Flash Reports on Labour Law April 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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Table of Contents

Executive Summary

National level developments

In April 2023, 27 countries (all but **Bulgaria**, **Liechtenstein, Iceland** and **Slovakia**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Implementation of EU Directives

The Work-Life Balance Directive has been transposed into legislation in both **Greece** and **Portugal**.

Similarly, in **Poland**, the law implementing the requirements of the Work-life Balance Directive and Transparent and Predictable Working Conditions came into force, while in **Denmark**, the government has put forward a legislative proposal that will implement the Directive on Transparent and Predictable Working Conditions.

In **Austria**, the government has proposed the transposition of Directive 2019/2021/EU on employee participation in companies resulting from cross-border mergers.

In **Luxembourg**, the Bill transposing European Directive 2019/1937 on the protection of persons who report violations of EU law will be adopted shortly.

Teleworking

In **Ireland**, legislation has been enacted giving employees the right to request flexible or remote working arrangements. Similarly, in **Poland**, the new law on remote work regulating work outside the office came into force, together with the new rules on documentation in relation to remote work.

In the **Czech Republic**, the government has approved an amendment to the Labour Code concerning flat-rate teleworking and the possibility of excluding reimbursement of teleworking costs.

In **Luxembourg**, amendments have been made to the Bill on the right to disconnect.

In **Sweden**, the Supreme Administrative Court has ruled on two cases on injuries suffered at home while working remotely during the pandemic.

Fixed-term work

In **Austria**, a ruling of the Supreme Court dealt with consecutive fixed-term employment contracts of soldiers on foreign deployment.

In **Belgium**, a new law limits the maximum duration of successive fixed-term employment contracts and replacement contracts up to two years. Similarly, in **Portugal**, the new amendments to the labour law introduces some amendments to the temporary work regime.

Temporary agency work

In the **Netherlands**, a mediation fee that was agreed upon by a work agency and a self-employed person who was posted to a user undertaking was declared null and void.

In the **Czech Republic**, the government has approved a draft amendment to Act 435/2004 on Employment, which regulates the legal placement services by employment agencies.

In **Germany**, the State Labour Court Hanover ruled on the so-called group privilege in temporary agency work.

Posting of workers

In **Germany**, a draft law on the posting of workers in the road transport sector has been presented.

In **Denmark**, an industrial arbitration ruling concerned the enforcement of claims on underpayment of posted workers.

In **Lithuania**, the Supreme Court ruled on a case on the liability of a German company for damages suffered by a posted Lithuanian worker in an accident at work at a German construction site.

In **Romania**, the government has simplified the procedure for designating a contact person for the competent authorities in undertakings that post workers to Romania.

Finally, in **Slovenia**, Directive 2020/1057/EU on posted drivers has been transposed into legislation abolishing the special rules according to which contributions for posted workers could be paid at a reduced rate.

Transfer of undertakings

In **Malta**, the transferor of an undertaking was held liable by the court to pay commissions arising from the period preceding the transfer.

In the **Netherlands**, the Court of Appeal of the Hague ruled that an inactive employee can also be transferred to the transferee following a transfer of undertaking.

In **Spain**, the Supreme Court has ruled that the regulations of transfers of undertakings apply to all workers, not just those selected by the new subcontractor.

Annual leave

In **Austria**, a ruling of the Supreme Court dealt with the calculation of compensation of unused annual leave.

In **Lithuania**, courts are relying on CJEU case law when interpreting limitations to the right to take annual leave.

Platform work and algorithmic management

In **Italy**, a ruling by the Court of Palermo applied the national law implementing the Directive on Transparent and Predictable Working Conditions in a case of algorithmic management.

In **Portugal**, a rebuttable presumption of the existence of an employment contract has been introduced for platform workers. Furthermore, information duties towards employees, the works council and union delegates have been established in case of use of algorithms and artificial intelligence for the hiring of employees.

Collective redundancies

In **France**, the Administrative Supreme Court has ruled on the employer's obligation of health and safety in case of a collective redundancy plan.

In **Norway**, the EFTA Court has issued an advisory opinion on the interpretation of the Collective Redundancies Directive.

Other developments

In **Ireland**, the Workplace Relations Commission has issued its first decisions on complaints under the European Works Council legislation.

In **Portugal**, the legal framework of professional training has been amended.

Table 1: Major labour law developments

Topic	Countries
Teleworking	CZ IE LU PL SE
Posting of workers	DE DK LT RO SI
Work life balance	EL PL PT
Temporary agency work	CZ DE NL
Fixed-term work	AT BE PT
Transfer of undertakings	ES MT NL
Collective bargaining and collective action	DE HU SE
Transparent and predictable working conditions	DK PL
Annual leave	AT LT
Platform work / algorithmic management	IT PT
Collective redundancies	FR NO
Dismissal	BE FR
Traineeships	PT
Whistleblowing	LU
European Works Councils	IE

Austria

Summary

(I) The government has proposed the transposition of Directive 2019/2021/EU on employee participation in companies resulting from cross-border mergers.

(II) Two rulings of the Supreme Court dealt with the calculation of compensation of unused annual leave, while another dealt with consecutive fixed-term employment contracts of soldiers on foreign deployment.

1 National Legislation

1.1 Cross-border mergers

The government plans to implement employment-related aspects of Directive 2019/2121/EU, amending Directive 2017/1132/EU on cross-border conversions, mergers and divisions, and therefore to (a) update the right of employee participation in companies resulting from cross-border mergers, and to (b) create a right to employee participation in companies resulting from cross-border transformations or divisions in the Austrian Labour Constitution Act (Arbeitsverfassungsgesetz, ArbVG). The legislative proposal was referred to the National Assembly's Committee on Labour and Social Affairs on 28 April 2023.

2 Court Rulings

2.1 Annual leave for assistant pre-school teachers

Supreme Court, 9ObA5/23k, 23 March 2023

Assistant pre-school teachers working for the Federal State of Tyrol have two legal options, namely they either have annual leave or they do not. For assistant preschool teachers that do not have annual leave, the working year lasts from September until the end of August; for those who have annual leave, the working year lasts from September until the beginning of the school holidays at the beginning of July. The difference in the annual working time of assistants without annual leave and those with annual leave in the context of year-round employment is compensated by different remuneration schemes. Both groups of assistants are entitled to the same amount of annual leave (200 hours, i.e. 5 weeks of 40 hours each).

In the present case, an assistant teacher argued that in case of termination of employment during the school year (i.e. before 31 August), the legislator's applicable regulation to financially compensate the difference in the number of annual working hours discriminates against assistant teachers with annual leave. Holiday periods are not taken into account in the calculation of compensation for unused annual leave (so-called 'annual leave compensation'). If the holiday period was not taken into account in the calculation of (annual leave) compensation when the employment relationship was terminated, the effective hourly wage of an assistant teacher with annual leave would be reduced. Since the majority of (paid) time off could only be used during the main holiday period, 'compensation of remuneration' ought to be paid in case of termination during the year.

As the Constitutional Court (G 210/2022, 20 September 2022) did not consider this unconstitutional for formal reasons, the claimant argued that the legal situation contravened Article 9 of the Working Time Directive 2003/88/EC (WTD) as well as Article 31 CFR, and proposed a preliminary ruling of the CJEU.

The Supreme Court did not consider this necessary as Article 7(2) WTD only provides for a minimum leave entitlement for employees of four weeks, and the time in dispute exceeded this amount. Financial compensation of part of the leave exceeding the four-week minimum leave requirement is therefore not mandatory under Union law (see Supreme Court, 9 ObA 147/21i, 25 January 2022). On the other hand, the legal provisions of the relevant Tyrolean Act do not call the plaintiff's entitlement to paid annual leave into question. The entitlement to financial compensation for annual leave not taken by the end of the employment relationship and associated with the entitlement to 'paid' annual leave (CJEU C-233/20, *job medium*, para. 29) continues to apply despite the alleged discrimination compared to assistants 'without annual leave'.

The Supreme Court used the obvious argument in its ruling of 23 March 2023, namely that the annual leave in question exceeds that provided for in Article 7 WTD. This argument has already been used when dealing with the effects of the CJEU's job medium decision. It is interesting, however, that the Austrian Supreme Court briefly follows up on the discrimination argument between the two groups of assistant teachers in the context of Union law. The two types of working time (with or without annual leave) ought to be considered as two different systems ('silos') that should be assessed independently. As the compensation for unused annual leave corresponds to the hours not worked, this seems to be in line with the requirements of Article 7 WTD.

2.2 Calculation of compensation for unused annual leave

Supreme Court, 9ObA103/22w, 23 March 2023

The Act on Employees of the Federal State of Styria (*Dienst- und Besoldungsrecht der Bediensteten des Landes Steiermark-* L-DBR) provides that compensation for unused annual leave in case of termination of the employment relationship of a contractual public employee is calculated on the basis of the salary and child benefit only (§ 187 (2) L-DBR). All other parts of the remuneration are not to be considered.

The claimant in the present argued that this provision contradicts EU law because it violates Article 7 of Working Time Directive 2003/88/EC (WTD) and Article 31 CFR. According to the WTD, the calculation of compensation for unused annual leave is based on the salary the employee would have received during his or her annual leave; therefore, the special pro rata 13th and 14th monthly payments, the hardship and danger allowance and the Sunday and public holiday allowance were to be included in the compensation. Article 7 WTD and Article 31 CFR have direct effect.

The Court of Appeals has already ruled that the provision of the L-DBR, which provides for the limitation of the basis for the calculation of compensation for unused annual leave must remain inapplicable as being contrary to Union law. On the other hand, § 187 (1) L-DBR, which generally provides for compensation for unused annual leave, can be interpreted in conformity with the WTD to the effect that in addition to the salary and the child allowance, the special payments and regular ancillary fees, which were to continue to be paid during the claimant's annual leave, were to also be included in the calculation of leave compensation. Article 7 (2) WTD, however, only grants employees a minimum holiday entitlement of four weeks. As a higher holiday entitlement had been granted under national law which was more favourable to employees, the WTD was not breached.

The Supreme Court confirmed this ruling, which reiterates the Austrian courts' efforts to align its legislation on annual leave with the requirements of EU primary and secondary law. The Austrian Supreme Administrative Court (Ra 2015/12/0017, 18 September 2015,) passed a similar ruling concerning federal public servants several years ago; the Federal State consequently adapted the calculation for its public servants (§ 186a L-DBR) but not for its contractual public employees. The state legislator will hopefully follow up on the ruling and modify the relevant act accordingly to make the legal situation for contractual public employees more transparent.

2.3 Fixed-term work

Supreme Court, 9ObA94/22x, 23 March 2023

In the present case, the Constitutional Act on Cooperation and Solidarity on the Deployment of Units and Single Persons Abroad (*Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland* - KSE-BVG) applied, which provides as follows (unofficial translation by the author):

§ 15 KSE-BVG

> *"(1) Persons who are not actively employed by the Republic of Austria and who are not members of the Federal Armed Forces shall conclude a fixed-term employment contract in accordance with the Contract Staff Act 1948 for the duration of their secondment pursuant to § 1 KSE-BVG, including any domestic preparatory and follow-up work.*
>
> *(2) Section 4 para 4 of the Act on Contractual Public Servants 1948 shall not apply to this employment relationship."*

The claimant was a soldier who had been deployed as a UN-military observer to the Western Sahara region. He argued that the consecutive fixed-term employment relationships—in his case, four renewals of his originally fixed-term contract—cannot be justified by objective reasons and he therefore worked under an open-ended contract. The defendant, the Republic of Austria, referred to the special provision cited above, which deviates from the general (unwritten) principle of Austrian labour law that the second fixed-term contract must be justified by objective reasons, otherwise an open-ended contract is deemed to exist.

The Supreme Court, in line with the two lower courts, rejected this claim and pointed out that § 15 KSE-BVG is to be considered a *lex specialis* that supersedes all general provisions on fixed-term employment. It must be assessed against Union law, however, namely Directive 1999/70/EC. If a national regulation on the nature of a fixed-term employment relationship does not provide for any of the measures referred to in § 5 No. 1 of the Framework Agreement, it must be examined whether the legal permission of successive fixed-term employment contracts in this regard can be justified by an objective reason (cf. CJEU C-331/17, *Sciotto*, para 37). The term 'objective reasons' is to be understood as meaning precisely defined, concrete circumstances that characterise a particular activity and can therefore justify the use of successive fixed-term employment contracts in this specific context. Such circumstances may arise, for example, from the specific nature of the tasks for which the contracts have been concluded and their essential characteristics or, where appropriate, from the pursuit by a Member State of a legitimate social policy objective (CJEU C-331/17, *Sciotto*, para 39). On the other hand, a national provision which confined itself to permitting recourse to successive fixed-term employment contracts in a general and abstract manner by law or regulation would not meet the requirements set out in the preceding paragraph of the CJEU's cited judgment. Such a purely formal provision does not provide for objective and transparent criteria to assess whether the renewal of such contracts actually meets a genuine need and is appropriate and necessary for the attainment of the objective pursued. Such a provision thus entails a concrete risk of abusive recourse to such contracts and is therefore incompatible with the framework agreement's objective and practical effectiveness (CJEU C-331/17, *Sciotto*, para 40).

In Supreme Court's opinion, a deployment pursuant to § 15 KSE-BVG constitutes such an exceptional provision as this Act only covers special missions of peacekeeping, humanitarian aid as well as search and rescue services. Deployment on the basis of a fixed-term employment contract may only take place in the cases specifically described in § 1 KSE-BVG, and only persons who have committed to serve in the respective mission and who are not members of the Federal Armed Forces or the Federal Police

can be covered by it. The Act when introduced was to ensure, among other things, prompt deployment for assistance in particularly urgent situations and to deploy persons who are specifically required for an operation. Therefore, objective reasons for the time limit in the sense of the principles ruled on by the CJEU are immanent for the Supreme Court. It is not a norm that generally allows for the limitation of contracts to a certain field of activity and without specifying concrete reasons. The admissibility of multiple successive fixed-term employment contracts under § 15 AZHG does not aim to cover a permanent need for persons who are not actively serving the Republic of Austria and are not members of the Federal Armed Forces, but a temporary need if a situation as defined in § 1 KSE-BVG exceptionally requires it. The provision was therefore considered to be in line with Directive 1999/70/EC and the claim was rejected.

The Supreme Court rightfully pointed out that § 1 KSE-BVG has an exceptional character for special missions of a temporary nature; in addition, it only applies to employees who are not in an employment relationship with the Republic of Austria or the Federal Armed Forces. These factors justify the permissibility of consecutive fixed-term employment contracts as it cannot be considered an abuse of this legal institution. The provision is therefore arguably in line with Union prerequisites.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Withdrawn amendment to the Civil Code

The legislative proposal contained an amendment of the Austrian Act on Civil Law (*Allgemeines Bürgerliches Gesetzbuch* ABGB), which regulates statutory notice periods for blue collar workers. Notice periods for blue collar workers in § 1158 ABGB have only been of the same duration as notice periods for white collar workers since October 2021 (e.g. six weeks in the first two years, two months from the second to the fifth year, three months following the fifth year and four months after the fifteenth year). Also, termination dates are now the end of the quarter and may only occur on the 15th or the last day of a month, if agreed.

§ 1158 ABGB allows social partners to deviate from the notice periods in § 1158 ABGB, also to the detriment of workers working in seasonal industries. 'Seasonal industries' are defined as industries that, by their nature, only operate at certain times of the year or that regularly operate significantly more during certain times of the year. This rather vague definition led to uncertainty as well as to some case law: Recently, the hotel and gastronomy industry could not prove before the Austrian High Court that it qualifies as a seasonal industry, thus not allowing shorter periods of notice compared to § 1158 ABGB (unless the seasonality of the industry can be proven).

The legislative proposal suggested an amendment of § 1158 ABGB that would allow social partners to deviate from the notice periods to the detriment of workers, irrespective of whether the collective bargaining agreement applies to the seasonal industry. Following public protests by trade unions, it was announced that this part of the legislative proposal will be withdrawn.

Belgium

Summary

(I) A new law limits the maximum duration of successive fixed-term employment contracts and replacement contracts to two years.

(II) Another law unifies the notice periods for blue collar and white collar employees by simplifying the employee's notice period, and eliminates discrimination in the duration of notice periods for upper and lower white collar employees.

(III) The Court of Cassation has ruled on the dismissal of an employee representative on the works councils.

1 National Legislation

1.1 Fixed-term work

The succession of fixed-term employment contracts and contracts for clearly defined assignments is limited by Articles 10 and 10bis of the Employment Contracts Law of 03 July 1978.

The same applies to the succession of fixed-term replacement contracts as specified in Article 11ter of the Employment Contracts Law of 03 July 1978 and Article 104 of the Recovery Law of 22 January 1985. The succession of replacement contracts for more than two years is also prohibited. Replacement contracts are employment contracts concluded for the replacement of an employee whose employment contract has been suspended for a reason other than lack of work due to economic reasons, bad weather, strike or lock-out.

However, some legal uncertainty remained in the case of alternations of successive replacement contracts and fixed-term employment contracts or employment contracts for clearly defined assignments. The law did not explicitly prohibit such an alternation.

The Constitutional Court resolved this problem in its judgment No. 93/2021 of 17 June 2021. The case that resulted in this judgment concerned a dispute between an employee who had been employed by the same employer for more than 15 years with a succession of fixed-term employment contracts and replacement contracts. The Court held that there was no justification for not guaranteeing job security in all situations of successive employment contracts, including situations of successive fixed-term contracts/contracts for clearly defined assignments and replacement contracts, and deemed the Belgian legislation on this point to be unconstitutional.

The new law of 20 March 2023 (*Moniteur belge*, 28 April 2023) amends the Employment Contracts Law of 03 July 1978 and inserts a new Article 11quater. The total duration of the succession of one or more fixed-term or clearly defined assignment employment contracts and one or more replacement contracts concluded between the same parties may not exceed a period of two years.

For the application of this maximum duration, one-time replacement contracts succeeding several successive fixed-term (or clearly defined assignment) employment contracts shall not be taken into account if these fixed-term (or clearly defined assignment) contracts are justified due to the nature of the work or for other lawful reasons. Moreover, the total duration of the succession (of fixed-term (or clearly defined assignment) contracts and replacement contracts may in no case exceed three years.

The new law does not affect the rule that the total duration of a replacement contract or successive replacement contracts may not exceed two years, subject to derogations provided for in Article 11ter of the Law of 03 July 1978 and Article 104 of the Recovery

Law of 22 January 1985 (Memory of Understanding, Parliamentary Documents, Chamber of Representatives, 2022-2023, No. 55-3096/001, p. 4-5).

The Law of 20 March 2023 applies to employment contracts concluded from 08 May 2023 onwards.

1.2 Notice periods

The Law of 26 December 2013 unified the different and discriminatory legal periods of notice for the employment contracts of blue collar and white collar employees.

The law also introduced a transitional regime for employees whose employment contract was concluded and commenced before 01 January 2014. The calculation of the notice period or of severance payment for a dismissal served as of 01 January 2014 and for an employee whose employment contract commenced before 01 January 2014, consists of two distinct steps, the results of which are subsequently added up.

