Flash Reports on Labour Law January 2023

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 December 2022, 29 countries (all but **Latvia** and **Slovakia**) 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 played only a minor role in the development of labour law in many Member States and European Economic Area (EEA) countries.

In **the Netherlands**, a healthcare facility was found liable for damages suffered by an employee as a result of exposure to COVID-infected patients without personal protective equipment.

In **Slovakia**, the Minister of Health issued rules on criteria for determining the COVID-19 supplement payment for employees who are in direct contact with COVID-19 patients.

Implementation of EU Directives

Romania has fully transposed the provisions of Directive 2019/1158 on Work-life Balance for Parents and Carers.

In **Liechtenstein**, a Draft Law implementing the Work-life Balance Directive has been submitted by the government. Similarly, in the **Czech Republic**, the government is deliberating the transposition of the Directive on Transparent and Predictable Working Conditions and the Work-life Balance Directive.

Annual Leave

In **Germany**, the Federal Labour Court has ruled on follow-up questions to the CJEU's decision in the case *Max Planck Gesellschaft*.

In **the Netherlands**, the Court of North-Holland ruled that in cases in which an employee has not been able to take the statutory minimum period of paid annual leave, a longer limitation period of five years shall apply.

Working time

In **Slovenia**, the Constitutional Court ruled on the limitation of overtime work for doctors and other healthcare professions.

In **Spain**, the Supreme Court considered that weekly rest periods can be accumulated for periods of up to 14 days.

Teleworking

In **Germany**, the State Labour Court Schleswig-Holstein has confirmed a far-reaching 'right to disconnect'.

In **Poland**, the amendment of the Labour Code on remote working was enacted by Parliament.

Transfer of undertakings

In **Ireland**, two decisions have been issued under the Transfer of Undertakings Regulations.

Similarly, in **the Netherlands**, the Supreme Court largely rejected a claim relating to the transfer of seniority after a transfer of undertaking.

Atypical work

In **Austria**, a decision of the Supreme Court dealt with consecutive fixed-term contracts.

In **Germany**, the Federal Labour Court issued a decision on the scope of the prohibition of discrimination against part-time workers.

In **Belgium**, penalties for the excessive use of short, consecutive temporary agency work assignments were introduced. Furthermore, a court held that Uber drivers were considered true self-employed persons and could not be considered as working under any authority, which is a features of employment contracts.

Other developments

In **Denmark**, the government has taken steps to annul the Directive on Adequate Minimum Wages.

In **the Netherlands**, the government has passed a bill implementing the Whistleblowing Directive.

In **Greece**, a draft law regulating the employment contracts of seafarers has been submitted.

Table 1: Major labour law developments

Topic	Countries
Collective bargaining and collective action	BE CY IS SI UK
Equal treatment	FR IT PL SE
Third-country nationals	BG CY CZ HR
Work-life balance	CZ LI RO
Teleworking	DE IT PL
Minimum wage	BG CY SI
Platform work	BE FR MT
Annual leave	DE NL
Working time	ES SI
COVID-19	NL SK
Transfer of undertakings	IE NL
Dismissal	FR IT
Seafarers' work	EL
Transparent and predictable working conditions	CZ
Temporary agency work	BE
Part-time work	DE
Fixed-term work	AT
Whistleblowing	NL

Austria

Summary

A Supreme Court decision deals with consecutive fixed-term contracts.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

Supreme Court, 9 ObA 11/22s, 24 November 2022

A Supreme Court decision deals with consecutive fixed-term contracts for theatre actors (ballet dancers).

This decision is nearly verbatim with the Supreme Court's ruling, 8 ObA 58/22w, 21 November 2022 reported in the December 2022 Flash Report. We therefore refer to the comments made there.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Whistleblower protection

Legislation on whistleblower protection passed the Parliamentary Committee on Social Affairs and is expected to pass the National Assembly on 01 February 2023 (*HinweisgeberInnenschutzgesetz* (HSchG)).

The Austrian draft aims to transpose only just the minimum requirements of Directive 2019/1937/EU. Violation against labour law or anti-discrimination legislation is not covered by the proposed Austrian Whistleblowing Act.

4.2 COVID-19 measures

All measures to fight COVID-19 will end by the end of June 2023, at the latest.

The government has announced that it aims to end all measures related to COVID-19 by the end of June 2023, including the wearing of mandatory masks and the obligation to report COVID-19 infections, etc.

Belgium

Summary

(I) A new legislative provision includes Saturday as a working day by redefining the concept of 'working day'.

(II) The New Programme Law contains several labour law measures for specific business sectors (cleaning sector, health care, casual work in the funeral industry, broadening the scope of the flexi job system, consecutive daily employment contracts in temporary employment).

(III) The basic law on collective bargaining agreements was amended in terms of the scope of application of the law and a change in the joint committee.

(IV) According to a recent judgment, Uber drivers are deemed true self-employed persons and cannot be considered as working under an authority, which is a feature of an employment contract.

1 National Legislation

1.1 Concept of 'working day'

The Law of 26 December 2022 neutralises Article 1.7 of Book 1 of the new Civil Code, as enacted by Law of 28 April 2022 on the definition of working day, as the definition builds on labour and social security law (*Moniteur belge* 30 December 2022).

Article 1.7 of Book 1 of the Civil Code defines working days as all days other than legal holidays, Sundays and Saturdays. This lead to a debate on its application in labour law, among others, where Saturdays are considered working days. Meanwhile, the recent Law of 26 December 2022 clarifies and neutralises this provision in the Civil Code. Consequently, the said article does not apply to the provisions whose object is the regulation of the employment relationship and social security regulations.

This law entered into force on 01 January 2023.

1.2 New regulations on work and social affairs

The Programme Law of 26 December 2022 contains an array of various labour law regulations intended primarily for specific sectors of industry (*Moniteur belge,* 30 December 2022). In some cases, additional criminal sanctions are included in the Social Penal Code when employers breach the rules.

For example, the Programme Law provides for:

(i) An electronic registration system in the cleaning industry

An electronic attendance recording system of the presence and rest breaks has been created for all natural persons at workplaces where maintenance and/or cleaning activities involving real estate are performed (Articles 22-48). This chapter will come into force on the date determined by the King, but no later than 01 January 2024.

(ii) An extension of occasional work in the funeral sector (Article 50).

The introduction of the status of occasional employment in the funeral industry from April 2019 aimed to reduce the administrative burden for short, unforeseen employment specific to the funeral industry, as well as to allow flexible employment for specific tasks. An occasional worker in the funeral industry is a worker who is occasionally employed in the funeral industry with a fixed-term employment contract or for clearly defined work. The employee provides limited and irregular services on a voluntary basis, without

a fixed schedule. This employee may only perform limited duties such as ushering, transporting, arranging burials, setting up a funeral chapel, providing a welcome at the funeral home and/or assisting at the coffee table. As of 01 January 2023, the duties will be expanded to include minor, non-regular maintenance work within and of buildings as a function of visits and ceremonies; preparing mourning letters for sending, including folding and putting in covers, and performing minor work in the cemetery, such as placing or removing accessories.

(iii) A regulation on unlawfully paid unemployment benefits in case of temporary unemployment (Articles 53-56).

If the employer relies on a suspension of the performance of the employment contract, pursuant to Article 26, 49, 50, 51 or 77/4 of the Employment Contracts Law of 03 July 1978, to not provide his/her employee with work while there is no force majeure, technical disorder, bad weather or lack of work due to economic causes, the employer is required to pay his/her employee the normal wage for the days during which there is no suspension of the performance of the employment contract. In this case, the National Employment Office may recover the gross sums wrongfully paid to the employee by his/her employer.

(iv) Elimination of reimbursement of the so-called 'insertion fees' in case of collective redundancies (Articles 57-58).

In certain cases, an employer had to pay a so-called insertion compensation to a dismissed employee as a result of a restructuring involving collective dismissal. When this insertion fee was higher than the normal severance payment, the employer could reclaim the share that is higher from the National Employment Office (NEO). From 01 January 2023, partial reimbursement by the NEO has been abolished. This applies to all collective dismissals announced after 31 December 2022.

(v) Penalties for excessive use of short consecutive temporary agency work (Articles 144-149)

In the fight to address excessive use of consecutive day contracts in the temporary work agency sector, a user will be able to incur a responsabilization fee from 01 January 2023.

The measure relates to the use of successive contracts for temporary agency work of a very short duration. This is understood to mean temporary employment contracts with the same user that do not exceed a duration of 24 hours and which immediately follow each other. The responsabilization contribution does not apply to temporary agency workers who are in receipt of a retirement pension, flexi-jobbers, casual workers at a user that belongs to the Joint Committee on Agriculture (JC 144), Horticulture (JC 145) and Hotel Industry (JC 302). The responsabilization contribution is only payable by the user if certain thresholds per semester and per temporary worker are exceeded. The size of the accountability contribution is determined by the frequency of successive contracts for temporary agency work of very short duration between the same temporary worker and the same temporary employment agency for employment with the same user. For instance, if the number of consecutive daily temporary agency employment contracts per semester and per temporary worker with the same user amounts to at least 40 to 59, a penalty fee of EUR 10 multiplied by the number of consecutive daily contracts is due.

(vi). Expanding the scope of flexi-jobs (Articles 146-150)

Recourse to flexi-job employment allows an employer to employ staff in a flexible manner. Until the end of 2022, this advantageous status was only allowed until the end of 2022 in certain branches of industry, falling specifically under the scope of the following Joint Committees (JC):

- JC 118.03 - Food Industry, limited to small (pastry) bakeries;
- JC 119 - on Food Trade;

- JC 201 - on Self-employed Retail Trade;
- JC 202 - for Food Retail Workers;
- JC 202.01 - for Medium-sized Food Companies;
- JC 302 - for the Hotel Industry;
- JC 311 - for Large Retail Establishments;
- JC 312 - for Department Stores;
- JC 314 - on Hairdressing and Beauty Care;
- JC 322 - on Temporary Agency Employment, if the user is covered by one of the Joint Committees listed above.

From 01 January 2023, this option will be extended to the following sectors:

- JC 223 - National Joint Committee on Sports;
- JC 303.03 - for the operation of cinema halls.
- JC 304 - for the entertainment industry, but excluding artistic, artistic-technical and artistic support functions that include activities as defined by the Law of 16 December 2022 establishing the Artwork Commission and improving the social protection of art workers;
- JC 330 - for certain health establishments and services or public establishments and services in the public health sector

A Royal Decree may introduce a joint committee which target employers and employees of the events sector, but only when the Royal Decree establishes a new joint committee that is specifically competent for the events sector. This may exclude the application to certain functions.

(vii) Measures due to staff shortages in the healthcare sector (Articles 151-152): Neutralisation of hours of student work in the care sector (also for the first quarter of 2023).

To cope with the shortage of staff in the care sector, a neutralisation of hours that young people with a student employment contract perform in the care sector was provided for in the past.

Such a neutralisation has also been provided for the first quarter of 2023. Consequently, these hours do not qualify for the quota of 600 hours (since 2023) that a student may be employed for in an advantageous manner within a calendar year.

1.3 Collective labour relations

The Law of 26 December 2022 on Collective Labour Relations amends several provisions on collective labour relations (*Moniteur belge,* 27 January 2023).

First, the law extends the scope of application of the Law of 05 December 1968 on Collective Bargaining Agreements and the Joint Committees of a number of public institutions/ utility institutions such as the Financial Services and Market Authority, the Delcredere Office and the National Bank of Belgium; social housing companies, and public limited companies "*Brussels South Charleroi Airport-Security*" and "*Liège-Airport-Security*" (Article 3).

A second major change relates to the fate of collective bargaining agreements in the event of the transfer of an employer from one joint committee to another in case of a change in the competence of a joint committee. The expiration date added under the previous government in Article 27 of the of Law of 05 December 1968 on Collective Bargaining Agreements and the Joint Committees Law has been deleted. Indeed, a legal loophole threatened to be created as of 01 January 2023. Workers and employers would be faced with different pay and working conditions, or worse, without agreement on the applicable terms (Article 4). A similar provision to that of Article 27 of the Collective Bargaining Agreements Law is being introduced for sector-specific Royal Decrees instead of collective bargaining agreements. When the scope of application of a joint committee

is changed or abolished, or when a joint committee is created, the King will determine which Royal Decrees on wage or working conditions of the former joint committee will continue to apply after the transition, as well as which employers and employees will be subject to those decrees. Afterwards, it will be up to the social partners of the new joint committee to consider whether they wish to retain or adapt those Royal Decrees over time (Article 5).

Thirdly, the new Law amends the Law of 21 December 2007 on the regulation of non-recurring result-related benefits (Articles 6 and 7). Non-recurring result-related benefits are benefits linked to the collective results of a company or of a well-defined group of employees based on objective criteria. These benefits depend on the achievement of clearly delineated, transparent, definable/ measurable and verifiable objectives, which are apparently uncertain at the time the bonus plan is introduced. Provided the benefits are granted in accordance with regulations, they are subject to low social security contributions and a low income tax rate.

2 Court Rulings

2.1 Qualification of the employment relationship of Uber drivers

Lower Brussels Labour Court, No. 21/632/A, 21 December 2022

The lower Brussels Labour Court ruled on 21 December 2022 (No. 21/632/A, - not yet published) on the qualification of the employment relationship of Uber drivers. In June 2020, an Uber driver, Mr X, addressed an application to the Administrative Commission for the Regulation of Labour Relations. Mr X asked the Commission to rule on the nature of his employment relationship with the Dutch company Uber, with whom he had entered into an independent service agreement. However, Mr X believed that in practice, he was employed as an employee. The Administrative Commission declared Mr X's application admissible and well-founded. The Commission ruled that the elements submitted to it were incompatible with the qualification of a self-employed employment relationship. According to the Administrative Commission, Uber should be considered to be Mr X's employer. Uber, in turn, appealed the Administrative Commission's decision to the Brussels French-speaking Labour Court. Mr X and the Belgian State are acting as defendants in these proceedings.

Article 338 of the Labour Relations Law of 27 December 2006 provides that each party has a period of one year from the commencement of the employment relationship to request an opinion on the nature of the employment relationship. In the present case, the question arose, among others, whether Mr X had requested an opinion within the statutory period. The Court ruled that the expiry period was linked to the duration of the employment relationship and not to the duration of the contract concluded between the parties. Thus, the Belgian State's argument, which argued that the expiry period only commences from the conclusion of the last fixed-term contract, was not accepted by the Court. The Court ruled that the application had not been filed within the statutory limitation period. The request was inadmissible and the Administrative Commission's opinion is therefore null and void.

The Court subsequently turned to the qualification of the nature of the employment relationship between Mr X and Uber. The Labour Relations Act provides that in certain sectors, including the passenger transport sector, the employment relationship is rebuttably presumed to be an employment contract if it appears that more than half of the criteria listed in Article 337/2, §1 are met. In the present case, the Court decided that five of the nine criteria were met, so that the driver's services were presumed to have been performed under an employment contract until proven otherwise. The Court ruled that Mr X bore no financial or economic risk, had no responsibility or decision-making power regarding financial resources, had no decision-making power over his purchasing and pricing policies and, moreover, that the electronic application 'Uber' should be considered equipment made available to Mr X. To check whether the above

presumption was rebutted, the Court examined the four general criteria of the Labour Relations Law.

