Flash Reports on Labour Law September 2021

Summary and country reports

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

September 2021

EUROPEAN COMMISSION

Directorate DG Employment, Social Affairs and Inclusion

Unit C.1 – Labour Law

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European Commission

B-1049 Brussels

Flash Report 09/2021 on Labour Law

Manuscript completed in October 2021

Luxembourg: Publications Office of the European Union, 2021

PDF ISSN 2600-3252 KE-CC-21-007-EN-N

Flash Report 09/2021 on Labour Law

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Executive Summary

National level developments

This summary is divided into two parts. The first part offers an overview of the extraordinary development of labour law in many Member States and the European Economic Area (EEA) triggered by the COVID-19 crisis; the second part sums up other labour law developments with particular relevance for the transposition of EU labour law.

Developments related to the COVID-19 crisis

Measures to reduce the risk of infection in the workplace

In September 2021, many countries still have measures in place to prevent the spread of the COVID-19 virus in the workplace. The state of emergency and/or restrictions on businesses have been extended in a few countries, including **Bulgaria** and the **Czech Republic**.

However, many countries are continuing to ease the restrictions related to the lockdown. Some exceptional and temporary health and safety measures related to the COVID-19 pandemic have been amended in **Austria** and **Portugal**. Moreover, all restrictive measures have been lifted in **Denmark** (as of 10 September) and in **Norway** (as of 24 September).

The recommendation to telework has been lifted in **Portugal.** Likewise, in **Sweden,** the instruction for all employees in the public sector to work from home has been revoked.

In many countries, some categories of workers are required to provide a COVID-19 certificate (so-called '3G Certification', 'Green Pass', 'SafePass', etc.) verifying vaccination against COVID-19, recovery or a negative test result. In **Italy**, this requirement has been extended to all workers in both the public and private sector, who will be required to present a COVID-19 certificate from 15 October 2021 onwards. In **Slovenia**, the Constitutional Court stayed the government's regulation which imposed a different COVID-19 certificate for public sector employees (attesting recovery or vaccination but excluding the testing option). In **Liechtenstein**, employers are entitled to verify possession of a COVID-19 certificate among their employees if this serves to determine appropriate protective measures.

Conversely, in **Poland**, the legislative process to adopt a bill that would entitle the employer to obtain information whether employees have been vaccinated against COVID-19 has been suspended.

Finally, in **Romania**, the possibility of suspending the employment contracts of doctors who are not vaccinated or tested periodically is being debated.

It is worth mentioning that there is an emerging case law on refusing to undergo COVID-19 testing or to get vaccinated. The **Austrian** Supreme Court upheld the dismissal of a nursery home employee on grounds of refusal to undergo COVID-19 testing. Interestingly, a court in the **Netherlands** has confirmed the dismissal of a healthcare professional who had repeatedly expressed extreme scepticism about COVID-19 and vaccines on LinkedIn.

Measures to alleviate the financial consequences for businesses and workers

To alleviate the adverse effects of the COVID-19 crisis, State-supported short-time work, temporary layoffs or equivalent wage guarantee schemes remain in place in many countries. Relief measures have been extended in **Italy, Norway** and **Spain**. In **Belgium**, the government has introduced consumption cheques as a relief measure for workers in sectors hit hard by the pandemic, or to compensate extra work.

In **Romania**, the resumption of relief measures for employees who have been temporarily suspended, are being discussed.

Conversely, only some specific measures have been extended in the **Netherlands**, where various general relief measures will cease in October 2021. Likewise, the **UK** furlough scheme comes to an end on 30 September 2021.

Leave entitlements and social security

Special care benefits or family leave for parents whose child needs to quarantine have been extended in **Luxembourg** and **Norway**.

Likewise, in **Austria**, a legislative proposal aims to reintroduce special paid leave for parents until 31 December 2021 in case of school closures.

Table 1: Main developments related to measures addressing the COVID-19 crisis

Topic	Countries
Relief measures	IT NO NL RO ES
Proof of vaccination or negative test for workers	AT IT LI SI PL
Childcare leave	AT LU NO
Teleworking	PT SE
Restrictive measures	BG CZ
Re-opening of society	DK NO
End of relief measures	NL UK
Mandatory vaccination against COVID-19	RO
Workers' subsidies	BE

Other developments

The following developments in September 2021 were of particular significance from an EU law perspective:

Working time

In the **Czech Republic**, certain changes in the working hours of employees in the transportation sector have been adopted and will enter into effect on 01 January 2022.

In **Ireland**, following CJEU case law, the Labour Court ruled that 'rostered overtime' is part of regular weekly

working hours and must therefore be included in the calculation of an employee's holiday pay.

In **Hungary**, the Labour Code has been amended to guarantee the application of the collective agreement's more favourable provision regulating work within the framework of working time banks in case of termination of the collective agreement.

In **Luxembourg**, a new bill on the right to disconnect has been introduced, proposing the obligation for employers to put in place a regime ensuring respect for the right to disconnect outside working time.

Part-time work

In **Austria**, a decision of the Supreme Court has reaffirmed direct applicability of the Part-Time Work Directive to the decision of an association of local authorities.

In **France**, the Court of Cassation has confirmed its case law according to which the reclassification of an employee's part-time employment contract into a full-time one is justified if, through overtime, the employee has reached or exceeded the legal working time.

Platform work

Two important cases on the employment status of platform workers have been delivered in the **Netherlands**. The Court of Appeal of Amsterdam ruled that household cleaners who work for the online platform Helpling are to be classified as temporary agency workers, and the Court of Amsterdam has determined that Uber drivers are to be considered employees.

In **Spain**, the rules on platform work, which entered into force in May 2021, have been enshrined in the Labour Code.

Other developments

The **Belgian** Constitutional Court rejected the appeal for annulment of the Law on the Status of Penitentiary Personnel, which regulates the right to strike to ensure the provision of essential services.

In the **Czech Republic**, a draft law introducing several changes as of 01 January 2022 to sickness insurance, including the extension of paternity leave and changes to long-term care support, has been adopted and will enter into effect on 01 January 2022.

In **Estonia,** Parliament amended the Collective Agreements Act, establishing new rules on the extension of the scope of application of collective agreements.

In **Finland**, the government has submitted a proposal on a new act regulating workers' participation in Parliament as of 01 January 2022.

Moreover, the Finnish Supreme Court has clarified the employers' duty to inform workers by removing uncertainties regarding the time and place of work.

The **French** Court of Cassation established that an employee who declares that he or she is on strike for the first few days of a rotation shift in the context of work for an airline company cannot claim payment of wages for the remaining days of the rotation.

Germany has ratified the ILO Maternity Protection Convention, 2000 (No. 183).

A public consultation on the transposition of the Transparent and Predictable Working Conditions Directive 2019/1152 has been launched in **Ireland**.

In **Italy**, the Court of Cassation has decided two cases on workers' privacy and the extent to which remote control of workers' activities is permitted.

In **Spain**, the Supreme Court ruled that in certain cases, it is the worker who claims applicability of the rules on transfers of undertakings to bear the burden of proof of the relevant elements of the transfer.

In the **UK**, a plan to remove the special status given to retained EU law has been announced in the House of Lords.

Table 2: Other major developments

Topic	Countries
Working time	CZ IE HU
Part-time work	AT FR
Platform work	NL ES
Transparent and predictable working conditions	FI IE
Right to strike	BE FR
Right to disconnect	LU
Transfer of undertakings	ES
Work-life balance	CZ
Workers' privacy	IT
Workers' representation	FI
Brexit	UK

Implications of CJEU Rulings

Stand-by time

This Flash Report analyses the implications of a CJEU ruling on the qualification of stand-by periods during breaks.

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, which originated from the request for a preliminary ruling raised by a Czech court, the CJEU reviewed whether a break period during which an employee must be available to his or her employer within two minutes in case of an emergency call-out, must be regarded as working time. Following the argumentation in cases C-344/19, *D.J. v Radiotelevizija Slovenija*, and C-580/19, *RJ v Stadt Offenbach am Main* (analysed in the March 2021 Flash Report), the CJEU clarified that breaks constitute 'working time' where it is apparent from an overall assessment of all the relevant circumstances that the limitations imposed on that worker are such as to objectively and very significantly affect the worker's ability to freely manage the time during which his or her professional services are not required.

This judgment provides further clarity to national courts on the distinction between working time and rest periods.

Most national reports, including **Austria**, **Bulgaria**, **Denmark**, **Greece, Finland, France, Hungary, Italy, Liechtenstein**, **Lithuania, Norway**, **Portugal**, **Romania**, **Slovakia**, **Spain** and **Sweden**, indicate that their national legislation or established case law follow the principle of the CJEU, as established in case C-518/15, *Matzak* and case C-344/19, *D.J. v Radiotelevizija Slovenija* and further clarified in this case.

As regards breaks, many of these reports indicate the existence of legislation or jurisprudence that ensure that breaks are genuine free time, in the sense that workers must be able to freely dispose of this time, and that employers are not entitled to require the employee's readiness to respond to calls within a given time limit during such breaks. In case of a continuous work shift, the **French** Court of Cassation has long established that time for a meal during which employees, who are working a continuous shift due to the specificity of their functions, cannot move away from their workstation and thus remain at the disposal of their employer, must be considered effective working time. Similarly, the **Romanian** courts have frequently reclassified lunch breaks as working time in cases in which workers are expected to be present the entire time at a shop during its official opening hours.

A few reports, such as **Croatia** and **Poland**, indicate that this case has limited implications for national legislation, since breaks are generally counted as part of working time.

Conversely, some reports indicate that the case may have significant implications in their country. This is the case of **Estonia** and **Latvia**, where the legislation does not clearly define the criteria according to which stand-by time is classified either as working time or a rest period. Likewise, the guidance provided by the CJEU in this judgment is considered to be of particular importance for the development of case law in **Slovenia** as well**,** where the concept of working time is not defined in detail.

In the **Netherlands**, where only one category of stand-by work is considered to be working time, it is reported that the present case increases concerns over the compliance of Dutch regulations with the Working Time Directive.

In the **Czech Republic**, where the legislation distinguishes between unpaid breaks (considered as rest periods) and breaks in the context of continuous work shifts (considered to be working time), this judgment clarifies the criteria used by the judges to determine whether a break can be considered as belonging to the former or the latter category.

Austria

Summary

(I) A new ordinance limits access to certain goods and services to holders of a certification attesting that he or she is either vaccinated, has recovered or has a negative COVID-19 test (so-called '3G certification'). In justified cases, this certification may be required to workers.

(II) A legislative proposal aims to reintroduce a special paid leave for parents in case of school closures until 31 December 2021.

(III) A decision of the Supreme Court upheld a dismissal of a nursery home employee on grounds of refusal to test for COVID-19.

(IV) A decision of the Supreme Court reaffirmed the direct applicability of the Part-Time Work Directive on the decision of an association of local authorities.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The Minister of Health has issued a new ordinance on COVID-19 measures (2nd Ordinance on Measures against COVID-19 (*2. COVID-19-Maßnahmenverordnung* – 2. COVID-19-MV)), enforcing what is publicly known as the 3G rule (*Geimpft* – vaccinated, *Genesen* – recovered, *Getested* – tested) as of 15 September.

Access to certain goods and services is limited to those who can present valid '3G proof' as they have 'evidence of low epidemiological risk'. As for testing, antigen test results are generally only considered valid for 24 hours and PCR test results for 72 hours (see Ordinance § 1 para 2 Z 1). While the ordinance applies to all of Austria, the Länder may introduce stricter regulations.

The ordinance contains specific regulations for workers who are in contact with customers: both the customers and workers who are in contact with customers must wear FFP2-masks when indoors, unless the risk of infection is minimised by other adequate means (§ 9 para 1). When presenting valid 3G certification, workers may take off their masks, and when customers and workers hold a valid 3G certification, customers may take off their FFP2 masks as well (§ 9 para 1, 1a, 2). Mobile care workers must provide 3G proof (if the proof is a test result, a renewal is required every seven days) in addition to wearing a mask (§ 9 para 3) when visiting clients.

In justified cases, employers may impose stricter rules for the wearing of masks and the presentation of 3G certification (§ 9 para 4).

Since it is unclear what circumstances justify the imposition of stricter rules in the workplace—which are in practice quite common, many employers apply the 3G regulation in their premises, regardless whether their employees are in contact with customers (and hence subject to the requirement to wear masks) or not—the social partners have been pushing for the government to issue a more comprehensive 3G regulation for the workplace.

1.1.2 Collective Bargaining Agreement

The social partners have concluded a General CBA on Regulations on Fighting COVID-19 (General Collective Bargaining Agreement on Regulations on Fighting COVID-19,

Generalkollektivvertrag Corona-Maßnahmen), which entered into force on 01 September 2021 and will remain in force until 30 April 2022. The CBA contains the following points:

- Workers who are required to wear masks must, after wearing their masks for three hours, be allowed to take their masks off for at least ten minutes.
- The employer may not request workers who can present a valid 3G (*Geimpft* – vaccinated, *Genesen* – recovered, *Getested* – tested) certification to wear a mask.
- Workers may not be disadvantaged or dismissed for enforcing their rights under the CBA, or for falling ill with COVID-19.

1.1.3 Proposal of paid care leave

Following the start of the school year, the legislator has re-introduced funded paid leave for parents in case of COVID-19 (§ 18b AVRAG, Arbeitsvertragsrechts-Anpassungsgesetz, for more details, see November 2020 Flash Report). The legislative proposal passed the National Assembly on 22 September 2021 and is expected to pass the Federal Assembly on 07 October 2021. It will enter into force retroactively as of 01 September 2021 and remain in force at least until 31 December 2021.

As previously regulated, publicly funded paid leave for parents (and relatives with certain care obligations) intends to entitle employees with certain care responsibilities and who are affected by the full or partial closure of childcare facilities, additional paid leave for up to three weeks, for which the employer is then reimbursed by the State.

Currently, as of 01 September 2021, the following regulations on publicly funded paid leave apply:

1. Employees are entitled to special care leave with continued remuneration to care for:

- children under 14 years of age, if educational institutions or childcare facilities are partially or fully closed due to the implementation of official measures, or if the child is placed in quarantine by the authorities;
- persons with disabilities, if the establishment providing disability assistance/the teaching institution or facility that provides care is partially or fully closed due to the implementation of official measures, or if the care is provided at home on a voluntary basis;
- dependents of persons in need of care (generally, elderly and/or sickly persons who live at home with a professional caregiver), if their caregiver is unavailable and care can therefore no longer be guaranteed;
- relatives of persons with disabilities who need personal assistance, if their personal assistance can no longer be guaranteed as a result of COVID-19.

2. Entitlement to paid funded leave and agreement on publicly funded leave:

The employee must take all reasonable steps to ensure that she or he can perform the agreed work. Only in cases where there are no alternative care options does an entitlement to funded paid leave exist.

Employees who are not entitled to paid funded leave or any other alternative care leave and whose work is not required for the operation of the establishment in which she or he works may agree to publicly funded leave with her or his employer.

3. Publicly funded leave can be taken for up to three weeks.

4. Employers are refunded 100 per cent of the remuneration paid for publicly funded paid leave, this amount is capped at a maximum monthly contribution basis according to the General Social Security Act and must be claimed by the employer from the

respective public authority (*Buchhaltungsagentur*) within six weeks after the funded leave has ended.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Refusal to take COVID-19 test as ground for dismissal

Austrian Supreme Court, 8 ObA 42/21s, 14 September 2021

At the time of the employee's dismissal (26 November 2020), the then relevant ministerial decree on emergency measures to fight the COVID-19-pandemic (COVID-19-Notmaßnahmen-Verordnung – COVID-19-NotMV) provided that nursery homes may only be accessed by the employees working there if they undergo COVID-19 testing once a month. The costs were borne by the employer in the present case. The plaintiff, a nursery home employee, refused to undergo such testing, claiming that they did not make sense and therefore infringed his personal rights. He communicated, however, that he was willing to wear an FFP2-mask while working. When he was dismissed, he claimed that his refusal to take tests was lawful and that the dismissal was therefore discriminatory. Thus, he should be reinstated.

The Supreme Court as well as the two lower courts dismissed the plaintiff's claim based on the legal obligation of the employer to observe the ministerial decree and to not allow untested persons into the workplace. As long as the decree is in force, the employer has no leeway to deploy such employees, even if they are willing to wear an FFP2-mask. The Court also cited the existing rather extensive legal literature that upholds this position.

This is the first Supreme Court decision that deals with the dismissal of a worker who refuses to undergo COVID-19 testing, and it did not come as a surprise, since the case is rather clear cut. The plaintiff's arguments were very general and the courts highlighted certain elements that could be relevant in future cases:

- the costs of the testing were borne by the employer;
- the plaintiff did not claim any health reasons for refusing to get tested;
- the obligation was based on a ministerial decree and not on a mere order of the employer; and
- it concerned a place of work with vulnerable persons.

Therefore, it is possible that in a case where one or more of the mentioned elements differ, the courts might also decide differently.

The decision was reached relatively quickly by all the courts, and the Supreme Court also expedited the publication of its decision (only a few days after reaching it) to provide some guidance in times of the pandemic, where many legal questions are unclear.

2.2 Part-time work

Austrian Supreme Court, of, 8 ObA 32/21w, 03 August 2021

According to §§ 29, 53 and 55 of the Tyrolean Act on Contractual Municipal Employees 2012 (*Tiroler Gemeinde-Vertragsbedienstetengesetz 2012*), part-time employees only receive a supplement of one quarter of the supplement of full-time employees for so-called stand-in services on Sundays and public holidays and receive no increased

supplement at all during the night shift, while full-time employees receive an increased supplement of 100 per cent. The works council of an association of local authorities claimed that this constituted a breach of EU law, namely of the Part-Time Work Directive 97/81/EC.

The Supreme Court refused to hear the case as it considered the existing jurisprudence on the direct applicability of EU law vis-à-vis the State to be clear. However, it used this opportunity to point out the essence of its existing case law.