The first step is related to seniority on 31 December 2013. The duration of this first part of the notice period is determined according to the rules applicable to the employee concerned on 31 December 2013. In this first step, his or her status as a blue or white collar worker, his/her seniority in service and the rules applicable on this date must be considered as though the employee's notice period was calculated on 31 December 2013. A specific arrangement is provided for so-called 'higher' senior white collar employees on 31 December 2013, namely for those with an annual salary that exceeds EUR 23 254 on 31 December 2013. In the event of notice by the employer, the part of the notice period associated with seniority in service on 31 December 2013 will be determined on a flat rate basis (and not by an agreement between the employer and the employee). The notice period is fixed at one month per started year of seniority. A lump-sum notice is also provided if notice is given by a white collar employee with an annual salary above EUR 32 254 on 31 December 2013. The fixed-term notice period in this case is 1.5 months per started period of five years of seniority with a maximum of 4.5 months if the employee's annual salary does not exceed EUR 64 508 or six months if his/her annual salary exceeds EUR 64 508 on 31 December 2013.

The second step concerned seniority acquired from 01 January 2014. The duration of this part of the notice period linked to this seniority is determined in accordance with the rules applicable to the employee in the new legal scheme introduced in the Employment Contracts Law of 03 July 1978. For this calculation, it is assumed that the new seniority period starts on 01 January 2014. The result of the calculations of the first and second steps are added up and together constitute the notice period to be observed or allowed to determine the amount of any termination indemnity.

(Another) new Law of 20 March 2023 (*Moniteur belge,* 28 April 2023) amends the Law of 26 December 2013 on the introduction of a unitary status between blue collar and white collar employees on notice periods.

The new law removes the two-step rule when the notice is given by the employee. From 28 October 2023, the employee must only comply with the 'new' notice period stipulated in Article 37, §2 of the Employment Contracts Law. That is, when an employee gives notice, the notice period is a maximum of 13 weeks. This applies to both blue collar and white collar employees (as well as senior white collar workers). This removes an ambiguity in the rules that would have meant that some employees would be subject to the 13-week maximum limit while others would not.

Secondly, the new Law of 20 March 2023 deletes the derogatory rules for senior (so-called higher) white collar workers. The effect of the deletion will be that in step one of the calculation, the notice period to be observed by the employer for all white collar workers will be at least three months per started period of five years of service. The special rule that applies to senior white collar employees when he/she gives notice,

namely that the notice period will be set at one month per started year of seniority with a minimum of three months will be removed.

It follows from the amended Unification Statute Law that so-called more favourable contractual termination clauses must be considered in step one of the calculation, as the majority of labour courts have already ruled.

The new law eliminates discrimination previously identified by the Belgian Constitutional Court in its rulings No. 140/2018, 18 October 2018 and No. 93/2019, 06 June 2019.

The law will enter into force six months after its publication in the Belgian Official Gazette (*Moniteur belge*), i.e. on 28 October 2023.

2 Court Rulings

2.1 Termination of an employee representative on the works council

Cour de Cassation Court, No S.21.0015.N, 03 April 2022

Non-elected candidates and elected employee representatives on the works council enjoy the strongest dismissal protection of all employees in Belgium. They can only be dismissed for an economic reason or an urgent reason or gross misconduct recognised in advance according to a certain procedure. This protection is contained in the Employee Representatives Dismissal Law of 19 March 1991. Article 2, §1 of the Law equates a resignation by the employee for an urgent reason attributable to the employer with a dismissal by the employer. According to case law, that provision of the Law also covers judicial terminations of the employment contract on the basis of a breach of contract constituting gross misconduct for immediate dismissal on the part of the employer.

If the employer terminates the employment contract of an employee representative without following the applicable procedure or without legal ground, the employee or representative workers' trade union who has put forward his/her candidature, can request reinstatement in the company. This must be done by registered letter within the 30 days following the date of termination of the employment contract.

If reinstatement is not requested, the employer must pay a fixed dismissal compensation for an amount that is at least equal to the wage corresponding to the duration of:

- two years for seniority < 10 years of service;
- three years for seniority > 10 but < 20 years of service;
- four years for seniority > 20 years of service.

If reinstatement is requested and rejected, the employer will have to pay another variable compensation equal to the salary of the remaining part of the mandate of four years in addition to this lump sum equal to two, three or four years' wages.

This ruling of the *Cour de Cassation* revisits the same case that was the subject of the *Cour de Cassation* judgment, S.14.0044.N, 08 October 2018. Specifically, it concerned an employee representative who had sought judicial termination of his employment contract because he no longer was receiving sufficient assignments. In addition, he requested special dismissal protection compensation given that he had applied for the social elections and, according to him, the employer had dismissed him in violation of this Act. The Antwerp Appeal Labour Court had granted all of the employee's claims.

The *Cour de Cassation* ruled on 08 October 2018 that a judicial termination of the employment contract pronounced on the basis of gross misconduct of the employer, the employee representative could legitimately have concluded that the employer irregularly terminated the employment contract constitutes a termination of the employment contract that qualifies as dismissal under Article 2, § 1, of the Employee

Representatives Dismissal Law of 19 March 1991. The Antwerp Appeal Labour Court had awarded him both the fixed special protection compensation and the variable protection compensation, namely the salary for the remaining part of the period of his representative mandate. On this last point, the *Cour de Cassation* annulled the Labour Court judgment, given that the variable protection compensation could only be granted on condition that the employee or the trade union that nominated his candidature applied for reinstatement and the employer refused this application. In this case, it was not determined by the Antwerp Appeal Labour Court whether the employee or trade union had applied for reinstatement.

The case was referred to the Appeal Labour Court of Ghent, which ruled on 13 November 2020 that the variable special protection allowance should not be granted because, although the reinstatement had been requested, it had not been requested within the statutory 30-day period. Moreover, the employee had only requested the reinstatement in case the Antwerp Appeal Labour Court reformed the judgment that had pronounced the dissolution. According to the Ghent Labour Court, this makes the reinstatement request ambiguous.

In addition, the employee had also sought the variable special protection compensation through Article 18 of the Employee Representatives Dismissal Law, which stipulates that the fixed and variable compensation are also due when the employment contract was terminated by the employee for facts constituting a gross misconduct on the part of the employer. The Ghent Labour Court did not follow this reasoning, considering that one should look at the classic meaning of gross misconduct in Article 35 of the Employment Contracts Law of 03 July 1978. The employee had to repay the variable protection compensation of nearly EUR 460 000 gross.

The employee appealed in cassation against this restrictive interpretation of Article 18 of the Employee Representatives Dismissal Law of 19 March 1991. In its ruling of 03 April 2023, the Belgian Cour de Cassation found that the concept of 'urgent reason' or 'gross misconduct' in Article 18 refers to the same concept in Article 35 of the Employment Contracts Law. Thus, the 'gross misconduct or urgent reason' in Article 18 should not be interpreted more broadly. This does not alter the fact that a contractual breach of contract on the basis of which judicial dissolution can be sought may indeed constitute a classic urgent reason in accordance with Article 18 of the Employee Representatives Dismissal Law and thus Article 35 of the Employment Contracts Law. However, the Ghent Appeal Labour Court, as a court of fact, had ruled unchallengeable that the breach of contract was certainly not serious enough to constitute an urgent reason. The cassation appeal against the judgment of the Ghent Appeal Labour Court of Appeal was dismissed.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

The amendment to the Regulations on the content of the worker's application form for the exercise of rights in the event of the employer's insolvency has been adopted.

1 National Legislation

1.1 Insolvency of the employer

The amendment to the Regulations on the content of the worker's application form for the exercise of rights in the event of the employer's insolvency has been adopted (Official Gazette No. 38/2023).

The provisions on the content of the employee's application form for the exercise of rights in the event of the employer's insolvency and on the documents attached to it have been amended. Furthermore, the circle of places where the application form can be submitted has been expanded.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Salaries in the public sector

The Act on Salaries in Civil and Public Service is currently being drafted. It will regulate the salaries in the public sector and redefine the system of rewards and sanctions.

Cyprus

Summary

The Labour Minister has proposed a compromise to renew the interim agreement on the cost of living allowance.

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 Cost of living allowance

The Labour Minister has submitted a compromise proposal on the dispute related to the CoLA (cost of living allowance). The Minister's proposal is to renew the 2017 interim agreement for another three years by increasing CoLA to two-thirds of the Consumer Price Index, i.e. it will be increased by a 66.67 per cent share from the currently 50 per cent. The proposal will come into effect on 01 June and will be based on last year's inflation rate. The goal is to ensure broader dialogue to finalise a permanent deal by 2025.

Trade unions and employers' associations have reviewed the proposal and are scheduled to meet with the Minister. Trade unions have expressed disappointment with the proposal, whilst the employers' associations in principle continue to support the abolition of COLA but stated that they will agree to the compromise.

Czech Republic

Summary

(I) The government has approved a draft amendment to the Labour Code on flat-rate teleworking, the possibility of excluding reimbursement of teleworking costs and the reduction of *vacatio legis*.

(II) The government has also approved a draft amendment to Act 435/2004 on Employment. The bill replaces the existing definition of illegal work and regulates and refines the legal regulation of placement services by employment agencies.

1 National Legislation

1.1 Amendment to the Labour Code

On 05 April 2023, the Government of the Czech Republic approved a draft amendment to Act 262/2006 Sb., the Labour Code and other related laws, a culmination of a long legislative process on the part of the executive branch (the government and Ministry of Labour and Social Affairs). The bill was approved by the working groups of the Legislative Council of the government and subsequently in the plenary session of the Legislative Council of the government. The details of the amendment have been discussed in earlier Flash Reports.

The wording approved by the government has since been amended for:

1. Flat-rate teleworking;
2. The possibility of excluding the reimbursement of teleworking costs;
3. Reduction of *vacatio legis.*

The Bill was subsequently introduced to the Chamber of Deputies of the Czech Republic as Parliamentary Print 423/0. It is expected that it to be discussed during the Chamber of Deputies' session in May this year.

The Bill is available here.

Flat-rate teleworking

A fundamental change in how to deal with the related costs was adopted in the middle of a government meeting. The originally proposed flat-rate reimbursement of employers' expenses eligible for deduction only included the costs explicitly mentioned in section 190a of the Labour Code (LC). That is, employees' expenses such as telephone and data connection costs were excluded. Moreover, the maximum amount of costs was subsequently set directly in section 190a LC, specifically at CZK 2.80 per hour of teleworking (incl. statutory indexation).

The version approved by the government deleted the hourly flat-rate and provided that the rate would always be determined by a current decree. The flat rate has also been generalised and is now intended to cover all costs incurred by the employee when teleworking.

Accordingly, under section 190a (1) LC, teleworking costs either refers to costs actually incurred or flat-rate costs. The reimbursement of expenses at a flat rate is determined by the company's internal policy or negotiated with the employee or stipulated in a collective agreement. The hourly flat rate is determined based on data published by the Czech Statistical Office with respect to household consumption in accordance with the teleworking model per adult in an average household in the Czech Republic.

The inclusion of all expenses in the statutory flat rate will give employees the opportunity to be reimbursed a lump sum for all their teleworking expenses. In turn, it will be administratively easier for employers to meet their obligation to reimburse the costs of dependent work based on a one all-inclusive amount.

Exclusion of reimbursement of teleworking costs

Another major change introduced by the government is the employer's option to agree with the employee that the employer will not reimburse the employee's teleworking costs or documented actual expenses or pay a lump sum reimbursement (see section 190a(1) and (2) LC). The employer and employee can agree to exclude the reimbursement of teleworking costs and allow teleworking to be performed without reimbursement.

Czech labour law defines dependent work as work that is performed on behalf of the employer, at the employer's expense and responsibility. Section 2 (2) LC directly imposes an obligation to perform dependent work at the employer's expense. Moreover, the provisions of section 346c LC expressly prohibit the employee from relieving the employer of the obligation to provide him or her with reimbursement of expenses in connection with the performance of work. Thus, Czech labour law does not allow the transfer of the costs of work performance from the employer to the employee. The employer shall pay dependent costs, regardless of where the work is performed, i.e. whether the work is performed at the employer's workplace, on a business trip, at the employer's client, or from another location, i.e. teleworking. This may bring the proposed section 190a(2) LC into conflict with section 2(2) and section 346c LC.

Reduction of vacatio legis

The government has once again reduced the *vacatio legis*, i.e. the period between the validity and the effective date of a law. According to the wording approved by the government, the law shall take effect on the first day of the calendar month following the month in which it enters into force, i.e. when it is published in the Collection of Laws. Thus, for example, if the law is published in the Collection of Laws on 20 September 2023, it will take effect on 01 October 2023.

1.2 Amendment to Act 435/2004 on Employment

On 26 April 2023, the Government of the Czech Republic approved a draft amendment to Act 435/2004 Sb. on Employment and other related acts. The Bill replaces the existing definition of illegal work and regulates and refines the legal regulation of placement services by employment agencies, in particular by unifying and refining terminology, specifying cases that lead to the withdrawal of an employment agency permit. It introduces a time limit for the initiation of proceedings for the withdrawal of an employment agency permit, clarifies the regulation of obtaining professional experience, determines the end of the time limit for applying for a new employment agency permit, and clarifies the regulation of the payment of costs of proceedings. The deposit for employment agencies applying for an employment agency permit has also been increased.

The Bill also introduces the following measures to protect agency employees:

- Agency employees may no longer be temporarily assigned to work for a user undertaking for a period of more than 3 years;
- Where a temporary assignment by an employment agency to a user undertaking is agreed for the duration of the temporary assignment and the assignment ends prematurely, the employment relationship must continue for an additional 14 days.

A detailed discussion of these changes has already been discussed in previous Flash Reports.

The Bill is available here.

Definition of illegal work

The new definition eliminates the long-term nature of illegal work as one of its defining criteria. Therefore, short-term or one-off work that does not meet the other criteria would still be treated as being illegal. Although the difficulty labour inspection authorities face in proving the non-fulfilment of the criteria of dependent work during their inspection is understandable, the solution of modifying the definition of illegal work does not seem particularly pertinent. The statutory legal definition and the definition of terms should only be modified in exceptional cases, and only if necessitated by a factual change in the content of the defined term caused by a change in objective reality, which is not the case here. Reinforcing the position of the supervisory authorities is not and cannot be such a reason. Such practice reduces the level of legal certainty of the subjects concerned. It also affects the legality and legitimacy of the legal order when it comes to public control and sanctions. The definition of undeclared work is linked to the definition of dependent work in section 2 LC and the corresponding obligations in the form of its performance in an employment relationship under section 3 LC. Comparative theoretical studies point out that it is very difficult to create such a restrictive definition of the subject of labour law. If the Czech Republic has decided to follow this path, the stability of such a definition needs to be protected from casuistic intervention. The stability of such a definition is also supported by the relatively constant jurisprudence of the Supreme Court of the Czech Republic.

Moreover, the defining element of superiority and subordination also implies the requirement of a certain continuity, or the duration of the employment relationship over a certain period of time, from which the dependence and subordination of the employee, as well as the position of the weaker party, is yet to emerge. If a natural person personally performs work under the employer's authority, on its behalf and under its instructions for a one-off period, or for a very short period of time, we cannot speak of a categorically dependent position requiring special employment law protection, nor does social and economic dependence arise in a relationship that is limited in time. The author is also inclined to argue that the very feature that legitimises the special statutory protection of the employee's position under section 1a LC is the long-term nature, or at least the repetitive nature, of the performance.

A change in the definition, on the contrary, would render many arrangements and relationships established by the Civil Code unlawful, which are also characterised by the performance of an activity on the instructions of the other party to the contract that do not fulfil the characteristics of repetition, let alone continuity. Such a definition would significantly limit the autonomy of the parties' will in private law relationships.

Agency work

The proposed wording of section 307c LC legitimises the 'flawed practice' of negotiating employment relationships between an employment agency and an employee for the duration of a temporary assignment only. Agency employment is a specific form of employment that allows an employment agency to temporarily assign its employees to a user undertaking who can flexibly use their labour potential for a certain period of time. It is perfectly legitimate for the user undertaking to be able to terminate the temporary assignment when it no longer needs the agency employee, but this should not affect the agency employee's employment with the agency.

Moreover, one may question the legitimacy of negotiating a fixed-term employment relationship, and hence an agreement to perform work that is linked to the duration of the temporary assignment in view of the temporary assignment agreement under

section 308 (1) (g) LC, which expressly allows the user undertaking and, ultimately, the agency employee (even if the agency employee is not a party to the agreement) to unilaterally and immediately terminate such a temporary assignment. Given the tripartite structure of the relationship between the user undertaking, the employment agency as the employer and its employee, the termination of the employment relationship depends on the user undertaking's will and, consequently, in relation to the temporary assignment agreement on the will of the employer – the employment agency. Nevertheless, the law only considers an obligation to be of a fixed duration if the parties to the agreement base its duration on the lapse of a period (time) or on some other objectively ascertainable circumstance that leaves no doubt as to when the fixed-term employment relationship will end (by analogy, Supreme Court judgment No. 21 Cdo 2372/2002). The legal fact to which the duration of the employment relationship is linked should not depend on the parties' will.

The purpose of temporary assignments is to enable the user undertaking to only use the work potential of the agency's employee for the duration of the assignment. Temporality and time flexibility on the part of the user undertaking is entirely appropriate. Temporary assignment is thus quite natural in its temporary nature, but it is not permissible for an employee's temporary assignment to always reflect a 'temporary job'. The purpose of this construct is to give the employment agency a reservoir of employees who will be temporarily assigned by the employment agency to user undertakings for as long as there is a demand for labour.

Moreover, the Labour Code exhaustively regulates the methods of termination of employment in section 48 LC, which cannot be extended or modified in this casuistic manner. The law may not determine whether or not a temporary assignment is terminated prematurely if the employment relationship is agreed for the duration of the assignment. Premature termination can be exercised by the employment agency or the user undertaking with regard to the temporary assignment agreement; on the other hand, the temporary assignment by its nature allows for a flexible termination of the employee's assignment. However, the precariousness of the termination of the employment relationship itself is another matter.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

(I) The Danish government has put forward a legislative proposal that will implement the EU Directive on Transparent and Predictable Working Conditions.

(II) An industrial arbitration ruling concerned the enforcement of claims on underpayment of posted workers in Denmark.

1 National Legislation

1.1 Transparent and predictable working conditions

The Danish government has put forward a proposal for a statutory Act to implement EU Directive 2019/1152.

The proposal has not been submitted in a timely manner, as the deadline for implementation had been set for 01 August 2022. The first proposal for implementation of EU Directive 2019/1152 from 2022 was withdrawn as a result of the parliamentary elections announced in October 2022.

The new government initiated a new negotiation process on how to implement the Directive.

The implementation of the Directive was—in line with Danish tradition—discussed in the Implementation Committee of the Ministry of Employment (a tripartite committee). The content of the legislative proposal is partly based on a so-called 'intention paper' (*forståelsespapir*) between the main social partners in the Danish labour market.

Instead of amending the existing Act on Employment Certificates, the government proposed the adoption of a new statutory Act on Employment Certificates and Certain Working Conditions. The new Act will include updated rights to an employment certificate, and will supplement the new material changes included in the Directive.

The proposal is the first step in the legislative process. Second- and third-round discussions will ensue in Parliament. The proposal is expected to come into force on 01 July 2023.

The link to the proposed Act No. 84 of 29 March 2023 is available here.

2 Court Rulings

2.1 Posting of workers, underpayment, enforcement by the trade union

Industrial arbitration ruling, FV 2023-132, 26 April 2023, Fagligt Fælles Forbund vs. Dansk Industri Overenskomst III for UAB Vixero

The Lithuanian posting entity, UAB Vixero, is a member of the Danish industry's employer association, Dansk Industri, and as such is required to pay their posted workers the salaries set out in the collective agreements of Dansk Industri.

The posted workers performed work under the collective agreement for bricklayers (*Murer- og Murerarbejdsmandsoverenskomsten*).