The Court noted that the will of the parties was to enter into a contract for self-employment, but considered this insufficient to rebut the presumption. It found that the driver's freedom to organise his working time was not limited. Referring to the ruling of 18 October 2010 of the Cour de Cassation (Cass. 18 October 2010), the Court stated that the driver was completely free to log in and out of the electronic Uber platform and accept or refuse transport services whenever he wanted. The fact that an algorithm determined which driver receives an offer at a given time, and that that driver can only establish the exact scope of the route after accepting the offer did not limit his free organisation of working time. Indeed, drivers always have the option to cancel an accepted ride. According to the Court, the documents on file confirmed the driver's freedom to organise the work offered to him through the Uber platform. The driver remained free to choose his route and navigation system. Nor did the argument that Uber determines the price of the ride affect the freedom of work organisation. Indeed, the driver is free at any time to accept, refuse or even cancel an offer after initially accepting it. The Court also found that no element indicated the possibility for Uber to exercise hierarchical authority over the drivers. The Uber drivers are judged by the users of the Uber services, not by Uber as an employer or co-contractor. In addition, there is no evidence to suggest that the geolocation system is used to exercise hierarchical control; on the contrary, the geolocation data are just the data on the basis of which the Uber algorithm functions. Moreover, drivers are not bound by exclusivity and Uber does not give any instructions regarding the ride itself.

Consequently, the Court concluded that the examination of the four general criteria confirmed the absence of a legal nexus of subordination so that the presumption based on the specific criteria is rebutted. Therefore, according to the Court, an existence of an employment contract between Uber and Mr X could not be concluded.The Court's ruling would have probably been different based on the new legislation introduced by the so-called Labour Deal Law of 03 October 2022, which introduced eight new specific criteria into law, which apply to work through a platform client (Law of 03 October 2022 containing various labour provisions; see November 2022 Flash Report, point 1.1.4).

If some of these specific criteria are met, it will be presumed, until proven otherwise, that an employment contract exists between the platform operator and the person performing the work. The measure entered into force on 01 January 2023.

This law enacted a new presumption of the existence of an employment contract.

The employment relationship between the operator of a digital platform principal and a person who performs platform work through that platform shall, until proven otherwise, be presumed to have been carried out under an employment contract if the analysis of the employment relationship shows that at least 3 of the 8 following criteria or 2 of the last 5 following criteria are met:

1. the platform operator can claim exclusivity with respect to its field of activity;

2. the platform operator may use a geolocation mechanism for purposes other than the proper functioning of its basic services;

3. the platform operator can restrict the freedom of the platform worker in how the work is performed, for instance, the freedom of the bicycle courier how he/she performs the work could be restricted:

- if he/she cannot freely choose the route or
- if he/she is obliged to deliver the package to the recipient personally or
- if he/she has to notify the platform of the receipt of the package according to a predetermined procedure, indicating the time of receipt.

4. the platform operator may limit the income level of the platform worker, in particular:

- by paying an hourly rate

- and/or by restricting the right of the platform worker to refuse offers of work based on the rate offered
- and/or by not allowing the platform worker to set the price of the service;

5. the platform operator may require the platform worker to comply with mandatory regulations on appearance/ behaviour towards the recipient of the service or the performance of the work;

6. the platform operator may determine the prioritisation of future job offers and/or the amount offered for a job and/or the determination of the ranking by using the information collected and by monitoring the performance of the platform worker's work, excluding the result of this work performance, in particular by electronic means;

7. the platform operator may restrict, possibly including by means of sanctions, the platform worker's freedom of organisation of work, in particular the freedom to choose one's own working hours or periods of absence, to accept or refuse tasks or to have recourse to subcontractors or substitutes, except where the law expressly limits the possibility of having recourse to subcontractors;

8. the platform operator may restrict the platform worker's ability to build up a customer base outside the platform or to perform work for a third party.

The presumption of the existence of an employment contract is rebuttable: it can be rebutted by any means of law. The qualification resulting from the actual exercise of the employment relationship must take into account the use of algorithms and other technological means in the organisation of work.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

Some new legislative initiatives concern the requirements for obtaining a 'blue card' and minimum wage.

1 National Legislation

1.1 Blue card

The National Assembly (Parliament) has adopted amendments and supplements to the Labour Migration and Labour Mobility Act (promulgated in State Gazette No. 8 of 25 January 2023).

To obtain a 'blue card', a third-country national:

- must possess a high level of professional qualification, i.e. a completed higher education, certified by a diploma, certificate or other document issued by a competent authority, which consisted of no less than three years of academic training provided by an educational institution recognised as a higher education institution in the respective country;
- with reference to positions included in the list approved by Order of the Minister of Labour and Social Policy – he or she must possess the necessary knowledge, skills and competences, certified by an official document, issued by a competent authority, verifying the applicant's professional experience at a level comparable to the acquired higher education, completed within the period specified in the list and which is related to the position or sector specified in the employment contract;
- with reference to positions outside this list, the applicant must verify that he or she possesses the necessary knowledge, skills and competences, certified by an official document issued by a competent authority for at least five years of professional experience at a level comparable to the acquired level of higher education, and which is related to the position or sector specified in the employment contract.

1.2 Employment agency

The Council of Minister adopted Decree No. 486 of 22 December 2022 which amends and supplements the Rules on the Application of the Promotion of Employment Act (promulgated in State Gazette No. 6 of 20 January 2023). In addition to the obligation of the employment agency to engage economically inactive persons, to conduct research and analyses of labour resources, carry out research on and monitor the conditions and procedure for organising and financing the validation of professional knowledge, skills and competences. The Executive Director of the Employment Agency must publish an annual study on employers' labour needs and send a letter to the Chairman of the Employment Commissions of the Regional Development Councils and the 'Labour Bureau' Directorates with instructions for the terms and procedures for recruiting and processing information about employers' needs for labour.

Special rules on work for economically inactive persons have been introduced.

1.3 Minimum wage

The Council of Ministers adopted Decree No. 497 on determining the amount of minimum wage (promulgated in State Gazette No. 1 of 03 January 2023). From 01

January 2023, the amount of minimum monthly salary amounts to BGN 780 and the minimum hourly wage to BGN 4.72 for regular working hours of eight hours and a five-day work week. The amount of minimum monthly salary is set for full-time work.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

The Regulation on the Procedure and Conditions for Hosting Third-Country Researchers has been issued.

1 National Legislation

1.1 Third-country researchers

The Regulation on the Procedure and Conditions for Hosting Third-Country Researchers has been issued (see Official Gazette No. 8/2022). It prescribes the procedure and conditions for hosting researchers from third countries at research organisations for a period longer than three months for the purpose of conducting research. Among others, it states that the hosting contract has the effect of an employment contract if it contains all clauses that must be included in the employment contract, and which are prescribed by labour law.

1.2 Salaries in local and regional governments

The Amendment to the Act on Salaries in Local and Regional Governments has been adopted (see Official Gazette No. 10/2022). It prescribes limits on the amounts of salaries. Among others, it states that the amount of salaries of employees in local and regional government units may not amount to more than 18 per cent of the unit's operating income realised in the year preceding the budget preparation year.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

The National Minimum Wage Decree came into effect, but excludes low paid migrant workers.

1 National Legislation

1.1 National Minimum Wage Decree

As of 01 January 2023, the National Minimum Wage Decree has come into effect and has been set at EUR 885, but excludes 40 000 low paid migrant workers (domestic, agricultural and maritime workers).

On 01 January 2023, Cyprus implemented the Decree for National Minimum Income (*Περί Κατώτατου Ορίου Μισθών Διάταγμα του 2022, Διάταγμα δυνάμει του άρθρου 3(1), Κεφ. 183. ANAK. 307, Κ.Δ.Π. 350/2022, Επίσημη Εφημερίδα της Δημοκρατίας Παράρτημα Τρίτο (I): 10.12020.*). Under Article 5 of this Decree, the wage for the first six months of employment is fixed at least at EUR 885, increasing thereafter to the minimum threshold of EUR 940.

In the past, the Republic of Cyprus did not have a national minimum wage (see Trimikliniotis, N. (2021): 'Legal interpretation of certain aspects of the Proposal for a directive on adequate minimum wages in the European Union', Report on Cyprus, European Centre of Expertise in the field of labour law, employment and labour market policies (ECE), ICF, 05 March 2021). It pursued a policy based on the Minimum Wage Law, a law in force since colonial times (Minimum Wage Law, Chapter 183 (ANAK.307), in operation since November 1941, *Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183*), which empowers the Council of Ministers to set minimum wage rates for any occupation in the Republic, either in general or in a specified area, place or district, for cases in which it is convinced that the wages paid to any person(s) employed in any occupation are unreasonably or unjustifiably low (Section 3, *Ο περί Κατωτάτου Ορίου Μισθών Νόμος - ΚΕΦ.183*).

The Decree stipulates that the full-time working hours of employees in any economic activity shall be those in effect at the time of the adoption of this Ordinance. In the case of part-time workers, the minimum monthly wage shall be adjusted in accordance with the hours worked in relation to full-time work.

Under Article 6, a Minimum Wage Adjustment Committee shall be established, appointed by the Council of Ministers, and shall consist of three (3) employee representatives, three (3) employers' representatives, and three (3) independent academics or experts of recognised standing, i.e. experts in labour matters, one of who shall be appointed by the Council of Ministers as the chair of the Committee.

Under Article 7(2), the adjustment mechanism with the appointment of members of the Minimum Wage Commission shall come into force for the first time after the entry into force of this Decree on 01 January 2024 and shall thereafter come into force every two years.

The Committee shall prepare a report to be submitted to the Minister at least two months before each review, taking the following parameters into account:

- the purchasing power of minimum wage earners, taking into account the variation in the cost of living;
- trends in employment levels and unemployment rates;
- diversification of economic growth and productivity levels;

- the variation and trends in levels of earnings and their distribution;
- the impact that any change in the minimum wage will have on employment levels, relative and absolute poverty rates, the cost of living and the economy's competitiveness.

Under Article 7(b), after taking account of the views of the members of the Labour Advisory Board on the Commission's report, the Minister shall submit a reasoned recommendation for the adjustment of the minimum wage to the Council of Ministers, including a recommendation for a zero adjustment. The Minister may, at his or her discretion, seek and take the views of any other bodies, persons or authorities into account before presenting a recommendation to the Council of Ministers.

Exclusions

However, over 40 000 workers engaged in agriculture and shipping as well as domestic workers are excluded from the minimum wage requirements. Interns or individuals participating in training for a degree or professional qualifications are excluded as well.

The Decree explicitly declares that it shall not apply to:

- Domestic workers, agricultural and livestock and maritime workers (Article 3(2));
- Any employee to whom more favourable arrangements apply by law, contract, practice or custom (Article 3(3));
- Employees to whom the Minimum Wages in the Hotel Industry Decree 2020 applies (Article 3(4));
- Persons who are participating in training or education provided by law, practice or custom for the purpose of obtaining a diploma and/or to exercise their profession (Article 3(5)).

Article 4 provides that where more favourable arrangements are provided, the provisions of this Decree on the minimum wage shall not affect in any way any legislation and/or contract and/or other agreement or practice or custom providing for more favourable terms.

Article 8 provides that any termination of employment which (under Part II of the Second Section to the Termination of Employment Acts 1967 to 2016) is not considered a termination of employment for the purposes of this Decree.

As for remuneration outside the normal working hours, Article 9 stipulates that any other arrangements for overtime pay or for working outside normal working hours or working on public holidays or other benefits shall not be affected by the provisions of this Decree.

Article 10 introduces specific provisions for payment for food and accommodation. Where, under the agreed employment contract, the employer provides the employee with board and/or accommodation, the minimum monthly wage may be reduced by agreement between the employer and employee, as follows:

- up to 15 per cent when board is provided; and/or
- up to 10 per cent when accommodation is provided.

The employee may terminate the above agreement on the provision of board and/or accommodation by giving forty-five (45) days' notice to the employer.

Article 11 stipulates that in the case of occasional employment of persons aged up to 18 years of age that does not exceed two consecutive months, the minimum wage in cash may be reduced by 25 per cent. However, any reduction above 25 per cent may not be applied at the same time as any other reductions provided for by the provisions of this Decree.

Unions and employers' organisations disagree over the method of determining the average salary on which the minimum salary should be based. The average wage calculated by the Cyprus Statistical Service is lower than that calculated by EU-SILC; the unions are calling for the minimum wage to be based on the latter. They argue that the EU-SILC methodology correctly calculates a country's average salary, as promoted by the previous Minister of Labour, which determines that the average salary ranges between EUR 940 and EUR 950. The employers' organisations support the former calculation methodology.

The social partners had arrived at an agreement in the Labour Advisory Council, which excluded domestic and agricultural workers as well as sailors from the national minimum wage provision which was enacted in May 2022 (Annie Charalambous: 'Three exemptions in minimum national wage by law in Cyprus', In-Cyprus philenews, 28 April 2022). The decision to exclude agricultural and domestic workers was strongly criticised by the Union of Doctoral Teaching and Research Scientists (DEDE) which expressed outrage at the intention of the government, social partners, institutional bodies, as well as a large number of MPs to exclude these groups of employees, and noted that these jobs are held almost exclusively by migrants and asylum seekers, who are the most vulnerable and impoverished social groups in the country, working under conditions of modern slavery, and need legal protection more than any other group of the population, since they do not even have the right to freely organise themselves in trade unions. The union stated that the underlying logic is racist and that immigrants and refugees are denied a decent living on the basis of origin, which constitutes an example of institutional racism (Stockwatch: *‚Να μην εξαιρεθούν εργάτες και οικιακές εργάτριες ζητά η ΔΕΔΕ'*, 30 April 2022). Publicly, none of the largest unions has expressed any misgivings about these exclusions.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 General strike

First general strike action for the restoration of the Cost of Living Allowance (CoLA) since the 1940s, with unions pledging to continue their coordinated action

The trade unions' general stoppage of work for three hours (both public and private employees) on 26 January 2023 was organised to demand the restoration of the Cost of Living Allowance (CoLA). This was the first general strike to take place since the strike actions that led to the establishment of CoLA under British colonial rule (Constantinou, M-C (2021): *‚Ο αγώνας για τον τιμάριθμο από το χθες στο σήμερα*', Philenews, 21 March 2021). The Cost of Living Allowance, which was introduced in 1944, was suspended following the 2013 financial crisis and partially reinstated in 2018, following the transitional agreement reached in mid-2017, with 50 per cent of CoLA granted. With the lapse of the period agreed for the traditional agreement, the tripartite talks collapsed when the employers refused to restore CoLA. The Minister of Labour decided to leave it to the next government to deal with the matter.

The strike action is the first union action, with workers demanding the full restoration of CoLA, while the employers want to continue paying 50 per cent of CoLA as has been the practice over the past five years.

Public and semi-public sector employees and approximately 25 per cent to 30 per cent of private sector employees are party to collective agreements and eligible to CoLA adjustments. The participating unions are Peo, Sek, Pasydy, Deok, Oelmek, Poed, Oltek, Sak, Pasyki, POASO and others. The strike took place across all regions between noon and 3 pm. Unions sought the full restoration of CoLA following an impasse after discussions between the Minister of Labour, unions and employers' organisations.

Cyprus has had a system in place that automatically reviews wages for around 60 per cent of the country's workforce based on the Cost of Living Allowance (CoLA) since the 1940s. The CoLA agreement goes back to colonial times (1944), when it was used as a basis for pay increases. The wages of employees covered by collective agreements were readjusted every 12 months (on 01 January) on the basis of the percentage change in the Consumer Price Index over the preceding 12-month period. The strong tripartite relationship allowed the system to operate on the basis of an agreement between the employers' organisations and the trade unions with a strong role by the Ministry of Labour (the calculation of CoLA based on the Consumer Price Index was calculated by the Statistical Service of Cyprus on the basis of a basket of goods).

It is acknowledged that CoLA has played a key role in stabilising the Cypriot industrial relations system. It is one of the most important achievements of the workers and was won after persistent efforts of the trade union movement. However, as a result of continuous pressure from employers to abolish it, a dialogue on CoLA and productivity was launched in January 1995. The government at the time proposed that increases in consumption taxes should not be counted for the purposes of CoLA, which was eventually implemented, to the detriment of workers, despite the disagreement of some trade unions. Since the implementation of this proposal in 1999, the market value of wages has dropped by about 10 per cent.

