Flash Reports on Labour Law September 2022

Summary and country reports

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

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Executive Summary

National level developments

In September 2022, all countries reported some labour law developments. The following were of particular significance from an EU law perspective:

Developments related to the COVID-19 crisis

This month, the extraordinary measures to mitigate the COVID-19 crisis did not play a significant role in the development of labour law in many Member States and European Economic Area (EEA) countries. Only in **France** have allowances for vulnerable employees who cannot work due to the pandemic been refinanced as of 01 September 2022. Conversely, in **Portugal**, the state of alert due to the pandemic ended on 30 September 2022, and several decree laws related to COVID-19 measures have been repealed.

Yet controversies arising from the governance of the pandemic are still ongoing. In **Austria**, the Supreme Court has requested the CJEU to give a preliminary ruling on the social security law applicable to a cross-border worker who was quarantined abroad.

Measures to respond to the cost-of-living crisis

Several countries reported the adoption of measures to limit the negative impact of the cost-of-living crisis. Several measures have been introduced in **France**, whereas a discussion on salary increases has been initiated in **Portugal**. Other countries, including the **Netherlands** and **Poland**, have increased their minimum wages.

Transposition of EU law

Directive (EU) 2019/1158 on Work-life Balance for Parents and Carers and Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions were transposed in **Belgium**, whereas a draft law is currently pending adoption in **Romania**. Moreover, a bill amending paternity leave entitlements is being discussed in the **Czech** Parliament.

In **Ireland**, the Minister for Transport has adopted Regulations transposing Council Directive 2020/1057/EU on the posting of drivers in the road transport sector.

Fixed-term work

Several developments concerned the regulation of fixed-term employment for public administrations, in particular in the educational sector.

In **Cyprus**, legislation was amended to equalise the employment and pension rights of public sector teachers whose fixed-term contracts were converted into contracts of indefinite duration. Moreover, an important decision of the Labour Court ruled that public school teachers who had service contracts with the Ministry of Education were to be considered employees, and their contracts were converted into open-ended employment contracts.

In **Estonia**, an amendment to the Employment Contracts Act enabling the conclusion of multiple fixed-term employment contracts for unemployed people is currently being discussed.

In **Portugal**, the Supreme Administrative Court held that a national rule (applicable to fixed-term employment contracts with public entities), which prohibits the conversion of fixed-term contracts that exceed the maximum duration or the number of renewals into permanent employment contracts, is not compatible with EU law.

In **Spain**, specific forms of fixed-term employment contracts for scientists and researchers were introduced.

Working time and annual leave

Three decisions concerned the record of working time. In **Germany**, the Federal Labour Court ruled that the employer is required under the Occupational Health and Safety Act to introduce a system to record employees' working time. Similarly, the **Hungarian** Supreme Court published a decision interpreting the Labour Code provisions on the requirement to record working time. In **Luxembourg**, a decision held that only a recording system established to measure working time can be used as proof that the employee worked overtime with the employer's consent.

The test to assess whether an employee is to be considered a senior manager, and to thus be excluded from the application of working time rules, have been clarified by judges in **Belgium** and **Luxembourg**.

In **France**, the Court of Cassation ruled that the compensation owed to an employee in case of unlawful dismissal also includes allowance in lieu of leave not taken.

Domestic workers

In **Germany**, a State Labour Court ruled on the '24-hour care at home' scheme, recognising the stand-by time of a live-in domestic worker as working time.

In **Spain**, legislation was passed to equalise the working conditions and social security rights of domestic workers with those of other workers, notably recognising their right to unemployment benefits in line with the CJEU's decision in case C-389/20, *TGSS*.

Transfers of undertakings

In **Austria**, the Supreme Court has ruled on the concept of a transfer of undertaking in a case of payrolling.

In **Luxembourg**, two decisions clarified that rules on transfers of undertakings also apply to public notaries, in line with the CJEU's view that they are engaged in an economic activity.

Other developments

In **Austria**, the Supreme Court has directly applied the provision of the Maternity Protection Directive 92/85/EEC on remuneration of maternity leave in a case raised by a public employee.

In **Finland**, legislative amendments were proposed to the law ensuring payment of employees' claims arising from an employment relationship in the event of employer insolvency.

Moreover, an Act, which temporarily enables Regional and State Administrative Agencies to postpone or suspend strikes under certain conditions, was passed to ensure the provision of necessary healthcare.

In **Germany,** the Federal Labour Court delivered the reasons for its earlier decision on the illegal hiring-out of workers from abroad, and further ruled that a collective agreement deviating from the legally permissible period of 18 months is binding for the temporary agency worker and the temporary work agency, irrespective of whether they are bound by the collective agreement.

In **Italy**, rules facilitating access to remote working for private employees, which were provided in emergency legislation that ended on 31 August 2022, have been re-adopted.

In **Lithuania**, a decision clarified that in the context of posting, per diem allowances shall not be considered part of the monthly salary to be taken into account when calculating the compensation of material damages.

In **Poland**, a parliamentary commission has submitted the draft on the right of trade unions to request the employer to share information on algorithms and AI in employee management.

In **Spain**, victims of sexual violence have been entitled to additional labour rights, including a specific leave scheme.

Table 1: Major labour law developments

Topic	Countries
Transparent and predictable working conditions	BE FR IT RO
Work-life balance	AT BE CZ RO
Fixed-term work	CY EE PT ES
Measures to respond to the cost-of-living crisis	FR NL PL PT
Working time – Recording system	DE HU LU
Working time – Personal scope	BE LU
Measures to respond to COVID-19	FR PT
Posting of workers	IE LT
Transfer of undertaking	AT LU
Domestic work	DE ES
Annual leave	FR
Information and consultation	PL
Insolvency	FI
Right to strike in essential sectors	FI
Employment status	CY
Teleworking	IT
Social security	AT

Implications of CJEU Rulings

Annual Leave

This Flash Report analyses the implications of a CJEU ruling on the entitlement to paid annual leave.

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This ruling originated from the request for a preliminary ruling raised by a German court about whether the right to paid annual leave could be subject to a limitation period of three years, even if the employer had not actually enabled the worker to exercise his or her annual leave entitlement. In this regard, the CJEU held that Article 7 of the Working Time Directive 2003/88/EC, interpreted in light of Article 31(2) of the Charter of Fundamental Rights of the EU, must be interpreted as precluding national legislation under which the right to paid annual leave acquired by a worker is time-barred after a period of three years, where the employer has not actually put the worker in a position to exercise that right.

A few countries, including **Bulgaria**, the **Czech Republic**, **Denmark**, **Lithuania**, **Luxembourg**, the **Netherlands**, **Romania**, the **United Kingdom**, reported that their legislation appears to be, or can be interpreted, in line with the CJEU ruling. Similarly, in **Austria**, a similar situation was recently dismissed by the High Court on the basis that the worker was aware of the risk of forfeiture of her leave, and there was no indication that the employer had attempted to prevent the exercise of that leave. This notwithstanding, it is reported that Austrian courts will now have to place a stronger focus on employers' encouragement for employees to take their leave.

By contrast, the **large majority** of countries reported that the decision will have a significant impact on their national legal framework. This is the case for example of **Estonia**, **Finland**, **Germany**, **Hungary**, **Malta**, **Norway**, **Poland**, **Portugal** and **Sweden**, which reported that their legislation does not seem to be in line with the interpretation of Article 7 provided by the CJEU, since the right to paid annual leave is time-barred after one, two or three years. Interestingly, the case is expected to have implications in **France**, where in similar cases the employee was allowed to seek compensation for damages rather than an allowance in lieu of leave.

Against this background, the Court provides useful guidance on the interpretation of the right to paid annual leave, and should now be taken into consideration in cases in which the employer has not actually put the employee in a position to exercise his/her right to annual leave.

It remains to be seen whether the interpretation of the CJEU would also extend to cases in which the temporal limitation is substantially longer, i.e. five years, such as in the case of **Belgium**, **Croatia**, **Greece** and **Slovenia**.

Austria

Summary

(I) The Supreme Court has directly applied the provision of the Maternity Protection Directive 92/85/EEC on remuneration of maternity leave in a case raised by a public employee.

(II) The Supreme Court has requested the CJEU to give a preliminary ruling on the social security law applicable to a cross-border worker quarantined abroad.

(III) The Supreme Court has ruled on the concept of a transfer of undertaking in a case of payrolling.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Maternity leave

Supreme Court, 8 ObA 42/22t, 30 August 2022

Under the General Social Security Act (*Allgemeines Sozialversicherungsgesetz,* ASVG), the maternity benefit is a cash benefit provided by health insurance, which compensates the remuneration not earned due to a prohibition to work related to pregnancy. According to § 122(1) ASVG, an entitlement to maternity benefit from health insurance requires the maternity leave to have commenced before the next work day following the end of the insurance period. In case a woman gets pregnant during her maternity leave, her entitlement to maternity benefit practically only exists if her pregnancy occurred while she was still receiving childcare allowance, which in the literature is sometimes referred to as the 'maternity benefit trap'.

In the present case (available here), the plaintiff, an employee of a social security provider, relied on Art 11 Z 2 lit b of the Maternity Protection Directive 92/85/EEC, according to which the continuation of payment of wages and/or entitlement to an appropriate social benefit must be guaranteed during maternity leave of at least 14 weeks.

The Supreme Court pointed out that an inadequately transposed Directive is not directly applicable to employment relationships with private employers but in the present case, the employer was a social security provider, a public body statutorily entrusted with public health care. The plaintiff was therefore able to invoke the Maternity Protection Directive 92/85/EEC against the defendant, insofar as the rights guaranteed therein are unconditional and sufficiently defined.

The Supreme Court then pointed out that Article 11(4) of the Maternity Protection Directive 92/85/EEC provides that the Member States may make the rights of workers subject to compliance with the conditions laid down in national legislation. However, the CJEU has already ruled that a national provision according to which a pregnant worker who interrupts her unpaid parental leave to take maternity leave within the meaning of the Maternity Protection Directive 92/85/EEC, is not entitled to continued payment of wages, is contrary to the right to parental leave (Directive 2010/18/EU), as now provided for in Article 5 of Directive (EU) 2019/1158 (case C-512/11 and C-513/11, *Terveys- ja sosiaalialan neuvottelujärjestö [TSN] ry*, para 52). The current Austrian legal situation, according to which the applicant can claim neither maternity allowance nor

continued payment of remuneration on account of her maternity leave, is thus contrary to EU law.

According to Article 11(2)(b) of the Maternity Protection Directive 92/85/EEC, workers are entitled to continued payment of wages and/or adequate social benefits. According to Art 11(3) of the Maternity Protection Directive 92/85/EEC, social benefits are only considered adequate if they are at least equivalent to the remuneration the worker concerned would receive in the event of an interruption of employment for health reasons. This minimum limit also applies to pay granted in lieu of social benefits (C-411/96, *Boyle*, para. 34).

Since the Directive thus guarantees workers an income during maternity leave which corresponds to the remuneration they would receive in the event of interruption of their employment for health reasons, the CJEU has already ruled that Article 11(1) to (3) of the Maternity Protection Directive is sufficiently specific to have a direct effect and to confer rights on individuals (case C-194/08, *Gassmayr*, para. 53). The fact that the Directive leaves it up to the Member States to decide whether they want to structure this entitlement as a social benefit or continued payment of remuneration does not prevent direct application, because—if the State does not fulfil its obligation to transpose the Directive in time—the entitled person can decide under which system she wants to assert her claims, although she is naturally not entitled to double payment (cases C-688/15 and C-109/16, *Anisimovienė*, para. 103 f). The defendant did not raise any objection about the plaintiff being entitled to other claims as a matter of priority or that they should be credited.

The Supreme Court therefore concluded that the plaintiff could base her claims directly on Article 11(2)(b) of the Maternity Protection Directive 92/85/EEC. The plaintiff claimed 49 per cent of her remuneration for the period of her employment ban from 5 June 2018 to 4 February 2019, which is in any case less than she would have received in the event of an interruption of her employment for health reasons. However, it must be considered that Article 8(1) of the Maternity Protection Directive 92/85/EEC only guarantees a maternity leave of 14 weeks, which is why the action had to be dismissed insofar as it related to a longer period.

The Austrian Supreme Court is very clear about the lack of proper transposition of the Maternity Protection Directive when it states that the current Austrian legal situation, according to which a mother who is on maternity leave after the childcare benefit has run out can neither claim maternity allowance nor continued payment of remuneration on account of her maternity leave, is thus contrary to EU law.

The Court closed the gap by applying the Directive directly. As this is only possible in the case of public employers, employees in the private sector may still fall into the so-called 'maternity benefit trap'. The benefit for public sector employees is still far below the wage a mother in an active employment relationship or a mother who still receives the childcare benefit would get.

2.2 Cross-border work and applicable social security legislation

Supreme Court, 8 ObA 64/22b, 30 August 2022

In this case (available here), the plaintiff was employed by the defendant, an Austrian temporary work agency, as a worker and was deployed at a user undertaking, which was also based in Austria. During the week, the plaintiff stayed in accommodation close to the employer's premises. At weekends, he returned home to the Czech Republic.

On 12 March 2021, while he was at home in the Czech Republic, the plaintiff was called by his supervisor at the employer's premises and asked whether he had had contact with a specific colleague, to which he replied in the affirmative. His supervisor told him not to come to work because his co-worker had tested positive for COVID-19. The plaintiff then went into self-isolation at his home and later got a quarantine order from

a Czech local authority. In the present case, the courts did not apply the Austrian Epidemic Act (*Epidemiegesetz,* EpiG) as no Austrian quarantine order had been issued. They instead applied the general provision of § 1154b (5) of the General Civil Code that provides for the continuation of payment in case of cessation of work for reasons attributable to the employee. The Czech quarantine order was considered to be covered by such a reason. The employer did not agree and contested the ruling.

The Supreme Court pointed out that the plaintiff is a so-called frontier worker within the meaning of Regulation (EC) No. 883/2004. In contrast to workers who are placed under quarantine by an Austrian health authority and for whom § 32 EpiG provides for compensation for loss of earnings, such a claim does not exist, according to the EpiG, if the quarantine was ordered by a foreign health authority. Due to the question of a potentially inadmissible discrimination of cross-border workers that thus arises, the Supreme Administrative Court (*Verwaltungsgerichtshof* – VwGH), in its decision of 24 May 2022 on Ra 2021/03/0098-0100, 0102, 0103 (registered as case C-411/22, *Themalhotel Fontana Hotelbetriebsgesellschaft m.b.H.*), asked the CJEU for a preliminary ruling on the following questions:

> *"1. Does compensation which is due to workers during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 for the pecuniary disadvantages caused by the impediment to their employment, and which is initially payable to the workers by their employer, with the entitlement to compensation vis-à-vis the Austrian Federal Government then being transferred to the employer at the time of payment, constitute a sickness benefit within the meaning of Article3(1)(a) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems?*
>
> *If Question 1 is answered in the negative:*
>
> *2. Must Article 45 TFEU and Article 7 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union be interpreted as precluding national legislation under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered by the health authorities in the case of a positive COVID-19 test result (with the compensation being initially payable to the worker by their employer, and the entitlement to compensation vis-à-vis the Austrian Federal Government then being transferred to the employer to that extent) is subject to the condition that the isolation is ordered by an Austrian authority on the basis of provisions of national law relating to epidemics, with the result that such compensation is not paid to workers who, as frontier workers, are resident in another Member State and whose isolation ('quarantine') is ordered by the health authorities of their Member State of residence?"*

The Supreme Court considers the answer to the questions referred to the CJEU by the Supreme Administrative Court relevant in the present case for the assessment of the question according to which the provision of a claimant's entitlement to continued payment of remuneration, if any, is governed. The Supreme Court must assume that the CJEU's preliminary ruling has a general effect and must therefore also apply in cases in which it is not directly the court hearing the case. The proceedings must therefore be interrupted.

This is an interesting case which demonstrates the interlinkage between administrative and civil law in the case of continuation of payment due to quarantine. In the case before the Supreme Administrative Court, which was the basis for the request for a preliminary ruling by the CJEU, it was the employer who wanted compensation based on epidemic legislation; in the present case, it is the employee claiming compensation for being prohibited from working by a foreign administrative act (and the employer refusing to grant it).

2.3 Transfer of undertaking

Supreme Court, 8 ObA 82/21y, 30 August 2022

§3(1) of the Act on the Adaption of Contractual Employment Law (*Arbeitsvertragsrechtsanpassungsgesetz*, AVRAG), which transposes Directive 2001/23/EC, provides that "*if a company, undertaking or part of an undertaking is transferred to another owner (transfer of undertaking), the latter shall take over as employer the employment relationships with all rights and duties existing at the time of the transfer*."

In the present case (available here), the user undertaking was the temporary work agency's main client, which continuously assigned up to 40 workers to this company (client). The temporary work agency only had a relatively small number of other clients. Over 50 per cent were workers who had already been recruited by the user undertaking, the rest were recruited by the temporary work agency according to job profiles provided by the user undertaking providing the employment contracts. All of them included an exclusivity clause according to which the temporary agency workers could only be assigned to the user undertaking. This was a textbook case of so-called 'payrolling', where the role of the temporary work agency was restricted to formally acting as the employer and administrating the financial aspects of the employment relationship. When the contract between the temporary work agency and the user undertaking was terminated in 2015, the contracts of the majority of temporary agency workers were terminated by agreement and many of them were then hired directly by the user undertaking. There was no transfer of other personnel between the temporary work agency and the user undertaking. Neither documents nor the software used by the temporary work agency were handed over. The employees involved in managing the agency work essentially left their jobs, but were not taken over by the defendant. From 2016 onwards, the temporary work agency shifted the focus of its business activities to tax and management consultancy and only leased employees on a small scale.

The plaintiff, who was on parental leave when these events took place, claimed that a transfer of undertaking had occurred and claimed continuation of her employment contract with the user undertaking. Both the courts of first and second instance negated that a transfer had occurred as no economic entity (the temporary work agency) had been taken over; only the employment contracts of the former temporary agency workers had been re-concluded with the user undertaking after their termination with the temporary work agency.

The Supreme Court did not uphold these rulings and decided to the contrary in favour of a transfer of undertaking and therefore of the transfer of the plaintiff's employment contract. It stressed the importance of an overall assessment, taking in particular the characteristics of a given activity into account. In the present case, it was the provision of employees for a single major client (user undertaking), who had specifically been selected by the client for its needs and in some cases had even been recruited by the client itself. The 'temporary work agency' took over the formal employer position, including the administrative personnel management, while all other employee functions were performed by the employer. The terms and conditions of the employment contracts were determined by the employer up to the agreement of the collective agreement applicable to his company ('payrolling'). Accordingly, these employees could only be exclusively assigned to this user undertaking.

This characteristic service of the temporary employment agency required practically no material resources. Its office expenditures, including computer software, were limited to personnel administration which is also otherwise necessary in every company. On the other hand, the number of up to 40 temporary employees managed for a single user undertaking were the essential characteristics of the organized economic unit.

These were not workers who could be replaced at will by other technically suitable workers, but persons who had been selected for the client's special needs and in some cases (the plaintiff) had been employed by him for years. Because of this special bond

with the employer, their take-over was practically necessary for the activity of any successor of the temporary work agency.

In this particular constellation, the Supreme Court concluded that the criteria of a transfer of undertaking were present. The absence of a transfer of material and operating resources as well as personnel management resources, which already exist in any other temporary work agency and are of no decisive significance for the provision of the characteristic service in this case does not change this. A transfer of personnel files or contractual terms and conditions to the defendant was already of no decisive significance in the overall consideration because the terms and conditions of employment were here unilaterally stipulated by it in the first place.

In this case, the relevant organizational entity is therefore to be seen as a grouping of workers due to their employment contracts according to which they could only be assigned to the former user undertaking (exclusivity clause). In this respect, they constituted the decisive factors of the undertaking concerned with 'payrolling'. Therefore, there was not only a transfer of a function, but also a transfer of the workers of this part of the company, who were decisive in the payrolling process.