As is common in all Danish collective agreements, the employer, UAB Vixero, had to apply the collective agreement provisions to unionised as well as non-unionised workers.

UAB Vixero had posted workers to a building site in Copenhagen for a period of approximately three months. The case involved four posted workers.

The four workers posted to the building site3 in Copenhagen were non-unionised workers. They were not members of the trade union (3F - *fagligt fælles forbund*), party to the collective agreement. For this reason, the trade union could not pursue claims for the repayment of outstanding remuneration for the non-unionised posted workers.

According to settled Danish case law, a trade union can, in such cases, raise a claim against the employer for breach of agreement and claim a penalty payment calculated as the costs the employer saved by breaching the agreement (in this case, the underpayment of posted workers). This shall ensure that an employer—regardless of the unionised or non-unionised status of employees—does not make a profit by breaching the employer's duties in the collective agreement.

The parties in the present case disagreed particularly on the calculation of working time and remuneration of the posted workers.

The industrial arbitrator first noted that the posting entity, UAX Vixero, had not fulfilled its obligation under the collective agreement to contribute to the investigation of facts in the present case. The company had not participated in the oral negotiation in the arbitrational court, and had not put forward adequate documentation on the employees' working time, salaries paid or the duty to provide food, housing, etc. The lack of documentation counts to the detriment of the company in the assessment of facts of the case.

The industrial arbitrator concluded that the posting entity had accrued a total saving of DKK 304 000 (approx. EUR 40 800), which the posting entity was consequently ordered to pay to the claimant (the trade union) in penalties for breach of agreement.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

The Employment Contracts Act has been amended to introduce the right of the employee to refuse to perform work if he or she is in the reserve service.

1 National Legislation

1.1 Right to refuse to perform work in case of reserve service

On 01 April 2023, an amendment to the Employment Contracts Act concerning the right of the employee to refuse to perform work has entered into force. The Employment Contract Act lists the aforementioned rights of the employee as an open list in § 19 of the Employment Contracts Act.

Previously, it was stipulated that an employee has the right to refuse to perform work, if he or she is in compulsory military service or alternative service or is participating in reserve training. According to the amendment, the right is granted to the employee if the employee is in compulsory military service, alternative service or reserve service.

This amendment results from the amendments to the Military Service Act and the Act on Amendments to Other Acts, which was adopted on 11 January 2023.

With these changes, the provisions of the Military Service Act have been adjusted, inter alia, a reserve service has been created for the replacement service. Reserve service is the performance by a person in reserve of the national defence obligation in reservist training and additional reservist training. A person in reserve service is a reservist (Military Service Act Article 5 (3)).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Number of employees earning an average salary

Jobs with a salary of close to EUR 1 700 (monthly average wage) are currently disappearing in Estonia. They are being replaced by positions with a remuneration of up to EUR 1 000 or more than EUR 2 500.

Even fewer companies pay minimum wage (EUR 725 per month), while employers often demand unjustified professional skills when offering higher wages. Both employees and employers feel that employees are overqualified for their job, although additional skills are often required. This is especially noticeable in office work and industry.

As a result of particularly high inflation, the salary pressure from employees is high, and to address this pressure, employers have been laying off some employees, whose tasks are then divided among the remaining employees. According to the OECD, medium-wage jobs will be replaced by either lower or higher wage jobs, which is also the case in Estonia, where a two-class society may develop in the future if this trend intensifies.

According to a recently published study, a person who changes jobs in Estonia expects to receive a salary increase of nearly EUR 700 in his or her new job. According to the Trade Union Confederation, it is normal for new employees to receive a higher salary than that earned by current employees. Overtime work has also increased in many workplaces – there are higher paid workers who occasionally perform additional work as a hobby, and employees who have to perform additional work to support their family.

4.2 Employers' views on the Pay Transparency Directive

The Estonian Employers' Association is sceptical about the new directive on the disclosure of salary information. Instead of solving any problem, employers will face unnecessary new obligations.

The European Parliament has recently approved the Salary Disclosure Directive, which aims to simplify salary comparisons and eliminate the gender pay gap. Although it does not entail the obligation to publish individual employees' salaries, the new rules require the employer's salary structure to be comparable and based on gender-neutral criteria, evaluation systems and classifications.

Employers disapprove of gender and other discrimination. When it comes to remuneration, the employee's skills and knowledge and the value he or she creates for the organisation is what counts. The employers are sceptical about the directive, which, instead of solving a problem, creates new problems and unnecessary obligations for companies.

Some of the reasons for the wage gap are known while others are not. One of the main reasons for the wage gap in Estonia is the fact that women and men often choose different professions. For example, more women work in the social and health sector, which is characterised by lower salaries. On the other hand, more men are employed in the technology sector, which pays higher salaries due to the considerable labour shortage and the resulting wage growth.

Accordingly, to reduce inequality in the labour market, for example, the mobility of people between different sectors should be increased, language and digital skills improved, and qualifications raised. Part of this is certainly a question of culture, but solving it through regulation also has negative consequences (for example, negative bias in the council members appointed on the basis of a quota). The salaries of Estonian civil servants have been public for many years, but salary cuts still exist.

At the same time, the majority of the wage gap in Estonia, i.e. 60 per cent, is unexplained. Therefore, the reasons for the pay gap should be identified and the root problem addressed rather than punishing companies with yet another obligation.

Finland

Summary

Nothing to report.

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 Exploitation of employees through severe underpayment and addressing the phenomenon

A report 'Exploitation of Employees through Severe Underpayment and Addressing the Phenomenon' has been published by the Ministry of Justice (*Oikeusministeriön julkaisuja, selvityksiä ja ohjeita* 2023:19). The research project examined criminal law issues related to the exploitation of employees through severe underpayment. Specifically, the project examined how severe underpayment can be addressed under the current provisions of the Criminal Code (*Rikoslaki*, 39/1889) and whether the Criminal Code should be developed to enable a more effective intervention in underpayment. A comprehensive analysis of the relevant case law of courts of first instance was carried out as part of the project. Furthermore, interviews were conducted to identify what kind of criminal law and criminal procedural law issues are related to employee exploitation through underpayment.

The report presents recommendations for measures to be implemented. According to the report, it would be justified to apply the criminal signs of extortion and fraud to a greater extent than at present in serious underpayment situations. The expertise of the police, prosecutors and courts should be strengthened through training. The awareness of workers with a foreign background about their rights should also be intensified, sufficient resources should be allocated to the monitoring and investigation of work-related exploitation and the exchange of information between authorities that encounter and investigate work-related exploitation should be developed. In addition, the report proposes long-term measures for, for example, the development of legislation.

4.2 Green occupations

The final report of the project 'Effects of the Green Transition on Finland's Labour Market, Employment and Occupational Structure' funded by the Prime Minister's Office has been published (*Valtioneuvoston selvitys* 2023:1). The report examines the effects of the green transition on occupations and Finland's occupational structure. The main goal was to define and classify so-called green occupations. It is thereby possible to assess the effects of the transition on the occupational structure and the labour market, as well as how well the labour market is adapting to the change.

Combining the greenness classification of occupations with the national occupational classification shows that a little less than one-fifth of Finnish employees work in green occupations. About 40 per cent work in non-green peer occupations, where tasks performed are quite similar to those in green occupations. Furthermore, based on previous studies, the skills required in green and non-green occupations do not differ significantly from each other. It can therefore be assumed that the Finnish occupational structure and labour market have an opportunity to adapt to the changes created by the green transition.

However, according to the report, it is recommendable for the labour administration to offer employees targeted support measures to ensure that the change is as smooth and fair as possible. The greenest occupations of all are various occupations that require special expertise and engineering skills, requiring physics, construction, technology and geography skills. The number of green occupations varies by industry, but the variation by province is very small. However, the effects of the green transition may be more harmful in areas where the share of persons working in sectors that produce climate emissions is high. Most green occupations are found in the energy and water supply industries. The effects of the green transition on occupational structure are visible over a longer period of time. To a large extent, the changes in skill and competence requirements caused by the green transition can be addressed by providing training at workplaces. This also emphasises companies' responsibility in the development of competences.

4.3 Organisation of Wage Earners

A study 'Organisation of Wage and Salary Earners in 2021' has been published by the Ministry of Economic Affairs and Employment (*Työ- ja elinkeinoministeriön julkaisuja* 2023:19). The primary aim was to investigate the degree of unionisation in 2021 compared with previous studies. In March 2022, a survey on unionisation was sent to all trade unions organised under a central organisation. In addition to information on unionisation, the survey included questions about the membership structure of unions. Determining the number of members whose interests the unions represent is crucial, as the percentage of these members of the total number of wage and salary earners and of unemployed persons equals the degree of organisation.

At the end of 2021, trade union membership totalled 1 889 000. However, 630 000 or 30.3 per cent were members whose interests were not represented. These include pensioners, students, non-paying members and self-employed persons. At the end of 2021, there were a total of 1 316 000 members whose interests were represented, and the degree of unionisation calculated accordingly was 54.7 per cent. According to the study, the degree of unionisation in 2017 was 60.2 per cent, which means it has decreased by 5.5 per cent. In 2021, the degree of unionisation among women was 60.9 per cent compared to 48.5 per cent among men. The degree of unionisation in public services was 76.7 per cent, in industry 63.4 per cent, and in the private services sector 41.6 per cent.

France

Summary

(I) The retirement reform plan has been enacted, and provisions have been introduced for the enforcement of the presumption of resignation in case of unauthorised absence.

(II) The Court of Cassation has ruled on the use of unlawful evidence to justify a dismissal; on the termination of a fixed-term employment contract for misconduct.

(III) The Administrative Supreme Court has ruled on the employer's obligation of health and safety in case of a collective redundancy plan.

1 National Legislation

1.1 Enactment of the retirement reform plan

In a decision of 14 April 2023, the French Constitutional Court vetoed minors' provisions of the government's retirement reform plan set out in the Rectifying Social Security Finance Bill. The major provision, the raising of the legal retirement age to 64 years, was validated by the Court.

The following provisions were vetoed:

- The 'Seniors Index', which the bill planned to introduce in companies with 300 or more employees to assess seniors' jobs and the development of their recruitment (Article 2);
- The 'Indefinite-term Employment Contract for Seniors' (Article 3);
- The provisions aimed at creating medical monitoring of employees who work or have worked in professions or activities particularly exposed to ergonomic risk factors (heavy loads, arduous postures, mechanical vibrations) (Article 17).

It should be noted that these provisions are censured solely on the grounds that they were not adopted within the relevant legislative framework. The Constitutional Court therefore does not prejudge their conformity with the Constitution. The government may therefore present these provisions, possibly amended, via another bill, such as the Labour Law expected in the summer.

The Rectifying Social Security Finance Act for 2023, cleared from the censured provisions, has been enacted on 15 April 2023.

1.2 Presumption of resignation in case of unauthorised absence

A Decree of 17 April 2023 implements the Law of 21 December 2022 on the presumption of resignation in case of unauthorised absence codified by this law on Article L. 1237-1-1 of the French Labour Code.

According to the Decree, an employer who notices that the employee is no longer present in his or her post and who intends to invoke the presumption of resignation must first send a formal notice to the employee.

The employee will then have to justify his or her absence and return to his/her post within a time limit set by the employer. The employee is presumed to have resigned at the end of this deadline if he/she does not return to his/her post.

The Decree specifies that the time limit set by the employer for the employee to justify his/her absence and return to his/her post may not be less than 15 days. It starts to run from the date of presentation to the employee of the formal notice.

If the employee intends to claim a legitimate reason from the employer to prevent a presumption of resignation, he/she must indicate this reason in the reply to the employer's formal notice.

If at the end of the minimum 15-day period, the employee is presumed to have resigned, he/she may challenge the termination of his/her employment contract before the employment tribunal.

2 Court Rulings

2.1 Unlawful evidence used to justify a dismissal for gross misconduct

Social Division of the Court of Cassation, No. 20-21.848, 08 March 2023

In the present case, a bus driver was dismissed for smoking and talking on the phone while driving as proved by a police report made based on videos provided by the employer.

The employee had initially filed a complaint after noticing that a block of tickets was missing from a bus he was driving. This led the employer to hand over video surveillance tapes of the vehicle to the police. The police, after viewing these tapes, found traffic violations, and drew up a report establishing that the employee had been using his telephone while driving and had been smoking on the bus. This report was then handed over to the employer. Finally, the employer dismissed the employee for gross misconduct.

According to Article 9 of the French Code of Civil Procedure, in the event of a dispute between an employer and an employee, it is up to the party that claims, for example, one fact over another and must prove this before the employment tribunal. However, the evidence provided by the parties must be lawful within the context of respect for the general principle of fairness of evidence.

In the context of a dismissal, if the evidence reported by the employer to justify the dismissal is illicit, the termination of the contract is then without material and substantial grounds.

The employee challenged his dismissal on the grounds that it was based on unlawful evidence. The trial judges agreed with the employee, finding that the evidence on which the employer's justification for the employee's dismissal for gross misconduct was unlawful.

In fact, the employer should never have had the police report in his possession, which was the only element supporting the misconduct alleged against the employee.

The employer was only a third party to these proceedings. Indeed, according to Articles R. 166 and R. 170 of the French Penal Code, he was not authorised to dispose of this document without the authorisation of the public prosecutor under the rules applicable to criminal proceedings.

The judges emphasised that the video surveillance recordings that made it possible to see what the employee was being accused of should never have been handed over to the police in accordance with the company's video protection charter.

Article 4 of this charter only allowed for the recordings to be handed over in the event of an offence or disturbance relating to the safety of individuals. In the present case, however, it was only a case of alleged theft of tickets without any violence. The police should therefore never have received the images.

Moreover, in Article 3.3 of the charter, the employer had undertaken to not use the video surveillance system to provide evidence of misconduct by the employee in internal disciplinary cases. The employer should therefore never have dismissed the employee on the basis of elements drawn from the video surveillance.

The police report, which was the only evidence provided by the employer to justify the employee's dismissal, had been obtained illegally and was therefore inadmissible.

As the Court of Cassation reminds in its decision of 08 March 2023, evidence deemed to be unlawful may nevertheless justify dismissal on the twofold condition that:

- Its production is indispensable for the exercise of the employer's right of proof;
- This is a principle of procedural fairness, and the infringement of the employee's rights, if established, must be proportionate to the aim pursued. However, the employer must have argued before the judges that the rejection of the unlawful evidence could undermine the fairness of the proceedings. In the present case, as the Court of Cassation pointed out, this was not apparent either from the Court of Appeal's decision or from the documents in the proceedings.

Hereby, the Court of Cassation issued an interesting decision by trying to strike a balance between the rules of a criminal procedure and the rules of a civil procedure governing labour law.

To reach this balance, the Court of Cassation seems to have applied the principle of proportionality emanating from European Union law and the Court of Justice of the European Union's rulings. This decision of the Court of Cassation is a further illustration of the use of the proportionality principle to resolve a conflict between different rules of domestic law.

2.2 Early termination of a fixed-term contract for serious misconduct

Social Division of the Court of Cassation, No. 21-17.227, 15 March 2023

In the present case, an employee was hired on 30 January 2014 as a senior administrative assistant by a pharmaceutical company under a fixed-term employment contract. A second and third contract followed, without interruption. However, the employer decided to terminate the third fixed-term employment contract early due to serious misconduct of the employee (the nature of which was not specified).

According to Article L. 1243-1 of the French Labour Code, unless agreed by the parties, the fixed-term employment contract may only be terminated before the end of the term in the event of serious misconduct, force majeure or incapacity established by the occupational doctor.

- The employee brought his claim before the employment tribunal and argued that, as the facts invoked by the employer had been committed on 08 January 2016 during the second fixed-term contract, they could not justify the early termination of the third fixed-term contract, which had taken effect on 29 January 2016;
- The employer argued that he had preferred to wait for the results of an investigation before deciding the employee's fate. It was therefore only during the third fixed-term employment contract that the employer was able to gain precise knowledge of the reality, nature and extent of the alleged facts and to thus take the decision to sanction the employee. However, the Court of Appeal rejected this argument and agreed with the employment tribunal's decision. The employer consequently appealed to the Court of Cassation.

In its decision of 15 March 2023, the Court of Cassation declared that "*the fault justifying the early termination of a fixed-term employment contract must have been committed during the performance of that contract*". The Court of Cassation therefore approved the Court of Appeal's decision and ordered the employer to pay the employee damages for wrongful termination of the fixed-term contract.

The Court of Cassation hereby confirmed that an employer who is aware of a fault committed by an employee working under a fixed-term employment contract must therefore decide during the performance of this contract whether this fault justifies early termination. Once the contract has come to an end, it is too late to terminate it. If the employer concludes a new fixed-term employment contract with this employee (either because, as in the present case, the employer has not yet realised the extent of the misconduct committed, or because he/she simply is not aware of it), he/she cannot apply the sanction of early termination to this new contract. The employer therefore has no choice but to wait for the contract to come to an end. It is impossible to defer the sanction by pronouncing the early termination of this second contract.

This decision seems sensible: indeed, recognising the possibility of terminating a second fixed-term employment contract due to a fault committed during the first contract would amount to a recognition of continuity between the two fixed-term employment contracts and could therefore lead to a reclassification of the fixed-term employment contracts as open-ended one.

Nevertheless, although it is difficult to know whether this reasoning was followed by the Court of Cassation, we can emphasise the protective nature of this decision against unexpected terminations of fixed-term employment contracts, even if this termination is justified by the employee's fault. In this regard, we can consider the influence of EU law which, both in the recitals of its latest directives and in Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, regularly underlines the need to protect workers on fixed-term employment contracts.

2.3 Employer's health and safety obligations in case of collective redundancy plan

Administrative Supreme Court, No. 460660 and No. 4500012, 21 March 2023

In the present cases, the French Administrative Supreme Court had to clarify its position on occupational health and safety issues in case of a collective redundancy plan.

According to Articles L. 4121-1 and L. 4121-2 of the French Labour Code, the employer must ensure the safety and health of workers. It should be noted that although the employer is solely responsible for this obligation, it must be fulfilled within the framework of social dialogue within the company, with the evaluation of potential risks and measures such as information on the risks identified.

Previously, the Court of Cassation had already described the safety obligation as an 'obligation of result', but it should be noted that the 'result' expected of the employer is not the absence of damage (i.e. the absence of an accident at work or an occupational disease), but the measures' effectiveness. Thus, the Social Division of the Court of Cassation ruled that the employer's safety obligation was met when the employer could justify having taken all measures provided for in Articles L. 4121-1 and L. 4121-2 of the French Labour Code.

The present cases involved two judgments of an Administrative Court of Appeal on an administrative decision to approve a unilateral document introduced by the employer in relation to a collective redundancy plan in the context of the employer's obligation of safety.

In a first decision of 21 March 2023, the Administrative Supreme Court stated that in the context of an application for approval of a unilateral document containing the collective redundancy plan, it is the responsibility of the administration:

- to ensure that the CSE has been informed and consulted on the psychosocial risks likely to be caused by the reorganisation of the company;
- but also, if necessary, to control the measures taken to prevent them and to protect the workers (CE, 21.03.2023, No. 450012).

In a second decision on the same day, the Administrative Supreme Court stated that this principle also applies to companies that cease their activity or are in judicial liquidation (CE, 21.03.2023, No. 460660).