According to the case law of the CJEU (see case C-282/10, *Dominguez*, paras. 38 et seq.), an individual may rely on a Directive against the State, regardless of the capacity in which the State acts – as an employer or as a public authority. In both cases, the State must be prevented from benefiting from non-compliance with EU law. A body which, irrespective of its legal form, is required by virtue of a State act to provide a service in the public interest under State supervision and which, for that purpose, is endowed with special rights that go beyond the rules applicable to relationships between private individuals, is one of the legal entities which may be held to be in breach of the directly applicable provisions of a directive. This is also the case for an association of local authorities.

The Court also pointed out the discriminatory nature of the provisions in the State act not only in terms of part-time work, but also that this constitutes discrimination based on sex, as 90 per cent of part-time workers are female. As there is no justification for this difference in treatment, this is considered to be in breach of EU law.

In this case, the Supreme Court has reiterated the direct applicability of EU law, in concreto of the prohibition of discrimination of part-time workers. It is in line with national case law as well as with the jurisprudence of the CJEU.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

As pointed out in the March 2021 Flash Report, the Austrian Working Time Act (*Arbeitzeitgesetz*, AZG) and the Austrian Rest Time Act (*Arbeitsruhegesetz*, ARG) do not contain definitions on working time or rest time. However, the Working Time Act includes special categories of working time referred to as 'standby duty' or 'readiness to work' (*Arbeitsbereitschaft*, § 5 Working Time Act). This is considered working time and allows for the extension of daily working time when the worker's working time substantially and regularly consists of such 'stand-by duty'. Also, there is a limit for on-call duty during daily as well as weekly rest periods: according to § 20a Working Time Act, on-call duty during a daily rest period may only be agreed upon on ten days per month and according to § 6a of the Rest Time Act during two weekly rest periods per month. The two Acts do not, however, include any explicit legal definitions.

The jurisprudence of the Austrian Supreme Court differentiates between on-call duty and stand-by duty as follows: during on-call duty, the worker only has to be available to the employer. In this case, the employee can choose his or her place of stay and essentially decide freely on the use of that time, whereas in the case of stand-by duty, he or she must remain at a place determined by the employer to be at the employer's disposal at any time. The limit for such availability to be ready to work is around 30 minutes – if the worker is required to be available to work in less than that time, according to the Supreme Court, the on-call duty will be considered to be stand-by duty, and hence working time.

Concerning the daily in-work rest break, § 11 Working Time Act does not mention the possibility to combine it with on-call duties. The Supreme Court's case law (9 ObA 9/18s and many others) is very clear, however: the break must be genuine free time and the

worker must be able to dispose of this time as he or she wishes. In the mentioned decision, which concerned a waiter on a train, it was explicitly mentioned that being on call during a 'break' reduces his or her free disposability of time and therefore contradicts the recreational purpose of such a break. Therefore, being on call during the in-work rest break results in such a break being considered working time.

The CJEU ruling now endorses this case law and the Austrian case law is fully in line with it. The Austrian Supreme Court would surely have considered an arrangement as the one in the present case (i.e. a duty to be available during the break within two minutes) as working time.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) The government has introduced consumption cheques as a relief measure for workers in sectors hit hard by the pandemic, or to compensate extra work.

(II) Two recently concluded collective agreements regulate 'landing jobs', a form of partial reduction in work performance for older workers who receive social security benefits.

(III) The Belgian Constitutional Court rejected the appeal for annulment of the Law on the Status of Penitentiary Personnel, which regulates the right to strike to ensure the provision of essential services.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for workers

While the COVID-19 crisis has resulted in temporary unemployment for a considerable number of workers, it has increased the work of other workers. To compensate the latter for their increased work, and to support businesses that had to close during Spring 2020, consumption cheques and a consumption premium, also referred to as the 'corona premium', were introduced.

These measures are regulated in Articles 56 to 62 and Article 67 of the Law of 18 July 2021 containing temporary support measures as a result of the COVID-19 pandemic, as well as Royal Decree of 21 July 2021 amending Article 19quinquies of the Royal Decree of 28 November 1969 implementing the Law of 27 June 1969 on the social security of workers, and Royal Decree of 30 July 2021 implementing Articles 7, §1, of the Law of 26 July 1996 on promoting employment and preventive safeguarding of competitiveness.

One of the changes that came into effect on 01 August 2021 was eligibility for consumption cheques or the consumption premium. They can be used in:

- employers in the tourism and catering sector;
- small retail stores that sell goods or offer repair services in the physical presence of customers;
- wellness centres;
- activities that fall within the scope of the joint committee for tourist attractions (Joint Committee No. 333);
- movie theatres;
- organisations engaged in the cultural sector that are subsidised by the government;
- bowling halls, swimming pools, fitness centres or sport clubs;
- beauty parlours, pedicure salons, massage parlours, barber shops and tattoo shops;
- driving schools.

Consumption cheques or the consumption premium can be granted to any worker. There is no requirement for the beneficiary to have already been in the employer's service

during the first wave of the COVID-19 pandemic and effectively worked during that period.

To be eligible for the consumption premium, the employer must have achieved 'good results' during the COVID-19 crisis. The legislation does not, however, define this in more detail, hence there is room for discussion on what qualifies as 'good results'.

Consumption cheques or the consumption premium must be introduced by means of a collective bargaining agreement. If there is no trade union delegation or in case of staff that do not usually sign collective bargaining agreements, a written agreement with the respective employee is also possible. The maximum amount of the consumption premium is EUR 500 per employee.

The end date of the validity of the consumption cheques or consumption premium has now been set to 31 December 2022.

Consumption cheques or the consumption premium are exempt from income taxes. They are also deductible for corporate tax purposes.

Consumption cheques or the consumption premium are exempt from normal employee and employer social security contributions. There is, nevertheless, a special employer social security contribution of 16.5 per cent.

The legislation does not explicitly address the employment law regime of consumption cheques or of the consumption premium, hence, the general rules apply. As these benefits are exempt from social security contributions, they are also excluded from the calculation basis of holiday pay. Since consumption cheques or the consumption premium are non-recurring payments, they should not be included in the calculation basis of an indemnity in lieu of notice.

There is a maximum margin for the development of labour costs (see the August 2021 Flash Report). However, the amount of the consumer cheques or consumer premium is not included in the calculation of the wage cost development.

1.2 Other legislative developments

1.2.1 Flexible working time

So-called 'landing jobs' are forms of partial career interruption in the form of an entitlement to reduced working hours for some older employees, the loss of whose wages is partly compensated by so-called interruption benefits, which are a form of unemployment benefits paid by the National Employment Office. A landing job allows older employees who are at least 60 years old to reduce their working hours by 20 or 50 per cent until they retire. In principle, an employee must be 60 years or older to obtain the break benefits for a landing job. However, the legislation allows a lower age limit for the entitlement to interruption benefits, albeit not under 55 years, for:

- workers employed in an enterprise recognised as facing economic difficulties or that is undergoing restructuring;
- workers with a long career (35 years), an arduous profession, 20 years of night work or workers who work in the construction sector, with a certificate of incapacity for work from the works doctor.

On the basis of CBA No. 156, concluded in the National Labour Council on 15 July 2021, employees with a long career, arduous profession or who work for a company that is facing economic difficulties or is in the process of restructuring are, for the period 2021–2022, eligible for a 20 per cent landing job with benefits for those aged 55 and up. For

a half-time landing job with benefits, the age limit has been reduced from 57 to 55 years.

At the same time, CBA No. 157, concluded in the National Labour Council of 15 July 2021, which was also concluded in the National Labour Council, provides for an extension of these provisions for the period from 01 January 2023 to 30 June 2023.

The derogation only applies under certain conditions. Among other things, an existing sectoral collective bargaining agreement is required. Employers from sectors in which the required sectoral CBA cannot be concluded because the sector does not fall under an established joint committee or because the joint committee is not operational may accede to CBA Nos. 156 and 157 by means of a collective agreement, an act of accession or an amendment to the work regulations at company level.

2 Court Rulings

2.1 Right to strikes in essential services

Constitutional Court, No. 107/2021, 15 July 2021

The socialist trade union argued that the right to collective action and strike contained in the Belgian Constitution, Article 8(1)(d) ECOSOC, Article 6(4) of the revised European Social Charter had been violated by the Law of 23 March 2019 on the organisation of penitentiary services and the status of penitentiary personnel.

The Belgian Constitutional Court rejected the appeal for invalidating the law. In this judgment, the Court of Cassation clarified that essential services that must be guaranteed by penitentiary staff in case of a strike in the Law of 23 March 2019 contribute to ensuring the human dignity of detainees as enshrined in Article 23 of the Constitution, as well as to prohibiting inhumane or degrading punishment or treatment as enshrined in Article 3 of the European Convention of Human Rights. The system of minimum services is, in principle, based on the voluntary commitment of staff members, as the prison staff members must announce 72 hours before the strike whether they will strike or not.

Thus, the determination of the services covered by the minimum service in prisons does not constitute a disproportionate interference in the event of a strike, with the right of the respective civil servants to strike remaining upright and, in particular, does not prevent social dialogue and collective bargaining, nor does it substantially affect trade union freedom and the right to collective bargaining.

If the strike lasts for more than two days and the list of staff members who are not participating in the strike does not cover the minimum needs, the Provincial Governor can order the necessary staff members to perform their work and to provide the services necessary to guarantee the minimum services.

2.2 Termination of employment contracts

Cour de Cassation, No. S.20.0013.N., 06 September 2021

The party that unilaterally and substantially modifies an essential element of the employment contract is deemed to have unlawfully terminated the employment contract. This form of dismissal is referred to as implicit dismissal (constructive dismissal) and has been addressed in case law for a long time. In this judgment, the Court of Cassation clarified the criterion to determine whether an essential element of the employment contract has changed substantially. According to the Court, this is

> *"the degree of modification of the element, in particular the question whether the element in question has been modified to such an extent that it cannot be*

assumed that, after this modification, the original employment contract will still be performed".

Indeed, when the employer—as it usually is the employer and not the employee—introduces such unilateral changes to components that essentially make up the agreement, he or she is indicating that he or she no longer wishes to comply with the contract, which is based on an agreement, and is thus tantamount to an irregular, implicit dismissal. The reasons why the employer refuses to honour an essential component of the employment contract are irrelevant to the assessment of the question of implied dismissal.

The Court of Cassation stated that "The interest of the parties in the amendment or retention is irrelevant in this respect".

Previous judgments confirm that the employer cannot appropriate the right to unilaterally modify an essential component of the employment contract for economic, organisational or financial interests: such *ius variandi* does not exist.

It is likely that this judgment will end the case law of the labour courts, which weighs the parties' interests when assessing implicit dismissals.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, the CJEU reiterates the principles set out in case C-344/19, *Radiotelevizija Slovenija*: periods of availability are either working time or rest periods. A high frequency and unpredictability of breaks in working time imply that the worker is in a permanent state of readiness. In any event, given the short duration of the breaks, the worker's opportunities to relax during the break and devote this time to activities of his or her choice were limited. All this suggests that the availability time of uninterrupted breaks should be regarded as working time.

This ruling clarifies the concepts of working time and rest periods in relation to workers who are frequently on stand-by in their company, with relatively short rest breaks that may or may not be interrupted for urgent tasks.

It is expected that Belgian case law will follow the clarification of the CJEU which leans towards working time in both cases.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

With new COVID-19 infections rising sharply, the Minister of Health has introduced more rigorous pandemic containment measures in Bulgaria.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Antigen test kits

The National Assembly (Parliament) has adopted a law ratifying the Donation Agreement SANTE /2020/C3/082-DC-BG of all-in-one antigen test kits for diagnosis of COVID-19 of the Republic of Bulgaria by the European Commission and Second Agreement for donation SANTE /2020/C3/082-DC-BG of all-in-one antigen test kits for diagnosis of COVID-19 of the Republic of Bulgaria by the European Commission, adopted by the 46th National Assembly on 7 September 2021. The Law has been published in the State Gazette No 77 of 06 September 2021.

1.1.2 Introduction of more rigorous pandemic containment measures

With new COVID-19 infections rising sharply, Order No РД-01-748/ 02 September 2021 of the Minister of Health introduces more rigorous containment measures in Bulgaria for two months, from 7 September to 30 October 2021.

The school year will start on 15 September with in-person classes, but pupils will switch to online learning if the coronavirus situation deteriorates. Language centres will remain open, with up to 10-person groups and observance of all precautions. Dance and art schools and centres can allow up to 19 persons in one room. Children's centres and group services for children will be suspended.

Food service establishments and gambling facilities will be open from 7 a.m. to 10 p.m., and limited to 6 persons per table. Staff must wear masks. Night clubs and discos will be closed.

Up to 30 persons indoors and up to 60 persons outdoors may attend private parties such as weddings and baptisms. Congresses, seminars, examinations and competitions may take place at 30 per cent seating capacity and with up to 30 persons in one room. Music festivals, folk initiatives and other crowd-drawing events are suspended.

Fitness gyms and hydrotherapy facilities will be limited to 30 per cent capacity. Attendance of films, theatre performances and concerts indoors will be limited to 50 per cent seating capacity. Admissions to museums and galleries will be limited to 1 visitor per 8 sqm., with the observance of a minimum distance of 1.5 metres. Capacity restrictions will be waived for all establishments where both the staff and the visitors are fully vaccinated, have recovered from COVID-19, or have a negative PCR test, which is valid for 72 hours.

Indoor sports competitions will be held without an audience, and professional competitions outdoors can take place at 30 per cent seating capacity, with spectators spaced out (every third seat).

Wearing masks is mandatory at open-air retail and wholesale markets for both sellers and customers, with one-way movement of visitors and allowing 1 person per 8 sq.m. at a time.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

There is no legal provision in Bulgarian labour legislation that regulates situations such as those examined in the present case. However, the general provision on overtime work may be applicable. According to Article 143(1) of the Labour Code (LC):

> *"work performed under the instruction of, or with the knowledge of and with no objection from the employer or the respective superior by an employee beyond the agreed working time shall be considered overtime work".*

Pursuant to Article 151(1) LC

> *"the working time of the employee shall be interrupted by one or several rest breaks. The employer shall provide the employee a rest break for a meal, which may not be shorter than 30 minutes."*

The rest breaks are excluded from the working time (Article 151q(2) LC). This means that any work performed under the instruction of the employer or the respective superior will be treated as overtime work and will be compensated with higher remuneration.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The CJEU's judgment in the present case does not have any implications for Croatian law because the daily period of rest (break) is considered part of working time (Article 73(4) of the Labour Act of 2014, last amended in 2019).

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The Court has followed the same line of thinking as in case C-344/19, 09 March 2021, *Radiotelevizija Slovenija*, which interpreted the meaning of stand-by time.

Cypriot law copies verbatim the definitions included in Directive Article 2.1 which defines 'working time' as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'. Article 2 of the Cypriot law also copies Article 2.2 of the Directive verbatim and 'rest period' is defined as 'any period which is not working time'.

As argued in the March 2021 Flash Report, the CJEU cases are of relevance for Cypriot law as they clarify more precisely what is understood by 'working time' and also cover the question of renumeration and contradicts the Cypriot Supreme Court's rulings.

In *Attorney General v Michalis Kongorizi* and Agapiou v *Attorney General (ΓΕΝΙΚΟΣ ΕΙΣΑΓΓΕΛΕΑΣ ΤΗΣ ΔΗΜΟΚΡΑΤΙΑΣ, v. ΜΙΧΑΛΗ ΚΟΓΚΟΡΟΖΗ*, 55/2005), the Supreme Court dealt with the issue of on-call time, which are periods during which a worker is required to remain at the workplace, prepared to carry out his or her duties if requested to do so. The Supreme Court, citing the relevant CJEU cases C-303/98, *Simap*, and C-151/02, *Jaeger*, concluded that remuneration is not an issue the CJEU has ruled on, neither does any EU rule or Cypriot labour law. Therefore, the Cypriot Court decided that this was an issue that was to be dealt with entirely on the basis of the contract agreed between the two parties. Accordingly, the Supreme Court ruled that on-call time must be considered working time. The Supreme Court argued that the two cited CJEU cases did not address the issue of remuneration but only the issue of the performance of labour, and that the relevant provisions of the law transposing the Working Time Directive do not interfere with the issue of remuneration in any way, nor do they impose a duty to remunerate on-call time as equal to the genuine performance of duties by the employee. The European Commission Report on the implementation of the Working Time Directive (COM (2010) 802 final) rightly unequivocally construed that "'*on-call time' refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so*", as the Court of Justice's rulings "*all on-call time at the workplace must be fully counted as working time for the purposes of the Directive*". Yet, it considered that "*on-call time at the workplace is entirely treated as working time under national law in nine Member States, including Cyprus*".

In the most recent case No. 1471/2015, of 15 April 2020, *Nicoli and others V Republic*, the Administrative Court allowed an appeal by firefighters regarding recognition and compensation for on-call waiting time. In 2015, the applicants appealed against the

decision of the Police Chief to compensate them for the time they were on-call. The Court also referred to the established practice of on-call duty having been in force for over 20 years, though there was discrimination in the treatment of the two different fire brigade officer groups, i.e. duty officers, on the one hand, and district/assistant district officers on the other.

Until 29 July 2015, duty officers were not requested to be on duty after completing their service due to a change in their working hours to 11 hours of work and 24 hours of rest and 13 hours of work and 48 hours of rest, while district/assistant district officers continued to perform their on-call duties.

Furthermore, in addition to the complaint of non-payment of compensation, the Court considered the problems created by how on-call duty is carried out: the maximum average weekly working duration of 48 hours concerned firefighters and within this limit, on-call duty is considered to be overtime, as established by the relevant jurisprudence. There is no derogation for firefighters.