This case dealt with the direct employment of temporary agency workers by a user undertaking in the case of payrolling. Although the Supreme Court's reasoning is not always easy to follow in its details, it demonstrates that this case constitutes a transfer of undertaking for the Austrian Supreme Court as the administration of those employment contracts was taken over by the user undertaking. The Supreme Court did not consider this to be a mere transfer of a function but of an economic entity, as the latter is characterised by the employment contracts that were only concluded formally by the temporary work agency but significantly decided by the user undertaking. If they (or at least the majority of them) are taken over, a transfer of undertaking has taken place.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

§4(5) Act on Paid Annual Leave (*Urlaubsgesetz*, UrlG) reads as follows:

> "*The holiday entitlement [of five weeks, given a five-day work week, extending to six weeks after 25 years of service with the same employer] shall become time-barred two years after the end of the holiday year in which it arose. This period shall be extended by the period of maternity leave in the case of maternity leave under the Fathers' Leave Act (VKG), Federal Law Gazette No. 651/1989, or under the Maternity Protection Act 1979 (MSchG), Federal Law Gazette No. 221/1979*."

The specific regulation on the time-barring of entitlements to paid annual leave (two years after the end of the holiday year in which the entitlement first arose) precludes the application of the general statute of limitations of the Austrian Civil Code (ABGB). It is not possible to deviate from §4(5) UrlG, neither by CBA, works council agreements or employment contracts. The commencement of the limitation period presupposes the objective possibility of asserting the claim. If it is impossible for the employee to make use of his/her entitlement to paid annual leave, e.g. due to illness, the commencement of the limitation period is postponed by the duration of the impediment (see case law of the Austrian High Court).

The question of fault for not using the leave has traditionally been legally irrelevant, the general notion has been that only if the employer fraudulently prevented the employee

from using his/her leave (or from bringing an action to enforce his/her leave entitlement), he/she may not invoke that the right to paid annual leave is time-barred.

This approach changed following the CJEU's rulings in C-619/16, *Kreuziger* and C-684/16, *Max-Planck-Gesellschaft*. The Austrian High Court recently acknowledged these CJEU decisions in a case concerning the pay-out of annual leave not taken by the end of an employment relationship in OGH 9 ObA 88/20m. The plaintiff argued that the employer cannot rely on §5(4) UrlG regarding certain presumably forfeited claims on the pay-out of annual leave not taken, as she was not requested to take this leave and because the employer did not mention the forfeiture of these claims.

The Austrian High Court referenced the CJEU's rulings but denied the claim. The plaintiff/employee was the person who had managed the lists of paid annual leave for staff and was therefore well aware of the risk of forfeiture of her leave. Under these circumstances, the High Court concluded that despite the CJEU rulings, there had been no need to draw the employee's attention to her outstanding leave entitlements. Additionally, the defendant/employer had complied whenever the plaintiff/employee requested an extension of the period for consumption of leave to avoid forfeiture. As there was no indication that the defendant/employer had attempted to prevent consumption of that leave, the plaintiff's entitlements were forfeited.

Despite its reference to C-619/16, *Kreuziger* and C-684/16, *Max-Planck-Gesellschaft,* the Austrian High Court did not place specific emphasis on whether or not the defendant/employer had actively requested the plaintiff/employee to take annual leave. This may or may not be attributable to the facts of the case, which are not reiterated in detail in the decision: the Austrian High Court merely mentioned that there is no indication that the defendant/employer violated her duty of care as regards paid annual leave.

It appears that in order to comply with the CJEU's ruling in the present case, Austrian case law will have to put a stronger focus on the employer's encouragement for employees to take their leave.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) Collective Bargaining Agreements (CBA) No. 161 and No. 162 transposing Directive 2019/1152 on Transparent and Predictable Working Conditions and Directive 2019/2018 on Work-life Balance for Parents and Carers in the Belgian legal order, came into force on 01 October 2022.

(II) The Belgian Cour de Cassation has interpreted restrictively the category of employees holding managerial position that can be excluded from regulations on normal working time.

1 National Legislation

1.1 Measures to promote employment

The Royal Decree of 11 September 2022 amended the so-called Codex on Well-being at Work of 28 April 2017 on the reintegration for incapacitated employees (*Moniteur belge*, 20 September 2022, P. 67.990).

First, the employer will be able to initiate the reintegration process as early as three months instead of four months. However, the employee can initiate this process him-/herself without being bound by any deadline. In addition, the consultant doctor of the sickness fund in the social security branch for sickness and disability can no longer request this process to be initiated.

Secondly, the number of decisions the prevention advisor/ occupational doctor can take is reduced to three instead of five. Thus, the employee is temporarily (decision A) or permanently (decision B) unfit to perform the agreed work but can perform other types of work. In addition, the prevention advisor/ occupational doctor may decide that for medical reasons, it is not possible (for the time being) to carry out a reintegration assessment (decision C), for example, if it is unclear whether the incapacity is temporary or permanent.

Thirdly, the Royal Decree lists certain situations in which the reintegration process shall be terminated. This is the case, for example, if the employer submits a reintegration plan that has been rejected by the employee to the prevention advisor/ occupational doctor or submits the approved reintegration plan to the prevention advisor/ occupational doctor and the employee. In addition, the reintegration process is also terminated the moment the employer is informed by the prevention advisor/ occupational doctor that the employee did not respond to repeated invitations by the prevention advisor/ occupational doctor. The same applies if the employer received a reintegration assessment form with a decision 'C' from the prevention advisor/ occupational doctor or if the employer has submitted a reasoned report referred to in Article I.4-74, §4 to the prevention advisor/ occupational doctor and to the employee. This article will only come into force on the same day as the future law containing various provisions on incapacity for work, which will amend Article 34 of the Employment Contracts Law of 03 July 1978.

Fourth, definitive medical force majeure is separated from the reintegration process. Previously, a reintegration process had to be initiated before the employment contract could be terminated due to medical force majeure. However, the future law containing various provisions on the incapacity for work, which shall amend Article 34 of the Employment Contracts Law, will provide for a special procedure in the context of terminating medical force majeure. Therefore, the implementing measure in this Royal Decree will only come into force on the same day as that law.

On 01 October 2022, the Royal Decree on the reintegration process for incapacitated workers entered into force.

1.2 Transposition of EU law

Transparent and predictable working conditions

On 27 September 2022, CBA No, 161 established to implement Directive EU 2019/1152 on Transparent and Predictable Working Conditions, was concluded in the National Labour Council.

That CBA grants employees the right to request a form of work with more predictable and secure working conditions. According to Article 6 and the commentary to Article 6 of CBA No. 161, more predictable and secure working conditions may include:

- an open-ended employment contract instead of a fixed-term employment contract;
- a full-time employment contract instead of a part-time employment contract;
- a part-time employment contract with a larger number of hours instead of a part-time employment contract with fewer hours;
- an employment contract with a fixed work schedule instead of an employment contract with a variable work schedule;
- a weekly or monthly employment contract for temporary agency work instead of a daily employment contract for temporary agency work.

It is up to the employee to determine what he/she considers a form of work with more predictable and secure working conditions.

CBA No. 161 does not attach a specific period to the transition to more predictable and secure working conditions. If the transition occurs, it is in principle for an indefinite period.

Work-life balance

On the same day, CBA No. 162 to implement Directive EU 2019/1158 on Work-life Balance for Parents and Caregivers was concluded by the National Labour Council.

This CBA grants the employee the right to request flexible work arrangements for care purposes. There are two care purposes that can substantiate the right to make such a request:

- the care of a child following birth, adoption, guardianship or long-term foster care up to the age of 12 (21 years for children with disabilities);
- the personal care or support of a family member or relative in need of intensive care or support for a serious medical reason.

For such care purposes, the employee has the right to request an adjustment of his/her work pattern, in particular in the form of:

- remote work, e.g. telecommuting;
- an adjustment of his/her work schedule;
- a reduction in working hours.

The commentary to Article 7 of CBA No. 162 states that the employee may request any adjustment to his/her current work pattern, even if the company does not provide for any adjustment or that particular adjustment is currently not being applied there. Flexible work arrangements include, but are not limited to flexible working hours, innovative flexible arrangements and telecommuting.

The employee has the right to request a flexible work arrangement for a period of maximum 12 months. The employee may make multiple requests for a flexible work arrangement during his/her career, with the total duration of all requests not limited to a maximum total period of 12 months.

Procedure

CBA No. 161 and CBA No. 162 establish an almost identical procedure to be followed to submit requests to reach an agreement on the modalities of the form of work to be exercised with more predictable and secure working conditions (CBA No. 161) or a flexible work arrangement (CBA No. 162).

In both cases, the employee must submit a written request to his/her employer, in principle at least 3 months before the commencement of the changed work schedule.

Both collective bargaining agreements describe the steps of the procedure after the request has been submitted.

Both CBAs provide that the employer may refuse the employee's request (within a period of 1 month from receipt of the application; CBA No. 161 provides for a period of 2 months for employers with fewer than 20 employees). Both the needs of the company and of the employee must be considered. A refusal must be justified in writing by the employer.

The employer may also postpone agreement to work with more predictable working conditions or a flexible work arrangement or offer a counterproposal.

Both CBAs provide safeguards for the employee to exercise his/her right. For example, it is stipulated that the employer may not take any adverse action against an employee who exercises the right granted by the collective bargaining agreement. An employer who violates this prohibition risks having to pay the employee compensation equivalent to at least 2 months' wages and up to 3 months' wages.

The employer may also not dismiss the employee who has submitted a request, except for reasons unrelated to the exercise of the rights arising from the CBA. An employer who violates the prohibition of dismissal must pay the employee dismissal compensation equivalent to at least 4 months' wages and at most 6 months' wages.

Finally, CBA No. 162 also stipulates that the employee has the right to resume his/her original work pattern after the end of the period of flexible work arrangement.

2 Court Rulings

2.1 Working time

Cour de Cassation, No. S.20.0026.F, 27 June 2022

Article 3(3)(1°) of the Labour Law of 16 March 1971 states that most of the provisions of the chapter relating to working and rest periods do not apply to "*employees designated by the King who hold a managerial position or a position of trust*". This concerns, in particular, the regulations on working hours, night work, observance of timetables, rest periods and breaks. A Royal Decree of 10 February 1965 lists those who hold a leading position or a position of trust. This refers to some specific professions, but the list also includes "*those persons who, under their responsibility, are authorised to make decisions on behalf of the company vis-à-vis third parties*".

The Belgian Cour de Cassation interpreted this category of employees, excluded from the personal scope of the Labour Law of 16 March 1971 on working time limits, in a restrictive way. The Supreme Court ruled that an employee who does not hold a management position or listed position can invoke that he or she is authorised to represent and make decisions on behalf of the company vis-à-vis third parties but that this legal definition should relate to certain matters of importance. It is not sufficient

that the employee is authorised to represent and make decisions on behalf of the company vis-à-vis third parties on minor issues.

In the present case, a person who held the positions of organisational consultant, technical assistant and attaché to the general management claimed unpaid overtime after his dismissal. None of his functions are listed in the Royal Decree. According to the Labour Court of Appeal, the applicant does not fall under the exception because he did not have autonomous decision-making power, he was not authorised to represent and make certain decisions of importance on behalf of his employer and he had to comply with his employer's instructions and regularly account for the decisions he took vis-à-vis customers. The employer negated this authority before the Cour de Cassation, holding that a position of trust does not require autonomous decision-making power (unlike a manager), that the Royal Decree's list does not necessarily refer to employees who can represent their employer in certain decisions of importance and, finally, that a person occupying a position of trust is an employee and must therefore follow the employer's instructions in any case. The Cour de Cassation rejected this argument.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In Belgium, the claim for payment of a blue collar worker's holiday pay lapses after 3 years from the end of the holiday service year in which such holiday pay arises (Article 46bis of the Annual Holiday Law of 28 June 1971). This applicability period also applies to the claim for payment of holiday pay of white-collar workers (Article 46ter of the Annual Holiday Law of 28 June 1971).

The limitation period for the payment of holiday pay in Belgium is therefore similar to that of Germany. This CJEU ruling therefore has important implications for the Belgian legal order if the employer has not actually put the worker in a position to exercise that right. It seems that in that case, the Belgian Annual Holiday Law, as far as the law concerns the applicability period, breaches Articles 7 of the Working Time Directive and Article 31(2) of the Charter of Fundamental Rights of the EU.

But the worker can also claim payment of his or her holiday pay. Failure to pay the holiday pay due, or to pay it within the prescribed period or according to the regulatory modalities is deemed an offence (see Article 162(3°) Social Penal Code). This means that the worker's claim for payment of unpaid holiday pay can also be based on the offence of non-payment of holiday pay. In a civil *ex delicto* claim, the integral recovery of damages can be claimed, so the employee can therefore claim holiday pay as such.

The limitation period is determined by Article 26 Preliminary Title Code of the applicable criminal procedure. That article provides that the civil action following a crime is time-barred according to the rules of the Civil Code and civil action, however, it cannot be time-barred before the criminal action. Thus, the claim for payment of holiday pay based on an offence is time-barred pursuant to Article 2262bis(1), second paragraph of the Civil Code after the lapse of 5 years from the day following the date on which the injured party became aware of the damage and of the identity of the person liable for it, without being subject to the statute of limitations for the purposes of criminal proceedings.

It is unclear how the CJEU would decide on this 5-year limitation period in case the employer did not actually put the worker in a position to exercise his/her right to paid annual leave.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The present ruling does not have any implications for Bulgarian labour legislation.

There is no provision in Bulgarian legislation (Articles 172—176a of the Labour Code – LC) under which the worker may not exercise his/her right to paid annual leave where the employer has not actually put the worker in a position to exercise that right. Paid annual leave shall be granted to the worker in a single, uninterrupted period or in a piecemeal way. It shall be used by the worker on a written authorisation by the employer.

The employer shall be entitled to grant paid annual leave to the worker even without the latter's written request or consent during an idling of more than 5 working days, where all workers use leaves simultaneously, as well as in cases in which the worker, following an invitation by the employer, would have failed to request to take his/her leave by the end of the calendar year during which it arose. The worker or employee shall use his/her leave by the end of the calendar year during which it arises.

The employer is required to authorise the use of paid annual leave by the end of the respective calendar year, unless the use of said leave has been deferred in accordance with the procedure of Article 176 LC. In such a case, the worker shall have the opportunity to use not less than one half of the paid annual leave to which he/she is entitled for the respective calendar year.

Under Article 176 LC, the use of paid annual leave may be postponed to the following calendar year by the employer for important production reasons under the condition of Article 173(5), in which case the worker shall have the opportunity to use not less than one half of his/her paid annual leave to which he/she is entitled for the respective calendar year. Paid annual leave may be postponed to the following calendar year by the worker as well, using an alternative type of leave or upon his or her request with the consent of the employer.

If the leave was postponed or was not used by the end of the calendar year during which it arose, the employer is required to ensure that it is used in the following calendar year, but no later than six months before the end of that calendar year. In case the employer does not authorise the use of leave in cases and under the terms mentioned above, the worker is entitled to determine the time of its use him-/herself by notifying the employer thereof in writing at least 14 days in advance. This is his or her entitlement in the employment relationship – an effective means for self-protection of labour rights.

Under Article 176a LC, in case paid annual leave or part thereof is not used within two years after the end of the year during which said leave arose, regardless of the reasons therefor, the entitlement to use that leave shall be extinguished by prescription. If the paid annual leave was postponed under the terms and procedure mentioned above, the right of the worker to use it shall expire upon expiry of two years after the end of the year during which the reason to not use it would have ceased to exist. Article 37a of the Ordinance on working time, rest periods and leaves requires the employer at the beginning of each calendar year, and no later than 31 January, to inform every worker in writing about paid annual leave he or she is entitled to that calendar year, including postponed or unused leaves for preceding calendar years.

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 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The Labour Act of 2014 (last amended in 2019) regulates the right to annual leave (Articles 76-85) and the statute of limitations for claims arising from the employment relationship (Article 139). It contains certain mechanisms for exercising the right to annual leave such as an obligation to take at least two consecutive weeks of annual leave within a calendar year, i.e. the employee may exercise the right to annual leave by taking portions of annual leave, unless otherwise agreed upon the employee and employer (Article 83). Furthermore, the employer must prepare the annual leave schedule by 30 June of the current year (Article 85(1)).

A five-year period of statute of limitations applies for claims arising from the employment relationship (Article 139). Employers and the national courts will have to take the CJEU's decision in case C-120/21 into account and in case of breach of the relevant provisions of the Labour Act, i.e. when the employer prevents the employee from exercising his/her right to annual leave, employees should be aware that the statute of limitations does not apply.

4 Other Relevant Information

4.1 Income tax

The Amendment to the Regulations on Income Tax (Official Gazette No. 112/2022) raises the amount of non-taxable pecuniary receipts of employees paid by the employer. It refers to the amount of the Christmas bonus, the annual leave bonus, severance pay when retiring, bonuses for children up to the age of 15 years, etc.

Cyprus

Summary

(I) Legislation was amended to equalise the employment and pension rights of public sector teachers whose fixed-term contracts have been converted into contracts of indefinite duration.

(II) An important decision of the Labour Court states that public school teachers, who had a contract of services with the Ministry of Education, were to be considered employees, and that their contracts were to be converted into employment contracts of indefinite duration.

1 National Legislation

1.1 Fixed-term work in the education sector

The main opposition party AKEL proposed an amendment to the main law, the Education Service (Amendment) Act, 2022 (File No. 23.02.063.044-2022), with the objective of equalising the rights of teachers employed under fixed-term contracts in secondary schools in the public sector and whose contracts have been converted into contracts of indefinite duration.

The matter had been discussed in the parliamentary session on education on 25 May 2022, when an officer of the Legal Service suggested that the amendment as it had been originally proposed violated the principle of equal treatment of these teachers. Therefore, the MPs removed the discriminatory provisions of the propped amending law.

The Constitution of the Republic of Cyprus prohibits granting the same status of civil servant or public sector employee to those employed under a temporary fixed-term contract. The employment of workers on fixed-term contract is regulated by law (FT Law, Law 98(I)2003, 25 July 2003, '*Ο Περί Εργοδοτουμένων με Εργασία Ορισμένου Χρόνου (Απαγόρευση Δυσμενούς Μεταχείρισης) Νόμος του 2003*') purporting to transpose Directive 1999/70/EC on Fixed-term Work, herein referred to as the 'Framework Agreement'. The law entered into force in 2003, a year prior to EU accession, explicitly stipulating its purpose to harmonise Cypriot law (Law 70(I)2002 (7 June 2002) amending the law on Termination of Employment, published in the Cyprus Official Gazette 3610 on 07 June 2002, effective 01 January 2003) with the Directive. Numerous transposition issues regarding the implementation of the FT Law have been raised in the literature. (See N Trimikliniotis and C Demetriou: 'National Expert Report on Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and ETUC', Studies on the implementation of Labour Law Directives in the enlarged European Union', 2006, on behalf of human European consultancy, Hooghiemstraplein 155, 3514 AZ Utrecht, the Netherlands, funded by the EU Commission; P. Polyviou: '*Η Σύμβαση Εργασίας*' (Chysafinis & Polyviou 2016, Nicosia), pp 509-521; A Emilianides and C Ioannou: Labour Law in Cyprus (Wolters Kluwer International publications, 2016), pp 59-64; S Yiannakourou: '*Κυπριακό Εργατικό Δίκαιο*', (Nomiki Bibliothiki, 2016), pp 144-153.)

An issue raised on numerous occasions is the fact that fixed-term workers who work in the public sector do not enjoy the same rights as civil servants or public sector employees; instead, their rights are regulated by private law.

With the amendment, the following important changes have been introduced:

- This group of teachers will not be required to take a written examination every eight years to remain on the list awaiting appointment;
- They will retain their right to be eligible for permanent appointment after the replacement of the appointment lists on 01 September 2027 by a list to be

specifically established for this purpose, which will be drawn up on the basis of merit criteria to be determined by regulations;

- They will enjoy the same employment and pension rights of teachers who have contracts of indefinite duration and face the risk of being dismissed for redundancy reasons and do not face any adverse discrimination.