Administrative Supreme Court, No. 450012, 21 March 2023

It is the responsibility of the administration within the framework of its overall control on the regularity of the procedure of the collective redundancy plan to check that the employer has submitted to the social and economic council (CSE):

- invitation to its first meeting, as well as where applicable;
- useful elements in response to requests expressed by the CSE or to observations or injunctions formulated by the administration, so that the CSE can formulate its opinions in full knowledge of the facts, elements relating to the identification and evaluation of the consequences of the reorganisation of the undertaking on the health or safety of the workers, as well as in the presence of such consequences, the actions planned to prevent them and to protect the workers from them, so as to ensure their safety and protect their physical and mental health.

Secondly, it is up to the administration to verify, in the light of these elements of identification and the evaluation of the risks, the debates that took place within the CSE, the exchanges of information and the observations and possible injunctions formulated during the elaboration of the collective redundancy plan, if they lead to the conclusion that the reorganisation of the company presents risks to the health or safety of workers. If the employer has decided on measures to remedy this, the administration must also verify that these measures as a whole, are suitable for preventing these risks and for protecting the workers.

In the present case, while the Administrative Court of Appeal held that the administrative authority had verified whether the staff representative institutions had been able to give their opinion in full knowledge of the facts, it had considered that the administration had not, on the other hand, controlled the content of the unilateral document which was its responsibility to verify the employer's compliance with its obligations in the area of risk prevention to ensure the safety and health of the workers.

According to the Administrative Court of Appeal, the approval decision was thus vitiated by illegality. The Administrative Supreme Court confirmed this reasoning.

Administrative Supreme Court, No. 460660, 21 March 2023

It is the responsibility of the administrative authority, requested to approve a unilateral document concerning a collective redundancy plan to verify respect by the employer of its obligation in terms of risk prevention to ensure the safety and health of the workers. In this respect, it is up to the employer to check both the regularity of the information and consultation procedure of the staff representative institutions and the measures to which the employer is bound pursuant to Article L4121-1 of the Labour Code in respect of the terms of application of the planned operation.

In the present case, the Administrative Court of Appeal noted that the company's cessation of activity would result in the elimination of all posts and that this situation would likely have an impact on the physical and mental health of its employees.

The Court then noted that the unilateral document prepared by the employer in relation to the collective redundancy plan submitted to the administrative authority for approval had not included any measures to protect employees from consequences on their physical or mental health due to the cessation of the company's activities.

The Administrative Court of Appeal concluded that the administration could not legally approve this unilateral document. The Administrative Supreme Court confirmed this reasoning.

These decisions by the Administrative Supreme Court tighten the requirements of the employer's safety obligation in the context of a collective redundancy plan. This position of the Administrative Supreme Court is in line with Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers in the workplace and follow the directives on health and safety of employees.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) Draft laws on working time and the posting of drivers in the road transport sector have been presented.

(II) The Federal Labour Court has ruled on the employee status of a yoga teacher.

(III) The State Labour Court Berlin has ruled on the participation of workers in a 'wildcat' strike.

(IV) The State Labour Court Hanover has ruled on the so-called group privilege in temporary agency work.

1 National Legislation

1.1 Draft Law on Working Time

On 18 April 2023, the competent Ministry presented a bill to amend the Working Time Act. It is the response to the decision of the Federal Labour Court of 13 September 2022 on the recording of working time (and the decision of the CJEU, case C-55/18, 14 May 2019*, Federación de Servicios de Comisiones Obreras [CCOO] / Deutsche Bank SAE*). The draft is a new version of section 16 subsection 2 of the Working Time Act (*Arbeitszeitgesetz*, ArbZG). Sentence 1 of the provision shall read as follows:

> *"The employer is required to electronically record the beginning, end and duration of employees' daily working time on the day of work performance".*

No specific type of electronic recording is prescribed. In addition to the time recording devices already in use, other forms of electronic recording using electronic applications such as apps on a mobile phone or the use of conventional spreadsheet programmes are possible.

Discussions are currently focused on the consequences for so-called trust-based working time (cf. Fuhlrott/Herzig, Arbeitszeit: *1:1-Umsetzung der gerichtlichen Vorgaben durch Referentenentwurf?,* ArbRAktuell 2023, 221). Relevant in this respect is the intended new regulation of section 16(4). Accordingly, if the recording of working time is carried out by the employee and the employer waives control of the contractually agreed working time, the employer must ensure by implementing suitable measures that he/she is informed of violations of the legal provisions on the duration and location of working time and rest periods.

1.2 Draft law on posting of drivers in the road transport sector and on the cross-border enforcement of the law on posting of workers

In future, the law on the posting of workers shall also be applied in the road transport sector, as provided for in a draft law (20/6496) of the Federal Government, by which the corresponding EU Directive ((EU) 2020/1057) is to be transposed into national law. This would affect, for example, drivers who work in Germany but are employed by a company based in another EU country. The aim of the new law is to eliminate:

> *"discrepancies between the interpretation, application and enforcement of rules on the posting of workers in the road transport sector".*

Drivers who only pass through EU countries and who carry out bilateral transport are not affected by the regulations.

2 Court Rulings

2.1 Employee status of a yoga teacher

Federal Labour Court, 9 AZR 253/22, 25 April 2023

The Federal Labour Court ruled that a member of a non-profit association whose statutory purpose is

> *"the education of the people through the dissemination of the knowledge, teachings, exercises and techniques of yoga and related disciplines as well as the promotion of religion"*

qualified as an employee (and was accordingly entitled to statutory minimum wage). Thereby, the Court found that the constitutionally guaranteed right of self-determination of religious and ideological communities can only be claimed by an association that has a sufficient degree of religious system formation and world interpretation. If these conditions are not met, the association, in principle, is prevented from agreeing with its members to perform externally determined work in personal dependence, bound by instructions, outside of an employment relationship. In the Court's opinion, the autonomy of the association, which is protected by the Basic Law (Article 9 (1) of the Basic Law), also permits the provision of externally determined work in personal dependence outside of an employment relationship, at most, if mandatory protective provisions under the labour law are not evaded. These include, among others, remuneration that guarantees the general statutory minimum wage against which board and lodging are not to be counted. This is because the purpose of the minimum wage is to secure a livelihood through earned income as an expression of human dignity (Article 1 (1) sentence 1 of the Basic Law).

The association argued that the plaintiff had performed charitable services as a member of a Hindu Ashram community and not in an employment relationship. At the same time, the association argued that the freedom of religion under Article 4 (1) and (2) of the Basic Law and the right to self-determination under Article 140 of the Basic Law in conjunction with Article 137 of the Constitution enabled it to create a spiritual community in which the members performed community service outside of an employment relationship.

2.2 Participation of workers in a 'wildcat' strike

State Labour Court Berlin, 16 Sa 868/22, 25 April 2023

The Court ruled that the extraordinary dismissals declared by the delivery service Gorillas against employees employed as bicycle couriers (so-called riders) were effective. The riders had taken part in a 'wildcat' strike and had been dismissed without notice for this reason.

The Court assessed the participation in the 'wildcat' strikes as significant breaches of their contractual duties, assuming that the non-unionised protest action could not be judged as a permissible exercise of the right to strike under Article 9(3) sentence 1 of the Basic Law. In the Court's view, this is not to be judged differently, even taking into account Part II Article 6 No. 4 of the Revised European Social Charter (RESC).

In Germany, industrial action is protected by Article 9(3) of the Basic Law to the extent that it is 'generally necessary to ensure a functioning autonomy of collective bargaining' (Federal Constitutional Court, 1 BvR 779/85, 26 June 1991). According to the case law of the Federal Constitutional Court and the Federal Labour Court, this is also the limit of the right to industrial action. As a means of achieving collective agreements, industrial action must, according to case law, be initiated by an association with the capacity to bargain collectively and be directed against an opponent with this capacity. The resulting tension with international labour law is discussed time and again in legal literature.

2.3 Temporary agency work

State Labour Court Hanover, 5 Sa 212/22, 12 January 2023

The Court held that the question of whether section 1(3) No. 2 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG) was contrary to EU law could be left undecided, as the provision could not be interpreted in conformity with EU law and had to therefore be applied. Thereby, the Court pointed out that Directive 2008/104/EC is not directly applicable. In the Court's view, the so-called group privilege of Section 1 (3) No. 2 of the AÜG is clear and unambiguous in terms of its wording and the sense and purpose that the national legislator has associated with this provision; an interpretation in conformity with EU law, which would then be an interpretation *contra legem*, was inadmissible for legal reasons.

According to section 1(3) No. 2 of the *AÜG*, the law does not apply, with a few exceptions,

> *"between companies belonging to a group of companies within the meaning of section 18 of the Stock Corporation Act if the worker is not hired and employed for the purpose of hiring out".*

The conformity of the provision with EU law is questioned by large parts of the literature. At the same time, however, it is recognised that the wording is unambiguous and that the provision cannot be interpreted in conformity with EU law. Accordingly,

> *"the only way to achieve conformity with the Directive is to expand the catalogue of provisions excluded from the application of the AÜG in the introductory sentence to include the mandatory protective provisions of the Temporary Agency Work Directive. The alternative, however, would be the deletion of the group privilege".*

(see Hamann, in: Schüren/Hamann*, Arbeitnehmerüberlassungsgesetz,* 6th ed 2022, § 1 para 638). In this context, the outcome of the proceedings in CJEU, case C-427/21, *ALB FILS KLINIKEN GmbH* is also likely to be relevant.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Greece

Summary

The Work-life Balance Directive has been implemented in national legislation.

1 National Legislation

1.1 Work-life balance

Presidential Decree 52/2023 transposes Directive 2019/1158 on Work-life Balance for parents and carers and in particular concerns seafarers. The Decree provides for individual rights related to paternity leave, parental leave, careers' leave and flexible working arrangements for seafarers who are parents or careers.

The Directive for other Greek workers was implemented by Article 25 ff of Law 4808/2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

The Supreme Court published a decision in February 2023 on the interpretation of discrimination grounds in case of a strike.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Equal treatment in case of strike

Supreme Court, Mfv.VIII.10.120/2022, 20 February 2023

The Supreme Court published a decision in February 2023 on the interpretation of discrimination grounds in case of a strike. The applicant was a university assistant lecturer at the employer. The employee had actively participated in organising a strike at the employer, including the launch of a strike of a TV channel on Facebook. The defendant employer terminated the employee's employment relationship during the probation period, with immediate effect and without providing a reason.

According to the judgment, the termination of employment was unlawful since it was discriminatory. Article 8 of Act 125 of 2003 on equal treatment contains a list of 19 discrimination grounds including 'political or other opinion' (Article 8 (j)). The Supreme Court emphasised that participation in a strike cannot be considered an opinion. However, it may be an expression of a political opinion and shall be covered by the discrimination grounds described in Article 8 point (j), when it involves participation in a strike with political demands, if the participation in the strike is supplemented with some additional activities on the part of the employee in relation to the strike demands. In the present case, the employee had been involved in such additional activities, therefore, the employee was covered by the protection of the Equal Treatment Act.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) Legislation has been enacted giving employees the right to request flexible or remote working arrangements.

(II) The Workplace Relations Commission has issued its first decisions on complaints under the European Works Council legislation.

1 National Legislation

1.1 Teleworking

The principal purpose of the Work Life Balance and Miscellaneous Provisions Act 2023, when it was first introduced was to give further effect to Directive 2019/1158/EU. The Act amends the Parental Leave Act 1998 ('the 1998 Act') by providing parents and carers with, *inter alia*, five days of unpaid leave for 'medical care purposes', and the right to request a 'flexible working arrangement' for 'caring purposes'. The employee must specify the form of the requested arrangement and its duration. Section 13C of the 1998 Act (inserted by section 8) required the employer, within no more than eight weeks from receipt, to 'consider' the request having regard to the 'needs' of both the employee and the employer. If the request is rejected, the reasons must be shared with the employee.

During its legislative passage, amendments were made to provide for five days of paid 'domestic violence' leave. Amendments were also made to enable all employees, not just parents and carers, to request a 'remote working arrangement'.

Section 20 of the Act provides that an employee may request approval from his or her employer for a remote working arrangement. The request must specify the details of the requested arrangement, the reasons why the request is being made and the details of the proposed remote working location. The employer, within no more than eight weeks from receipt, must 'consider' such a request, having regard to the 'needs' of both the employee and the employer. If the request is rejected, the reasons for this decision must be shared with the employee.

Nothing in the Act prevents an employer from agreeing to more favourable provisions with an employee: see section 17(3) of the Act.

Complaints can be submitted to the Workplace Relations Commission that an employer has not fulfilled its obligations under section 13C of the 1998 Act or section 20, but section 21A(6) of the 1998 Act and section 27(6) make it clear that there can be no assessment during the hearing of a complaint of the merits of an employer's decision to reject a request for teleworking. The maximum compensation that can be awarded for a breach of section 13C is the equivalent of 20 weeks' remuneration whereas the maximum for a breach of section 20 is the equivalent of four weeks' remuneration.

The Act also envisages the adoption of a Code of Practice for the purpose of providing 'practical guidance' to employers and employees about the steps that might be taken to comply with the provisions relating to flexible/remote working requests (see section 31 of the Act).

The Act has not yet been implemented.

2 Court Rulings

2.1 European Works Councils

Workplace Relations Commission, ADJ-00034402, ADJ-00035079, ADJ-00035245 and ADJ-00035766, 14 April 2023

Directive 2009/38/EC has been transposed in Ireland by the amended Transnational Information and Consultation of Employees Act 1996 ('the 1996 Act'). Following the UK's withdrawal from the EU, it is estimated that more than 100 multinational companies have moved their EWCs to Ireland (see the presentation of Dr Werner Altmeyer to the Joint Committee on Enterprise, Trade and Employment in February 2023). One of those companies was Verizon, whose EWC is now operating under the "subsidiary requirements" because its EWC agreement under UK law expired in October 2020 and was not renewed.

In July 2021, four EWC members including the Chair of the EWC, all of whom were based outside of Ireland, referred complaints to the Workplace Relations Commission (WRC) pursuant to the 1996 Act. These were the first ever complaints to be referred under that Act and the decisions thereon were delivered on 14 April 2023 (see ADJ-00034402, ADJ-00035079, ADJ-00035245 and ADJ-00035766).

The complaints all concerned the issue of 'training' and whether central management was required to reimburse the members for the costs of their attendance at a conference in Hamburg. Additionally, there was a further complaint about central management's refusal to discharge the invoice submitted by the EWC's expert.

Verizon contended that the WRC had no jurisdiction to adjudicate on these complaints because the EWC was operating under the 'subsidiary requirements' set out in the Second Schedule to the 1996 Act. The adjudication officer decided, however, that the WRC did have jurisdiction, noting that the protections in Article 10 of the Directive were available to all employee representatives, regardless whether the EWC was one to which the subsidiary requirements applied.

Central to the four complaints was the issue of training. Central management's position was that attendance at the Hamburg conference was not necessary as the EWC members had previously been provided with training in relation to the 1996 Act and the Irish "legal landscape". The complainants categorised this as merely the provision of information; but the adjudication officer decided that the presentations provided by central management did constitute training.

The adjudication officer went on to say, however, that the adequacy of training should be assessed annually. Furthermore, he stressed that the right to training could encompass funds being provided to the EWC to procure training. Consequently, central management could be in contravention of the 1996 Act where it did not provide any training or where the training provided was not effective or where the EWC identified a particular training need that is not addressed.

The adjudication officer declined to make an Article 267 reference to the CJEU.

One of the complainants, however, was awarded EUR 4 000 compensation because he had been threatened with disciplinary action for the manner in which he sought permission from his local management to attend the Hamburg conference.

In relation to the complaint raised by the EWC Chair about the non-payment of the expert's invoice, the adjudication officer decided that not all the items billed in the invoice were either 'required or reasonable'. Consequently, central management was ordered to pay only 50 per cent of the invoice.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Italy

Summary

A ruling by the Court of Palermo applied the national law implementing the Directive on Transparent and Predictable Working Conditions in a case of algorithmic management.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Algorithmic management and transparent working conditions

Court of Palermo, no. 14491/202303, April 2023

The Court applied the Legislative Decree 29 June 2022 No. 104 (*Decreto trasparenza*), transposing Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the European Union (see also August 2022 Flash Report) and establishes the right of unions to be informed on the logics of the algorithm used for the management of labour relationships.

Riders working for food delivery platforms are managed by apps that, through geolocation, locate the rider to whom a 'proposal of delivery' is sent. If he/she accepts it, the app indicates the route with the distance the rider will have to complete and the estimated time, the requirements of the delivery (e.g. delivery of the food up to the door), as well as payment methods.

According to Legislative Decree 104/2022, the public and private employer shall inform the worker about the use of automated decision making or monitoring systems to provide information relevant to the recruitment or assignment, management or termination of the relationship of work, tasks, etc. In particular, the employer or customer is required to provide the worker with the following information: a) the aspects of the employment relationship affected by the use of algorithmic systems; b) the purpose of these systems; c) the logic and operation of the systems; d) the data categories and the main parameters used to programme or train the systems, including the mechanisms for evaluating performance; e) the control measures adopted for the automated decisions, any correction processes and who the quality manager is; f) the level of accuracy and cybersecurity of the systems and the metrics used to measure those parameters, as well as their potentially discriminatory impacts.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid Annual Leave

CJEU case C-192/22, 11 March 2022, FI vs. Bayrische Motoren Werke AG

According to Article 149 (5) of the Labour Law provides that in case of termination of the employment relationship, the employer has the obligation to pay compensation for the entire period of unused paid annual leave. It follows from this provision that there is no time-lapse to the right to use paid annual leave. In addition, Latvia does not have the type of retirement scheme in question in the present case.

It follows that the decision of the CJEU in case C-192/22 has no implications for Latvian law.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

(I) Lithuanian courts are relying on CJEU case law when interpreting limitations to the right to take annual leave, and have difficulty identifying cross-border temporary work patterns and the liability of foreign user undertakings.

(II) A proposal to tighten rules on summary work patterns has been issued.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Limitations to the right to take (prolonged) annual leave

Supreme Administrative Court of the Republic of Lithuania, No. eA-1183-575/2023, 17 April 2023

The Supreme Administrative Court, in an important case concerning the right to so-called prolonged annual leave (for employees (civil servant) who are single parents of a child under the age of 14 years) and limitations to the right to annual leave, has heavily relied on the CJEU's case law on interpreting limitations to the employee's right to annual leave in cases where such leave was not taken due to circumstances not attributed to the employee. In its ruling case No. 22/2021, 30 November 2022, the Constitutional Court acknowledged that the omission in the legal framework of annual leave for civil servants established in the Statute of Civil Service was unconstitutional. The framework did not include additional annual leave for civil servants raising a child(ren) under the age of 14 years on their own, and was recognised as contradicting the Constitution of the Republic of Lithuania. The civil servant, who had been denied this right since 2010, did not only succeed in having her right to prolonged annual leave (five days additionally per annum) confirmed, but was also granted the leave for the period exceeding the general three years of limitation in labour law matters terms (Article 27 (2) of the Labour Code 2002, Article 15 (2) of the Labour Code 2016), and the special limitation of three years to take annual leave (Article 127 (5) of the Labour Code 2016). In approving the lower administrative court's decision, the Supreme Court relied on the interpretation of the right to take annual leave given by the CJEU in cases C-214/16, 29 November 2017, C-684/16, 06 November 2018, C-120/21, 22 September 2022).