The Court referred to the wording of the concept of 'rest time' during which the employee has no obligation to his or her employer and may pursue his or her interests freely and without interruption to neutralise the effects on the employee's safety and health. The Court considered the applicants' claim that non-observance of the obligations and deadlines imposed on a Member State by a Community Directive cannot be justified by any provisions or practices of national law. The Administrative Court decided that the Police Chief's decision is insufficiently justified and allowed the appeal, recognising that compensation is warranted for on-call duty time.

4 Other Relevant Information

4.1 Update on COVID-19 situation

September has witnessed further easing of pandemic-related restrictive measures, as the number of vaccinated persons is increasing and the infection rate seems to be dropping. Businesses are allowed to operate but customers must present a safe pass (vaccination certificate or 72-hour rapid test). Gyms, schools, colleges and universities have reopened with measures to ensure distance between individual (50 per cent capacity), access by those who possess a safe pass and other measures to contain the spread of the virus. Casinos are allowed to operate at 50 per cent capacity.

Check points that allow access from and to the northern territories not under the control of the Republic of Cyprus were operational, however, until 26 September 2021, together with the vaccination certificate, a rapid test or PCR test that is valid for seven days was required. From 27 September, all those who are vaccinated are allowed to cross, provided that they remain in the country for ten days.

The Deputy Ministry of Research, Innovation and Digital Policy made an announcement regarding the issuance of the EU Digital COVID Certificate to Turkish Cypriots: Turkish Cypriots who have been vaccinated and wish to obtain the EU Digital COVID Certificate (EUDCC) for travelling purposes until 16 September 2021, should continue to follow the existing process (as described in the announcement dated 17 August 2021. See here for the Announcement by the Deputy Ministry of Research, Innovation and Digital Policy for the issuance of the EU Digital COVID Certificate to Turkish Cypriots, 30 August 2021).

As far as travel is concerned, a new epidemiological risk assessment of countries concerning COVID-19 was published on 27 September 2021.

The new Government Decree provides for a vaccination procedure for the third dose for specific groups of the population (PIO, 06 September 2021). Despite the decision to proceed with the third vaccination campaign of specific population groups against

COVID-19, the aim of the vaccination programme remains the primary vaccination of the entire population over the age of 12 years.

4.2 Collective action

Part-time, fixed-term and substitute teachers have suspended their strike action, yet the Ministry refuses to comply with the Administrative Court ruling which considers their work to be 'concealed employment'.

The case is very serious as it directly affects over 3,000 workers in public schools and institutes; moreover, it is 'an important precedent for many thousand more workers' who are in a similar position in the public and private sector. As reported in the December 2020 Flash Report, the Administrative Court concluded that if the social security authorities failed to provide reasons for why they are considered to be 'self-employed', their employment will be deemed concealed employment. The Ministry of Education started to negotiate a settlement with the unions, but then filed an appeal. The Ministry refused to implement the Court's decision in the interim period and did not treat these individuals as employees and as a result, a prolonged dispute began with strike actions since May 2021. The striking workers have not been paid since. The unions SEK and PEO, decided to suspend the strike action. The government has invited teachers whose contracts have expired to reapply as service providers and continues to refrain from implementing the Administrative Court's decision (1368/2014).

Since 2014, numerous teachers who had been working under a fixed-term or part-time contract for many years have been forced to provide services as self-employed contractors and have sought remedy in the labour disputes court. The cases are still pending.

The unions insist (interview with trade unionist, 30 September 2021) on the implementation of the Administrative Court's decision contrary to the decision of the Director of Social Security Services, who designated a number of part-time and fixed-term teachers in public schools as subcontractors under a contract of service (1368/2014). Whilst negotiations between the trade union and the Ministry of Education are underway, the Director of Social Security Services has appealed against the decision of the Administrative Court.

The case affects thousands of workers and is a test case on the application of basic labour law for workers in atypical forms of employment under Directive 97/81/EC on part-time work and Directive 1999/70/EC on fixed-term work. Union leaders have suggested that numerous teachers will pursue their case via the courts and will submit a complaint to the EU Commission on grounds that the government is violating the EU acquis on fixed-term and part-time work, as these teachers are being discriminated and their right to convert their temporary employment status into a permanent one is not respected by the Republic of Cyprus (interview with trade unionist, 30 September 2021).

4.3 Collective action

The English School Staff trade union (ESSA) staged an impromptu work stoppage on 26 September morning to protest the suspension of their union chair after she allegedly used the school system to send 'unauthorised correspondence to parents'. The management has barred the union leader from any correspondence and access to her work email and on-line school facilities, alleging violation of GDPR (*Η Αγγλική Σχολή έθεσε σε διαθεσιμότητα την πρόεδρο της Συντεχνίας της, PaideiaNews,* 30 Sept 2021). The union alleges that the union chair merely set the record straight and sent the email to parents to clarify the union's position following misinformation communicated to parents by the mazement (interview with ESSA union member, 30 September 2021). The union and the school board announced that they would defend the trade unionist leader against the disciplinary action against her. The stoppage lasted for two periods,

between 9.55 a.m. and 11.30 am, and was supported by teachers from the secondary school unions OELMEK and the general workers federations, SEK and PEO, as well as members of the Parliament House Education Committee, and pupils (Antigoni Pitta: 'Trouble at English School as teachers down tools', Cyprus Mail, 30 September 2021).

4.4 Disciplinary action

As reported in the August 2021 Flash Report, the Ministry of Education initiated disciplinary action against a head teacher in a public secondary school, who is also a well-known painter whose paintings were displayed on his Facebook page.

Following a public outcry and the Attorney General issuing a statement that the decision to discipline the head teacher and artist is 'political' and not connected to any criminal violations, the Cabinet on Wednesday announced that the disciplinary procedure against the controversial public school headteacher and artist Giorgos Gavriel would be dropped.

The controversial case was suspended as there was wide condemnation of the way the government had handled the case ('Disciplinary case against artist Gavriel dropped, Prodromou under fire', Cyprus Mail, 15 September 2021. *Έκαναν πίσω με τη δίωξη του Γιώργου Γαβριήλ: Οι αντιδράσεις έφεραν αποτέλεσμα*, *AlphaNewsLive*, 15 September 2021). The teacher received a letter from the Ministry informing him that the case against him had been 'suspended' (Letter dated 16 September 2021, *Πειθαρχική υπόθεση* 13/2021).

The ministerial action and the Ombudswoman's position paper were criticised for failing to assert how and where the allegations occurred and contravened the rights the teacher and artist is entitled to as an employee and as a citizen under the Charter for Fundamental Rights, particularly under Article 13 and Article 10 and 11 of the European Convention on Human Rights, the Constitution and Cypriot law.

Czech Republic

Summary

(I) Restrictions on businesses and the travel ban have been readopted and extended, with amendments.

(II) An act introducing several changes in terms of sickness insurance, including the extension of paternal leave, as well as changes to care and long-term care benefits, has been adopted and will enter into effect on 01 January 2022.

(III) A government regulation introducing certain changes in the working hours of employees in the transportation sector has been adopted and will enter into effect on 01 January 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 restrictions

With effect as of 11 September 2021, restrictions on the entry of persons in the territory of the Czech Republic have been readopted – with certain amendments. The government has retained and amended the travel ban (see the Protective Measure of the Ministry of Health No. MZDR 20599/2020-116/MIN/KAN). These restrictions have been amended with effect as of 30 September 2021 (see Protective Measure of the Ministry of Health No. MZDR 20599/2020-121/MIN/KAN).

With effect as of 30 September 2021, the conditions on the operation of businesses have been readopted and amended (see Protective Measure of the Ministry of Health No. MZDR 14601/2021-25/MIN/KAN). At the same time, requirements for holding mass events and assemblies have been adopted as well.

Businesses are allowed to operate as long as they adhere to certain rules. Mass events and assemblies may also only take place if certain rules are adhered to. Persons may only enter businesses and attend mass events and assemblies under certain conditions as well (they need to have been tested, vaccinated, keep a distance from others, etc.).

1.2 Other legislative developments

1.2.1 Work-life balance

Act No. 330/2021 Coll., amending Act No. 187/2006 Coll., on sickness insurance, as amended, as well as certain other acts, has been published. The Act will enter into effect on 01 January 2022.

As already reported in the August 2021 Flash Report, the Act introduces several changes to sickness insurance. Most notably, it extends the duration of paternity leave to 2 weeks.

Moreover, it extends the beneficiaries of care benefits to also include carers that do not live in the same household as the persons they are caring for, and reduces the period of hospitalisation required for entitlement to long-term care benefits.

1.2.2 Working hours in the transport sector

Government Regulation No. 342/2021 Coll., amending Government Regulation No. 589/2006 Coll., which sets forth regulations on the working hours of employees in the

transportation sector, as amended, has been published and will enter into effect on 01 January 2022.

Government Regulation No. 589/2006 Coll. uses the term 'administrative journeys' (in Czech: *'režijní jízdy'*), referring to the period of time necessary for the employee's commute from the agreed place of work to another location to perform work prior to the commencement of work, during the performance of work, or after the performance of work.

Government Regulation No. 342/2021 Coll., Section 13 of Government Regulation No. 589/2006 Coll., which regulates the working hours of rail transport employees, has been amended as follows:

> *"(1) The employer shall distribute the fixed weekly working hours of the rail transport employee on national, regional and siding railways so that the duration of the shift does not exceed 13 hours. Where a shift includes an administrative journey, the length of the shift may be extended under the first sentence only by the duration of the administrative journey, provided that the shift may not exceed 15 hours; however, in the case of a railway transport employee on a national, regional or siding railway who drives a railway vehicle, the duration of the shift may only be extended in this way in case of an administrative journey planned and carried out at the end of the shift.*
>
> *(2) If an employer divides a shift of a railway transport employee who drives a railway vehicle on a national, regional or siding railway into several parts by means of a written work schedule, the time between the start of the first part of the shift and the end of the last part of that same shift may not be more than 13 hours or not more than 15 hours under the conditions referred to in subsection (1) within a consecutive 24-hour period.*
>
> *(3) An administrative journey of a railway transport employee on a national, regional or siding railway is considered working time.*
>
> *(4) The employer shall also maintain a record in the working time register of individual rail transport employees' administrative journey time, indicating the start and end of its duration."*

In an effort to prevent possible future excesses with a negative impact on the occupational safety and health of rail transport employees, the Government Regulation now explicitly limits the possibility of extending the shift due to his or her administrative journey. To improve the safety of employees and to eliminate the risk of increased fatigue during work, the Government Regulation introduces a limit to the time period during which a driver's shift can be divided into several segments over a consecutive 24-hour period.

Government Regulation No. 342/2021 Coll., Section 14 of Government Regulation No. 589/2006 Coll., which regulates the working hours of rail transport employees, has been amended as follows:

> *"(1) The employer shall schedule working hours in such a way that a railway employee on a national, regional or siding railway has at least 11 hours of uninterrupted rest between the end of one shift and the start of the next one within a consecutive 24-hour period.*
>
> *(2) The rest period referred to in subsection (1) may be reduced to up to 7 hours within any consecutive 24-hour period for a railway transport employee of a national, regional or siding railway, provided that the employer makes provision for the employee to sleep in a bed for at least 6 hours. Continuous rest between two shifts may be shortened provided that the following rest period is extended by the period of the shortened rest period."*

Employees will now be guaranteed a minimum continuous rest period between shifts of at least 7 hours (from previously 6 hours), provided that the employee can spend at

least 6 hours of this time sleeping in a bed. The extra hour of rest time provided should be sufficient to allow the employee to actually sleep in a bed for at least 6 hours after finishing work.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The present judgment originates from a request for a preliminary ruling raised by a Czech court, the District Court for Prague 9. The court had already decided the case in line with EU law prior to the preliminary ruling. The court held that the worker could have been called upon at any time during his breaks and had to resume the performance of work within 2 minutes, which the court found to be an immense mental and physical constraint, regardless of the frequency of interventions. According to the court, the employer had not adequately dealt with the substitutability of firefighters and, according to the court, it was clear that an unpredictable work schedule was not ruled out in any part of the worker's shift. The court considered the breaks to be working time that must be remunerated. Its ruling and the Appeal Court's endorsement were set aside by the Supreme Court, which referred the case back to the District Court.

As reported in the March 2021 Flash Report, the Czech Labour Code differentiates between 'work breaks for meal and rest', which are provided by the employer after a continuous work shift of maximum six hours, and a 'reasonable time for meal and rest' which takes place when work cannot be interrupted.

The former shall last at least 30 minutes and is considered a rest period, and is thus unpaid; the latter, on the other hand, is considered working hours as the employee does not benefit from a genuine rest period due to the nature of the work (e.g. an employee who supervises boilers and who cannot leave the boilers' proximity for more than 5 minutes due to the boilers' technical requirements), and this time is therefore remunerated.

Bearing this in mind, the Supreme Court held that these work breaks were planned and regular, that the work was not of a continuous nature that could not be interrupted, and that while there was a possibility that the firefighter's breaks could be interrupted by an emergency call, such random occurrences did not constitute work that cannot be interrupted. Furthermore, the Supreme Court added that if such random occurrences were crucial for determining the nature of work (continuous or not), such an approach could be used for other random occurrences as well, e.g. employees' obligation to actively prevent harm to the employer's property in case of impending risk (Section 249(2) of the Labour Code).

As mentioned above, the Supreme Court set the previous rulings aside and referred the case back to the District Court, resulting in the lower court deciding the case in line with the Supreme Court's ruling (according to the procedural rules of the Czech Republic). Instead, the District Court referred questions to the CJEU for a preliminary ruling, and the CJEU ruled as cited above.

The main implication of this judgment is that the District Court will likely decide the case in line with its initial ruling, i.e. determining that the worker's breaks are stand-by time which must be considered working hours (rather than as rest periods), taking into account the consequences for the worker's ability to freely manage his or her time, the time limit within which he or she must resume work, the frequency of the interventions,

other constraints imposed on the worker and the facilities granted to him or her. Such a decision would be in line with the CJEU's rulings C-107/19, C-344/19 and C-580/19. The CJEU reaffirmed that the principle of primacy of EU law enables the lower court to disregard the ruling of a higher court if this is not compatible with EU law:

> "*The principle of primacy of EU law must be interpreted as precluding a national court ruling following the setting aside of its judgment by a higher court, from being bound, in accordance with national procedural law, by the legal rulings of that higher court, where those assessments are not compatible with EU law*".

4 Other Relevant Information

4.1 Employment policy

The Labour Office is introducing a new active employment policy instrument – the so-called FLEXI Programme. According to the Labour Office, the FLEXI Programme supports flexible forms of employment with the goal of promoting greater harmony between workers' private and professional life and facilitating entry into the labour market, especially for people who, for various reasons (health, family), cannot be employed full time. The target group includes:

- people with disabilities;
- people over the age of 60 years;
- people caring for a child that is under the age of 10 years;
- people caring for a person with some degree of dependency;
- people unable to work full time for an objective reason.

To ensure these goals, the Labour Office created the following three forms of support:

1. shared work position;
2. socially purposeful job – generational tandem;
3. training.

Their common denominator is the condition to enter into an employment relationship with a so-called job seeker (or a person interested in a job) who is registered with the Labour Office and has joined the FLEXI programme. Employers can also sign up for the programme.

Shared work position

The employer establishes a cooperation with the Labour Office for the FLEXI project and creates a shared work position pursuant to Section 317a of the Labour Code (i.e. a position in which multiple employees rotate). The Labour Office recommends suitable candidates chosen among the job seekers who signed up for the programme, and if an employment relationship is concluded, the employer may apply for a subsidy.

The subsidy of the Labour Office consists of the reimbursement of salary costs; the maximum period is 12 months and the maximum amount is CZK 15 200 per shared work position. The number of shared work positions is not limited but maximum 4 employees can work in each shared position (the minimum workload is 25 per cent of the total weekly working hours) of which at least one must be a job seeker. The subsidy is reduced by each employee who does not belong to the target group.

Generational tandem

This form of support has two goals – on the one hand, to keep a person who is close to retirement age in an employment relationship (the person must be a current employee of the employer who will be entitled to a pension in no more than 36 months) and on

the other hand, to increase the qualifications of job seekers (under 30 years of age) whom the employer hires.

Under the generational tandem, the employer receives a subsidy both for the trainer's salary costs (up to CZK 24 000 per month) and for the salary costs of the newly hired employee (up to CZK 20 000 per month). The subsidy can be collected for 6-12 months. At the same time, the employer undertakes that the trainer's employment does not end earlier than six months after the end of making use of the subsidy.

Training

The subsidy for training already existed in the past, but it was re-introduced together with the FLEXI Programme, probably because it pursues similar goals.

The contribution is provided to employers who conclude an employment relationship with a job seeker that the Labour Office is endorsing for reasons of health, age, caring for a child or other serious reasons.

The maximum period of entitlement is 3 months and the subsidy's maximum amount is half of the minimum monthly salary. The subsidy must be applied for before concluding the employment relationship and it cannot be combined with the previous two FLEXI instruments.

Denmark

Summary

Danish society has now fully re-opened, with all remaining COVID-19 restrictions ending on 10 September 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 End of COVID-19 restrictions

Danish society has now fully re-opened. As of 10 September 2021, COVID-19 was downgraded from being a 'critical threat to society' in Denmark. The decision implies that all remaining COVID-19 restrictions ended on 10 September, including the use of face masks as well as of a COVID-19 passport.

As of 29 September 2021, nearly 75 per cent of the population was fully vaccinated. Around 1.2 per cent of the population has been re-vaccinated, which means that they have received their third dose. The infection rates are relatively stable.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In this ruling, the CJEU clarifies and exemplifies the distinction between working time and rest periods with regard to 'stand-by time during breaks'. The argumentation of the Court largely follows the CJEU judgments in C-344/19 and C-580/19 of 09 March 2021 (see March 2021 Flash Report).