CoLA was granted twice a year until 2012, in line with the increase in inflation. With the advent of the economic crisis in 2013, the trade unions agreed to suspend CoLA along with many other benefits and a drastic reduction in wages. With the strong recovery of the economy in 2017, a 'Transitional Agreement of the Social Partners' was reached, reinstating the ATA from 01 January 2018, at 50 per cent of the increase in the Consumer Price Index. The freeze continued until 2018 as a consequence of the bailout agreement between the government and its international lenders. The 2015 memorandum of understanding extended the wage freeze to the private sector. According to the memorandum, a tripartite agreement pursued with the social partners by Q4 in 2015 had to ensure that a reformed wage indexation system applicable to the public sector (with a lower frequency of adjustment, suspension at times of recession and partial indexation) was also adopted by the private sector, when the period of CoLA suspension ended. However, the duration has been extended.

Unions claim that the above decisions contributed to inequality to the detriment of workers, which has increased significantly over the last decade, with capital's share of GDP now at 54 per cent against 46 per cent in wages, up from 44.3 per cent against 55.7 per cent in 2009. Unions claim that any increase in inflation results in a real reduction in incomes, since workers' purchasing power decreases as the prices of goods and services rise. They claim that CoLA is the only tool that can restore the eroded purchasing power of wages, and, if not restored, will lead to a reduction in demand for goods and to a reduction in output in the long term, an increase in unit costs and the closure of enterprises.

The Employers and Industrialists Federation (OEV) and the Chamber of Commerce (KEVE) have criticised the trade unions' decision to strike over a dispute that the new government taking office must resolve.

The strike was accompanied by mass rallies across the country, and unions have pledged to continue their strike actions.

4.2 Review of the strategy of employment of third-country nationals (TCNs)

Unions have expressed strong disagreement with the Minister of Labour's review of the strategy of employment of TCNs before leaving office, accusing him of taking the side of employers and undermining collective agreements

An acute disagreement has emerged on the decision of the incumbent Minister of Labour to review the strategy of employment of third-country nationals before leaving office on 28 February 2023. Amid the presidential elections on 05 February 2023, the incumbent Minister of Labour announced that he would not leave his post until a revamping of a strategic plan for hiring third-country nationals is promoted to the cabinet. Speaking during a conference to review his work during his tenure as minister, the Minister of Labour stated that this is a matter that falls within the government's remit and must be reviewed, unlike CoLA, which he claimed was meant to be hashed out between employers and unions.

TNCs are currently allowed to work in the hospitality, agriculture and domestic sectors. The review of this policy is a thorny issue and long-standing discussions have been going on between unions and employers on the Minister of Labour's proposal to include foreign nationals—specifically from third countries—in the workforce. The General Secretary of the Chamber of Commerce stated that the sticking point was the clause that specifies that companies can only have third-country nationals make up 50 per cent of their workforce if they are part of a collective agreement.

Unions have refused to attend the review meeting, stating that it is hypocritical and fraught with double standards that serve the interests of employers. A review of the strategy on employment by a lame-duck government is possible, but it refuses to deal with the issue of CoLA on the grounds that the next government will have to deal with it. Unions consider the Minister's decision to be unilateral, without consultation, and that it is arbitrary, siding with employers. Unions are calling for the granting of permits to employers to use migrant labour from third countries to be subject to employers being required to implement collective agreements and recognise unions, rather than exploit cheap migrant labour for purposes of social dumping, thereby undermining collective agreements and working conditions (Adamou, A. (2023): ‚Συντεχνίες: Τρία stop στον Κούσιο για ξένους εργάτες', Philenews, 02 February 2023).

Commenting on the matter, the Minister will not leave the ministry unless a new employment strategy has been adopted, as the incumbent government has executive power until 28 February. Regarding CoLA, he claimed that he attempted to adopt an interim proposal to satisfy all parties, but that he was unable to do so due to the difference of opinion between the employers' organisations and the trade unions. The Ministry is unable to intervene further than to act as an intermediary, according to the Minister, as CoLA is based on an agreement between employers and workers.

As regards the guaranteed minimum income, the Minister asserted that in 2021, 20 250 families benefited with an expenditure of EUR 207.6 million, which corresponds to an average of EUR 10 252 per family compared to public assistance in 2013, where the funds amounted to EUR 168 million for 23 872 families, corresponding to an average of EUR 7 037 per family.

Czech Republic

Summary

The government is deliberating the transposition of the Directive on Transparent and Predictable Working Conditions and the Work-life Balance Directive.

1 National Legislation

1.1 Transposition of EU Directives

The Bill amending Act No. 262/2006 Coll., the Labour Code, will be deliberated by the government. Afterwards, the Bill will proceed to Parliament.

The Bill is available here.

The Bill was discussed in the July 2022 Flash Report.

This amendment primarily aims to implement two Directives. The first is Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union and the second is Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-life Balance for Parents and Carers and to repeal Council Directive 2010/18/EU.

1.2 Temporary protection and toleration visas

Act 20/2023 Coll., on the amendment of Act No. 65/2022 Coll., on certain measures in connection with the armed conflict in the territory of Ukraine resulting from the invasion of the Army of the Russian Federation, as amended, has been published and entered into effect on 24 January 2023.

The Act is available here.

This Act introduces, among others, the extension of temporary protection and toleration visas issued to eligible foreign nationals in connection with the conflict in Ukraine. The Act extends the validity of temporary protection until 31 March 2024. The toleration visas are automatically extended by law until 31 March 2024.

This Act extends temporary protection and toleration visas.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

The Danish government has taken steps to annul the Directive on Adequate Minimum Wages.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Adequate Minimum Wages Directive

Action for annulment of the Directive on Adequate Minimum Wages in EU

As reported in the December 2022 Flash Report, one of the political agreements of the new coalition government in Denmark was to seek an annulment by the CJEU of Directive (EU) 2022/2041 on Adequate Minimum Wages. Denmark voted no to the Directive, and the social partners on both sides have consistently voiced concerns over the new Directive.

On 18 January 2023, the Ministry of Employment issued a press release stating that the steps for annulment had been filed. The background and arguments for the annulment are described in a Ministerial memorandum of the same date.

The memorandum stated that the government did not expect the Directive to have significant consequences for Danish law, and that Danish law corresponds to the Directive. The government's steps for annulment are mainly motivated by fundamental concerns to safeguard the Danish labour market model and clarify whether the adoption of the Directive lies within the European Union's area of competence.

The Directive on Adequate Minimum Wages was adopted with a legal basis in Article 153 (2), cf. (1), litra b, TFEU. According to this provision, the EU legislator may adopt directives on 'working conditions'. The Danish government argues, however, that the Directive's content is covered by the exception in Article 153 (5), according to which the competence of the EU legislator is not extended to, inter alia, pay and the right to association, and that the Directive on Adequate Minimum Wages thus lacks legal basis.

Moreover, the government contends that Article 4 of the Directive concerns 'collective defence of the interests of workers and employers' as regulated in Article 153 (1), litra f, TFEU. The adoption of directives based on this legal basis requires a special legislative procedure (unanimity), which is not the case.

Estonia

Summary

The Labour Inspectorate has prepared a sample employment contract that can be used by employers and employees.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Sample of employment contract

The Labour Inspectorate has prepared a sample of an employment contract, which outlines the key components that should be included when concluding a contract of employment. It is a convenient tool for both employers and employees, because the interests of both parties are protected when using the sample.

The Labour Inspectorate asserts that different types of contracts can be concluded to perform work, such as an employment contract, a contract for services or an authorisation agreement. Such a distinction is necessary because different rights and obligations apply. In the case of a contract for services and an authorisation agreement, the employee has greater independence in the performance of work, but less protection and fewer benefits compared to persons working under a regular employment contract. An employment contract provides for a number of legal rights to employees, such as minimum wage, paid vacation, higher pay for overtime, restrictions to working time and rest periods, and much more.

The Employment Contract Act requires all important terms and conditions to have been agreed upon before the commencement of work and that the employment contract has been concluded in writing. An employment contract relationship with the employer is established from the moment the employee begins to perform tasks for the employer, even if the written contract has not yet been concluded at that time.

An employment contract is considered to have been concluded when the employee and the employer have reached an agreement on all relevant conditions. An agreement on the content of the work tasks, the remuneration for the work, the calculation of working hours, the time and place of work, the duration of the probation period and many other conditions must be negotiated and reached. When starting a job, an employee must ensure that all components included in the employment contract are comprehensible and that both parties agree to them, because a signed employment contract is mandatory for both parties to fulfil the contract, and the conditions can only be amended by agreement of the parties.

Fixed-term or open-ended contracts

It is assumed that an employment contract is concluded for an indefinite period, unless otherwise agreed. A fixed-term employment contract can only be concluded if the work is of a temporary nature, for example, in the case of seasonal work or a temporary increase in the workload, or to replace an employee who is temporarily absent.

The Employment Contracts Act allows for the conclusion of a fixed-term employment contract for a maximum of two consecutive terms or can be extended once. A fixed-term employment contract can be concluded for max. up to five years. In mid-December 2022, amendments to the Employment Contracts Act entered into force, which allow the conclusion of fixed-term employment contracts of up to eight days without limitation over a 6-month period, but it must be taken into account that when a new fixed-term employment contract is concluded after a six-month period, the contract converts into an open-ended employment contract.

The sample employment contract has been prepared in three languages, namely in Estonian, English and Russian.

See here for further information.

Finland

Summary

Legislative changes to the Act on Mediation in Labour Disputes and the Act on the Labour Court that enable a greater role for voluntary conciliation have been approved.

1 National Legislation

1.1 Mediation in labour disputes

Legislative changes to the Act on Mediation in Labour Disputes (*Laki työriitojen sovittelusta*, No. 420/1962) and the Act on the Labour Court (*Laki oikeudenkäynnistä työtuomioistuimessa*, No. 646/1974), which contains provisions on the judicial procedure in the Labour Court, have been approved and will enter into force 01 March 2023. These changes enable a greater role for the voluntary conciliation and consultation of parties and specify the obligations of parties related to the preparation for conciliation. According to the legislative changes, the national conciliator can, upon request of the parties, mediate the labour dispute. Voluntary mediation, which is a new means in the Act on Mediation in Labour Disputes, requires approval by all parties to the dispute. The aim is to develop the labour dispute mediation system and improve the efficiency of the mediation of labour disputes.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Study leave report

The Ministry of Economic Affairs and Employment of Finland has published a report on study leave (Publications of the Ministry of Economic Affairs and Employment 2023:6).

The purpose of the report was to obtain information for the development of the Study Leave Act (*Opintovapaalaki*, No. 273/1979). The report examined the current use of study leave and legislation in other countries, as well as challenges related to study leave. Based on the results, the report presents recommendations to develop study leave legislation. A large majority (90 per cent) of those on study leave are completing a new qualification and most are acquiring knowledge in another discipline. In Finland, the Study Leave Act serves those who wish to retrain for a new field. Currently, the Study Leave Act only meets the objectives of continuous learning to a limited extent.

According to the report, the legislation should more precisely define what kind of education is considered suitable during a study leave. Based on the results, the report considers it to be justified to assess whether the scope of the Study Leave Act could be expanded so individuals would, under certain conditions, be entitled to use study leave to complete other relevant studies that benefit their work and increase their competence. In addition, the report recommends that the Study Leave Act should be elaborated to lay down more detailed provisions on part-time study leave and the division of study leave into separate periods. The reform of the Study Leave Act should also consider how the laws regulating financial aid and the rights and obligations of

study leave could support each other and how their provisions could be reconciled better.

France

Summary

(I) A decree has implemented the unemployment insurance reform.

(II) The French government has proposed a reform of the French pension system.

(III) The Court of Cassation has ruled on the risk of nullity of dismissal, as well as on the use of statistics to prove discrimination in recruitment.

1 National Legislation

1.1 Unemployment insurance

Decree No. 2023-33 of 26 January 2023 on unemployment insurance implements the law of 21 December 2022 (Law No. 2022-1598 of 21 December 2022 on emergency measures relating to the functioning of the labour market aiming full employment). The decree specifies the regulatory measures that govern the compensation of job seekers, employers' contributions to the unemployment insurance scheme, and all other measures relating to unemployment insurance regulations. Specifically, this decree introduces a modulation of the duration of compensation for jobseekers in accordance with the labour market situation, except for overseas departments and communities, or unemployed persons covered by the specific schemes for intermittent workers in the entertainment industry, fishermen, occasional dock workers and expatriates, for whom the current rules on the duration of compensation are maintained. This modulation will apply to rights in respect of terminations of employment contracts from 01 February 2023 onwards. This decree also extends the first modulation of unemployment insurance contributions (*bonus-malus*) until 31 August 2023, which began on 01 September 2022 and establishes the second modulation period from 01 September 2023 to 31 August 2024.

For more information, see also the December 2022 Flash Report.

1.2 Retirement reform plan

On 10 January 2023, the French Prime Minister presented the government's proposal (Draft Law for the rectifying of social security for 2023) for the future of the public pension system.

The following measures are planned:

- Measures to balance the system

  The legal age at which an employee can retire will be gradually increased, starting in September 2023, at a rate of three months per year of birth. The target of 64 years as the statutory retirement age will be reached in 2030.

  The number of years an employee must work to be eligible for a full pension will also change. In 2027, an employee will have had to have worked for a total of 43 years. As is the case today, employees who retire at the age of 67 years will automatically benefit from a full pension (i.e. without a reduction), even if they have not worked for a total of 43 years.

- Measures for long careers/ arduous jobs

  The long career system will be adapted so that no employee who started working early will be forced to work for more than 44 years in total. The long career retirement ages will be as follows:

  - Age 58 for those who started working before the age of 16 years;

- Age 60 for those who started working between 16 and 18 years; and
- Age 62 for those who started working between 18 and 20 years.

- Measures for all

  The reform will mark the end of the special pension schemes. New recruits in the public transport sector, public utilities, and other workers to whom special pension schemes applied will be affiliated with the general pension scheme.

- For public service workers

  Gradual retirement will be extended to public servants, allowing for end-of-career working time adjustments starting from the age of 62 years.

- Measures in favour of seniors

  A seniors' index will be created to increase transparency in companies and to put age management back on the agenda of social dialogue.

More precisely, as regards progressive pre-retirement, the aim is to facilitate access to phased retirement.

The employer will now be responsible for justifying any refusal to allow an employee to switch to part time. The main obstacle to accessing the scheme is the employer's obligation to justify refusal to allow an employee to work part time. If the employer cannot justify incompatibility with the economic activity, a switch to part-time work to access the phased retirement scheme will be authorised. In addition, part-time work may be granted for a period of less than 24 hours. The age of access to phased retirement will be set at 2 years prior to the legal age, as is the case today.

As regards the continuation of employment during retirement, the government intends to create pension rights for the period of continued employment during retirement. In other words, the employee will be able to continue to acquire pension rights and thus improve his or her pension. As a reminder, at present, once an employee has claimed his or her retirement pension, he or she will not be able to acquire new pension rights.

2 Court Rulings

2.1 Risk of nullity of dismissal

Social Division of the Court of Cassation, No. 21-15.533, 19 October 2022

In the present case, an employee, who was working as a dental assistant, was issued a warning on 12 October 2018 for unjustified absence.

On 30 November 2018, the employee brought an action before the Employment Tribunal to obtain the termination of her employment contract and the cancellation of the warning. One month later, her employer dismissed her for personal reasons. The dismissal letter referred to several breaches and to the employee's recent action lodged in court.

According to the French Labour Code, if a dismissal is ruled null and void, the scale provided for in Article L.1235-3 of the French Labour Code relating to unfair dismissal does not apply.

An employer who states several grounds for dismissal in the dismissal letter may, however, ask the judge to examine all the grounds for dismissal referred to in the dismissal letter to limit the amount of payable damages in accordance with the provisions of Article L.1235-2-1 of the French Labour Code.

The Court of Appeal considered the dismissal null and void as it infringed the employee's fundamental rights. The Court of Appeal awarded the employee 16 months' salary in

damages. The limit of 10.5 months' of salary payable to employees who have 11 years of service did not apply due to the dismissal being null and void. The employer did not contest the amount requested by the employee.