2.2 Recognition of cross-border temporary work and liability of the foreign user undertaking

Supreme Court of the Republic of Lithuania, No. e3K-3-123-1075/2023, 20 April 2023

The Supreme Court of the Republic of Lithuania has heard a case on the liability of a German company for damages suffered by a posted Lithuanian worker in an accident at work on a German construction site. The employee had concluded a temporary work contract with a Lithuanian company and had been posted to the territory of Germany to work on a construction site operated by a German enterprise, operating a crane that belonged to the German enterprise. After the crane fell on its side while the Lithuanian employee was operating it, he suffered serious health damages and submitted claims against both the Lithuanian and German companies, stating that the German enterprise had acted as the user undertaking whereas the Lithuanian company, as agreed in the

contract of employment, was only a temporary work agency. The majority of the employee's financial claims were met but the courts lifted the possibility of imposing responsibility on the German enterprise, because of 'unproven fact of temporary work pattern'. This decision was made by Lithuanian courts despite the fact that the employee had concluded a written contract for temporary work, that Lithuanian company was officially registered in the register of temporary work companies in Lithuania and had issued invoices for the work of its temporary workers. The courts held that the contract for temporary work services between German and Lithuanian enterprises had not been signed by the German enterprise and that the companies had concluded an oral agreement on the provision of construction works only. The direct supervision of the Lithuanian worker by a Lithuanian manager on site was considered one of the arguments for asserting the factual non-existence of a temporary work pattern. The case indicates the practical problems that can arise in Member States in connection with proof of temporary work patterns in more sophisticated business operational schemes.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Working time

Some opposition members in Parliament (*Seimas*) have put forward a proposal to amend the Labour Code with the aim of tightening existing rules on the working time regime. A limit to so-called summary working time is proposed by recording working time patterns (i.e. a cumulative working time model which allows an introduction of reference periods and the flexible organisation of shift distributions during this period) in separate departments (branches or representative offices) of continuously operating companies, institutions or organisations or in activities related to the provision of continuous services or continuous production and requiring the permanent presence of employees. In other companies, institutions or organisations, cumulative working time accounting should be entered only after agreement on this in the sectoral or employer level collective agreement. In addition, the proposal introduces 48 hours (instead of previously 35) of an uninterrupted weekly rest period. Given the recent ruling of the CJEU in case of C-477/21, 02 March 2023 (MAV-START), this statutory novelty would actually mean 59 hours of uninterrupted rest periods between two working weeks.

Luxembourg

Summary

(I) A law on moral harassment has been adopted.

(II) A reform on arbitration clarifies that arbitration clauses are not valid in employment relationships.

(III) The law on whistleblowers is about to be adopted

(IV) Amendments have been made to the bill on the right to disconnect.

1 National Legislation

1.1 Law on moral harassment

The law on moral harassment at work (*harcèlement au travail)* has been adopted (for the initial bill, see also the July 2021 Flash Report). This matter was not completely unregulated under Luxembourg law in the past, but the existing rules were deemed insufficiently effective. Thus, a convention of the social partners, which was launched in 2009, was declared to be of a general obligation that is based on the convention concluded at European level (2007 framework agreement on harassment and violence at work). However, it has not yet been implemented in all companies. As for the procedures before the labour courts, the judges relied on general principles of the law of obligations (good faith, *bonne foi*) in an attempt to provide a legal framework and to circumscribe the employer's obligations.

The new law is in many respects closely inspired by the existing rules on sexual harassment, which were introduced in 2000.

Following formal opposition by the Council of State, which feared unequal treatment before the law between civil servants and private law employees, the definition of harassment retained by the legislator is not the one proposed in the initial draft, but the one that already exists in the civil service:

> *"Moral harassment in the context of labour relations (...) constitutes any conduct which, by its repetition or systematisation, undermines the dignity or the psychological or physical integrity of a person"* (*«Constitue un harcèlement moral à l'occasion des relations de travail (…) , toute conduite qui, par sa répétition, ou sa systématisation, porte atteinte à la dignité ou à l'intégralité psychique ou physique d'une personne»*).

On the other hand, the law introduces an innovative addition to clarify that the protection against harassment extends to certain para-professional events: the law provides that

> *"work-related travel, professional training, communications in connection with or as a result of work by any means and even outside normal working hours are an integral part of the performance of work".*

The new law lays down a clear prohibition of mobbing for both the employer and employees, as well as for customers and suppliers. The employer is required to take measures to protect employees from bullying at work. In particular, the employer must define the means available to victims and the rules to ensure a prompt and impartial investigation.

If the employer concludes that the facts are confirmed, he/she is required to take the necessary measures to immediately end the harassment. The law is not more specific in this respect and does not, for example, explicitly require the perpetrator to be punished.

The law involves the employee representatives (*delegation du personnel)*, for example in the protective measures to be taken within the company.

The new rules also include protection against retaliation in the event of protest or refusal against mobbing behaviour, or in the event of testimony about such behaviour. Retaliatory measures are void; in particular, any dismissal can be challenged for nullity within 15 days under an accelerated procedure.

An employee who is dismissed or resigns can claim damages for the harassment he/she has suffered. Even if the law does not specify this, it must be admitted that this possibility also exists outside the context of resignation or dismissal.

This issue has been discussed at length, but the authors of the law consciously decided not to introduce rules for the alleviation of the burden of proof, such as those that exist for sexual harassment or discriminatory harassment. Judicial practice shows, however, that proof is the main obstacle faced by victims of moral harassment. Two new procedures can help victims:

Administrative procedure

If the employer fails to take action or if such action is insufficient and the harassment continues, the employee (or with his or her agreement, the staff delegation) may refer the matter to the labour inspectorate (*Inspection du travail et des mines)* under a newly introduced and innovative procedure. In short, the inspectors must investigate and draft a report within 45 days. If the report concludes that harassment is taking place, the director of the labour inspectorate will issue an injunction to the employer to take the necessary measures to immediately end the harassment. It remains to be seen how the inspectorate will implement this procedure and what form the injunction will take.

Criminal procedure

Moral harassment as such also becomes a criminal offence. The victim therefore has the possibility to file a complaint and to thus bring the law enforcement authorities into play.

Failure to take preventive measures, failure to take the necessary steps to put an end to a proven case of harassment, as well as retaliation are also penalised. However, the fine provided for by the law remains very modest, with a maximum of EUR 2 500.

It seems that the agreement of 2009 between the social partners continues to remain in force. The two texts therefore apply in parallel according to the principle of the predominance of the most favourable rule, with the result that there is potential legal uncertainty.

More generally, it remains to be seen whether this new law will really bear fruit and whether companies will put in place effective measures and procedures to fight harassment. While large companies generally already have a framework in place, the question arises whether this new legislation may be too complex and demanding for smaller companies.

1.2 Arbitration legislation

The New Code of Civil Procedure (*Nouveau Code de Procédure Civile* - NCPC) has been adapted to modernise the rules on arbitration.

The only point of relevance for labour law is the new Article 1225 NCPC, which now explicitly states that disputes between employers and employees cannot be submitted to arbitration (as well as disputes between professionals and consumers and those relating to residential rental leases).

1.3 Aggravating circumstance for discriminatory crimes

A law has been adopted to provide for an aggravating circumstance for all crimes, misdemeanours and contraventions (*crime, délit, contravention)* when these offences have been committed because of one of the elements of discrimination provided for in the Penal Code.

The Penal Code lists criteria for non-discrimination that partly differ (and are more extensive) than those established in the Labour Code. These are: origin, skin colour, sex, sexual orientation, gender change, gender identity, family status, age, state of health, disability, morals (*moeurs*), political or philosophical opinions, trade union activities, actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion.

With certain limits, the aggravating circumstance entails a doubling of the maximum custodial sentence and fine.

This law is not specific to labour law, but it may be important since many discrimination problems occur in the workplace and general or specific labour law offences are provided for in the texts.

For example, the new fine introduced for moral harassment may be doubled if it can be deemed discriminatory harassment.

For a critical analysis of the initial draft, see here.

1.4 Whistleblowers

The Bill transposing European Directive 2019/1937 on the protection of persons who report violations of EU law (whistleblowers) is likely to be adopted very soon. The report of the Parliamentary Committee has recently been published.

We recall that Luxembourg has opted for a very extensive transposition of the Directive, introducing a general protection for any report of an act or omission which is unlawful, or which runs counter to the object or purpose of directly applicable provisions of national or European law.

1.5 Right to disconnect

The government has introduced some amendments to the bill on the right to disconnect, in particular following the opinion of the Council of State.

The Council of State had pointed out that the bill requires companies to set up a general disconnection regime, without any minimum requirements. A company that limits disconnection to a few minutes per day or a few days per year would thus be in formal compliance with the law. However, the protection of employees is a matter that the Constitution reserves for the law, so that such a broad autonomy could not be recognised to the social partners.

It is therefore proposed that the following text be added: "In all cases, this system must ensure compliance with the legal or conventional provisions applicable to working time".

According to the comments on the amendment, the right to disconnect already exists as a result of compliance with these rules, and that the aim of the law is to put in place mechanisms that promote compliance and practical implementation.

However, this new approach refers to the fundamental principle that the employee should only be available to his/her employer (on average) for 8 hours per day and 40 hours per week, and that any period of work interrupts the mandatory breaks and rest periods. In a strict application, the (non-executive) employee would therefore have the right to be disconnected at any time outside of his/her working hours.

The amendments do not, however, address a problem raised by the Council of State concerning a different date of entry into force of sanctions for non-compliance by companies, depending on whether they implement the right to disconnect by collective agreement or by internal agreement with the staff delegation. Because of the different mechanisms and timeframes for negotiation, the government considers that there is a disparity in the objective situation justifying the differentiation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4. Other Relevant Information

4.1 Reduction of working time

To objectify the debate on a possible reduction of working time, which remains fixed at 40 hours per week in Luxembourg, the Minister of Labour commissioned the LISER research institute to carry out a study on the impact of such a project. This study has now been finalised and presented to the social partners, causing a lot of criticism, in particular the absence of the employers at the presentation meeting. According to initial analyses, the study remains ambiguous on the advantages and disadvantages of a reduction in working time; it considers that a global and undifferentiated reduction is difficult to implement (no "one size fits all") and that more detailed studies, and in particular sectoral ones, would be useful.

The Ministry of Labour considers that to cope with the labour shortage and to increase the attractiveness of Luxembourg's labour market, working conditions (work-life balance) need to be improved, especially because salaries are becoming increasingly less competitive compared to neighbouring countries and Luxembourg would have a higher average number of hours worked per year than its neighbours (even if it remains within the European average). A reduction in working hours would therefore be a measure to increase the attractiveness of Luxembourg.

Employers argue that apart from the financial aspects, such a reduction would only accentuate the labour shortage.

4.2 Platform work

The Minister of Labour also announced that a bill concerning platform work will be tabled soon (probably in May). He stated that he did not want to wait for the initiative underway at European level, as this would take too long. The number of platform workers in Luxembourg has been estimated at 2 000 – 2 500.

As mentioned in previous reports, a bill on platform work has already been drafted by the Chamber of Employees and tabled by a very minority political party. This proposal has no practical chance of success, especially if a government proposal is tabled.

However, it should be noted that the parliamentary elections will be held in the autumn, so the fate of this upcoming bill is uncertain.

Malta

Summary

A transferor (of an undertaking) was held liable by the Court to pay commissions arising from the period preceding the transfer.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

In the case *Rikors Ġuramentat Numru 612/15, C-32424, 27 April 2023, Raymond Cassar vs. Montekristo Vineyards Limited by the Honourable Court of Appeal*, the Court of Appeal had to decide (*inter alia*) whether commissions owed to an employee that had been accumulated prior to the transfer of the undertaking must be paid by the transferor or transferee.

This issue had arisen because the defendant undertaking argued that the provisions of Subsidiary Legislation 452.85 - Transfer of Undertakings (Protection of Employment) Regulations, 2003, as subsequently amended, specifically Article 3B) were not applicable because they had entered into force after the transfer in question occurred. This essentially meant that the Court had to decide whether the Transfer of Undertakings (Protection of Employment) Regulations also meant that all commissions to which the employees were entitled to prior to the transfer would be transferred to the transferee by the transferor. The Court ultimately decided that commissions that had been accumulated during the period before the transfer should be paid by the transferor, not by the transferee, because Subsidiary Legislation 452.83 does not include commissions and that the employee had not taken any action that effected an exemption of the transferor from paying him the commissions due.

Hence, the Court ruled that the transferor undertaking was to pay the commissions to the employee.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Platform work

Previous Flash Reports discussed the Digital Platform Delivery Wages, Council Wage Regulation Order, 2022 which were touted as improving the working conditions of digital platform delivery couriers.

However, recent press reports show that many working conditions have not improved at all. In one recent newspaper article, it was clearly stated that platform delivery workers are not being paid the minimum wage and that despite the recent legislative intervention, problems continued to exist and are prevalent in the industry. Enforcement is very weak in Malta but above all, there is a gaping loophole in the relative law, which makes it easy for abusers to find a way to circumvent the legislation. Hence, more needs

to be done to ensure that such legislation is not abused, and, above all, two further measures need to be taken:

- Better enforcement; and
- Much better drafting.

More will be reported on the issue as developments arise.

Netherlands

Summary

(I) The Court of Appeal of the Hague ruled that an inactive employee can also be transferred to the transferee following a transfer of undertaking.

(II) A mediation fee that was agreed upon by a work agency and a self-employed person who was posted to a user undertaking was declared null and void.

(III) The Attorney-General advised the Supreme Court to annul the judgment of the Court of Appeal Arnhem-Leeuwarden in the *Heiploeg* case.

(IV) An employer is required to inform the employee of important changes in the company's pension scheme.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Court of Appeal of The Hague, 200.317.423, 21 March 2023,

This case concerned the interpretation of Directive 2001/23/EC and, more specifically, the question whether an inactive employee also transfers to the transferee following a transfer of undertaking. In the present case, the employee had not worked for the transferor between August 2018 and April 2019 due to a disability. From 1 April 2019 onwards, the employee was no longer available for work at the transferor because of employment elsewhere. In May 2019, a transfer of undertaking took place between the transferor and the transferee. According to the Court of Appeal, the abovementioned circumstances did not change the fact that the employee had transferred to the transferee, since it could not be said this was an unreasonable outcome.

The judgment of the Court of Appeal seems correct in light of the *Piscarreta Ricardo* case, in which the CJEU held that a person who is not in active service also transfers to the transferee if that person is still protected as an 'employee' under national law. This criterion seems to have been met in the present case: on the date of the transfer, the employee was still an employee of the transferor within the meaning of Article 7:610 Dutch Civil Code who, therefore, enjoyed general protection as an employee under Dutch law.

2.2 Temporary agency work

Court of Appeal Arnhem-Leeuwarden, 200.286.626, 28 March 2023

This ruling concerned the question whether a temporary work agency was allowed to deduct a mediation fee of 3.5 per cent from the remuneration of a self-employed person who was posted by that agency to a user undertaking. The self-employed person argued that the mediation fee deducted by the agency violates Article 9 of the Posting of Workers by Intermediaries Act (*Waadi*), which implements Article 5(3) of Directive 2008/104/EC. The Court of Appeal applies the CJEU's *Ruhrlandklinik* case criteria, which the Dutch Supreme Court interpreted in two rulings from 2017 and 2022. On the basis of these criteria, the Court of Appeal found that the self-employed person qualifies as a worker within the meaning of Article 9 Waadi and that the mediation fee is therefore incompatible with that provision. Firstly, according to the Court of Appeal, a hierarchical

relationship existed between the self-employed person and the agency. The general conditions of the agency the self-employed person had to comply with were as follows: he had to familiarise himself with the temporary work agency's protocols, company structure and business processes, he had to comply with the work agency's code of conduct, was bound by a non-competition clause, and was not allowed to appoint a substitute to perform his services. Secondly, the Court of Appeal ruled that the self-employed person worked under the direction of the user undertaking, since he had to perform his duties according to the instructions of the user undertaking's manager and permanent staff. Thirdly, the Court of Appeal found that the self-employed person is protected as a worker under national employment law. In this regard, the Court of Appeal mentioned, apparently by means of an example, that a self-employed person enjoys the protection of Article 7:658(4) Dutch Civil Code, a provision that extends the liability of a user undertaking for the damages an employee suffers in the performance of his or her work as a self-employed person.

There is a lively debate in Dutch literature about the meaning and interpretation of the third criterion (whether the worker is protected as a worker under national employment law). Different from the worker in the *Ruhrlandklinik* case, the self-employed person in question was not a specific type of worker who was not categorised as a 'worker' in national employment law but who was nevertheless treated the same as a worker under national employment law. As a result, it is unsure whether the interpretation of this criterion (which has not yet been interpreted by the Supreme Court) by the Court of Appeal is in line with the *Ruhrlandklinik* case. At the same time, it is argued in Dutch literature that it would be incompatible with the *effet utile* of Directive 2008/104/EC to exclude self-employed persons who qualify as workers from the protection of the Directive simply because they do not enjoy the same level of protection as employees under national law. More guidance from the CJEU is needed.

2.3 Pre-pack procedure

Opinion issued by Advocate General (AG) Drijber, 31 March 2023, 18/04401

On 31 March 2023, Advocate General (AG) Drijber published his opinion in anticipation of the Supreme Court's ruling in the *Heiploeg* case (scheduled for 17 November 2023).

This case concerned the Heiploeg group (a group of companies engaged in the wholesale trade of fish and seafood), which faced major financial problems at the end of 2013. Since bankruptcy seemed inevitable, a so-called pre-pack procedure was initiated in mid-January 2014. The company was purchased and continued by another company. As a result of the bankruptcy, 90 out of around 300 employees lost their jobs. The terms of employment for the remaining 210 employees, who continued to work for the new employer, were mostly less favourable.

The trade unions FNV and CNV initiated a legal procedure, claiming that the pre-pack violated Article 5(1) of Directive 2001/23/EC. This provision formulates a bankruptcy exception, where in short, employees do not have the protection they usually do in the event of a transfer of undertaking. The exception only applies when the following three conditions are met: (i) the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings; (ii) those proceedings have been instituted with a view to the liquidation of assets of the transferor; and (iii) the procedure is conducted under the supervision of a competent public authority.

On 17 July 2018, the Court of Appeal Arnhem-Leeuwarden ruled that Heiploeg's pre-pack procedure met all three conditions. FNV disagreed with this ruling and appealed in cassation. On 29 May 2020, the Supreme Court issued an interlocutory judgment and submitted a preliminary reference to the CJEU. Consequently, on 28 April 2022, the CJEU ruled in the *Heiploeg* case that the pre-pack was considered compatible with the bankruptcy exception in substance. However, the CJEU stipulated the condition that with

regard to the requirements of legal certainty, the pre-pack must be regulated by a statutory or administrative regulation to provide a framework for the application of the bankruptcy exception.

Following the CJEU's judgment, the proceedings at the Supreme Court resumed. In its (further) conclusion, AG Drijber discusses the implications of the CJEU judgment.

He states in his conclusion that the substantive conditions of the bankruptcy exception can be met. However, the CJEU determined that as a formal condition, the pre-pack should be regulated in statutory or administrative regulation. That condition is not met because the pre-pack was developed in case law. According to the AG, it will be up to the legislator to create a legal basis; until that time—according to the AG—the pre-pack cannot be revived. The AG therefore advised the Supreme Court to annul the judgment of the Court of Appeal Arnhem-Leeuwarden.

2.4 Changes in the company pension scheme

Court of North Holland, 9915260 CV EXPL 22-3266, 28 March 2023

This case concerned an employee who worked as a salary partner at a law firm. The law firm and the employee agreed that the employee would not participate in the company's pension scheme, for which part of the contributions were paid by the employer and part the employee. Instead, the employee opted for a higher salary. During the employment relationship, the pension scheme was modified, meaning that the employee no longer had to contribute to the pension scheme. The employee was not informed about this.