In the present case, the worker had to be ready to respond to a call from his employer within two minutes during his break, which he spent on the work premises. The CJEU concluded that 'such a break constituted working time', if that break affected—objectively and very significantly—that the worker's ability to manage such time freely and to devote it to his or her own interests.

The criteria listed by the CJEU does not conflict with existing Danish regulations or case law, which has been interpreted in conformity with the case law of the CJEU, particularly in cases involving working time and stand-by time.

The Working Time Directive 2003/88 is implemented in Denmark in three different statutory acts as well as in collective agreements. The calculation of daily and weekly rest periods is implemented in the Work Environment Act. According to the Executive Order issued by the Minister of Employment in 2002 (amended in 2003), Section 15, it follows that 'stand-by time at the work premises cannot be regarded as daily or weekly rest periods'.

It is also custom in many Danish collective agreements to have provisions on 'remuneration for breaks', which entail that the employee is entitled to remuneration during breaks, if he or she must be at the employer's disposal during the break. These provisions are typically restricted to regulating remuneration aspects of the employee's performance of work and not the calculation of daily and weekly rest periods.

The new CJEU ruling clarifies and exemplifies how to calculate working time in relation to breaks, where there is a stand-by duty. The ruling falls in line with the existing Danish state of law on the issue, and in that sense, will have an impact on future cases to not deviate from the existing state of law.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

The Estonian Parliament has amended the Collective Agreements Act, establishing new rules on the extension of the scope of application of collective agreements.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The present case has implications for Estonia. The Estonian Employment Contracts Act (hereinafter ECA) regulates 'on-call' time. According to Article 48 of the ECA, if an employee and employer have agreed that the employee shall be available to the employer for the performance of duties outside of working time, this time will be deemed on-call time. An agreement on the application of on-call time that does not guarantee the employee the possibility of using daily and weekly rest time is void.

The part of the on-call time during which the employee is in subordination to the instruction and control of the employer is considered working time.

According to the longstanding interpretation of the ECA, on-call time is neither working time nor rest time.

Taking the CJEU's case into account, on-call time as described in the ECA must be understood as working time. To date, there have been no changes to the legislation and on-call time is still considered time that is neither equal to working time nor to rest time.

4 Other Relevant Information

4.1 Extension of collective agreements

The Estonian Parliament has amended the Collective Agreements Act (hereinafter CAA). The changes primarily concern rules for the extension of the scope of application of a collective agreement. As the Estonian Supreme Court has declared that the rules on the extension of the scope of a collective agreement are unconstitutional, the new amendments were deemed necessary.

According to the amendments, an extension of a collective agreement clause may be agreed upon by:

- an association of trade unions or a trade union whose members make up 15 per cent of the employees of the occupation or who have at least 500 members;
- and an employers' association or union whose members employ at least 40 per cent of the employees.

An extended condition of a collective agreement will be submitted to the minister responsible together with documents certifying the parties' compliance to the collective agreement with the requirements of the CAA. The minister responsible shall verify the compliance of the extended condition of the collective agreement with the requirements of the CAA. The inspection shall be carried out for consultative purposes by the Confederation of Employers and the representatives of the Estonian Confederation of Trade Unions. The minister responsible shall publish the extended condition of the collective agreement in the Official Gazette (*ametlikud teadaanded*).

It is not yet clear on what date the amendments will come into force.

The adopted amendments in Estonian can be found here.

Finland

Summary

(I) The government has submitted a proposal on a new act regulating workers' participation in Parliament. The act, which would replace the Act on Co-operation in Undertakings, is due to enter into force on 01 January 2022.

(II) A judgment of the Supreme Court has clarified the duties of the employer to inform the workers and removes uncertainties regarding the time and place of work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Workers' participation

The government submitted a proposal on a new Act on Co-operation (Government Proposal No 159/2021) to Parliament on 30 September 2021. The Act, which would replace the Act on Co-operation in Undertakings, is due to enter into force on 01 January 2022.

The government proposes provisions on continuous dialogue to develop the long-term relationship between the employer and employees. The point of departure is that the means of conducting dialogue in practice would be agreed at the individual workplaces. Another objective of the Act on Co-operation is to improve the employees' ability to exert influence and to access information. Before the employer makes a decision on matters that have a significant effect on the employees, such as reductions in the workforce, the employer would have to consult the employees or employee representatives. According to the revised act, this process would be referred to as "change negotiations". The procedures of change negotiations would remain largely the same as described in the current Act on Co-operation within Undertakings (334/2007).

The provisions on staff representation in companies' administration would largely correspond with the current Act, but would be transferred from the Act on Personnel Representation to the Act on Co-operation (725/1990). Employees should be represented in the body of the company or organisation that deals with important business matters, finances and personnel issues. The employee representatives would have a right to training to better perform their duties as employee representatives in the company's respective body.

2 Court Rulings

2.1 Transparent and predictable working conditions

Supreme Court, KKO:2021:66, 23 September 2021

The present case concerned an employee whose working time had been between 0-40 minutes per week at different work locations. After the employee's annual holiday, the work was supposed to continue; however, when the holiday ended, the employer had not informed the employee of a new work location.

The employee did not arrive at work after the holiday and after an absence of seven days, the employer considered the employment contract to have been cancelled.

In the present case, the Supreme Court established that the employer did not have the right to consider the employment contract cancelled on the basis of Chapter 8, section 3 of the Employment Contracts Act (55/2001).

If the employee is not informed about the work location after returning from holiday and the employer is aware of the nature of the employment contract (i.e. different working hours and work locations), it is up to the employer to inform the employee about the place of work and remove any related uncertainty or to at least attempt to reach the employee to inform him or her about his or her place of work.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The Finnish Act on Working Hours (872/2019) was amended in 2019.

The CJEU case law was taken into account in 2019 amendment, in particular as regards the meaning of working time and rest periods as well as the issue of stand-by time as working time.

Indeed, according to Section 4 of the Working Hours Act (872/2019), an employer and an employee may agree on stand-by duty and its compensation. Time spent on stand-by is not considered working time, unless the employee is required to remain at the workplace or in its immediate vicinity. Stand-by duty may not unduly hamper the employee's leisure time.

4 Other Relevant Information

4.1 Draft on working time

A Government Proposal (Government Proposal No. 161/2021) submitted to Parliament includes changes to the Working Hours Act that would enable deviations from the general provision on regular working hours and rest periods through national level collective agreements. Proposed deviations would be possible for work carried out from time to time during regular daily working hours in which the employee is already at work. The change would allow deviations from weekly and daily regular working hours.

4.2 Report on labour disputes

The report of Minna Etu-Seppälä and Simo Zitting deals with disputes about the choice of collective agreements and related resolution mechanisms with the aim of avoiding disturbances in industrial peace. This report was published by the Ministry of Economic Affairs and Employment in September 2021. According to the report, voluntary dispute resolution mechanisms have not had a significant impact on preventing and resolving disputes, unlike conciliation under the Act on Mediation in Labour Disputes (420/1962). The report proposes that, in addition to conciliation based on notices of industrial action, a voluntary mediation process on disputes related to the choice of collective agreements and other labour disputes should be established during which the parties could not launch industrial action. The report also proposes that in case a dispute on choice of collective agreements arises in labour court proceedings, all parties to the dispute should be heard. In addition, the report recommends that the preservation of industrial peace based on a normally applicable collective agreement be improved by clarifying the use of conditions that a collective agreement only applies to the members of an employee union that is party to the agreement.

France

Summary

(I) The Labour Division of the Court of Cassation ruled that an employee can request the judicial termination of her employment agreement due to moral harassment, even though a staff representation body had previously requested an investigation into the incident.

(II) The Court of Cassation established that an employee who declares to be on strike for the first few days of a rotation in the context of work for an airline company cannot claim payment of wages for the remaining days of the rotation.

(III) The Court of Cassation has confirmed its case law according to which the reclassification of an employee's part-time employment contract into a full-time one is justified if, through overtime, the employee has reached or exceeded the legal working time.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Moral harassment

Labour Division of the Court of Cassation, No. 20-14.011, 08 September 2021

The present case concerned an employee who had been hired in 1995 as a salesperson by a company, and whose employment contract was transferred by agreement to a coordinator position in 2012. She was absent from work due to illness from March 2012 onwards. In November 2013, a trade union brought an action before the Paris Employment Tribunal for the purpose of investigating alleged moral harassment against the employee.

Article L. 2313-2 (now L. 2312-59) of the Labour Code provides that the staff's representative body in the company (Social and Economic Council) may refer matters to the Employment Tribunal in the event of the employer's failure to take action in case of potential harassment of an employee, so that an investigation can be conducted, provided that the employer does not refuse. However, the Employment Tribunal rejected the union's request to carry out an investigation, as did the Court of Appeal in February 2018.

In June 2013, the employee brought an action for judicial termination of her employment contract. In March 2015, she was dismissed for incapacity and impossibility of reclassification. In October 2019, the Court of Appeal upheld the judgment, declaring her claims inadmissible.

The Court of Cassation annulled the Court of Appeal's decision on grounds that neither the principle of *res judicata* (according to which what has already been definitively judged cannot be judged again), nor the principle of the unicity of proceedings (according to which all claims based on the same employment agreement must be presented in the context of one and the same proceeding), prevent an employee from bringing an action on his or her own behalf with regard to the termination of his or her employment contract.

In other words, the Court of Cassation held that previous action by a staff representative body to investigate harassment does not prevent subsequent action by the employee him- or herself to obtain judicial termination of his or her employment contract. Moreover, the principle of unicity of proceedings no longer applies to actions brought

since 01 August 2016 (Labour Division of the Court of Cassation, No. 18-24.180, 01 July 2020).

2.2 Right to strike

Labour Division of the Court of Cassation, No. 19-21.025, 08 September 2021

The present case concerned an employee who had been hired as a pilot in 1987 and whose employment contract had since been transferred to Air France. On 23 July 2012, he informed his employer of his participation in a strike planned for 25 July 2012. The employer proceeded to deduct wages for the strike day of 25 July 2012 and the two following days, i.e. three days corresponding to the duration of the rotation planned in the employee's schedule. On 15 April 2013, the employee filed a claim with the Employment Tribunal for damages in respect of the deduction of wages.

Article L.1114-3 of the French Transport Code imposes on staff in the passenger air transport sector, whose absence compromises the operation of a flight, the obligation to individually inform the employer of his or her intention of participating in a strike at least 48 hours in advance and to inform the employer of his or her return to work at least 24 hours in advance.

Under the terms of Article L.6522-5 of the same Code, flight personnel are required, except in cases of force majeure or medical impossibility, to carry out their service as scheduled between two passages at one of the company's flight personnel assignment bases.

In view of the pilot's planned absence, the employer cancelled the entire rotation, which could not be carried out without the outbound flight, before deducting the employee's wages for the entire duration of the rotation, i.e. three days. The Court of Appeal upheld the employee's request to contest the deduction of wages for the two days when he had not declared that he would be on strike.

The Court of Cassation censured this position, considering that the employee had declared that he would be on strike on the first day of his rotation and would not be able to perform his service as scheduled, i.e. over three days, hence the employer could not be required to pay him remuneration for the following days of the rotation not performed, even if the employee had not declared that he would be on strike for the last two days of the rotation.

This solution can be explained by the specificity of the passenger air transport sector where the rotation days of flight crews constitute an indivisible whole.

2.3 Part-time work

Labour Division of the Court of Cassation, No. 19-19.563, 15 September 2021

In the present case, an employee was hired by a private security company under a part-time employment agreement for a monthly duration of 140 hours, reduced to 50 hours by an amendment in November 2014. The employee applied to the Employment Tribunal to have his part-time employment contract converted into a full-time contract.

Under the terms of the former Article L. 3121-10 of the Labour Code (L. 3121-27 new), the legal duration of employees' actual work is set at 35 hours per calendar week.

Under the terms of the former Article L. 3123-17 of the Labour Code (L. 3123-9 new), overtime (i.e. hours worked by a part-time employee in addition to the normal working hours stipulated in his or her employment agreement) cannot have the effect of increasing the working hours performed by an employee to the level of the legal working hours.

The Court of Appeal dismissed the employee's claim, pointing out that his working hours were fixed on a monthly basis, so that working more than the legal weekly work hours (*i.e.* 35 hours) during one week, while the monthly working hours remained unchanged, could not result in the part-time contract being reclassified as a full-time contract.

By contrast, the Court of Cassation noted that the employee had worked 36.75 hours during the first week of February 2015. His working hours thus exceeded the legal working hours. Consequently, the Court of Cassation overturned the decision of the Court of Appeal, considering that an employee's part-time employment contract must be reclassified as a full-time one when, in the course of a week, his working hours exceeded the legal working hours through overtime.

Thereby, the Court of Cassation confirmed its case law according to which the reclassification of an employee's part-time employment contract into a full-time employment contract is justified when, through overtime, the employee has reached or exceeded the legal working time (Labour Division of the Court of Cassation, No. 12-15.014, 12 March 2014). In the present judgment, however, it specified that this legal duration must not be reached in the course of a week, even if the monthly duration was not ultimately exceeded.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. M. Prahy

In French labour law, Article L. 3121-1 of the Labour Code states that:

> "*effective working time is the time during which the employee is at the disposal of the employer and must comply with his instructions without being able to freely go about his personal business*".

Concerning break times, Article L. 3121-2 of the Labour Code specifies that:

> "*the time required for meals as well as the time devoted to breaks are considered as effective working time when the criteria defined in Article L. 3121-1 are met*".

Consequently, time for a meal during which employees, who are working a continuous shift due to the specificity of their functions, cannot move away from their workstation and thus remain at the disposal of their employer, must be considered as effective working time (Labour Division of the Court of Cassation, No. 95-43.003, 10 March 1998; No. 03-42.492, 07 April 2004). Similarly, the Court of Cassation overturned an appeal decision that rejected an employee's request for payment of overtime and damages, even though during those hours, the employee was required to remain in a monitoring room provided at the workplace and had to consume his meals on the premises in order to respond to any potential requests from residents, without being able to freely pursue personal interests (Labour Division of the Court of Cassation, No. 97-45.001, 14 November 2000).

Thus, in terms of the applicable legislation and case law, French law complies with the decision of the Court of Justice of the European Union.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Administrative Court has ruled on holiday compensation claims of civil servants.

(II) Germany has ratified the ILO Maternity Protection Convention 2000 (No. 183).

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Maternity protection

Germany has ratified the ILO Maternity Protection Convention 2000 (No. 183).

More information is available here.

2 Court Rulings

2.1 Holiday compensation

Federal Administrative Court, 2 A 1/20, 15 June 2021

According to the Federal Administrative Court, a civil servant cannot claim compensation for leave if the minimum leave guaranteed under EU law was taken during the year in question; this applies irrespective of whether the leave was new or carried over from the previous leave year.

Pursuant to section 10 (1) of the Recreational Leave Ordinance (*Erholungsurlaubsverordnung*, *EUrlV*), recreational leave is compensated if it has not been taken in the amount of the minimum leave entitlement guaranteed under European Union law (Article 7(1) of Directive 2003/88/EC) before the termination of the civil service relationship due to temporary incapacity. Section 10(2) of the EUrlV stipulates that recreational leave or additional leave already taken in the leave year is to be credited against the minimum leave entitlement guaranteed under Union law (Article 7(1) of Directive 2003/88/EC), irrespective of the point in time at which the entitlement arose.

The Court held that the plaintiff was not entitled to compensation for leave. In the Court's view, when calculating the number of days of leave to which the employee is entitled in the context of the claims under Article 7(1) and (2) of Directive 2003/88/EC, the purpose of this provision is to determine only whether and how much leave the person concerned has taken in a specific year. It is irrelevant whether this was new or old leave, i.e. leave carried over from the previous leave year.

With this decision, the Court clarifies that its case law on the entitlement to compensation for leave in civil servant relationships, which was previously based solely on Article 7(1) and (2) of Directive 2003/88/EC, continues to apply, even after entry into force of section 10 of the EUrlV in 2015. In its ruling of 31 January 2013 (2 C 10/12), the Court, in view of the CJEU's decision in case C-337/10, *Neidel*, had ruled that civil servants have a claim to compensation for recreational leave that they were unable to take until the termination of their civil servant relationship due to illness. Now the entitlement follows directly from section 10(1) of the EUrlV. This does not entail any

changes in substance, however. According to the explanatory memorandum to the law (cf. BT-Drs. 18/3248, p. 34), the scope of the entitlement to compensation should be limited to the minimum annual leave under EU law. The legislator therefore expressly decided against going beyond the minimum standard arising from Article 7 of Directive 2003/88/EC (cf. also *Krome*, juris PraxisReport. 39/2021, Anm. 3).

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

As the present decision closely follows the existing case law, reference should be made to the March 2021 Flash Report.

In the German literature, hope was expressed that the Court would clarify 'which standard is to be used for the assessment of the average frequency and duration of assignments' to be considered in the overall assessment (*Breucker*, in: *Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR)* 2021, p. 359 (268).

This hope has probably not been fulfilled. However, the Court has more clearly outlined the aspect of unpredictability of possible interruptions of rest breaks (especially in paragraph 41).

4 Other Relevant Information

4.1 Pay differential between Germans and foreigners

According to the Federal Government, in December 2020, around 20.74 million German nationals were in full-time employment and subject to social security contributions, as were around 3.13 million people with a foreign nationality. Around 2.94 million full-time employees with a German nationality earned a gross wage in the lower pay range. This corresponds to a share of 15.9 per cent of all German full-time employees subject to social insurance in the core group. For full-time employees with a foreign nationality, the figure was around 1.06 million or 36.9 per cent (BT-Drs. 19/32265 of 02 September 2021).

4.2 EU-wide regulation on due diligence obligations in global value chains

The Federal Government has made it clear that it supports the EU Commission's plan to propose a European legislative act on sustainable corporate governance before the end of this year, which would also include binding due diligence obligations in global value chains.