2 Court Rulings

2.1 Employee status

Labour Court, 290/2016 and 798/2016

The Labour Disputes Court has issued an important decision that may affect several thousand secondary and tertiary education teachers in the public sector, which may also have an impact on the private sector.

In joined cases 490/2016 and 798/2016 (the decision has not yet been reported and uploaded to the database Cylaw), the Court decided on the employment status of music teachers employed to teach in specialised public sector schools, namely music secondary schools, by the Ministry of Education under temporary contracts.

Firstly, the annual 10-month contracts the music teachers had been required to sign since 2013 were designated by the Ministry as service contracts, i.e. as subcontractors. The Court ruled that this amounted to concealed employment.

Secondly, the Court cited the Cypriot law on workers working under a fixed-term contract (FT Law) (Law 98(I)2003, 25 July 2003, '*Ο Περί Εργοδοτουμένων με Εργασία Ορισμένου Χρόνου (Απαγόρευση Δυσμενούς Μεταχείρισης) Νόμος του 2003*') purporting to transpose Directive 1999/70/EC on Fixed-term Work. The Court ruled that the teachers were performing jobs that covered a permanent need, and given that the 30-month period of successive contracts had been met, the fixed-term contracts were converted into contracts of indefinite duration.

The Court cited several CJEU cases, such as the joined cases C-378/07 to C-380/07, *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis*; *Charikleia Giannoudi v Dimos Geropotamou and Georgios Karabousanos*; and *Sofoklis Michopoulos v Dimos Geropotamou*; C-486/08, *Zentralbetriebsrat der Landeskrankenhäuser Tirols;* case C-313/10, *Land Nordrhein -Westfalen v. Sylvia Jansen;* joined cases C-22/13, C-61/13 and C-418/13; C-574/16, *Grupo Facility;* case C-677/16, *Montrero Mateos*; case C-619/17, *De Deigo Parras.*

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This case dealt with the right to paid annual leave (Article 7, Working Time Directive), specifically whether an allowance in lieu of leave not taken after the termination of the employment relationship over a three-year limitation period, was due. The Court (Sixth Chamber) ruled that Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation under which the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

The Republic of Cyprus regulates working time in the Laws on Annual Leave with Pay (*Ετήσιων Αδειών με Απολαβές Νόμος του* 1967, N. 8/1967), which regulates the general framework for paid leave and the law purporting to transpose the Working Time Directive, the Law on Organisation of Working Time (Law 63(I)/2002 as amended, *Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του 2002* (63(I)/2002)), herein referred to as WTL. Cyprus is amongst those Member States whose legislation contains explicit provisions that this is the only case in which it is permissible to grant the worker a payment in lieu. However, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated (see Commission Staff Working Document SWD (2017) 204 final, ft.108, p. 20.).

Article 7(3*)* of the WTL provides that all employees are entitled to four weeks of paid leave in accordance with the terms and conditions provided for in legislation or collective agreements and/or the practice of obtaining the right to and the granting of leave.

5(1) of the Law on Paid Leave, which provides for the duration of leave, is also relevant. The duration of an employee's leave, who has worked not less than 48 weeks in the given leave year shall be 20 working days in the case of an employee who has worked a five-day week, and 24 working days in the case of an employee who has worked a six-day week. Provided that where an employee is entitled by law, custom, collective agreement or otherwise to a period of leave longer than the days provided, the number of days in that longer period shall be substituted for the days provided for in this Article, as long as the law, custom, collective agreement or otherwise remains in force.

As for the minimum period and accumulation of paid leave, Article 7(1) of the Cypriot law on Paid Leave provides that a leave shall include a continuous period of not less than nine days. Also, Article 7(1) allows for leave to be accumulated up to a maximum of the leave to which the employee is entitled to over two years by agreement between the employer and employee.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The government has decided to reduce the minimum temperature at the workplace due to the energy crisis caused by the war in Ukraine.

(II) A bill amending paternity leave entitlements is being discussed in the Chamber of Deputies.

1 National Legislation

1.1 Working environment

A draft regulation amending Government Regulation No. 361/2007 Coll., on laying down the conditions for occupational health protection has been approved by the government; this regulation will take effect on the date of its publication, which is expected in the coming days.

The Government Regulation contains a plethora of occupational health aspects, one of which is the minimum temperature at the workplace. The draft regulation proposes a decrease in the minimum temperature for work *I* category (office work such as PC work, laboratory work, etc.) from 20°C to 18°C, and for work *IIa* category (lighter manual work such as cashiers, passenger car or lift truck drivers, production operators, etc.) from 18°C to 16°C. The temperatures for other work categories shall remain unchanged.

Furthermore, the minimum temperatures for sanitary rooms shall be decreased as well. The minimum temperature for changing rooms shall be decreased from 20°C to 18°C, for washrooms from 22°C to 19°C, for showers from 25°C to 19°C and for toilets from 18°C to 15°C.

The government has issued this amendment in connection with the energy crisis caused by the war in Ukraine. The purpose of decreasing the above temperatures, which were considered to be unnecessarily comfortable, is to save energy while also taking workers' health into account.

1.2 Work-life balance

A Bill amending the Act on the Provision of Benefits to Persons with Disabilities and amending some other acts is being discussed in the Chamber of Deputies. It shall enter into effect on the first day of the calendar month following its publication.

One of the acts it aims to amend is the Sickness Insurance Act, particularly paternity leave. The Bill proposes to broaden the group of persons entitled to paternity leave to include persons to whom a child was stillborn or died within 6 weeks of birth; the time during which the father must take his paternity leave shall be amended to reflect this change. Fathers would now be entitled to take paternity leave in the first 14 days after the death of the child (otherwise, if the child died 2 days before the end of the first 6 weeks, e.g. the father would be entitled to 2 days of paternity leave only). Last, if the father takes paternity leave and the child dies afterwards, the father is entitled to a new paternity leave as the birth and death of the child are two different events establishing entitlement to the benefit.

The Labour Code is another act the Bill aims to amend. It introduces paternity leave as a new impediment to work. This is mostly a formality, as paternity leave factually existed in practise even prior to the Bill.

The described part of the Bill is based on the assumption that the death of a new-born (or stillborn) child will cause a similar psychological state in the father as in the mother

of the child. Such a psychological state, as a rule, does not allow for proper performance of work, and it is therefore important to ensure that the father is also able to take leave of absence with compensation of salary.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In the Czech Republic, paid leave shall generally be taken during the year in which the entitlement arises. Any paid leave that is transferred to the following year must be ordered by the employer before 30 June and must be taken until the end of that year; otherwise, the employee may take the leave him-/herself, given that they inform the employer 14 days in advance. If the leave is still not taken in that following year, it is not forfeited; the expert public is of the opinion that the general limitation period does not apply. Additionally, the Labour Code states that if the leave could not be taken in the following year due to the employee's incapacity for work or due to maternity/paternity leave, the employer must order leave to be taken once the impediments to work cease to exist.

Pursuant to EU law, the Labour Code prohibits paid leave entitlement to be compensated monetarily. Termination of an employment relationship is the only exception. Once the employment relationship is terminated, the employee is entitled to compensation of salary in an amount corresponding to the untaken leave. This entitlement is subject to the general three-year limitation period; however, it applies to the entitlement as a whole, meaning that the limitation period begins for the 'older' parts of the entitlement following the termination as well.

From the above, it is apparent that the CJEU's ruling should have no implications in the Czech Republic.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The Danish holiday system is organised differently than the German one as regards unclaimed holiday payments. The current state of law in Denmark protects the employee's holiday pay, it has a longer limitation period of 5 years, which can be interrupted by the employee at any time and ensures that the employer does not profit from the employee not claiming holiday pay.

Article 7, Directive 2003/88 has been transposed in the Danish Holiday Act. According to the Act, an employee accrues 5 weeks of paid leave per holiday year ('*ferieåret*') from 01 September to 31 August the following year (i.e. over 12 months), cf. Section 4. All five weeks of paid leave must be taken within the holiday-taking period ('*ferieafholdelsesperiode*'), which is 01 September to 31 December of the following year (i.e. 16 months), cf. section 6. However, at least four out of the five weeks must be taken within the holiday year (12 months), cf. section 8(1).

First, the employer does not profit when the employee does not take annual leave or does not claim holiday pay. Any unclaimed holiday pay are transferred at the end of the holiday-taking period to the Labour Market Holiday Fund ('*Arbejdsmarkedets Feriefond*'), cf. the Holiday Act Section 34 (1). The system is specifically designed to ensure that the employer does not profit if employees do not take holidays or claim holiday pay. This principle is explicitly highlighted in the new Holiday Act of 2018, cf. remarks of the Ministry of Employment in section 2.7. of the preparatory works.

Any unclaimed holiday pay must be transferred to the Labour Market Holiday Fund or the private holiday fund no later than 15 November after the expiry of the holiday-taking period, cf. section 34 (3). Requiring the employer to transfer unclaimed holiday pay to an independent public institution is intended to safeguard that the employer makes sure that the employees take their leave.

The Labour Market Holiday Fund spends its funds on 'holiday purposes' for employees, including financial support for institutions or organisations that establish holiday opportunities for employees, cf. section 40 (3).

Second, the Danish limitation period for unclaimed holiday pay transferred to the Labour Market Fund is 5 years after the expiry of the holiday-taking period, cf. section 30(1) and (2) of the Holiday Act. If the employee has transferred non-taken holidays from one year to another, the limitation period is calculated from the expiry of the holiday year to which the leave has been transferred (the later year).

The limitation period can be suspended if the employee contacts the Labour Market Holiday Fund (given that the holiday amounts have been transferred to the fund), cf. section 30(1).

The limitation period for an employee's claim for holiday pay, where the employer has not acknowledged the claim, is regulated in section 30(2). In this case, the disputed holiday pay is not yet_transferred to the Labour Market Holiday Fund. The provision gives a time limit for initiating holiday pay claims that have not been acknowledged by the employer. The limitation period is suspended when an employee seeks justification for his or her claim by way of legal proceedings within five years from the expiry of the holiday-taking period.

In conclusion, the situation that the German employee faced in the CJEU ruling would not arise under the current Danish Holiday legislation.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

An amendment to the Employment Contracts Act, enabling the conclusion of multiple fixed-term employment contracts for unemployed people, is currently being discussed.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The mentioned decision of the European Court has implications for Estonian law.

According to the Estonian Employment Contracts Act S 68 (6), an employee has the right to postpone his/her leave by one year. If the employee does not take his/her leave one year later, his/her claim for annual leave expires. If the leave period expires, the leave cannot be claimed and will not be compensated monetarily.

The Estonian Employment Contracts Act does not specify that the leave can still be used after this time if the employer has not given the employee the opportunity to exercise his/ her right to leave or has not informed the employee that his/her right will expire. Although the provision of the Employment Contracts Act does not directly contravene EU law, the European Court of Justice's decision now requires the employer's conduct to be taken into account when assessing the employee's right to annual leave.

4 Other Relevant Information

4.1 Fixed-term work

A draft amendment to the Employment Contracts Act is being discussed in the Estonian Parliament, *Riigikogu*, which provides for the possibility of short-term employment (gig-employment).

This exception covers individuals registered as unemployed. If a person is registered as unemployed, he/she has the right to work for eight calendar days per month. The Employment Contracts Act will be amended to ensure the possibility of concluding multiple fixed-term employment contracts.

According to the amendment, a person registered as unemployed may conclude unlimited fixed-term employment contracts. This opportunity will be valid within six months from the conclusion of the first fixed-term employment contract. It is not yet clear when the said amendment will be adopted.

See here for further information.

4.2 Minimum wage

The social partners the Estonian Union of Trade Unions and the Estonian Employers' Union signed a national minimum wage agreement for 2023, increasing the minimum wage to EUR 725 and the minimum hourly wage to EUR 4.3.

At the same time, employers' associations and trade unions have proposed to decouple the minimum wage from taxes or fees, such as the fee for a place in a kindergarten or the salary of municipal managers.

Although fines, alimony, etc. based on the minimum wage have been continuously falling, the connection with several subsidies and benefits has remained.

The agreed minimum wage will come into effect on 01 January 2023.

The monthly minimum wage agreed for 2020 was EUR 654 per month and EUR 3.68 per hour.

See here for further information.

Finland

Summary

(I) The Act on Ensuring Necessary Healthcare and Home Care during an Industrial Action, which temporarily enables Regional State Administrative Agencies to postpone or suspend strikes under certain conditions to ensure the provision of necessary healthcare, has been passed.

(II) Legislative amendments to the law ensuring payment of employees' claims arising from an employment relationship in the event of employer insolvency have been proposed.

1 National Legislation

1.1 Industrial action in essential sectors

The President has confirmed the Act on Ensuring Necessary Healthcare and Home Care during an Industrial Action (*Laki välttämättömän terveydenhuollon ja kotihoidon turvaamisesta työtaistelun aikana*, 826/2022). The Act entered into force on 20 September 2022 and will be in force until 31 January 2023. The purpose of the Act is to prevent the endangerment of lives of customers and patients as well as serious endangerment of health due to insufficient availability of healthcare personnel on account of industrial action.

The enactment of the Act relates to strike warnings organised by *TEHY* (The Union of Health and Social Care Professionals in Finland) and *SuPer* (The Finnish Union of Practical Nurses) which represent healthcare professionals working in the municipal sector. Mass resignations have also been under preparation by *TEHY* and *SuPer*. These relate to a long lasting labour dispute over wages in the nursing sector.

The purpose of the Act is not to prevent industrial actions. The means provided for in the Act can only be used when other means are insufficient in order to prevent serious endangerment of health or lives of customers and patients. Negotiations on sufficient availability have to be carried out before an industrial action begins.

According to the Act, Regional State Administrative Agencies can postpone or suspend strikes under certain conditions. A strike can be postponed for a fixed period. In total, four decisions on postponing or suspending one strike can be made.

1.2 Protection of employees in case of insolvency

The purpose of the pay security system is to ensure payment of employees' claims arising from an employment relationship in the event of employer insolvency.

The government has proposed a reform of the pay security legislation to address serious exploitations of workers, to streamline the pay security process and fight the grey economy. On 19 September 2022, the government submitted its proposal (Government Proposal No. 173/2022) to Parliament. The proposal includes several changes to the Pay Security Act (*Palkkaturvalaki*, 866/1998) and the Seamen's Pay Security Act (*Merimiesten palkkaturvalaki*, 1108/2000).

If an employer is insolvent, the employee may apply for pay security to cover claims arising from the employment relationship. These include pay, holiday compensation and daily allowances. Before pay security can be paid, the grounds for and the amount of claims must be established. The reform aims to resolve issues concerning the coverage of pay security and to develop practices related to access to and disclosure of information. Another goal is to speed up the pay security procedure and fight the grey economy.

Normally, the application period for pay security is three months from the due date of the claim. According to the Government Proposal, victims of serious work-related exploitation can also apply for pay security after this deadline, either on the basis of a legally valid criminal conviction or without one.

If the employer of a victim of serious work-related exploitation has received a criminal conviction to pay claims arising from an employment relationship or compensation for criminal damage based on them, the victim may apply for pay security for these claims. In such a situation, the three-month application period would not commence until the criminal conviction becomes legally valid. The aim is to prevent employees' claims from becoming time-barred during criminal investigations and the consideration of charges.

Pay security could also be paid to the victim outside the normal application period in cases where no judgment has been issued in the matter. This would apply to situations where there are reasonable grounds to believe that an employee has been subjected to serious work-related exploitation, which has prevented application for pay security within the normal application period. According to the government proposal, in such situations, the application period for pay security would be extended to 18 months after the termination of the employment relationship. An employee could use the exceptional period to apply for pay security only once.

The Government Proposal also includes proposed changes to the right of the authority in charge of pay security to access and disclose information. The objective is to speed up the pay security process and fight the shadow economy. The employer's obligation to disclose information would be extended, for example, to natural persons representing a legal person. In future, the authority responsible for pay security could impose a conditional fine on an employer to persuade them to disclose information.

According to the Government Proposal, the authority in charge of pay security could in certain situations and on its own initiative disclose information related to pay security to the criminal investigation authority, prosecutor, Financial Intelligence Unit, tax administration and occupational safety and health authority.

In dispute situations, a pay security application is usually submitted after a legal process, in which the court investigates the claims and pleas of the parties to an employment relationship. If the employer remains passive in the legal process, the employee may receive a default judgment, where the accuracy of the employee's claims has not been examined. In addition, the court does not examine the content of the agreement the parties to the dispute may reach during the legal process. The government proposes adding the conditions for paying pay security to the legislation on the basis of a default judgment or a conciliated settlement confirmed by the court.

The legislative amendments, which have been prepared on a tripartite basis, would enter into force on 01 January 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The Annual Holidays Act (*Vuosilomalaki*, 162/2005) contains provisions on the right to annual leave. According to Section 34, subsection 1 of the Act, the right to obtain the entitlement referred to in this Act shall expire if a claim during the employment

relationship is not made within two years of the end of the calendar year during which the annual holiday should have been granted or the holiday compensation paid.

According to subsection 2, after the end of the employment relationship, any claim concerning an entitlement referred to in subsection 1 must be commenced within two years of the end of the relationship.

4 Other Relevant Information

4.1 Equality Law

A Government Proposal concerning the Non-discrimination Act and acts that relate thereto (Government Proposal No. 148/2022) has been submitted to Parliament. The Non-discrimination Act (*Yhdenvertaisuuslaki*, 1325/2014) aims to prevent discrimination at workplaces.

According to the Government Proposal, the employer would be required to assess the realisation of equality in the workplace and recruitment. The Non-discrimination Ombudsman would supervise compliance with the Act, also in working life-related issues. The rules on the competence of the occupational health and safety authorities related to the supervision of the Act would be specified. These authorities could issue a notice on the obligation of an employer to assess and promote equality.

4.2 Personnel funds

A Draft Proposal for changes to the Act on Personnel Funds (*Henkilöstörahastolaki*, 934/2010) has been circulated for comments. The purpose of the Act on Personnel Funds is to promote the use of remuneration schemes covering an organisation's entire personnel with a view to enhancing productivity and competitiveness.

According to the Draft Proposal, personnel funds could also be established if the company or its profit unit regularly employs at least five people and the company's net sales or comparable revenue at the time of the fund's establishment equals at least EUR 100 000. Currently, the company must employ at least ten people and the amount of net sales or comparable revenue needs to be EUR 200 000.

France

Summary

(I) Allowances for vulnerable employees who cannot work due to the persisting pandemic have been refinanced as of 01 September 2022.

(II) Various measures for employees and employers have been introduced to boost purchasing power amid inflation.

(III) With the entry into force of the Transparent and Predictable Working Conditions Directive, employers are required to provide employees with additional information at the start of employment.

(IV) The Law on the Protection of Whistleblowers entered into force on 01 September 2022.

(V) The Court of Cassation has ruled that the compensation owed to an employee due to unlawful dismissal also includes the allowance in lieu of leave not taken.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

The partial activity scheme for vulnerable employees again applies since 01 September 2022 (see Act No. 2022-1157 of 16 August 2022 on remedying finances for 2022). The amount of allowance paid to employees suffering from serious pathologies (e.g. in particular: chronic respiratory pathology, high blood pressure, diabetes, severe chronic renal failure, cancer treatment) remains at 70 per cent of their gross hourly pay per hour of work missed.

However, employers will only be reimbursed 60 per cent of this amount.

1.2 Measures to respond to increasing prices

The Emergency Purchasing Power Act has been in force since 17 August 2022 to boost purchasing power amid inflation, and implements several measures for employees and employers regarding *'prime de partage de la valeur'*, overtime, employee financial participation agreements, early release of financial participation schemes and CBA salary negotiations (see Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022).

Employee bonus

Outlined in its Article 1, the measure *'prime de partage de la valeur'* (PPV) is a voluntary exceptional purchasing power bonus that employers may pay to employees and which is not subjected to tax or social security contributions.

This value-sharing bonus (PPV replaces the exceptional purchasing power bonus ('prime exceptionnelle de pouvoir d'achat', PEPA) created during the 'yellow jackets' crisis in 2019, amounts up to EUR 1 000 per year (doubled if a profit-sharing agreement was in place or if there were under 50 employees).