The employer appealed to the French Supreme Court and criticised the Court of Appeal's decision on the basis of Article L.1235-2-1 of the French Labour Code for not having considered the other grounds for dismissal referred to in the dismissal letter in the procedure to determine the amount of damages awarded to the employee.

The French Supreme Court's decision is clear: Article L.1235-2-1 of the French Labour Code gives the employer the possibility to submit a counterclaim, which must be submitted to the prosecution. The judges will only review this counterclaim if the employer asks them to, which was not the case in the present case.

When such a request is made by the employer, the judges must consider the other grounds for dismissal invoked in the dismissal letter to assess the damages to be awarded to the employee. This must amount to more than six months' salary.

Where there is a risk that a dismissal will be ruled null and void and where the dismissal letter mentions several grounds for dismissal, the employer must request the court to consider the other grounds referred to in the dismissal letter to limit the amount of damages that may be awarded to the employee.

The Supreme Court's decision also serves as a reminder that where a dismissal is rendered null and void, the employer can only be ordered to reimburse the unemployment benefits to *Pôle Emploi* (French Unemployment Agency) in the cases mentioned in Article L. 1235-4 of the French Labour Code.

Hereby, the Court of Cassation for the first time specifies situations in which judges must issue their decisions on the basis of Article L. 1235-2-1 of the French Labour Code. Thus, the Court of Cassation has decided that the judges do not have to conduct this examination *ex officio*. It is only when the employer requests it that the judge shall examine whether the other grounds for dismissal mentioned in the letter of dismissal are well-founded and may, if necessary, take them into account to determine the amount of compensation awarded to the employee, subject to the six months' salary. Indeed, for the Court of Cassation, the provisions of Article L 1235-2-1 of the Labour Code provide for a counterclaim on the merits of the case, which must be submitted to an adversarial debate

2.2 Use of statistics to prove discrimination in recruitment

Social Division of the Court of Cassation, No. 21-19.628, 14 December 2022

In the present case, a temporary agency worker performed work for a company as a pre-assembler and assembler due to a temporary increase in activity from 09 June 2015 to 08 December 2016, and then from 04 September 2017 to 01 March 2019.

On 06 May 2019, this employee brought a claim before the Employment Tribunal for the requalification of the temporary employment contracts into an employment contract of indefinite duration and for the payment of damages for discrimination in recruitment due to his non-European-sounding name.

According to Article L.1132-1 of the French Labour Code, no person may be excluded from a recruitment procedure or from access to an internship or training period in a company on the grounds of a prohibited discriminatory criterion. Among these are a person's origin and family name. If a person is treated less favourably than another is, has been or will be in a comparable situation on the basis of his or her origin or surname, there is discrimination.

To prove discrimination, Article L. 1134-1 of the French Labour Code provides that in the event of a dispute, the employee concerned must present factual evidence

suggesting the existence of discrimination. If there is sufficient evidence in this regard, it is then up to the employer to prove that his or her decision is justified by objective factors unrelated to any discrimination. The judge then assesses these factual elements 'as a whole' (see *Social Division of the Court of Cassation, No. 10-15.792, 29 June 2011*).

In the present case, the employee presented a statistical analysis based on the personnel register recording the main staff identification data for the period from 26 March 2018 to 31 December 2018 and the company's organisation chart. It showed that:

- Among employees with a European surname recruited on a temporary basis, 18.07 per cent had been offered a permanent contract compared to 6.9 per cent for employees with a non-European surname;
- employees with non-European surnames in temporary employment represented 8.17 per cent of all temporary employees, but only 2.12 per cent of all employees under a permanent contract for the same positions;
- 80.93 per cent of employees with a European surname were working under a permanent contract compared to only 21.43 per cent of employees with a non-European surname.

For its part, the employer provided only a few examples to refute the employee's analysis.

According to the Court of Appeal, these elements taken as a whole did indeed suggest discrimination in hiring; moreover, the employer failed to justify that his hiring choices were justified by objective factors unrelated to any discrimination.

The Court of Cassation agreed with the Court of Appeal that the employer had not provided objective elements to prove lack of discriminatory practices.

This judgment marks a turning point in the use of statistics to prove discrimination on the basis of origin.

The judgment therefore allows statistical evidence of direct discrimination in recruitment to be retained. It can be used to the benefit of the person initiating the dispute, and demonstrates an overall discriminatory situation.

Nevertheless, the novelty of the judgment of 14 December 2022 may have direct consequences, specifically within companies. Indeed, the figures transmitted by the employee in the present case, since they were accepted by the judges as proof of discrimination, can be used and may well be used by other temporary workers who have not entered into an employment contract with the employer. This dispute thus proposes a pre-constructed mode of proof for the following.

Beyond the manipulation of the specific data of the case, the general mode of evidence used here also suggests an unprecedented opening up of the issue of proof of discrimination by employees on the grounds of origin.

It also questions the prohibition since the introduction of the Data Protection Act of 06 January 1978 of direct and indirect statistics related to ethnic or racial origin. the family name, as an indicator of origin, is an element that cannot be manipulated in numerical studies. This is also what the employer indicates in its plea: the employee provides evidence with data that he himself cannot consider because of the prohibition of ethnic statistics.

However, there are several exceptions to this prohibition. Thus, the ban is no longer necessary for the establishment, exercise or defence of legal claims or for the exercise or defence of a legal right or whenever the courts act in their judicial function according to Article 9 of the General Data Protection Regulation (see Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural

persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC).

In the latter case, there is no need for prior authorisation, and it is understandable that the need to prove discrimination justifies the use of ethnic statistics, in particular by using the family name as an indicator of origin.

Hereby, the Court of Cassation has taken a step in accordance with EU legislation and CJEU case law. Yet some uncertainty arises. Indeed, some may assert that the Court of Cassation did not put the statistics into perspective. What if the employment area of this case that is composed of 80.93 per cent of employees with a European surname were working under a permanent contract, and only 21.43 per cent of employees with a non-European surname?

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Platform work

Uber drivers agree on a minimum income per trip

On Wednesday, 18 January 2023, Uber and the main unions of passenger car drivers signed an agreement providing for an increase in the minimum income for rides.

In concrete terms, the agreement with Uber sets as of 01 February 2023, the minimum net income per trip completed by drivers at EUR 7.65, 'regardless of the application they use'. The agreement also concerns independent delivery drivers. For customers, the 27 per cent increase in this rate will increase the price of trips from currently EUR 8.00 to EUR 10.20.

Yet this agreement still has to be ratified by the French authority (*Autorité des relations sociales des plateformes d'emploi (ARPE)*) in charge of social dialogue between platform workers and platforms.

Germany

Summary

(I) The Federal Labour Court has ruled on follow-up questions to the CJEU's decision in the case *Max Planck Gesellschaft*.

(II) The Federal Labour Court also issued a decision on the scope of the prohibition of discrimination against part-time workers.

(III) The State Labour Court Schleswig-Holstein has affirmed a far-reaching 'right to disconnect'.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Limitation of the right to compensation for holiday entitlements

Federal Labour Court, 9 AZR 456/20, 31 January 2023

The Federal Labour Court has ruled that an employee's statutory claim against the employer to be compensated for holidays not taken after the termination of the employment relationship is subject to the statute of limitations. The three-year limitation period that applies under German law generally begins at the end of the year in which the employee leaves the employment relationship. If the employment relationship ended before the CJEU's decision in case C-684/16, of 06 November 2018, *Max Planck Gesellschaft*, the limitation period could not start before the end of 2018, if the employee could not reasonably bring an action for compensation.

The decision was based on the following situation: the employer operated a flight school. It had employed the plaintiff as a training manager since 2010, without granting him annual leave. In 2015, the parties agreed that the plaintiff would work for the company as a self-employed worker. In the action brought in 2019, the plaintiff sought, inter alia, compensation for leave he did not take during his period of employment prior to the change in contract. The defendant raised the defence of limitation.

The Federal Labour Court had already ruled in its decision of 20 December 2022 (9 AZR 266/20) that holiday claims may become time-barred, but that the three-year limitation period only begins at the end of the calendar year in which the employer informed the employee of his or her specific holiday entitlement and requested him or her to actually take the holiday with reference to expiry periods. It had thereby assumed that the unmet statutory holiday entitlement can neither expire pursuant to section 7(3) of the Federal Holidays Act (*Bundesurlaubsgesetz*, BUrlG) nor become time-barred pursuant to section 195 of the Civil Code and must be compensated upon termination of the employment relationship pursuant to section 7 (4) of the BUrlG.

According to the present decision, the holiday compensation claim is itself subject to the statute of limitations. As a rule, the three-year limitation period for the claim for compensation begins at the end of the year in which the employment relationship ends, without regard to the fulfilment of the employer's obligations. The legal termination of the employment relationship marks a clear dividing line. Unlike the holiday entitlement, the holiday compensation entitlement is not aimed at release from the work obligation for recreational purposes with continued payment of remuneration, but is limited to its financial compensation. In the view of the Federal Labour Court, the structurally weaker position of the employee, from which the CJEU derives the need for protection of the

employee when claiming leave, ends with the termination of the employment relationship.

In case of an application of the limitation rules in conformity with constitutional and Union law, the limitation period cannot commence as long as it is not reasonable to bring an action on the basis of a contrary Supreme Court case law. At the time of the termination of the employment relationship in 2015, the plaintiff could not be expected to take legal action to enforce his claim for compensation for the holiday from 2010 to 2014 that had not been granted by then. At that time, the Federal Labour Court still assumed that holiday entitlements automatically expired at the end of the holiday year or a permissible carry-over period, irrespective of the fulfilment of obligations to cooperate. Only after the CJEU had set new rules for the forfeiture of leave in its judgment in C-684/16, 06 November 2018, *Max Planck Gesellschaft* was the plaintiff required to claim compensation in court for the leave years from 2010 to 2014.

By contrast, the plaintiff's claim for compensation for leave not taken in 2015 was time-barred. On the basis of previous case law, the plaintiff had to recognise that the defendant had to be compensated for leave not taken in the year in which the employment relationship ended. The three-year limitation period therefore began at the end of 2015 and ended at the end of 2018. The plaintiff did not bring the action until 2019.

Section 7 of the BUrlG:

> *"(3) The leave must be granted and taken in the current calendar year. Leave may only be carried over to the next calendar year if this is justified by urgent operational reasons or reasons relating to the employee. In the event of a carry-over, the leave must be granted and taken in the first three months of the following calendar year. However, at the request of the employee, partial leave (…) shall be carried over to the next calendar year.*
>
> *(4) If leave can no longer be granted in whole or in part due to termination of the employment relationship, it shall be compensated."*

2.2 Holiday pay and a collectively agreed cut-off period

Federal Labour Court, 9 AZR 244/20, 31 January 2023

The Federal Labour Court has ruled that an employee's statutory claim against the employer to compensate for holiday leave not taken after the termination of the employment relationship may expire in accordance with a preclusive period under a collective bargaining agreement. If the employment relationship ended before the decision of the CJEU in case C-684/16, 06 November 2018, *Max Planck Gesellschaft* and it was not incumbent on the employee to assert the claim within the collectively agreed preclusive period due to the Court's case law, the preclusive period only began with the notification of the judgment.

2.3 Part-time Work

Federal Labour Court, 5 AZR 108/22, 18 January 2023

The Federal Labour Court has ruled that employees in marginal employment, who are not subject to instructions by their employer with regard to the scope and location of their working hours, but who can make requests, which the employer, however, does not have to comply with, may not receive a lower hourly remuneration for an identical activity, provided they have the same qualifications, than full-time employees who are assigned by the employer to work.

The decision was based on the following situation: the plaintiff worked as a paramedic in a marginal employment relationship with the defendant. The defendant carried out emergency rescue and ambulance services on behalf of a rescue association. It employed what it called 'full-time' ('*hauptamtlich*') paramedics on a full-time and part-time basis, to whom it paid an hourly remuneration of EUR 17. In addition, it employed so-called 'part-time' ('*nebenamtlich*') paramedics who received an hourly gross remuneration of EUR 12. The defendant did not unilaterally assign the part-time paramedics to services. Instead, they could request certain dates for assignments, which the defendant then took into account. In addition, the defendant informed the part-time paramedics of vacant shifts that still needed to be filled and asked them to take over a shift at short notice if full-time paramedics were unavailable. The plaintiff's employment contract provided for an average working time of 16 hours per month. In addition, it was stipulated that he could work longer hours and was required to actively look for shifts.

The Federal Labour Court opined that the lower hourly remuneration compared to full-time paramedics disadvantaged the plaintiff without objective reason, contrary to section 4(1) of the Act on Part-Time and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz*, TzBfG). Thereby, it mainly relied on the fact that the full-time and part-time paramedics were equally qualified and, moreover, carried out the same activity. The defendant's general allegation of an increased effort in planning the deployment of part-time paramedics did not constitute a reason to justify the unequal treatment. Even if one assumed that the defendant had more planning security through the use of full-time paramedics because it could unilaterally assign them shifts, it was not free to do so due, in particular, to the limits arising from working time law. It was also irrelevant that they were free to organise their working time. In this respect, the defendant failed to take into account that this group of persons was not entitled to be assigned the requested services, neither in terms of location nor in terms of time. The fact that an employee had to report for certain working hours on the instruction of the employer did not justify, in the view of the Court, a higher hourly remuneration compared to an employee who was free to accept or reject services.

2.4 Right to disconnect

State Labour Court Schleswig-Holstein, 1 Sa 39 öD/22, 27 September 2022

In its judgment (the reasons for the judgment have only been published now), the Court ruled that an employee is not required to inquire in his free time whether his duty roster has been changed. He is also not required to accept a message from the employer—for example, by telephone—or to read a text message. If he does not take note of information about a change in the duty roster, he will only receive it when he starts work.

In this regard, the Court stated the following:

> *"(…) the defendant requires the plaintiff to perform work if it expects the plaintiff to read an official text message or to learn of the time and place of his commencement of work on the internet. This is because the plaintiff exclusively acts to satisfy another's need, namely the defendant's need to ensure the proper organisation of its work processes through proper personnel planning. In this context, the plaintiff's work performance begins the moment he has to make his own efforts (calling up after receiving a text message and reading its content/viewing the duty roster on the internet). By contrast, the mere answering of a telephone call or a verbal instruction is possibly a violation by the defendant of the plaintiff's right 'to be unavailable', but it does not change the receipt of the instruction. In his free time, the plaintiff is entitled to this right of unavailability. Free time is characterised precisely by the fact that employees do not have to be available to employers during this period and can decide for*

themselves how and where they spend this free time. During this time they do not have to work for the benefit of others and are not part of an externally determined organisational unit under labour law and do not function as an employee. It is one of the most noble personal rights that a person decides for himself/herself for whom he/she wants to be available or not during this time."

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Greece

Summary

A draft law was submitted to the Greek Parliament which regulates the employment contracts of seafarers.

1 National Legislation

1.1 Employment contract of seafarers

A draft law was recently submitted to the Greek Parliament for discussion, part of which concerns the regulation of the employment contract of seafarers.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

The government issued a Decree on introducing a deadline of up to one year for the termination of the employment contract of civil servants with immediate effect.

1 National Legislation

1.1 Termination of employment of public servants

As a consequence of the limitations to strike law, many teachers are engaging in civil disobedience, which means they are refusing to work (in practice, a strike) for short periods (a few hours or days). In retaliation, several teachers' public servant employment relationships were terminated with immediate effect based on the reasoning that the teachers violated their employee obligation to perform work. However, Article 33/A (3) of Act 33 of 1992 on the Legal Status of Public Servants, and Article 78 (2) of Act 1 of 2012 on the Labour Code requires the employer to submit his or her termination letter within 15 days of acquiring information by the employer on the violation of his or her obligations.

On 12 January 2023, the government issued Government Decree No. 4/2023 on amending provisions Article 33/A (3) of Act 33 of 1992 on the Legal Status of Public Servants, and Article 78 (2) of Act 1 of 2012 on the Labour Code. The state of emergency in response to the war in Ukraine is the legal basis of the Decree.