According to the government, an EU-wide regulation can, on the one hand, increase the effectiveness of the protection of human rights and, on the other, create uniform competitive conditions in the internal market (BT-Drs. 19/32238 of 31 August 2021).

4.3 Discussion of the Federal Labour Court's request for a preliminary ruling

On 16 June 2021, the Federal Labour Court (AZR 390/20 (A)) made a request for a preliminary ruling regarding the application of the Act on Temporary Agency Work in the public service (see June 2021 Flash Report), or more precisely, the so-called *Personalgestellung* under section 4(3) of the TVöD.

A first reasonably comprehensive analysis of the request is now available. There, the author argues, among other things, that the provision of personnel qualifies as temporary agency work, that the Temporary Agency Work Directive in Article 1(3) only excludes narrowly defined cases from its scope of application, and that it does not recognise any privilege for the public sector (see *Hamann*, juris PraxisReport 37/2021, Anm. 5).

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

This judgment is in line with the previous jurisprudence of the Court (e.g. case C-344/19, *Radiotelevizija Slovenija*) concerning the qualification of stand-by time as working time when the timeframe within which the employee must be ready to work does not allow him or her to freely manage his or her breaks.

According to the Greek Supreme Court (judgments Nos. 1102/2009 and 1352/2009), if the employee agrees to restrictions to his or free time by remaining at the employer's disposal to perform work (on-call duty), all provisions of labour law and particularly those concerning working time and minimum pay levels apply.

By contrast, the above rules do not apply, if the employee is not required to remain at the employer's disposal. The time the worker is on-call is not considered working time and the provisions stipulated in laws and collective agreements on minimum pay also do not apply to such contracts. Only if the employee is called on and performs actual work will he or she be entitled to receive minimum pay.

The above jurisprudence is relatively old and was issued prior to the CJEU's judgment in case C-518/15, *Matzak,* which clarifies the issue of on-call work when employees do not physically remain at the workplace, but are nonetheless at the employer's disposal and must be fully available, even if in such situations the employees can manage their time with fewer constraints and can potentially pursue their personal interests.

As regards breaks, according to Law 4808/2021, employees are entitled to a break of at least 15 minutes and of maximum 30 minutes after four hours of continuous work, during which they must be allowed to leave their work post. The break cannot be taken at the beginning or the end of the work shift. Breaks do not constitute working time and are not paid, unless a contrary agreement exists (see the judgment of the Greek Supreme Court, No. 517/2019, DEN 2019, 1313).

There is no jurisprudence concerning cases in which the employee was subject to respond to a call during his or her break within a short period of time. Therefore, the present judgment offers an interesting clarification of the regulation of breaks, specifying that employees' breaks shall remain uninterrupted and that they shall not be available to the employer.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) A new Act has amended the provision of the Labour Code which guarantees the application of the more favourable provision of the collective agreement regulating work within the framework of working time banks in case of termination of the collective agreement.

(II) Parliament has passed the amendment of the Act on Co-operatives to introduce new rules for the care-taking mothers' cooperative.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Working time

Decision No. II/83/2019 of the Constitutional Court established that 'Parliament omitted to establish rules on the application of Article 94 (3)-(4), which would guarantee that the provisions of a collective agreement in force for up to 36 months and providing more favourable rules for employees than the Labour Code, would be implemented in case of termination of the respective collective agreement'.

The Constitutional Court therefore invited Parliament 'to establish such protective provisions by 31 July 2021'.

Consequently, Act 101 of 2021 amended Article 94(4) of the Labour Code as of 29 June 2021.

The original text of 94(4) stated:

> "The *termination or cessation of a collective agreement shall not affect work within the framework of working time banks in progress.*"

The amended text of 94(4) now states as follows:

> "*Cessation of the collective agreement shall not affect work within the framework of working time banks in progress for the period of three months calculated from the cessation of the collective agreement.*"

1.2.2 Care-taking mothers' cooperative

Parliament has passed the amendment of the Act on Co-operatives on care-taking mothers' cooperative (Act 10 of 2006, Articles 35-53).

The new provisions (Article 35-53) entered into force on 01 July 2021.

The new provisions allow members of a cooperative of care-taking mothers to perform services for third parties through the cooperative. This is a very similar set up or even equal to a temporary work agency. However, this form of (quasi agency) work is exempt from the regulations of the Labour Code (Article 46 of Act 10 of 2006). Only very limited working time rules would apply to these workers.

It was reported on 21 September that four such co-operatives with around 100-200 members already exist.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In Hungary, working time does not cover breaks, with the exception of stand-by duties (Article 86.3.a of The Labour Code).

'Stand-by duties' are described as:

- due to the nature of the job, no work is performed during at least one-third of the employee's regular working time based on a longer period during which the employee is at the employer's disposal; or
- in light of the nature of the job and of the working conditions, the work performed is significantly less strenuous and less demanding than commonly required for a regular job.

The duties in the present case would be considered stand-by duties in the Hungarian system, hence breaks would be considered to be working time.

If the performed duties are not equal to stand-by duties, then the break is not considered working time. Article 110(4) of the Labour Code contains the definitions of 'stand-by duty' (*ügyelet*) and 'stand-by time according to a stand-by system' (*készenlét*):

- 'Stand-by duty' ('*ügyelet*'): the employer shall be entitled to designate the place the employee is to remain at and to be available (be on-call);
- 'Stand-by time according to a stand-by system' ('*készenlét*'): the employee may choose the place where he or she will remain at to be able to report for work without delay, when called on by the employer (stand-by).

If the employee is required to be at the disposal of the employer, this period can be considered as being part of the stand-by system described above ('*ügyelet*' or '*készenlét*'), depending on the place of stand-by. If it is chosen by the employee, then it is 'stand-by time according to a stand-by system' (*készenlét*). It is not considered working time if the employee can freely choose the place where he/she will remain in order to be able to report for work without delay when called on by the employer. It is, however, considered working time if the employee must perform work during that period, or if the employer designates the place where the employee shall remain in order to be available for work.

Therefore, situations may arise when the employee's break time is not considered working time, although the limitations imposed on the employee during that break are such as to objectively and very significantly affect that worker's ability to freely manage the time during which his or her services are not required and to devote that time to his or her personal interests. This is the case when (1) it is not a stand-by duty, (2) the parties did not agree on including breaks in working time, and (3) the employee must be at the disposal of the employer in the manner described in the foregoing sentence.

However, Article 103(4) emphasises that 'During the break, work must be interrupted'.

Moreover, Article 7 contains this relevant general principle:

> *"The wrongful exercise of rights is prohibited. For the purposes of this Act 'wrongful exercise of rights' means, in particular, any act that is intended for or*

leads to the injury of the legitimate interests of others, restrictions on the enforcement of their interests, harassment, or the suppression of their opinion".

Overall, the Hungarian rules ensure that the employee has access to remedies against such a wrongful exercise of rights by the employer.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

The Supreme Court has ruled in a case on non-pecuniary damages due to illegitimate grounds of dismissal in a case concerning allegations of sexual harassment.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal

Supreme Court, no. 15/2021, 23 September 2021

On 23 September, the Supreme Court issued a judgment in a case concerning a dismissal of an employee in the private sector due to allegations of sexual harassment. Although this information was not included in the letter of dismissal, it was presented to him in a meeting following the dismissal. As the rules and guidelines in Regulation No. 1009/2015, on measures against harassment, sexual harassment, gender-based harassment and violence in the workplace were not followed in the employee's dismissal, the employee was awarded ISK 1.5 million (around EUR 10 000) in non-pecuniary damages.

The Supreme Court reasoned that the employer had, in principle, deviated from the rules of conduct in the regulation which he should have complied with when assessing the allegations made against the employee, even though the dismissal was directly related to those rules. Had the employer followed the rules, it is impossible to determine what the outcome would have been. Under those circumstances, the premise that was specifically stated for the termination did not have a legitimate foundation and would have constituted a breach of the employer's mutual obligation of confidentiality and consideration towards the employee in their contractual relationship.

The case is unique, since it is the first of its kind that involves Regulation No. 1009/2015. In addition, the general rule in Iceland is that an employer may freely dismiss an employee as long as (1) rules regarding the notice period are respected, (2) there is no specific dismissal protection in place, e.g. for union representatives or pregnant employees, and (3) the foundation of the dismissal is legitimate. It should be emphasised that in the present case, the rules on the notice period were followed and no specific dismissal protection was in place. This case could be important also with regards to the third condition.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In Icelandic law, a break *(neysluhlé)* is considered as part of the employee's paid working time, but not as active working time during which the employee works without interruption and has the freedom to use his or her time as he or she wishes. Although this is not explicitly stated in larger collective agreements, they do stipulate that daytime work may be shortened by the daily break time following an agreement between the employer and employee (see, for instance, here, Art. 16.5.4; from eight hours to seven hours and twenty minutes, for example, if the daily break time constitutes 40 minutes)

and even include provisions stating that work during breaks should be considered overtime work (see, for instance, here, Art. 4.2 on pp. 82).

However, especially in recent years, the social partners have been discussing the status of breaks in the context of the shortening of working time. In arrangements in which paid breaks have been excluded from working time and the working time has subsequently been shortened by that amount, the breaks are now not under the authority of the employee, but under that of the employer (see, for instance, here, p. 8).

The social partners should discuss the status of those breaks in the light of this ruling as well as the experience so far of the shortening of the work week during the next round of collective bargaining, which is set to begin next year.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) Following the CJEU case law, the Labour Court ruled that 'rostered overtime' is part of the normal weekly working hours and thus must be included in the calculation of an employee's holiday pay.

(II) A public consultation on the transposition of the Transparent and Predictable Working Conditions Directive 2019/1152 has been launched.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Work pay

Labour Court, ADJ-00028656, Employee v. Security Company, 31 August 2021

Regulation 3(2) of the Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997 (S.I. No. 475 of 1997) provides that the 'normal rate of pay' does not include any pay for 'overtime'. In *Employee v. Security Company* ADJ-00028656, the claimant was assigned eight hours of overtime each week according to a duty roster but these hours were not included in the calculation of his holiday pay.

A WRC Adjudication Officer decided that the claimant's 'normal weekly rate' for the purposes of Article 7 of Directive 2003/88/EC did include 'rostered overtime' but not overtime, which only arose occasionally and was not a task 'intrinsically linked to the contract that requires the employee to work the hours'. In coming to his decision, the Adjudication Officer had regard to the CJEU decisions in case C-539-/12, *Lock*; case C-214/16, *The Sash Window Workshop*; and case C-385/17, *Hein*.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

This case confirms earlier CJEU case law to the effect that in determining whether a break period during which the worker must be available to the employer in case of an emergency callout, is to be considered 'working time', the assessment may take into account the fact that such callouts only occur at random. The CJEU added, however, that the unforeseeable nature of possible interruptions was likely to have an additional restrictive effect on the worker's ability to manage his or her time freely, as the uncertainty was liable to put that worker on 'permanent alert'.

The decision reiterates that WRC Adjudication Officers, when hearing claims under the Organisation of Working Time Act 1997, will have to consider whether the limitations imposed on an employee during a rest break are such as to effect 'objectively and very significantly' the employee's ability to freely manage the time during which his or her services are not required and to devote that time to his or her personal interests.

4 Other Relevant Information

4.1 Transparent and predictable working conditions

The Department of Enterprise, Trade and Employment has opened a public consultation on the transposition of Directive 2019/1152 on Transparent and Predictable Working Conditions. Views are sought on four issues:

- the length of the probation period;
- the form of notice of an unpredictable work assignment;
- the right to redress; and
- protection against adverse treatment.

Some aspects of the Directive, such as the provisions on 'zero-hours contracts', have already been implemented by the Employment (Miscellaneous Provisions) Act 2018.

4.2 Pandemic unemployment payment

As of 28 September 2021, 106 245 persons (45.5 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment (PUP). The sectors with the highest number of PUP recipients are accommodation and food services (18 407), wholesale and retail trade (16 752) and administration and support services (12 506). The number of recipients in construction has dropped from 42 333, at the end of April, to 9 838. In terms of the age profile of PUP recipients, 10.7 per cent were under 25. Additionally, 2 012 persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 182 382 persons have been medically certified for receipt of this benefit, 53.3 per cent of whom were female.

The Annual Report of the Comptroller and Auditor General (C&AG) finds that Ireland spent EUR 17.1 billion on its COVID-19 response during the first year of the pandemic up to the end of February 2021, including EUR 6.1 billion on the PUP and EUR 4.8 billion on the two wage subsidy schemes supporting businesses adversely affected by the pandemic. The C&AG criticised a lack of checks as the office's review of a sample of PUP claims found that 9.4 per cent of claimants were not eligible to receive the payment either because there was no evidence that they had been working prior to the pandemic or because they received the payment whilst still working.

Italy

Summary

(I) Two Law Decrees have extended the use of COVID-19 certificates (Green Pass) to enter schools and universities, and to all workers in both the public and private sector. Workers who are not able to present a Green Pass will be suspended from work without remuneration. It has been clarified, however, that this suspension will not give rise to any dispute or disciplinary measure.

(II) The possibility of requesting relief measures (*Cassa Integrazione Guadagni)* for up to 13 weeks has been extended for large companies that are of significant national strategic interest.

(III) The Court of Cassation has decided two cases on workers' privacy and the extent to which remote control of workers' activities is permitted.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

Various legislative measures have been adopted to extend the use of the so-called 'Green Pass', which certifies vaccination, recovery from COVID-19 or a negative COVID-19 test.

First, Law Decree No. 122 of 10 September 2021 provides for additional urgent measures to address the COVID-19 emergency in schools, universities, residences for the elderly, hospices and other health facilities, establishes that anyone entering schools and universities (including suppliers of goods or services and students' parents) must have a 'Green Pass'.

This obligation does not apply to school students of all levels; it applies to university students (Law Decree No. 11 of 06 August 2021). Penalties for the infringement of this obligation apply.

The Law Decree also provides that anyone who works in a healthcare facilities must be vaccinated. The rules introduced by Law Decree No. 44 of 01 April 2021 for healthcare staff apply to them.

Access to various activities (restaurants indoors, shows, museums, gyms and indoor pools, arcades, amusement parks, spas, festivals and fairs, conferences) is also limited to those who have a Green Pass, according to Law Decree No. 105 of 23 July 2021, which was converted into law by Act No. 126 of 16 September 2021.

Secondly, Law Decree No. 127 of 21 September 2021 provides urgent measures to ensure the safe performance of public and private work based on the use of the Green Pass.

According to this Law Decree, from 15 October to 31 December 2021 (end of the state of emergency), workers must possess and exhibit, upon request, the Green Pass to access all workplaces. Employers must ensure compliance with this obligation and define the methods of checking the Passes.

Workers without a Green Pass will not be able to access their workplace and will be considered unjustified absence. Starting from the fifth day of absence in the public sector, and after one day in the private sector, the employment relationship will be suspended until the presentation of the Green Pass. During this period of suspension, neither remuneration nor any other emolument, however named, will be due.

Failure to possess a Green Pass and the consequent suspension from service will not give rise to any dispute or disciplinary measure. Consequently, the employment relationship cannot be terminated on grounds of lack of a Green Pass.

1.2 Other legislative developments

1.2.1 Act 18 September 2021 No. 125

Act No. 125 of 18 September 2021 extends the duration of the Wages Guarantee Fund (*Cassa Integrazione Guadagni*) for companies of major national strategic interest.

According to this Act, undertakings with at least 1 000 employees that manage at least one industrial plant of national strategic interest can apply for the Wages Guarantee Fund for an additional period of 13 weeks, to be requested until 31 December 2021.

Employers that apply for this Fund cannot dismiss their employees for economic reasons and any collective dismissal procedure will be suspended. The prohibition of dismissal does not apply in case of definitive closure of the undertaking if no transfer thereof takes place (Article 2112 of the Civil Code) or if the company reaches an agreement with the most representative trade unions.

2 Court Rulings

2.1 Non-competition clause

Corte di Cassazione, No. 23723, 01 September 2021

In its judgment, the Court of Cassation ruled that the clause that allows the employer to arbitrarily terminate a non-competition clause is void. It has been established that the obligations deriving from a non-competition clause begin the moment the agreement is published, and their effects cannot be unilaterally removed, even if the early termination of the agreement does not harm the employee.

2.2 Disciplinary power of the employer

Corte di Cassazione, No. 25731, 22 September 2021

In this judgment, the Court of Cassation ruled on the impossibility of using information collected based on checking the company chat used for internal communications between employees for disciplinary purposes.

The case concerned a company that, after accessing a company chat for maintenance reasons, found that an employee had used the chat to heavily criticise the behaviour of other colleagues and the superior. The employee was dismissed. The Court of Cassation considered the dismissal to be illegitimate because the employees were not informed about the checks, and thus the information obtained from these checks could not be used for disciplinary purposes.

2.3 Workers' privacy and remote control of employees' activities

Corte di Cassazione, n. 25732, 22 September 2021

In this judgment, the Court of Cassation distinguished between controls in the defence of company assets, which concern all employees, and defensive controls in the strict sense, aimed at verifying the illegal behaviour of a worker.

The case concerned the legitimacy of the checks of company computers to verify the origin of a virus that had infected the company computer system. The Court ruled that this check was certainly legitimate, but that the data collected during this control could

only be used for disciplinary purposes if they were collected after the emergence of a 'well-founded suspicion' against an employee. Such control may not target the analysis of all the information collected before the suspicion arises, because the defensive control would thereby exceed all proportions.

This judgment contributes to the clarification of the interpretative doubts that had emerged after the amendment by Legislative Decree No. 81 of 15 June 2015 (so-called Jobs Act), of the discipline established in Article 4, Law 300/1970 (so-called Workers' Statute) limiting the remote control of employees' activities. Following this amendment, the judges reflected whether it was still possible to speak of defensive controls (i.e. put in place to defend the company assets) or whether all controls must take place in accordance with the procedures of the new Article 4.