According to the Court, under Article 7:611 Dutch Civil Code, the employer should have informed the employee of this important change on the basis of which she could have reconsidered her choice to not participate in the pension scheme. Indeed, the standard arising from Article 7:611 Civil Code is that the employer must treat the interests of employees with care in the event of major changes in terms of employment. The Court emphasised that in the context of pensions, the duty to inform does not only extend to providing information at the employee's request. In addition, the employer's obligation to provide information extends further if it concerns an adverse change for the employee and if the employee's personal and financial interests are known to the employer. This interpretation helps inform the employee about relevant labour conditions and is therefore interesting in the light of Directive (EU) 2019/1152/EC on transparent and predictable working conditions in the European Union.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Labour market package

On 03 April 2023, the government issued a letter elaborating a labour market package, which builds on the letter on labour market reform published on 05 July 2022. The letter of April 2023 is the result of intensive and constructive consultations with the social partners.

The main relevant issues the government aims to address are:

- Choice of employment relationship based on nature and design of work:

  The measures proposed plan to phase out the self-employed tax deduction and the tax old-age reserve; opportunities for self-employed persons to bargain collectively; strengthening the position of self-employed persons in the Social

and Economic Council; and minimising the differences between a permanent and a fixed-term employment contract.

- Strengthening security for workers:
    - Access to an affordable public disability insurance for self-employed persons with an opt-out option where these persons have a private insurance;
    - Improved income and work schedule security for on-call contracts (*oproepcontracten*): a basic contract will be introduced with a minimum number of hours during which they agree to work, plus a number of hours during which they agree to be available to the employer. Lower unemployment benefit premiums will be due where the basic contract is of a permanent duration. Where workers structurally work more hours than the minimum agreed number of hours, the employer has to offer an adjustment on the scope of working hours after a 12-month period. One exception to this new type of on-call contract will be made for pupils and students;
    - Temporary agency workers will benefit from more security after 52 weeks, with a view to giving them a permanent contract sooner. This will be linked to the introduction of a certification system for temporary work agencies;
    - The current break period applicable to successive fixed-term employment contracts (6 months) will be replaced by an administrative expiry period of 5 years. That is, if the period between two successive contracts with the same employer is 5 years or more, the succession of temporary contracts an employee may enter into with that employer will start anew. This will apply to temporary agency workers as well. An exception will be made for pupils and students.
- Retaining workers in the event of calamities and crises:

  The part-time unemployment benefits will be replaced with a crisis regulation on retaining workers from which employers can benefit where there is at least 20 per cent less work across the undertaking. This will not affect workers' unemployment benefits.
- Preventing false self-employment:

  With a view to classifying employment contracts, the criterion 'working in the service of' (authority) established in Article 7:610 Civil Code will be structured along three main elements: (i) material subordination (supervision, instructions, etc.); (ii) the organisational embedding of the work, and—as a contraindication for the existence of an employment contract—(iii) self-employment within the relevant employment relationship. Moreover, a civil law presumption of employment linked to an hourly rate will be introduced.
- New instruments contributing to lifelong development and fostering a smooth transition to new jobs when an employment contract ends will be introduced.

4.2 Child labour

A letter from the Minister of Social Affairs and Employment was published on 13 April 2023 on future alterations in the regulation of child labour. Children under the age of 16 years old will be banned from working as 'flash deliverers'. Flash deliverers are couriers that work for online supermarkets from 'dark stores' that promise to deliver groceries within a short amount of time.

Currently, in line with ILO Convention 138 on minimum age, Directive 94/33/EC on the protection of young people at work, and Article 7 European Social Charter (ESC), the Working Hours Act stipulates that all work performed by children under the age of 16 years is prohibited unless explicitly authorised. Children aged 13-16 years can perform labour under strict conditions, which is further elaborated in the Further Regulation on Child Labour. Since 01 July 2020, this regulation explicitly banned meal delivery by persons aged under 16 years. This ban will be extended later this year to include flash delivery.

Additionally, the Minister of Social Affairs and Employment plans to change the times during which children are allowed to work on non-school days. Children will also be allowed to work until 20.00 h on these days under strict conditions. Children between the ages of 13 and 16 years will also be allowed to work on a limited number of Sundays to which the same conditions apply. Furthermore, the Minister indicated that the current child labour laws and regulations do not sufficiently cover new forms of work such as influencing and vlogging. This will also be investigated to see whether clearer rules are needed to protect children from the risks of this work.

4.3 STAP-budget

On 28 April 2023, the Minister of Finance published the Spring Memorandum 2023 (*Voorjaarsnota 2023*) (*Kamerstukken II* 2022/23, 36350, No. 1). Unlike the government letter elaborating a labour market package published on 03 April 2023 (see 4.1 above), which emphasises that for lifelong development (*leven lang ontwikkelen*) the STAP budget is crucial, the Memorandum announced that the STAP-budget will be repealed as of 2024.

Norway

Summary

The EFTA Court has issued an advisory opinion on the interpretation of the Collective Redundancies Directive.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancies

EFTA Court case E-9/22, 19 April 2023, Verkfræðingafélag Íslands vs. The Icelandic State

The EFTA Court has issued an advisory opinion to the Icelandic Court of Appeal (Landsréttur) in a case involving the Association of Chartered Engineers in Iceland, the Computer Scientists' Union and the Pharmaceutical Society of Iceland and the Icelandic State concerning the interpretation of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

The case concerned the termination of specific overtime agreements for technical support workers, which had been concluded in addition to the workers' employment agreements. The affected workers were offered new temporary agreements covering normal overtime. The question was whether the termination of the overtime agreements was to be considered a collective redundancy in line with the Icelandic legislation implementing Council Directive 98/59/EC.

The questions of the Icelandic Court to the EFTA Court were:

1. Does it follow from Article 1(1) and Article 2 of Council Directive 98/59/EC, as well as from the principle of effectiveness, that an employer who intends to terminate the contracts of a group of workers on fixed overtime is required to observe the procedural rules laid down in the Directive, including consultations with worker representatives under Article 2 of the Directive and notification of the competent public authority under Article 3 of the Directive?
2. If the answer to the first question is in the affirmative, does the employer's obligation cease to apply if the termination of contracts on fixed overtime does not subsequently result in the full termination of the workers' employment contracts?
3. Is it of significance for the answer to the first two questions whether the contracts on fixed overtime which are terminated by the employer were specifically concluded as independent contracts in addition to the workers' employment contracts?

The Court responded as follows to the questions:

1. The first subparagraph of Article 1(1) (a) of Council Directive 98/59/EC must be interpreted as meaning that the fact that an employer—unilaterally and to the detriment of the employee—makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy'. The second subparagraph of Article 1(1) of Directive 98/59/EC must be interpreted as meaning that a notice of amendment that does not reach the threshold of constituting a 'redundancy' for the purpose of the first subparagraph of Article 1(1) (a) of that

Directive can be assimilated to a "redundancy", provided that the conditions laid down in the second subparagraph of Article 1(1) of that Directive are fulfilled. The consultation procedure provided for in Article 2 of Directive 98/59/EC must be initiated by the employer once a strategic or commercial decision requires him or her to contemplate or plan for collective redundancies. Where a decision involving the amendment of conditions of employment could help avoid collective redundancies, the consultation procedure must begin once the employer intends to make such amendments. An employer is required to notify the competent public authority about any projected collective redundancies according to the first subparagraph of Article 3 of Directive 98/59/EC. Such a notification must include anticipated redundancies within the meaning of the first subparagraph of Article 1(1) (a) of that Directive and terminations of employment contracts assimilated to redundancies within the meaning of the second subparagraph of Article 1(1) of that Directive.

2. The obligation to initiate the consultation procedure and to notify the competent public authority laid down in Articles 2 and 3 of Directive 98/59/EC cannot depend on subsequent events, such as whether employment contracts are in fact terminated.
3. It is irrelevant whether an employee's conditions of employment are stipulated in one contract or are distributed across several contracts.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Poland

Summary

(I) The new law on remote work regulating work outside the office came into force together with the new rules on the necessary documentation in relation to remote work.

(II) The amendment implementing the requirements of the Work-life Balance Directive and the Transparent and Predictable Working Conditions Directive came into force.

1 National Legislation

1.1 Remote work

The regulations on remote work came into force on 07 April 2023 on the basis of the Act of 01 December 2022 on the amendment of the Labour Code and other acts (JoL 2022, item 240, the law is available here).

A detailed description of the new regulations on remote work (also included in previous Flash Reports) are presented below:

Definition of remote work

Remote work 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 each time with the employer, including the employee's residence by means of direct remote communication.

Location of remote work

The location of remote work can be:

- the employee's home;
- other location chosen by the employee.

Remote work may be carried out (approved each time by the employer) in such locations 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 work partially at the office.

Entitled individuals

Remote work can be performed by employees in all positions (with exceptions). Those entitled to remote work 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 work

Remote work may be introduced in the following situations:

- when the contract of employment is being concluded;
- during the employment relationship;
- by the employer's order to work remotely;
- occasional performance of remote work during the employment relationship.

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

(i) at the employee's request or the employers' initiative when the contract of employment is being concluded;

(ii) at the employee's request or the employers' initiative during the employment relationship;

(iii) by the employer's order to work remotely (during a period of state of emergency, epidemiological threat, or state of epidemic and within 3 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 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 on paper or electronically that the employee has the necessary premises and technical conditions to perform remote work;

(iv) at the employee's request for occasional remote work, during the employment relationship.

The employer must accept a request for remote work from special categories of employees who enjoy additional protection (pregnant women, employee raising a child up to the age of 8 years, parent of a disabled child (also when that child has turned 18)) - except if it is not possible due to the way in which the work is organised, or the type of work being carried out by the employee (the employer must inform the employee of the reason for rejecting the request in writing or electronically within seven work days from the date of submission of the employee's request).

Occasional remote work

Occasional remote work can take place:

- at the employee's request;
- for not more than 24 days in a calendar year;
- without obligation to implement special regulations and reimburse an employee for the costs of remote work.

Remote work may be carried out occasionally, at the employee's request submitted in writing or electronically, for up to a maximum of 24 days per calendar year. The performance of remote work, H&S and compliance with security and information protection requirements, including with personal data protection procedures, should all be checked in accordance with the terms agreed with the employee.

Conditions for remote work

Remote work can be regulated in:

- an agreement with the company's trade union; or
- regulations issued by the employer; or
- an agreement concluded with the employee; or
- an order of the employer.

The rules for remote work may be specified in one of four permissible forms: (i) an agreement with the company's trade union (within 30 days from the date of the employer's submission of the draft agreement); (ii) regulations issued by the employer; (iii) an agreement concluded with the employee; (iv) the employer's order (only in cases indicated in 4 (iii) above).

Each of (i)-(iv) above should specify:

(i) the group or groups of employees who may be subject to remote work (that do not apply to an agreement concluded with the employee and an order of the employer);

(ii) the rules for how the employer covers the costs of remote work;

(iii) the rules for determining a cash equivalent or lump sum for the employee's use of own equipment;

(iv) the rules for how the employer and the employee communicate during remote work, including how the remote worker will confirm attendance at work;

(v) rules for checking the work of an employee who is working remotely;

(vi) rules for checking the health and safety at work;

(vii) rules for checking compliance with security and information protection requirements, including procedures for the protection of personal data; rules for installing, record-keeping, maintaining and updating software and repairing the work tools entrusted to an employee, including equipment.

Employer's health and safety obligations

The employer's health and safety obligations to remote workers include:

- preparing an occupational risk assessment;
- preparing information on rules for remote work including rules for health and safety in remote work and the employee's obligation to comply with them.

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

- drawing up an occupational risk assessment for specific job categories; and
- preparing information containing rules for remote work (the employee must confirm that an employee has read this information in a statement submitted in paper 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 vision, the musculoskeletal system and psychosocial conditions of the work. Based on the results of this assessment, the employer must draw up information containing the:

(i) rules and methods for the proper organisation of a remote workstation, taking regard to ergonomics;

(ii) rules for healthy and safe remote working;

(iii) actions to be carried out after completion of the remote work;

(iv) 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 work positions).

In case a remote work 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 doubts).

The employee's health and safety obligations

The employee's H&S obligations include:

- arranging the workplace;

- providing meals and refreshments (if required by law);
- providing sanitary facilities and personal hygiene products.

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

(i) arranging the workplace (adequate to 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);

(ii) providing meals and refreshments (if required);

(iii) providing sanitary facilities and necessary personal hygiene products.

The employer's obligations towards employees working remotely

The employer's H&S obligations to remote workers include:

- providing materials and work tools;
- providing or covering the costs of installing, servicing and maintaining the work tools;
- providing training and technical assistance.

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

(i) providing the remote worker with materials and work tools, including equipment, required for carrying out remote work;

(ii) providing or covering the costs of installing, servicing and maintaining the work tools, including equipment, as well as covering the costs of electricity and telecommunications services required for remote work;

(iii) covering other costs related to remote work if their reimbursement is specified in the agreement/regulations/agreement/order;

(iv) providing the remote worker with the training and technical assistance needed to carry out the work.

Cash equivalent / lump sum payment

The following are the distinct ways in which the employer may compensate the employee for using own materials and tools for remote work:

- cash equivalent;
- lump sum (a fixed amount).

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

When determining the amount of the cash equivalent or the 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.

Aspects and principles of checking remote work

Aspects of checking remote work:

- checking the employee's performance of remote work;
- checking compliance with H&S regulations;

- checking compliance with security and information protection requirements, including data protection procedures.

Principles of checking remote work:

- 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 home premises;
- in a manner appropriate to carrying out remote work.

The employer is entitled to check:

(i) the employee's performance of remote work;

(ii) compliance with H&S regulations;

(iii) compliance with security and information protection requirements, including data protection procedures.

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

(i) in consultation with the employee;

(ii) at the location where the remote work is being carried out;

(iii) during the employee's working hours;

(iv) without violating the privacy of the remote worker and others, or interfering with the intended use of the home premises;

(v) in a manner appropriate to the performance of remote work (therefore, it may be both in-person and online).

Employees' rights to use the company's premises

Employees working remotely have the right to:

- attend the workplace;
- communicate with others;
- use the employer's premises;
- (and additionally to equal treatment and to receiving relevant information prior to commencing remote work).

The remote worker has the following rights:

(i) to attend the workplace;

(ii) to communicate with other employees;

(iii) to use the employer's premises and facilities on the terms and conditions applicable to all employees;

(iv) to use the company's social facilities and take part in social activities in accordance with rules that apply to all workers;

(v) to be treated at least as favourably with regard to the establishment and termination of employment, the terms and conditions of employment, promotion and access to training to improve his or her professional qualifications, like other employees engaged in the same or similar work (having regard for the specific nature of remote work);

(vi) to receive information, before commencing work about the employer's organisational unit to which the remote worker's workplace/station belongs;

(vii) 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 the remote work.

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

Termination of remote work

Remote work may be terminated, if:

- such work was agreed during the employment relationship;
- such work was ordered by the employer (in other cases, there are no regulations for terminating remote work).

Remote work may be terminated in the following ways:

(i) if the remote work was agreed at the time when the employment contract was entered into – no regulated issue of resignation;

(ii) if the remote work 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;

(iii) if the employer ordered the remote work – 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 prevents remote work).

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

Special categories of employees may not be recalled from remote work, unless further remote work is not possible due to how the work is organised or the type of work carried out by the employee.

1.2 Amendment to regulations on employment documentation for remote work

On 07 April 2023, Regulation of the Minister of Family and Social Policy, dated 06 March 2023, amending the regulation on employee records came into force (Journal of Laws 2023, item 471, the Regulation is available here). The new law requires keeping documentation on remote work in Part B of the employees' personnel files.

1.3 Work-life balance and transparent and predictable working conditions

On 26 April, 2023, Act amending the Labour Code and other Acts (Journal of Laws 2023, item 641, the Regulation is available here).

The Act implements two EU Directives into Polish legislation:

- 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;

- 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 repealing Council Directive 2010/18/EU.

The main changes to labour law regulations included in the Act are presented below.

New employer's information obligations

The employer shall inform the employees, among others, about:

- the standard daily and weekly working times;
- daily and weekly working hours;
- work breaks;
- daily and weekly rest periods;
- rules on overtime work and compensation for it;
- rules on transitions from shift to shift (shift work);
- rules on movement between places of work (several places of work);
- other components of remuneration and benefits;
- the amount of paid leave;
- applicable rules for termination of employment;
- the employee's right to training;
- a collective bargaining agreement or other collective agreement;
- rules of conduct in the absence of work regulations.

Scope of information obligation

The employer shall inform the employees in writing or electronically (no later than seven days from the date of the employee's admission to work), at least about:

- the standard daily and weekly working times applicable to the employee;
- the daily and weekly working hours applicable to the employee;
- work breaks the employee is entitled to;
- daily and weekly rest periods the employee is entitled to;
- rules on overtime work and compensation for it;
- in the case of shift work, rules on transitions from shift to shift;
- in the case of several places of work, rules on movement between places of work;
- other components of remuneration and benefits in cash or materials to which the employee is entitled (other than those agreed in the employment contract);
- the amount of paid leave to which the employee is entitled (in particular, annual leave or, if it not possible to determine it on the date of providing the employee this information, rules for its calculation and granting);
- applicable rules for terminating the employment relationship (including formal requirements, length of notice periods / method of determining such notice periods and deadline for appeal to the labour court);
- the employee's right to training if provided by the employer (in particular, the general principles of the employer's training policy);

- a collective bargaining agreement or other collective agreement to which the employee is covered (and if a collective agreement is concluded outside the workplace by general bodies or institutions, the name of such bodies or institutions);
- if the employer has not established work regulations, the date, place, time and frequency of payment of remuneration for work, night-time work and methods adopted by the employer for employees to confirm their arrival and attendance at work and justify their absence from work.

Additionally, the employer shall inform employees in writing or electronically no later than 30 days from the date of the employee's admission to work, about the name of the social security institutions to which social security contributions related to employment are paid and information about the social security protection provided by the employer; however, this does not apply to the case in which the employee chooses the social security institution.

Obligation to inform on amendments

The employer shall inform employees about:

- the change of address of its registered office / place of residence, no later than within seven days from the date on which the change occurred;
- the change of terms and conditions of the employment as indicated above;
- coverage of the employee by a collective bargaining agreement or other collective agreement immediately (but no later than the date on which such a change applies to the employee).

This does not apply if the change in the terms and conditions of employment is due to a change in provisions of labour law and social security regulations, if these regulations are indicated in the information provided to the employee.

Form of information

The employer is entitled to inform employees about the above-mentioned details indicating in writing or electronically.

Obligation to inform about job opportunities

The employer shall notify the employee about job opportunities.

The employer is required to inform the employees in the manner adopted by the employer about:

(i) the possibility of full-time or part-time employment;

(ii) opportunities for promotion;

(iii) vacancies.

The referral of the employee abroad

The employer shall inform the employee about:

- the country or countries;
- expected duration of such work;
- currency of remuneration;
- cash or material benefits;

- provision or lack of provision for the employee's return to the country;
- conditions for the employee's return to the country (if applicable).

Prior to the departure of the employee to work or for a business assignment abroad for a period exceeding four consecutive weeks, the employer shall provide him or her information in writing or electronically about: (i) the country or countries in which the work or business assignment is to be performed, (ii) the expected duration of work or business assignment, (iii) currency in which the employee shall be paid (in this case, the employer may also indicate in writing or electronically the relevant labour provisions), (iv) cash or material benefits related if such benefits are provided in labour regulations or arise from the employment contract; (v) the provision or lack of provision for the employee's return to the country; (vi) the conditions for the employee's return to the country if such return is provided.

