Flash Reports on Labour Law
May 2023

Summary and country reports

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

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Executive Summary

National level developments

In May 2023, 31 countries reported developments in labour law. The following were of particular significance from an EU law perspective:

Developments related to the COVID-19 crisis

This month, the extraordinary measures to mitigate the COVID-19 crisis played only a minor role in the development of labour law in many Member States and European Economic Area (EEA) countries.

French law has suspended the compulsory COVID-19 vaccination requirement for health care staff from 15 May 2023 onwards.

Implementation of EU Directives

The **German** Parliament has finally passed a Draft Act that will implement Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. According to this law, internal reporting offices are to be established in companies and public authorities that have over 50 employees, which whistleblowers can report violations of EU and German law to.

In **Denmark**, the Directive on transparent and predictable working conditions has been transposed and the Act will come into force on 01 July 2023.

In **Luxembourg**, the Law on Protection of Whistleblowers has been adopted. It implements a very broad level of protection of any person reporting any kind of breach of the law. The law is intended to transpose European Directive (EU) 2019/1937.

Collective redundancies

The **German** Federal Labour Court has delivered a ruling on mass redundancies. If an employer has incorrectly assessed the size of the business and therefore did not issue a mass dismissal notice, it is currently unclear whether this—as assumed by the Federal Labour Court in its consistent case law—still leads to the dismissals' invalidity. The sanction system developed by the Federal Labour Court may not be in line with the Collective Redundancies Directive and could therefore be disproportionate. The Sixth Senate of the German court therefore stayed the proceedings, pending the CJEU's decision in case – C-134/22 (preliminary ruling procedure).

In **Ireland**, government approval has been given for legislation to enhance employees' protection in collective redundancies following insolvency.

Dismissal protection

In **Belgium**, the Cour de Cassation ruled that the substitute members of trade union delegates at company level in large retail stores are not protected against dismissal as long as the substitute delegate does not replace an effective trade union delegate.

A new ruling by the **Danish** Eastern High Court clarifies the Danish Act on Transfers of Undertakings that implements Directive 2001/23/EC. More specifically, the ruling clarifies the (lack of) protection of shop stewards in situations in which the transferee does not adopt the collective agreement following the transfer. The ruling must be read in light of the Danish regulation of employee representation.

In **Italy**, the Court of Cassation dealt with part-time work and dismissals. An employee who refuses to change his/her employment relationship from full time to part time can be lawfully dismissed, if such a request was made on the basis of the company's objective needs.

Domestic workers

The **Belgian** Safety and Health Law of 04 August 1996 and the Welfare Codex of 28 April 2017 now apply to domestic workers and helpers. From now on, they will be entitled to the same minimum guarantees for well-being at work, just like employees in companies. This legislative change has been in the pipeline for nearly 10 years. However, the drafting of the implementing regulations took this long due to the specific circumstances of professional domestic work.

Employee representation

The **Austrian** Labour Constitution Act has been amended (transposing the Mobility Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions) to ensure employee representation in special negotiation bodies, even in cases where no works council has been established at national level.

Fixed-term work

The **Cypriot** Labour Court has ruled that politically appointed associates under fixed-term contracts shall have their contract converted into contracts of indefinite duration.

A **Spanish** Supreme Court ruling confirmed that fixed-term employment contracts for persons who teach Catholic religion in public schools are no longer permissible, except in case of 'interim contracts', that is, contracts to substitute employees who are entitled to return to their job for a justified reason (sick leave or parental leave).

The **Italian** government has approved a law decree on employment relationships with specific rules for fixed-term contracts. It removes the reasons justifying the date of fixed-term contracts, their extension or renewal introduced by a previous legislative decree. These reasons can now be established by collective bargaining.

Temporary agency work

A modification of the **Czech** Labour Code strengthens the statutory protection of temporary agency workers, whose term of employment coincides with the term of the temporary assignment. Employment agencies are now prohibited from concluding an employment contract or an agreement to perform work for the term of the employee's temporary assignment to a user undertaking only. Such a clause is treated as *void ab initio.*

The **German** Federal Labour Court has ruled on the possibility of deviating from the principle of equal pay for temporary agency work through collective agreements.

A new approval scheme for temporary work agencies has been established in **Norway** by an amendment to the existing regulations on temporary work agencies operating in the country, apart from the hiring of seafarers.

Transfer of undertaking

In **Sweden**, the Labour Court has held that a change of public transportation operators did not constitute a transfer of undertaking in the meaning of the Transfer of Undertaking Directive.

Platform work

In **Hungary**, the Debrecen Regional Court of Appeal decided on 18 April 2023 that the platform work the case dealt with was in fact an employment relationship.

Working time

The **German** Federal Labour Court has delivered a ruling on financial compensation for leave not taken in excess of minimum leave.

The **French** Court of Cassation has ruled on the consequences of situations in which a bank holiday falls on the right to rest.

In **The Netherlands**, a Court of Appeal ruled that the time an employee must be present prior to the start of his/her shift falls within the definition of working time.

In **Slovenia**, amendments to the Labour and Social Security Registers Act were adopted, introducing stricter regulations for employers to register working time and other work-related data.

Minimum wage

The **Estonian** Trade Union Confederation, the Minister of Economy and Information Technology and the Estonian Employers' Association have concluded an agreement on the increase in minimum wage until 2027, by when it will account for 50 per cent of the average wage.

Other developments

A ruling of the **Austrian** Supreme Court is of interest from the perspective of Union employment law. It deals with possible discrimination of nationals *vis-à-vis* transnational worker mobility. A procedure before the Constitutional Court has been initiated with a potential preliminary ruling procedure before the CJEU to clarify the question of applicability of Article 20 of the CFREU.

The **French** Administrative Supreme Court has ruled on co-employment. In this case, nine protected employees were the subject of a request for authorisation to dismiss them because their company, which belonged to a group, was being discontinued. CJEU case law on the notion of co-employment is limited and does not yet provide any concepts that might help to further define co-employment.

The Constitutional Court of the Republic of **Croatia** has abolished the provisions of the Labour Act on more favourable financial rights for unionised workers (members of representative trade unions) because it found them to be discriminatory.

In **Portugal**, the Court of Appeal Lisbon has issued a ruling on the limits to the right to strike, in particular in sectors related to the provision of minimum services.

Implications of CJEU Rulings

Working time

This Flash Report analyses the implications of a CJEU ruling on working time.

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG

The present case concerned the right to paid annual leave under German law in the context of progressive retirement schemes. The progressive retirement scheme in the specific case entailed that the employment agreement was transformed into a part-time employment agreement, where the employee was to work for approx. three years (from 01 February 2013 to 31 May 2016) and would then be released from work over the next approx. three years (from 01 June 2016 to 30 September 2019). The employee was prevented from taking some days of accrued annual leave due to illness before the expiry of the work phase, and the entitlement lapsed the next year (2017).

The CJEU ruled that the Working Time Directive, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, precluded such rules. It was considered contrary to the Directive to apply national rules that provide that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, when the worker has been prevented from taking that leave before the work release phase commences due to illness, even where it is not a long-term absence.

The decision is not expected to have any major implications nor direct relevance in **Bulgaria**, **Croatia**, **Czech Republic**, **Cyprus**, **Ireland**, **Hungary**, **Greece**, **Finland**, **Lichtenstein**, **Luxembourg**, **Latvia**, **Norway**, **Romania**, **Slovenia** and **Spain**.

Progressive early retirement schemes exist in **Luxembourg** and take the form of a reduction in weekly, or at least monthly, working time, rather than the subdivision of a working year into a working period and a suspension period.

There is no time lapse to the right to use paid annual leave in some countries, such as **Latvia** and **Norway**.

Annual leave cannot be forfeited because of sickness in **Malta** – even if not in the context of a progressive retirement scheme.

There is a time-lapse to the right to use paid annual leave and limitation periods in **Austria** (lapse period of two years which is only extended by a period of parental or maternity leave), **The Netherlands** (six months after the last day of the calendar year in which entitlement to that leave arose, with a five-year limitation period replacing the lapse period), **Poland** (the status of limitation for claiming holiday leave is three years), **Slovakia** (limitation period of three years and wage compensation under specific circumstances), **Liechtenstein** (forfeiture period of one year and the principle that compensation for annual leave not taken is granted), **Hungary** (lapse period of three years and suspension of lapse period for leave not taken). In **Romania**, if the employee cannot take his/her entire or partial annual leave to which he/she is entitled in the respective calendar year for justified reasons, the employer is required to grant any unused annual leave for a period of 18 months starting from the year following that in which entitlement to annual leave arose. Compensation in lieu of annual leave is only allowed in case of termination of the employment contract. The situation is similar in **Ireland** with a carry-over period of 15 months after the end of the relevant leave year and the right to compensation for leave not taken. The Labour Court has consistently recognised that entitlement to paid annual leave is a "*fundamental social right in European law*".

In **Norway**, there is no limitation to the number of days that can be carried over.

In some countries, it is debatable whether their national law is aligned with the CJEU's understanding of the law as expressed in this ruling. For example

in **Portugal**, if the worker cannot take his/her remaining leave in the relevant year, he/she is entitled to receive remuneration corresponding to the period of annual leave not taken or to take the annual leave by 30 April in the following year. As a result, Portuguese law seems to establish a limit to the carry-over of annual leave, which may be potentially considered too short in the light of the CJEU's case law.

In **France**, there is a differentiation between a period of non-occupational illness and one of occupational illness which entitles an employee to claim paid leave from his/her employer regardless of CJEU case law.

The **Estonian** Employment Contracts Act does not establish an explicit exception on the expiration of leave in case of temporary incapacity for work. Thus, it was reported that it might be reasonable to introduce a clarifying provision in employment contract law on the suspension of the expiration of the employee's claim.

In **Denmark**, this case may be relevant for Danish employers that use a progressive retirement scheme. It should be noted that the use of progressive retirement schemes is not specifically regulated in Danish law and the regulation has not been subject to any case law. Thus, the extent to which these schemes are in fact used in Denmark is unclear.

The national courts in certain countries heavily rely on CJEU case law when interpreting the provisions on the right to annual leave. In **Lithuania**, the Labour Code stipulates that the right to full annual leave or part thereof (or financial compensation under special circumstances) expires after a lapse of three years from the end of the calendar year in which entitlement to the annual leave arose, except in cases when the employee could factually not use the leave. As this exception is relatively new in the Lithuanian legal system, only few cases have been interpreted by the courts. However, the wording of the national provision allows for a broader interpretation of the notion of 'impossibility' to execute the right to annual leave.

Although the specific case has not yet been settled in **Belgian** case law, a correct interpretation of the Belgian annual leave legislation will presumably lead to the result that in a situation such as the one settled by the CJEU, the employee would retain his/her right to paid annual leave acquired by virtue of his/her employment under the progressive early retirement scheme, where the employee was unable to take that leave on account of illness before the start of the phase of exemption from work, even in cases in which the absence was not a long-term absence.

This ruling will have an impact on only a few countries, such as in **Germany.** It will also have implications for **Sweden**'s regulations as the Swedish rules on annual leave rights are similar to the German ones that were found in the present case to be incompatible with EU law. In addition, the general rule in **Icelandic** law is that any annual leave not taken cannot be carried over to another year. Therefore, amendments to Icelandic legislation and collective agreements to reflect the CJEU's rulings may be necessary. It is expected that the **Austrian** Supreme Court will expand its case law on the suspension of limitation periods during sick leave in cases involving progressive retirement schemes.

Table 1: Major labour law developments

Topic	Countries
Collective bargaining and collective action	PT RO SE SI UK
Working time	DE FR NL SI
Whistleblowing	DE LU
Annual leave	DE
Fixed-term work	CY ES IT
Dismissal protection	BE DK IT
Transfer of undertakings	DK SE
Platform work	HU SI
Collective redundancies	DE IE
Transparent and predictable working conditions	DK IT
Work-life balance	PL
Occupational health and safety	BE
Temporary agency work	CZ DE NL NO
Employee representation	AT DK
COVID-19	FR
Minimum wage	EE NL
Third-country nationals	NL
Remote work	PL

Austria

Summary

(I) The Labour Constitution Act has been amended to ensure employee representation in special negotiation bodies, even in cases where no works council has been established at national level.

(II) One ruling of the Austrian Supreme Court is of interest from the perspective of Union employment law. It deals with possible discrimination of national *vis-à-vis* transnational worker mobility.

1 National Legislation

1.1 Transposition of Mobility Directive (EU) 2019/2121

The National Assembly passed an amendment to the Labour Constitution Act on 25 May 2023, transposing the Mobility Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions (738/BNR). The transposition updates the right to employee participation in companies resulting from cross-border mergers and the emergence of the right to employee participation in companies resulting from cross-border transformations or divisions in the Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz* - ArbVG).

A key provision that applies to cross-border conversions, mergers and divisions as well as to European companies (SE) and European cooperative societies is an amendment of the provision of employee secondment to special negotiation bodies, in § 218 (3a) ArbVG (unofficial translation by the author):

> "*If no works council has been established in any Austrian establishment of the company or group of companies, the delegation shall be determined by the competent statutory representation of employees' interests*."

The aim of the amendment is to contribute to a better representation of Austrian enterprises in special negotiating bodies and to prevent disadvantages for Austrian companies in international negotiations.

Amendments concerning cross-border mergers

The current regulation on employee participation in case of cross-border mergers were redefined to comply with the requirements of the Directive (§ 258 ff ArbVG). This includes a definition of companies resulting from cross-border mergers to which the law on employee participation applies. The existing systems of employee participation in case of subsequent cross-border or domestic mergers, any transformations or divisions continue to apply.

Amendments relating to cross-border conversions or divisions

In terms of cross-border conversions and division, the Act now defines companies that result from cross-border transformations or divisions to which the law on employee participation applies (§ 263ff ArbVG). The provisions of employee involvement in the European company apply.

All amendments will enter into force on 01 August 2023.

The Directive's requirements on information and consultation rights in relation to cross-border transformations, mergers and divisions already exist in Austrian law, so there was no need for transposition in this respect.

See here and here for further information.

2 Court Rulings

2.1 Discrimination of national vis-à-vis transnational worker mobility

Supreme Court, 8 ObA 82/22z, 29 March 2023

The Act on Contractual Public Employees of the Federal State of Carinthia (*Kärntner Landesvertragsbedienstetengesetz* – K-LVBG) provides that equivalent (*gleichwertige*) service times resulting from transnational mobility must be fully taken into account. This is not the case for equivalent service times accumulated working for an employer in Austria. The Austrian Trade Union Federation claimed that this constitutes a so-called 'discrimination of nationals' (*Inländerdiskriminierung*) and infringes the right to equal treatment in the Austrian Constitution as well as in Article 20 of the Charter of Fundamental Rights of the EU (CFREU). The Federal State of Carinthia claimed that Union law only requires Austrian lawmakers to take service times acquired outside of Austria into account, but not purely the national circumstances. In fact, the basis for these provisions were the decisions of the CJEU in case C-24/17, *Österreichischer Gewerkschaftsbund/Republik Österreich* (ECLI:EU:C:2019:373) as well as in case C-703/17, *Adelheid Krah/Universität Wien* (ECLI:EU:C:2019:850), and case C-710/18, *WN/Niedersachsen* (ECLI:EU:C:2020:299). The Federal State argued that the differentiation was therefore justified.

The Supreme Court did not follow this line of argument and considered it possible that this differentiation between national and transnational mobility might breach the constitutional principle of equal treatment. It therefore initiated an examination by the Austrian Constitutional Court, which has competence to rule on the compatibility of national laws with Austrian constitutional law and to nullify parts of the law that are unconstitutional.

The Supreme Court pointed out that the exclusion of the application from the case law on the right to freedom of movement of the favourable regulation on transnational mobility to periods of previous service in Austria in case of 'adaptation' to Union law requirements is also questionable from the perspective of Union law. On the one hand, this is because the CJEU increasingly extends the application of the law on the free movement of persons to purely internal circumstances, if these are 'noticeable'. On the other hand, for example, a German citizen who has retired as a teacher in Austria is restricted in terms of crediting his/her periods of service in a new employment relationship, or a worker from Germany can be prevented from switching to a private employer in Austria to bridge the gap before being employed by a regional authority.

It also pointed out that the obligation to transpose Union law cannot justify such a differentiation. The requirement of objectivity of the principle of equality of Article 20 of the CFREU also applies to the transposition of Union law. Should it therefore be assumed that Austrian constitutional law allows such a differentiation, then this does not apply to the requirement of objectivity of Article 20 of the CFREU. In this respect, the latter precedes and would preclude such transposition as that being disputed before the courts.

Although this is not a final ruling but the initiation of a procedure before the Constitutional Court, it illustrates the interlinkage between Union and national law and that the highest courts at least are very much aware of that. It will be interesting whether the Constitutional Court will follow the Supreme Court's line of argument and whether it will initiate a preliminary ruling procedure before the CJEU to clarify the question of applicability of Article 20 of the CFREU to properly transpose the CJEU's jurisprudence.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Under Austrian law, holiday entitlements generally lapse after two years from the end of the holiday year in which it arose (i.e. effectively after three years, § 4 Abs 5 Act on Annual Leave – *Urlaubsgesetz* - UrlG). This period is only extended by the period of parental or maternity leave.