The rules of the new mechanism will vary depending on the period of payment. From 01 July 2022 through 2023, employees earning below three times the SMIC may be paid an annual PPV up to EUR 3 000 (doubled if a profit sharing is in place or there are under 50 employees), not subject to income tax or social security contributions. From 2024, all employees may be paid a PPV up to the same limit, subject to income tax but not to social security contributions.

The PPV may be paid in up to four quarterly instalments to prevent it from replacing salary increases. Similar to the Macron bonus, companies that choose to pay a PPV must do so for all employees, although the amounts may vary by employee based on objective criteria (e.g. salary, job classification, working time).

Overtime

Employers will be entitled to a lump sum deduction (amount to be set by decree) from their contributions for overtime worked or rest days forfeited by employees, subject to certain conditions. This applies to employers with between 20 and 250 employees, and to overtime worked from 01 October 2022 (Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 2, I.).

Profit-sharing agreements

The implementation of voluntary profit-sharing agreements ('accords d'intéressement') is encouraged in small companies.

The new law:

- Increases the maximum duration of profit-sharing schemes called 'intéressement' (from 3 to 5 years);
- Enables employers to tacitly renew the 'intéressement' multiple times in the agreement (this was previously only possible once);
- In certain circumstances, it allows companies with less than 50 employees to implement 'intéressement' by unilateral decision of the employer (previously, this was only possible for companies with less than 11 employees (see Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 4, I.);
- Considering paternity leave as time worked for the calculation of the 'intéressement'; and
- Temporarily implementing (until 31 December 2022) an additional early release (to purchase goods/a house or the provision of services) of 'intéressement' and 'participation' rights that were invested in a PEE before January 2022.

Early release of financial participation schemes

Article 5 of the Emergency Purchasing Law provides for new conditions for early release to employees or other beneficiaries (Article L. 3332-2 of the French Labour Code) of a financial participation scheme. This early release must take place between 18 August and 31 December 2022 at the latest.

Provisions of Article 5 apply to companies with at least 50 employees and companies with less than 50 employees, which have voluntarily set up a financial participation scheme (Article L. 3311-1 of the French Labour Code).

These provisions apply to sums allocated to profit-sharing schemes (Articles L. 3323-2 et L. 3323-5 of the French Labour Code) and employee share ownership schemes (Article L. 3315-2 of the French Labour Code). These sums are free from tax and social security contributions (Articles L. 3312-4, L. 3315-2, L. 3325-1 and L. 3325-2 of the French Labour Code). It does not apply to sums invested in a collective retirement savings plan ('*Plan d'épargne pour la retraite collectif*', PERCO) or in a retirement savings plan *('Plan d'épargne retraite'*, PER) (Articles L. 3334-2, L. 3334-4, L.3332-17, L. 3332-25, 2° and L. 3323-3 of the French Labour Code), those invested in frozen accounts (except those of production cooperative societies and authority schemes) and in solidarity funds (Articles L. 3334-2, L. 3334-4, L.3332-17, L. 3332-25, 2° and L. 3323-3 of the French Labour Code). Besides, the legislator intends to support household consumption only (Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 5, I, 1° and 2°) (school fees are accepted) and not to support savings, the sums may not be reinvested, for example in rental property or investment products or

securities of any kind (passbooks, life insurance, shares, etc.), nor used to pay off a loan or close a loan early. Similarly, the payment of taxes is excluded.

The release is not automatic, the employee must make a request and is sometimes subject to the agreement of the head of the company or to the prior signature of an agreement (Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 5, II.).

The sums released under this scheme are limited to EUR 10 000 per beneficiary. They benefit from an exemption from income tax but not of social security contributions (Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 5, III.).

CBA salary negotiations

The timeline for initiating wage negotiations has been reduced from three months to 45 days (Act of 16 August 2022, No. 2022-1158, Official Journal 17 August 2022, Article 7, 1°), in cases where the relevant sectoral collective agreement includes a minimum wage below the SMIC (‘*Salaire minimum interprofessionnel de croissance’*, minimum wage) (Article L. 2241-10 of the French Labour Code).

1.3 Transparent and predictable working conditions

Since 01 August 2022, employers are required to provide employees with additional information at the start of employment as set out in Directive 2019/1152 on transparent and predictable working conditions in the European Union. France has not taken any measures to transpose this Directive within the scheduled three-year period. Therefore, as of 01 August 2022, the provisions of the French Labour Code must be interpreted as taking into account the requirements of the Directive.

The new obligation applies to ‘workers’, as interpreted by the Court of Justice of the European Union. This includes employees, regardless of their type of contract, as well as trainees, apprentices and workers on job-sharing platforms.

In addition to the usual mandatory information on the place of work, position, start date, duration of paid leave, remuneration or applicable collective bargaining agreement, workers must also now be informed of:

- the duration of the trial period and any conditions attached;
- the right to training;
- the complete procedure to be followed in case of termination of the contractual relationship (including the duration of the notice period);
- the identity of the social security bodies collecting the social security contributions and the social protection provided by the employer (including complementary collective health coverage schemes); and
- for temporary contracts, the expected working hours, or, if not applicable, details of the variable working hours and their remuneration.

In addition, the Directive specifies that information relating to the place of work, position, the duration of the trial period and the employment contract, remuneration and working hours must be provided to the employee within a maximum period of one week from the commencement of the employment contract. The other information listed in the Directive must be provided within one month.

1.4 Whistleblowers' protection

Law No. 2022-401 of 21 March 2022 sought to improve the protection of whistleblowers entered into force on 01 September 2022, following its enactment in March 2022 (see April 2022 Flash Report).

Specifically, the new law amends France's existing whistleblowing framework, including Law No. 2016-1691 of 09 December 2016 on Transparency, the Fight against Corruption and the Modernisation of Economic Life ('Sapin II'), thereby transposing the Directive on the Protection of Persons who Report Breaches of Union Law (Directive (EU) 2019/1937) (23 October 2019) ('the Whistleblowing Directive') into French law.

The main changes are as follows:

- The definition of 'whistleblower' has been revised: whistleblowers will now have to act 'without direct financial consideration and in good faith' rather than 'disinterestedly and in good faith' as was previously stated. Good faith remains a condition, but the notion of 'disinterestedness' will be replaced by a stipulation that the whistleblower must not have a financial interest when filing a report;
- The requirement of 'personal knowledge' of the facts reported has been partially abandoned. Instead, under the new rule, 'when the information was not obtained in the course of professional activities, the whistleblower must have had personal knowledge of it';
- Protection for whistleblowers will extend to their supporters. The law now protects not only the whistleblower him-/herself, but also any 'facilitators', that is, any individual or entity formed under private non-profit law that helped the whistleblower report and disclose information relating to the facts in question (associations, trade unions, etc.);
- The categories of individuals who can submit an internal whistleblowing report has been extended to include former staff members (when the information reported was obtained during the course of their employment), job applicants, company managers, shareholders or partners and co-contractors and subcontractors;
- The hierarchy of reporting channels has been removed: whistleblowers may now report directly to the competent authorities (specifically, the 'Defender of Rights', an independent administrative authority charged with defending individual rights and freedoms), without submitting a prior internal report;
- Protection for whistleblowers has been extended to employees who report bullying or sexual harassment.

The law will also require a change of internal whistleblowing rules, because it states that these must 'note the whistleblower protection system provided for in Chapter II of Law 2016-1691 of 09 December 2016 on transparency, the fight against corruption and the modernisation of economic life' (Labour Code L.1321-2, version in force as from 01 September 2022).

Although the law came into force on 01 September 2022, some of its provisions are subject to the publication of implementing decrees, which have not yet been published. This concerns, for example:

- the internal procedure for collecting and processing alerts in organisations employing at least 50 employees; and
- the possibility for industrial tribunals (in addition to any other sanction) to require the employer to fund the whistleblower's personal training account in the event the employee's employment contract is terminated following submission of a report.

Companies' internal regulations documents ('*règlement intérieur*') must be amended to reflect the obligations arising from the law improving whistleblowers' protection.

2 Court Rulings

2.1 Equal treatment

Social Division of the Court of Cassation, No. 21-12.175, 14 September 2022

In the present case, an employee who was dismissed on 17 November 2015, brought an action against her former employer to contest her dismissal for breach of the principle of equal treatment.

According to Article L.3221-4 of the French Labour Code, work that requires a combination of professional knowledge, attested by a title, diploma and professional practice, abilities resulting from acquired experience, responsibilities and physical or emotional stress, are considered equal.

The Court of Appeal rejected the employee's argument. Appealing to the Court of Cassation, she argued that according to the principle of equal treatment, the employer had to objectively justify unequal treatment between employees. Furthermore, the mere difference of diplomas does not justify a difference in treatment between employees performing the same duties, unless it is justified, the reality and relevance of which it is up to the judge to verify, that the possession of a specific diploma attests to specific knowledge that is particularly useful for the performance of the given duties.

In its decision of 14 September, the Court of Cassation stated that the Court of Appeal had violated the principle of equal treatment by not considering that the employer had not justified the diploma of the employee and had not established that this diploma attested to specific knowledge that is useful for exercising the given position occupied by the employee. The Court of Cassation recalled that it was for the employer to prove that objective factors existed justifying this difference in treatment. Therefore, from the principle of equal treatment, it resulted that the mere difference in diplomas did not justify a difference in treatment between employees who perform the same duties, unless it is justified, the reality and relevance of which is up to the judge to review, namely that the possession of a specific diploma attests to particular knowledge that is useful for the performance of the relevant position.

With its decision, the Court of Cassation clarified the balance between the principle of equal treatment and the difference in treatment based on diplomas. If under French law, a diploma justifies a difference in treatment, the Court of Cassation still requires this diploma to attest to specific knowledge that is particularly useful for exercising the given position occupied by the employee. The mere difference in diplomas is insufficient to justify a difference in treatment between two workers. Hereby, the Court reinforced its requirement for justifications to be brought by the employer.

2.2 Allowance in lieu

Social Division of the Court of Cassation, No. 21-13.552, 21 September 2022

On 07 September 2016, a trade union delegate was dismissed without prior authorisation from the competent authority. The trade union delegate brought an action against his former employer on 31 October 2016. During the proceedings, on 30 June 2019, he retired.

In principle, the dismissal of a protected employee under French law without administrative authorisation for dismissal or despite refusal of authorisation for dismissal, entitles the employee to compensation for violation of his/her protected status (see Article L. 2411-6 of the French Labour Code and Article L. 3141-6 of the French Labour Code).

The Court of Appeal rejected the employee's claim for payment of overtime work, compulsory compensatory rest, and compensation for undeclared work. The Court of Appeal also limited the amounts owed by the employer for violation of the protected status and as back pay for the period of precautionary layoff. Appealing to the Court of Cassation, the trade union delegate argued that an employee whose dismissal is cancelled by a court decision because of the violation of his/her protected status against dismissal is entitled to paid annual leave for the period between the date of dismissal and the date of retirement. Therefore, by refusing the right to allowance in lieu of leave relating to the compensation for his prejudice for the period between his dismissal and his retirement, the Court of Appeal had not respected the law.

Considering the right to allowance in lieu of leave, the Court of Cassation replied considering Articles L. 2411-1, L. 2411-2 and L. 2411-6 of the Labour Code and Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time.

According to the case law of the Court of Cassation (see Social Division of the Court of Cassation, 25 November 1997, No. 94- 43.651, Bull. 1997, V, No. 405), the penalty for the employer's disregard of the protected status of a staff representative, who was illegally dismissed and who was not requesting reinstatement, is the remuneration that the employee would have received until the end of the current period of protection, and not the compensation for the prejudice actually suffered by the protected employee during this period. This compensation is due even if the employee has found a job during the period in question. Similarly, the compensation due for the violation of the protected status is a lump-sum payment, so that an employee who does not request reinstatement cannot claim payment of the related leave (see Social Division of the Court of Cassation, 21 November 2018, No. 17-11.653).

Furthermore, according to the case law of the Court of Justice of the European Union (see CJEU, case C- 762/18, *Varhoven kasatsionen sad na Republika Bulgaria*, and case C-37-19, *Iccrea Banca*), a worker who has been unlawfully dismissed and subsequently reinstated in his/her job in accordance with national law following the annulment of his/her dismissal by a judicial decision, is not entitled to paid annual leave for the period between the date of dismissal and the date of reinstatement, on the ground that during that period, the worker did not perform actual work for the employer. The right to annual leave, enshrined in Article 7 of Directive 2003/88, has a dual purpose, which distinguishes the right to paid annual leave from other types of leave pursuing different purposes, and is based on the premise that the worker has actually worked during the reference period (see CJEU case C-341/15, *Maschek*). Therefore, the period between the date of the unlawful dismissal and the date of reinstatement of the worker, in accordance with national law, following the annulment of that dismissal by a judicial decision, must be treated as a period of actual work for the purposes of determining entitlement to paid annual leave.

According to the Court of Cassation's case law (see Social Division of the Court of Cassation, 14 November 2018, No. 17-14.932), to receive his/her retirement pension, the employee must sever all professional ties with his/her employer. As a result, an employee whose contract has been terminated by the employer and who has exercised his/her retirement rights cannot subsequently seek reinstatement in his/her job or in an equivalent job. In this case, the employee who has retired, thus making reinstatement impossible, is entitled to the remuneration he/she would have earned from the date of dismissal until the date of his/her retirement (see Social Division of the Court of Cassation, 13 February 2019, No. 16-25.764). In this regard, the Court of Justice of the European Union has ruled that Article 7(2) of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national legislation which deprives of the right to financial compensation for paid annual leave not taken by a worker whose employment relationship ended following his/her application for retirement and who has not been able to exhaust his/her rights before the end of that

employment relationship (see CJEU case C-341/15, *Maschek*).The Court of Justice specified that Article 7(2) of Directive 2003/88, as interpreted by the Court, does not lay down any condition for entitlement to financial compensation other than that relating to the fact that the employment relationship has ended and to the fact that the worker has not taken all of his/her paid annual leave to which he/she was entitled on the date on which that relationship ended (see CJEU case C-118/13, *Bollacke*). Consequently, a worker who has not been able to take all of his/her paid annual leave entitlements before the end of his/her employment relationship is entitled to financial compensation for paid annual leave not taken. The reason for the termination of the employment relationship is irrelevant in this regard.

Therefore, where a protected employee, whose dismissal is null and void in the absence of administrative authorisation for dismissal and who has requested reinstatement, has subsequently exercised his/her right to retirement, thus making reinstatement impossible, the compensation due for the violation of the protected status entitles the employee to compensation with an allowance in lieu of leave. If the employee has held another job during the period between the date of unlawful dismissal and the date of his/her retirement, he/she may not, however, claim with respect to his/her first employer, the annual leave rights corresponding to the period during which he/she held another job.

The Court of Cassation reversed the Court of Appeal's decision by affirming that the compensation for violation of the protected status due to the employee equalled the amount of remuneration that had been forfeited between his dismissal from the company and his retirement on 30 June 2019, including the right to allowance in lieu of leave.

Hereby, the Court of Cassation, in accordance with the CJEU's case law and its own settled case law, clarifies what is included in the compensation for violation of protected status. Thus, allowance in lieu of leave is included in this compensation.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

Under French law, the right to paid annual leave acquired by a worker during a given reference period is time-barred after a period of three years (see Articles D.3141-7 and L. 3245-1of the French Labour Code). This prescription period has a particular starting point. Indeed, it runs from the date when the person exercising it knew or should have known the facts allowing him/her to exercise it (see Article L. 3245-1of the French Labour Code). Thus, as under German law, workers' rights to paid annual leave are time-barred.

When considering the right to leave and not the right to claim allowance in lieu of leave, the Court of Cassation's case law asserts that leave must be taken by the worker who cannot demand that it be carried over to the following year. In other words, the employer must ensure that his/her worker is in a position to actually take that leave (see Social Division of the Court of Cassation, 09 December 2020, No. 19-12.739). Consequently, the employer and worker cannot reach an agreement to replace a day of leave through financial compensation.

There are exceptions to this principle recognised by the Court of Cassation. If the employee was unable to take leave because the employer did not allow him/her to exercise his/her right to annual leave, he/she may claim compensation for his/her loss (which has the nature of damages). In this case, it is a question of damages and not of an allowance in lieu of leave, which has the nature of a salary. Indeed, in principle, according to the case law of the Social Division of the Court of Cassation, allowance in

lieu of leave, which has the nature of a salary, cannot be cumulated with the salary itself. Therefore, an employee who did not take leave during the period provided for and who, on the contrary, worked in the service of his/her employer, will not be able to subsequently claim an allowance in lieu of leave in addition to the salary he/she received during the said period.

In other words, an employee who has not taken his/her acquired leave during a given period loses his/her right to leave and cannot, in principle, claim financial compensation for leave. The employee may, however, claim damages in the amount of his/her loss (loss resulting from not taking rest days), if he/she was unable to take leave on account of the employer (see Social Division of the Court of Cassation, 16 October 2001, No. 99-44.049). In practice, such compensation (of damages) may, in fact, be equal to the allowance in lieu of leave (in wages). The trial judge has the power to make an assessment in this matter.

However, if an employee seeks compensation for damages rather than an allowance in lieu of leave (which has the legal nature of wages) on the grounds that he/she was unable to take leave on account of the employer, his/her action would seem to be time-barred at the end of a period of two years (instead of three), which is the limitation period applicable to actions for compensation relating to the conditions of the performance of the employment contract in accordance with Article L. 1471-1 of the French Labour Code.

Thus, the question of the national of the CJEU judgment in the present case regarding the time-barred right to allowance in lieu of leave not taken after the termination of the employment relationship is far from settled.

It is not clear how the French courts will take this decision into consideration in the light of their longstanding case law. For a full enforcement of the reasoning of this decision, a French judge would have to overrule its previous decisions by not demanding a claim in damages by the worker asking for compensation of the leave he/she has not taken on account of his/her employer.

The implication of this decision under French law is even more difficult because of two periods of prescription applied depending on the nature of the claim, namely two years for claims of damages and three years for claims on back pay.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Labour Court has delivered the reasons for its earlier decision on the illegal hiring-out of workers from abroad in a case on temporary agency work. Moreover, it ruled that a collective agreement deviating from the legally permissible period of 18 months is binding for the temporary agency worker and the temporary work agency, irrespective of whether they are bound by the collective agreement.

(II) The Federal Labour Court has ruled that the employer is required under the Occupational Health and Safety Act to introduce a system to record the working time of employees.

(III) The State Labour Court Berlin-Brandenburg has essentially upheld the claim of a domestic worker employed within the scope of '24-hour care at home' for the payment of additional remuneration for on-call time.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Temporary Agency Work

Federal Labour Court, 9 AZR 228/21, 26 April 2022

The Federal Labour Court ruled on 26 April 2022 that, in addition to a continuing employment relationship with a temporary work agency abroad, no further employment relationship of the temporary agency worker with the user undertaking in Germany is established if a temporary agency worker is transferred from abroad to Germany without permission. The coexistence of an employment contract and a fictitious employment relationship is excluded. The violation of the obligation to obtain a permit does not lead to the invalidity of the employment contract pursuant to Section 9 No. 1 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, *AÜG*) if the employment relationship is governed by the law of another Member State of the European Union (see Flash Report April 2022).

The written reasons for the judgement have become available. They also contain considerations on the international jurisdiction under the Brussels Ia Regulation. The Court cites the wording of the law, systematic reasons and the legal materials against the view that an employment relationship between the temporary agency worker and the user undertaking is established in addition to the continuing employment relationship with the agency abroad, limited to the domestic territory. In the view of the Court, all of this speaks in favour of an understanding in the sense of a legally ordered change of employer, which excludes a coexistence of an employment contract and a fictitious employment relationship.

Federal Labour Court, 4 AZR 83/21, 14 September 2022

The Federal Labour Court ruled that in the case of temporary agency work, a collective agreement concluded by the parties to the collective agreement in the sector of assignment may stipulate a different maximum hiring-out period in deviation from the legally permissible period of 18 months. This is then also decisive for the temporary agency worker and his/her employer (temporary work agency), irrespective of whether they are bound by the collective agreement.

