of the United Kingdom (UK) from the EU. The powers in section 2(2) of the European Communities Act 1972 are relied upon to make amendments to correct existing technical inaccuracies in the current legislation (these amendments are made by paragraph 9, 11(c) and 16(c) of Schedule 1).

- These Regulations make amendments to legislation in the field of employment rights.
- Schedule 1 contains amendments to primary and secondary legislation extending to England and Wales, and Scotland. The amendments to primary legislation include the repeal of existing powers for the Secretary of State to make regulations to implement or deal with matters arising out of or related to the UK's obligations under certain EU Directives (which concern provision for parental leave, part-time workers, fixed-term work and information and consultation). Amendments are also made to secondary legislation to amend or remove references that relate to the UK's membership of the EU. The saving provision in Part 3 of Schedule 1, ensures that these amendments do not affect the validity of any regulations that came into force before exit day and were made under those Acts amended by Part 1.
- Schedule 2 contains amendments to the Transnational Information and Consultation of Employees Regulations 1999, which extend to the whole of the United Kingdom, to amend or remove references that relate to the UK's membership of the EU, and provisions which concern the establishment of a European Works Council. Part 2 of Schedule 2 contains saving and transitional provisions.
- SI 536/2019 also applies in the event of a no-deal Brexit. These Regulations do the following:
 - Part 1 of the Schedule makes amendments to primary legislation. Firstly, to section 38 of the Employment Relations Act 1999, which currently provides a power to the Secretary of State to make regulations in certain circumstances where EU obligations relating to the treatment of employees on the transfer of all or part of an undertaking or business do not apply. The amendments do not change the scope of the power but ensure the wording used is appropriate once the UK has exited the EU. Secondly, Part 1 amends the Work and Families Act 2006, removing powers for the Secretary of State to make regulations (relating to annual leave), which are no longer appropriate once the UK has exited the EU. The savings provision in Part 3 ensures that these amendments do not affect the validity of any regulations that came into force before exit day and were made under either of those Acts.
 - Part 2 of the Schedule makes amendments to secondary legislation. Regulation 27A of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 is amended to reflect the fact that the UK will no longer be a member of the EEA, following exit from the EU.

Equivalent regulations have been passed for Northern Ireland, [the Employment Rights \(Amendment\) \(Northern Ireland\) \(EU Exit\) Regulations 2019 \(SI 537/2019\)](#) and [Employment Rights \(Amendment\) \(Northern Ireland\) \(EU Exit\) \(No. 2\) Regulations 2019 \(SI 538/2019\)](#) have also now been made.

2 Court Rulings

2.1 Worker status

Employment Tribunal, No. ET/2201625/18, 27 February 2019, Braine and others v The National Gallery

The perennial problem continues over the question of who is a worker. This month, in [Braine and others v The National Gallery](#), ET/2201625/18, 27 February 2019, the Employment Tribunal said that art experts working at the National Gallery were workers when undertaking individual assignments, but did not have an employment status (neither employee nor worker) between assignments.

2.2 Working Time

Court of Appeal, No. EWCA Civ 269, 05 March 2019, Network Rail Infrastructure Ltd v Crawford [2019]

In [Network Rail Infrastructure Ltd v Crawford \[2019\], EWCA Civ 269](#), the Court of Appeal said that in the situation of a 'special case' worker (a railway signaller), the Working Time Regulations (SI 1998/1833) did not require a compensatory rest break to be an uninterrupted rest break of 20 minutes. The rest break could be made up of shorter breaks throughout the shift.

2.3 Freedom of association

High Court, No. EWHC 728, 25 March 2019, R (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee [2019]

In *R (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee [2019] EWHC 728*, 25 March 2019, judicial review was brought of two Central Arbitration Committee (CAC) decisions which had rejected two applications for statutory trade union recognition for a group of outsourced workers at the University of London. Specifically, in one decision, the CAC had said that it was satisfied that the University was not the employer of the workers in the Union's proposed bargaining unit and therefore, the Union's application to the CAC under Sched 1 was not admissible. The High Court rejected the judicial review. Of particular interest is its observation that

"I do not accept that Article 11 requires that the Union should have a right of compulsory collective bargaining with the University, which is not the relevant workers' employer and with whom they have no contractual relationship. Thus Article 11 is not, in my view, engaged in this context".

3 Implications of CJEU rulings and ECHR

Nothing to report.

4 Other relevant information

4.1 Legislation in force post the Taylor Review

The new rules on itemised payslips and 'aggravated' breaches of employment law have come into force. The details of the first can be found in The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 which amends section 8 of the Employment Rights Act 1996, adding to the list of particulars which must be included in



the itemised pay statement which an employee has a right to be given. The amendment requires an itemised pay statement to also contain information regarding the number of hours worked by the employee for which they are being paid, but only in situations where the employee's pay varies as a consequence of the time worked.

The details of the second can be found in [The Employment Rights \(Miscellaneous Amendment\) Regulations 2019](#) (SI 731/2019). They increase the maximum penalty for an 'aggravated' breach of employment law from GBP 5 000 to GBP 20 000. These Regulations also:

- confer the right to a written statement of particulars of employment and associated enforcement provisions upon all workers (currently, this right applies only to employees) by amending Part 1 of the Employment Rights Act 1996 (c.18) (parts 3 and 5);
- lower the percentage required for a valid employee request for the employer to negotiate an agreement on informing and consulting its employees. The threshold is lowered from 10 per cent to 2 per cent of the total number of employees employed by the employer. This is achieved by amending the Information and Consultation of Employees Regulations 2004 ('the 2004 Regulations'). The 2004 Regulations impose obligations in respect of information and consultation on an employer with at least 50 employees if a sufficient percentage of its employees submit a valid request (part 4).

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