According to long standing case law, if an employee is prevented from taking annual leave due to (an excessively long period of) sick leave, her/his holiday entitlement does not lapse, but the limitation period is suspended. There is currently no case law on the lapse of holiday entitlement in progressive retirement schemes. It is expected that the Austrian Supreme Court will expand its case law on the suspension of limitation periods during sick leave in cases involving progressive retirement schemes.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) Wage costs cannot be increased because the Royal Decree of 13 May 2023 has set the wage norm for 2023–2024 at 0 per cent.

(II) From 01 June 2023, when an employee submits a request for formal psychological intervention as a result of harassment or violence at work, he/she can supplement it with a description of the link between the facts he/she is presenting and a discriminatory ground. Thus, the worker can count on the protection of the laws to fight discrimination.

(III) The Safety and Health Law of 04 August 1996 and the Welfare Codex of 28 April 2017 now applies to domestic workers and helpers.

(IV) The substitute members of trade union delegates at company level in large retail stores are not protected against dismissal as long as the substitute delegate does not replace an effective trade union delegate.

1 National Legislation

1.1 Wage moderation

The Royal Decree of 13 May 2023, implementing Article 7 §1 of the Law of 26 July 1996 to promote employment and preventively safeguard competitiveness, *Moniteur belge* 26 May 2023, p. 50369 has been published.

The wage norm is the maximum margin for wage cost development in the private sector and has been set at 0 per cent for this and next year. Hence, wage costs cannot be increased in the 2023–2024 period. This should not be misunderstood, however. Rising indexation of consumer prices, which leads to automatic salary and baremic increases in addition to the wage norm, is guaranteed.

The Federal Government set the wage standard after the social partners failed to agree on it, even after the government's mediation proposal. This was also the case for the period 2021–2022. The wage norm was set by Royal Decree because the social partners could not reach an agreement. At the time, the rate was still 0.4 per cent.

The established wage standard may not be exceeded by agreements at the intersectoral, sectoral, company or individual level. Employers who do not respect the wage standard may be fined.

1.2 Protection in case of a request for formal psychosocial intervention

The Royal Decree of 01 May 2023 amends Title 3 of Book I of the Codex on Welfare at Work on information provided to the employer on protection against adverse actions in line with the internal procedure, *Moniteur belge* 15 May 2023, p. 4596.

From now on, when an employee submits a request for formal psychosocial intervention in response to a case of harassment or violence at work, he/she can supplement it with a description of the link between the facts he/she is reporting and a discriminatory ground. Thus, the worker will be protected under the anti-discrimination laws.

It is up to the employee who submits a request for formal psychosocial intervention to indicate in his/her request for such intervention that a link exists between the facts of violence or harassment he/she is reporting and a discriminatory ground.

Once the request has been accepted, the psychosocial prevention advisor (PAPS) will inform the employer, in addition to the identity of the applicant, of:

- the fact that the request mentions facts of violence or harassment at work which may or may not be related to a discriminatory ground as referred to in the employee's report or to facts of unwanted sexual advances at work;
- the fact that the applicant enjoys protection against adverse action.

This prevents the employer from having to infer that the protection of anti-discrimination laws applies and that the employee must inform the employer of his/her request, which would result in the employer receiving information twice for the same request.

In addition, witnesses are protected in the context of discriminatory unlawful conduct: the PAPS must immediately inform the employer that the employee, who has given a witness statement in support of the applicant claiming discriminatory unlawful conduct at work, enjoys protection against adverse consequences as well referred to in anti-discrimination laws. The PAPS must also inform the employer of the identity of this witness, except where the latter insists on remaining anonymous.

1.3 Safety and health legislation applicable to domestic workers and helpers

The Royal Decree of 07 May 2023 sets down specific measures on welfare at work of domestic workers and helpers in Book X of the Codex on Welfare at Work, *Moniteur belge* 15 May 2023, p. 45964.

On 15 May 2023, the Safety and Health Law of 04 August 1996 and Welfare Codex of 28 April 2017 became applicable to domestic workers and helpers as well. From now on, they will enjoy the same minimum guarantees for well-being at work, just like employees in companies.

This change has been in the pipeline for nearly 10 years. The federal legislator introduced the necessary changes to the Safety and Health Law as early as 2014. The drafting of the implementing regulations took this long because of the specific circumstances of professional domestic work.

Through this Decree, the Codex on Welfare at Work now applies to domestic workers and helpers, as well as to their employers. In addition, the Royal Decree contains another set of specific measures for employers. It explicitly states that 'the Codex applies insofar as the Royal Decree of 07 May 2023 does not provide for specific provisions'.

2 Court Rulings

2.1 Dismissal protection of members of the trade union delegation

Cour de cassation, No. S. 22.0038.F, 15 May 2023

Members of the trade union delegation and their substitutes in the company enjoy protection against dismissal by the employer. When this dismissal protection is breached, the trade union member or substitute will be awarded severance pay equal to one year's salary. This scheme is contained in the Framework Collective Bargaining Agreement No. 5, concluded in the National Labour Council of 24 May 1971.

The present case dealt with a sectoral collective bargaining agreement concluded on 21 September 2015 in Joint Committee No. 311 for large retail stores, implementing Framework CBA No. 5.

Article 6 of the collective bargaining agreement of 21 September 2015, laying down the status of trade union delegations, concluded in Joint Committee No. 311 for large retail companies and made generally compulsory by the Royal Decree of 08 November 2016, establishes the number of effective delegates and substitutes. Under Article 26 of this CBA, members of the trade union delegation may not be dismissed for reasons inherent in the exercise of their mandate, and an employer who intends to dismiss a trade union delegate for any reason whatsoever must, as a rule, comply with the procedure laid down in this provision. It does not follow from these provisions or from any other provision of the CBA that the protection introduced by Articles 26 and 28 extends to substitute delegates as long as they are not actually replacing an effective delegate.

Under Article 28 of this sectoral CBA, a lump sum must be paid by the employer if it dismisses a trade union delegate without complying with the dismissal protection procedure. It is not apparent from those provisions or from any other provision of the CBA that the protection introduced by the abovementioned Articles 26 and 28 extends to substitute delegates as long as they are not replacing an effective delegate. By deducing from the aforementioned provisions that 'the substitute union delegate may invoke in his/her favour the protective provisions of Articles 26 and 28 of the CBA of 21 September 2015' without investigating whether he/she was actually replacing an effective delegate, the Appeal Labour Court Liège violated those provisions, according to the Cour de Cassation.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The consequences of the Court's judgment for the Belgian legal order are discussed below.

Articles 66 and 67 of the Annual Leave Decree of 30 March 1967, implementing the Annual Leave Law of 28 June 1971, provide that an employee who is unable to take annual leave due to incapacity for work, which is assimilated to work in the annual leave legislation, shall be entitled to annual leave until the expiry of 12 months following the end of the so called 'annual leave service year'. The annual leave service year is the calendar year preceding the year in which entitlement to annual leave arises and represents the basis for determining the employee's annual leave entitlement.

This time limitation of 12 months in Belgium is usually considered contrary to the Working Time Directive 2003/88/EC, as interpreted in the CJEU's case law for employees who are unable to take their annual leave due to illness (see CJEU cases C-350/06 and C-520/06, 20 January 2009, *Schultz-Hoff* and *Sociaalrechtelijke Kronieken* 2010, 47, case note Dressen, and CJEU case C-214/10, 22 November 2011, *Schulte*.

It follows from Article 7 of the Working Time Directive 20003/88/EC that entitlement to financial compensation for annual leave days not taken cannot be quickly forfeited. As regards the right to four weeks of paid annual leave guaranteed by the Working Time Directive 2003/88, a termination of the employment contract before that leave has been taken cannot deprive the worker of his/her annual leave (CJEU cases C-762/18 and C-37/19, 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria* and *Iccrea Banca*, para 83).

Pursuant to Article 67 of the Annual Leave Decree, the employer must pay the employee financial compensation for annual leave days not taken no later than at the end of the annual leave year if it was impossible for the employee to take all or part of his/her annual leave or if he/she was unable to take all or part of the acquired annual leave due to a suspension of the performance of the employee's employment contract.

Although the specific case dealt with in BMW case C-192/22 has not yet been settled in Belgian case law, a proper interpretation of the annual leave legislation will presumably

lead to the result that in a situation such as the one dealt with by the Court of Justice, the employee retains his/her right to financial compensation for annual leave days not taken, acquired by virtue of his/her employment relationship under the progressive early retirement scheme, where the employee was unable to take that leave on account of illness before the start of the phase of exemption from work, even in the case where the absence was not a long-term absence.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Case C-92/22 does not have any implications for Bulgarian legislation and national practice related to Article 7 of Directive 2003/88/EC.

No progressive retirement scheme like in Germany exists in Bulgaria.

The right to paid annual leave, its use, related procedure, interruption of use, postponement of use, expiry of entitlement to use are regulated in the national legislation similarly, in principle, for employees under an employment relationship (Labour Code – LC), civil servants (Civil Servants Act - CSA), magistrates (Judicial Power Act), as well as persons employed with the national security and defence forces (special laws). Financial compensation in lieu of annual leave is prohibited, except upon termination of the employment relationship (of civil servants).

Employees must use their annual leave by the end of the calendar year in which entitlement arises. According to Article 173, paragraph 5 LC, the employer is required to authorise use of paid annual leave by the end of the respective calendar year, unless the use of said leave has been deferred in accordance with the procedure of Article 176. Article 57 CSA establishes an identical rule for civil servants. Such rules also exist in special laws, for instance in Article 198 of the Republic of Bulgaria's Defence and Armed Forces Act. In case of postponement of leave, an opportunity must be guaranteed for the worker to not use less than half of the paid annual leave to which he/she is entitled for the respective calendar year.

The rules on postponement of paid annual leave are established in Article 176 LC (for employees). They are also applicable to civil servants (Article 59 CSA), magistrates (Article 339 JSA) and those employed in the national security and defence forces (explicit provisions in the social laws). Use of paid annual leave may be postponed for the following calendar year by: the employer – for important production reasons; the worker – by using an alternative type of leave or upon his/her request and with consent from the employer (for temporary disability, maternity, etc.).

If the leave was postponed or has not been used by the end of the calendar year in which entitlement arose, the employer is required to ensure it is used in the following calendar year, but no later than six months after the end of the calendar year in which entitlement to the leave arose (Article 76, paragraph 2 LC). Similar rules have been established for some civil servants in the special laws. In case the employer did not authorise the use of leave in cases and in line with the terms that fall under

Paragraph (2), the worker is entitled to determine himself/herself when he/she will make use of it by notifying the employer thereof in writing at least 14 days (seven days for civil servants) in advance. Article 176a LC provides that where paid annual leave or a part thereof is not used within two years after the end of the year for which entitlement to the respective leave arose, regardless of the reasons, entitlement to its use ceases in accordance with the law. If paid annual leave is postponed, the right to use it ceases upon expiry of two years from the end of the year in which the reason to not make use of the leave ceased to exist. The rules in Article 59a CSA are identical.

Upon termination of the employment relationship, the worker is entitled to cash compensation for any unused paid annual leave for the current calendar year in proportion to the duration of his/her period of service and for any unused leave deferred in accordance with the procedure set out in Article 176, the right to which has not yet lapsed in accordance with the law. Identical rules exist in Article 51, paragraph 2 CSA for civil servants and in the special laws for persons working for the defence and security forces.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) The Government of the Republic of Croatia has adopted the Amendment to the Regulations on the Manners and Conditions of Promotion of Civil Servants.

(II) The Constitutional Court of the Republic of Croatia has abolished the provisions of the Labour Act on more favourable financial rights of unionised workers (members of the representative trade unions) because it found them to be discriminatory.

(III) The Minister of Labour, Pension System, Family and Social Policy with the prior consent of the Minister of Health, has adopted the Regulations on Determining the Health Capacity for Work of Minors.

1 National Legislation

1.1 Promotion of civil servants

The Government of the Republic of Croatia has adopted the Amendment to the Regulation on the Manners and Conditions of Promotion of Civil Servants (Official Gazette No. 53/2023). A novelty is that civil servants with a higher level of education than required for the position for which they are assigned, can advance to a non-managerial position for which that civil servant's level of education matches that prescribed as a precondition for the respective post. This is only possible when s/he has twice as much work experience in state bodies in a job that requires a lower level of education as the work experience prescribed as a precondition for assignment to a given position and if s/he has worked continuously in the same state body for at least two years.

2.2 Regulations on Determining the Health Capacity for Work of Minors

The Minister of Labour, Pension System, Family and Social Policy with the prior consent of the Minister of Health, has adopted the Regulations on Determining the Health Capacity for Work of Minors (Official Gazette No 55/2023). This Regulations prescribes the method for determining the health capacity for work of minors, the deadlines by when the determination of health capacity must be repeated, the content and method of issuing a certificate of health capacity and other issues important for determining the health capacity of minors (Article 1). On the date of entry into force of these Regulations, the Regulations on Jobs in Which Minors May Work and Activities in Which They May Participate ceases to be valid (Official Gazette No. 62/2010).

2 Court Rulings

2.1 Abolition of more favourable financial rights of unionised workers

Constitutional Court, U-I-242/2023, 23 May 2023

The Constitutional Court of the Republic of Croatia has abolished Article 192(4), (5) and (6) of the Labour Act (U-I-242/2023, U-I-1050/2023, U-I-1399/2023, U-I-1944/2023 of 23.5.2023). The abolished provision has been introduced in the Labour Act by the latest Amendment to the Labour Act (Official Gazette No. 151/2022). This particular provision had prescribed more favourable financial rights of certain unionised workers – members of the representative trade unions if so agreed in the collective agreement. The Constitutional Court found this provision to be discriminatory and therefore contrary to the Constitution. The Constitutional Court cited in its decision the opinion of the

Peoples Ombudsperson. She confirmed the possibility of contracting a larger scope of financial rights through a collective agreement, but only for union members who negotiated that the agreement in practice can negatively affect the exercise of the right to freedom of association and create indirect pressure on workers, guided by the criteria of exercising greater financial rights, to join a specific trade union. In their separate opinions, two judges of the Constitutional Court expressed the opinion that the abolished provision was not discriminatory, but the purpose of the provision was to promote social dialogue and consolidate the fragmented union scene so that larger unions could better protect workers' rights.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Article 84 (4) and (5) and Article 82 (1) of the Labour Act of 2014 (last amended in 2022) are of relevance in the light of the facts of the case *FI vs. Bayerische Motoren Werke AG* and for the comparison of German and Croatian law in this context.

In Croatia, the worker is entitled to use annual leave or a portion thereof, which is either interrupted or unused in the year it was acquired due to illness or maternity leave, parental or adoption leave, or leave for taking care of a child with serious developmental disabilities, after returning to work, and by 30 June of the following calendar year, at the latest (Article 84(4) of the Labour Act). Exceptionally, the worker is entitled to use the annual leave or a portion thereof, which, due to maternity leave, parental or adoption leave, or leave for taking care of a child with serious developmental disabilities, s/he was not in a position to use or was not allowed by the employer to use it by 30 June of the following calendar year, by the end of the calendar year in which he/she returns to work (Article 84(5) of the Labour Act). Furthermore, in case of termination of the employment contract, the employer is required to pay a worker who could not use his/her annual leave an allowance in lieu of that leave (Article 82(1) of the Labour Act). The cited provisions should be read in line with the judgment of the CJEU in the case *FI vs. Bayerische Motoren Werke AG.*

4 Other Relevant Information

4.1 Annexes to the Collective Agreement for Civil Servants

The Annexes to the Collective Agreement for Civil Servants and Employees in State Bodies and to the Basic Collective Agreement for Public Servants and Employees in Public Bodies (see here and here) prescribe more favourable financial rights to the workers – members of the representative trade unions (Official Gazette (No. 58/2023)). However, since the Constitutional Court of the Republic of Croatia has abolished the provision of the Labour Act which had allowed such differentiation (for more details, see above 2.1), these provisions of the Annexes of the Collective Agreements are null and void.

Cyprus

Summary

The Cypriot Labour Court has ruled that politically appointed associates under fixed-term contracts shall have their contract converted into contracts of indefinite duration.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Conversion of fixed-term contracts into contracts of indefinite duration

Labour Court, Case 385/2022, 12 May 2023

In its decision, the Labour Court ruled that politically appointed associates under fixed-term contracts shall have their contracts converted into contracts of indefinite duration.