The amendments stipulate that the employer may terminate public servant employment relationships or employment relationships of employees in public education with immediate effect with reason until 01 August of the given academic year; in case of a later violation (practically in August), the deadline is extended to the end of the following academic year, irrespective of the (normal, former) 15-day deadline. Furthermore, the Decree has retrospective effect, i.e. the new deadline shall apply, if the 15-day deadline has not passed on 12 January 2023.

This practically means that teachers' employment can be terminated with immediate effect even many (e.g. ten) months after the breach of the contract. A teacher might refuse to work for one day in September and may teach during the entire school year, but her employment relationship could be terminated with immediate effect the following year at the end of July.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

(I) A labour court judgment concerns the dismissal of union representatives and collective redundancy.

(II) Two judgments were delivered on the legality of planned strikes and ongoing collective bargaining.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal of trade union representative

In Labour Court case No. 6/2022 from 03 January 2023, a capital area trade union's employment contract termination of one of its' union representatives as part of a larger collective redundancy due to organisational changes was deemed to contravene Article 11 of Act No. 80/1938 on trade unions and industrial action and provisions of the relevant collective agreement.

The case is unique as trade unions have not made their employees collectively redundant before in addition to the fact that a union representative of another union was dismissed as part of that redundancy. Moreover, dismissal protection in Icelandic labour law is relatively weak compared to other European countries. However, union representatives enjoy dismissal protection along with few other select groups such as pregnant individuals. The judgment therefore confirms earlier case law in this regard.

2.2 Collective bargaining

On 10 January 2023, the same trade union broke off collective agreement negotiations with the employer's organisation; the union has been without an agreement since the beginning of November. Shortly thereafter, the union announced it would strike at a specific hotel chain in Reykjavík, and the strikes were planned to start on 07 February 2023. The bimonthly legally mandated meeting between the union and the employer's organisation, which was conducted two weeks later, lasted for only several minutes, i.e. formal talks have not been ongoing between the parties. On 26 January 2023, the State Mediation Officer put forth a mediation proposal in an attempt to resolve the dispute, but the social partners reacted negatively, in particular the unions that condemned the proposal.

The provisions of the abovementioned Act No. 80/1938 stipulate that union members should vote on a mediation proposal, and a vote had been planned by the mediation officer. However, the trade union refused to hand over a list of its members, resulting in the State Mediation Officer taking the union to court to demand the handover of the list. In addition, the employer's organisation decided to challenge the legality of the union's planned strikes in the Labour Court.

On 06 February 2023, the District Court of Reykjavik ordered the union to hand over the membership list, deeming the mediation proposal by the State Mediation to be legal. The union appealed the judgment. On the same day, the Labour Court deemed the strikes called by the union to be legal with three votes against two, with the strikes commencing on 07 February 2023 as planned. The two judgments will be further

discussed in the next Flash Report. It should be mentioned that this situation is without precedent.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

Two decisions have been issued under the Transfer of Undertakings Regulations.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Directive 2001/23/EC has been implemented by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the 2003 Regulations) (S.I. No. 131 of 2003).

The Labour Court, TUD2210, 01 December 2022, Williamson v Dublin City Council

In *Williamson v Dublin City Council* TUD2210, the claimant had been employed as a dog warden by Ashton Dog Pound (Ashton) pursuant to a contract between Ashton and Dublin City Council (the Council). When that contract came to an end, the Council decided to bring the dog warden service 'in house' and the claimant's employment with Ashton came to an end. The Labour Court, relying on the CJEU's decisions in case 24/85, *Spijkers* and case C-13/95, *Suzen*, ruled that no transfer of an undertaking had taken place and, consequently, the claimant did not become an employee of the Council.

The Labour Court, ADJ-00033568, 04 January 2023, O'Regan v CBRE GWS (Ireland) Ltd

In *O'Regan v CBRE GWS (Ireland) Ltd* ADJ-00033568, there was no dispute that a transfer of an undertaking had taken place. What was at issue was whether the claimant's entitlement to an enhanced redundancy payment, which had been collectively agreed between the claimant's trade union and the transferor, was subject to the time limit of five years which applied to the UK-based employees who had also transferred. The Workplace Relations Commission adjudication officer rejected this contention and awarded the claimant compensation in the amount of EUR 78 104, the maximum allowable under the 2003 Regulations. Had the claimant received the collectively agreed redundancy payment when she was dismissed, the amount would have been EUR 116 480, less the statutory redundancy of EUR 31 620 which she did receive, leaving a 'short fall' of EUR 84 860. No issue appears to have been raised as to whether the ceiling on awardable compensation under the 2003 Regulations, which resulted in the claimant receiving less than to which she was entitled, coupled with the incurring of legal costs which the claimant has to pay out of the award, was consistent with EU law.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Ministerial appointments

Following the appointment of Leo Varadkar TD as Taoiseach (Prime Minister), the new Minister for Enterprise, Trade and Employment is Simon Coveney TD, the former Minister for Foreign Affairs and Defence. The new Minister of State with responsibility for Employment Affairs is Neale Richmond TD.

In the Department brief for the new Minister setting out an overview of the Department's work, current priorities and key issues, pages 69-81 are of particular interest. In addition to progressing work on the right to request remote working, reference is made to (i) the need to bring members of the Defence Forces and An Garda Síochána (the Police Force) within the scope of the Organisation of Working Time Act 1997; (ii) the need to further strengthen employees' protection during a collective redundancy, particularly where the employer is insolvent; and (iii) the need to fully transpose Article 2(1)(b) of Directive 2008/94/EC on the protection of employees in the event of insolvency of their employer. No mention, however, appears to have been made of the concerns about the adequacy of the measures transposing Directive 2009/38/EC on European Works Councils.

Italy

Summary

(I) The Italian Constitutional Court has declared an age limit for the recruitment of police psychologists unconstitutional.

(II) The *Corte di Cassazione* dealt with dismissals and protection of safety at work.

1 National Legislation

1.1 Employment relationship measures in Budget Law

On 29 December 2022, the Italian Parliament approved the State budget for the financial year 2023 and the multi-year budget for the period 2023–2025 (Act 29 December 2022 No. 197 (Budget Law)).

The December 2022 Flash Report included a brief description of the measures relating to employment relationships contained in this law. A more detailed description is provided below:

- Recruitment incentives (paras. 294-298): the law provides for an exemption from social security contributions for employers that hire the following persons under a permanent contract in 2023: beneficiaries of the citizenship income; persons under 36 years of age; 'disadvantaged' women (i.e. women over 50 who have been unemployed for over 12 months; women of all ages living in regions eligible for financing under the Union's Structural Funds who have not been regularly employed for at least six months; women of any age who carry out professions or activities in economic sectors characterised by gender inequality and who have been without regular employment/ not earned an income for at least six months; women of any age, who reside anywhere in the country and who have not had regular employment for at least 24 months);
- Smart working (para. 306): until 31 March 2023, vulnerable workers have the right to smart working. The employer must support the performance of work remotely, also by assigning them different tasks, without a change in pay. 'Vulnerable workers' are those affected by one of the diseases referred to in the Decree of the Minister of Health of 04 February 2022;
- Incentives for the recruitment of imprisoned workers (para. 308): tax incentives are provided for companies that hire imprisoned workers for not less than 30 days, or who provide training activities for prisoners (in particular, young prisoners). This does not, however, include imprisoned workers employed by the prison administration;
- Voucher-based work (paras. 342-354): the Budget Law broadens the scope of voucher-based work. The maximum limit of remuneration an employer can pay for voucher-based work annually in the tourism and agricultural sector ranges from EUR 5 000 to EUR 10 000. These employers can use voucher-based work if they have a maximum of ten employees (the previous limit was five employees). Each worker may not earn more than EUR 5 000 annually in voucher-based work. Agricultural companies can use voucher-based work for no more than 45 working days per year per worker, but only in the years 2023–2024.
- Parental leave (para. 359): the allowance for parental leave for working mothers or working fathers has been increased to 80 per cent of the beneficiary's salary (previously, it was 30 per cent for one month, and had to be taken before the child turns six years old, also in case of adoption and custody). For the remaining months of parental leave, the allowance remains at 30 per cent.

2 Court Rulings

2.1 Age discrimination

Corte costituzionale, No. 262, 22 December 2022

The age limit of 30 years for the recruitment of police psychologists has been ruled unconstitutional.

National law establishes a general principle of non-discrimination on grounds of age for access to employment (Legislative Decree 09 July 2003 No. 216, implementing Directive 2014/54/UE on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers). Article 3, paragraph 6, of Law 15 May 1997, No. 127 had provided that the participation in competitions organised by the public administration

> *"is not subject to age limits, unless otherwise provided for in regulations of individual administrations linked to the nature of the service or objective needs of the administration".*

For example, the law sets age limits for access to police management functions, distinguishing between officials, technical officials, doctors and vets. The age limit for access to the post of psychologist (technical officials of the State Police) is arbitrary and unreasonable because psychologists do not perform operational, but technical-scientific functions.

The Italian Constitutional Court referred to several CJEU rulings (CJEU, case C-304/21, 17 November 2022, *VT;* CJEU, case C-258/15, 15 November 2016, *Go.Sa.So;* CJEU, case C-416/13, 13 November 2014, *Vital Perez;* CJEU, case C-229/08, 12 January 2010, *Colin Wolf*).

2.2 Dismissal

Corte di Cassazione, No. 770, 12 January 2023

The dismissal of a worker, who does not diligently perform his/her job because the employer does not guarantee his/her safety, is illegitimate.

The worker has the right to refuse to perform his/her job, and retains his/her salary, if the employer violates the safety obligation established by Article 2087 Italian Civil Code.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

The Draft Law implementing the work-life balance Directive aims to improve the compatibility of work and family life with innovations such as the introduction of paid parental leave, paid paternity leave and care leave.

1 National Legislation

1.1 Work-life balance for parents and carers

Background information

The present project serves to implement Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repeals Council Directive 2010/18/EU.

Directive (EU) 2019/1158 builds on and complements the provisions of Directive 2010/18/EU by strengthening existing rights and introducing new rights. Specifically, the compatibility of work and family life shall be improved through the following innovations: introduction of paid parental leave, introduction of paid paternity leave, introduction of care leave, concretisation of time off work due to force majeure, better design of flexible work arrangements, and explicit provision on protection for employee employment claims.

Summary of major points:

The aim of the draft law is, as mentioned, is to adapt Liechtenstein's law to reflect Directive (EU) 2019/1158. This is to be achieved through three key points:

(1) Each parent shall be entitled to four months of non-transferable parental leave, which, in principle, must be taken by the time the child turns three years old. Two of the four months of parental leave will be paid at 50 per cent of the parent's average monthly salary, but will be limited to the maximum amount of the monthly old-age pension. Paid parental leave will be financed and administered by the Family Compensation Fund (FAK).

(2) Fathers shall be entitled to two consecutive weeks of paternity leave, which must be taken within eight months of the child's birth at the latest. Paternity leave is paid at 80 per cent of the salary, subject to contributions for old-age insurance. This benefit is granted through the Health Insurance Act.

(3) If substantial care or assistance needs to be provided to relatives or persons who live in the same household as the employee, the employee shall be entitled to care leave of up to five working days per year. The care leave is not remunerated.

In addition to the actual implementation of Directive (EU) 2019/1158, the financing of maternity leave will also be revised.

The enactment of the proposed amendments requires the adaptation of numerous acts. The key points will be regulated in the following acts:

Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB, LR 210), which will regulate financing. The focus is on amending the following acts:

Act on Family Allowances (*Gesetz über die Familienzulagen, Familienzulagengesetz*, FZG, LR 836.0)

Health Insurance Act (*Gesetz über die Krankenversicherung*, KVG, LR 832.10)

Stage of the adoption process and subsequent steps

The Liechtenstein government has submitted a draft law with an accompany-ing report for consultation. The consultation will last until 17 March 2023, after which the government will evaluate the comments received and submit a report and motion to Parliament.

The draft law is available here. (*Vernehmlassungsbericht der Regierung betreffend die Abänderung des Allgemeinen bürgerlichen Gesetzbuches (Arbeitsvertragsrecht), des Familienzulagengesetzes (FZG), des Krankenversicherungsgesetzes sowie weiterer Gesetze (Umsetzung der Richtlinie (EU) 2019/1158 zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige)*

Significance of these developments

The amendment is of considerable significance. This is an important issue for the economy, the labour market, workers and employers. In the area of work-life balance for parents and carers, some important issues have been newly regulated.

- Departing from the previous lines of reasoning

  The amendment departs from previous lines of reasoning because no new laws have been created per se, but the existing structures have been used to implement the changes.

  There has been a legal entitlement to parental leave in Liechtenstein since 01 January 2004. This entitlement is based on Directive 96/34/EC, with the objective of achieving better compatibility of family and work and promoting equal opportunities and equal treatment between men and women. The Directive has been primarily incorporated into the Civil Code's employment contract law provisions.

- Likely implications in the legal and political spheres

  The purpose of the consultation of municipalities, courts, businesses and employers' associations, the Liechtenstein Trade Union and other organisations is precisely to give government an idea of the likely implications in the legal and political spheres. For this reason, the government always adapts, depending on the outcome, the original draft law based on the results of the consultation process, where necessary, before it is submitted to Parliament.

- Likely implications for the EU *aquis*

  The main purpose of the amendments is to implement Directive (EU) 2019/1158. An initial review of the draft law reveals that the government is seeking implementation in line with the mentioned Directive.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

The obligation to refrain from employing brokers from other members of the Association of Real Estate Agencies is deemed an unlawful competition practice as it deprives employees from bargaining power and affects their possible wages or other working conditions.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Anti-competitive practices

The Competition Council of the Republic of Lithuania has sanctioned the members of the Association of Real Estate Agencies for participating in unlawful anti-competitive practices. The violation of anti-competition laws, including the EU law on competition, has been found in the adoption (and possible compliance) with the provision of the Code of Ethics of the Real Estate Agencies (Article 24 of the Code), which establishes the rule that the solicitation of real estate brokers from other members of the Association constitutes unethical behaviour. According to the Lithuanian Competition Council, this provision shall be considered unlawful competition practice as it deprives employees from bargaining power and affects their potential wages or other working conditions. The Council held that by entering into this agreement on non-competition for each other's workers, the economic entities eliminated the independence of competitors' market behaviour and their incentives to compete by reducing the perceived competitive pressure due to the possible loss of available human resources.

The tenor of the national competition authority was:

> *"Employees providing services to companies experience the greatest benefits precisely when companies compete for the acquisition of their labour force, for example, by offering better working conditions and higher salaries. When companies agree not to compete for each other's employees, they do not compete in the market for the acquisition of human resources, hence employees lose their bargaining power with employers, which normally exists in the absence of an agreement, and the loss of bargaining power also affects their potential wages or other working conditions."*

In addition, the Council stated that the mobility of workers was reduced, i.e. the freedom of movement between workplaces.

The Council's decision was heavily criticised because of the fact that the companies simply had rewritten the rules on the prohibition of 'poaching' employees based on the

Law on Competition in force (Article 15 of the Law). The Council's decision will be challenged in the Administrative Court.

Luxembourg

Summary

(I) A major revision of the Constitution implements certain fundamental rights and freedoms relevant to labour law.

(II) Two new bodies to promote gender equality are being set up.

(III) An option for cultural leave has been reintroduced.

1 National Legislation

1.1 Revision of the Constitution

Following long debates, the draft revision of the Constitution (*révision constitutionnelle)* has finally been completed. Although it was initially planned that the Constituent Assembly would adopt a completely new Constitution, the project was finally reduced in scope and focuses on a thorough modernisation of the country's 1868 Constitution.

The constitutional revision was divided into four parts, resulting in the adoption of four laws on 17 January 2023:

1) Reform of the legislative power (Chamber of Deputies, Council of State). This aspect is not specifically relevant to labour law.