According to the Court of Cassation, there are two types of controls: controls in defence of company assets, which concern all employees, and defensive controls in the strict sense, aimed at verifying the illegal conduct of a worker. Only the first type of controls (controls in defence of company assets) must always respect Article 4, Law 300/1970. Conversely, defensive controls in the strict sense that are aimed at verifying the illegal conduct of a worker, considering that they do not concern the worker's normal activity, they do not fall within the rule of Article 4, Law 300/1970. In the present case, in fact, an extraordinary and exceptional event had taken place, which required an ascertainment and sanctioning of serious offences by a single employee.

The possibility of conducting defensive checks is confirmed in the ECHR ruling of 17 October 2019, *López Ribalda and Others v. Spain* (Applications Nos. 1874/13 and 8567/13), according to which the Court stated that:

> *"while the Court could not accept the proposition that, generally speaking, the slightest suspicion of misappropriation or any other wrongdoing on the part of employees might justify the installation of covert video-surveillance by an employer, the existence of reasonable suspicion that serious misconduct had been committed and the extent of the losses identified in the case would appear to constitute weighty justification".*

This does not mean that in the presence of any suspicion of illegal activity, the employer can carry out any type of control, because the guarantee of confidentiality and dignity of the worker may in no case be removed. It is therefore necessary to find a balance between the need to protect the company assets and the freedom of economic initiative, on the one side, and the dignity and privacy of the worker, on the other (see ECHR ruling of 05 September 2017, *Bărbulescu v. Romania* - Application No. 61496/08).

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In Italy, working time is regulated by Legislative Decree No. 66 of 14 April 2003.

According to Article 1, 'working time' is 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties', as written in Article 2(1), Directive 2003/88/EC. According to Article 8, 'breaks' are periods to which every worker must be entitled where the daily working time is more than six hours, as stipulated in Article 4 of the Working Time Directive 2003/88. In Italian legislation, 'the concepts of 'working time' and 'rest period' are mutually exclusive', as clarified by the CJEU ruling in paragraph 28.

The period during which the worker must be prepared to respond to a call-out may constitute 'working time'. This period is considered stand-by time, which, according to Italian jurisprudence, can be active or passive, as specified in the analysis of case C-344/19, *Radiotelevizija Slovenija* (March 2021 Flash Report).

During active stand-by time, the employee must respond immediately to the employer's call and perform the required service. Instead, passive stand-by time consists of the obligation of the employee to be available to his or her employer outside working hours in view of a possible need to carry out work.

The active stand-by time is part of the working time and must be remunerated: in this case, the employee must be at the place established by the employer and available to work in case of need (see judgment of the Court of Cassation, No. 18654/2017). Therefore, Italian law complies with EU law and the CJEU's jurisprudence.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

Latvian law does not explicitly regulate situations as that dealt with by the CJEU, specifically, the national legal regulation does not provide criteria for distinguishing between 'working time' and 'rest time'.

Article 130(1) of the Labour Law (the Labour Law (*Darba likums*), Official Gazette No.105, 6 July 2001) defines 'working time' as follows:

> '*Working time within the meaning of this Law shall mean a period from the beginning until the end of work within the scope of which an employee performs work or is at the disposal of the employer, with the exception of work breaks*.' […]

Article 141(1) of the Labour Law defines 'rest periods' as follows:

> '*Rest time within the meaning of this Law shall mean a period of time during which an employee does not have to perform his or her work duties and which he or she may use at his or her own discretion. […]*'

It follows that the national legal regulations should be amended by criteria set by the CJEU to ensure that in borderline cases, the respective periods of time are classified either as working time or rest periods in conformity with Directive 2003/88/EC.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Employers are entitled to verify whether their employees hold a COVID-19 certificate if this serves to determine appropriate protective measures. The employees or their representatives shall be heard in advance.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The Liechtenstein government has recently addressed COVID-19 certificates within the scope of labour law.

Employers are entitled to verify whether their employees hold a COVID-19 certificate if this serves to determine appropriate protective measures. The result of such verification may not be used for other purposes. If the employer verifies whether the employees hold a COVID-19 certificate, he or she shall record this, and the measures derived from it in writing. The employees or their representatives shall be heard in advance.

These provisions have been established in Art. 8(4) and (4a) of the Ordinance on Measures to Control for the Coronavirus (Covid-19) (Covid-19 Ordinance) (*Verordnung über Massnahmen zur Bekämpfung des Coronavirus (Covid-19) (Covid-19-Verordnung, LR 818.101.24)*).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, the CJEU confirmed its case law of C-344/19, *Radiotelevizija Slovenija*, according to which stand-by time is 'working time' only if the constraints imposed on the worker during that period are of such a nature as to constrain objectively and very significantly the ability to freely manage the time and to devote that time to his or her own interests.

In Liechtenstein, according to Art. 15 of the Ordinance I to the Employment Act (*Verordnung I zum Arbeitsgesetz, ArGV I, LR 822.101.1)*, stand-by time shall be deemed to be working time if it is performed in the establishment. If the stand-by time is performed outside the establishment, the time made available shall only be counted as working time to the extent that the employee is actually called upon to work.

This provision was adopted from Swiss law. Since Liechtenstein is a small country, comparatively few cases come before the courts. The Liechtenstein courts generally follow the case law of the Swiss courts, in particular the Swiss Federal Supreme Court, as regards the interpretation and application of a provision adopted by Swiss law.

In judgment 4A_94/2010 of 04 May 2010, the Swiss Federal Supreme Court decided a case involving a medical doctor employed by a hospital, who claimed that the stand-by time he performed constituted working time. The doctor's private apartment was 100 metres from the hospital. He could remain at home during his stand-by duty but was required to be ready for work within 15 minutes.

The Swiss Federal Court stated that since he was able to spend his time outside the establishment, the employee had more leisure and recreational opportunities. Stand-by time performed outside the establishment is only to be considered stand-by duty if the employee can actually make use of these opportunities. This is not the case if the employee is called on to work during the stand-by time and must arrive at the work premises within a very short period of time, e.g. within 15 minutes after the call, and is therefore limited in terms of leaving the establishment under the given circumstances and thus also to not benefit from his or her free time. The situation is different, however, if the employee can actually perform his or her stand-by time at home, since this gives him or her several possibilities that are excluded if the employee has to remain on the company's premises, in particular with regard to social contacts and leisure activities. In the present case, therefore, stand-by time did not constitute working time.

These statements reflect the CJEU's judgment in case C-344/19 and in the present judgment. All decisions are essentially based on the same evaluation criteria. In this respect, it can be said that Liechtenstein's law is fully in line with the case law of the CJEU.

4 Other Relevant Information

4.1 EEA implementation rate

In the latest edition of its implementation report, the EFTA Surveillance Authority (ESA) gives Liechtenstein a good grade with regard to the fulfilment of its EEA obligations.

The high implementation rate of 99.6 per cent and the low number of six infringement proceedings pending before the ESA demonstrate that Liechtenstein correctly implements and applies EEA law. As of the end of July 2021, 11 187 EEA legal acts apply in Liechtenstein as a result of its EEA membership.

For further information, see here.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The judgment of the CJEU in the present case has no implications for Lithuania because neither the law, nor practice allows the employer to interfere with the employees' right to a daily break (lunch break).

Similar to the situation in the Czech Republic, the employee is entitled to a daily lunch break (of not less than 30 minutes), which is not included in the calculation of working time (Art. 122 (2) p. 2 of the Labour Code).

The relevant Lithuanian legislation even contains the provision that the 'employee may leave the place of employment during the lunch break'. By contrast to the Czech legislation, there is no legislative provision or practice that entitles the employer to require the employee's readiness to respond to calls within a given time limit. No such or similar provision exists for firefighters or for other categories of workers who perform special activities.

4 Other Relevant Information

4.1 COVID-19 testing and mandatory vaccinations

In Lithuania, no definitive decisions have been introduced yet, but in September, discussions surrounding the following questions took place:

- Whether the government should introduce a list of professions that will have to undergo obligatory vaccination against COVID-19;

  Whether employers shall finance the regular testing of workers who, by virtue of legislative provisions, are required to present a 'Green Pass' ('*Galimybiu pasas*') but refuses to be vaccinated and must therefore be tested regularly.

Luxembourg

Summary

(I) The derogatory rules on family leave have been extended until 18 October 2021.

(II) A new bill on the right to disconnect has been introduced, proposing the introduction of an obligation to put in place a regime ensuring respect for the right to disconnect outside working time as defined in collective agreements or at the company level.

1 National Legislation

1.1 Measures against Covid-19

1.1.1 Family leave

The COVID-related derogatory rules on family leave (*congé pour raisons familiales)* have been extended until 18 October 2021.

1.2 Other legislative developments

1.2.1 Right to disconnect

As reported in the May 2021 Flash Report, the Social and Economic Council (*Conseil Economique et Social*), composed of representatives of employees, employers and the government, adopted an opinion on the right to disconnect (*droit à la déconnexion*). The social partners have proposed a text to be integrated into the Labour Code.

A bill has now been introduced to give effect to this proposal. The text of the bill is mostly identical to that proposed by the Social and Economic Council.

There will be an obligation to put in place a regime ensuring respect for the right to disconnect outside working time, adapted to the particular situation of the company or sector.

This obligation exists for all companies 'when employees use digital tools for work purposes' ('*lorsque des salariés utilisent des outils numériques à des fins professionnelles*'). It is understood that these digital tools must be available outside of the employee's usual working time; an employee who uses a computer during his or her eight hours of work is not affected by the right to disconnect.

It is interesting to note that these new rules (future Articles L. 312-19 and L. 312-20) are integrated into the part of the Labour Code that deals with safety and health at work, and not into the part regulating working time.

This regime can be defined either by a collective agreement or internally in the company.

Collective agreement

The modalities of the system that ensure respect for the right to disconnect outside of working time will be subject to compulsory negotiation (future Article L. 162-12 (4) al.1. pt. 5). The social partners are therefore required to negotiate the subject and, in the absence of an agreement, to include their respective positions in the collective agreement

Company level

If there is no collective agreement or if it does not address the subject, the employer must set up an internal company scheme. The law does not define the form that such a scheme should take; parliamentary work suggests that it may take the form of a charter or simple information sessions. For any introduction or modification of the regime

ensuring respect for the right to disconnect outside of working time, the employer must respect the new competences of the staff delegation, introduced by the bill:

- Less than 15 employees. There is no staff delegation;
- 15-149 employees. The staff delegation must be informed and consulted in advance (future Article L. 414-3 (6));
- 150 or more employees. The issue is one of co-decision, the employer needs the delegation's agreement (future Article L. 414-9 pt.8).

The regime should cover the practical arrangements and technical measures for disconnecting from digital tools, awareness raising and training measures and compensation arrangements in the case of exceptional derogations from the right to disconnect.

It can be deduced from the title 'right to disconnect' that there is such a right, but the law does not lay down any substantive rules concerning this right. The complex problems that the right to disconnect pose in terms of compliance with working time regulations are thus not resolved by the law. The employer seems to be fulfilling its obligations if it sets up a scheme, regardless of the scheme's content.

In case of violation of these rules, an administrative fine of between EUR 251 to EUR 25 000 is to be imposed by the Director of the Labour Inspectorate. This targets companies that have failed to set up a disconnection regime when they are required to do so, as well as failure to respect the powers of the staff delegation.

This solution may come as a surprise, since compliance with other workplace safety rules is punishable by a criminal fine, including imprisonment (L. 314-4), and not by a simple administrative fine. However, failure to comply with the right to disconnect could also constitute an offence in terms of working hours and lead to criminal sanctions in this respect.

The text is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

As stated in the March 2021 Flash Report concerning case C-344/19, *Radiotelevizija Slovenija*, there is not much case law on standby periods in Luxembourg, and there is even less case law on breaks. No similar case has yet been decided.

There is no reason why national case law would not comply with this new decision of the CJEU.

Concerning the second decision issued by the Court, it must be noted that national courts are not bound by the legal rulings of higher courts, so the problem cannot arise in Luxembourg. For a long time, the case law of Luxembourg has adopted a very international approach.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

This judgment follows the recent ruling of the CJEU in case C-344/19, *Radiotelevizija Slovenija*.

The judgment may have many implications for employers in Malta, in particular where collective agreements are concerned. How the unions and the Director of Industrial and Employment Relations (DIER) will apply this judgment remains to be seen. However, harsher negotiations may be envisaged.

The judgment is of particular significance if applied in the situation of remote working due to the erosion of the clear demarcation of work and rest which may derive from the pressures of technology on the worker (such as video conference meetings which start when the worker should be on break, or evermore frequently, when the employee should switch off their home laptop/ computer at the end of the working day).

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) Many general relief measures will not be extended and will cease in October 2021, but some specific measures will remain in force until December 2021.

(II) A bill on diversity at the workplace, and in particular in the top position of companies, has been accepted.

(III) Two important cases have been delivered on the employment status of platform workers. The Court of Appeal of Amsterdam ruled that household cleaners who work for the online platform Helpling are to be classified as temporary agency workers, and the Court of Amsterdam established that Uber drivers are to be considered employees.

(IV) A dismissal of a healthcare professional who had repeatedly expressed extreme scepticism about COVID-19 and vaccines on LinkedIn has been deemed valid.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 End of relief measures

As of October 2021, many support measures that have supported the Dutch economy during the pandemic will end. This concerns the NOW, TVL, Tozo, TONK and various tax measures, which will not be extended.

Some support measures will remain in place in the fourth quarter of 2021.

Additionally, the Dutch government is working on elaborating support measures for businesses that are usually open after midnight, such as nightclubs, but must continue to remain closed due to the pandemic.

1.2 Other legislative developments

1.2.1 Diversity in the workplace

A draft bill on increased diversity in higher business positions was accepted. The bill was found to be necessary because the results from the business community regarding increased diversity have been lagging behind. The aim is for the law to go into effect on 01 January 2022.

The bill contains two measures to promote diversity at the top of the business community.

Firstly, a growth quota stipulates that at least one-third of the supervisory boards of listed companies must consist of men and at least one-third of women. This will apply to new appointments.

In addition, large public and private companies are required to set appropriate and ambitious targets to make the ratio between the number of men and women at the (sub)top of companies more balanced. They must report on their progress annually.

The new law will be evaluated after five years and the growth quota and target figure scheme will expire after eight years.

2 Court Rulings

2.1 Platform work and temporary agency work

Court of Appeal Amsterdam, ECLI:NL:GHAMS:2021:2741, 21 September 2021

The Amsterdam Court of Appeal has ruled in a case involving cleaners who work for households through the online platform 'Helpling'. According to the Court of Appeal, these cleaners have the legal status of temporary agency workers. This means, among others, that they are entitled to wages in case of illness and to a transition payment in case of dismissal.

According to the Court of Appeal, most of the factual circumstances of the case indicate the existence of a contractual relationship between Helpling and the cleaners. This contractual relationship is that of a temporary agency contract. For such a qualification, the Court of Appeal finds it particularly important that the cleaners are structurally employed by the household, which gives instructions to the cleaner. Helpling only has a limited role in determining the amount of remuneration paid by the household to the cleaner. This amount is mainly determined by the household and the cleaner, however, Helpling prescribes that the payment must be made via a payment platform enabled by Helpling. In addition to a payment to the cleaner, the household pays commission to Helpling. In the event of the cleaner's illness, the household can get another cleaner via Helpling and the household can switch cleaners via Helpling as well.

No employment contract is concluded between the cleaner and the household. The collective labour agreement for cleaners is not applicable to 'Helpling' due to its status as a temporary agency employer.

2.2 Platform work

Court of Amsterdam, ECLI:NL:RBAMS:2021:5029, 13 September 2021

In a case involving platform work that was brought before the Court of Amsterdam by the trade union FNV, the Court ruled that Uber drivers are employees. According to the Court, the legal relationship between Uber and these drivers meets all the requirements of an employment contract, despite Uber's argument that it only offers a platform where self-employed drivers and their customers can connect. The Court ruled that Uber has authority over the drivers by means of the Uber app, which has a disciplining and instructive effect on the drivers and gives a financial incentive to work.

This ruling means that Uber is required to apply the sector's collective labour agreement to the drivers' employment contracts during periods in which the collective labour agreement has been declared universally binding. In certain cases, these drivers can thus claim overdue salary. In addition, Uber must pay FNV compensation for failing to comply with the collective labour agreement.

2.3 Dismissal

Court of Gelderland, ECLI:NL:RBGEL:2021:4701, 24 August 2021

A case brought before the Court of Gelderland concerned the dismissal of a healthcare worker who had posted messages on LinkedIn related to COVID-19, in which she expressed strong scepticism about the virus and the vaccines. Despite repeated warnings from her employer to stop commenting, the employee continued to express her opinions on LinkedIn.

According to the employer, the employee's statements on a business platform such as LinkedIn could have negative consequences for the employer. Moreover, according to the employer, her comments were insulting towards colleagues and the employer. This

led to a disrupted employment relationship and the employer decided to terminate the employment contract.

According to the Court, a distinction must be made between the two types of messages the employee posted on LinkedIn. The first type of message in which she expresses her opinions about the pandemic in general, fall within her right to freedom of expression. However, she also posted and/or shared hurtful messages specifically aimed at people who are involved in the national (vaccination) policy. By posting these messages, the employee crossed a line that was not necessary for the purpose pursued by it, while the content thereof may have been offensive to her own colleagues. As a good employee, she should therefore not have made these statements public.

It is important in this respect that she chose to do this on a business network, where—at the time of posting the messages—it was stated on her profile that she works for the specific employer. Additionally, it appears that the messages actually had harmful consequences for the employer. According to the Court, under these circumstances, the employer can no longer reasonably be expected to continue the employment relationship.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In this ruling, stand-by time took the shape of break periods granted to a worker during his or her daily working time, during which the worker had to be ready to respond to a call-out within a time limit of two minutes. The question arose whether this time must considered working time or as a rest period within the meaning of Article 2 of Directive 2003/88.