Four persons related to the former President of the Republic, who were hired by political appointment as associates between March and April 2013, applied to the Labour Disputes Court, claiming that their fixed-term contract should be converted into one of indefinite duration. They applied to the Court to quash the decision to dismiss them following a law passed by Parliament. Parliament had sought to exclude politically appointed persons or those appointed based on nepotism from benefiting from the provision converting fixed-term contracts into contracts of indefinite duration by imposing a legal provision of budgetary constraints to this effect (Law 56(II)/2021). The Labour Disputes Court ruled in their favour, however, as the provision violates laws that purport to transpose Directive 1999/70/EC (Law 70(I)/2016). The Court held that the legislative budgetary reservation imposed by Parliament is unconstitutional, and contravenes the separation of powers, Articles 25 and 26 of the Constitution, and Article 15 of the Charter of Fundamental Rights, since this interference by Parliament with the right to freedom of association was not permissible. Parliament, it is alleged, imposed restrictions on the applicants' right, which are not, in principle, compatible with the freedom of contract. The Court also held that there was a contradiction with Article 28 of the Constitution as well as with the articles of the European Convention on Human Rights, the Charter of Fundamental Rights and European directives in relation to the principle of equality and non-discrimination.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

This case deals with the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) and Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). Recitals 4 and 5 of Directive 2003/88 provide that (4) the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations. Also, (5) all workers should have adequate rest periods. Moreover, Article 7 of the Directive, entitled 'Annual leave', provides that:

- Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice;
- The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

The Court ruld that the answer to the first question is that Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter, must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, lapses at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

Such matter has not come before the Cypriot courts. The Republic of Cyprus regulates working time in the 'Laws on Annual Leave with Pay' (*Ετήσιων Αδειών με Απολαβές Νόμος του 1967*, No. 8/1967), which regulates the general framework for paid leave and the law purporting to transpose the WTD, the 'Law on Organisation of Working Time' (Law 63(I)/2002 as amended, Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του 2002 (63(I)/2002)), herein referred to as WTL. The WTL 7(3*)* provides that all employees are entitled to four weeks of paid leave in accordance with the terms and conditions provided by legislation or collective agreements and/or the practice of obtaining the right and granting leave. 5(1) of the Law on Paid Leave provide for the duration of leave. The duration of an employee's leave who has worked not less than 48 weeks during the leave year is 20 working days if the employer has a five-day work week and 24 working days the employer has a six-day work week. Provided that where an employee is entitled by law, custom, collective agreement or otherwise to a period of leave that is longer than the days provided, the number of days in this longer period shall be substituted for the days provided for in this Article as long as the law, custom, collective agreement or otherwise remains in force.

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

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

The Labour Code and the Employment Act have been amended as regards temporary agency employment, the definition of illegal work and temporary assignments.

1 National Legislation

1.1 Amendment to Act 262/2006 Sb., the Labour Code and other related acts (Parliamentary Print 423/0)

The draft amendment to Act 262/2006 Sb., the Labour Code and other related acts, which was approved by the government and presented to the Chamber of Deputies as Parliamentary Print No. 432/0 in April, has just passed the first reading in the Chamber of Deputies. The time limits between parliamentary readings of the bill have been condensed to accelerate the promulgation of the bill and to observe the deadline for the transposition of EU law. Considering the procedural steps taken to pass the law, it is expected that the law will become effective either on 01 September or on 01 October later this year.

As regards contentions about the hasty application of the law, see the April 2023 Flash Report. The bill was not modified in the first reading.

1.2 Amendment to Act 435/2004 Sb., on employment and other related acts

The draft amendment to Act 435/2004 Sb., on employment and other related acts was approved by government and submitted to the Chamber of Deputies as Parliamentary Print No. 540/0. The proposed amendments have been discussed in detail in previous Flash Reports. Compared to the draft amendment submitted to government, the bill presented to Parliament has been modified as follows:

- The proposed change of the definition of illegal work has been removed,
- The statutory protection of agency employees, whose term of employment coincides with the term of temporary assignment, has been strengthened.

1.2.1 Change of the definition of illegal work

The proposed amendment eliminating the long-term nature of illegal work as one of its defining criteria, which would only make short-term and one-off work illegal, applies as long as the other criteria of illegal work are met. The bill, as passed by government retains the original definition of illegal work as laid down in section 5(e) of the Employment Act.

1.2.2 Agency employment

The proposed wording of section 307c LC, which extends the term of employment of agency employees by 14 days beyond the date on which the temporary assignment was terminated by the user in cases in which the term of employment was to coincide with the term of assignment, has been deleted. As presented in the April 2023 Flash Report, the wording of this provision was at risk of misinterpretation and misapplication, and, for all practical intents and purposes, legitimised the 'bad practice' of restricting the term of employment relationships between the employment agency and the agency worker to the duration of a temporary assignment only.

The new wording of section 307c LC, which intends to replace the original text, stipulates:

> *"If a contractual arrangement in an employment contract or an agreement to perform work between an employee and an employment agency which contains a clause on the temporary assignment of the employee to a user undertaking incorporates a clause that states that the term of contract coincides with the term of the temporary assignment, such a clause is deemed non-existent/invalid from the outset. Employment agencies are prohibited from incorporating such a clause in their contracts."*

In other words, employment agencies are prohibited from making an employment contract or an agreement to perform work only for the term of the employee's temporary assignment to a user undertaking. Such a clause is treated as *void ab initio.* An employment agency may still enter into a fixed-term contract, but the term of contract may not be defined by reference to the duration of the temporary assignment at the user undertaking. This modification aims to remedy the defects of the original draft (discussed in the April 2023 Flash Report), ensuring a higher degree of stability and predictability of the employment of agency employees.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Unlike German law, the Czech statutory regulation of leave does not allow for an accumulation of working time for the purposes of progressive retirement. The time worked may therefore not be expanded or condensed to complete mandatory working time to allow the employee to take time off or become eligible to a retirement pension at an earlier date. Czech law only permits an uneven distribution of working time with a compensatory period that does not exceed 52 weeks, if so agreed in the applicable collective agreement, insofar as the employee completes the agreed working time (term of employment) during the compensatory period (c.f. section 78(1)(m) LC).

The statutory regulation of leave per calendar year accounts for both even and uneven distribution of working hours, and leave is thus inferred from the employee's average working hours. The difference in hours worked in individual weeks does not affect the employee's overall amount of leave.

The set of circumstances discussed in the Court's ruling can therefore not occur under Czech employment law. According to section 218 LC, if annual leave cannot be used up in the calendar year in which the employee is entitled to that leave (the reason notwithstanding), unused leave is carried forward to the next calendar year. Unused leave that has been carried forward is used first in the next calendar year. Annual leave may not be forfeited or replaced by monetary compensation, except if employment is terminated. According to section 222(2) LC, unused annual leave may only be replaced with monetary compensation if employment is terminated.

When the employment relationship ends abruptly or prematurely, the employee may be unable to use up his/her leave due to incapacity for work or some other legal circumstances. If the employee cannot use up the remainder of his/her leave on account of his/her employment contract being terminated, the employer must pay the employee compensation for unused leave in the amount equal to their average wage under Czech

law, or, more specifically, under section 222 LC. Czech law does not allow the employer to deny the employee the opportunity to take leave or wage compensation.

Different rules apply when it comes to so-called supplementary leave, which is provided in addition to annual leave to employees who perform particularly arduous work as defined under section 215 LC. The instances of such arduous work are exhaustively listed in the law. Supplementary leave must always be used up first as a matter of preference in the calendar year in which entitlement to such leave arose, and may not be carried forward or monetarily compensated. In the event of premature and sudden termination of employment, insofar as the employer had not granted the employee any leave in the corresponding calendar year, the right to supplementary leave expires. However, the set of circumstances involving supplementary leave that exceeds the scope of four weeks is not covered by the present Court ruling and is not regulated in Article 7 section 2 of the Regulation, which only refers to minimum leave.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

(I) The Directive on transparent and predictable working conditions has been transposed and the Danish Act will come into force on 01 July 2023.

(II) A new ruling of the Danish Eastern High Court clarifies the meaning of the Danish Act on Transfers of Undertakings, which transposes Directive 2001/23/EC. More specifically, the ruling clarifies the (lack of) protection of shop stewards in situations where the transferee does not take over the collective agreement following the transfer. The ruling must be read in light of the Danish regulation of employee representation.

1 National Legislation

The Act on Employment Certificates and Certain Working Conditions was passed by Parliament on 08 May 2023. The Act transposes the Transparent and Predictable Working Conditions Directive.

The Act—fully in line with the Danish legislative tradition in the labour market—is semi-dispositive, meaning that the Act is secondary to collective agreements that implement the Directive's provisions.

This interplay between collective agreements and the Act is expressed in section 1.

The Act does not apply if a duty for the employer to share information is provided for in a collective agreement, which as a minimum include the rules corresponding to Articles 2-13 and 15-19 of the Directive, cf. section 1(4).

The sections on material working conditions, sections 6-11 of the Act, does not apply to employees that are covered by a collective agreement concluded by the most representative social partners in Denmark, which applies to the entirety of Danish territory, and which ensures the overall protection of the employees concerned, cf. Article 14 of the Directive, cf. section 1(5).

The Transparent and Predictable Working Conditions Directive has been transposed by a number of collective agreements.

The Act will enter into force on 01 July 2023. Current employees have the right to have their employment certificate updated to the standards under the new Act. An employer must provide an updated certificate within 8 weeks of the employee's request. The new Act on Employment Certificates applies to a wider group of employees. Previously, only workers with a minimum of eight working hours per week were covered. The New Act stipulates that workers with an average of three working hours per week over a period of four consecutive weeks are covered. The average three working hours are calculated not only on the basis of planned/agreed work schedules, albeit—as previously—on the basis of the work actually performed.

Second, the duty to inform is extended by five new types of information, cf. section 3(2)(1)-(15). This includes information that must be provided to temporary agency workers, to workers with an unpredictable work pattern, the duration of and terms for a probation period, the duration of any form of leave with pay (i.e. not limited to holidays), rules on overtime and payment (if any), the right to upskilling/training, and social security arrangements. These types of information were also considered 'substantial' under Danish law under the former Act, and as such, the additions do not aim to change the employer's material duties.

New types of information must be provided to posted workers, cf section 4, and a new duty to inform posted workers in writing about changes to their contract as soon as

possible has been introduced, at the latest at the date the changes come into force, cf. section 5.

Third, the timing of the duty to inform has been modified. Under the previous act, the employer had to inform workers about changes within one month from the start of their employment/change to their employment. Now, the employer must inform workers about the majority of their terms of employment within 7 calendar days from the commencement of the employment relationship.

Fourth, minimum working conditions now apply to all workers covered by the act.

A probation period may not exceed six months. The probation period may not exceed 25 per cent of the entire fixed-term employment relationship. This does not change the status quo in Denmark much, as probation periods are maximum three months, which applies e.g. to the Salaried Employees' Act.

An employer may also not agree on an exclusivity clause with an employee, which prevents or otherwise sanctions the employee from pursuing parallel employment, as long as the employee is able to fulfil the contract with the employer during his/her scheduled working hours, and the supplementing position is not otherwise in conflict with his/her employment.

An employer can only order an employee, whose working hours are entirely or mostly unpredictable, to work, if the work is performed within pre-determined reference hours or reference days, and if the employee has been notified about the task.

The new Act includes a victimisation provision, which comes with a shared burden of proof rule.

As mentioned, the Act will enter into force on 01 July 2023.

The new Act has been anticipated for a long time. The Act is based on negotiations between the main social partners on how to interpret and transpose the Directive's provisions in the Danish labour market. The negotiation process was not entirely smooth.

The new Act is available here. The preparatory work to the new Act is available here.

2 Court Rulings

2.1 Transfer of undertaking

Eastern High Court ruling, BS-32531/2021-OLR, 09 May 2023

This case concerned a transfer of 'respiratory functions' from the public authority Region Hovedstaden (transferor) to the region's private supplier (transferee). It was undisputed that the Danish Act on Transfers of Undertakings applied to the transfer. It was also undisputed that the collective agreement applicable to the work of the transferor had not been acceded to by the transferee, which is an option provided for by the Danish Act on Transfers of Undertakings section 4a.

The main questions were whether an employee had retained the function of and special dismissal protection as shop steward after the transfer, and in this context, when this protection could be terminated at the earliest after the transfer. The case thus concerned an interpretation of the Danish Act on Transfers of Undertakings, section 4(2) and 4a(1), which implements Directive 2001/23/EC, Article 6.

The Court first noted the status of law in Denmark. Under Danish statutory legislation, there is no general right to elect workers' representatives, nor is there statutory-based dismissal protection of workers' representatives. The right to elect general workers' representatives to function on behalf of the employees (shop stewards), including dismissal protection of shop stewards, is only found in collective agreements.

Thus, the question before the High Court was to what extent the shop steward continued to function and to be protected as a shop steward following the transfer on 01 February 2020, where the company had not acceded to the collective agreement. In addition, the question was at which earliest time the employee, who had been a shop steward before the transfer, could be terminated.

The Court first concluded that as the collective agreement had not been acceded to by the transferee, the workplace was not covered by a collective agreement after the transfer, and the transferred employees were not covered by a right to elect shop stewards/representatives.

The question then was whether the 'basis for worker representation' in the Danish Act on Transfers of Undertakings section 4(2) had ceased.

The Court found that the expression the 'basis for worker representation' in the Danish Act on Transfers of Undertakings section 4(2) and the expression 'the mandate for the representative … expires' in the TOU Directive Article 6(2) must be understood as covering a situation such as the present one, where the collective agreement, which stipulates the right to elect shop stewards, is not acceded to.

This is supported by the preparatory works to the Danish Transfer of Undertakings Act. The example given in the preparatory works (that there is an insufficient number of employees after the transfer) for the use of section 4(2) was only provided as an example and was not exhaustive. As this example was not exhaustive, the preparatory works did not exclude a situation such as the present on as being covered by section 4(2).

This understanding is aligned with para 26 in the CJEU's ruling in case C-344/18 that the purpose of the Directive is to ensure the right balance between both the employees' and the employers' interests.

The High Court concluded that as a consequence of this understanding of the terms 'expiry' in the Directive and of 'ceasing' in the transposing Danish provision, the functions as shop steward ceased to exist on the date of the transfer on 01 February 2020.

The final question then is whether the dismissal protection as provided for in the collective agreement followed the original one expiring on 31 March 2021, or whether the dismissal protection of shop stewards followed the expiry of the function as provided for in the Act on Transfers of Undertakings, Article 4(2).

The High Court stated that the protection as shop steward (regulated in the former collective agreement) continued to exist for a period of time as provided for in the Act, section 4(2).

The function as shop steward expired on the date of the transfer, i.e. on 01 February 2020. The notice period for the employee representative calculated according to the Act, section 4(2), referring to the extended notice period for shop stewards in the specific collective agreement concerned, was the individual notice period of +3 months, cf. the collective agreement section 17. As the individual notice period of this employee was 6 months, the calculated extended notice period for the employee as shop steward was 9 months.

The protection of the shop steward in this case thus ceased 9 months after the expiry of the shop steward's function, i.e. 9 months after 01 February 2020, i.e. on 01 November 2020.

In Denmark, the right to elect shop stewards as well as the function of shop stewards as worker representatives is enshrined only in collective agreements in Denmark. There is no general right or general legislative framework for shop stewards under Danish law.

When a transferee decides against acceding to a collective agreement, the consequence is that the protections and rights formerly established in the collective agreement must

be respected by the transferee after the transfer as individual employee rights. The protections and rights must be respected until the expiry of the (original) collective agreement.

The institution of a shop steward is not (necessarily) considered an individual right that must be respected by the transferee when a collective agreement is not acceded to.

A shop steward serves as a local representative of the trade union at the workplace. Other forms of worker representation are based in statutory acts, such as health and safety representatives (The Work Environment Act), and—if applicable—employee representatives on company boards (The Companies Act). However, this is not the case for general worker representation in the form of shop stewards, which are only provided for in collective agreements, and as such only binds workplaces, that are covered by a collective agreement.

Likewise, the special dismissal protection of shop stewards only applies if the workplace is covered by a collective agreement. Special dismissal protection varies across the different collective agreements. It is usually limited to the material level, i.e. that imperative reasons must exist for dismissing a shop steward. At the procedural level, the shop steward is usually entitled to a longer notice period as well as a pre-dismissal hearing. The special dismissal protection again applies only in workplaces, where the collective agreement provides such protection.

The High Court ruling in May was presumably the first time that a Danish court was faced with the interplay between the right of the transferee to not take over the collective agreement and the right to representation after the transfer.

The question in the present case was precisely to which extent the transferee, when not acceding to the collective agreement, continues to be bound by the function of a shop steward, and/or continues to be required to respect the special dismissal protection of a shop steward, and—if so—whether the protection continued until the time of expiry of the collective agreement or perhaps expired at an earlier time.

The Danish High Court actively relied on EU law in this case. The interpretation included the wording and purpose of the Directive and took recent CJEU case law into account.

The Court's result is in line with Danish labour law and the Danish implementation of the Directive. Under Danish law, the role of shop stewards is intrinsically tied to the enforcement of an applicable collective agreement. The (legal) basis for the function as shop steward (i.e. the collective agreement) ceases to exist the moment the collective agreement no longer is in force. As a protective measure, the (former) shop steward still enjoys extended dismissal protection as a shop steward for a certain period after the transfer (nine months in the present case).

However, the High Court did not find that the shop steward's protection should have the same status as the individual employee's rights, which must be respected by the transferee until the expiry of the (original) collective agreement.