> Reference: *Loi du 17 janvier 2023 portant révision des chapitres IV et Vbis de la Constitution.*

2) The reform of the executive (Grand Duke, government, municipalities, etc.). This aspect is not particularly relevant to labour law.

> Reference: *Loi du 17 janvier 2023 portant révision des Chapitres I^{er}, II, III, V, VII, VIII, IX, X, XI et XII de la Constitution.*

3) Reform of the judiciary. It may be noted that unlike the former Constitution (Article 94 para. 2, 1989 revision), the labour courts are no longer explicitly mentioned in the Constitution.

> Reference: *Loi du 17 janvier 2023 portant révision du chapitre VI. de la Constitution.*

4) Fundamental rights and freedoms. Some of the new texts may have an impact on labour law.

> Reference: *Loi du 17 janvier 2023 portant révision du chapitre II de la Constitution.*

The framework has been modernised, and the text distinguishes more clearly between 'fundamental rights' (*droits fondamentaux)*, 'public freedoms' (*libertés publiques)* and simple 'objectives of constitutional value' (*objectifs à valeur constitutionnelle)*.

Among public freedoms, Article 11 (2) now states that 'no one shall be discriminated against on the grounds of his or her personal situation or circumstances'. This is a very broad concept of discrimination that is not linked to particular characteristics (age, sexual orientation, skin colour, etc.).

Article 15 enshrines respect for privacy, which was already included in the previous text. Article 24 is new and guarantees the right of every person to informational self-determination and to the protection of personal data concerning him or her.

As an objective of constitutional value, the State continues to guarantee the right to work (*droit au travail)* and must ensure the exercise of this right, as this text has changed only slightly (new Article 38).

In terms of collective labour law, the rules on freedom of assembly (*liberté de réunion)* and freedom of association (*liberté d'association)* have not fundamentally changed. No substantive changes have been made to trade union freedoms (*libertés syndicales*) and the right to strike (*droit de grève*). According to the new Article 21,

> "*trade union freedoms are guaranteed. The law shall organise the exercise of the right to strike*" (*"les libertés syndicales sont garanties. La loi organise l'exercice du droit de grève"*).

However, the reform innovates by including the promotion of social dialogue (*dialogue social*) among the objectives of constitutional value (new Article 39).

Other more general texts, e.g. on the inviolability of human dignity, freedom of thought, conscience and religion, equality before the law, respect for family life, etc. may also have an influence on labour law.

In general, as in the past, labour law (more specifically, social security, health protection and workers' rights) remains a matter reserved for the law (*matière réservée à la loi;* new Article 27). This notion of reservation to the law is clarified in that it is for the legislator to regulate these matters 'as to their principles'.

As for the constitutional counterweight of worker protection, the freedom of trade and industry, liberal professions and agricultural activity (*liberté du commerce et de l'industrie, de la profession libérale et de l'activité agricole)* remains guaranteed in the same terms as under the previous version of the Constitution (new Article 35).

1.2 Cultural leave

Cultural leave (*congé culturel)* was introduced in 1994 and repealed in 2014. It has now been reintroduced in a slightly different form, as recommended in the Cultural Development Plan (*plan de développement culturel)* 2018–2028, with a view to valuing cultural work.

This is a special leave for cultural actors (*acteurs culturels*), in particular creative and performing artists (*artistes créateurs et exécutants)*, as well as persons involved in film, audio-visual, musical, performing arts, graphic, plastic, visual or literary arts projects or productions. Certain additional conditions must be met in terms of affiliation to Luxembourg (minimum five years) and involvement in the cultural scene.

The purpose of this leave is to enable participation in high-level cultural events or specialised training; the law lists eligible events, for example, theatre and film productions, exhibitions, festivals, fairs, congresses, trade fairs, etc.

The duration of the leave employees can request individually is limited to 12 days per year.

Another form of leave, limited to five or ten days annually depending on the case, may be granted to administrative staff (*cadres administratifs)* of national federations and networks in the cultural sector. The federations and networks still have a credit of 50 days of cultural leave per year for participation in high-level cultural events within the country. The cultural sector associations each have a quota of ten days per year.

The leave must be authorised by the Minister of Culture on the advice of an advisory committee.

The employee is only eligible if he or she has worked for the employer for at least six months. The employer's opinion is sought, and cultural leave may be refused if the employee's absence will have a major impact on the company.

The duration of cultural leave is treated as actual working time. The employee receives compensatory allowance equal to his or her average salary, but not exceeding four times the minimum wage. The employer advances the compensation and is reimbursed by the State.

Leave may also be granted to civil servants (*fonctionnaires)*, in which case the costs are borne by the State. Self-employed persons and those engaged in liberal professions can apply for it and receive an allowance calculated on the basis of their contributory income, which may not exceed four times the minimum social wage.

Reference: *Loi du 6 janvier 2023 portant institution d'un congé culturel et modification: 1° du Code du travail; 2° de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État; 3° de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux. (rectifié)*

1.3 Draft law on gender equality

A bill has been tabled to create two bodies to promote gender equality: the Observatory for Gender Equality (*Observatoire de l'Egalité entre les genres)* and the High Council for Gender Equality (*Conseil supérieur à l'Egalité entre les genres*).

The mission of these two bodies is not limited to labour law, as the professional field is only one of their possible focal points.

The Observatory's aim is to collect and process data on gender equality, in particular to provide better responses to requests from the United Nations, the Council of Europe or the European Union.

Its mission is to provide objective data and information to practitioners and to monitor and analyse developments in gender equality. The Observatory will consist of at least five members.

The High Council for Gender Equality is the successor of the former 'Women's Labour Committee' (*comité du travail féminin*, CTF) established in 1984. Its mission is to study and give opinions on all issues relating to gender equality and to submit proposals. It will be composed of nine members, selected on the basis of their expertise in the field.

Reference: *Projet de loi n° 8139 portant 1. création d'un Observatoire de l'Égalité entre les genres; 2. création d'un Conseil supérieur à l'Égalité entre les genres.*

2 Court Rulings

2.1 Protection of staff delegates

CSJ, 8e, ordonnance, n° CAL-2022-00389, 27 October 2022

Staff representatives (*délégués du personnel)* are protected against any form of unilateral change (*modification unilatérale)* to their contract. The question has arisen as to whether the employer can nevertheless change a delegate's job if the contract contains a flexibility clause. In the present case, the aim was to change a delegate from a social worker's post (*assistant social)* to an educator's post (*éducateur gradué)* and to change his working hours. Both the precise nature of the task and the working hours were stipulated in the contract as variable.

It was decided that such a clause is enforceable against a delegate (as it is against an ordinary employee), so that the employer's decision does not constitute a substantial change to the employment contract, and the employee must accept it. The fact that he no longer had a personal desk and computer in his new position was not decisive.

2.2 Substitute holidays

CSJ, 3e, n° CAL-2020-00660, 27 October 2022

If a public holiday falls on a Sunday (or other day on which the employee would normally not have worked), it in principle gives the right to leave (substitute holiday; *jour férié*

de remplacement) to be taken within three months. In the past, some jurisprudence has considered that if the employee does not request it, this right is lost.

Now the Court of Appeal has ruled that the employer is required to ensure that the employee takes the compensatory day within the statutory three-month period when a public holiday falls on a Sunday. At the end of the employment contract, the employee is entitled to an indemnity to compensate the alternative day off not taken, even after the three-month period.

This decision is in line with case law which considers that it is the employer's responsibility to ensure that employees take their leave.

2.3 Admissibility of proof

CSJ, cass., *n° 156/2022*, n° CAS-2022-00039*, 15 December 2022*

In a dispute before the Labour Court, an employer produced as evidence a message he found on the employee's work computer, but in a private 'Whatsapp' message. The question arose whether such evidence was admissible.

For the Court of Cassation, this evidence was admissible. The right to privacy is not violated and messages from a message system may be admitted as evidence when these messages are of a professional nature not protected by the secrecy of correspondence, which is the case in particular when:

- the messages are on the work computer;
- the employer has access to it within the framework of his/her organisational power, particularly with a view to safeguarding professional content;
- the messages were not specifically identified as belonging to the private sphere;
- access to the application had been left open without being protected by a password.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Automatic adjustment of salaries

In accordance with the Luxembourg system of automatic adjustment of salaries to the cost of living index (*échelle mobile des salaires)*, following the triggering of a threshold, all salaries will have to be increased by 2.5 per cent on 01 February 2023.

A further index increase will fall on 01 April 2023; this is an increase that was deferred from last year following a tripartite agreement.

Due to inflation, it is likely that there will be at least a third pay raise later this year. Therefore, calls are being made to initiate new tripartite negotiations to protect employers from intolerable costs.

Malta

Summary

The Digital Platform Delivery Wages Council Wage Regulation Order, 2022 has entered into force.

1 National Legislation

1.1 Platform work

The Digital Platform Delivery Wages Council Wage Regulation Order, 2022 entered into force on 23 January 2023 and has been codified as Subsidiary Legislation 452.127. A full report on the Order is available in the October 2022 Flash Report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) The Dutch government has presented an action programme against sexually transgressive behaviour and sexual violence and has passed the bill to implement the Whistleblowing Directive.

(II) The Supreme Court largely rejected a claim relating to the transfer of seniority after a transfer of undertaking.

(III) A healthcare facility was found liable for damages suffered by an employee as a result of exposure to COVID-infected patients without personal protective equipment.

(IV) Where the employee has not been able to take the statutory minimum period of paid annual leave, the longer limitation period of five years applies.

1 National Legislation

1.1 Action programme against sexually transgressive behaviour and sexual violence

The Dutch government has presented an action programme against sexually transgressive behaviour and sexual violence. It includes sexually transgressive behaviour in the workplace. The programme's ultimate goal is to fight such behaviour, while its secondary goal is to more quickly identify sexually transgressive behaviour to reduce harm. According to the government, the social problem of such behaviour must be fought with legislation and regulations, public campaigns, safe solutions, the role of bystanders and proper assistance. Over the next few years, EUR 11 million will be made available for the action programme.

The programme consists of three measures:

1. Measures for the government such as regulations;
2. Measures for social sectors with the government taking a supportive and facilitating role; and
3. Measures that ensure that society no longer accepts sexually transgressive behaviour and people will correct each other.

The measures support the five lines of action identified by the programme, namely:

1. Shared societal values and norms where it is normal for bystanders to speak out if they witness unacceptable behaviour. This can be achieved, among others, by making sexuality a subject of discussion in schools.
2. Changing laws and regulations such as establishing by law that organisations, including employers, must provide a mandatory code of conduct and complaints procedure. In addition, the new Sexual Offenses Act will be broadened so that public sexual harassment becomes punishable, for example.
3. Businesses will have to actively ensure a socially safe working culture by, among others, drawing up a policy with measures that contribute to a safe working environment.
4. Measures will be developed so bystanders can more quickly intervene if they observe sexually transgressive behaviour.
5. Assistance must be made more accessible and be of good quality.

1.2 Whistleblowing

After missing the deadline for implementation (17 December 2021), the Dutch Parliament (on 20 December 2022) and the Senate (on 24 January 2023) have (finally) passed the bill amending the House of Whistleblowers Act and some other laws to implement Directive 2019/1937 (EU) on the protection of persons who report breaches of Union law. The bill not only aims to implement the Directive but also introduces several amendments with the aim of clarifying the House of Whistleblowers Act (which will henceforth be known as the Whistleblower Protection Act) and to improve the general protection of whistleblowers, which has been the primary cause for the delay. The bill will enter into force at a time to be determined by Royal Decree.

2 Court Rulings

2.1 Transfer of undertaking

Supreme Court, ECLI:NL:HR:2023:65, 20 January 2023

The present case concerned the transfer of an undertaking within the meaning of Article 7:662 Dutch Civil Code, implementing Directive 2001/23/EC, between airline companies Martinair and KLM. After an earlier judgment by the Supreme Court, the Court of Appeal of The Hague ruled that several cargo pilots of Martinair had transferred to KLM through a transfer of undertaking and that all rights and obligations arising from the employment contract between the cargo pilots and Martinair passed to KLM as of the date of the transfer (01 January 2014). The Court of Appeal, however, rejected the cargo pilots' claims on the transfer of their seniority with Martinair to KLM. Specifically, the cargo pilots had requested a legal declaration relating to the retention of their seniority for the purpose of KLM's seniority list (which is linked to various rights such as the chance of promotion at KLM) and their position in the order of dismissal in case of redundancy at KLM.

In cassation, the cargo pilots argued that the Court of Appeal misjudged that seniority is a right that passes to the transferee on the basis of Article 7:663 Dutch Civil Code and the Directive, in any case if the seniority is linked to financial rights. The Supreme Court derived from the CJEU's case law that seniority as such is not a right that passes to the transferee after a transfer. Yet to the extent that seniority influences rights of a financial nature, these rights must be maintained by the transferee on the same footing as with the transferor. On these grounds, the Supreme Court saw no reason to refer the matter to the CJEU for a preliminary ruling.

As regards the position on KLM's seniority list, the Supreme Court considered that the Court of Appeal rejected the cargo pilots' claim on the basis that the chance of promotion at KLM on the basis of seniority are more favourable than at Martinair in view of the differences in the job structure and the greater number of aircraft types and promotion positions at KLM. According to the Court of Appeal, the Directive does not demand that employees are put in a more favourable position as a result of the transfer. Furthermore, the Court of Appeal considered that the cargo pilots retain their salary entitlements as of the date of the transfer. For these reasons, the Court of Appeal held that the cargo pilots' generally formulated claim relating to their placement on KLM's seniority list was not admissible. According to the Supreme Court, this judgment amounts to the cargo pilots' claim on their placement on KLM's seniority list was too general to be admissible, as their retention of salary entitlements was already guaranteed, and placing the cargo pilots on KLM's seniority list while retaining their seniority accrued at Martinair would result in more favourable promotion opportunities. The Supreme Court ruled that this judgment does not indicate an error of law and is not incomprehensible. This means that the Court of Appeal could leave open in this dispute whether the cargo pilots' various rights linked to the seniority list were to be considered rights of a financial nature

that should be maintained by the transferee on the same footing as with the transferor. If necessary, this will have to be assessed on a case-by-case basis.

As regards the retention of seniority relating to dismissal protection in case of redundancy—which is not a general claim—the Court of Appeal did not explicitly examine whether the order of dismissal is a right of a financial nature for which seniority is a co-determining factor and whether, as a result of the transfer, the cargo pilots would end up in a less favourable position than at Martinair if their seniority accrued at Martinair in the event of redundancy at KLM were not taken into account. The cargo pilots therefore rightly complained that the Court of Appeal had not provided sufficient reasons for its rejection of this claim. The Supreme Court therefore set aside the Court of Appeal's judgment and referred the case to the Court of Appeal of Arnhem-Leeuwarden for further consideration and decision.

The Supreme Court's decision seems appropriate. The cargo pilots did not specify their claims to the specific rights linked to KLM's seniority list, but claimed a general retention of their seniority for the purpose of obtaining, in a general way, a higher placement on KLM's seniority list (which in itself is not a right of a financial nature). With regard to the order of dismissal, it seems justified that the Supreme Courts interprets the concept of 'rights of a financial nature' broadly and extends it to the fundamental question whether an employee qualifies for dismissal after the transfer. However, as this is uncertain, it can be argued that the Supreme Court should have asked preliminary questions to the CJEU about the concept of 'rights of a financial nature'.

2.2 Liability for damage

Court of Amsterdam, ECLI:NL:RBAMS:2022:7569, 16 December 2022

In the present case, the Court of Amsterdam ruled that a healthcare facility was liable for damages suffered by an employee as a result of exposure to COVID-infected residents without personal protective equipment such as a face mask.