Section 1 (1b) sentence 3 of the of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG) must be qualified as authorisation provided by the legislature outside the Act on Collective Bargaining Agreement (*Tarifvertragsgesetz*, TVG). It allows the parties to collective agreements in the sector of employment, in derogation of section 1 (1b) sentence 1 of the AÜG, to regulate in a binding manner the maximum duration of an assignment not only for user undertakings bound by collective agreements, but also for temporary work agencies and temporary agency workers, without it being relevant whether they are bound by a collective agreement. In the view of the Court, this regulation is in conformity with EU law and the Constitution. Moreover, the maximum assignment period of 48 months agreed upon in the specific case is within the scope of the statutory power to regulate.

Pursuant to section 1 (1 b) sentence 1 of the AÜG, the temporary work agency may not "*assign the same temporary agency worker to the same user undertaking for more than 18 consecutive months; the user undertaking may not allow the same temporary agency worker to work for more than 18 consecutive months*". Under section 1 (1b) sentence 3 of the AÜG, "*a collective agreement concluded by the parties to the collective agreement in the sector of assignment (...) may stipulate a maximum assignment period that deviates from sentence 1*".

2.2 Working time

Federal Labour Court, 1 ABR 22/21, 13 September 2022

The Federal Labour Court ruled that the employer is required under section 3 (2) No. 1 Occupational Health and Safety Act (*Arbeitsschutzgesetz*, ArbSchG) to introduce a system to record the working time of employees. Due to this legal obligation, the works council cannot force the introduction of a system of (electronic) working time recording in the enterprise with support of the conciliation board (*Einigungsstelle*). A corresponding right of co-determination under section 87 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) only exists if and to the extent that the company matter is not already regulated by law.

The applicant works council and the employer, who run a full inpatient residential facility, concluded a works agreement on working time in 2018. At the same time, they negotiated a works agreement on the recording of working time. However, no agreement was reached on this. At the request of the works council, the labour court appointed a conciliation board. After the employer objected its jurisdiction, the works council instituted legal proceedings. It sought a declaration that it could demand the employer to introduce an electronic time recording system.

According to the Federal Labour Court, the works council only has a right to co-determination under section 87 (1), introductory sentence, of the BetrVG, if there is no statutory or collective agreement provision. However, in the Court's view, if section 3 (2) No. 1 ArbSchG is interpreted in conformity with EU law, the employer is already legally required to record the working hours of employees. This precludes the works council's right of initiative to introduce a system to record working time, which could be enforced with the support of the conciliation board.

Section 3 of the ArbSchG reads as follows:

> *"(1) The employer shall be required to take the necessary occupational safety and health measures, taking into account the circumstances affecting the safety and health of workers at work. The employer shall review the effectiveness of the measures and, if necessary, adapt them to changing circumstances. Thereby, the employer shall strive to improve the safety and health of workers.*
>
> *(2) In order to plan and implement the measures referred to in subsection (1), the employer shall, taking into account the nature of the activities and the*

number of employees, 1. ensure appropriate organisation and provide the necessary resources (…)".

The BAGs ruling is the preliminary conclusion of the discussion on the (necessity of) implementing the CJEU's decision of 14 May 2019 - C-55/18.

After the announcement of the landmark decision on 13 September 2022, the Federal Ministry of Labour held out (*Sueddeutsche Zeitung*, 14 September 2022) the prospect of proposals for implementation. First, however, the ministry would have to evaluate the decision and the justification for it.

2.3 Domestic work

State Labour Court Berlin-Brandenburg, 21 Sa 1900/19, 05 September 2022

The Court upheld the claim of an employee employed in the context of '24-hour care at home' for payment of additional remuneration.

A working time of 30 hours per week was agreed in the plaintiff's employment contract. However, the care of the elderly lady had to be ensured 24 hours a day. In addition to her paid working hours, the plaintiff had to work a considerable amount of paid on-call time to provide care. During the times when no other person was present in the elderly person's flat to provide care, the plaintiff was required to provide care just in case. Therefore, regardless of the contractually regulated working hours, these times are also subject to remuneration.

The Court held that the plaintiff bore the burden of proving that she had been on call. The Court dismissed the action for a small part of the payments claimed. After taking evidence, the Court was not convinced that the plaintiff had worked on-call during these periods.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This decision and the decision in the associated cases C-518/20 and C-727/20, *Fraport* have major implications for German law, as they are based on German cases and two references for preliminary rulings from the Federal Labour Court (of 07 July 2020 - 9 AZR 245/19 (A) and of 29 September 2020 - 9 AZR 266/20 (A)).

4 Other Relevant Information

Nothing to report.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

As is the case in German law, Greek law provides that leave must be granted and taken in the course of the current calendar year and during the first three months of the following calendar year. Where an employment relationship ends or when the specified period of granting the annual leave ends, the employer must compensate the employee for any unused annual leave entitlement (leave pay). If the employer intentionally prevented the employee from taking annual leave, the employee also has the right to request compensation in the form of a civil penalty equal to 100 per cent of his/her leave pay. Employees are not allowed to voluntarily waive their statutory annual leave entitlement.

Articles 250 and 251 of the Greek Civil Code provide that a standard limitation period of five years applies to all types of employee claims. The term begins to run from the time the claim was raised until it is possible to pursue its recovery by legal action.

Due to this five year limitation, the employee loses his or her right to paid annual leave even if he/she did not have the opportunity to exercise his/her right.

Therefore, this judgment is of major significance for Greek law.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

The Supreme Court published a decision to harmonise the law (No. 1/2022) on interpreting the provisions of the Labour Code on the requirement to record working time.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Supreme Court, 1/2022, JEH (No. Jpe.IV.60.014/2022/9), 27 June 2022

The Supreme Court (Curia) has published a decision to harmonise the law on interpreting the provisions of the Labour Code on working time records.

The Curia may publish decisions to harmonise the law, which are compulsory for all courts to comply with. The aim of this kind of compulsory decision is to achieve uniform interpretation of the law provision in question.

This decision concerns Article 134 of the Labour Code, according to which employers shall keep records of: *"a) the duration of regular working time and overtime; b) the duration of stand-by duty; c) periods of leave."* Moreover, it provides that these records shall be regularly updated and shall contain facilities to identify the start and end times of any regular and overtime work and stand-by duty. By way of derogation, the records on the duration of regular working time and overtime may be maintained in the form of verifying the work schedule published in writing at the end of the month, updated on a daily basis.

In its decision, the Court stated that

> *"Article 134 of Act 1 of 2012 of the Labour Code does not explicitly prescribe the obligation of the employer to maintain working time records at the actual place of work. At the same time, the employer's working time records must be objective, reliable, timely and verifiable, in accordance with the regulatory objective of the provisions of working time recording."*

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

According to the Hungarian Labour Code, the right to paid annual leave acquired by a worker over a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, even if the employer has not actually given the worker the opportunity to exercise that right (see Article 286 of Act 1 of 2012 of the Labour Code).

Therefore, the Hungarian provisions do not comply with the CJEU's judgment in the present case.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The general rule enshrined in Article 13 of the Act on Annual Holiday No. 30/1987 prohibits the transfer of annual holiday days between holiday years, which run from the beginning of May until the end of April the following year.

There are no explicit exemptions from this rule in the Act, besides sickness preventing an employee from enjoying annual holiday as stipulated in Article 6(2) of the Act.

This rule needs to be read in conjunction with Article 5, which states that the employer decides in consultation with the employee when leave shall be granted. While it is not prescribed in the law, some consider that if an employer neglects this obligation, he or she should pay the employee the holiday pay, which is at least 10.17 per cent of the employee's salary.

However, this is not clear in the law. Considering the CJEU's judgment, certain amendments are necessary to better reflect this ruling in law and collective agreements.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

The Minister for Transport has adopted Regulations transposing Council Directive 2020/1057/EU on posting drivers in the road transport sector.

1 National Legislation

1.1 Posting of workers

For the purposes of giving effect to Parliament and Council Directive 2020/1057/EU laying down specific rules for posting drivers in the road transport sector and to Article 463(4) of the Trade and Cooperation Agreement, the Minister for Transport has transposed the European Union (Posting of Drivers) Regulations 2022 (S.I. No. 438 of 2022).

The Regulations impose obligations on 'posted drivers' as defined in the European Union (Posting of Workers) Regulations 2016 (S.I. No. 412 of 2016 as amended by S.I. No. 320 of 2022), to make available relevant records during roadside checks and, furthermore, to specify the powers of 'control officers'.

2 Court Rulings

Nothing to Report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This case has some similarities with an Irish decision in which the Labour Court held that it only had jurisdiction to consider appeals concerning complaints arising in the six months prior to their being referred to the Workplace Relations Commission at first instance (see August 2022 Flash Report). That case concerned a worker who had taken annual leave for his 20+ years of employment but contended that his holiday pay over that period, incorrectly, did not include regular and rostered overtime.

In the present case, however, the worker had not taken all of her annual leave for the years in question.

Unless the Labour Court's decision is appealed, consideration will not be given to whether it was correctly decided in light of the CJEU's decision, which decision was delivered some five months after the hearing in the Labour Court.

4 Other Relevant Information

Nothing to Report.

Italy

Summary

(I) Two rules facilitating access to remote working for private employees, which were provided in emergency legislation that ended on 31 August, have been extended.

(II) The Ministry of Labour has provided for guidelines on the Legislative Decree implementing the Directive on Transparent and Predictable Working Conditions.

1 National Legislation

1.1 Remote working

The Act of 21 September 2022, No. 142 converts the Law Decree of 09 August 2022, No. 115 into law.

According to Article 23 *bis*, fragile workers and employees with children under the age of 14 have right to 'flexible work' until 31 December 2022.

According to Article 25 *bis*, an individual agreement is no longer compulsory to arrange remote working in the context of private employment. The employer only needs to inform the Ministry of Labour (name of the employee and deadline of the remote working arrangement).

These two rules were already provided in emergency legislation which expired on 31 August 2022, thus since 01 September 2022, there was a temporary return to the ordinary system, which provides for individual agreements as a condition for working remotely.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

According to Article 10, Legislative Decree of 08 April 2003, No. 66, the employee is entitled to annual leave of not less than four weeks. This period, except as provided for in collective bargaining, shall be used for at least two consecutive weeks during the year in which entitlement arises and the remaining two weeks shall be used within the following 18 months. The minimum period of four weeks cannot be replaced by compensation in lieu, except in case of termination of employment.

Specific rules are provided for public employment. According to Article 5(8), Law Decree of 06 July 2012, No. 95 (converted into Act 07 August 2012, No. 135), public employees cannot benefit from compensation in lieu, not even in the event of resignation or retirement, and leave must be taken before the end of the employment relationship. This prohibition does not apply to fixed-term school staff, who can only enjoy holidays at certain times of the year. According to the judgment of the Court of Cassation No. 19330, of 15 June 2022 (see June 2022 Flash Report), this prohibition does not even apply if the employee resigns at the end of maternity leave because although the relationship was ended on the basis of a voluntary choice of the employee, she could

not in any way have been able to take the holiday leave during her period of compulsory leave.

In case of termination of the employment relationship, the right to compensation in lieu expires after 10 years, as is the case for any compensation for failure to benefit from a right (in this regard, see Court of Cassation, No. 3021, of 10 February 2020).

4 Other Relevant Information

4.1 Transparent and predictable working conditions

In its Ministerial Decree of 20 September 2022, No. 19, the Ministry of Labour provided for guidelines on the Legislative Decree of 27 June 2022, No. 104, implementing Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.

According to the Ministry, the information notice to be provided to the worker may not simply refer to the rules of law or collective agreements, but must provide specific information on how the employment relationship is regulated in practice.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The CJEU's decision in case C-120/21 does not have any implications on Latvian law as the limitation period on the right to unused paid annual leave or right to compensation in lieu in case of termination of the employment relationship was removed (see Amendments to the Labour Law (*Grozījumi Darba likumā)*, OG No.225, 23 October 2014).

Currently, Article 149(5) of the Labour Law (*Darba likums)* provides the following:

> "(*5) Annual paid leave may not be compensated monetarily, except in case the employment relationship is terminated, and the employee has not used his or her annual paid leave. An employer has the obligation to provide remuneration for the entire period for which the employee did not use his or her annual paid leave*."

Respective amendments banning time limitations on the right to use paid annual leave or the right to compensation in lieu in case of termination of the employment relationship was introduced due to the widespread practice by employers of not actually giving workers the opportunities to exercise that right.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In Liechtenstein law, leave shall, as a rule, be granted contiguously and in the course of the relevant year of service, but no later than during the following year of service (section 1173a Article 32(1) of the Civil Code = *Allgemeines bürgerliches Gesetzbuch, ABGB*, LR 210). The employee does not have the obligation to take the leave of his/her own accord, the employer has the obligation to 'grant' the leave.

According to section 1173a Article 69(2) of the Civil Code, claims arising from the employment relationship are subject to a limitation period of five years. The problem of the present case is therefore already mitigated by the fact that a longer limitation period applies.

This provision does not contain a rule on the commencement of the limitation period. It is therefore possible as a matter of course to interpret the provision in the sense of the CJEU's judgment.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

In the context of posting, per diem allowances shall not be considered part of the monthly salary to be taken into account when calculating the compensation of material damages.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Vilnius regional court (second instance), No. e2A-2059-880/2022, 15 September 2022

A Lithuanian employee entered into a temporary employment contract with a Lithuanian enterprise and was posted to work in a construction site in Germany, where he suffered an accident at work.

There was no written contract between the German company and the Lithuanian company, and it was proved that the employee worked for a German company, so the court qualified his work in Germany as work for his Lithuanian employer.

As a result, the German company which operated the construction site was exempt from the obligation of compensation. Compensation for damages was awarded to the employee from the Lithuanian employer which was actually in charge of the service in Germany.

The Court, interpreting Article 3(7) of the Posted Workers Directive 96/71, decided that when calculating compensation for damages, the per diem allowance received by the employee in Germany shall not be included in his monthly salary, because in accordance with legislation, per diems shall cover additional expenses related to the relocation during work, and the employee had not been relocated to another country after the injury occurred. The judgment clarifies the notion of per diem allowance and the rules on calculation of damages in case of work injury.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

Lithuanian law has a similar provision on the limitation of the worker's right to claim his or her right to paid annual leave, but it has been constructed in a slightly different way.

In Lithuania, there are two different rules on the matter:

- A general limitation of three years. According to Articles 15(1)-(2) of the Labour Code, a "*limitation of actions shall mean a period of time specified by law within which a person may bring an action or an application to hear a labour dispute in defence of his infringed rights*". Moreover, "*[t]he general period of limitation of actions in relations regulated by this Code shall be three years, unless shorter periods of limitation of actions are established for individual claims by this Code or other labour laws*";

- A special limitation for paid annual leave. In accordance with Article 127 (5) of the Labour Code, the right to use full annual leave or a part thereof (or receive monetary compensation for it in case of termination of the employment relationship) shall be lost after a lapse of three years from the end of the calendar year during which the right to full annual leave arose, except for cases when the employee could factually not use leave.

The latter provision applies to the situations covered by the CJEU judgment in the present case. Since Lithuanian law contains the precondition "*except for cases when the employee could factually not use leave*" for the validity of the limitation, the exception will also cover cases in which the employer has not actually put the worker in a position to exercise that right.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) Two decisions have clarified that the rules on transfers of undertakings also apply to public notaries, since according to the CJEU, they are engaged in a commercial/economic activity.

(II) A decision held that only a recording system established to measure working time can be used as evidence that the employee worked overtime with the employer's consent.

(III) Two decisions have clarified which test shall be used to assess whether an employee is to be considered a senior manager.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

CSJ, 3rd, CAL-2020-00661, 09 June 2022,

CSJ, Cass., CAS-2021-00054, 09 June 2022

The rules on transfers of undertakings that are based on EU law imply an obligation to take over employment contracts without changing the terms and conditions.

In accordance with well-established case law, the Court recalled that the transferee's refusal to take over the employment contract and to integrate the employee is tantamount to a dismissal with immediate effect. As a further clarification, the Court added that the fact that the employee was on sick leave at the time of the transfer of undertaking is irrelevant.

A previous Flash Report reported on the Court of Appeal's case law, which considered that public notaries (*notaires*) would not be subject to the rules on transfers of undertakings, as they were not engaged in a commercial/economic activity. The Court of Cassation has now overturned the judgment in question. It explicitly refers to the CJEU's case law:

> *"According to the case law of the Court of Justice of the European Union, the concept of 'economic activity' is analysed as an activity "consisting of offering goods and services on the market" as opposed to "activities relating to the exercise of public authority", which are excluded from this definition. According to the criteria developed by the Court of Justice of the European Union in relation to freedom of establishment, notarial activities do not participate in the exercise of public authority, but are carried out in the form of an independent economic activity (cf. judgments C-268/99, C-51-08, European Commission v. Grand Duchy of Luxembourg, paragraphs 83-117, and C-392/15, paragraphs 99-101). As this assessment is transposable to the application of the Directive and its national transposition law, this activity falls within the scope of the provisions on transfers of undertakings."*

2.2 Overtime work

CSJ, 3rd, CAL-2021-00086, 28 April 2022

This judgment clarifies that an employee who requests payment for overtime must establish that he or she worked overtime with the employer's consent.

An increasing number of decisions accept time sheets or other systems to record working hours as evidence. The judges consider that if the employer sets up such a system (which he/she is theoretically required to do), he/she must also regularly monitor what employees enter into it. If he/she disagrees with the amount of hours worked, he/she must intervene. If the employer does not intervene within a reasonable period of time, he/she is deemed to have accepted the overtime worked and must therefore pay for it.

This decision of the Court specified that the recording system must be intended to measure working time. A system (in this case an Excel file) solely intended for monitoring invoicing cannot be used against the employer as proof of hours worked. Indeed, a record not intended to allow regular control by the employer of the number of hours worked is not equivalent to a clocking-in system and therefore does not allow for tacit acceptance of the hours entered.

2.3 Senior management status

CSJ, 3rd, CAL-2020-0077019, May 2020

CSJ, 3rd, CAL-2018-00309, 02 June 2022

The status of senior manager (*cadre supérieur*) has essentially two implications:

- Senior managers do not benefit from the collective agreement;
- Many rules on working time, including overtime, do not apply to them.

For this reason, employers tend to extensively qualify employees as senior managers. Nevertheless, this qualification is a matter of public policy; only those who meet the conditions imposed by the Labour Code are senior managers.

The Court stated that the conditions defining a senior manager are cumulative and that an employee is a senior manager when he or she, in particular, earns a salary that is significantly higher than that provided for by the collective agreement for other employees, genuine power of direction, broad independence in the organisation of work and a broad freedom of working hours, including the absence of constraints on working hours.

Furthermore, if the employee accepts the post as senior manager, the burden of proof is reversed. This is also the case if the employee has not challenged the status of senior manager assigned to him/her by his/her employer within a reasonable time.

2.4 Dismissal protection

CSJ, 3rd, CAL-2022-00009, 21 April 2022

In France, a certificate from a midwife (*sage-femme*) suffices, whereas Luxembourg's law requires a medical certificate to be produced for protection against dismissal in the event of pregnancy.

The Court ruled that although the medical certificate a pregnant woman must produce must be issued by a doctor, it does not necessarily have to be issued by a gynaecologist. A certificate from a midwife, however, is insufficient, even if it were to suffice under the law of the employee's place of residence.

Therefore, the employee in question did not benefit from any protection and her dismissal was not annulled.

2.5 Social security

CSJ, 3rd, CAL-2020-00236, 05 May 2022

Luxembourg's law provides that in certain cases, unemployment benefits paid by the State (Employment Fund) must be reimbursed by the unsuccessful party to the dispute over the legitimacy of such dismissal, namely in the following cases:

- The employer must reimburse unemployment benefits if the dismissal is declared unfair, whether it is with notice or with immediate effect;
- The employee has to pay back unemployment benefits only in case of dismissal with immediate effect; in that case, the employee can be provisionally admitted to unemployment and will have to pay back what he/she has received if he/she is found to have committed a serious fault.