The High Court treated the institution of worker representation as a right different from individual employee rights in the collective agreement applicable to the transferor and as such, did not require the same extended level of protection as the individual rights. The consequence is that shop stewards who are transferred to a transferee that does not accede to the collective agreement and are not covered by another collective agreement, do not continue to serve (perform the function) as shop stewards after the transfer, and they enjoy the former protection as shop stewards only for a limited time after the transfer.

This aligns with the overall institution of shop stewards as the guardians of collective agreements at the workplace and as such, does not express a right of the individual employee to be represented in a certain manner.

It also aligns with earlier case law on the duty of the transferee to respect non-material provisions in the (original) collective agreement. In the Eastern High Court Ruling U

2002.1927 Ø, the duty to notify the trade union in connection with dismissals of employees with more than eight months seniority were found to be a significant element of the individual employee's overall position, and should thus be respected by the transferee.

The new Eastern High Court ruling delineates the transferee's duties in terms of respecting collective agreement provisions, which the transferee did not accede to.

In situations in which the transferee (or any other employer) has no collective agreement in place for certain types of work, the trade unions may engage in industrial action with the aim of concluding a collective agreement to cover the work. This means that a transferee that does not accede to the transferor's collective agreement and is not bound by a collective agreement, is 'fair game' for trade unions, with a view to covering the transferee by a collective agreement.

It should also be stressed that employees employed in workplaces without special rules on representation in a collective agreement are always entitled to choose a 'spokesperson' to speak on their behalf. Such spokespersons are, however, not afforded any special protection against dismissal or similar.

Finally, it must be noted that the key questions in the case were not formulated very clearly by the claimant. The claimant (representing the shop steward) had not claimed any outstanding salaries or compensation for undue dismissal, hence the potential financial consequences of their claims were not clear to the Eastern High Court. The parties instead agreed to submit the question of financial compensation to an industrial arbitration court afterwards (an agreement on jurisdiction, 'procesaftale').

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The present case concerned the right to paid annual leave under German law in the context of progressive retirement schemes. The progressive retirement scheme in the specific case entailed that the employment agreement was transformed into a part-time employment agreement, where the employee was to work for approx. three years (from 01 February 2013 to 31 May 2016) and would then be released from work over the next approx. three years (from 01 June 2016 to 30 September 2019). The employee was prevented from taking some days of accrued annual leave due to illness before the expiry of the work phase, and the rights lapsed the next year (2017).

The CJEU ruled that the Working Time Directive, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, precluded such rules. It was considered contrary to the Directive to apply national rules that provide that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, when the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

In Denmark, the Directive's rules on annual leave have been transposed in the Holiday Act, L No. 230 of 12 February 2021. The Holiday Act covers all employees, i.e. both in the public and private sectors.

The CJEU's ruling seems very specific in its application, as the judgment is closely tied to the use of a progressive retirement scheme in Germany, where part-time employment consists of a full working time phase and a work release phase.

The use of progressive retirement schemes is not specifically regulated in Danish law and the regulation has not been subject to any case law. The extent to which these schemes are in fact used in Denmark is unclear.

To the extent that Danish employers use a progressive retirement scheme, the ruling is of relevance for the employer to comply with the requirements of the EU Working Time Directive.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) Continuation of the procedure for paying sickness benefits under more favourable conditions for employees is being considered.

(II) The Estonian government plans to modernise working regulations and make them more flexible. The trade unions and employers' associations signed an agreement to raise the monthly minimum wage. The government plans to allow employees to work when they are on extended sick leave of more than two months. The monthly average wage has increased.

1 National Legislation

1.1 The conditions for paying sickness benefits

The Estonian Parliament is discussing amendments to the Occupational Health and Safety Act and Health Insurance Act. According to the proposal, both acts would be amended in such a way that from 01 July 2023 onwards, the procedure for the payment of sickness benefits provided temporarily would remain in force. This special procedure was adopted as a measure to deal with the consequences of the spread of the COVID-19 virus.

According to the proposal, the regulation would continue to apply, according to which the employee's deductible only applies to the first day of illness. The employer will pay compensation from the second to the fifth day, and the Health Insurance Fund will pay compensation from the sixth day onwards.

See here for the Act to amend the Occupational Health and Safety Act and Health Insurance Act. The draft No. 7 SE, Estonian Parliament.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

In this judgment, the Court dealt with the question whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter preclude a rule of national law according to which days of paid annual leave acquired during the work phase of a progressive retirement scheme but not taken are likely to be forfeited because they cannot be taken during the work release phase.

The Court found that the aforementioned provisions must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

According to Estonian law, this issue is regulated as follows. The Employment Contracts Act (hereinafter ECA) stipulates that the employer is required to grant annual leave as

prescribed and to pay holiday pay (§ 28 subsection 2 clause 3). It is presumed that an employee's annual leave is 28 calendar days, unless the employee and employer have agreed upon a longer annual leave or unless otherwise provided by law (ECA § 55). An agreement on monetary or other forms of compensation for annual leave during the term of validity of an employment contract is void (ECA § 70 subsection 3). Upon expiry of the employment contract, the employer is required to financially compensate the employee for any unused annual leave which has not expired (ECA § 71).

Consequently, according to Estonian legislation, there is no difference between full-time or part-time employees or whether they are in a pre-retirement phase or retiring. In any case, the rule protecting the employee applies for employees who are entitled to annual leave or in case of cancellation of the employment contract, to monetary compensation for any unused leave.

The expiration of annual leave is stipulated in § 68 subsection 6 of the ECA. Accordingly, the claim for annual leave expires within one year of the end of the calendar year in which entitlement to annual leave arose. The expiry of annual leave is suspended for periods of maternity leave, paternity leave, adoptive parent leave or parental leave, as well as during the employee's period of enlistment or alternative service.

Based on the above, it can be concluded that the employee's temporary incapacity for work is not mentioned in the so-called 'closed list' specified in the law, i.e. the given reason is not the basis for suspending the expiration of the annual leave claim.

The statute of limitations is strongly related to the fulfilment of the parties' rights (in this case, primarily the employee). Based on the above, it would be reasonable to introduce a clarifying provision in employment contract law on the suspension of the expiration of the employee's claim.

At the same time, it must be emphasised that the employee can also use his or her right to annual leave for the so-called 'holiday year' during the entire following year. The timeframe provided in general is relatively long, so that the employee has the opportunity to realise his or her right.

4 Other Relevant Information

4.1 Modern and flexible working conditions

The Estonian Reform Party, Estonia 200, and the Social Democratic Party as the governing coalition presented their programme for 2023–2027 on 10 April 2023. The objectives set out in the agreement will serves as a basis for the government to draft its four-year plan of action.
Among others, the coalition agreement contains a clause concerning labour relations:

> "*We will make working regulations more modern and flexible. Legislation relating to work must adapt to the changed nature of work, bring as many different groups of people as possible to the labour market, and allow flexible work and organisation of work, whilst ensuring social guarantees.*"

The government is currently discussing how working regulations could be made more modern and flexible.
See here for the coalition agreement 2023–2027, Government of Republic of Estonia.

4.2 Agreement on the development of the minimum wage

The Estonian Trade Union Confederation, the Minister of Economy and Information Technology and the Estonian Employers' Association concluded an agreement on the rise in minimum wage until 2027, by when it will make up 50 per cent of the average wage.

According to the agreement, the minimum wage will be increased in stages: 42.5 per cent in 2024, 45 per cent in 2025, 47.5 per cent in 2026, and 50 per cent of the average salary in 2027.

In addition, it was agreed that trade unions and the employers' associations would agree on the exact amount of the minimum salary in the fall of each year, based on the latest available forecast of Eesti Pank (Estonian Bank).

According to the government's action plan, the minimum wage agreement helps increase social cohesion and equal opportunities in education and the labour market, therefore, according to the agreement, the minimum wage will rise faster than the average wage until 2027, but the growth rate will not exceed 16 per cent.

See here for further information.

4.3 Employers support working during long-term sick leaves

The Estonian government plans to allow part-time work or the performance of lighter tasks during a sick leave of a duration of more than two months and to receive a salary. The purpose of this change is for employees to maintain a connection with working life and prevent the development of permanent incapacity for work.

Employers support the principle of this plan. A healthy person is key for society and the economy, and due to the deepening labour crisis, it is important to prevent the loss of working capacity.

At the same time, employers are concerned about the risks of abuse and possible costs to the state and to employers. Since health care costs place a huge burden on the state budget, introducing new services or changes to existing services must be carefully reviewed.

This change in approach covers an average of 17 000 employees who are on sick leave for more than 60 days per year. Of these, an estimated 5 000 people would use the opportunity to work while on sick leave, and approximately 1 800 would need the unemployment fund's support services for this. In addition, under certain conditions, the state plans to pay the employee's salary from the Health Fund's budget.

See here for further information.

4.4 The average salary in the first quarter 2023

The average salary in Estonia in the first quarter of 2023 was EUR 1 741; the median salary was EUR 1 424.

According to Statistics Estonia, the average gross monthly salary in the first quarter of 2023 was EUR 1 741 or 13.3 per cent higher than at the same time last year. The median salary was EUR 1 424.

By activity, the average gross monthly salary in the first quarter was highest in the information and communication sector (EUR 3 160), financial and insurance activities (EUR 2 952) and energy (EUR 2 435). It was lowest in accommodation and catering (EUR 1 124), other service activities (EUR 1 142) and real estate activities (EUR 1 209).

See here for further information.

Finland

Summary

The effectiveness and efficiency of the Government Action Plan for Gender Equality were examined. According to the survey, the Action Plan for Gender Equality is necessary, but needs to be further developed as a guiding document.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

According to section 2, Chapter 2 of the Employment Contracts Act (*Työsopimuslaki*, 55/2001), an employer must treat all employees equally. Equal treatment is also required for annual leave entitlements. Annual leave that is postponed due to incapacity for work is regulated in Section 26 of the Annual Holidays Act (*Vuosilomalaki*, 162/2005). A summer holiday that had to be postponed due to incapacity for work must be granted at a later date during the same holiday season. A winter holiday may have to also be postponed. A winter holiday must be granted before the beginning of the following holiday season. If such granting of the holiday is not possible, annual leave must be granted during the holiday period of the calendar year following the holiday period in which entitlement to the respective annual leave arose, but no later than by the end of that calendar year. If the granting of annual leave is not possible in the manner referred to above because of the employee's continued incapacity for work, the annual leave not granted is replaced with financial compensation.

4 Other Relevant Information

4.1 Differences in careers between women and men in the industrial sector and their monthly salaries

A study (Reports and Memorandums of the Ministry of Social Affairs and Health 2023:23, Publisher Ministry of Social Affairs and Health) examined gender differences in careers and their connection to the pay gap (monthly salaries) between women and men among employees who started their careers in the Finnish industrial sector between 2002 and 2020. The report includes a review of literature on gender differences in careers and pay. Based on a statistical analysis, women are more likely than men to be employed at lower levels of the occupational hierarchy in the year the employment relationship commences. Men, on the other hand, are more likely to have jobs at the top levels of the occupational hierarchy. These differences are dominated by gender differences in the field of education. In addition, women's pay starts to diverge from men's pay during the year in which employment commences: the difference in average pay is 22.6 percentage points in favour of men. Gender segregation in the field of education accounts for more than half of this. Following an analysis of a wide group of underlying

factors, the study still found an unexplained pay difference of nearly four percentage points. Gender differences are also evident in later career development. When career development is divided into four levels of skills, men are more likely than women to be promoted.

4.2 Government Action Plan for Gender Equality

The effectiveness and efficiency of the Government Action Plan for Gender Equality (Publications of the Government's analysis, assessment and research activities 2023:41, Publisher Prime Minister's Office) have been reviewed. The analysis is based on 51 interviews and a wide range of documentation. The main message is that the Action Plan for Gender Equality is necessary, but needs to be further developed as a guiding document. The Action Plan has four functions: societal, administrative, political and democratic. Its societal function is to promote gender equality in society, its political function is to clarify the government's gender equality goals and to engage government. The document's administrative function is to promote inter-administrative cooperation and engage ministries, while its democratic function is to engage civil society. Four challenges need to be addressed:

- the role of the Action Plan is unclear;
- the Action Plan's functions are not being properly fulfilled;
- the Action Plan's functions are currently not balanced;
- the visibility and awareness of the Action Plan is weak.

According to the report, the Action Plan for Gender Equality must be societally effective, visible and accessible. The report makes five recommendations to achieve this vision:

- the Action Plan's functions must be balanced;
- it must clearly express the government's commitment to change;
- processes must be made more inclusive;
- the Action Plan needs a budget for financing measures; and
- measures must be weighty and concrete.

France

Summary

(I) New rules on the procedure before penalties for failure to comply with the gender balance requirement in management positions and exemptions to Sunday rest for the 2024 Olympic Games have been issued.

(II) The Administrative Supreme Court has ruled on co-employment and the Court of Cassation has ruled on the consequences of situations in which a bank holiday falls on the right to rest.

1 National Legislation

1.1 Gender balance in management positions: a new procedure before penalties

Decree No. 2023-370 issued on 15 May 2023 defines the procedure to be followed before a 1 per cent penalty imposed when the rules governing the allocation of management positions between men and women in large companies are not complied with.

Law No. 2021-1774 of 24 December 2021 (aiming to accelerate economic and professional equality) has introduced new quotas for management positions in companies with at least 1 000 employees over three consecutive financial years.

Employers who fail to meet the minimum share of women in management positions have two years left to comply.

At the end of this period, if the results obtained are still below the rate set, the employer may be subject to a financial penalty of 1 per cent of the remuneration and earnings paid to employees or similar staff during the calendar year preceding the expiry of the period.

The Decree of 15 May 2023 sets out the procedure to be followed when imposing the penalty and defines the criteria to be taken into account when determining the amount. This penalty will apply from 01 March 2029.

If the labour inspectorate finds that the company has not complied with its obligation at the end of the two-year compliance period (results obtained below the rate, which will be 40 per cent when the penalty comes into force), a report on the situation will be submitted to the Labour Administration (known as '*Direction Régionales de l'Economie, de l'emploi, du travail et des solidarités* (DREETS)').

The Labour Administration, when considering the 1 per cent penalty, will notify the employer of its intention within two months. It will also invite the employer to submit its observations and give reasons for its failure to comply within one month, which may be extended by an additional month at the request of the company if the circumstances or complexity of the situation justify this. The employer may be heard at its request.

The Labour Administration will then notify the employer of the decision setting the rate of penalty to be applied, within two months of the expiry of the period for the employer to submit observations and justifications.

This rate takes the initial situation of the company into account, the measures taken by the company in terms of representation of women and men, the employer's good faith, as well as the reasons for the employer's failure to comply. Within two months of this notification, the company shall be informed by the authorities about the pay and earnings used to calculate the penalty.

1.2 Sunday rest: exemption for the 2024 Olympic Games

Law No. 2023-380 of 19 May 2023 (Olympic and Paralympic Games and other provisions) provides that the prefect may authorise the opening on Sundays of retail establishments that provide goods or services located in municipalities where the Olympic Games competition venues are located, and those bordering or close to these venues. The weekly rest period for employees of these establishments would be taken on a day other than Sunday on at rotational basis. The scheme will run from 15 June to 30 September 2024, unless the law is censured by the French Constitutional Council.

Sunday work will be voluntary for employees, who must give their written consent to the employer as provided for in the French Labour Code (see Article L. 3132-25-4 of the French Labour Code). The employee may reverse his/her decision at any time, provided he/she gives the employer ten days' written notice.

The employee will be entitled to the compensation provided for by 'Mayor's Sundays' (see Article L.3132-27 of the French Labour Code; financial compensation of at least double pay and in the form of time off in lieu).

It should be noted that this system is intended to be used in a supplementary manner, i.e. in the absence of or in addition to any other derogation from which the employer already benefits (e.g. Sunday morning opening hours of food retail outlets, Mayor's Sunday, establishments located in an international tourist zone).

2 Court Rulings

2.1 Co-employment

Administrative Supreme Court (Conseil d'Etat), No. 453087, 28 April 2023

In the present case, nine protected employees were the subject of a request for authorisation to dismiss them because their company, which belonged to a group, was being discontinued.

Even before the 'Labour Law' of 08 August 2016 (see Law No. 2016-1088 of 8 August 2016 on work, modernisation of social dialogue and the securing of professional careers), which incorporated the cessation of activity into the Labour Code as a situation justifying economic dismissal (see Article L. 1233-3 of the French Labour Code), the Administrative Supreme Court had already recognised the autonomous nature of this reason. In other words, in the event of a request for authorisation for economic redundancy based on the cessation of the company's activity, the labour inspector only had to check that the cessation was total and definitive. He did not carry out the traditional checks on the existence of technological change, economic difficulties or a threat to the company's competitiveness (see Administrative Supreme Court, No. 348559, 08 April 2013).