It was established that the employee conducted a physical examination on a resident—who later turned out to be infected with COVID-19—without protective equipment. According to the Court, it is a fact of common knowledge that COVID-19 patients are contagious as early as one to two days before the onset of symptoms. Therefore, the employee was in close contact with a resident who was infectious at that time. It has also been established that two other residents, who stayed in the department where the employee worked, were infected with COVID-19 a few days later. The employee provided care to them as well in the common areas of the ward, where no protective equipment was used. The identified exposure may have led to the employee's COVID-19 infection and according to the Court, the odds that the employee had contracted the infection outside of working hours were low enough to be negligible.

In The Netherlands, the employer has a duty of care for the health of its employees pursuant to Article 7:658 Dutch Civil Code. If the employer fails to take due care, he/she may be held liable for the consequences thereof. In the present case, the employer seemed to have generally taken appropriate measures in the context of the pandemic. The key question, however, is whether the employer had introduced sufficient measures, within the limits of what could be asked at that time, to prevent the employee from being infected with COVID-19.

In various newsletters, the employer had expressly pointed out the importance of complying with the work instructions provided. These work instructions prescribed that it was up to the company doctor to decide whether or not protective equipment would be necessary. If the company doctor instructed the employees to not use protective equipment, the employee could not be expected to defy this and use protective equipment anyway, as the employee would then have violated the work instructions. Additionally, the work instructions did not leave room for the employee to make the

decision to use personal protective equipment on her own, without consulting the company doctor.

Seeing as how the employee did not have the real possibility to use personal protective equipment when she saw reason to do so and consequently became ill, the employer failed in its duty of care pursuant to Article 7:658 of the Dutch Civil Code. The conclusion was that the employer is liable for the past and future damage suffered as a result of her COVID-19 infection.

This case is especially interesting given the fact that healthcare workers who became ill during the early stages of the pandemic—when personal protective equipment was scarce—and now suffer from long-COVID, have started losing their jobs. Pursuant to Article 7:629 Dutch Civil Code, employers are required to continue paying wages to their sick employees for a maximum of 104 weeks. This time has now passed. This means that healthcare workers with long-COVID have become dependent on social security benefits, which has a negative impact on their income. There could be more healthcare workers in a comparable situation as that of the plaintiff in the present case.

2.3 Paid annual leave

Court of Noord-Holland, ECLI:NL:RBNHO:2022:11574, 05 December 2022

The Court of North-Holland ruled that the paid annual leave of an employee, whose employment contract was terminated while he was on sick leave, has not lapsed.

The employee has accrued 54 days of annual leave while he was on sick leave. He did not take any annual leave during that period. The employee was dismissed after approval by the Employees Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*).

Following the Court, a distinction must be made between the applicable time-bar for the statutory minimum period of paid annual leave (which has been adopted in line with Directive 2003/88/EC) and the one for annual leave that goes beyond that minimum. For the minimum period of paid annual leave, a time-bar of six months applies, meaning that the entitlement to paid annual leave lapses six months after the last day of the year in which annual leave has been accrued (Article 7:640a Civil Code). There is an exception in case the employee has reasonably not been able to take annual leave. This may be the case where the employee has been on sick leave and no re-integration obligations apply. As to the annual leave that goes beyond the statutory minimum, the entitlement lapses after five years. The Court ruled that if the shorter time-bar of six months does not apply, the limitation period of five years will apply.

As the applicant has demonstrated that he was not able to take annual leave while he was on sick leave, even though he stayed a few days abroad to accompany his son, the employer was ordered to pay the paid annual leave not taken as it were not time-barred. This ruling seems to be in line with the CJEU's case law.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Norway

Summary

A committee has been appointed to review the model for the determination of wages in Norway.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Determination of wages

The government, at the request of the social partners, has appointed a committee to review the traditional model for the determination of wages in Norway, the so-called *Frontfagsmodellen*. This model organises the negotiation of wages between the social partners. The industries whose companies compete in international markets negotiate first; the level of wage increase in these sectors is considered the maximum when other industries and sectors negotiate later. This model for coordinated and moderate wage settlements aims to contribute to high employment and international competitiveness.

Due to new challenges in the Norwegian and international economy, the committee will assess how wage determination, in conjunction with economic policy, can contribute to a balanced development of Norway's economy, with continued high employment and competitiveness. The starting point shall be to preserve the existing model, and the committee shall discuss how to adjust it and which developments might weaken its effectiveness. The more detailed mandate can be found here.

The committee will deliver its report by 15 December 2023.

Poland

Summary

(I) The amendment of the Labour Code on remote working was enacted by Parliament on 13 January 2023, and signed by the President on 31 January 2023.

(II) The Supreme Court has confirmed that candidates are protected against discrimination based on the principle of equal treatment of sex and gender identity.

1 National Legislation

1.1 Remote working

The new regulations on remote working were enacted by Parliament on 13 January 2023 and signed by the President on 31 of January 2023. The law on remote working is expected to enter into force at the beginning of April 2023 (the new law will enter into force 14 days after the date of its promulgation – with the exception of provisions on remote working and those on teleworking which have been repealed and will become binding two months after promulgation).

Information on the legislation procedure is available here.

The following terms and conditions of remote working have been included in the new law:

- definition of remote working (work which can be performed fully or partly at the place indicated by the employee and agreed with the employer, and may include the employee's residential address, in particular with means of direct remote communication);
- parties may agree on remote working in the following ways: (i) when an employment contract is concluded – at the employee's request or the employer's initiative; (ii) during the period of employment – at the employee's request or the employer's initiative; (iii) following an order by the employer for employees to work remotely: during a state of emergency, epidemic threat or epidemic state of emergency and within three months after their cancellation, or when it is impossible for the employer to provide safe and hygienic work conditions at the employee's current workplace due to force majeure; (iv) during the period of employment, for occasional performance of remote working – at the employee's request;
- the employer must accept an employee's request to work remotely by special categories of employees who benefit from additional protection (pregnant women, employees raising a child under the age of four years, a parent of a disabled child, etc.; these categories of employees cannot be recalled from remote working, unless further remote working is not possible due to the organisation of work or type of work performed by the employee;
- employers would have the right to inspect the performance of work by employees within the scope indicated in the draft act (e.g. compliance with H&S and data protection rules);
- the employer's obligations, particularly with regard to providing employees with materials and work tools, providing installation, service, maintenance of work tools or covering costs related to remote working (e.g. electricity and telecommunications services) as well as familiarization with information on safe and hygienic remote working;
- occasional remote working is also possible; remote working may be performed occasionally at the employee's request, either in writing or in electronic form, for

up to a maximum of 24 days within a calendar year without the requirement to implement a special procedure or to reimburse costs to the employee.

Definition of remote working

Remote working is defined in the new law as work that can be carried out fully or partly at a place specified by the employee and agreed with the employer, and may include the employee's residential address, in particular by means of direct remote communication.

Location of remote working

Remote working may be carried out in such locations (approved by the employer) such as: away from the office (the employee's home or other location chosen by the employee) or partially away from the office (the employee's home or other location chosen by the employee) – the employee will be allowed to partially work at the office.

Entitled individuals

Those entitled to work remotely include employees in all positions, except for those employed in positions where the work: (i) is particularly hazardous; (ii) would expose the employee to harmful substances and factors; (iii) causes intensive griming.

Introduction of remote working

The parties may agree to remote working in the following ways:

- at the employee's request or the employer's initiative when the contract of employment is being concluded;
- at the employee's request or the employer's initiative during the employment relationship;
- the employer may order employees to perform remote working (during a period of state of emergency, epidemiological threat, or state of epidemic emergency and within three months after their revocation or during a period when force majeure makes it impossible for the employer to provide safe and hygienic working conditions at the employee's current workplace) – the employer's order for employees to work remotely is a situation in which the employee must agree to work remotely if the employer has ordered it – on condition that before complying with the order, the employee submits a statement in writing or electronically that the employee has access to the necessary premises and technical conditions to perform remote work;
- at the employee's request for occasional remote working, during the employment relationship.

The employer must accept requests for remote working from special categories of employees who are entitled to additional protection (pregnant women, employees raising a child under the age of eight years, parents of a disabled child (also if the child has already turned 18 years), unless it is not possible due to the way in which work is organised, or the type of work carried out by the employee (the employer shall inform the employee of the reason for refusing the request in writing or electronically within seven working days from the date of submission of the employee's request).

The employer's obligations regarding OSH

The most important employer's OSH obligations include drawing up an occupational risk assessment for specific job categories and preparing information containing the rules for remote working (the employee must confirm that he/she has read this information

in a statement submitted in writing or electronically before being allowed to work remotely).

The following should be considered when assessing the occupational risk of the remote worker: the impact of the work on his/her vision, his/her musculoskeletal system and the psychosocial conditions of the work. Based on the results of this assessment, the employer must draw up information containing:

- the rules and methods for the proper organisation of a remote workstation, taking ergonomics into account;
- rules for healthy and safe remote working conditions;
- the actions to be carried out after completion of remote working;
- the rules for dealing with emergency situations that constitute a threat to human life or health (the employer may prepare a universal occupational risk assessment for each group of remote working positions).

In case a remote working accident is reported, the site of the accident shall be inspected by the employer at a time agreed by the employee or his/her household member; an inspection is not mandatory if the circumstances and causes of the accident do not raise any doubts).

The employee's OSH obligations

The employee's most important H&S obligations include:

- arranging the workplace (in line with the type of work being carried out, maintaining the workplace in a condition that guarantees H&S working conditions; organising the remote workstation with regard to ergonomics);
- providing meals and refreshments (if required);

providing sanitary facilities and necessary personal hygiene products.

The employer's obligations towards employees who work remotely

Under the new law, the employer's obligations include:

- providing the remote worker with the necessary materials and work tools, including equipment required for remote working;
- providing or covering the costs of installing, servicing, maintaining the work tools, including equipment, as well as covering the costs of electricity and telecommunications services required for remote working;
- covering other costs related to remote working, if their reimbursement is specified in the agreement/ regulations/ agreement/ order;
- providing the remote worker with the necessary training and technical assistance needed to perform the work.

Cash equivalent/ lump sum payment

The remote worker is entitled to a cash equivalent (in an amount agreed with the employer) to use materials and work tools, including technical equipment, required for remote working, but that are not provided by the employer, or a lump sum (fixed amount).

When determining the amount of the cash equivalent or lump sum, the following factors must be taken into consideration: the standards of consumption of materials and work tools, including equipment, their proven market prices and the amount of material used

for the employer's needs and the market prices of these materials, as well as the standards of consumption of electricity and the costs of telecommunications services.

Monitoring remote working

The employer is entitled to check:

- the employee's performance of remote working;
- compliance with H&S regulations;
- compliance with security and information protection requirements, including data protection procedures.

The new law also specifies the rules on checking remote working:

- in consultation with the employee;
- at the location where the remote work is being carried out;
- during the employee's working hours;
- without violating the privacy of the remote worker and others, or interfering with the intended use of the employee's home premises;
- in a manner that corresponds to the performance of remote working (therefore, it may be both in-person and online).

Employee's right to use the company's premises

The remote worker has the following rights:

- to be present at the workplace;
- to communicate with other employees;
- to use the employer's premises and facilities according to the terms and conditions that apply to all employees;
- to use the company's social facilities and take part in social activities in accordance with the rules that apply to all workers;
- to be treated, at least as favourably with regard to the establishment and termination of an employment relationship, the terms and conditions of employment, promotion and access to training to improve professional qualifications, as other employees engaged in the same or similar work (having regard for the specific nature of remote working);
- to receive information before commencing work about the employer's organisational unit to which the remote worker's workplace/ station belongs;
- to receive information before commencing work about the person or body responsible for cooperating with the remote worker, who is authorised to conduct inspections at the place of remote working.

In addition, the employee may not be discriminated in any way for performing work remotely, as well as for refusing to do such work.

Termination of remote working

Remote working may be terminated in the following ways:

- if remote working was agreed at the time when the employment contract was entered into – no regulated issue of resignation,
- if remote working was agreed during the employment relationship – either party to the employment contract may submit a binding request, either in writing or

electronically (the reinstatement of the previous terms and conditions of work will occur at a time agreed by the parties, but not more than 30 days after receipt of the request, or 30 days after receipt of the request, if there is no agreement between the parties;

- if the employer ordered remote working – optional (at any time with at least two days' notice) or obligatory (in the event of a change in the premises and technical conditions at the workplace that prevent remote working).

There is no regulation allowing an employee to be recalled from occasional remote working.

Special categories of employees may not be recalled from remote working, unless remote working is no longer possible due to how the work is organised, or the type of work carried out by the employee.

Effective date of legislation

The final reading of the bill took place on 14 January 2023 in the Sejm and the President signed it on 31 January 2023. The new law should be announced shortly. We anticipate that the law will enter into force around 10 April 2023 (two months after its announcement in the official journal of law).

2 Court Rulings

2.1 Discrimination

Supreme Court (Sąd Najwyższy), I NSNc 575/21, 08 December 2022

The Supreme Court ruled on the protection of candidates against discrimination in its ruling of 08 December 2022.

The case involved a transgender person who had applied to a post as a receptionist in October 2016. The recruitment had been completed before a court formally changed the claimant's details (name, surname and PESEL number). The claimant was undergoing a sex change and had been perceived to be a woman during the recruitment process. However, she presented a previously issued personal identity card stating that she was male. As a result, the claimant was not issued women's work clothing, and it was pointed out to her that she was entitled to men's attire in accordance with the details of her personal identity card. Because the claimant insisted on being issued a woman's uniform, the defendant eventually refused to employ her. The claimant then brought a claim for compensation under Article 13 of the Anti-Discrimination Act, namely the Act on the Implementation of Certain Provisions of the European Union on Equal Treatment, of 03 December 2010.

The District Court dismissed the claim, concluding that the defendant had not breached the principle of equal treatment during the recruitment process or the scope of the claimant's employment because of the claimant's transgender status. However, as a result of the claimant's appeal, the regional court overturned the court of first instance's judgment and ordered the defendant to pay to the claimant the amount of the claim (PLN 1 480). The court also ruled, referring to the case law of the Court of Justice of the European Union, that direct discrimination had occurred by refusing to issue women's work clothing to the claimant. The regional court compared the respondent employer's conduct in relation to the claimant to that towards a person who did not have transgender features (i.e. a person of female appearance and registered to be of female gender) and showed that the claimant had been treated less favourably. A person of female appearance and registered as being of female gender would have received female attire, whereas the claimant was treated less favourably solely because of gender identity; she remained registered as a male but looked, acted, felt and was perceived to be female. The motive for the less favourable treatment of the claimant was her

gender identity, a feature that is protected by the legislator. The prosecutor general submitted an extraordinary appeal against the judgment of the Court of Appeal (referring, in part, to a breach of Article 2 of the Polish Constitution), but it was dismissed by the Supreme Court.

The Supreme Court rejected the submissions of the prosecutor general and, thereby, dismissed the extraordinary appeal that had been filed. The Supreme Court in deliberations noted that the institution of an extraordinary appeal should be used with extreme care and should not be regarded as being another extraordinary means of appeal that is meant to control and possibly correct defective judgments. In addition, when assessing the need to ensure compliance of final judgments with the principle arising from Article 2 of the Polish Constitution (the principle of a democratic state of law), it is crucial to weigh constitutional values. In the Supreme Court's opinion, the reasoning in the extraordinary appeal lacked an argument explaining the reason for filing the appeal, its explanation having to comply with the principle.

The judgment can be described as a milestone. The Supreme Court pointed out the necessity of protecting the principle of equal treatment based on sex and gender identity. Even if a breach of the principle has not occurred, it is crucial to precisely indicate the reasons, referring to specific regulations.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

The annual update that applies to disability and old-age pensions in 2023 has been applied.

1 National Legislation

1.1 Annual update of pensions

Ordinance No. 24-B/2023, of 09 January 2023, approved the annual update for 2023 to pensions and other social benefits provided by the social security system, pensions awarded by the *Caixa Geral de Aposentações* and pensions for permanent incapacity for work and for death resulting from an occupational disease.