Specifically, the employer shall immediately inform the employee in writing or electronically of a change in the above terms and conditions of employment (but no later than the date on which such a change applies to the employee). However, this does not apply in the case where change in terms and conditions of employment is due to a change in labour regulations if such regulations were specified in the information provided to the employee.

Employment contract content

An employment contract shall specify:

- parties to the contract;
- address of the employer's registered office / place of residence;
- type of contract;
- date of its conclusion;
- terms and conditions of work and pay.

Under the new law, an employment contract shall specify: (i) parties to the contract; (ii) address of the employer's registered office (if the employer is an individual and does not have a registered office, the place of residence) - a new component of the employment contract; (iii) type of contract; (iv) date of its conclusion; and (v) terms and conditions of work and pay, in particular:

- type of work;
- place or places of work;
- remuneration for work corresponding to the type of work (indicating components of remuneration),
- working hours;
- day of commencement of work;
- in the case of a probationary employment contract, its duration or date of its termination (and, when the parties so agree, a provision on extending the contract for the period of leave, as well as by the time of other excused absences of the employee from work if such absences occur) and the period for which the parties intend to conclude a fixed-term contract and a provision for the extension of the contract in the case referred to as envisaged by changes to the law;
- in the case of a fixed-term employment contract, its duration or date of its termination.

Termination of a fixed-term employment contract

The employer will be required to:

- indicate the reason justifying the notice or termination of contract;
- notify the company trade union organization representing the employee in writing of the intent to terminate.

Notification obligation: the employer's statement of termination of a fixed-term employment contract should specify the reason justifying the termination of the contract, and the employer shall notify the company trade union organisation representing the employee in writing of its intent to do so (accompanied by a justified reason).

Redresses: in the event of irregularities, the employee may be entitled to compensation or reinstatement. If the period until which a fixed-term employment contract was to have lasted has expired by the time a judgment is issued or if reinstatement is not recommended due to the short period remaining until expiry of that period, an employee is entitled to compensation only (equal to the remuneration for the period he or she would have been entitled to had the contract not been terminated, but not more than three months).

Probationary contract

A probationary employment contract is permitted for a maximum period of one, two or three months (depending on the expected type and length of contract at the end of the probationary period).

Length of contract: a probationary contract shall be concluded for a maximum period of three months with the possibility of concluding it for a maximum period of: (i) one month (in the case of intent to conclude an employment contract for a fixed term of less than six months); (ii) two months (in the case of intent to conclude an employment contract for a fixed term of at least six months and less than 12 months).

Right to extend: Parties to the contract will be entitled to extend the above-mentioned periods of one and two months once in a probationary employment contract, but not more than by one month if justified by the type of work, and will also be entitled to agree that the contract will be extended by the time of annual leave as well as other excused absence of the employee from work if such absence occurs (the employer will be able to re-enter into a probationary employment contract under the same conditions if hired to perform different type of work).

Content of contract: The probationary employment contract should include its duration or date of termination (and, if the parties so agree, a provision on extending the contract for the period of leave, as well as by the time of any other excused absence of the employee from work if such absences occur) and the period for which the parties intend to conclude a fixed-term contract and a provision for the extension of the contract in the case referred to as envisaged by changes to the law.

Right to additional employment

The employer will not be entitled to restrict employees from working for other employers.

Prohibition: the employer cannot prevent an employee from simultaneous employment with another employer or from being in a simultaneous legal relationship being the basis for the provision of work other than through employment.

Exceptions: the right to additional employment may be restricted: (i) in a non-competition agreement, or (ii) if separate regulations permit such a restriction.

Time of training deemed as overtime

Training ordered by the employer will be considered to be working time and paid by the employer

Obligation to cover the costs of training: in case of training undertaken by an employee at the instruction of a supervisor, or if the employer's obligation to train employees necessary for a specific type of work or work in a specific position arises from:

- provisions of a collective agreement; or
- other collective agreement; or
- regulations; or
- the law; or
- employment contract;

such training shall come at the employer's expense and, as far as possible, shall take place during the employee's work hours.

Obligation to consider trainings as working time: the time of the aforementioned training outside the employee's regular working hours shall be included in working time.

Flexible work arrangements

Employees raising a child up to the age of eight will be able to request flexible work arrangements.

Forms of flexible arrangements: employees raising a child up to the age of eight years will be able to submit a request, either in writing or electronically, for flexible work arrangements, which are considered: (i) remote work, (ii) work time system: interrupted work, shortened work week and weekend work, (iii) so-called flexible starting hours; (iv) individual work time schedule; (v) reduction of working hours.

Application: an application will be submitted at least 21 days before the planned start of the use of flexible work arrangements. In such an application for flexible work arrangements, the employee must indicate: (i) the name and date of birth of the child; (ii) reason for having to use flexible work arrangements; (iii) start and end date of the flexible work arrangement; (iv) type of flexible work arrangement the employee plans to use.

Employer's decision: the employer will consider a request for flexible work arrangements based on the worker's needs, including the date and reason for the need to use flexible work arrangements, as well as the employer's needs and capabilities, including the need to ensure continuity of work, the organisation of work or type of work performed by the employee. After considering a request for flexible work arrangements, the employer shall inform the employee that the request has been granted, the reason for rejecting the request, or a different possible date for the use of flexible work arrangements than that indicated in the request - in writing or electronically within seven days of receipt of the request.

Return to previous conditions: a worker requesting flexible work arrangements may at any time submit an application in writing or electronically to return to the previous work arrangement before expiration of the start and end dates of the flexible work arrangement indicated in the application if is justified by a change in circumstances for which the employee requested flexible work arrangements. The employer, after considering the application and taking the respective circumstances into account shall inform the employee of approval or the reason for rejecting the application or possible

date of return to work, in writing or electronically within seven days of receipt of the application.

Prohibition of termination: the submission of an application by the employee for flexible working time organisation may not constitute a reason justifying termination of the employment contract or termination without notice by the employer or any reason justifying preparations for termination or termination of employment without notice.

Right to request amendment to the employment contract

The employee will be able to request a change in the type of contract once a year:

- into an indefinite-term contract; or
- more predictable and safer work conditions.

An employee who has been employed for at least six months (previous employment will be included if the employee has been transferred from one to another employer) to request in writing or electronically a change in the type of contract once a year: (i) to an indefinite-term contract, or (ii) more predictable and safer work conditions (including those involving a change in the type of work or full-time employment). However, this does not apply to an employee hired under an employment contract for a probationary period (need for a written or electronic response to this request no later than one month from the date of receipt of such a request - with a justification if the request is rejected).

Additional breaks

Employees will be entitled to a second 15-minute break if the employee works more than nine hours, and a third 15-minute break if the employee works more than 16 hours.

Employees will be entitled to additional breaks (included during working time): (i) right to a second break of at least 15 minutes if daily working time exceeds nine hours (ii) right to a third break of at least 15 minutes if daily working time exceeds 16 hours.

Exemption from work 'due to force majeure'

Such an exemption will be applicable at the rate of two days or 16 hours with the right to half pay.

Scope of the right: an employee is entitled to exemption from work during the calendar year either two days or 16 hours due to force majeure for urgent family matters caused by illness or accident if the employee's immediate presence is necessary. During this exemption from work, the employee retains the right to a salary in the amount of half his or her salary (the manner of its use in a calendar year is decided by the employee in the first request for such leave submitted in a calendar year).

Rules of granting: the employer shall grant exemption from work: (i) at the request submitted by the employee no later than on the day the exemption is used; (ii) on an hourly basis for a part-time employee - in proportion to the employee's working hours (an incomplete hour of exemption from work shall be rounded up to the nearest whole hour).

Care leave

Employees will be entitled to a care leave up to five days per calendar year.

Duration of the leave: under the new law, employees will be granted care leave of up to five days per calendar year to provide personal care or support a person who is a family member or resides in the same household and who requires care or support for serious medical reasons (a family member is considered a son, daughter, mother, father or spouse).

Unpaid: care leave will be unpaid.

Form of application: the employee will be able to submit a request in writing or electronically with at least one day's advance notice. Care leave will be granted on days that are working days for the employee according to the employee's work schedule and the period of care leave shall be included in the period of employment on which the employee's rights depend.

Parental leave

Employees will be entitled to parental leave of a total of 41 or 43 weeks (depending on how many children are born at one birth).

Scope of leave: the parental leave period will be extended by nine weeks. It will last:

- 41 weeks – in case of a single birth;
- 43 weeks – in other cases (multiple births).

Parental leave will also be extended when combined with work. It can last for a maximum of:

- 82 weeks – in case of a single birth;
- 86 weeks – in case of multiple births.

Longer leave is granted to some parents of children with disabilities.

Nine weeks of exclusive parental leave: each parent shall have nine weeks of parental leave on an exclusive basis. To this extent, leave will not be transferable to the other parent. Nine weeks of exclusive parental leave will accrue as part of and not in addition to the 41/43 weeks of leave.

Transition period: if, on the date of entry of the amendment into force, an employee is already on leave granted under the so-called long application for parental leave (i.e. for the entire maternity and parental leave), his or her leave will be extended by nine months.

Form of leave application: a distinctive feature of the new legislation will be the ability to apply not only in writing, but also electronically. This also applies to an application for parental leave, as well as for its combination with work. The employer will therefore also have to accept an electronic application.

Parental leave in five parts: parental leave will be allowed until the end of the calendar year in which the child turns six years old. The school employee will be able to use it in one go or in parts (maximum five parts).

Expanded employment protection: in connection with parental leave, the protection of employment has been extended. During this leave, but also from the date of application until the date of its commencement, it will be prohibited not only to terminate employment but also to prepare for termination or terminate the employment relationship without notice.

Maternity allowance for the period of parental leave: generally, maternity allowance during parental leave is to be paid at 70 per cent of the assessment basis. However, another solution is possible. This is because an employee will be able to submit a request for payment of the maternity benefit for the entire period of maternity and parental leave at 81.5 per cent of the assessment base. Such a request can be made within 21 days of the date of childbirth. In this situation, a benefit of 70 per cent would be payable for the nine weeks of exclusive leave (see above).

Paternity leave

Paternity leave will can only be taken until the child is 12 months old.

The employee-father shall be entitled to paternity leave of up to two weeks, but no longer than until: (i) the child reaches the age of 12 months, or (ii) the expiration of 12 months from the date when the decision declaring the adoption of the child is effective, and no longer than until the child reaches the age of 14 years.

Protection of employment

Employees using leave related to parenthood will be granted special protection of employment.

Scope of the protection: according to the amendments: (i) during pregnancy; (ii) during the period of maternity leave; (iii) from the date of a worker's application for maternity leave or part thereof; (iv) from the date when a worker applies for maternity leave or part thereof; (v) from the date when a worker applies for paternity leave or part thereof, parental leave or part thereof, the employer will not be able to:

- conduct preparations to terminate employment with that worker or terminate it without notice;
- terminate or dissolve employment with that worker, unless there are reasons justifying termination without notice due to its fault and the company trade union representing the worker has agreed to the termination.

Timeframe of the protection: protection shall begin: (i) seven days before the start of paternity leave or part thereof; (ii) 14 days before the commencement of part of maternity leave and part of parental leave; (iii) 21 days before the start of parental leave or part thereof.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

Several amendments to Portuguese labour law to implement the 'Decent Work Agenda' entered into force on 01 May 2023.

1 National Legislation

1.1 Amendments to labour legislation

Law No. 13/2023, published on 03 April 2023, amends the Portuguese Labour Code and related legislation, implementing the so-called 'Decent Work Agenda'. In general terms, the provisions of Law No. 13/2023 entered into force on 01 May 2023 and also apply to employment contracts already in force on that date.

the main changes to the labour law introduced by the referred law are presented below.

Employer information duties

This new law transposes Directive 2019/1152/EU, of 20 June 2019, on transparent and predictable working conditions in the European Union into national law.

In this context, the duty of information incumbent upon the employer is extended to cover several new areas. The information must be provided by the seventh day of when the employment relationship becomes effective or, for certain matters, within one month from the same date, and the employer must keep evidence of the transmission of this information.

The employer must also provide an update to the employee in writing on any changes to the elements covered by the information duty by the date upon which the relevant amendment takes effect.

Probation period

The employer is required to provide information to the employee on the duration and conditions of the applicable probation period in writing at the beginning of the contract. There is a legal presumption that the probation period is excluded whenever the employer fails to comply with such a (new) information duty.

The probation period is reduced if the employee has completed a professional traineeship with a different employer in the previous 12 months, provided that this professional training lasted 90 days or more and was carried out for the same role.

The notice period applicable to the employer to terminate the employment contract during the probation period, is extended from 15 to 30 days, whenever the probation period has exceeded 120 days of duration.

Temporary work

The new law introduces some amendments to the temporary work regime to fight the precariousness and protect temporary employees.

Within this context, the temporary employee will be deemed to be employed by the user undertaking under an open-ended employment contract, whenever the contract for the use of temporary work is concluded with an unlicensed temporary work agency.

The current maximum admitted number of renewals of temporary employment contracts is reduced (from six) to four. The overall duration of successive temporary work contracts for different users, agreed with the same company, controlled or

controlling companies, a company under a group relationship, or companies sharing organisational structures is limited to a maximum of four years.

Professional traineeship

The legal framework of professional training, established in Decree Law No. 66/2011, of 01 June, has been amended in the following terms:

(i) Professional trainees will be entitled to an allowance corresponding to at least 80 per cent of the mandatory minimum monthly remuneration (which, in 2023, is fixed at EUR 760);

(ii) The traineeship promoter must contract work accident insurance coverage to protect professional trainees against occupational accidents which replaces personal accident insurance mandatory until now;

(iii) The professional traineeship is treated as an employment contract for social security purposes and, therefore, trainees and traineeship promoters must pay social security contributions.

Self-employed workers in a situation of 'economic dependence'

In innovative terms, it is envisaged in the Labour Code that collective bargaining agreement provisions in force in the relevant professional and geographic sector of activity are applicable to self-employed workers in a situation of 'economic dependence'.

Furthermore, some rights of a collective nature have been extended to these service providers, namely the right to be represented by trade unions and works councils and the recognition of the possibility of trade unions negotiating collective bargaining agreements specifically for self-employed workers.

Parental care leave and care worker protection

The new law transposes Directive 2019/1158/EU, of 20 June 2019 on work-life balance for parents and carers into Portuguese law.

The following changes have been introduced in the Portuguese Labour Code:

(i) With regard to initial parental leave, the main innovation is the possibility that after 120 consecutive days of leave, parents may combine the remaining days of leave with part-time work;

(ii) The mother's exclusive parental leave corresponds to 42 consecutive days following childbirth;

(iii) The duration of the father's exclusive parental leave is fixed at 28 days, to be taken consecutively or in interpolated periods of at least seven days in the 42 days period following the birth, to which an optional seven days' leave is added;

(iv) Recognition of a specific status under labour law of the so-called 'care workers' (i.e. employees who have been granted the status of non-principal informal carer under the terms of the applicable legislation upon presentation of the corresponding proof), which implies:

i) The granting of specific rights, namely the rights to take leave for providing care to the person being cared for, to work part-time for a maximum of four years or under a flexible working time regime for as long as the need for care persists, as well as not being required to provide overtime work;

ii) The granting of protection in case of termination of the employment contract in similar terms to that foreseen for parenthood.

Digital platforms

In innovative terms, work for digital platform operators is now regulated in the Labour Code, mainly through the establishment of a rebuttable presumption of the existence of an employment contract, whenever at least two of the characteristics provided for by law to qualify the case as that of an employee (as opposed to an independent contractor) are present.

Algorithms and artificial intelligence

Another innovation of Law No. 13/2023 is the regulation in the Labour Code of the use of algorithms and artificial intelligence. Specifically, according to the new rules, the use of algorithms and artificial intelligence for the hiring of employees or the management of working conditions generates information duties towards employees, the works council and union delegates. Furthermore, the protection of the employee or job applicant against discrimination is expressly established, even if the decision was based on the use of algorithms or on artificial intelligence systems.

Overtime work

Overtime work of over 100 hours per year becomes more onerous. It must be paid with the following increase to the hourly date (which is double the one applicable for overtime work provided up to that limit): *i)* on working days, an additional charge of 50 per cent on the first hour or fraction thereof, and 75 per cent on the subsequent hour or fraction thereof; *ii)* on a compulsory or complementary weekly rest day or on a public holiday, an additional charge of 100 per cent on each hour or fraction thereof.

Non-waivability of labour credits

The Labour Code now states that the employees' labour credits arising from the employment contract, its breach or termination cannot be extinguished by waiver or remission, unless the corresponding declaration is issued in a court settlement.

Compensation for termination of the employment contract

Compensation due to the employee for the termination of his or her employment contract—severance pay—is increased to *i)* 24 days (instead of 18 days) of the base remuneration and seniority premiums ('*diuturnidades*') for each year of seniority in case of t termination of a fixed-term employment contract, and *ii)* to 14 days (instead of 12 days) of the base remuneration and seniority premiums ('*diuturnidades*') for each year of seniority in case of dismissal for objective reasons (collective dismissal and redundancy resulting from extinction of the job position).

Prohibition of outsourcing

The outsourcing of services is prohibited, if hired to satisfy needs previously filled by an employee whose employment contract was terminated within the previous 12-month period as a result of collective dismissal or of extinction of the job position.

Trade union action in the company

Trade unions without affiliated employees in the company are recognised the right to have an appropriate place to exercise their functions in companies or establishments with at least 150 employees, as well as to post and distribute trade union information. Under specific conditions, those associations may participate in employees' meetings in the workplace.

1.2 Update to the remuneration of public administration employees

Decree law No. 26-B/2023, of 18 April promotes the mid-term update of the amount of remuneration of public administration employees. In particular, the value of the pecuniary amounts of the remuneration levels is increased by 1 per cent. This rule shall take effect from 01 January 2023.

1.3 Meal allowance amount applicable to public administration employees

Ordinance No. 107-A/2023 updates the amount of meal allowance to EUR 6 for each day of service effectively rendered, as of 01 January 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Romania

Summary

(I) The government has simplified the procedure for designating a contact person for the competent authorities in undertakings that post workers to Romania.

(II) The new category of 'professional cultural workers' benefits from a series of labour law rules, even though they have not concluded an employment contract.

(III) The High Court of Cassation and Justice unifies judicial practice on the salary owed to employees seconded from the private sector to the public sector.

1 National Legislation

1.1 Posting of workers

Government Decision No. 302/2023, published in the Official Gazette of Romania No. 290 of 06 April 2023, amended the methodological norms for the posting of workers within the framework of the provision of services on Romanian territory.

The Statement of Reasoning of the Romanian government's Decision No. 302/2023 explains that the reason for this change is the assessment of the national measures Romania introduced to implement Directive 2014/67/EU on the enforcement of Directive 96/71/EC. The European Commission found that the Romanian national measures did not comply with Article 9 of the Directive. The undertakings established in a Member State other than Romania have the obligation to designate a person to liaise with the competent national authorities and to send and receive documents and/or notifications, if necessary. According to the methodological norms, that person can only be:

- either the legal representative of the undertaking on Romanian territory;
- or, in the case of undertakings that do not have such a representative, one of the posted workers.

This requirement could have required the employer to post a worker separately or to post or establish a legal representative in Romania to fulfil the obligations of having a contact person. The European Commission deemed that the national provisions restrict the circle of possible contact persons, which is not proportionate to ensure effective monitoring of compliance with the obligations laid down in Article 9 of Directive 96/71/EC and invited Romania to take the necessary measures to comply with the regulations.