In this respect, when the company belongs to a group, the fact that another company in the group continues its activity of the same nature is not in itself an obstacle to the cessation of activity being recognised as total and definitive. On the other hand, the Administrative Supreme Court has ruled that the administration must take into account any other circumstances that may prevent dismissal, in particular a resumption, even if only partial, of the company's activity that would involve transferring the employee's employment contract to a new employer pursuant to Article L 1224-1 of the French Labour Code (see Administrative Supreme Court, No. 375897, 22 May 2015).

For the Court of Cassation, when an employee's co-employers are entities that belong to the same group, the cessation of activity by one of them may only constitute an economic reason for dismissal if it is justified by economic difficulties, technological change or the need to safeguard the competitiveness of the group's business sector (see Social Division, Court of cassation, No. 09-69.199, 18 January 2011).

In the case of the nine protected employees presented before the Administrative Supreme Court, the Labour Administration had authorised their dismissal, but the Administrative Court of Appeal approved the annulment of this decision on the grounds of a situation of co-employment between the company and the group to which it belonged, which excluded the administrative authorisation of dismissal on the grounds that the employing company had ceased its operations. It thus based its reasoning on that of the Court de Cassation.

The Administrative Supreme Court overturned the nine rulings of the Administrative Court of Appeal. It began by reiterating the principle of the autonomous nature of cessation of activity, provided that it is total and definitive, as a reason for economic redundancy, but added two exceptions.

Redundancy must be rejected:

- if it appears that the employment contract must be considered as having been transferred to a new employer. This principle has already been established (see above);
- If it is established that another company is, in fact, the employee's actual employer.

In the light of this second exception, the Administrative Court of Appeal erred in law when it held that a situation of co-employment existed in order to cancel the administrative authorisation, whereas only the fact that another company was, in reality, the real employer of the protected employees could lead to a rejection of the authorisation application.

In its decision of 28 April 2023, the Administrative Supreme Court ruled that when a protected employee is dismissed because a company that belongs to a group ceases its activity, the labour inspector is not required to check whether a situation of co-employment exists, but instead identify the employee's true employer.

As regards CJEU case law, any relevant decisions are scarce and limited. Some decisions have been handed down on co-employment and may shed some light on the CJEU's position.

Firstly, it is worth noting that the CJEU, in case C-10/05, 30 March 2006, Mattern and Cikotic defined an employer as

> "*the person on whose behalf the employee performs services for him for a certain period of time, in his favour and under his direction, in return for which he pays remuneration.*"

The notion of management could be used here for the purposes of co-employment. However, the notion of employer within the meaning of European law is strictly circumscribed by the CJEU. Thus, within the framework of groups of companies, even if the strategic decision to proceed with redundancies emanates from a parent company, the starting point of the obligation to inform and consult staff representatives is up when the subsidiary concerned by the job cuts is identified, and it is limited to the latter (see CJEU, case C-44/08, 10 September 2009, Akavan v Fujitsu Siemens Computers). From these decisions, it could be considered that the decision of 28 April 2023 of the Administrative Supreme Court is in line with CJEU case law.

Yet, secondly, although the Court de Cassation was able to refer to European law at the beginning of its case law on co-employment (see Social Division, Court of cassation, No. 05-42.570, 19 June 2007), the CJEU in case C-44/09, 10 September 2009, then the ECJ, clearly stated that

> "*the undertaking which controls the employer, even if it can take binding decisions with regard to the latter, does not have the status of employer.*"

Therefore, there is a clear limitation to the notion of co-employment, and European law does not provide any concepts that might help to further define co-employment.

Consequently, the CJEU still has to clarify its position on this notion and its implications.

2.2 Working time spread over four days instead of five days, and bank holidays

Court of Cassation Social Chamber, No. 21-24.036, 10 May 2023

In the present case, a company agreement provided for a 35-hour work week over four days, with 8.75 hours of work per day for blue collar workers. The agreement also stipulates that in addition to the weekly rest day on Sunday, the employee is entitled to two rest days per week in rotation.

Article L. 3122-4 of the French Labour Code, as in force between 22 August 2008 and 10 August 2016, provided that:

> *"When a collective bargaining agreement organises a variation in weekly working hours over all or part of the year, or when the possibility of calculating working hours over a period of several weeks, as provided for by the decree referred to in Article L. 3122-2, is applied, overtime is deemed to have been worked, depending on the framework adopted by the agreement or the decree for calculating overtime:*
>
> *1° hours worked in excess of 1 607 hours per year or the lower annual limit set by the agreement, after deduction, where applicable, of any overtime worked in excess of the upper weekly limit set by the agreement and already counted;*
>
> *2° hours worked in excess of the average of thirty-five hours calculated over the reference period set by the agreement or by the decree, after deduction of any overtime worked in excess of the maximum weekly limit set by the agreement or by the decree and already recorded in the accounts."*

The employee brought an action before the employment tribunal to obtain an additional rest day or, failing that, compensation when a variable rest day provided for in the agreement coincides with a public holiday.

The Court of Appeal ruled in his favour. It held that since the two non-fixed rest days were organised as part of an agreement to reduce working hours, they could not be positioned on a public holiday, unlike the weekly rest day acquired outside this type of agreement.

The employer contested this analysis and appealed to the Court of Cassation. It ruled that the two days of rest set by rotation are not the counterpart of an excess of the working time as determined by agreement, but that they result from the sole fact that this working time is spread over four days.

The employer argued that unless otherwise provided, when the bank holiday normally observed coincides with the employee's weekly rest day, it does not give rise to compensation. This is only the case when the holiday coincides with rest days acquired in return for exceeding the legal or contractual working hours applicable in the company.

The Court of Cassation upheld the employer's analysis and censured the appeal judge's decision.

In its decision of 10 May 2023, the French Court of Cassation ruled that the coincidence of rest days and bank holidays does not entitle to either additional rest or compensation if the rest days are not intended to compensate for hours worked above the legal or collectively agreed working hours, even if these rest days are provided for in a working time reduction agreement.

It stated that the company agreement in question provided for a 35-hour work week over four days. Thus, the three days not worked constituted rest days that were not intended to compensate for hours worked in excess of the statutory or collective agreement working hours.

Consequently, the fact that these days fell on bank holidays did not entitle the employee to additional rest or compensation.

It seems that in the light of recent CJEU case law, the latter would not apply the same reasoning as the Court of Cassation. Indeed, in CJEU case C-477/21 of 02 March 2023 (MÁV-START), the CJEU stated that daily rest and weekly rest were two autonomous and additional rights, even if national legislation grants workers a period of weekly rest that is greater than that required by European law. Thus, the CJEU could rule that the right to rest and non-working days due to bank holidays are two autonomous notions. Consequently, according to this reasoning, the employee would be entitled to both. Nevertheless, we might also note that the CJEU's strict approach essentially covers the right to rest, and we might therefore be led to think that the CJEU would be more flexible regarding bank holidays.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Annual leave cannot lapse if the worker could not take the leave due to sickness before he/she was exempted from work, even where it is not a long-term absence.

Under French law, if the employee becomes sick during paid annual leave, the employer must carry over the remaining days of leave if the collective agreement so provides.

The first paragraph of Article L3141-3 of the French Labour Code states:

"Employees are entitled to 2.5 working days' of paid annual leave per month of actual work".

This means that an employee who has worked for 12 months is entitled to 2.5 days x 12, i.e. 30 working days' paid leave.

This Article makes acquisition of said leave conditional on 'actual work', defined in Article L3121-1 of the same Code as time during which the employee is at the employer's disposal, under its authority, and cannot pursue his/her personal interests. In addition, the Labour Code stipulates that certain absences by an employee are deemed time actually worked, particularly in the case of an employee who is absent from work due to a work-related illness.

In practical terms, this means that an employee who is absent from work due to an occupational illness is entitled to 2.5 days paid annual leave per month, which is not the case for an employee who is absent due to a non-occupational illness.

In the absence of collective bargaining provisions, the collective bargaining agreement, branch, company or establishment agreement applies in labour law. These set out the obligations and rights of the employer and employee; the CJEU considers that paid leave must be deferred. This position has not been confirmed by the French courts.

It is the first cause of suspension of the contract that prevails, i.e. taking paid leave. The employer is not legally required to postpone paid leave previously granted as a result of the employee's sick leave. In this case, the days of annual leave during which the employee was absent from work are lost.

If the employer does not grant a deferral to an employee who has fallen ill during his/her leave, the employee may go before the industrial tribunal to request a deferral.

Much has been written about the relationship between these texts, as it appears that national law does not comply with European law.

In 2010, the Cour de Cassation (French Supreme Court) asked the CJEU for the first time whether a Member State was entitled to make a distinction in terms of paid holiday entitlement, depending on whether or not the cause of the absence was work-related.

In a judgment of the CJEU, case C 382/19, 24 January 2012, *Dominguez*, the European Court of Justice responded as follows:

> *"according to Article 7 of Directive 2003/88, any worker, whether on sick leave during the said reference period as a result of an accident occurring in the workplace or elsewhere, or as a result of sickness of whatever nature or origin, may not have his or her right to at least four weeks' paid annual leave affected".*

In other words, the CJEU stated in this ruling that the loss of the right to paid leave during a period of sick leave due to a non-occupational illness is contrary to European Union law.

However, in a ruling handed down on 13 March 2013, the French Supreme Court confirmed that a period of non-occupational illness does not entitle an employee to claim paid leave from his/her employer (Cour de Cassation soc., No. 11-22285, 13 March 2013).

In a decision of the Social Division of the Court of Cassation, No. 20-16.010, dated 15 September 2021, the facts of the case were as follows:

An employee was recruited as a nurse, and was subsequently affected by a long-term non-occupational illness, and was off sick from December 2013 to January 2016, retaining her salary. When she returned to work, she wanted to take the paid annual leave she had accumulated prior to her sick leave, as well as the annual leave accumulated during her sick leave period. She therefore sought to take annual leave that she had accumulated in 2013 in 2016. The employer rejected her request, and the employee appealed to the Labour Court.

It should be noted that the applicable collective agreement contained two clauses relating to the said paid annual leave:

- Clause 1: absences due to long-term illness for which salary is maintained are treated as working time;
- Clause 2: absences due to illness lasting more than 12 months do not give entitlement to leave.

The judge ruled that Clause 1 applies, allowing sick employees to acquire leave entitlements whether or not their illness is work-related. In addition, it was ruled that since an employee on sick leave is not 'able' to take paid annual leave, it must be deferred until the date on which he/she actually returns to work.

4 Other Relevant Information

4.1 COVID-19: suspension of compulsory vaccination for health care workers

Decree No. 2023-386 of 13 May 2023 (on the suspension of compulsory COVID-19 vaccination for professionals and students) suspends the vaccination requirement for health care staff from 15 May 2023 onwards.

Law No. 2021-1040 of 05 August 2021 (on health crisis management) stipulated that staff employed in care, medical and social establishments had to be vaccinated from 09 August 2021 (unless there was a medical contraindication or they presented a certificate of recovery from COVID). This obligation was temporarily maintained by Law No. 2022-1089 of 30 July 2022 (putting an end to the exceptional arrangements created to fight the COVID-19 epidemic).

This obligation has now been suspended. This decision is in line with the recommendations issued by the French National Authority for Health on 29 March 2023.

Germany

Summary

(I) Parliament has finally passed a Draft Act that will implement Directive 2019/1937.

(II) The Federal Labour Court has delivered a ruling on financial compensation for leave not taken in excess of minimum leave and mass redundancies.

(III) The Federal Labour Court has ruled on the possibility of deviating from the principle of equal pay in TAW through collective agreements.

1 National Legislation

1.1 Implementation of the Whistleblower Directive

About one and a half years after the deadline for implementation of Directive 2019/1937 has passed, the Mediation Committee of the Bundestag and Bundesrat reached an agreement, on the basis of which an amended bill was passed first by the former and then by the latter Chamber. The core of the draft is a new Whistleblower Protection Act (*Hinweisgeberschutzgesetz*). According to this law, internal reporting offices are to be established in companies and public authorities that have over 50 employees, to which whistleblowers can report violations of EU and German law. The law provides details on the exact structure of hotlines and provides for external hotlines as alternatives. It also provides legal protection for whistleblowers against reprisal.

See here and here for further information.

2 Court Rulings

2.1 Financial compensation for leave not taken in excess of minimum leave

Administrative Court Koblenz, 5 K 1088/22.KO, 09 May 2023

A civil servant who retires early may only claim financial compensation for leave in the amount of minimum leave of 20 days guaranteed under Union law. According to the Court's decision, recreational or additional leave already taken in the leave year in question must be counted towards this minimum annual leave, regardless of the point in time at which entitlement arose. According to the Court, it only matters whether and how much leave the respective person has already taken in the specific year. It is therefore irrelevant whether this is new or old leave, i.e. leave carried over from the previous leave year.

2.2 Mass redundancies

Federal Labour Court, 6 AZR 157/22 (A), 11 May 2023

Section 17(1) of the Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG) reads as follows:

> *"The employer is required to report to the Employment Agency before it dismisses 1. over five employees in establishments with, as a rule, over 20 and less than 60 employees; 2. ten per cent of employees regularly employed in the enterprise or over 25 employees in enterprises with usually at least 60 and less than 500 employees; 3. at least 30 employees within 30 calendar days in establishments with, as a rule, at least 500 employees. Other terminations of employment initiated by the employer shall be deemed equivalent to dismissals."*

The requirement 'as a rule' in section 17 (1) of the KSchG neither contains a regulation on a specific date nor does it require an average consideration. Instead, it is based on the number of employees to perform the company's regular business. This requires a retrospective view of past staffing levels and, if necessary—provided there is no closure of the enterprise—an assessment of future developments. Periods of exceptionally high or low business activity are not to be included. This has already been confirmed in the CJEU's case law. If an employer has incorrectly assessed the size of the business and therefore did not issue a mass dismissal notice, it is currently unclear whether this—as assumed by the Federal Labour Court in its consistent case law—still leads to the dismissal's invalidity. The sanction system developed by the Federal Labour Court may not be in line with the Mass Dismissals Directive and could therefore be disproportionate. The Sixth Senate therefore stayed the proceedings, pending the Court's decision in case – C-134/22 – (reference for a preliminary ruling from the Sixth Senate dated 27 January 2022 – 6 AZR 155/21 (A)).

See here for the press release.

2.3 Equal pay in temporary agency work

Federal Labour Court, 5 AZR 143/19, 31 May 2023

According to section 8(2) of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG), a collective agreement may deviate from the principle that temporary agency workers are entitled to the same pay as comparable permanent employees of the user undertaking for the duration of a temporary assignment, with the consequence that the temporary agency only has to pay the temporary agency worker the lower collectively agreed remuneration. The Federal Labour Court has now ruled that a collective agreement to this effect meets the EU law requirements of Article 5(3) of Directive 2008/104/EC.

The lower courts had dismissed the action. The plaintiff's appeal before the Fifth Senate of the Federal Labour Court was unsuccessful. To clarify questions related to Union law, the Senate had initially suspended the appeal proceedings by order of 16 December 2020 (- 5 AZR 143/19 (A)) and requested the CJEU to give a preliminary ruling on legal questions in connection with the 'respect for the overall protection of temporary agency workers' required by Article 5(3) of the Temporary Agency Work Directive but not defined in more detail. The CJEU answered these questions in its judgment of 15 December 2022 (case C-311/21, *TimePartner Personalmanagement*).

The Federal Labour Court has now ruled that the relevant collective agreement, at least in conjunction with the statutory protection provisions for temporary agency workers, meets the requirements of Article 5(3) of the Temporary Agency Workers Directive. According to the Court, disadvantages were sufficiently compensated by advantages. According to the CJEU's case law, a possible compensatory advantage can be the continued payment of wages, even during periods without an assignment. German law always allows for periods without a hiring out of the temporary worker, even in the case of fixed-term temporary employment relationships, for example if—as in the case in dispute—the temporary agency worker is not exclusively hired for a specific assignment or the user undertaking contractually reserves the right to have a say in the selection of temporary agency workers. The collective agreement guaranteed the continued payment of remuneration during periods without a temporary worker being hired out. In addition, section 11 (4) sentence 2 of the AÜG ensures that the temporary work agency bears the full economic and operational risk during periods of non-assignment, since the claim to compensation for default of acceptance under section 615 sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) cannot be waived in the temporary employment relationship. The legislator has also ensured that the collectively agreed remuneration of temporary agency workers may not fall below the lower wage limits set by the state and the statutory minimum wage. In addition, since 01 April 2017,

the deviation from the principle of equal pay under section 8(4) sentence 1 of the AÜG is generally limited in time to the first nine months of the temporary employment relationship.

The decision is so far only available as a press release.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

According to the CJEU, Article 7 of Directive 2003/88/EC, read in the light of Article 1(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a rule of national law, which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

The ruling concerns a special feature of German law (partial retirement) and is based on the request for a preliminary ruling of the Federal Labour Court (9 AZR 577/20 (A), 12 October 2021). So-called partial retirement is intended to promote a smooth transition from working life to retirement (cf. section 1 (1) of the Partial Retirement Act, *Altersteilzeitgesetz*, ATG)). The law leaves the details to the parties to the employment contract and to collective agreements. In practice, part-time work for older workers is usually based on the so-called block model. According to this model, the employer and employee agree that the employee will continue to work to the same extent during the first half of partial retirement, but will only receive half of the remuneration. In the second half, the employee is no longer required to work, while the employer continues to pay half the remuneration.