To ensure that the rights of the State are respected, the Labour Code provides that it is compulsory to include the State in any dispute concerning a dismissal. However, this rule only applies to the Luxembourg State, which is the direct debtor of unemployment benefits for persons residing in Luxembourg at the time of their dismissal. For cross-border commuters—who account for around 50 per cent of the working population in the Grand Duchy—foreign states cannot make any claims. The Labour Code therefore does not provide for their compulsory involvement in the procedure.

An employer who had dismissed an employee residing in France had concluded that the latter's legal action was inadmissible on the grounds that he had not involved the French authorities (*Pôle emploi*). The Court ruled that such intervention is not required by Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Furthermore, the difference in treatment between the Luxembourg state and foreign states/authorities has not been found to violate the constitutional principle of equality before the law and does not constitute discrimination.

2.6 Internal investigations

CSJ, 3rd, CAL-2020-00820, 12 May 2022

Internal investigations (*enquête interne*) are becoming a tool that companies are using more and more frequently. In the field of labour law, this includes harassment investigations.

A recent Court decision only recognised a very limited probative value of the minutes of interviews conducted during such investigations: "*The minutes of the interview document the reproaches addressed to the employee, but do not constitute proof of the validity of these reproaches*".

2.7 Communication with the employer

CSJ, 3rd, CAL-2021-00310, 02 June 2022

Many disputes revolve around the question whether or not the employer has been given certain information. This discussion is often found in connection with the provision of medical certificates.

In the past, Luxembourg courts have generally held that proof of deposit in the mailbox does not constitute proof of receipt by the employer. The Court has now held that the deposit of the medical certificate in the employer's mailbox leads to a presumption of receipt of the certificate by the employer the following day.

2.8 Moral harassment

CSJ, 8th, CAL-2019-01186, 16 June 2022

In matters of moral harassment, the Court recalled that the victim must prove that she had informed the employer within one month of her resignation of the inadmissible behaviour of the perpetrator of the alleged acts of sexual harassment and that the employer did not immediately take measures to put an end to this sexual harassment.

It added that the obligation to denounce such behaviour also applies if the person concerned is the managing director (*adminsitrateur-délégué)* of the employer company.

This solution seems particularly demanding, since it could have been considered that the managing director and the employer are one and the same, so that what the managing director is aware of, the company is also assumed to be aware of.

2.9 Legal fees

CSJ, 8th, CAL-2020-00812, 24 March 2022

CSJ, 8th, CAL-2020-00562, 16 June 2022

In Luxembourg, the unsuccessful party does not automatically have to pay the other party's legal fees (*frais d'avocat)*. Lawyers have started to claim reimbursement of legal costs on the basis of civil liability, i.e. as damages. The Court of Cassation has confirmed that such claims can in principle be founded. Nevertheless, not every unsuccessful legal action is necessarily wrongful and entails the liability of the unsuccessful party.

In this context, it is interesting to note that the Court considered that the fact of having wrongfully dismissed the employee constitutes a fault on the part of the employer, which is causally linked to the legal fees paid by the employee to assert his/her rights.

The fact that the dismissal is unfair therefore automatically gives the right to reimbursement of legal fees.

However, the courts base their awards on a reasonable amount of fees and do not always award the amounts that were actually charged by the lawyers.

Indeed, if the costs and legal fees necessary to bring an action for unfair dismissal are to be paid, details of the cost of the services provided and proof of payment must be provided.

2.10 Dismissal shortly after trial period

CSJ, 3rd, CAL-2021-00178, 14 July 2022

The main purpose of the trial clause (*clause d'essai*) is to allow the employer to check the skills and abilities of the newly hired employee.

It is therefore not possible to dismiss an employee shortly after the trial period for certain facts similar to those already observed during the trial.

The employer should have terminated the trial in this case.

2.11 Dismissal for professional incompetence

CSJ, 8th, CAL-2020-00562, 16 June 2022

CSJ, 8th, CAL-2020-00812, 24 March 2022

Any dismissal for misconduct, and therefore also for professional incompetence (*insuffisance professionnelle*), must be based on specific and verifiable grounds.

Thus, the professional inadequacy on which a dismissal is based must be described in the letter of motivation by precise and detailed facts and must be established over a certain period of time.

To establish excessive slowness in the performance of an employee's work, it is up to the employer to indicate objective reference values that can serve as a basis for assessing the merits of the complaint of professional unfitness invoked by the employer to justify the dismissal of the employee.

Failure to achieve objectives does not necessarily imply professional inadequacy, but the judge must check whether the objectives set are realistic and whether their non-achievement is attributable to a breach of the employee's duty of care.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This judgment states that EU law precludes that the right to paid annual leave acquired by a worker over a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose.

The question of limitation of annual leave does not arise under the same terms and conditions in Luxembourg.

The legal framework for the postponement of leave is similar to that of the German law at issue in the present case. The employer can only refuse leave on certain grounds and the leave is, in principle, lost at the end of the year, postponement being possible in certain limited cases only, in which case the employee's leave balance must be taken at the beginning of the subsequent year. Luxembourg's case law follows the CJEU's case law on the postponement of leave when the employee is not able to take his/her leave (e.g. in case of illness).

Case law also accepts postponements if the employer agrees, implicitly or explicitly (e.g. by mentioning the balance on the salary slip).

In such cases, untaken leave can, in principle, be carried forward indefinitely and can be accumulated. In any case, there is no case law to the contrary that would limit the carry-over time. At most, a 30-year statute of limitations applies.

On the other hand, case law accepts that the balance of holiday pay is subject to the three-year statute of limitations, which applies in particular to wages (see e.g. CSJ, 8th, No. 43612, 25 January 2018). However, this claim does not become due and the limitation period therefore only commences at the time the contract ends (CSJ, 8th, No. 44958, 04 April 2019). At the end of the contract, the employee therefore has three years to bring any such claim before the court.

Thus, the postponement of leave is not subject to a short statute of limitations, only pecuniary compensation can be claimed within a 3-year period after the end of the employment contract. This situation does not seem to contravene the principles laid down by the CJEU in its judgment.

4 Other Relevant Information

4.1 Measure to respond to increasing prices

As announced in previous Flash Reports, tripartite negotiations were initiated to deal with the high inflation rates, especially because Luxembourg has a system of automatic indexation of salaries adapting them to the cost-of-living index. This system has already

been temporarily amended, as a salary increase was reported to next year. The national statistical institute STATEC expected that multiple new increases of 2.5 per cent might be required this year. The tripartite negotiations have now come to a conclusion.

Although this solution is not directly linked to labour law, it has an indirect impact on it. Indeed, it was decided that most energy prices (electricity, gas, mazut) will be capped. This is a huge investment for Luxembourg, expected to cost EUR 1.1 billion. The indirect impact for labour law is that by capping energy prices, the cost-of-living index will be (artificially) kept down, so no (or lower) salary increases will be mandatory. A bill implementing this tripartite agreement will be deposited soon.

It has also been decided, in accordance with past practice, that the minimum wage will be adapted to reflect the general development of wages.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

This issue has been debated in Malta labour law. Whilst it was clear that if the employee does not take annual leave for reasons imputable to him or her, then he/she forfeits any unused holiday leave in any calendar year, unless otherwise agreed with the employer. No law regulates what happens if the employee were to be precluded from taking his or her holiday leave because of either work exigencies or because the employer repeatedly refuses to grant the employee's annual leave requests.

The Organisation of Working Time Regulations, 2002 (SL 452.86) state the following:

> *"8.(1) Every worker shall be entitled to paid annual leave of at least the equivalent in hours of four weeks and thirty-two hours calculated on the basis of a forty-hour working week, and an eight-hour working day and out of this paid annual leave entitlement, a minimum period equivalent to four weeks may not be replaced by an allowance in lieu, except where the employment relationship is terminated, and any agreement to the contrary shall be null and void:"*

Regulation 8(3) then states the following:

> *"(3) Notwithstanding the provisions of subregulation (1), a proportion of the leave entitlement not exceeding 50% of the annual leave entitlement, may, by mutual agreement between the employer and employee, be carried over once to the next calendar year. Such vacation leave carried forward from the previous year will be utilised first, and may not be carried forward again."*

The assumption underlying these regulations clearly show that it is the employee who voluntarily refuses to take his or her holiday leave allowance. However, situations in which the employee was precluded from taking his or her annual leave have been reported in Malta.

Maltese law does not distinguish between the two scenarios and irrespective of whether the employee could take his or her holiday leave or otherwise, he/she can only carry forward 50 per cent of his/her holiday leave balance upon agreement with the employer. It is not carried over automatically.

This judgment of the CJEU seems to address this lacuna. This judgment therefore has serious implications for Maltese law and Maltese law should take heed of such judgment because, it is submitted, that Regulation 8 (1) and (3) do not appear to follow this decision of the CJEU.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) According to a decision of the Court of Appeal, a general prohibition of ancillary activities is no longer allowed.

(II) The Attorney-General has published a 'Conclusion' on the unilateral change of employment conditions by the employer.

1 National Legislation

1.1 Minimum wage

On 01 January 2023, the Dutch minimum wage will be increased by 10.15 per cent. This is part of the Dutch government's plans to make working more rewarding and stimulate people to work more. Due to the exceptionally high inflation rate and its consequences on the disposable income of Dutch residents, the government has decided to raise the minimum wage at once instead of gradually. This increase will also raise the income of the recipients of social benefits that are linked to the minimum wage, such as the state pension.

The increase of 10.15 per cent is not the only planned change to the minimum wage. The minimum wage is currently set on a monthly basis. Therefore, an employee who works 40 hours a week has a lower minimum hourly wage than someone who works 36 hours a week. A proposed bill to change this was recently adopted. As a result, there will be a statutory minimum hourly wage from 01 January 2024, regardless of the length of the work week.

2 Court Rulings

2.1 Employment contract

Court of Appeal Den Bosch, ECLI:NL:GHSHE:2022:3002, 30 August 2022

The Court adopted an interim decision in a controversy between an employee and an employer, whose employment agreement stipulated that the employee is not allowed to pursue ancillary activities without prior consent of his/her employer. The employer stated that the employee worked for another company without requesting consent or permission in advance.

In this interim decision, the Court ordered the employer to provide proof of this statement. Furthermore, the Court explicitly invited both parties to reflect on the introduction of the Article 7:653a Dutch Civil Code, implementing Directive 2019/1152 as per 01 August 2022, applied to the case, which stipulates that any clause that limits the employee to work outside his/her working hours for his/her employer is null and void, unless there is an objective reason for this limitation

As such, the Court apparently also wanted to consider the role of the implementation of the Directive, although the employment agreement had been concluded in 2009 and the alleged violation of the employment agreement took place in 2019, before the implementation of the Directive.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In the present case, the CJEU ruled that general statutory limitation periods cannot prevent annual leave from becoming effective if the employer has not made an effort to actually allow the employee to take holiday leave. According to the CJEU, Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union preclude the application of a national provision under which the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years, which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

In the Netherlands, the claim to grant or take the minimum number of annual leave days to which an employee is entitled each year pursuant to Article 7:634 of the Dutch Civil Code lapses within six months after the last day of the calendar year in which the entitlement was acquired, unless this period is deviated from by written agreement in favour of the employee (Article 7:640a of the Dutch Civil Code). The legislator opted for this short expiration period to encourage employees to actually recuperate regularly and in a timely manner by taking vacation days in the interest of their health and safety.

The six-month limitation period enshrined in Article 7:640a Dutch Civil Code does not apply if the employee was not reasonably able to take holiday leave. This exception is in line with the CJEU's interpretation of Article 7 of Directive 2003/88/EC. In that case, the limitation period that applies to holiday entitlements in excess of the statutory entitlement applies. Pursuant to Article 7:642 of the Civil Code, these lapse five years after the last day of the year in which the annual leave entitlements were accrued.

According to the CJEU, the employer is required to ensure that the worker is in a position to take his/her paid annual leave. He/she must do so by prompting the employee to take leave, while informing him or her that the leave will be lost otherwise. If the employer is unable to prove that he/she has done so, it must be held that Article 7(1) and (2) of Directive 2003/88/EC have been breached, if entitlement to such leave lapses or if (in case of termination of employment) as a consequence of such lapse, no financial compensation is paid for the annual leave not taken. According to the CJEU, if national rules on leave cannot be interpreted in such a way as to be compatible with Article 7 of Directive 2003/88/EC, the national court must disapply those national rules on the basis of Article 31(2) of the Charter.

Thus, in the Netherlands, if the employer has not complied with his/her duty of care and information, it appears that the court shall disapply Article 7:642 of the Dutch Civil Code, according to this CJEU ruling. Upon termination of the employment contract, the employee still has an entitlement to holiday leave pursuant to Article 7:641 (1) of the Dutch Civil Code. As the leave can no longer be taken, the employee is entitled to a cash payment. Article 3:308 of the Dutch Civil Code applies to this legal claim, which means that a limitation period of five years from the day on which the employment contract was terminated, applies.

4 Other Relevant Information

4.1 Measures to respond to the consequences of the war in Ukraine

Since 04 March 2022, Ukrainian displaced persons have been allowed to work in the Netherlands. The Dutch government plans to amend the Childcare Act to allow them, as well as all working parents with a partner outside of the EU, to claim childcare allowance.

Those who meet the conditions may also request an allowance for childcare costs they have had to pay since 04 March 2022.

This measure is aimed at facilitating the combination of work and childcare, making the use of childcare more affordable and therefore more accessible.

4.2 Unilateral change of employment conditions

An advice ('Conclusion') by the Attorney-General has been published that precedes the Supreme Court ruling in a case regarding the unilateral change of employment conditions. This Conclusion has provided some more clarity about important and well-known Dutch case law.

In Dutch law, an employer can unilaterally change employment conditions if a unilateral amendment clause has been agreed upon in the employment contract. The conditions for this change are set out in Article 7:613 of the Dutch Civil Code. If this clause has not been agreed upon, then in principle, the employee's consent for a change is required.
Previous case law, known as the *Stoof/Mammoet*-ruling, has shown that under certain circumstances an employee must accept a change in his/her employment conditions.

The requirements here are that the employer, as a good employer, has made a reasonable change proposal, there are changed circumstances at work and acceptance of the proposal can reasonably be required of the employee considering the circumstances. Here, the legal basis for the change can be found in Article 7:611 of the Dutch Civil Code.
Another possible ground for changed employment conditions is laid down in Article 6:248(2) of the Dutch Civil Code. This article states that a rule applicable between parties as a result of an agreement does not apply if this were 'unacceptable' according to standards of reasonableness and fairness in the given circumstances.

The *Stoof/Mammoet* ruling determined that a unilateral modification clause in the meaning of Article 7:613 Dutch Civil Code is more likely to cover collective changes for multiple employees, whereas Article 7:611 Dutch Civil Code might be used for individual changes. According to the Attorney-General, this does not mean that Article 7:613 Dutch Civil Code exclusively applies to collective changes. In his opinion, a collective change could also be made based on Article 7:611 Dutch Civil Code. The Attorney-General further indicates that the rule of Article 6:248(2) Dutch Civil Code should not be equated with an amendment based on Article 7:611 Dutch Civil Code. The Attorney-General indicated that 'unacceptability' would set the bar too high for a 7:611 amendment.

The Attorney-General's Conclusion provides a number of clarifications which are important for legal practice. For instance, it clarifies that for collective and individual amendments, both Article 7:613 and Article 7:611 of the Civil Code can be invoked. In addition, it clarifies that Article 7:611 Dutch Civil Code entails a different test than Article 6:248(2) of the Civil Code.

It is worth noting, however, that the Supreme Court, in its future ruling, may divert from the Attorney-General's advice and opinions, which are authoritative but not binding.

4.3 Annual report on collective labour agreements

On 12 September 2022, the Minister of Social Affairs and Employment submitted the annual report on collective labour agreements and its contents to Parliament. One of the issues that was researched is whether or not agreements for self-employed workers are part of the CLA's (this at the explicit request of Parliament).

For the study, a complete set of 658 collective bargaining agreements was examined. In four of the 658 collective bargaining agreements, provisions on (guidelines for) the use of a rate were found: the Dutch Pop Stages and Festivals CLA, the Theatre and Dance CLA, the Architectural Agencies CLA and the Music Ensembles CLA.

4.4 Learning and development for workers

The Dutch government is making EUR 1.2 billion available to stimulate learning and development during a worker's career and to promote the learning culture in the workplace. According to the Dutch government, this is necessary to prepare workers for future changes in the labour market.

Norway

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In the Norwegian Holiday Act (LOV-1988-04-29-21), the right to annual leave (‘*feriefritid*’) is regulated separately from the right to holiday pay (‘*feriepenger*’), cf. chapter II and chapter III, respectively. As in German law, there is a general limitation period of three years, cf. the Act on Limitation of Claims (LOV-1979-05-18-18v) section 3. The general limitation period is calculated from the day on which the claimant has a right to request fulfilment of the claim, based on an objective assessment of when the right to request fulfilment was first established. There is, however, no specific regulation of allowance in lieu of leave where leave cannot be taken as in German law.

As regards the right to leave, the Holiday Act stipulates that leave days not taken by the end of the holiday year shall be transferred to the following holiday year, cf. section 7 (3) subsection 2. The preparatory works state that there are no limitations on the right to transfer days of leave not taken, cf. Ot.prp. No. 65 (2007-2008) chapter 2.5.2, and section 7 (3) subsection 2 must be regarded as lex specialis vis-à-vis the general limitation rule. Consequently, the general limitation rule does not apply, and the right to annual leave is not time-barred.

The right to holiday pay, on the other hand, is a monetary claim. The Holiday Act does not have specific rules on limitations of such claims, and the general limitation rule will therefore apply as a clear starting point. However, the question is from when the limitation period shall be calculated. This has been an unresolved question in Norwegian law. The question was addressed in a recent judgment from the Court of Appeal from 2021, LB-2019-184977. The case concerned claims based on employment rights, including claims for holiday pay, from workers who were considered wrongly classified as self-employed. The Court interpreted and applied the general limitation rule in light of the Holiday Act, Directive 2003/88/EC and the case law of the CJEU on the right to paid annual leave. Based on this, the Court concluded that the limitation period must be calculated from when the worker was in a position to exercise the right to annual leave. Still, the judgment has not fully resolved this issue. According to Norwegian legal methodology, judgments from courts of appeal are generally not considered legal precedents, but a legal source of limited value.

As a result of the separation of the right to annual leave from the right to holiday pay, a situation may arise where the employee has received full holiday pay, but still has days of leave not taken when the employment relationship is terminated. In such cases, the employee may have a wage claim corresponding to days of leave not taken: The

employee usually receives holiday pay in lieu of his/her monthly wage in a specific month (typically in June), while regular monthly wage will be paid if the leave is taken in another month. In other words, the employee may have been subjected to a wage deduction presupposing that full annual leave is taken, resulting in a wage claim corresponding to the days the employee worked instead of taken leave. The general limitation rule will apply to the wage claim. Again, an unresolved question in Norwegian law is from when the limitation period shall be calculated.

Against this background, the ruling in the present case will have clear implications in Norwegian law. The ruling supports that the general limitation rule as regards the right to holiday pay must be calculated from when the employer actually put the worker in a position to exercise his/her right to annual leave. As explained above, this will help clarify an issue that has not been fully resolved in Norwegian law. Furthermore, the ruling seems to imply the same calculation of the limitation periods as regards wage claims based on days of leave not taken by the time the employment relationship is terminated. This issue has also been unresolved in Norwegian law.

4 Other Relevant Information

4.1 Compulsory arbitration

The government has intervened in an industrial conflict and decided, in the form of interim legislation, that the dispute shall be settled by compulsory arbitration.

The dispute arose between three teachers' trade unions (*Utdanningsforbundet, Skolenes Landsforbund og Norsk lektorlag*) and The Norwegian Association of Local and Regional Authorities (KS) and concerned the teachers in municipalities, except the municipality of Oslo, which negotiated the case separately. The strike lasted for almost 14 weeks and was the longest lasting strike of teachers in Norwegian history.