As explained more broadly in the March 2021 Flash Report, the Dutch working time regulation (Working Time Act and Working Time Decree) distinguishes between three types of stand-by work (on-call work; stand-by work and stand-by work on site). Only the third category is considered as working time in the Netherlands.

It is questionable whether this complies with Directive 2003/88 and the present case increases these doubts as the stand-by time in this case has similarities to the first category of stand-by work in the Netherlands. This type of stand-by work may impose constraints upon the worker that objectively and very significantly affect his or her possibility to manage his or her time during which his or her professional services are not required and to pursue his or her own interests, which may imply that it must be classified as working time within the meaning of Directive 2003/88.

So far, there have not been any responses in Dutch literature or debates about this case.

4 Other Relevant Information

Nothing to report.

Norway

Summary

Some temporary measures to mitigate the effect of the COVID-19 crisis, such as the exemption for the employer from the wage obligation during temporary lay-offs and the right to care benefit for parents when the child is in quarantine, have been extended.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 End of COVID-19 restrictions

After a long period of decreasing infection rates, an increase was registered in August and at the beginning of September. The fourth and final step of the government's plan for a gradual reopening of the society was initially planned for late July, but has been postponed due to increasing infection rates (see previous Flash Reports).

However, vaccination rates have steadily increased. By the end of September, 84.6 per cent of the population above 18 years have been fully vaccinated (see updated statistics here).

In early September, the government once again maintained the third step of its plan but announced that there would not be a fourth step; the plan instead was to go directly from the third step to a full reopening of society. The reopening was announced on 24 September and was enacted on 25 September at 4 pm. A reopened society refers to 'normal everyday life with increased emergency preparedness'. From 25 September, all domestic restrictions are removed, apart from a requirement of isolation in case of contracting COVID-19. Local restrictions may still apply in some municipalities.

The advice against non-essential travel abroad was already removed for countries in the EEA, Schengen and the UK and other countries that are considered safe. From 01 October, the remaining global advice against non-essential travel will also be removed. However, there may still be advice against travel to specific countries. Updated travel advice can be found here.

In 'normal everyday life with increased emergency preparedness', the restrictions on entry to Norway will be removed in three phases. Phase 1 began on 25 September at 4 pm. From then on, EEA nationals, people from other countries who reside in the EEA and people who live in the UK and Switzerland will be able to enter Norway.

More information on the three phases can be found here.

1.1.2 Relief measures

The employment and labour law measures introduced in 2020 to mitigate the effects of the COVID-19 crisis have been described in previous Flash Reports. In September 2021, a few temporary measures were extended until the end of October, most importantly:

- The period during which the employer is exempt from the wage obligation during temporary lay-offs, and the period of unemployment benefits during temporary lay-offs (see FOR-2021-09-21-2806);
- Right to sickness benefit in the event of absence from work due to COVID-19 or suspicion of such illness (FOR-2021-09-24-2826).

Other temporary measures have *not* been extended, and will no longer apply from 01 October, most importantly:

- The shorter employer period of three days (instead of 16 days) for sickness benefits, after which the benefit is paid by the National Insurance;
- Sickness benefits for freelancers and self-employed paid by the National Insurance from the fourth day of sickness.

1.1.3 Care benefits

The right to care benefit for parents when the child is in quarantine, when school or kindergarten are partially or completely closed due to the pandemic, and in certain other situations (FOR-2021-09-24-2826) has been extended to the end of October.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The working time regulations in the Working Environment Act chapter 10 build on mutually exclusive definitions of working time and rest periods, cf. section 10-1. The definition of working time is interpreted in accordance with the definition in Directive 2003/88/EC and the case law of the EFTA court and the CJEU (see, for example, HR-2018-1036-A).

Whether a break during which the worker must be ready to respond to a call from the employer within a specific time is considered working time or a rest period depends on the concrete assessment according to the definitions in section 10-1, interpreted in line with the Directive.

Section 10-9 (1) specifically states that breaks must be considered working time if the employee is not free to leave the workplace during his or her break or where no adequate break room is available. The preparatory works clarify that breaks shall only be considered rest periods if the worker is exempt from duties and can use the break, for example, to leave the workplace. It is also stated that the break must be considered working time if the worker has the duty to answer telephones, for example.

Stand-by duty outside the workplace is specifically regulated. According to section 10-4 (3), at least one-seventh of the time on stand-by duty shall, as a general rule, be included in ordinary working hours. This calculation rule only applies if the stand-by time is considered to be a rest period. If the stand-by time is considered to be working time, the entire time period will count as working time.

Thus, the Norwegian regulations on breaks and stand-by time take account of, and seem to be well aligned with, the definition of working time in EU law (see also the comments in the March 2021 Flash Report). The ruling may thereby specifically affect the interpretation and application of these regulations and the definition of working time more generally. Apart from that, the ruling is not expected to have any significant implications for Norwegian law.

4 Other Relevant Information

4.1 Unemployment rate

The unemployment rate rose slightly between December and March and then started to decline. The decline was significant both in May and June, and continued in July, August and September. At the beginning of September, there were 129 600 unemployed people, amounting to 4.6 per cent of the workforce (see the statistics here).

Poland

Summary

The legislative process to adopt the bill that would give the employer the right to obtain information whether employees have been vaccinated against COVID-19 has been interrupted.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The draft of the law that would give the employer the right to obtain information on whether employees have been vaccinated or have recovered from COVID-19, has not been passed to Parliament by the government.

The draft provides that the employer would be entitled to unilaterally modify the employment conditions of employees who are not vaccinated. For example, it would be admissible to assign non-vaccinated employees another type of work, to modify the location of their work performance (e.g. without contact to other employees and/or clients), and to grant the employee unpaid leave. Employees cannot be dismissed on grounds of not being vaccinated. Information on whether candidates who are looking for a job have been vaccinated is also possible (preliminary information on the draft was presented in the August 2021 Flash Report).

The official government information on the draft can be found here.

It is uncertain when and if the draft will be enter the parliamentary legislative process. Therefore, at the moment employers do not have the legal foundation to ask their employees whether they have been vaccinated.

1.2 Other legislative developments

1.2.1 The law on limiting trade on Sundays, public holidays and some other days

On 17 September 2021, the Sejm (lower chamber of Parliament) accepted the amendments to the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days (consolidated text: Journal of Laws 2021, item 936). On 20 September 2021, the draft was submitted to the Senate (higher chamber of Parliament) and will be subject to further stages of the legislative process.

The draft intends to repeal certain exceptions that make it possible for entrepreneurs to avoid the ban and to keep their shops/supermarkets open. The draft was presented and analysed in the July 2021 Flash Report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, the CJEU dealt with stand-by time and breaks during working time.

In Poland, the relevant provisions are subject to the Labour Code (consolidated text Journal of Laws 2020, item 1320 with further amendments).

Article 134 LC provides that if the employee's working time within a 24-hour period amounts to at least 6 hours, the employee has the right to a break from work that lasts at least 15 minutes; such a break is considered working time.

Art. 151(5) LC refers to on-call shift. In accordance with §1, an employer may request an employee to be on call outside his or her regular working hours to provide work as specified in the employment contract at the workplace or at another place designated by the employer (on-call shift). §2 provides that the time of an on-call shift is not counted towards the employee's working time if, during the on-call shift, the employee does not perform any work. The time spent on an on-call shift may not infringe on the employee's right to rest as referred to in Articles 132 and 133 (i.e. daily and weekly rest periods). Under §3, for the time of an on-call shift—with the exception of an on-call shift performed at home—the employee is entitled to time off that corresponds to the duration of the on-call shift, and if time off cannot be provided, the remuneration resulting from his or her personal remuneration grade based on an hourly or monthly rate, and if this component of remuneration was not established when setting the remuneration conditions, it shall amount to 60 per cent of the employee's remuneration.

It is of crucial importance that this dispute concerned breaks during working time, and referred to a case in which the plaintiff remained in the company's canteen, i.e. de facto at the employer's premises, and that the break could be interrupted in case of emergency.

In such a case, the provisions on breaks from work would be applicable under Polish law. Article 134 LC expressly provides that such a break should be considered working time, i.e. the employee has the right to remuneration, and no additional factual circumstances affect that conclusion. There is no doubt that under Polish law, the break from work would be considered working time.

Therefore, there is no incompatibility between the Labour Code and Directive 2003/88 and with a view to case C-107/19, there is no need to introduce any amendments into national law.

4 Other Relevant Information

4.1 Minimum wage

On 14 September 2021, the Ordinance of the Council of Ministers on the amount of minimum remuneration for work and the amount of minimum hourly wage in 2022 was enacted (Journal of Laws 2021, item 1690). As of January 2022, the minimum wage will amount to PLN 3 010 for employment contracts (around EUR 620), and PLN 19.70 per hour for civil law contracts. In 2021, the minimum wage amounts to PLN 2 800 and PLN 18.30. The change implies the raise of minimum wage by 7.5 per cent.

The legal foundation for enacting the abovementioned Ordinance is the Law of 10 October 2020 on minimum remuneration for work (consolidated text, Journal of Laws 2020, item 2207), available here.

The minimum wage has been continuously rising in recent years. As in previous years, the Social Dialogue Council did not reach the agreement on next year's statutory minimum wage. Therefore, the competence to determine the amount of minimum remuneration in 2021 was exercised by the government.

Next year's minimum wage will amount to 50.8 per cent of the average wage in the national economy expected in 2022.

Portugal

Summary

(I) The government has approved the lifting of some restrictive measures implemented within the context of the COVID-19 pandemic, such as the recommendation to adopt teleworking.

(II) Some exceptional and temporary health and safety measures related to the COVID-19 pandemic have been amended.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

Following the progressive process of lifting the restrictive measures implemented within the context of the COVID-19 pandemic, the Resolution of the Council of Ministers No. 135-A/2021, of 29 September, declares a situation of alert due to the COVID-19 pandemic for the entire mainland territory until 31 October 2021 (terminating the situation of contingency declared by the Resolution of the Council of Ministers No. 114-A/2021, of 20 August) and determines, *inter alia*, the elimination of:

- the recommendation to adopt a teleworking regime where compatible with the functions, without prejudice to the maintenance of the rules on the adoption of non-coincident timetables;
- restrictions concerning the opening times of certain commercial establishments and events.

1.1.2 Health and safety measures

The above-mentioned Resolution No. 135-A/2021 eliminates the testing rules that were in force for workplaces with 150 or more employees.

On 29 September 2021, Decree Law No. 78-A/2021 was published, which approved several changes to the exceptional and temporary measures related to the COVID-19 pandemic, considering the positive development of the epidemiological situation in Portugal and the high vaccination rate already achieved.

These include, *inter alia*:

- the employer may implement technical and organisational measures to ensure the protection of employees, namely adequate individual protection equipment such as the use of masks; and
- people with immunosuppression that require an additional dose of the COVID-19 vaccine according to the guidelines of the Health General Directorate can justify their absence from work through a medical statement, provided that they cannot perform their activity under a teleworking regime.

These measures apply from 01 October 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In line with Directive 2003/88, Portuguese labour law only provides for the concepts of 'working time' and 'rest period'.

According to Article 197 (1) of the Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended (hereinafter referred to as 'PLC'), 'working time' is any period during which the worker carries out the activity or remains available to perform the activity. The 'rest period' is understood as any period that is not considered working time (Article 199 of PLC).

Under Portuguese law, the concept of 'working time' also includes certain situations of inactivity, which the law describes as interruptions and breaks, as listed in paragraph 2 of the above-mentioned Article 197 of PLC. This is the case of meal breaks during which the worker must remain at the workplace or nearby in case he or she is called on by the employer to perform work.

Based on this legal provision, in a situation such as the one dealt with in case C-107/19, the worker's stand-by time would be qualified by Portuguese law as 'working time', provided that the worker must remain at the workplace.

In addition, it should be noted that Portuguese case law has followed the CJEU's rulings regarding the criteria for the qualification of stand-by time as 'working time' or 'rest period'.

Portuguese labour courts generally consider stand-by time to be classified as working time or a rest period, depending on whether the worker must remain at his/her workplace or not during that period, and the constraints imposed by this regime affect (or not) significantly the worker's ability to freely manage this time and to devote it to his/her own personal interests (as an example, see the ruling of the Coimbra Appeal Court of 8 November 2007, the ruling of the Supreme Court of 19 November 2008; the ruling of the Lisbon Appeal Court of 17 December 2014; the ruling of the Lisbon Appeal Court of 13 January 2016).

Moreover, according to Portuguese case law, except when otherwise agreed by the parties or a different rule is established in a collective agreement, the worker is entitled to be paid for his or her stand-by time only when such a period falls into the concept of working time. Otherwise, the employee is only paid the remuneration corresponding to the work effectively performed during the stand-by time (if any).

To sum up, Portuguese law and case law on the classification of stand-by time can be considered to be in line with the interpretation of Article 2 of Directive 2003/88 as upheld by the CJEU in the present case.

4 Other Relevant Information

4.1 Decent Work Agenda

The government has recently presented a set of proposals to the social partners to promote the Decent Work Agenda, following the discussion of the Green Book on the Future of Work.

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On 03 September 2021, the government began discussing the proposed measures with the social partners, which cover, among others, the following labour-related matters: temporary work, misclassification of independent contractors, probation period, digital platform workers, collective bargaining agreement and reinforcement of the Employment Authority's powers.

The referred Agenda and the upcoming discussions with the social partners are likely to result in amendments to the current labour legislation.

Romania

Summary

New bills to respond to the COVID-19 crisis, including the resumption of relief measures for employees who have temporarily been suspended, are being discussed.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Draft measures

In Romania, as a result of increasing COVID-19 infection rates, a series of bills aimed at containing this trend are being debated. The unemployment benefits being paid by the State's social insurance budget in the amount of 75 per cent of the salary of the employee whose employment contract has been suspended, would be resumed for certain professional categories. The draft has already been approved by the Legislative Council.

The possibility of suspending the employment contracts of doctors who are not vaccinated or tested periodically is also being debated. Accordingly, employees would have to carry the costs of testing, a provision criticised by some of the trade union confederations.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, the CJEU ruled that a lunch break should be classified as working time if the employee can be required to return to work within a very short period of time. This approach is not new, the Court having considered on other occasions that the time within which an on-call employee is required to respond in the event of such a request is a criterion for the qualification of this period as working time or rest time. It should be noted that the Court did not distinguish between the daily or weekly rest period (it already ruled that a very short response time, which limits the possibility for the employee to relax and to freely organise his or her private life, shall be considered working time) and the lunch break.

The Romanian Labour Code does not provide for a minimum limit of the lunch break; its duration depends on the parties according to Article 134(1) of the Labour Code. In cases where the daily working time is longer than 6 hours, employees are entitled to a lunch break and other breaks under the conditions established by the applicable collective labour agreement or by internal rules. Young people up to the age of 18 years are entitled to a lunch break of at least 30 minutes, if their daily working time is longer

than 4.5 hours. Breaks are not included in the normal daily working time, unless otherwise provided in the collective agreement or in the internal rules.

The legislative premises are therefore similar to those considered in the present case.

In the practice of the Romanian courts, the issue of reclassifying lunch breaks as working hours was raised particularly in situations where the employee was denied the possibility to leave the workplace, based on the argument, for example, that "*The fact that a food vending machine exists within the undertaking does not remove the employee's right to the full exercise of the right to a lunch break*" (Decision No. 117/2021 of 02 March 2021, Iași Court of Appeal), which led the court to qualify the lunch break as working time. The lunch break was also classified as working time in a case in which a sales agent was working with clients between 9.00 and 18.00. The Cluj Court of Appeal rejected the company's defence that this work schedule would have included a one-hour lunch break, which the employee was free to take during the performance of his daily activities.

> *"Such a possibility is a purely theoretical one, because in practice, it is not acceptable that an employee could decide, at will, to close the payment counter for one hour in order to ensure his lunch break. The observance of the displayed schedule is obligatory for the economic operators, and this obligation was obviously known both by the employer and by the employee"* (Decision No. 1457/2020 of 21 December 2020, Cluj Court of Appeal).

The problem with official opening hours for the public without interruption, so that employees must cut their lunch break short to perform their activity s soon as a client enters the premises, is recurrent in Romanian jurisprudence, and the courts relentlessly reclassify these periods as working time.

Although the Romanian courts have not yet considered a situation in which the employee, although he or she leaves the work premises during his or her lunch break, has the obligation to return within a very short time, it is assumed that their decision would be similar to that of the CJEU in the present case.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

As mentioned in the March 2021 Flash Report, the legal regulations in Slovakia are in line with the Directive. They do not go into such detail as in the present judgment, as stand-by work is regulated in Article 96 of the Labour Code, but no mention is made of breaks at work.

The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – "Coll") as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public sector.

According to Article 85 paragraph 1, working time refers to the time during which an employee shall be at the disposal of the employer, performs work and discharges obligations pursuant to the employment contract. A rest period shall be any period that is not considered working time (paragraph 2).

Breaks at work are regulated in Article 91 of the Labour Code. According to Article 91 paragraph 1, the employer is required to provide the employee, whose work shift is longer than six hours, a break for rest and eating with a duration of 30 minutes. The employer must provide a 30-minute rest period and eating break to juvenile employees whose work shift is longer than 4.5 hours. In case the performance of work cannot be interrupted, the employee must be provided with adequate time to rest and eat without interruption of the operations or of work. According to paragraph 2, the employer shall agree on more detailed conditions for the provision of a rest and eating break, including its extension, with the employees' representatives. Breaks for a rest period and eating are not provided at the beginning and end of shifts (paragraph 4).

According to Article 91 paragraph 5 of the Labour Code, rest and eating breaks are not included in working time; however, this does not apply in case of rest periods and eating breaks, which provides adequate time for rest and eating without interruption of work by the employee. A break provided for reasons to ensure the safety and health of employees at work is included in the working hours (paragraph 6).