In its request for a preliminary ruling, the Federal Labour Court was probably inclined to the view that the agreement on part-time work for older workers establishes special circumstances that permit the forfeiture of leave after the end of the leave year in which the work phase ends and the leave could have been taken, or the relevant carryover period under section 7(3) of the Federal Leave Act (*Bundesurlaubsgesetz*, BUrlG) (cf. *Bauer*, *Vorabentscheidungsersuchen – Urlaub, Altersteilzeitarbeitsverhältnis im Blockmodell, Mitwirkungsobliegenheiten des Arbeitgebers*, in: ArbRAktuell 2022, p. 404). However, the CJEU rejected this view.

4 Other Relevant Information

Nothing to report.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Greek law provides that the days of sickness during annual leave are not counted towards the employee's annual leave days. These leave days shall be therefore granted at a later time. It also provides that leave must be granted and taken in the course of the current calendar year and during the first three months of the following calendar year. If the employment relationship ends, or when the above period of granting annual leave ends, the employer must financially compensate the employee for any unused annual leave (leave pay).

Therefore, the judgment has no implications for Greek law.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

The Debrecen Regional Court of Appeal decided on 18 April 2023 that a platform work relationship was to be classified as an employment relationship.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Platform Work

Debrecen Regional Court of Appeal, Mf.I.50.063/2022/7, 18 April 2023

The Debrecen Regional Court of Appeal decided on 18 April 2023 that the platform work dealt with in the case was an employment relationship. The platform worker had started working for a food delivery app in October 2019 and performed work until January 2020. He sued the platform and asked the Court to reclassify his work relationship with the platform as an employment relationship. He wanted this to be officially stated so he could apply for social security benefits, which requires the former existence of an employment relationship. The First Instance Debrecen Court stated that his work relationship was a civil law relationship based on a civil law contract, since the relationship between the platform and the worker was loose. However, the Court of Appeal changed this assessment and ruled that an employment relationship existed based on the assessment of national case law criteria for the classification of employment. The judgment also referred to international case law and literature.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

According to the Labour Code, the right to paid annual leave acquired by a worker is to lapse within three years calculated from the end of the year in which entitlement to annual leave arose (see Article 286).

If the worker has been prevented from taking annual leave before the work release phase due to illness, the lapse of the right to annual leave is suspended in accordance with Article 6:24(1) of the Civil Code:

> *"If the individual is unable to enforce a claim for a justifiable reason, the prescription shall be suspended."*

Therefore, Hungarian legal provisions are in line with the judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The general rule in Icelandic law is that any annual leave not taken cannot be transferred between years, in line with Article 13 of Act No. 30/1987 on Annual Leave (lög um orlof). While certain collective agreements permit limited derogations, this is still the general rule in Icelandic labour law.

This judgment along with CJEU case C-120/21 of 22 September 2022 require amendments to Icelandic legislation and collective agreements to reflect the Court's rulings. Some discussions on this issue have taken place between the social partners.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) Government approval has been given for legislation to enhance employees' protection in collective redundancies following insolvency.

(II) The WRC has issued a decision holding an employer to have failed both to initiate consultations on a proposal to create collective redundancies and to provide relevant information relating to the proposed redundancies.

1 National Legislation

1.1 Collective redundancies

The government has approved the priority drafting of legislation

> *"to enhance the protection of employees in collective redundancies following insolvency".*

The proposed legislation will amend the Companies Act 2014 to improve the quality and circulation to workers as creditors in a liquidation. Amendments will also be made to the Protection of Employment Act 1977 ('the 1977 Act') so as to remove the exemption from notification requirements in respect of collective redundancies caused by the employer's insolvency and to expressly align the 1977 Act with CJEU case law–case C-235/10, 03 March 2011, Claes–that the employer's obligations must also be complied with by liquidators where they are managing the collective redundancy process.

2 Court Rulings

2.1 Collective redundancies

The Labour Court, ADJ-00038906, 15 May 2023, *Crowe v Debenhams Retail (Ireland) Ltd*

On 08 April 2020, the UK-based parent company informed Debenhams Retail (Ireland) Ltd that due to its insolvency, it could no longer provide funding. The following day, the Board of Directors of the Irish company decided that it would cease trading with immediate effect and that the parent company, as the sole shareholder, should take the necessary steps to petition the High Court for the appointment of a liquidator. Provisional liquidators were appointed by order of the High Court on 16 April 2020 and the company was formally wound up on 30 April 2020.

In the meantime, by letter dated 09 April 2020, the Irish company's chief executive wrote to all staff informing them of the situation and confirming that the stores "*are not expected to reopen*". The trade union representing the employees was advised on 14 April 2020 that the reasons for the proposed redundancies related to 'trading difficulties'.

On 17 April 2020, a meeting took place between union representatives and the provisional liquidators, following which a 30-day consultation process commenced. Further inconclusive meetings took place on 28 April and 07 May 2020. A final meeting took place on 15 May 2020, at which the liquidators stated that there was no reason to extend the consultation process. By letter dated 20 May 2020, all employees were given notice of termination on the ground of redundancy.

Section 9 of the 1977 Act provides:

> (1) Where an employer proposes to create collective redundancies, he shall, with a view to reaching an agreement, initiate consultations with employees' representatives.

(2) Consultations under this section shall include the following matters:

(a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or mitigating their consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining employees made redundant;

(b) the basis on which it will be decided which particular employees will be made redundant.

(3) Consultations under this section shall be initiated at the earliest opportunity and in any event at least 30 days before the first notice of dismissal is given.

Section 10 of the 1977 Act provides:

(1) For the purpose of consultations under section 9, the employer concerned shall supply the employees' representatives with all relevant information relating to the proposed redundancies.

(2) Without prejudice to the generality of subsection (1), information supplied under this section shall include the following, of which details shall be given in writing:

(a) the reasons for the proposed redundancies;

(b) the number and descriptions or categories of employees whom it is proposed to make redundant;

(c) the number of employees and description or categories normally employed;

(cc)(i) the number (if any) of agency workers to which the Protection of Employees (Temporary Agency Work) Act 2012 applies, engaged to work for the employer;

(ii) those parts of the employer's business in which those agency workers are, for the time being, working, and

(iii) the type of work that those agency workers are engaged to do,

and

d) the period during which it is proposed to effect the proposed redundancies.

€ the criteria proposed for the selection of the workers to be made redundant, and

(f) the method for calculating any redundancy payments other than those methods set out in the Redundancy Payment Acts 1967 to 2022, or any other relevant enactment for the time being in force or, subject thereto, in practice.

(3) An employer shall, as soon as possible, supply the Minister with copies of all information supplied in writing under subsection (2).

Many of the employees lodged complaints with the Workplace Relations Commission ('WRC') contending that the company had not complied with the requirements set out in those two sections and a 'test case' was selected. The complaint was, first, that the consultation process should have commenced on 09 April at the latest; second, that the consultation process entered into on 17 April was not 'meaningful'; and third, that the information provided was incomplete.

The WRC Adjudication Officer considered three CJEU decisions – case C-44/08, 10 September 2009, *Fujitsu Siemens*; Case C-235/10, 03 March 2011, *Claes*; and case C-16/17, 07 August 2018, *Bichat* – and the High Court decision in *Tangney v Dell Products* [2013] IEHC 622 on 26 June 2013. He concluded that the 'strategic decision', which exerted 'compelling force' on the employer, was taken on 08 April 2020 and that the consultation process should have begun no later than the 9th, and that relevant information had not been shared with the union representatives during the process which had taken place, to enable them to formulate constructive proposals. Consequently, there was a breach of both sections 9 and 10. Section 11A of 1977 limits the amount of compensation that can be awarded for a breach of the Act to four weeks' remuneration, so the complainant was awarded EUR 2 280 (being EUR 285 x 4 x 2).

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Article 7(1) of Directive 2003/88/EC is implemented in Ireland by section 19 of the Organisation of Working Time Act 1997 ('the 1997 Act'). This section was amended by section 86(1)(a) of the Workplace Relations Act 2015 ('the 2015 Act') to give effect to the ruling in CJEU, case C-350/06, 20 January 2009, *Schultz-Hoff* by providing that days when an employee is absent from work due to illness shall be deemed to be days that he or she was at work.

Section 20(1) of the 1997 Act addresses the times at which annual leave may be granted. Paragraph (c), which was amended by section 86(1)(b) of the 2015 Act to reflect the ruling in case C-214/10, *KHS*, provides that annual leave shall be granted within the leave year to which it relates or, "*with the consent of the employee*", within the period of six months after the end of that leave year. Where the employee due to illness is unable to take all or part of his or her annual leave during those periods, there is a carry-over period of 15 months after the end of that leave year.

Section 23(1) of the 1997 Act provides that, where an employee ceases to be employed and the whole or any portion of annual leave remains to be granted, the employee shall be paid compensation equivalent to the pay he or she would have received if granted that annual leave.

The Labour Court has consistently recognised that the entitlement to paid annual leave is a "*fundamental social right in European law*": Cementation Skanska v Carroll DWT0338, 28 October 2003. Consequently, and in light of the different provisions of national law, the Labour Court would have come to a different conclusion to that reached by the *Arbeitsgericht*.

4 Other Relevant Information

4.1 Workplace Relations Commission

The WRC has published its Annual Report for 2022. Its Inspection and Enforcement Service carried out 5 820 inspections, found 1 763 employers to be in breach of employment law obligations and recovered EUR 1 405 126 in unpaid wages. Sectors of specific interest included fishing—where there was a 50 per cent non-compliance rate—and meat processing – where the non-compliance rate was 75 per cent. Its Adjudication Service received 12 780 specific complaints—26 per cent relating to pay, 14 per cent relating to discrimination, and 12 per cent to unfair dismissal—and issued 1 968 decisions, an increase of 27 per cent compared to 2021. Its Conciliation Service received 555 requests and a resolution rate of 88 per cent was achieved.

Italy

Summary

(I) In May 2023, the Italian government approved a Law Decree on employment relationships, with specific rules on transparent working conditions, fixed-term contracts and voucher-based contracts.

(II) The Court of Cassation dealt with part-time work and dismissals.

1 National Legislation

1.1 Job Decree

The Law Decree 04 May 2023 No. 48 provides for "*urgent measures for social inclusion and access to employment*".

The Decree introduces an allowance for inclusion as of 01 January 2024, as a national measure to fight poverty, vulnerability and social exclusion; strengthens the rules on safety at work and protection against accidents; provides incentives for the employment of young people and people with disabilities. In addition, the Decree provides for some rules on transparent working conditions (Article 26), fixed-term contracts (Article 24) and voucher-based contracts (Article 37).

Article 24 of the Decree removes the reasons justifying the date of fixed-term contracts, their extension or renewal introduced by Legislative Decree 12 July 2018 No. 87. These reasons can now be established by collective bargaining. The contract shall continue to require no justification for a contract duration of less than 12 months. In addition, until 30 April 2024, the Decree allows the employer and employee to determine, by individual agreement, the requirements underlying the conclusion, renewal or extension of the fixed-term employment relationship, provided that collective bargaining does not provide for this.

Article 26 of the Decree modifies some rules provided by Legislative Decree of 29 June 2022 No. 104, implementing 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. In particular, for certain information, the employer may inform the employee of the rules of law or collective bargaining, including corporate bargaining, which regulate the matter. In the present case, he/she must make all applicable collective agreements applied available (also digitally) to his/her employees and collaborators. The information that may be provided to the worker in this new simplified form is the planning of working time; the duration of the probation period; the duration of paid leave; the procedure, form and duration of the notice in the event of dismissal and resignation; the indication of the initial amount of remuneration and of its elements; the indication of the institutions collecting social security and insurance contributions. The legislator also changed the rule that requires employers who use automated decision-making or monitoring systems to include information on the purpose, logic and operational aspects of such systems in the employment contract. These information requirements now apply only in case of 'fully' automated systems and they do not apply to systems protected by industrial and commercial secrecy.

Article 37 of the Decree states that for congresses, fairs and events in spas and amusement parks, the use of voucher-based work will be allowed up to EUR 15 000 per year for each user (instead of EUR 10 000). In these sectors, vouchers can be used by employers with up to 25 employees (instead of ten, as provided for all other sectors).

2 Court Rulings

2.1 Part-time work

Court of Cassazione, No. 12244, 09 May 2023

An employee who refuses to change his/her employment relationship from full time to part time can be lawfully dismissed, if such a request was made for the company's objective needs.

According to Article 8, para. 1, Legislative Decree 81/2015,

> *"the employee's refusal to transform his/her relationship from full-time to part-time work, or vice versa, does not justify his/her dismissal".*

However, dismissal is lawful if the employer demonstrates that real economic and organisational needs exist, which do not allow full-time employment to be maintained. In this case, the dismissal is not ordered because of the employee's refusal to accept a change to his/her employment contract, but because of the impossibility of offering the employee full-time work.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

In Italy, in case of early retirement, the notice period prior to the termination of the employment relationship cannot be used to take annual leave. However, the employer and the employee can agree to waive the notice period, so that the employee can take annual leave during that period. If this period is not sufficient for the employee to take the leave he/she is entitled to, the remaining leave days will be financially compensated. Leaves are generally not paid and are lost if the employee has been put in a position to take leave but despite repeated invitations, has refused to do so. If, on the other hand, it was the employer who prevented the use of leave, he/she will be subject to penalties and may be ordered to pay damages (*ex pluribus*, Cass. No. 14, 02 January 2002; Cass. No. 13937, 25 September 2002; Cass. No. 11462, 09 July 2012; Cass. No. 28428, 04 July 2013; Cass. No. 28428, 19 December 2013; Cass. No. 2496, 01 February 2018).

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

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.

Liechtenstein

Summary

Recently, the so-called package meeting between the EFTA Surveillance Authority ESA and Liechtenstein took place.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

In case C-192/22, the CJEU (Sixth Chamber) ruled as follows:

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

Exceptionally, a brief excerpt from the facts of the case is reproduced here because it is important for understanding the present case. FI was employed by BMW from 1986 until 30 September 2019. FI retired on 01 October 2019. In late 2012, in the context of the progressive retirement scheme, FI and BMW agreed to change their employment relationship to a part-time employment relationship. In that scheme, FI was to work from 01 February 2013 to 31 May 2016 and would be released from work from 01 June 2016 to 30 September 2019. FI took leave from 04 May to 25 May 2016 to use up his remaining leave for 2016. However, as he was ill during that period, he was unable to take two and two-thirds days of leave before the end of May 2016. In 2019, FI brought an action before the Labour Court against BMW for compensation for the days of leave he had not taken, claiming in that connection that he had not been able to take those days of leave due to illness (CJEU case C-192/22 Nos 6–9).

The employer's rejection of the request was based on Paragraph 7(3) and (4) of the German Federal Law on Leave, which reads as follows: Leave must be granted and taken in the course of the current calendar year. Carrying over of leave to the next calendar year shall only be permitted if justified on compelling operational grounds or compelling reasons relating to the worker himself or herself. If leave is carried over, it must be granted and taken during the first three months of the following calendar year. If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu (CJEU case C-192/22 No. 5).

From a legal point of view, this is a so-called forfeiture period *(Verwirkungsfrist),* which is to be distinguished from a limitation period *(Verjährungsfrist).*

According to Liechtenstein law, annual leave shall normally be granted in the course of the relevant year of service, but no later than in the following year of service, see Section 1173a Art. 32(1) of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB, LR 210).

The Liechtenstein regulation differs from German law, which was the subject of the CJEU ruling, in three significant respects:

- Firstly, the forfeiture period in Liechtenstein is significantly longer, namely one year instead of three months;
- Secondly, under German law, leave must be 'granted and taken' by the expiry of the forfeiture period, whereas under Liechtenstein law, it must only be 'granted'; in other words, only the employer and not the employee as well is responsible for keeping to the deadline;
- Thirdly, German law restricts financial compensation for leave in case it can no longer be granted in whole or in part because of the 'termination of the employment relationship', whereas no such restriction exists in Liechtenstein. Although the principle that an allowance shall be paid if leave can no longer be granted is not explicitly set out in writing in Liechtenstein law, it must be regarded as generally accepted. The Liechtenstein courts regularly refer to Swiss law, respectively Swiss case law in such cases. The Swiss Federal Supreme Court has ruled that the claim for compensation for annual leave not taken arises when it is established that it can no longer be granted in kind (judgment 5C.238/2004 of 26 May 2005, BGE 131 III 451).

These characteristics make it easily possible to interpret Liechtenstein law in such a way that it is in line with CJEU case C-192/22.

4 Other Relevant Information

4.1 Package meeting ESA – Liechtenstein

Recently, the so-called package meeting between the EFTA Surveillance Authority ESA and Liechtenstein took place. Open implementation work and current infringement proceedings were discussed. The meeting mainly dealt with procedures in the areas of environment, financial services, free movement of persons and energy.