As a result, the government adopted Decision No. 302/2023. The new legal text no longer refers to a legal representative or an employee, but only maintains the obligation to designate any person as the designated person.

The refusal of the designated person to liaise with the competent authorities in Romania by providing labour inspectors with the necessary documents for the inspection of compliance with working conditions is punishable by a fine ranging from RON 5 000 to RON 9 000 (approximately EUR 1 000 to EUR 1 800).

1.2 Professional cultural workers

Emergency Ordinance No. 21/2023, published in the Official Gazette of Romania No. 297 of 07 April 2023, regarding the Status of Professional Cultural Workers, regulates the legal regime of a new category of individuals who, without having concluded an employment contract, carry out dependent activity. This concerns artists who engage in cultural activities and who have undergone a tax registration procedure. Professional cultural workers enter into copyright assignment contracts or contracts for carrying out

cultural activities. The period during which the individual was registered as a professional cultural worker constitutes the duration of service.

Professional cultural workers have the following rights: a) the right to participate and represent collectively for the improvement of working conditions and the freedom of action in defence of their rights; b) the right to establish or join a professional association; c) the right to consultation or exchange of information.

Professional cultural workers who are contributors to public health insurance systems have the following rights: a) sick leave and allowances for temporary incapacity for work caused by common illnesses or accidents outside of work; b) sick leave and allowances for maternity leave; c) sick leave and allowances for caring for a sick child; d) sick leave and allowances for maternal risk.

Emergency Ordinance No. 21/2023 is part of the new trend of the Romanian legislator to extend the applicability of labour law and social security law norms to categories of individuals who, without being employees, perform dependent activity. Both the Labour Code (as amended in October 2022) and the Law on Social Dialogue No. 367/2022 refer, in addition to employees to 'workers'. Thus, the Labour Code includes certain rights to information for those who have labour legal relationships not based on an employment contract, regulated by special laws without, however, listing the categories of personnel that fall under the category of workers (without an employment contract). We may assume that at least interns (governed by Law No. 176/2018) and day labourers (governed by Law No. 52/2011) are included in this category, alongside professional cultural workers.

2 Court Rulings

2.1 Secondment from the private to the public sector

High Court of Cassation and Justice, Decision No. 23/2023, 27 March 2023

Over time, there has been an inconsistent practice in Romanian case law on the salary due to employees seconded from the private sector to the public sector. In Romanian law, secondment constitutes a temporary change of workplace by a unilateral act of the employer. The employment contract with the posting unit is suspended, and the employee is temporarily employed by the receiving unit.

The inconsistent practice stemmed from the provisions of Article 47 (2) of the Labour Code, according to which "*during the secondment period, the employee enjoys the rights that are more favourable to him/her, either the rights of the employer who ordered the secondment, or the rights of the employer to whom he/she is seconded*."

However, while salary negotiations are the norm in the private sector, in the public sector, the wage is prescribed by the Law on Public Sector Wage No. 153/2017. This has led to inconsistent practices in the courts, which have decided differently on the salary due to seconded employees. Some courts applying Article 47 (2) of the Labour Code have ruled that a private sector employee seconded to the public sector has the right to maintain the salary from the posting unit, even if it was higher than that corresponding to the position held in the public sector according to Law No. 153/2017.

The High Court of Cassation and Justice issued a ruling to unify practice, stating by a decision binding on all courts in the country, that an employee seconded from the private sector to the public sector is only entitled to the salary due in the public sector for the position held under the Law on Public Sector Salary No. 153/2017. The receiving public institution cannot be required to pay salary rights that exceed the amount provided by law.

Thus, by Decision No. 23/2023, published in the Official Gazette of Romania No. 364 of 28 April 2023, the High Court of Cassation and Justice ruled that an employee seconded from an employer whose salary rights are negotiated cannot be paid by the receiving

employer, public institution or authority, rights that exceed the maximum level provided by Law No. 153/2017. The employee cannot claim the same salary as the one they had earned at the posting unit, as it is determined through negotiation in the private sector, while the public sector has a law regulating salaries.

However, the High Court added that a seconded employee who has so far received salary rights from the receiving employer (public institution) that exceed the maximum level provided by Law No. 153/2017 for the position to which they were seconded is not required to refund them. To establish this, the High Court of Cassation and Justice invoked the decision of the European Court of Human Rights of 15 December 2015 in Case of S.C. Antares Transport - S.A. and S.C. Transroby - S.R.L. v. Romania, paragraph 48: "*the risk of any mistake made by the State authority must be borne by the State and errors must not be remedied at the expense of the individual concerned*". In the present case, throughout the period of secondment and work for the public institution, the seconded person had the representation that the equivalent of this work was the salary negotiated in the private sector. This representation was confirmed by the documents drawn up by the public institution, the illegality of which is not in any way attributable to the seconded worker. Therefore, the decision of the High Court will only have effects for the future.

In conclusion, the decision of the High Court of Cassation and Justice of 23 April 2023 unifies judicial practice and ensures coherence and predictability of judicial decisions on this issue, while respecting the principles of transparency, financial sustainability and equality in the public sector.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The new Transnational Provision of Services Act transposes the new Directive 2020/1057/EU on posted drivers into Slovenian legal order, abolishing special rules according to which contributions for posted workers could be paid at the reduced rate.

(II) The employment of foreigners has been simplified.

1 National Legislation

1.1 The new law on posting of workers

The new Transnational Provision of Services Act was published on 03 April 2023 and entered into force on 18 April 2023 (*'Zakon o čezmejnem izvajanju storitev – ZČmIS-1'*, Official Journal of the Republic of Slovenia (OJ RS) No 40/23, 03 April 2023).

The new rules on posting from Slovenia to other EU Member States and some other amended provisions will begin to apply as of 01 January 2024.

According to Article 1 of the *ZČmIS*-1, this Act transposes the following EU directives: Directive 96/71/ES as amended by Directive 2018/957/EU, Directive 2014/67/EU, Directive 2018/957/EU, Directive 2020/1057; it also partly regulates the implementation of the following regulations: Regulation No. 883/2004 as last amended by Regulation No. 1372/2013, Regulation No. 987/2009 as last amended by Regulation No. 1368/2014, Regulation No. 1231/2010, Regulation No. 1072/2009, Regulation No. 1073/2009 and Regulation No. 2016/403.

Whereas other directives have already been transposed by the previous Transnational Provision of Services Act (see Article 2 of the *ZČmIS* of 2017 as amended in 2021), the new *ZČmIS*-1 transposes the new Directive 2020/1057/EU on posted drivers in international transport into Slovenian legal order and ensures the following in the Slovenian legislative framework (as presented by the government):

- an exemption from the general posting rules applicable to cabotage and international transport, with the exception of transit, 'bilateral transport' (both freight and passenger) and bilateral transport with two additional stops linked to the transport – this exemption is limited to cases in which a service contract has been concluded between the employer sending the driver and the contracting party operating in the EU host country;
- penalties in the event of breaches of the obligations of carriers and posted drivers.

Another important issue addressed by the new *ZČmIS*-1 is the payment of social security contributions for posted workers from Slovenia. Article 144 of the Pension and Disability Insurance Act (*'Zakon o pokojninskem in invalidskem zavarovanju (ZPIZ-2)'*, OJ RS No 96/12 et subseq.) allowed Slovenian companies that had temporarily posted workers abroad to pay social insurance contributions at the reduced rate and in this connection, the European Commission had already issued a reasoned opinion in January 2023. This provision (Article 144, para 2 of the *ZPIZ*-2) has been abrogated and will cease to apply as of payments of wages for January 2023, i.e. the current problematic regime of contributions at the reduced rate will be applied for the last time for the payment of wages for December 2023 (see Article 35 of the *ZČmIS*-1).

According to the new provisions, a worker's right to rest, leave or a short period of absence due to sickness shall not be considered an interruption of the cross-border provision of services or an interruption of the posting of the worker (Article 6, para 7 of the *ZČmIS*-1).

According to Article 6, para 8 of the new *ZČmIS*-1, third-country nationals (posted workers or self-employed persons) may now provide services in the EU on the basis of a valid uniform residence and work permit or a temporary residence permit not issued for employment, self-employment or work, provided that the foreigner has the relevant consent of the Employment Service of the Republic of Slovenia or, if they have the right to free access to the labour market in accordance with the Employment, Self-employment and Work of Foreigners Act.

1.2 Amendments to the Employment, Self-employment and Work of Foreigners Act and to the Foreigners Act

The amendments to the Employment, Self-employment and Work of Foreigners Act were adopted ('*Zakon o spremembah in dopolnitvah Zakona zaposlovanju, samozaposlovanju in delu tujcev (ZZSDT-D)*', OJ RS No 42/23, 07 April 2023, p. 3617-3620) and the amendments to the Foreigners Act ('*Zakon o spremembah in dopolnitvah Zakona o tujcih (ZTuj-2G)*', OJ RS No 48/23, 26 April 2023, p. 4065-4068).

Both acts were adopted in the fast-track procedure. The amendments are aimed at simplifying procedures for employing foreign workers, although—according to the government—this does not mean less legal protection for foreign workers, since the aim of the Ministry of Labour, which prepared the amendments, is

> "*not only to ensure that there are enough workers, but also to ensure adequate working conditions and fair pay*".

One of most debated issues was a Slovenian language examination. The law postponed to 01 November 2024 the entry into force of the provision pursuant to which the extension of the temporary residence permit for family members of foreigners and the issuance of a permanent residence permit will require passing a Slovenian language examination.

Among others, the amendments also concern a simplification of procedures in case of changes to the worker's post with the same employer, changes of the employer or employment by two or more employers. The amendments have abolished a written approval in the form of a decision, which is being substituted by the consent issued by the Employment Service of the Republic of Slovenia (see Article 1 and 4 of the *ZZSDT-D* and Article 5 of the *ZTuj-2G* which amended Article 37 of the *ZTuj-2*).

The amendment that excludes the employment of foreigners in the State or public sector from the general rules is worth mentioning. According to the government, due to the severe shortage of suitable staff in the State and public sector, especially in the area of health and social services (health centres, retirement homes, sheltered work centres and social welfare training institutes, public institutions providing social welfare services such as family home care and public social welfare institutions providing social welfare services) and the procedures at the Employment Service of Slovenia are complex, there is a need to exclude the public sector from these complex procedures. After the amendments, no consent of the Employment Service of Slovenia is required for the employment of a foreigner in the above mentioned sectors (Article 2 of the *ZZSDT-D* which amended Article 5 of the *ZZSDT*).

1.3 Recognition of professional qualifications

The rules on recognition of professional qualifications of licensed architects for citizens of European Union Member States, the European Economic Area and Swiss Confederation ('*Pravilnik o priznavanju poklicne kvalifikacije pooblaščeni arhitekt državljanom držav članic Evropske unije, Evropskega gospodarskega prostora in Švicarske konfederacije'*, OJ RS No. 48/2023, 26 April 2023, p. 4072-4074) have been adopted.

They transpose Directive 2005/36/ES as last amended by the Commission Delegated Decision 2021/2183 into the Slovenian legal order, insofar as professional architects are concerned.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Collective bargaining

The collective agreement for craft and entrepreneurship (‘*Kolektivna pogodba za obrt in podjetništvo*’, OJ RS No 46/23, 21 April 2023, p. 3954-39-64) concluded on 03 April 2023 was registered at the Ministry of Labour and published in the Official Journal.

The Trade Union of Financial Accounting Employees (*Sindikat finančno računovodskih uslužbencev*) has acceded to the already concluded sectoral collective agreement for the cultural sector (*Kolektivna pogodba za kulturne dejavnosti*, OJ RS No 44/23, 14 April 2023, p. 3810).

Spain

Summary

The Supreme Court has ruled on a case of transfer of undertakings.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Tribunal Supremo, STS 929/2023, 15 March 2023

According to CJEU case law, in CJEU case C-60/17, 11 July 2018, *Hermo vs. Esabe Vigilancia SA* and CJEU case C-472/16, 07 August 2018, *Sigüenza vs. Ayuntamiento de Valladolid*, the rules on transfers of undertakings are not limited to the classic or prototypical examples of transfers of undertakings, i.e. those that arise after the sale of a company's ownership, in whole or in part. The Directive also applies

> *"to a situation in which a contracting entity has terminated the contract for the provision of services […] concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, in so far as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned".*

This extension of the rules on transfers of undertakings raises concerns, particularly when the new subcontractor does not take over all of the transferor's workers. A transfer of undertaking could be the consequence of an agreement between the undertakings, with one undertaking succeeding the other on a voluntary basis, either due to a clause in the collective agreement or an individual decision made by the undertaking. The CJEU has not provided any guidance on the treatment of workers not selected by the new subcontractor.

The rules on transfers of undertakings do not seem to allow for a division or distinction, as noted by the Spanish Supreme Court. This means that in situations qualified as transfers of undertakings, the Directive should apply to all workers, not just those selected by the new subcontractor. Workers who are not selected (in this case, 60 per cent) must be considered as having been dismissed, so the new subcontractor must follow the relevant procedures, including collective dismissal procedures if the number of affected workers requires this. If no procedure has been followed because the new subcontractor has simply disregarded those workers, the situation qualifies as null and void dismissals.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Sweden

Summary

(I) The Labour Court has published a judgment on competing collective agreements.

(II) The Supreme Administrative Court has ruled on two cases on injuries suffered at home while working remotely during the pandemic.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Competing collective agreements

Labour Court, AD 2023 No. 25, 26 April 2023

The Labour Court rendered a judgment in a case on competing collective agreements, AD 2023 No. 25. The conflict related to a decades long dispute involving the Transportation Workers' Union (*Transportarbetareförbundet*) and the Dock Workers Union (*Svenska Hamnarbetarförbundet*) and the major company operating the unloading (and loading) of container ships in the very important Port of Gothenburg. This conflict has been reported on in multiple previous Flash Reports over the past 5-6 years. For a number of years, the employer has been bound by two separate collective agreements with the Transportation Workers' Union and the Dock Workers' Union. Whereas the Transportation Workers' Union is affiliated with the National Trade Union Confederation (*Landsorganisationen [LO]*), the Dock Workers' Union is unaffiliated. Even if the trade union confederation cover most employees nationwide, the Dock Workers' Union is the major union in the Port of Gothenburg. The two collective agreements include identical coordinated provisions on—as disputed in the case—overtime. The Labour Court found that the two different (similar) collective agreements indeed were competing and that the chronologically first collective agreement has priority under Swedish law. The trade union concluding the secondary agreement was therefore not entitled to damages for the violation of provisions on overtime. The Labour Court also concluded that the provisions on overtime were, regardless of which, applicable to all employees working under any of the two agreements. In its judgment, the Labour Court explicitly assessed whether Swedish law on competing collective agreements was compliant with the European Convention on Human Rights (ECHR) and the case law developed by the Strasbourg Court. The conclusion in this part was that Swedish law was in line with the ECHR.

2.2 Teleworking and work-related accidents

Supreme Administrative Court, No. 441-22 and 3375-22, 24 April 2023

As a consequence of accidents during the stay-at-home work policy during the pandemic, the Supreme Administrative Court decided two cases of work-related injuries and social insurance. In both HFD case 441-22 and in HFD case 3375-22, the Supreme Administrative Court concluded that the employees, who were both working from home at the time, were not entitled to work-related insurance, as the injuries they suffered were more of a private life nature that were associated with the work tasks performed from home.

In case 3375-22, the Court found that not all injuries suffered at home during working hours were covered by public insurance and that the situations of the case, where the

insured employee left her desk to get a cup of coffee from the kitchen and thereby ran into her jumping dog and suffered injuries to her teeth, did not qualify as a work-related accident and was of a more private nature.

Similarly, the Court determined that the situation in which a person was working at home and had to bend over to pick up the disconnected power-cable to the laptop was not a work-related accident. While bending down, his three-year-old son, playing under the desk, hastily stood up, hitting his father's teeth with his head. Despite concluding that the employee was performing his duties at the time of the accident, the Court concluded that the injury was, nevertheless, primarily related to the employee's private life and found that he was not entitled to a work-related insurance payment.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Collective bargaining and working time

The WTD has since long been transposed into Swedish law in the Working Time Act, which entails an explicit provision that collective agreements deviating (in pejus) from the Act may not undercut the provisions of the WTD. However, multiple collective agreements, not least in on-call or night-shift employment relationships, such as firefighters, hospital care staff, or personal care staff of disabled persons in their homes, have offered very long working hours (of which the employee normally is able to sleep full or almost full nights 'at work'). As a result of criticism from the EU Commission, the Swedish industrial partners in these sectors have renegotiated or are in the process of renegotiating their collective agreements, with the aim of limiting the working time to meet the 11-hour daily and 24-hour weekly rest periods of the Directive. Some collective agreements with this content have been concluded, applicable from 01 October 2023. While the intention is to obviously cater to an adequate working time and balance between rest periods and work, the new collective agreements have faced enormous criticism from groups of employees, individual employees, employers, and disability organisations. To summarise the criticism, the main arguments differ but include aspects such as working 24 hours in a row, six or seven days a month gives an opportunity to also have a parallel secondary employment with the possibility to sleep full nights during shift work or the disabled patient will have to face an significantly increased number of carers if the long shifts are discontinued. The discussion has been surprisingly heated and includes massive criticism by the EU as well as the trade unions and the employers signing the collective agreements.

4.2 Wild strike

In the Stockholm region during a week in April, wild strikes took place. While these may be frequent in many countries, they are very rare occurrences in Sweden. The wild strikes, which included train drivers, emerged after a political decision to cancel the use of train hosts on local trains for commuters in the Stockholm region. For almost one week, this traffic was significantly disrupted, with two-thirds of the trains not running at all. The employers are now bringing legal claims in the amount of SEK 6000 (EUR 600) against the individual train drivers who had participated. The trade union (SEKO) had asked its members to not participate in any wild strikes.

United Kingdom

Summary

There have been developments in relation to Retained EU Law (REUL).

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 which sunsets all 3 745 pieces of retained EU legislation was due to have its report stage in the House of Lords on 15 May, but it has not been scheduled in the House of Lords' lists with the reason being unclear. A summary of the issues can be found here. Rumours are rife as to what has happened to the Bill (see the press articles here and here).

4.2 Naming and shaming rogue employers

There are provisions in the UK for naming and shaming employers who fail to pay tribunal awards. The Guardian made a Freedom of Information request which revealed:

that after the Department for Business, Energy and Industrial Strategy's (BEIS) pledge to name and shame employers in 2018, they were notified 3 713 times about bosses failing to pay successful claimants their money. However, they have not named a single employer in that time.

The FoI also revealed that, on average, more than 50 per cent of employers failed to pay all or any of the money won by claimants at employment tribunal 28 days after being told to do so.

4.3 The Strikes (Minimum Service Level) Bill

The government was defeated on four amendments to this Bill in the House of Lords. These were:

- a consultation to be carried out and reviewed before the powers in section 234B can be used;
- an amendment preventing failure to comply with a work notice from being regarded as a breach of contract or constituting lawful grounds for dismissal or any other detriment;
- an amendment removes the section that removes protection from Unions;

- This amendment limits the application of this Act to England.

A further amendment was introduced by the government identifying additional matters that an employer must not have regard to when deciding whether to identify a person in a work notice. This was adopted unopposed.

There is a further day of reporting stage in the House of Lords; the matter will then go back to the House of Commons for consideration of the amendments.

The TUC has organised a letter signed by politicians across Europe protesting the Bill.

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