Stand-by work is regulated in Article 96 of the Labour Code. There is no mention of breaks at work. According to Article 96 paragraph 1, if, in justified cases and in order to ensure the performance of essential tasks, an employer orders an employee or the employee agrees to remain in a place determined in advance for a period of time outside his or her work shift and beyond the set weekly working time and to be prepared to perform work in accordance with the employment agreement, the employee is deemed to be performing stand-by work.

Employment relationships in the civil service are currently regulated by 6 Acts:

- Act No. 154/2001 Coll. on prosecutors and legal trainees of the prosecution;
- Act No. 35/2019 Coll. on financial administration and on amendments to certain acts;
- Act No. 73/1998 Coll. on civil service of members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police;
- Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps;
- Act No. 281/2015 Coll. on civil service of professional soldiers;
- Act No. 55/2017 Coll. on civil service.

In these Acts, the issue in question is regulated very similarly. In all of these Acts, there is no mention of stand-by work in connection with breaks at work.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) Various measures aiming to contain the spread of COVID-19 virus infections applied during September 2021.

(II) The rules regulating the requirement to possess a COVID-19 certificate attesting recovery, vaccination or a negative test have been amended.

(III) The Constitutional Court stayed the government's rules which imposed a different COVID-19 certificate (attesting recovery or vaccination but excluding the testing option) for public sector employees.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

Various measures aiming to contain the spread of COVID-19 virus infections continued to apply in September 2021. A summary overview of all valid measures are published in English on the government's website.

The most important changes concern the RVT (recovered-vaccinated-tested) and RV (recovered-vaccinated) requirement. Numerous RVT Ordinances were adopted by the government during September, the rules have been changing very frequently (see OJ RS Nos. 142/2021 and 146/2021). On 14 September 2021, the new RVT Ordinance was adopted (OJ RS No 147/2021), which entered into force on 15 September 2021, and introduced the RVT requirement as a general rule for all activities, with very few exceptions. However, the new RVT Ordinance was later amended several times already during September.

For example, initially, it applied to all workers and self-employed persons, including those working at home/from home; an amendment changed that and explicitly excluded those working at home/from home (OJ RS No. 152/2021).

Another amendment to the RVT Ordinance (OJ RS No. 149/2021) introduced the new Article 10.a in the RVT Ordinance and imposed the RV requirement on all State employees (the 'tested' option was excluded for them), which shall apply as of 01 October 2021, but the Constitutional Court stayed these rules on 30 September 2021 (see below, Section 2.1).

The consolidated text of the now valid RVT Ordinance can be found here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 COVID-19 certificate

Constitutional Court, No. U-I-210/21, 30 September 2021

On 30 September 2021, the Constitutional Court stayed the government's rules (Article 10.a of the RVT Ordinance, see above) which had imposed the RV requirement (recovered or vaccinated) on all employees in the State public administration.

According to Article 10.a of the RVT Ordinance, all State employees should be vaccinated or recovered, whereas the 'tested' option would no longer suffice as of 01 October 2021. The provision was challenged before the Constitutional Court; the complaints were lodged by numerous claimants, among them the police trade union and others.

The RV requirement was perceived as a mandatory vaccination, but only for a particular group of persons, i.e. State employees. Publicly, various government representatives mentioned that this measure was supposed to promote vaccination and increase the percentage of vaccinated people in Slovenia. However, the government also claimed that the RV requirement for all State employees was introduced by the government as an employer and that it was introduced as a measure of health and safety at work.

The Constitutional Court rejected this argument; it weighed between potentially harmful and irreparable consequences if this rule were applied (or not) and decided to stay the rules on RV requirement for State employees until its final decision.

This implies that the same general rules, i.e. the RVT requirement, continues to apply (in the same way as before: recovered-vaccinated-tested) to all State employees as well, at least until a final decision on the constitutionality of Article 10.a of the RVT Ordinance is issued.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

The CJEU judgment in this case is of relevance for Slovenian law. Slovenian labour legislation does not define in detail the concept of working time. According to the Employment Relationships Act (OJ RS No. 21/13 et subseq.), "*working time shall mean the effective working hours and breaks according to Article 154 of this Act (30 minutes per day for full-time work) and the time of justified absences from work in accordance with the law and collective agreement and/or a general act*" (Article 142, para. 1) and "*effective working hours shall be the hours during which a worker carries out his work, which means that he is at the employer's disposal and fulfils his working obligations under the employment contract*" (Article 142, para. 2).

Therefore, case law fulfils and concretises the meaning of these rather general provisions on the definition of working time; the guidance provided by CJEU case law in this respect is therefore of particular importance for the development of Slovenian case law on this matter.

See also the comments in the March 2021 Flash Report in relation to the CJEU case C-580/19 to which the CJEU frequently refers in the present judgment.

It is worth mentioning that the Supreme Court of the Republic of Slovenia strictly followed the guidance in the mentioned CJEU judgment in case C-580/19 (see decision of the Supreme Court No. VIII Ips 147/2018, 30 March 2021). It can be expected that the present judgment will also be taken into account by the Slovenian labour courts when dealing with the same or similar issues.

4 Other Relevant Information

Nothing to report.

Spain

Summary

(I) Temporary financial assistance for undertakings, the reduction of social security contributions and other measures to limit worker lay-offs, as well as the more flexible rules to access unemployment benefits, have been extended until 28 February 2022. Access to reductions in social security contributions are now conditional on the provision of vocational training programmes for workers.

(II) The rules on platform work, which entered into force in May 2021 by means of a Royal Decree, has now been enshrined by the Labour Court.

(III) The Supreme Court ruled that in certain cases, it is the worker who claims the applicability of the rules on transfers of undertakings to bear the burden of proof of the relevant components of the transfer.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

As reported in previous Flash Reports (from March to June 2020), the government has approved numerous measures to protect workers and undertakings from the adverse effects of the pandemic. According to these measures, lay-offs on account of COVID were not allowed, because the main purpose was to deal with the situation without incurring a huge loss of jobs. The government provides financial assistance to undertakings, so instead of terminating work contracts, employers must adopt less harmful measures such as the suspension of employment contracts, the reduction in working hours or changes in working conditions. Workers affected by these measures are entitled to unemployment benefits, because more flexible rules are being implemented. Dismissal due to COVID is not permitted and undertakings that enjoy the benefits of a temporary lay-off (lower social security contributions) cannot dismiss workers for six months.

These temporary measures were extended several times: until June 2020, until September 2020, until 31 January 2021, until May 2021, until September 2021 and now they have been extended until 28 February 2022.

A major novelty has been introduced: the reduction of social security contributions in case of temporary lay-offs will now be conditional because the undertakings requesting this measure are required to provide vocational training programmes for the workers.

1.2 Other legislative developments

1.2.1 Platform work

The Labour Code has been modified to introduce two different rules:

1. There is a (rebuttable) presumption of the existence of an employment relationship of delivery riders in the context of platform work. Specifically, this presumption affects the 'activity of persons providing paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise the entrepreneurial powers of organisation, direction and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform'.

2. Worker representatives have a new information right (not including consultation) regarding algorithmic management. Specifically, the works council has the right 'to be informed by the undertaking of the parameters, rules and instructions on which algorithms or artificial intelligence systems are based that affect decision-making which may have an impact on the working conditions, hiring and maintenance of employment, including profiling'.

These measures were introduced in May through a Royal Decree Law, a type of provision adopted by the government for urgent reasons. In the field of labour law, it is common for the contents of a Royal Decree Law to be incorporated into an act passed by Parliament, on occasion with amendments/improvements. In this case, the contents of the Act are the same as those of the previous Royal Decree Law.

2 Court Rulings

2.1 Transfers of undertakings

Supreme Court, ECLI:ES:TS:2021:3347, 09 September 2021

Transfers of undertakings have been a key issue in Spanish case law over the last few years. The Supreme Court has attempted to adapt its doctrine to CJEU case law, but has faced several challenges. There have been numerous CJEU rulings on transfers of undertakings in recent years, and the Supreme Court has not always been able to fully comply with them, at least initially. Currently, the Supreme Court has adapted its doctrine to CJEU case law, even in cases concerning the succession of staff through collective bargaining.

However, this ruling of 09 September 2021 is of major significance because it refers to the burden of proof.

The Supreme Court stated that the employers must prove the absence of elements of a transfer of undertaking if the activity is essentially based on manpower. If this is not the case, and certain assets have been transferred between the former and the new employer, the worker claiming the applicability of the rules on transfers of undertakings must prove the existence of the relevant element(s).

The case concerned an ambulance driver, who could not even prove that the ambulance he was driving was the same before and after the change of employer (a change in subcontractors had taken place). Therefore, the Supreme Court concluded that there was no proof of a real transfer of undertaking for the lack of diligence of the worker to prove the relevant facts.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

This ruling follows the same guidelines of the CJEU's judgments in case C-518/15, *Matzak,* and in cases C-344/19*, D.J. v Radiotelevizija Slovenija,* and C-580/19, *RJ v Stadt Offenbach am Main*.

The Spanish legal framework of stand-by time has not been amended in recent years, not even after the *Matzak* judgment. As a general rule, periods of stand-by time are not considered working time when the worker is not physically at the employer's premises, although the worker is usually entitled to a salary supplement.

These CJEU rulings must be implemented through case law and the Supreme Court has followed the *Matzak* doctrine several times with a case-by-case analysis.

The Supreme Court has stated that stand-by time is not working time when the worker (1) is given a reasonable time to respond to his or her employer's call (30 minutes at

least), (2) can freely choose where to spend that time, (3) can respond by phone or computer to some of the calls, reducing the average frequency of calls requiring him/her to physically commute to the undertaking/client premises. (see e.g. Supreme Court judgment of 18 June 2020, and judgment of 02 December 2020).

A more extensive description of the Spanish legal framework on stand-by time can be found in the March 2021 Flash Report.

4 Other Relevant Information

4.1 Unemployment rate

Unemployment continues to fall (by 82 583 in August). This trend seems to be consolidating because unemployment declined by 675 000 people since February. There are currently 3 333 915 unemployed people in Spain.

4.2 Minimum wage

Article 27 of the Labour Code establishes that the amount of minimum wage must be approved each year, with the possibility of a semi-annual review, if necessary. The power to set the minimum wage is conferred to the government after hearing the most representative trade unions and business organisations. The minimum wage must be set according to various economic and social indicators, specifically the price index, the general economic situation or the national average productivity.

Minimum wage was increased in February 2020 for the last time (see February 2020 Flash Report). At the time, the government decided to set a minimum wage of EUR 950, with the intention of reaching EUR 1 200 in the next three or four years. However, minimum wage has not been yet been update in 2021 due to the crisis caused by COVID-19. The government has decided to increase the minimum wage now as a result of the improvement of the economic situation. The new monthly minimum wage has been set at EUR 965 (EUR 32.17/day). A new raise of the minimum wage is expected in January 2022.

4.3 Promotion of employment and vocational training

In Spain, the so-called 'Employment Act' (Law 3/2015) deals with the general organisation of employment policy: objectives, the powers of the State and the Autonomous Communities, the instruments of planning, the organisation of public employment services, private placement agencies and vocational training. This Law needs to be further developed to fully achieve its goals. In this regard, the recently approved Royal Decree 818/2021 attempts to better implement coordination methods for employment programmes between the State and the regions. The objective is to improve the efficiency of active employment policies.

These programmes aim to improve vocational training of employees and self-employed persons. They also seek to facilitate the integration of individuals facing great difficulties finding a job. In this vein, the Royal Decree requires special attention to be paid to people with disabilities and to female employment.

Sweden

Summary

The instruction for all public employees to work from home has been revoked, with effect from 29 September 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

In a decision of 09 September 2021, the Swedish government's instruction of 22 December 2020 that all public employees should work from home due to the COVID-19 pandemic was revoked, with effect from 29 September 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present judgment, the CJEU clarifies that stand-by time in connection with lunch breaks shall be considered as working time if the time within which the employee is required to return to work is short.

The notion of break time according to Section 15 of the *Arbetstidslag* (1982:673) (Working Hours Act) has been interpreted by the Swedish Labour Court as a time during which no work duties are performed (see AD 1967 No. 26). In that judgment, the Labour Court clarified that a break is an in-advance planned break from work, in which the employee shall be free to dispose of his or her time without having to remain at the workplace.

As the Swedish concept of break time corresponds to the qualification laid down by the CJEU in the present case, the ruling will have no implications for Swedish labour law.

4 Other Relevant Information

4.1 Employment Protection Act

Proposed Swedish legislation is often referred to various agencies and organisations for consideration. In the ongoing legislative procedure to amend the Employment Protection Act, the deadline for considerations on the proposed legislation was set for 15 September 2021. The proposed legislation faced unusually severe criticism from many instances (all statements can be found here).

As regards the proposed legislation's compatibility with EU law, the Swedish Labour Court in its statement asserted that the proposed possibility to set aside the statutory

requirement on objective grounds for the employer's termination of an employment contract is in conflict with EU law. The Swedish Bar Association *(Sveriges Advokatsamfund*) contends in its statement that a new rule for temporary agency workers is in conflict with EU law.

Much of the criticism can be explained by the untraditional legislative procedure that preceded the proposals. Instead of letting an official committee draft the proposal, the amendment is the product of an agreement between the Swedish social partners. It is important to emphasise, however, that the future of the proposed legislation is still uncertain.

United Kingdom

Summary

(I) The furlough scheme, which ran from March 2020, has come to an end on 30 September 2021.

(II) A plan to remove the special status given to retained EU law has been announced in the House of Lords.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

Furlough came to an end on 30 September 2021, having supported over 11.6 million jobs. The government is emphasising its Plan for Jobs, including the super-deduction—the biggest business tax break in modern British history—the Kickstart Scheme, apprenticeships and traineeships.

In its October 2021 report, the Office for National Statistics noted the following:

- One in four people who were employees during the coronavirus (COVID-19) pandemic were on furlough at some point between March 2020 and June 2021;
- Employees with GCSEs as their highest qualification were more likely to have been furloughed than those with degrees or equivalent qualifications;
- 8 per cent of people who have ever been furloughed were no longer employed in the three months to June 2021; this is a similar proportion to employees who had never been furloughed (7 per cent);
- Half of those furloughed were furloughed for more than three months and this group were less likely to be employees by August 2021, when compared with those furloughed for a shorter time;
- The skill set of people who have ever been furloughed was similar to the skill set of current employees who have never been furloughed; however, the former group identified a slightly greater number of skills they would have liked to improve for their career when compared with employees who have never been furloughed.

1.1.2 Self-isolation

According to the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) (No. 3) Regulations 2021 (SI 2021/1073), self-isolation of persons with COVID-19 remains mandatory until 24 March 2022.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

Case C-107/19, 09 September 2021, Dopravní podnik hl. m. Prahy

In the present case, the CJEU set out the main criteria for identifying on-call time as working time in the cases C-344/19, *Radiotelevizija Slovenija* and C-580/19, *Stadt Offenbach am Main*. In the present case, the Court applied the same reasoning to daily breaks during which an employee needs to remain available to respond to emergencies.

These decisions have required UK employers to consider the application of the Working Time Regulations. As one law firm notes:

> *"These judgments provide guidance to employers on how to assess standby time where the worker does not have to be physically present on-site but does have to be contactable and responsive. We recommend employers who operate standby systems and whose employees are not remunerated (or are remunerated at a lower rate) for their standby hours should review their standby hours policies to establish if such policies are in breach of the WTD and/or WTR."*

All three decisions are post-Brexit and so have persuasive effect only on British courts.

4 Other relevant information

4.1 Brexit

Lord Frost announced in the House of Lords that he plans to remove the special status given to retained EU law and to develop a fast-track mechanism to repeal retained EU law:

> *"First of all, we are going to conduct a review of so-called 'Retained EU law' and by this, I mean the very many pieces of legislation which we took onto our own statute book through the European Union (Withdrawal) Act of 2018 and we must now revisit this huge, but for us, anomalous, category of law.*
>
> *In doing so, we have two purposes in mind. First of all, we intend to remove the special status of retained EU law, so that it is no longer a distinct category of UK domestic law, but normalised within our law, with a clear legislative status. Unless we do this, we risk giving undue precedence to laws derived from EU legislation over laws made properly by this Parliament. This review also involves ensuring that all courts of this country should have the full ability to depart from EU case law according to the normal rules. In so doing we will continue, and indeed finalise, the process of restoring this sovereign Parliament, and our courts, to their proper constitutional positions. Our second goal is to review comprehensively the substantive content of Retained EU law. Now some of that is already under way - for example our plans to reform the procurement rules that we inherited from the EU, or the plan announced last autumn by my RHF the Chancellor to review much financial services legislation. But we are going to make this a comprehensive exercise and I want to be clear: our intention is eventually to amend, to replace, or to repeal all that retained EU law that is not right for the UK.*
>
> *That problem is obviously a legislative problem and accordingly the solution is also likely to be legislative. We are going to consider all the options for taking this forward. In particular, we will look at developing a tailored mechanism for accelerating the repeal or amendment of this retained EU law - in a way which reflects the fact that, as I have made clear, laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country."*

4.2 Employment rights

In 2016, the government launched a consultation about tips; it has now announced that it will legislate to ensure that tips left for workers can be kept by them in full. The government says:

> "*We will bring forward measures to ensure tips, gratuities and service charges go to workers in full as part of an upcoming Employment Bill. These will require employers to pass tips on to workers in full without making any deductions. Employers will also be required to distribute tips in a way that is fair and transparent, including via tronc systems if they wish, and they must have a written policy on tips, and a record of how tips have been dealt with.*
>
> *This legislation will be supported by a statutory Code of Practice on Tipping. There will be provisions to allow workers to request information relating to an employer's tipping records and, where employers fail to comply with these measures, this will be enabled through Employment Tribunal."*

The government has also launched a consultation on making the right to request flexible working a 'day one' right for employees (currently, they have to work 26 weeks before making such a request).

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