See SEWR News 2/2023 for further information.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Article 127 (5) of the Labour Code stipulates that the right to full annual leave or a part thereof (or a monetary compensation under the circumstances provided by the Labour Code in case of termination or expiry of the contract) shall be lost after a lapse of three years from the end of the calendar year in which entitlement to the annual leave arose, except in cases when the employee could factually not use leave. The exception formulated as 'cases when an employee could factually not use leave' is relatively new in Lithuanian legal system (introduced on 01 July 2017), and therefore, only few cases have been interpreted by the courts. However, the wording of the national provision allows for broader interpretation of the notion of 'impossibility' to execute the right to annual leave. The courts heavily rely on CJEU case law when interpreting the provision (see Supreme Administrative Court of the Republic of Lithuania, 17 April 2023, case No. eA-1183-575/2023) and would not recognise the revocation of the right to annual leave because of the employee's work pattern or sickness-related reasons (Vilnius regional court, 07 March 2023, case No. eB2-1501-577/2023).

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

The Law on Protection of Whistleblowers has been adopted. It implements a very broad level of protection of any person reporting any kind of breaches of the law.

1 National Legislation

1.1 Law on Whistleblowers (persons reporting breaches of law)

A new Law on Whistleblowers (*lanceur d'alerte; auteur d'un signalement*) has been adopted following a lengthy legislative procedure, with the draft giving rise to much criticism. The law itself is not limited to subordinate workers, as it also protects certain self-employed persons (such as suppliers), shareholders and directors, but is expected to have the greatest impact in labour law.

The law will form a stand-alone statute and will not be incorporated into the Labour Code. It is interesting to note that the law does not use the usual national concepts (e.g. employee (*salarié*), but refers to all 'workers' within the meaning of the Treaty on the Functioning of the European Union.

The law is intended to transpose European Directive (EU) 2019/1937, and to a large extent adopts the logic and terminology of that Directive.

The main difference, however, is that the Directive has served as the basis for the introduction of a very general whistleblower protection statute in Luxembourg, as announced by the government in its coalition agreement. This very broad transposition has also been the main source of criticism.

Indeed, the new law does not apply to the few specific breaches of EU law listed in the Directive, nor to a limited number of other breaches, but applies to all 'breaches' (*violation*) defined as acts or omissions that:

a) are unlawful; or

b) contravene the object or purpose of directly applicable provisions of national or European law.

The only information obtained in a professional context is covered. Only persons acting in good faith are protected. On the other hand, there is no requirement for the whistleblower to feel secure; the violation in question may concern his or her own person. Similarly, no minimum degree of severity is required by the law.

Reports relating to national security (classified information) are excluded from legal protection. Following several discussions, various secrets, including medical secrecy, the secrecy of legal professions (lawyers, notaries, bailiffs) and the secrecy of judicial deliberations remain protected.

In addition, the law does not cover cases in which people report facts that are in themselves illegal but which for other reasons (e.g. their morality) may be of interest to a wider public, bearing in mind that these cases can be covered by the case law of the European Court of Human Rights. In the end, the law does thus not cover all possible cases of whistleblower protection.

In terms of reporting channels, the law follows the logic and criteria of the European Directive, distinguishing between internal reporting, external reporting to the authorities and public disclosure.

Private sector companies with 50 or more employees, as well as public sector bodies (with the exception of municipalities with fewer than 10 000 inhabitants) must establish internal reporting channels. These channels must meet a certain number of criteria,

such as a secure design to guarantee confidentiality, impartial and diligent follow-up, feedback within a reasonable timeframe, etc. Internal alerts must make it possible to submit alerts in writing or orally in each of the country's three official languages.

The law lists 22 authorities as competent to receiving external alerts, for example the labour inspectorate (*Inspection du travail et des mines*) or the 'banking authority' (Financial Sector Supervisory Commission, CSSF). The police or judicial authorities are not included in the list. The law imposes obligations on these authorities in terms of the establishment of reporting channels.

An '*Office des signalements*' (Reporting Office) has been set up under the authority of the Ministry of Justice, with a remit to provide information and raise awareness.

The law protects whistleblowers against all forms of retaliation. This protection is ensured firstly by a duty of confidentiality regarding the identity of the reporting person, a confidentiality that can only be lifted in exceptional cases.

Secondly, any form of retaliation is prohibited. The law introduces a presumption that retaliation is linked to the report. No time limit is set for this presumption.

The exemplary list of prohibited acts is taken from the Directive. As far as the employment relationship is concerned, dismissal, demotion, withholding of promotion, transfer of duties or withholding of training are all prohibited.

Any retaliatory measure is declared null and void. The author of a report may request it to be declared null and void before the court within 15 days; alternatively, damages may be claimed.

Furthermore, the person who issued the alert cannot be held liable (probably both from a civil and from a criminal perspective).

In addition to civil penalties, the law introduces criminal penalties. A fine of up to EUR 25 000 can be imposed on those who retaliate or bring vexatious proceedings against those who report a violation. Conversely, knowingly reporting or publicly disclosing false information will be punishable by up to three months' imprisonment and a fine of up to EUR 50 000 without prejudice to damages.

Furthermore, the competent authorities may impose administrative fines of up to EUR 250 000 in certain cases, for example in the event of obstructing an alert or breaching the confidentiality of the identity of the author of the alert. It is surprising that certain authorities have hitherto had no binding powers, and can now take action against those who do *(*Reference: Loi du 16 mai 2023 *portant transposition de la directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l'Union).*

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The decision will not have any major implications in Luxembourg. Generally speaking, Luxembourg courts have always followed European case law on deferred leave. Progressive early retirement (*préretraite progressive*) exists in Luxembourg. It is regulated in Articles L. 584-1 et seq. of the Labour Code. There are no specific rules on paid annual leave in this section.

As far as we know, in practice, progressive retirement takes the form of a reduction in weekly, or at least monthly, working time, rather than the subdivision of a working year into a working period and a suspension period. The situation at issue in case C-192/22 should therefore not arise.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Maltese law has always sought to preserve workers' rights to paid annual leave.

Article 6 of the Annual Leave National Standard Order states the following:

> *"Annual leave shall continue to accrue in favour of an employee during the period when he is on sick leave or injury leave in terms of the Act, orders or regulations issued thereunder:*
>
> *Provided that notwithstanding anything to the contrary stated in any law, order or regulation, any balance of annual leave unavailed of by the end of the calendar year shall be automatically transferred to the next calendar year when it has not been possible for the employee to avail himself of such leave during the same year when the sickness or injury leave commenced."*

These provisions clearly demonstrate that annual leave cannot be forfeited because of sickness – even if not in the context of a progressive retirement scheme.

Hence, the ruling has no major implications for Malta, except that it further bolsters the position previously taken by means of these specific provisions.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) The draft bill Participation Act in Balance aims to encourage a stronger focus on social assistance recipients rather than merely strictly following the rules.

(II) The government will introduce a statutory hourly minimum wage as of 01 January 2024.

(III) User undertakings will, as follows from a draft bill, be required to report any workplace accidents of temporary agency workers.

(IV) A district court deems an all-in wage to be admissible if certain criteria are met.

(V) The time that an employee must be present before the start of his/her shift falls within the definition of working time.

(VI) Compensation in time is not regarded as wages within the meaning of Directive 2003/88/EC.

(VII) Surinamese pensioners with an incomplete old-age pension are to receive an allowance of EUR 5 000 per person.

1 National Legislation

1.1 Draft Bill Participation Act in Balance

The Dutch government aims to amend the current Participation Act (*Participatiewet*) that entered into force on 01 January 2015 to (inter alia) regulate the right to social assistance. Policy analyses have shown that welfare recipients, experts and implementing agencies perceive the law as 'harsh'. The overall conclusion was that the government pays too much attention to the rules rather than to the social assistance recipients and the problems they face.

For that reason, the bill 'Participation Act in Balance' (*Participatiewet in Balans*) has been drafted. The starting point of the bill is to focus on the people, aiming to increase legal certainty for social assistance recipients and giving professionals sufficient discretion to do so.

The draft bill consists of 20 measures, and from 17 May until 28 June 2023, will be open for internet consultation to allow interested parties to respond to the proposed bill online.

The main measures proposed are:

- Creating more possibilities to provide informal care without it affecting the social assistance recipient's benefits. The amended Article 33 Participation Act will therefore, more specifically, include that if a welfare recipient temporarily lives with someone in need of intensive informal care, the social assistance recipient retains his or her own right to social assistance during that temporary situation. Previously, this would be considered as work valued on wages.
- Article 31 (2) sub m Participation Act will be amended providing that social assistance recipients will be allowed to receive up to EUR 1 200 in gifts without being required to declare it.
- An amended Article 34a Participation Act will allow social welfare recipients to keep additional earnings up to 15 per cent as a stepping stone to a new job.
- Article 34b Participation Act will be added, determining that if the new job causes large fluctuations in income, a so-called buffer budget can be claimed.

1.2 Developments on the Bill Act introducing minimum hourly wage

In a letter to Parliament of 09 May 2023, the Minister of Social Affairs and Employment confirmed that the Council of Ministers agrees with the Bill Act introducing minimum hourly wage (*Wet invoering minimumuurloon*). To date, only a statutory monthly minimum wage exists. The Bill Act's aim is to make the rules on minimum wage more transparent and fairer. The level of minimum wage per hour will be the same for all and with the introduction of a uniform minimum hourly wage, enforcement will be simplified.

The Ministry of Social Affairs and Employment's draft proposal was opened for internet consultation from 21 April to 19 May 2023.

On 09 May 2023, the Minister of Social Affairs and Employment stated that Article 11 of the Bill appears to be a cause for ambiguity among the implementing parties. This provision stipulates that the minimum hourly wage must be paid for each hour worked. As a result, it is no longer possible to assume an average number of workable hours per month (based on a fixed agreed number of working hours per week) with a fixed monthly wage. Since this practice is common in the Netherlands and since the initiators of the current Article 11 intended to continue this practice, the Minister declared that this provision would be amended, so that it is in line with what is stated in the explanatory memorandum.

This means that the existing practice of a fixed monthly payment for fixed working hours per week can be continued. In addition, the existing practice of the plus-minus hours system, agreed in collective agreements, can be continued as well. The government aims to introduce the statutory minimum hourly wage as of 01 January 2024.

1.3 Draft Bill on the duty to report accidents at work and the duty to inform user undertakings in TAW

The online consultation phase of the Draft Bill introducing a duty to report accidents at work and the duty to inform user undertakings lasted from 20 April until 25 Mai 2023. The Draft Bill must be viewed against the background of structural improvements in the working and living conditions of migrant workers. Currently, the user undertaking has no role or responsibility at all when it comes to workplace accidents, not even in reporting such accidents. As the user undertaking, however, is an employer within the meaning of Article 1 Working Conditions Act, it has such a responsibility towards the temporary agency worker and is thus responsible for reporting any workplace accident.

To achieve this, the Working Conditions Act will be extended to include two duties:

1. An obligation to report accidents at work, and
2. A duty of verification (*vergewisplicht*)
    a. Prior to the commencement of work of the posted employee, and
    b. After a notifiable accident at work has occurred.

The starting point for this Draft Bill is that *bona fide* employers should be given room to operate, while *mala fide* employers should be prevented from doing any business.

2 Court Rulings

2.1 Admissibility of 'all-in-wage'

District Court The Hague, ECLI:NL:RBDHA:2023:5469, 30 March 2023 (published 01 May 2023)

This case concerned a dispute about the admissibility of a so-called 'all-in wage'. With reference to the CJEU case C 131/04, 16 March 2006, *Robinson Steele*, the District Court ruled that this type of pay construction is permissible, provided that the elements of pay have been formulated in a transparent and comprehensible manner, which had not been the case in the present dispute. As a result, compensation for the accrued, unused

annual leave days (including a statutory increase of 10 per cent and interest) was awarded.

This case seems to be an example of an incorrect reading of *Robinson Steele*. After all, in *Robinson Steele*, the CJEU did not consider under which circumstances an all-in wage is admissible, but under which circumstances a set-off can take place when it has already been established that the employer—wrongly—applied an all-in wage. This case therefore reflects an ongoing bifurcation (concerning the interpretation of *Robinson Steele*) in Dutch case law, which has been observed in Dutch literature.

2.2 Working time

Court of Appeal The Hague, ECLI:NL:GHDHA:2023:738, 02 May 2023,

This judgment of the Court of Appeal of The Hague concerned working time before the official start of a shift at a call centre. The employee in the present case was required to be present at work at least ten minutes before the official start of his shift to ensure that he was logged in on time and ready to start at the beginning of the shift. According to the employee, this was to be considered paid working time. The Court of Appeal agreed and considered that working time is the time during which the employee performs work under the employer's authority according to Article 1:7 sub k Working Hours Act. This definition is in line with Article 2 Working Time Directive. The fact that the employee had to be present ten minutes before the start of his shift means that he was limited in his ability to use this time to pursue his own interests. In consideration of this, the Court of Appeal ruled in line with CJEU cases, C-580/19, 09 March 2021, *RJ v. Stadt Offenbach am Main* and C-344/19, 09 March 2021, *D.J. v. Radiotelevizija Slovenija*. The fact that the employee was not yet productive for his employer during those ten minutes, since the employer was only paid by his client from the official start of the shift, did not alter the Court of Appeal's judgment. As a result, the employee was entitled to his salary for an additional ten minutes for each day of work.

2.3 Holiday pay

Administrative High Court (CRvB), ECLI:NL:CRVB:2023:809, 02 May 2023

This Administrative High Court case concerned holiday pay of police officers. The claimants were employed by the police in the position of dog handler. As they were permanently responsible for the service dog, they received, among other things, compensation in time. In November 2016, the Chief of Police gave the claimants a supplementary holiday payment for the period 2012 to 2016. This supplementary payment was a result of CJEU, case C-155/10, 15 September 2011, *Williams.* The appellants protested against the amount of the supplementary payment, claiming that the compensation in time forms part of the employees' wages as referred to in the Working Time Directive. They pointed out that the compensation in time could be valued in money and argued that they were therefore also entitled to this compensation during their annual leave. The Administrative High Court agreed with the lower court that it does not follow from the Directive, nor from case law, that compensation in time must be considered as part of the wage to which the employee is entitled during his/her annual leave period within the meaning of Article 7 Working Time Directive. The Court referred to point 2.2 from the *Williams* judgment, where the CJEU ruled that any burden intrinsically linked to the performance of tasks assigned to the employee in his/her employment contract and for which he/she receives financial compensation, must necessarily form part of the amount of wage to which the employee is entitled during his/her annual leave. As the claimants received compensation in time, there was no financial compensation and the compensation was therefore not regarded a wage within the meaning of the Directive. The fact that the compensation in time could be valued in money did not affect the Court's opinion.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Under Article 7:640a BW, entitlement to *statutory annual leave* under Article 7:634 BW lapses six months after the last day of the calendar year in which entitlement to that leave arose. If the employee has been reasonably unable to take statutory annual leave within six months after the calendar year in which that leave arose, the five-year limitation period of Article 7:642 BW replaces the lapsing period (see also *Kamerstukken II* 2009/10, 32 465, nr. 3, p. 8). A reasonable inability to take statutory annual leave occurs when the employee was unable to use his/her statutory annual leave during the entire accrual year and the following six months for medical reasons or due to other special circumstances. Such special circumstances exist, for example, if it was not possible to take (sufficient) annual leave due to the fault of the employer (see *Kamerstukken II* 2009/10, 32 465, nr. 3, p. 7). The limitation period also applies to annual leave in excess of statutory annual leave. Moreover, there is a possibility to interrupt the five-year limitation period (Article 3:317(1) BW), which is not the case with the lapse of the right to that leave. Where there is a possibility for employees to return to work, the remaining, i.e. the unused statutory annual leave entitlements will be paid out upon termination of employment (Article 7:641 BW).

In a situation in which an employee is released from work while the employment relationship is being maintained, the employee would still be entitled to (take) annual leave under Dutch labour law. That also means that an employee who does not take annual leave during a release period from work when he or she was able to do so, runs the risk that the statutory annual leave will lapse following Art. 7:640a BW. This, however, presupposes that the employer did not prevent the employee from taking annual leave. This was decided by the Appeals Court Arnhem-Leeuwarden, ECLI:NL:GHARL:2021:8899 on 21 September 2021 in a case concerning an employee who was on sick leave, but was not considered completely incapacitated for work while her incapacity was mainly related to her own workplace and employer. According to the Appeals Court, this meant that the employee had been able to take annual leave. Moreover, following the Appeals Court, the employer had informed the employee about the policy on the lapse of annual leave, which is in line with CJEU case C-684/16. 06 November 2018, *Max-Planck* and case C-619/16, 06 November 2018, *Kreuziger*.

4 Other Relevant Information

4.1 Surinamese pensioners receive compensation for pension gap

The Dutch government has declared that it will give a group of Surinamese pensioners, who do not receive a full old-age pension, an allowance of EUR 5 000 per person.

The allowance targets pensioners who moved to the Netherlands from Suriname before the country's independence in 1975. At the time, this group believed that they would accrue a Dutch state pension for the years they had lived in Suriname, when the country was still part of the Kingdom of the Netherlands. However, this was not the case, and as a result, they have been affected by the so-called 'pension gap'.