The government justified its decision to intervene in the industrial conflict by referring to the severe societal consequences for children and young persons, with reference to their right to education, vulnerable children and young persons, in particular, and their mental health. The government also emphasised that the negative effects were amplified as the strike succeeded a pandemic with its severe impact for pupils in schools. It is the first time that compulsory arbitration has been justified by reference to the right to education and mental health.

The interim legislation has not yet been published, but the press release can be found here.

Poland

Summary

A Parliamentary Commission has submitted the draft on the right of trade unions to demand information from the employer on algorithms and artificial intelligence in employee management.

1 National Legislation

1.1 Minimum wage

On 13 September 2022, the Ordinance of the Council of Ministers on the amount of minimum remuneration for work and the amount of minimum hourly rate in 2023 was enacted (Journal of Laws 2022, item 1592).

As of January 2023, the minimum wage will amount to PLN 3 490 for employment contracts (around EUR 727), and PLN 22.8 per hour for civil law contracts. As of July 2023, the minimum wage will amount to PLN 3 600 for employment contracts (around EUR 750), and PLN 23.5 per hour for civil law contracts.

In 2022, the minimum wage amounts, respectively, to PLN 3 010 and PLN 19.7. From July 2023, the minimum wage will be higher by 19.6 per cent in comparison to 2022. In comparison to 2015, the minimum wage has been raised by 105.7 per cent.

According to the Law on Minimum Wage, if the next year indicator of expected prices for commodities and services is at least 105 per cent, then the minimum wage should be modified twice a year, i.e. in January and in July. Such a situation will occur in 2023. Next year, it is expected that the minimum wage will amount to 50.8 per cent of the average remuneration of the national economy.

The Law of 10 October 2002 on minimum remuneration for work (consolidated text, Journal of Laws 2020, item 2207) is available here.

Minimum wage has been continuously raised in recent years. As in previous years, the Social Dialogue Council could not reach an agreement on next year's statutory minimum wage. Therefore, the competence to determine the amount of minimum wage in 2021 was exercised by the government, which raised minimum wage to a higher amount than that suggested by trade unions.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé).

In Poland, annual leave is subject to Section 7 of the Labour Code (Article 152 LC and following). According to Article 152 §1 LC, an employee has the right to an annual, continuous, paid vacation leave. Under §2, an employee may not renounce his or her right to leave. Article 161 LC provides that the employer is required to grant the employee leave in that calendar year during which the employee acquires the right to it. According to Article 168 LC, a leave that has not been taken in the period determined in the leave schedule, shall be granted to the employee until 30 September of the following calendar year.

Thus, the employer is expressly required to grant the employee annual leave every year. Any leave not granted within a given calendar year should be used by 30 September of the following year. However, after that date, the employee does not lose his/her right to the holiday leave of the previous year, although this may be considered a breach by the employer of the employee's rights, subject to a pecuniary fine (Article 282 §1 item 2 LC).

Under Article 171 §1 LC, in case of termination or expiry of an employment contract, an employee has the right to the cash equivalent for any annual leave not used.

General rules apply to time limitations of the right to annual leave. According to Article 291 §1 LC, a claim arising from the employment relationship shall be barred by limitation of three years after the day on which the claim became enforceable. Therefore, an employee loses the right to annual leave for the specific calendar year after three subsequent years, and this period commences on 01 January the following year. Polish and German rules on time limitations of the right to holiday leave, as analysed in the present case, are based on the same notion.

Under Polish law, the right to holiday leave extinguishes automatically after three years, regardless of the fact whether the employer put the employee in a position to actually take the leave in good time or not. The employer is not statutorily required to encourage employees to take leave and inform them about the possible loss of that right. It is irrelevant whether the employer effectively enabled the employee to exercise the right to holiday leave in a specific calendar year (in practice, the employee would be granted the annual leave within a given calendar year or until 30 September the following year).

As regards the three-year limitation of the right to leave, Polish law does not expressly require the employer to encourage employees to take leave or to inform them about the loss of entitlement. In other words, Polish law does not require the employer to actually put employees in a position to exercise that right (para 57 of the judgment).

The Polish regulations on time limitations of the right to holiday leave appears not to meet the standards imposed by Article 31 CFREU and Article 7 of the Directive 2003/88, as interpreted by the CJEU in the present case. The right to annual leave extinguishes, regardless of the fact whether the employer has granted the leave or did not take any action on that matter. In the light of the CJEU judgment, there is a need to modify well-established practice on time limitations on the right to annual leave. It seems that the new pro-Union interpretation of national law would be sufficient and there is no need to introduce legislative amendments.

4 Other Relevant Information

4.1 Information and consultation rights

On 15 September 2022, the Parliamentary Commission for Digitalisation, Innovation and Modern Technologies submitted a draft of the amendment to the Law on Trade Unions on the right to claim information on algorithms management at the establishment.

A trade union organisation operating at an establishment has the right to claim information from the employer, which is necessary to carry out union activities (Article 28 of the Law). According to the draft, the scope of such information will be extended. Trade unions will have the right to demand information on parameters, rules and instructions on which algorithm or artificial intelligence systems are based, that influence decision making processes, and that can affect work and remuneration conditions, access to employment and its continuation, including profiling.

More information on the legislative process is available here.

4.2 Working time

On 22 September 2022, the group of deputies from *Lewica* (left-wing party) submitted a draft of the Law on the amendment of several laws to Parliament to introduce a 35-hour working week.

According to the draft, Article 129 §1 Labour Code would provide that working time may not exceed 8 hours within a 24-hour period and an average of 35 hours in an average five-day work week within a given reference period not exceeding four months, subject to exceptions provided by other provisions. Thus, the current 40-hour, five-day workweek should be replaced by a 35-hour five-day work week. Under the new Article 131 §1 LC, weekly working time, together with overtime hours, should not exceed an average of 43 hours within a given reference period (instead of the current average of 48 hours).

The same amount of weekly working time will be determined by other statutes that concern particular professional groups. The drafters propose that remuneration should not be decreased due to the reduction of statutory working time. The drafters emphasise that increased rest periods will contribute to health and safety protection as well as work/life balance.

The new regulations are to be implemented gradually. Within two years after the amendment has taken effect, an average weekly working time would amount to 38 hours. Only from the third year onwards would the average weekly working time amount to 35 hours.

Portugal

Summary

(I) Several decree laws related to COVID-19 measures have been repealed and the state of alert due to the COIVD-19 pandemic ended on 30 September 2022.

(II) The Supreme Administrative Court held that a national rule (applicable to fixed-term employment contracts with public entities) that prohibits the conversion of fixed-term contracts that exceed the maximum duration or the number of renewals into permanent employment contracts is not compatible with EU law.

1 National Legislation

1.1 End of COVID-19 related measures

Decree law No. 66-A/2022, of 30 September 2022, terminates the validity of several decree laws published in the context of the COVID-19 pandemic, given the positive development of the epidemiological situation in recent months.

As regards employment-related measures, mandatory isolation in case of infection with COVID-19 is no longer required, and the special rules on absence from work due to a COVID-19 infection and the corresponding allowance have been repealed. From now on, cases of illness due to COVID-19 infection will be treated, for these purposes, as any other illness. This act entered into force on 01 October 2022.

It should also be noted that the state of alert due to the COVID-19 pandemic—which had been extended until 30 September 2022 by the Resolution of the Council of Ministers No. 73-A/2022 (see August 2022 Flash Report)—is no longer in force (the government did not renew it at the end of the defined term).

2 Court Rulings

2.1 Fixed-term work

Supreme Administrative Court, No. 0939/15.9BEPRT 0620/17, 08 September 2022

In its ruling, the Supreme Administrative Court analysed the potential infringement of EU Directive 1999/70/CE by Portuguese legislation on fixed-term employment contracts concluded by legal entities governed by public law, specially under Article 92 (2) of Law No. 59/2008, of 11 September 2022, which approved the Legal Framework of the Employment Contract in Public Functions (‘*Regime e Regulamento do Contrato de Trabalho em Funções Públicas*’).

This rule expressly prohibits the conversion of such contracts into permanent employment contracts at the end of their maximum term. It should be noted that this rule is no longer in force, as it was repealed by Law No. 35/2014, of 20 June, which contains the current legal framework applicable to civil servants (‘*Lei Geral do Trabalho em Funções Públicas*’). However, this question remains substantively unchanged in the legislation currently in force, considering that Article 63 (2) of Law No. 35/2014 contains a similar solution.

In the present case, the Supreme Administrative Court decided to refer the following questions to the CJEU for a preliminary ruling:

> *“1) Should EU law, in particular Clause 5 of the framework agreement annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, be interpreted as precluding national legislation which in all cases prohibits the*

> *conversion of fixed-term employment contracts concluded by public law entities into contracts of an indefinite duration?*
>
> *2) Should Directive 1999/70/EC be interpreted as requiring the conversion of the contracts as being the only means to prevent abuse arising from the use of successive fixed-term employment contracts?"*

In its order in case C-135/20, *Câmara Municipal de Gondomar,* the CJEU gave a unitary reply to those two questions in the following terms:

> *"Clause 5 of the framework agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP must be interpreted as precluding legislation of a Member State that, in the public sector, prohibits absolutely the conversion of a succession of fixed-term employment contracts into a contract of indefinite duration, where that legislation does not include, as regards that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts"*

Taking into account this decision, the Supreme Administrative Court had to assess whether the measures adopted by Portuguese law to prevent and punish the abusive conclusion of successive fixed-term employment contracts can be considered equivalent and effective. On the date the facts occurred, the measures adopted by Portuguese law to prevent and punish the abusive conclusion of successive fixed-term employment contracts by public entities were set out in Article 92 (3) of Law No. 59/2008, which stated that

> *"without prejudice to the full production of their effects during the time they have been in force, the conclusion or renewal of fixed-term contracts in breach of the provisions of this regime shall determine their nullity and gives rise to civil, disciplinary and financial liability of top managers of the bodies or services who have concluded or renewed them".*

This provision was similar to Article 63 (1) of Law No. 35/2014, currently in force.

In the present judgment, the Supreme Administrative Court concluded that the measures envisaged in the referred Article 92 (3) of Law No. 59/2008 are not equivalent to those applicable in the private sector. In fact, Article 147 (3) of the Portuguese Labour Code, applicable to the employment relationships between employees and private entities, imposes the conversion of all fixed-term employment contracts that exceed the maximum duration period or the number of renewals into permanent employment contracts.

The Supreme Administrative Court asserted that the distinction established in Portuguese legislation between the public and the private sectors regarding this matter does not have any grounds in the European legislation, as the Directive does not distinguish between the two sectors, and it cannot be justified by any reason related to the fight against the precariousness in public employment; on the contrary, this distinction facilitates the conclusion of precarious contracts in the public sector. Indeed, the solution of Article 92 (3) of Law No. 59/2008 protects the public employer, not the employee. Based on this reasoning, the Supreme Administrative Court concluded that the measures envisaged in the abovementioned legal provision do not effectively prevent or punish the abusive conclusion of successive fixed-term employment contracts.

As a result, the Supreme Administrative Court ruled that as Portuguese law does not provide any other effective measure to prevent and, where appropriate, to punish the abusive conclusion of successive fixed-term contracts, the provision of Article 92 (2) of Law No. 59/2008, which prohibits the conversion of fixed-term employment contracts concluded by public entities into contracts of indefinite duration infringes EU law, in

particular Article 5 (5) of the framework agreement annexed to Council Directive 1999/70/EC of 28 June 1999.

The Court also stated that the conversion of a fixed-term employment contract into one of indefinite duration, by the effect of the direct application of Article 5 (2) (b) of Directive 1999/70/EC, does not constitute an arbitrary restriction to the equality principle in access to the public service and does not violate Article 47 (2) of the Portuguese Constitution.

2.2 Equal pay

Supreme Court of Justice, No. 3556/17.5T8PNF.P1.S1, 21 September 2022

In the present case, the employer, a public business entity that provides health care services, concluded a permanent employment contract on 31 May 2010 under the Labour Code regime with the plaintiff for the performance of functions corresponding to the professional category of superior technician. The employer hired two other employees in the same professional category that same year. These employees received higher remuneration than the plaintiff, based on the fact that they entered into an employment contract in public functions, to which specific rules on the determination of the remuneration and position of the employees apply, which do not (directly) apply to employment relationships that are subject to the Labour Code regime.

The Supreme Court of Justice confirmed that in the present case, salary discrimination had occurred, considering that all employees were hired in the same year and in the same professional category, and there is no justifying factor for such discrimination. The principle 'equal pay for equal work', enshrined in Article 59 (1) of the Portuguese Constitution and Article 270 of the Portuguese Labour Code, determines that the plaintiff should receive the same monthly remuneration as the other employees.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

Under Portuguese labour law, any employee's credit arising from an employment contract, its violation and termination, is time-barred after one year from the day following the termination of the employment contract (Article 337 of Portuguese Labour Code).

In case of termination of the employment contract, the employee is entitled to receive remuneration corresponding to the untaken leave (Article 245 (1) (a) of the Portuguese Labour Code). If not paid upon termination of the employment contract, the employee may claim this labour credit up to one year after such termination, considering the specific limitation period referred to above.

Portuguese labour law does not include an express provision that determines the extinction of the right to paid annual leave if it is not exercised within a certain period, although there are legal rules on the scheduling and carrying-over of entitlement to paid annual leave. As a rule, annual leave should be taken in the year in which it is acquired by the employee (Article 240 (1) of Portuguese Labour Code). However, under certain circumstances, annual leave (or part thereof) may be taken in the subsequent year by agreement between the employee and the employer (Article 240 (2) and (3) of the Portuguese Labour Code). The law also allows for carrying-over of the annual leave entitlement that cannot be exercised in the relevant year because the employee is temporarily incapacitated for work due to illness (Article 244 (3) of Portuguese Labour Code).

Under Portuguese law, the annual leave period shall be scheduled by agreement between the employee and the employer or, in the absence of agreement, by the employer (Article 241 (1) and (2) of Portuguese Labour Code). Furthermore, the employer must create a leave map annually, containing the start and end date of each employee's leave period. This means that the employer should ensure that the employee's annual leave entitlement is exercised under the terms defined by law.

The limitation period rule applicable under German law—which was reviewed by the CJEU in the present case—differs from that established in the Portuguese Labour Code, as that rule sets out a three-year limitation period, which commences at the end of the year in which the right to leave arose (while the one-year limitation period applicable in Portugal only commences after the termination of the employment contract). This notwithstanding, the CJEU's recent judgment may have implications in Portugal, considering that it determines that an employer cannot argue that an employee's right to annual leave is time-barred if the employer has not actually put the employee in a position to exercise that right. As explained by the CJEU,

> *"it cannot be accepted (…) under the pretext of ensuring legal certainty, that an employer may rely on its own non-compliance, namely failing to put a worker in a position actually to exercise his or her right to paid annual leave, in order to take advantage of it in the context of that worker's action asserting the same right, by pleading that the right in question is time-barred"* (paragraph 48).

This ruling reinforces the understanding that the employee's annual leave entitlement does not expire if it has not been exercised within the period defined by law, namely in cases where the employer has not complied with its obligation of scheduling the employees' annual leave period and ensuring the exercise of this right by the employees. In addition, in light of this ruling, it seems defensible that the one-year limitation period applicable under Portuguese law for claiming payment of untaken annual leave after the termination of the employment contract, may not be applicable if the employer did not actually put the employee in a position to exercise that right in accordance with the terms defined by the applicable law.

4 Other Relevant Information

4.1 Labour law reform

The proposal of Law No. 15/XV/1, containing several changes to the labour legislation, was presented to the Portuguese Parliament by the government on 06 June 2022 (see Flash Report of July 2022). The legislative procedure is ongoing and the proposal will likely be voted on (and approved) by Parliament in upcoming months.

4.2 Discussion on salary increases

The social partners and government have initiated discussions on the increase of salaries for 2023 and the following years.

On 28 September 2022, the government proposed a nominal increase of wages to the social partners by 4.8 per cent on average each year between 2023 and 2026. The goal is to ensure that by 2026, there will be an average increase of 20 per cent in workers' wages compared with the current year.

The government has also proposed an increase in the value of overtime work rendered over 120 hours. According to this proposal, the value would increase from 25 per cent to 50 per cent in the first hour or fraction thereof, from 37.5 per cent to 75 per cent in the subsequent hour or fraction thereof on a work day, and from 50 per cent to 100 per cent for each hour or fraction thereof on a weekly rest day or public holiday.

Romania

Summary

The Draft Law transposing Directives (EU) 2019/1158 and 2019/1152 has been promulgated.

1 National Legislation

1.1 Transposition of EU law

A Draft Law amending the Labour Code, which will include transposition provisions of Directive (EU) 2019/1158 on Work-life Balance and Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions, as well as a series of new rules that will have a significant impact on labour relations, is pending promulgation (i.e. it has not yet been published in the Official Gazette of Romania). The provisions contained in the project include:

- the right to carer's leave of five working days per calendar year;
- the employer's obligation to provide the employee, upon employment, with a list of new information, such as any arrangements for overtime and its remuneration, the components of remuneration (detailed separately) or the conditions regarding professional training offered by the employer;
- the prohibition of parallel employment, at different employers, if the work schedule overlaps in full or partially;
- the employee's right to request a transfer to a more advantageous vacant position than his/her current one and to receive a reasoned written reply;
- the employee's right to time off from work in unforeseen situations, determined by a family emergency caused by illness or accident, with the obligation to recover the absent period;
- inclusion in the company's internal regulations regarding the notice and the general policy of employee training;
- the information the employer is required to provide when hiring a person, when the legal employment relationship is not based on an employment contract (for example, in case of interns and day labourers), etc.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

According to Article 146 (2) of the Labour Code, if the employee, for justified reasons, cannot take in whole or in part the annual leave to which he or she is entitled for that calendar year, with the consent of the person in question, the employer must grant the rest leave not taken over a period of 18 months starting with the year following the one in which the employee was entitled to the annual rest leave.

This provision is interpreted in practice as imposing a term during which the employer has the obligation of granting the employee the possibility to exercise the right to rest; after the expiry of the 18-month period, the non-granting of the rest leave constitutes a contravention of the law. This does not mean, however, that after the end of the 18 months the rest leave can no longer be taken; on the contrary, this right is not subject to a limitation period while the employment relationship is still in force.

If the employment contract is terminated and the issue of its monetary compensation arises, the courts have been presented with the question: for how many years can an allowance in lieu be granted?

Judicial practice is not uniform:

a) Some courts have argued that the allowance in lieu is only due if the employee actually applied for leave and his/her application was rejected.

For example, the Cluj Court of Appeal, in Decision No. 699 of 09 May 2019, considered that the right to annual leave, just like any other right recognised in labour legislation, can be exercised or not by the employee, and if it is not exercised within the legal terms, it is subject to a limitation period.

In this case, the employer had not scheduled the employees' rest leaves, but the court considered that this did not affect the employees' right to take annual leave, but on the contrary, offered them greater freedom in terms of the manner of exercising that right. However, the employees did not submit any request for rest leave during the reference period, adopting a passive attitude, incompatible (according to the court) with the exercise of this right. As a result, the court ruled that following the termination of their employment relationship, the workers could not claim payment of rest leave allowances for the years starting from 2013, because they had never requested the rest leave while their employment relationship was still in force.

b) Other courts considered that upon termination of the employment contract, the employee has the right to allowance in lieu for annual leave not taken in all years, regardless of whether or not the employee made a request to this effect.

For example, the Galati Court of Appeal, in Decision No. 632 of 09 November 2017, ruled that the granting and taking of annual rest leave in kind is not conditional on the consent or option of the employee or their possible personal interests not to take the rest leave in kind. Therefore, any potential 'opposition' of the worker or his/her request to not be scheduled for rest leave was not likely to prevent the employer in any way from ordering rest leave to be taken in kind, regardless of the worker's opposition. The Court assessed that the passiveness of the employee who does not apply for rest leave cannot, in any case, be interpreted as a waiver of the unused leave, since such an interpretation would contravene the provisions of the Labour Code, according to which employees cannot waive the rights recognised by law, not even by a written convention. Therefore, upon termination of the employment relationship, the employee is also entitled to monetary compensation for unused rest leave days that were not taken in previous years.