In general terms, the disability and old-age pensions granted before 01 January 2022 should be updated by applying a percentage that may vary between 3.89 per cent and 4.83 per cent, except in the case of pensions higher than EUR 5 765.16, which, save in exceptional cases, are not subject to any update.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Future amendments to labour law

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 also July 2022 Flash Report). The legislative procedure is still ongoing, and it is expected that the proposal will be voted on (and approved) by Parliament in coming months.

Romania

Summary

Romania has fully transposed the provisions of Directive 2019/1158 on Work-life Balance for Parents and Carers.

1 National Legislation

1.1 Work-life balance

Emergency Ordinance No. 164/2022 amending and supplementing Government Emergency Ordinance No. 111/2010 on childcare leave and related monthly allowance (published in the Official Gazette of Romania No. 1173 of 07 December 2022) transposed Directive 2019/1158 on Work-life Balance for Parents and Carers into Romanian legislation and repealing Council Directive 2010/18/EU.

The new regulation extends the minimum period of parental leave from one to two months, which cannot be transferred from one parent to the other if both parents meet the legal requirements.

The Ordinance provides for an increase in the amount of allowance in certain cases and introduces the obligation of the worker to notify the employer at least ten days in advance of the intention to benefit from parental leave.

Government Decision No. 1.577/2022 (published in the Official Gazette of Romania No. 6 of 04 January 2023) updates the rules for the application of Paternity Leave Law No. 210/1999 as a result of the changes introduced by Emergency Ordinance No. 117/2022 (see August 2022 Flash Report). As a result, paternity leave is now also in line with the provisions of Directive 2019/1158.

is now also in line with the provisions of Directive 2019/1158.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The minimum wage was adjusted, together with the minimum hourly rate for occasional and temporary work of students.

(II) The Constitutional Court ruled the limitation of overtime work for doctors and other healthcare professions.

1 National Legislation

1.1 Compensation for occupational diseases due to asbestos exposure

On the basis of Article 6 of the Act Concerning Remedying the Consequences of Work with Asbestos (*'Zakon o odpravljanju posledic dela z azbestom (ZOPDA)'*, OJ RS 38/06 et subseq.), the Minister of Labour published the new scheme for determining the compensation for particular types of occupational diseases due to asbestos exposure (*'Shema za določanje odškodnine za posamezne vrste poklicnih bolezni zaradi izpostavljenosti azbestu'* OJ RS No. 11/23, 27 January 2023, p. 649) with higher, updated amounts of compensation.

1.2 Minimum wage

The minimum wage was adjusted on the basis of Articles 4 and 6 of the Minimum Wage Act (*'Zakon o minimalni plači (ZMinP)'*,OJ RS No. 13/10 et subseq.) (Minimum Wage Amount, *'Znesek minimalne plače'*, OJ RS No. 4/2023, 13 January 2023, p. 140-141).

From 01 January 2023 onwards, the minimum wage amounts to EUR 1 203.36 gross (monthly rate for full-time work). It was EUR 1 074.43 in 2022, EUR 1 024.24 in 2021 and EUR 940.58 in 2020.

1.3 Minimum hourly rate for temporary and occasional work

Following the adjustment of the minimum wage (see Section 1.2), the minimum hourly rate for occasional and temporary work of students was adjusted (Order on the adjustment of the minimum gross hourly pay for temporary and occasional work, *'Odredba o uskladitvi najnižje bruto urne postavke za opravljeno uro začasnih in občasnih del'*, OJ RS No. 7/2023, 20 January 2023, p. 255).

From 21 January 2023 onwards, the minimum hourly rate for occasional and temporary work of students amounts to EUR 6.92 gross.

1.4 COVID-19 supplement payments

On the basis of Article 36 of the Act determining urgent measures to contain the spread of COVID-19 disease and mitigate its consequences in the area of healthcare (*'Zakon o nujnih ukrepih za zajezitev širjenja in blaženja posledic nalezljive bolezni COVID-19 na področju zdravstva',* Official Journal of the Republic of Slovenia (OJ RS) No. 141/22, 07 November 2022, p. 10693-10704), the Minister for Health issued the Rules on criteria for determining the COVID-19 supplement payment for employees in direct contact with COVID-19 patients (*'Pravilnik o merilih za določitev višine dodatka COVID-19 za neposredno delo z obolelimi za COVID-19',* OJ RS No. 7/23, 20 January 2023, p. 251-252). Health and social care professions who are entitled to such a supplement are determined as well as the amounts of the supplement. The maximum amount per employee per month is EUR 900.

2 Court Rulings

2.1 Working time

Constitutional Court, No. U-I-198/19, 05 January 2023

The Constitutional Court published Decision No. U-I-198/19, 05 January 2023 (ECLI:SI:USRS:2023:U.I.198.19), which concerns several issues regulated by the Health Services Act (‘*Zakon o zdravstveni dejavnosti (ZZDej)*’).

One of the issues raised by the complainants was the limitation of additional (overtime) work for doctors and other healthcare professions. The Constitutional Court decided that the regulation, which limits the additional work of a doctor employed on a full-time basis to eight hours per week, on average, at another employer or as an independent contractor is in conformity with the Constitution. In its reasoning, the Constitutional Court referred to several international documents (such as the relevant ILO Conventions, etc.) and to EU law, in particular, to the Charter of Fundamental Rights of the EU, Article 31, as well as to the EU Working Time Directive 2003/88 and the relevant corresponding CJEU case law on working time and limitation of overtime work (see, in particular in paras. 80, 81, 87, and footnotes 59, 60 and 61, as well as footnotes 65-68).

The Constitutional Court emphasised, among others, that when determining the upper limit of the duration of work of a healthcare worker at another provider of healthcare activities or as an independent provider of healthcare activities, this represents a restriction and constitutes an interference with the right to freedom of work guaranteed by Article 49 of the Constitution. However, such interference is proportionate and pursues the legitimate aim of protecting the health of workers, which is also recognised in international legal acts, binding for Slovenia.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Collective bargaining

Annexes to several sectoral collective agreements have been concluded: Annex to the Collective Agreement for the Education Sector in the Republic of Slovenia (‘*Aneks h Kolektivni pogodbi za dejavnost vzgoje in izobraževanja v Republiki Sloveniji*’, OJ RS No. 11/23, 27 January 2023, p. 653-680); Annex to the Collective Agreement for Research Activities (‘*Aneks h Kolektivni pogodbi za raziskovalno dejavnost’*, OJ RS No. 11/23, 27 January 2023, p. 680-681), Annex to the Collective Agreement for Real-Estate Business (‘Aneks h kolektivni pogodbi za dejavnost poslovanja z nepremičninami, OJ RS No. 7/23, 20 January 2023, p. 284285), Annex to the Collective Agreement for Slovenia’s Electrical Industry (‘*Dodatek h Kolektivni pogodbi za dejavnost elektroindustrije Slovenije*, OJ RS No. 4/23, 13 January 2023, p. 160), etc. Most of them concern the adjustment of basic pay and other payments, such as reimbursement of work-related costs, annual leave allowance, etc.

There were also some accessions of trade unions to the already concluded sectoral collective agreements (see OJ RS No. 4/23, 13 January 2023, p. 161).

4.2 Wage trends

According to the most recent official report on wage trends of November 2022, the average monthly gross salary amounted to EUR 2 244.35 (an increase of 10.9 per cent in comparison to October 2022) and the average monthly net salary amounted to EUR 1 479.56 (an increase of 12.3 per cent in comparison to October 2022) (Report on wage trends November 2022, '*Poročilo o gibanju plač za november 2022*', OJ RS No. 11/2023, 27 January 2022, p. 681).

Spain

Summary

(I) New measures to promote employment have been introduced. They consist of financial incentives that aim to boost and consolidate permanent contracts.

(II) The Supreme Court considered that weekly rest periods can be accumulated for periods of up to 14 days.

1 National Legislation

1.1 Promotion of employment

The measures to promote employment in Spain consist of public financial incentives for undertakings to facilitate the recruitment of workers. There are two types of incentives that depend on the respective Administration that pays for them. The regions and municipalities provide subsidies. The State, on the other hand, prefers to reduce the social security contributions undertakings have to pay.

That is the main purpose of Royal Decree Law No. 1/2023, 10 January 2023, which reduces the social security contributions the undertaking must pay if it hires certain workers. As an explicit goal, this provision aims to boost permanent employment contracts, hence measures to promote fixed-term contracts are kept at a minimum. Financial incentives to hire new employees have been introduced, as have financial incentives to convert fixed-term contracts into permanent ones.

However, not every worker qualifies for such measures, which are specifically designed for individuals who face particular challenges finding employment, such as young people with low skills, long-term unemployed persons, people aged 45 years or older, disabled persons, people at risk of social exclusion, victims of gender-based violence and victims of sexual violence, among others.

The undertakings that benefit from these financial incentives are required to maintain the relevant employment contracts for at least three years. Otherwise, they must return the subsidy, in addition to surcharges and interest.

These measures are explicitly linked with the Recovery and Resilience Facility.

2 Court Rulings

2.1 Maternity leave and surrogacy

Tribunal Supremo. Sala de lo Social, STS 4943/2022 – ECLI:ES:TS:2022:4942, 21 December 2022

The Spanish Supreme Court in 2016 ruled that even if surrogacy is not permitted under Spanish law, surrogate parents have the right to maternity leave. In this ruling of 2022, the issue differs slightly. A surrogacy contract had been concluded, but the father was the biological father of the child and enjoyed paternity leave after the birth in September 2017. His wife was not the biological mother, but adopted the child several months later (May 2018) and requested maternity leave. The relevant social security managing body denied her application. It argued that the applicant had lived with the child since he was born, so there was no reason for her to take maternity leave after the adoption, which took place months later. The Supreme Court, however, considered the adoption to be a new legal fact and recognised the right of the mother to maternity leave.

2.2 Working time

Tribunal Supremo. Sala de lo Social, STS 4962/2022 – ECLI:ES:TS:2022:4962, 22 December 2022

The case concerned health staff in the region of Madrid. According to the relevant provisions on working time, in case of stand-by work (24-hour shift) on Saturdays, they ended work on Sunday at 8 a.m., and had to return to work on Monday at 8 a.m., after a 24-hour rest period. The minimum weekly rest period is set at 36 hours, so the workers claimed that after stand-by work on Saturdays, they had the right to a 36-hour rest period. The Supreme Court considered that the weekly rest period can be accumulated for periods of up to 14 days, so there is no obligation for the employer to give such a rest period immediately after the 'stand-by shift'. The workers have the right to the weekly rest period, but not necessarily when they want it.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Unemployment rate

Unemployment dropped in 2022 (79 900 people), i.e. there were 3 024.000 unemployed people at the end of the year. The fixed-term employment rate has decreased to 17.93 per cent.

Sweden

Summary

(I) The Swedish statutory retirement age has increased since 01 January 2023.

(II) The Labour Court has rendered a decision on the limitation period for discrimination claims.

1 National Legislation

1.1 Pension Age

The Swedish statutory retirement age has increased by one year since 01 January 2023. This means that the lowest possible age to qualify for a pension has increased from 62 years to 63 years while the lowest possible age to qualify for a guarantee pension has increased from 65 years to 66 years. For employment protection purposes, employees now have the right to keep their post until the age of 69 years (instead of 68 years).

The pension reform passed with a large majority based on the so-called 'pension group's' agreement' in December 2017. The pension group was formed in 1994 and comprises the current liberal and conservative government parties Moderaterna, Kristdemokraterna and Liberalerna as well as the left liberal opposition parties Socialdemokraterna and Centerpartiet. The pension reform has not lead to public protests.

2 Court Rulings

2.1 Persistent discrimination

Labour Court, AD 2023 No. 5, 14 December 2022

A medical doctor filed a lawsuit against his employer for persistent discrimination on the grounds of his ethnicity. The employer invoked that the employee's claim was not permissible as the limitation period had run out. In its decision, the Labour Court held that the statutory limitation period for the claim was two years. Consequently, the Court held that only the part of the persistent discrimination that had taken place in the two last years before the claim was filed could be tested. The part of the claim that was older than that was subject to limitation.

It is noteworthy that the Court based its reasoning on national legal sources only. No EU law was consulted despite the fact that discrimination law is heavily influenced by EU law. Particularly noteworthy is it that CJEU's judgment of 22 September 2022 in CJEU case C-120/21 *(Prescription du droit au congé annuel payé)* was not mentioned. The CJEU held in its judgment that a limitation period of two years for annual leave claims was not consistent with EU law. As was reported in the September 2022 Flash Report, that judgment was expected to have for a significant impact on Swedish labour law as its limitation periods are often very short.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

(I) The draft Retained EU Law (Revocation and Reform) Bill is likely to face significant opposition at the Lords.

(II) The Strikes (Minimum Service Levels) Bill was introduced in January 2023 following a period of prolonged industrial action across a number of sectors.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Retained EU Law (Revocation and Reform) Bill

The Bill has now gone to the Lords where it is likely to face significant opposition. The government has, however, committed that:

- the Bill would not weaken environmental protection;
- the government would continue to honour its commitment to protecting workers' rights in matters of health and safety in the workplace
- as a priority, the government would take the necessary action to safeguard the substance of any retained EU law and legal effects required to meet international obligations within domestic law.

The government does not actually know how much retained EU law exists. Its dashboard has been updated and now identified 3 745 pieces of legislation that may potentially be affected by the Bill.

4.2 The Strikes (Minimum Services Levels) Bill

The Strikes (Minimum Service Levels) Bill was introduced in January 2023 following a period of prolonged industrial action across a number of sectors. The government had already introduced a Bill on minimum service levels, the Transport (Minimum Service Levels) Bill. The Strikes (Minimum Service Levels) Bill replaces this (see here for further information).

The new Bill aims to deliver on a commitment in the 2019 Conservative manifesto to ensure minimum services operate during transport strikes by enabling the government to regulate minimum service levels in a range of sectors. These sectors are health services; fire and rescue services; education; transport; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security.

The Bill only applies to Great Britain (England, Scotland, and Wales).

The Bill would amend the 1992 Act to introduce authority for government ministers to set minimum service levels in listed sectors. It would enable employers to issue 'work notices' to require minimum service levels to be delivered in the specified sectors. It would also amend the Act to restrict the protection of trade unions from legal action, as well as remove the automatic protection of employees from unfair dismissal if the minimum services were not delivered.

The minimum service level will be made by the relevant minister via a 'minimum services regulation' (i.e. secondary legislation rather than primary legislation which is made by Parliament). Before setting the minimum services level, the minister is required to consult 'such persons as [s/he] considers appropriate'. There is no requirement to negotiate, let alone reach an agreement with, trade unions. The regulation setting the minimum standard would be submitted to Parliament, but Parliament would not be able to amend or change the minimum services level.

4.3 Consultation on the *Harpur Trust* decision

Daniel Barnett notes that:

> *"The government has issued a consultation paper to address the issues arising from the Supreme Court's judgment last year in Harpur Trust v Brazel.*
>
> *As a result of Harpur Trust, part-year workers are entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year.*
>
> *The Government wishes to address this disparity to ensure that holiday pay and entitlement received by workers is proportionate to the time they spend working. The proposal is to replace the 52 week reference period when weeks in which no remuneration is earned are ignored, with a 52 week reference period which includes weeks with no remuneration.*
>
> *The consultation seeks to understand the implications of the judgment on different sectors including agency workers who have complex contractual arrangements. The Government wants to ensure that any changes it considers does not have any adverse impacts on other parts of the legislation. Its impact assessment calculated that this change will save businesses GBP 113m per annum."*

4.4 Firing and Rehiring

As reported before, there has been a long history of concerns over employers' practice of firing and rehiring. The government is now consulting on the Draft Code of Practice. As the government has stated:

> *"This consultation is seeking views on the draft Code of Practice on dismissal and re-engagement."*

The Code sets out employers' responsibilities when seeking to change employment terms and conditions, in case of prospect for dismissal and re-engagement. It requires employers to consult staff and explore alternative options, without using the threat of dismissal to pressure employees to agree new terms.

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