In conclusion, the legislation and judicial practice in Romania is consistent with the CJEU's decision on the imprescriptibility of the right to rest, where the employer has not actually put the worker in a position to exercise that right. On the contrary, if the employee remained passive and did not take any steps to exercise his/her right to rest, and the employment contract is terminated, there is a non-uniform practice regarding the prescription of the right to monetary compensation for unused leave.

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 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The main legal source for paid annual leave is the Labour Code – Act No. 311/2001 Collection of Laws (Coll.) as amended.

According to Article 111(1) of the Labour Code, the employer shall decide when the employee may use his/her paid annual leave following consultations with the employee in accordance with the paid annual leave time-table, developed with prior consent from the employee representatives, in such a way that all employees can use their full paid annual leave by the end of the calendar year. When deciding when the employee may use his/her leave, the employer's tasks and the justified interests of the employee must be considered. Employees may use at least four weeks of paid annual leave per calendar year if they are entitled to paid annual leave, and if obstacles to work on the part of the employee do not prevent the granting of paid annual leave.

> *"An employer may decide when an employee shall make use of his or her paid annual leave, even if the employee has not yet become eligible to claim paid annual leave, if there are grounds to believe that the employee will become eligible by the end of the calendar year in which the paid annual leave arises or by the termination of the employment relationship"* (Article 113(1) of the LC).

If an employee cannot use all of his/her paid annual leave in a given year because his/her employer does not put him/her in a situation to exercise that right, or due to obstacles to work on the part of the employee, the employer is required to grant the employee paid annual leave so that it is taken no later than by the end of the following calendar year. If the employer does not grant paid annual leave by 30 June of the following calendar year and the employee is therefore unable to use his/her paid annual leave by the end of that calendar year, the employee may determine independently when to make use of his/her annual leave. The employee shall notify the employer in writing of when he/she will be using his/her paid annual leave at least 30 days in advance; this time limitation can be reduced with the employer's consent (Article 113(2) of the LC).

If an employee is unable to use all of his/her paid annual leave by the end of the following calendar year due to maternity leave or parental leave, the employer shall transfer the untaken paid annual leave to after the end of maternity or parental leave (Article 113(3) of the LC). If an employee is unable to use all of his/her paid annual leave by the end of the following calendar year because he/she is deemed to be

temporarily incapacitated for work as a result of disease or an accident, his/her employer shall transfer the paid annual leave to after the end of the employee's temporary incapacity for work (Article 113(4) of the LC). If the employee is unable to use all of his/her paid annual leave due to a long-term leave to perform a public function or a trade union function, his/her employer shall transfer the unused annual leave to after the end of the public function or trade union function (Article 113(5) of the LC).

According to Article 116(1) of the Labour Code, the employee shall be entitled to wage compensation in the amount of his/her average earnings for the period of used paid annual leave. Employees are entitled to wage compensation at the rate of their average earnings for the part of paid annual leave in excess of four weeks of the basic scope of paid annual leave he/she was unable to use before the end of the following calendar year (Article 116(2) of the LC). Employees shall not be paid any wage compensation for paid annual leave that has not been taken up to the four weeks of the basic scope of paid annual leave, except where he/she was unable to take paid annual leave as a result of termination of the employment relationship (Article 116(3) of the LC).

The Labour Code Act regulates individual labour law relationships in connection with the performance of dependent work by natural persons for legal persons or natural persons and collective labour law relationships (Article 1(1) of the LC). According to Article 1 paragraph 4 of the Labour Code, unless stipulated otherwise by Part 1 of this Act (General Provisions – Articles 1 to 122), the general provisions of the Civil Code shall apply to legal relationships pursuant to paragraph 1.

According to Article 101 of the Civil Code, the limitation period shall be three years and commence from the date when the right could have been exercised for the first time. If the claimant exercises his/her right before a court or other competent authority during the limitation period, the limitation period shall not run from the time of the exercise of that right during the proceedings (Article 112 of the CC).

The legislation in the Labour Code imposes a whole range of obligations on the employer as regards the taking of leave by employees. According to Article 41(1), of the Labour Code (even prior to the conclusion of an employment contract), asserts that an employer shall be required to grant a natural person the rights and obligations he/she will be entitled to within the scope of an employment contract, with all applicable working and wage conditions.

However, there is no explicit equivalent to the part of the sentence of the Court's ruling, 'where the employer has not actually put the worker in a position to exercise that right'. Eliminating any doubts would probably require a legislative amendment.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU, case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

The CJEU judgment in this case is of relevance for Slovenian law. The case concerned the right to paid annual leave and, in particular, allowance in lieu of leave not taken and the question whether such claim can be time-barred after a certain period of time (limitation period of three years in the present case) where the employer has not actually put the worker in a position to exercise that right.

There is no specific provision in the Employment Relationships Act (*Zakon o delovnih razmerjih (ZDR-1)*, OJ RS No. 21/13 et subseq.) that addresses this specific question. The Employment Relationships Act stipulates, as a general rule for claims arising from employment relationships, that the limitation period is five years (Article 202 of the ZDR-1).

There are no specific rules on limitation periods for the claims concerning annual leave not taken and the allowance in lieu of such leave; no additional conditions (such as adequate information provided to the worker, etc.) are foreseen in Slovenian legislation. There is not yet any relevant case law that specifically deals with the question whether the limitation period applies in such cases and under what conditions.

4 Other Relevant Information

Nothing to report.

Spain

Summary

(I) Legislation was passed to equalise the working conditions and the social security rights of domestic workers with those of other workers, notably recognising their right to unemployment benefits in line with the CJEU decision in case C-389/20, *TGSS*.

(II) A specific form of fixed-term employment contracts was introduced for scientists and researchers.

(III) Victims of sexual violence are entitled to certain labour rights to prevent work from becoming an additional burden to cope with when dealing with such a personal situation.

1 National Legislation

1.1 Domestic workers

Domestic workers are governed by labour law. However, special rules apply to them since they are considered workers who have a 'special employment relationship', along with senior management, professional athletes and resident doctors, among others. This 'specificity' means that these groups fall under a different regulatory framework, which is adapted to them. In the case of domestic workers, the singularity also extend to social security, as domestic workers have traditionally been excluded from unemployment benefits.

The CJEU ruling in case C-389/20, *TGSS* stated that this exclusion was not in line with EU law and constituted indirect gender-based discrimination.

Royal Decree Law 16/2022 addresses that particular issue, but does not only grant domestic servants the right to unemployment benefits, but also amends some labour provisions to improve such workers' protection. Indeed, they are now entitled to protection from the Wage Guarantee Fund.

Moreover, the grounds and consequences of the termination of the employment contract have been modified. Traditionally, the employer has a right of withdrawal, so the employment contract of the domestic worker could be terminated by the sole will of the employer (the worker was entitled to financial compensation). Following this amendment, there is no right of withdrawal, but the employer can terminate the contract according to a different regulatory framework than that provided by the Labour Code. For this purpose, the law requires the employer to prove one of the following circumstances (valid grounds for termination):

- a deterioration of the economic situation of the employer/family unit;
- a change in the needs of the family unit justifying the termination of the contract;
- the worker's behaviour, which reasonably and proportionately justifies the employer's loss of confidence.

If the employer proves one of these grounds, the employment contract can be terminated, but the domestic worker is entitled to a financial compensation of 12 days of salary per year of seniority (much lower than the ordinary one provided in the Labour Code, established at 33 days of salary per year of seniority).

Likewise, the right to receive information on the essential features of the employment contract has been extended to all domestic workers. Previously, this right was only recognised when the duration of the contract was longer than four weeks.

It is expressly stated that workers' right to a high level of protection of their health and safety at work must include the prevention of violence against women.

1.2 Insolvency law

The Spanish Law on Insolvency currently in force passed in 2020 (Royal Legislative Decree 1/2020) and has now been modified to transpose Directive 2019/1023, of 20 June 2022.

This Directive and the Spanish Law that implements it are not labour law provisions in the strict sense, but they include some rules of interest. Indeed information and consultation rights are reinforced, particularly concerning restructuring plans (Article 628 bis), specific rules on transfers of undertakings in this context (Articles 224 bis or 710, among others) and the rules on the ranking of creditors, which includes workers (Articles 242 et ff.).

1.3 Fixed-term work

The labour reform of December 2021 reduced the types of fixed-term employment contracts to boost permanent employment. Universities and research centres raised complaints because many researchers were linked to programmes or projects for a predefined period, i.e. the duration of their employment contracts was linked to the project's duration. The labour reform removed the contract for a specific assignment or service, which was used extensively in this context.

The Royal Decree Law of April 2022 (see April 2022 Flash Report) created a new permanent contract for researchers, adapted to the particular circumstances of research institutes.

Law 17/2022 has amended the Law on Science, Technology and Innovation (Law 14/2011) based on several objectives. One of them is to provide a more rational structure for the professional career of researchers, consistent with labour law. There are particular types of employment contracts for scientist and researchers (pre-PhD researchers, PhD researchers, renowned researchers and for scientific-technical activities). The contracts for pre-PhD and PhD researchers are fixed-term employment contracts (a maximum duration of four years for pre-PhD contracts and six years for contracts of PhD researchers). The duration of the contracts for renowned researchers is 'agreed by the parties' (no further clarification). The contract for scientific-technical activities, which allows the hiring of technical support staff, is a permanent contract.

There are also specific rules on internal promotions (Articles 25 et sqq.).

1.4 Victims of sexual violence

The Spanish Parliament has passed Organic Law 10/2022 on the comprehensive guarantee of sexual freedom. Despite the fact that the primary goal of this law is unrelated to labour law, it includes relevant provisions that affect the employment relationship, in a very similar way as the Law on Gender-based Violence of 2004 does.

Specifically, the Labour Code has been amended to recognise that certain labour rights apply to the victims of sexual violence, such as the modification or adaptation of the rules on working time (even switching to teleworking, if available), transfer to another work centre or the temporary suspension of the employment contract. The decision of the employer to terminate a contract due to that circumstance (the condition of the victim of sexual violence) leads to the dismissal being deemed null and void, so reinstatement is assured.

It is worth noting that only women seem to be entitled to these rights, because the law explicitly refers to 'female workers' (Article 38).

All employers carry this obligation, including public administrations (these rights and measures also extend to civil servants). The law establishes a duty to promote working conditions that prevent sexual violence and allows for collective bargaining to improve the protective measures (Article 12). The Criminal Code has been amended to stiffen the penalty when the employer commits such an offence (Article 184 of the Criminal Code).

1.5 Working time

Royal Decree 640/2007 of 18 May 2007 introduced exceptions to the mandatory rules on driving times, rest periods and the use of the tachograph in road transport.

The government amended the Royal Decree to assure full compatibility with Regulations (EC) No. 561/2006 and (EU) No. 165/2014. The list of exceptions to the general rules seems to be fully consistent with EU law.

2 Court Rulings

2.1 Work-life balance

Supreme Court, ECLI:ES:TS:2022:3022, 12 July 2022

According to Article 37(4) of the Labour Code, workers are entitled to parental leave for nursing (including artificial feeding), which can take different forms: a break during the workday, a reduction in total working hours and can even be accumulated, so the worker can take full days of leave.

Traditionally, this parental leave was denied if the other parent did not work, assuming that this non-working parent could take care of the child.

This Supreme Court ruling referred to CJEU case law in cases C-104/09, *Roca Álvarez*, C-5/12, *Betriu Montull*, C-222/14, *Konstantinos Maïstrellis*) to hold that the requirements for taking parental leave cannot be different on the grounds of sex. Otherwise, there is a risk of perpetuating the traditional roles between women and men, which could lead to discrimination.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

There is no explicit provision on this issue in Spain. As a general rule, Article 59(1) of the Labour Code states that "*legal action based on the employment contract with no special term indicated shall expire a year after its termination*".

As regards annual leave, Article 38 of the Labour Code does not mention time barring, but the Supreme Court and collective bargaining generally expect annual leave to be taken during the relevant calendar year, so workers were not entitled to the right of annual leave after the end of the year.

The Spanish Supreme Court has modified this doctrine, but only in cases in which the worker could not take annual leave on the agreed dates due to maternity leave or temporary disability. This amendment was introduced to comply with CJEU case law, particularly the rulings in case C-350/06 and C-520/06, *Schultz-Hoff y Stringer*, case C-277/08, *Vicente Pereda,* and case C-282/10, *Domínguez*.

Accordingly, the Labour Code amended the regulation in 2012, and since then, Article 38(3) grants the worker the right to take annual leave after the end of his/her temporary disability/maternity leave, even if the calendar year has ended. There is no time barring in case of maternity leave, but a limitation was introduced for temporary disability. Annual leave in that case is time-barred at 18 months from the end of the year in which the right to annual leave arose (i.e. 30 June 2024 for the right to annual leave generated in 2022). This limit of 18 months intends to comply with the CJEU ruling in case C-214/10, *KHS AG*.

The regulation of these three situations (ordinary, maternity leave and temporary disability) is based on the actual possibility of being able to take annual leave. In fact, according to Spanish law, it is difficult to determine why a worker could not take annual leave for more than three years. Article 38(1) cannot allow the worker to renounce annual leave, to not replace annual leave (in full or in part) with economic compensation. Annual leave is a worker's right, hence depriving him/her of that right (in accordance with the employer's wishes) is simply not permitted. This would be considered an infringement of labour provisions, and even a criminal offence depending on the circumstances.

If a similar case were to arise in Spain, the courts would certainly interpret the law in conformity with this CJEU ruling. At least, recent evidence suggests that this would be the case. For example, the Supreme Court in a judgment of 11 May 2021, referred to the CJEU ruling in cases C-762/18 and C-37/19, *QH and CV* to grant the worker the right to annual leave (or financial compensation in lieu if there was no opportunity to effectively exercise this right) in case of reinstatement following dismissal, even though the worker did not actually perform work for the employer during that period. The Supreme Court took into account that the worker has no responsibility for the situation. Therefore, if a worker cannot take annual leave because the employer has not actually put him/her in a position to exercise that right, it is very likely that the Supreme Court would follow this ruling and would not set a time-bar. Nonetheless, there is no explicit rule on this issue.

4 Other Relevant Information

4.1 Unemployment rate

Unemployment rose again in August (40 428 more unemployed persons). There are currently 2 924 240 unemployed persons.

Sweden

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In its judgment, the CJEU held that the German three-year limitation period for annual leave rights is not compatible with EU law. Just like Germany, Sweden has a three-year limitation period for annual leave rights. Hence, the judgment will have major implications for Swedish law.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

The Retained EU Law (Revocation and Reform) Bill was introduced to Parliament on 22 September 2022.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual Leave

CJEU case C-120/21, 22 September 2022, LB (Prescription du droit au congé annuel payé)

In the present case, the Court ruled Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union precluded national legislation under which the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

Under UK law, the rules on time periods for bringing claims are found in Regulation 30 of the Working Time Regulations 1998. These provide:

> *"30.— Remedies*
>
> *(1) A worker may present a complaint to an employment tribunal that his employer–*
>
> *(a) has refused to permit him to exercise any right he has under–[*
>
> *(i)* regulation 10(1) or (2), 11(1), (2) or (3), 12(1) *or* (4), 13 or 13A*;]*
>
> *…*
>
> *(b) has failed to pay him the whole or any part of any amount due to him under* regulation 14(2) *or* 16(1)*.*
>
> *(2) [Subject to [*regulation 30B*], an employment tribunal] shall not consider a complaint under this regulation unless it is presented–*
>
> *(a) before the end of the period of three months (or, in a case to which* regulation 38(2) *applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.*

> *[(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by* regulation 15 *of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).]*

Regulation 13 concerns annual leave. So the basic rule is that there are three months to bring the claim (Reg 30(2)(a)) but this period can be extended where '*it was not* reasonably practicable for the complaint to be presented before the end of that period of three months') (Reg 30(2)(b)).

A purposive reading, which is still allowed under the EU(Withdrawal) Act 2018, would allow the Court to read Reg 30(2)(b) in the light of this case law.

4 Other Relevant Information

4.1 Brexit

The text of the Retained EU Law (Revocation and Reform) Bill was introduced to Parliament on 22 September 2022.

The Annex contains the government's press release and summary of the Bill.

The Bill is a serious, substantial and complex piece of legislation. The headline is that it 'sunsets' i.e. turns off all EU Retained law which is secondary law (i.e. not Acts of Parliament like the Equality Act 2010). This would include much EU social law including the Working Time Regulations, the Agency Work Regulations, Fixed term Work Regulations.

However, departments like BEIS can choose whether to keep that law so it is not subject to the sunset (Clause 1(2)) or restate the retained (or assimilated) EU law as domestic law, or to replace it completely (see eg Clause 15).

More information on the Retained EU Law (Revocation and Reform) Bill can be found in the press release.

> *"On the 31 January 2022, to mark the two-year anniversary of getting Brexit done, the Government set out its plans to bring forward the Retained EU Law (Revocation and Reform) Bill.*
>
> *Retained EU Law is a category of domestic law created at the end of the transition period and consists of EU-derived legislation that was preserved in our domestic legal framework by the European Union (Withdrawal) Act 2018.*
>
> *Retained EU Law was never intended to sit on the statute book indefinitely. The time is now right to end the special status of retained EU Law in the UK statute book on 31 December 2023. The Bill will abolish this special status and will enable the Government, via Parliament to amend more easily, repeal and replace retained EU Law. The Bill will also include a sunset date by which all remaining retained EU Law will either be repealed, or assimilated into UK domestic law. The sunset may be extended for specified pieces of retained EU Law until 2026.*
>
> *The retained EU Law (Revocation and Reform) Bill is part of the Government's commitment to put the UK statute book on a more sustainable footing. By ending the special status of retained EU Law, we will reclaim the sovereignty of Parliament, and restore primacy to Acts of Parliament. (...)*
>
> *The Retained EU Law (Revocation and Reform) Bill is the culmination of a journey that began on 23 June 2016 when more than 17 million citizens of the UK and Gibraltar voted for the UK to leave the European Union (EU).*
>
> *Our approach to making the UK 'the best regulated economy in the world' is set out in the Benefits of Brexit document published in January 2022. This approach*

is supplemented by the reviews into the substance and status of retained EU law which commenced in September 2021. The Bill will provide the means for Government, via Parliament to update legislation in response to the outcome of the substance and status reviews.

From these reviews, also came the retained EU law dashboard, which is a catalogue of over 2 400 pieces of retained EU law across 300 unique policy areas and 21 sectors of the economy. It was published on the 22 June 2022, as part of the Prime Minister's promise to empower the public to scrutinise EU-derived law that remains on the UK statute book. The dashboard enables the public to hold the government to account on retained EU law reform. (...)

Now that the Government has mapped where EU-derived legislation sits on the UK statute book, we are bringing forward this Bill in order to fully realise the opportunities of Brexit, and to support the unique culture of innovation in the UK. (...)

The Bill will sunset the majority of retained EU law so that it expires on 31 December 2023. All retained EU law contained in domestic secondary legislation and retained direct EU legislation will expire on this date, unless otherwise preserved. Any retained EU law that remains in force after the sunset date will be assimilated in the domestic statute book, by the removal of the special EU law features previously attached to it. This means that the principle of the supremacy of EU law, general principles of EU law, and directly effective EU rights will also end on 31 December 2023. There is no place for EU law concepts in our statute book. (...)

Currently, retained direct EU legislation takes priority over domestic UK legislation passed prior to the end of the Transition Period when they are incompatible. The Bill will reverse this order of priority, to reinstate domestic law as the highest form of law on the UK statute book. Where it is necessary to preserve the current hierarchy between domestic and EU legislation in specific circumstances, the Bill provides a power to amend the new order of priority to retain particular legislative effects."

The full text of the press release is available here.

4.2 Agency work in the case of strikes

Following adoption of the law which allows agency workers to be used to replace workers on strike, trade unions have now sought judicial review of it (See July and August 2022 Flash Reports).

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