> *"The elderly from the Surinamese community feel like second-class citizens, while they came to the Netherlands because they wanted to remain Dutch,"*

said Minister for Poverty Policy, Participation and Pensions. The minister acknowledged their financial predicament. However, the Council of State earlier ruled that full compensation of the state pension gap would not be possible. Therefore, the government decided to offer a one-time compensation of EUR 5 000 per person as a 'gesture of recognition' for the injustice and suffering these people have experienced.

The allowance targets a group of around 30 000 Surinamese pensioners. To be eligible for the allowance, the Surinamese pensioners must have moved to the Netherlands no later than 25 November 1975 at the age of 18 or older, and must have lived in the Netherlands for at least 25 years.

Norway

Summary

An approval scheme for temporary work agencies has been introduced.

1 National Legislation

1.1 New approval scheme for temporary work agencies

A new approval scheme for temporary work agencies has been established by amendments to the existing regulations on temporary work agencies (FOR-2023-05-25-733 amending FOR-2008-06-04-541).

The new regulations apply to all temporary work agencies operating in Norway, apart from the hiring of seafarers. These agencies must be approved by the Labour Inspection Authority.

To be approved, the agency must document that certain statutory obligations have been met, inter alia, that all workers have employment contracts and are covered by occupational injury insurance, and that the agency has established routines to ensure the principle of equal treatment in terms of pay and working conditions in connection with the hiring out of workers.

The Labour Inspection Authority will keep a public register of approved/non-approved agencies and applications under consideration.

Approved agencies must submit an annual confirmation that the agency still meets the obligations. New documentation must be submitted every third year.

The hiring of workers is only allowed from approved agencies. If workers are hired from a non-approved agency, the worker can claim direct and permanent employment with the user undertaking and compensation employment according to the Working Environment Act (LOV-2005-06-17-62) Section 14-14.

The amended regulations will enter into force 01 January 2024, with a transition period until 31 March 2024.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

In the Norwegian Holiday Act (LOV-1988-04-29-21), the right to annual leave (‘*feriefritid*’) is regulated separately from the right to holiday pay (‘*feriepenger*’), cf. Chapter II and Chapter III, respectively. See also September 2022 Flash Report.

The Holiday Act stipulates that days of leave not taken by the end of the holiday year shall be transferred to the following holiday year, cf. Section 7 (3) subsection 2. It is explicitly stated that the right to transfer also applies when the reason why annual leave was not taken was illness or parental leave, cf. Section 9 (1) and (2). Earlier, the period of illness had to last at least six working days for the days of annual leave to be transferrable, but the six-day requirement was removed by an amendment in 2014.

The preparatory works state that there are no limitations on the right to transfer days of leave not taken, cf. Ot.prp. No. 65 (2007-2008) chapter 2.5.2. Consequently, there are neither limitations to the number of days that may be transferred nor time limitations where the right will lapse after a specific period.

The worker's acquired right to annual leave will therefore not lapse by the end of the holiday year or at a later date according to Norwegian law. Instead, the acquired right to days of annual leave not taken in the holiday year will be transferred to the following holiday year. If the acquired days of leave are not taken that year, inter alia, as a result of illness (whether short term or long term), the days of leave will be transferred to the following year and can accumulate. When the employment ends, the worker is entitled to holiday pay for all acquired days of leave, cf. Section 11 (3).

In light of this, the ruling does not seem to have any implications for Norwegian law.

4 Other Relevant Information

Nothing to report.

Poland

Summary

(I) The new law on employment documentation has entered into force and reflects recent changes to work-life balance laws.

(II) The draft law on new requirements for workstations of employees who work remotely has been announced.

1 National Legislation

1.1 New rules for employment documentation

The regulation of the Minister of Family and Social Policy was published on 09 May 2023 and entered into force on 17 May 2023.

Part B of the employee's personal file should henceforth also include:

- the employee's request and employer's response to such request to change the type of employment contract to an indefinite term contract or for more predictable and safer working conditions (newly adopted Articles 29^3 § 1 and 3 of the Labour Code);
- the employee's request and employer's response to such request for a reason justifying termination of a probationary contract by notice or action having an effect equivalent to employment contract termination (newly adopted Articles 29^4 § 3 and 4 of the Labour Code);
- documentation on flexible work arrangements (Article 188^1 of the Labour Code).

Documentation on the employment relationship should now include:

- employee requests to claim and use time off work of either two days or 16 hours for reasons of force majeure for urgent family matters due to illness or accident, and the use of care leave;
- consent of an employee raising a child aged eight or younger to work overtime during night hours, in an interrupted work time system or for posting.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Polish law does not provide for cases of expiry of the right to annual leave in a situation where the employee cannot use it due to the gradual reduction in the number of working hours and retirement. In each such situation, the employee will be entitled to receive an equivalent for unused holiday leave. Thus, the law in Poland is compliant with EU regulations and the position expressed in the analysed ruling.

Additionally, it is worth noting that the status of limitation of claim for holiday leave is three years.

4 Other Relevant Information

4.1 Draft health and safety regulations on working at workstations equipped with screen monitors

The Government Legislation Centre has published a draft regulation of the Minister of Family and Social Policy concerning health and safety procedures at workstations equipped with screen monitors. The proposed changes include:

- an update of the definition of a workstation – it is proposed that it should include both the workspace and different categories of equipment:
  - basic equipment including a screen monitor, keyboard, mouse or other input devices and software with a user interface;
  - chair and table or work surface;
  - optional equipment, e.g. printer or footstool;
- an update of an attachment to the regulation, which defines minimum requirements that workstations with screen monitors should meet:
  - a new obligation to define the organisation of workstations intended for use of portable systems for at least one-half of a work day (mainly laptops);
  - limitation of requirements regarding monitor setting and repealing the requirement of an anti-reflection and appropriate filter layer;
  - limitation of demands on keyboard design;
  - simplification of table and work surface requirements;
  - a new requirement to provide workstations with document holders;
  - a new obligation for the employer to provide an employee with a footstool upon request;
  - simplification of guidelines for a workstation equipped with a screen monitor;
  - guidelines for lighting at a workstation equipped with a screen monitor.

The draft proposes a 14-day *vacatio legis* and a three-month transition period for employers to adjust all workstations from entry into force.

Portugal

Summary

Analysis of a recent ruling of the Appeal Court of Lisbon on the limits to the right to strike, in particular those related to the provision of minimum services.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Right to strike and minimum services

Ruling of the Appeal Court of Lisbon, no. 1006/23.7YRLSB-4, 17 May 2023

In this judgment, the Appeal Court of Lisbon ruled that the right to strike is a fundamental right but is also a limited right, coexisting with other constitutionally protected rights and interests. Hence, it is understood that this right may be subject to limitations, but may not be restricted to the bare minimum. Amongst these limitations is the determination of minimum services.

In its judicial decision, the Court analysed the scope of minimum services set forth in the law and ruled that in the education sector, the imposition of such minimum services is limited to final assessments, examinations or tests of a national nature that must be held on the same date throughout the national territory. According to the Court, considering that this circumstance was not verified in the specific case, the setting of minimum services would be illegal.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

This case concerned the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Article 31 (2) of the Charter of Fundamental Rights of the European Union.

According to the CJEU,

> *"Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter, must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence".*

Under Portuguese law, annual leave does not commence or is suspended when the worker is temporarily incapacitated for work due to illness or other reasons which the worker is not responsible for (Article 244 (1) of Portuguese Labour Code). To the extent that the impediment ends during the period of leave that had been initially planned, the worker shall take the remaining days of leave; otherwise, the annual leave period must be rescheduled to another time by agreement or, failing this, by the employer (Article

244 (2) of Portuguese Labour Code). Only if the worker cannot take his/her remaining leave in the relevant year, will he/she be entitled to receive remuneration corresponding to the period of annual leave not taken or to take the annual leave by 30 April in the subsequent year (Article 244 (3) of PLC). This last provision may raise some questions about its compatibility with the CJEU's interpretation of Article 7 (2) of Directive 2003/88/EC.

As explained by the CJEU in the present ruling, Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he or she was entitled on the date that relationship ended.

However, the CJEU admitted in previous judgments that

> *"any carry-over period provided for by the law of a Member State, in addition to the fact that it must take into account the specific circumstances of a worker who is unfit for work, is intended to protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail"* (judgment C-214/10, 22 November 2011).

Furthermore, in case C-214/16, 29 November 2017, under the specific circumstance that the worker is incapacitated for work for several consecutive holiday years, the CJEU held that

> *"having regard not only to the protection of workers as pursued by Directive 2003/88, but also the protection of employers faced with the risk that a worker will accumulate periods of absence of too great a length and the difficulties in the organisation of work which such periods might entail, Article 7(1) of that directive must be interpreted as not precluding national provisions limiting, by a carry-over period of 15 months at the end of which the right to paid annual leave is lost, the accumulation of entitlements to such leave by a worker who has been unfit for work for several consecutive holiday years"*.

Portuguese law determines that if the worker cannot take annual leave in the year in which entitlement arises because he/she is incapacitated for work, for instance due to illness, he/she may take the annual leave until 30 April in the subsequent year or to receive remuneration corresponding to the period of annual leave not taken. As a result, Portuguese law seems to establish a limit to the carry-over of annual leave which may be potentially considered too short in the light of the CJEU's case law.

For this reason, it is debateable whether Portuguese law is aligned with the CJEU's understanding of the CJEU expressed in the ruling under analysis.

4 Other Relevant Information

Nothing to report.

Romania

Summary

The Labour Code and the Law on Social Dialogue have been modified. The special procedure for resolving labour disputes has been reinstated. New cases for the suspension of the employment contract and new rules for collective bargaining have also been introduced.

1 National Legislation

1.1 Labour jurisdiction

The Law on Social Dialogue No. 367/2022 eliminated the chapter dedicated to labour jurisdiction. As a result, the special labour jurisdiction remained unregulated, and the general rules contained in the Code of Civil Procedure became applicable (see February 2023 Flash Report).

Government Emergency Ordinance No. 42/2023 (published in the Official Gazette of Romania No. 459 of 25 May 2023) amends the Labour Code, reintroducing the special procedural rules applicable to labour disputes. Consequently, labour disputes are now resolved in the first instance by a tribunal, and not at the district court.

From a territorial perspective, jurisdiction lies with the tribunal within whose jurisdiction the claimant has its domicile, residence, place of work, or, if applicable, registered office. The tribunal's decisions are subject only to appeal, and the deadline for appeal is ten days from the date of communication of the decision.

1.2 Suspension of employment contract

Law No. 140/2023 (published in the Official Gazette of Romania No. 461 of 26 May 2023) has introduced a new cause for suspension of the employment contract at the initiative of the employee. It pertains to the performance of specific activities such as foster parent, personal assistance to a severely disabled person, or professional personal assistance. During this new suspension of employment:

- Foster parents are paid by the child protection authority or a private entity, based on Law No. 272/2004, on the protection and promotion of children's rights;
- Non-professional personal assistants of disabled persons are paid by local public authorities. They perform their activity at the beneficiary's home, under the conditions of Law No. 448/2006, on the protection and promotion of the rights of persons with disabilities;
- Professional personal assistants, who are specialised caregivers who provide care for severely disabled people in their own homes, are paid by the Directorate of Social Assistance or private social services providers. Government Decision No. 548/2017 establishes the certification procedures and status of the professional personal assistant.

A similar case of suspension has also been introduced in the Administrative Code for Civil Servants.

As regards the suspension of the contract during a strike, a contradiction used to exist between the legal texts: the Labour Code stipulated that it occurs at the employee's initiative, while the Law on Social Dialogue provided that it occurs automatically, de jure. As a result of the amendment of the Law on Social Dialogue No. 367/2022 through Government Emergency Ordinance No. 42/2023, the two legal provisions have now been aligned. Currently, they both provide that the suspension of the contract occurs at the employee's initiative.

1.3 Collective bargaining

Government Emergency Ordinance No. 42/2023 amends the Law on Social Dialogue No. 367/2022. It introduces new rules on collective bargaining, strengthening the role of both representative and non-representative trade union federations. Thus, at the unit level, employees are represented in collective bargaining:

- By the representative trade unions in the unit;
- In the absence of a representative trade union, by the representative trade union federation to which non-representative trade unions in the unit are affiliated, based on their request and mandate;
- If there are no representative trade union federations at the sector level, by the non-representative trade union federation, if it is a member of a representative trade union confederation at the national level, at the request of non-representative trade unions in the unit affiliated to it;
- If the above-mentioned organisations do not exist, by representatives of all non-representative trade unions at the unit level. They jointly designate a maximum of ten representatives;
- If there are no trade unions established at the unit level, by representatives of employees elected by vote of more than half of the total number of employees in the unit and are specially mandated for this purpose.

Government Emergency Ordinance No. 42/2023 also includes a series of specific amendments on the acquisition of the legal personality by trade unions and employers' organisations and the file for obtaining representativeness.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

Romanian legislation does not provide for the possibility of exempting an employee from work in the period prior to retirement and does not include provisions on progressive retirement schemes.

The rules imposed by Article 7 of Directive 2003/88 apply equally to full-time and part-time workers. Accordingly, Article 146 of the Labour Code provides that annual leave must be taken every year. If, for justified reasons, the employee cannot take the entire or partial annual leave to which he/she is entitled in the respective calendar year, the employer is required to grant the unused annual leave within a period of 18 months starting from the year following that in which entitlement to annual leave arose. Compensation in lieu of annual leave is only allowed in case of termination of the employment contract.

Therefore, this decision of the Court of Justice of the European Union will unlikely have any implications for Romanian judicial practice.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

This issue is not regulated in detail in Slovak labour law.

According to Article 111 paragraph 1 of the Labour Code (Act No. 311/2001 Coll. as amended), the use of leave is determined by the employer after negotiations with the employee in accordance with the leave plan developed with prior approval of the employee representatives so that the employee can, as a rule, use the leave in its entirety and by the end of the calendar year. When determining leave, the employer's tasks and the legitimate interests of the employee must be considered. The employer must ensure leave of at least four weeks per calendar year, if the employee is entitled to it, and there are no obstacles to work on the part of the employee.

If an employee cannot use his/her leave in a calendar year because the employer has not granted it, or due to obstacles to work on the part of the employee, the employer is required to grant the employee leave so that it ends no later than the end of the following calendar year. If the employer does not grant the employee leave by 30 June of the following calendar year at the latest, so the employee can use his/her leave by the end of that calendar year, the employee can determine when to take leave. The employee must notify the employer of his/her leave in writing, at least 30 days in advance; the specified period can be shortened with the employer's consent (Article 113 paragraph 2 of the Labour Code).

If the employee cannot use the leave even by the end of the following calendar year because he/she takes maternity leave, paternity leave or parental leave, the employer shall grant them their unused leave after the end of the maternity, paternity or parental leave (Article 113 paragraph 3 of the Labour Code).

According to Article 113 paragraph 4 of the Labour Code, if an employee cannot use his/her leave even by the end of the next calendar year because he/she is temporarily incapacitated for work due to illness or injury, the employer shall grant him/her the unused leave after the employee's temporary incapacity for work ends. If the employee cannot use his/her leave because he/she has been released for a long time to perform a public or trade union function, the employer shall grant him/her the unused leave after the performance of the employee's public or trade union function has ended (Article 113 paragraph 5 of the Labour Code).

The employee is entitled to wage compensation in the amount of his/her average earnings for any unused leave (Article 116 paragraph 1 of the Labour Code). According

to Article 116 paragraph 2 of the Labour Code, for any days of leave that exceed the four weeks of the basic amount of leave, which the employee could not use even by the end of the following calendar year, the employee is entitled to a wage compensation in the amount of his/her average earnings. For the unused four weeks of the basic amount of leave, the employee cannot be paid compensation, except if he/she could not use this leave due to the termination of the employment relationship (Article 116 paragraph 3 of the Labour Code).

Decisive in this regard are the cited provisions of Article 113 paragraph 4, Article 116 paragraph 2 and Article 116 paragraph 3 of the Labour Code.

The limitation period, which is regulated in the Civil Code (Act No. 40/1964 Coll. as amended), should also be mentioned in addition to these provisions. According to Article 101 of the Civil Code, in such cases, the limitation period is three years and runs from the day when entitlement to annual leave first arose.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) Amendments to the Labour and Social Security Registers Act were adopted, introducing stricter regulations for employers to register working time and some other work-related data.

(II) Several collective agreements have been amended (adjustment of wages and other payments).

(III) The platform workers at Glovo and Wolt (food delivery couriers) went on strike after the two companies refused to initiate negotiations with the trade union Mladi plus, which represents these platform workers.

1 National Legislation

1.1 Amendments to the rules on registering working time

Amendments to the Labour and Social Security Registers Act of 2006 ('*Zakon o evidencah na področju dela in socialne varnosti* (ZEPDSV)', Official Journal of the Republic of Slovenia (OJ RS), No. 40/2006, 14 April 2006; last amendments not yet included in the text published on the webpage of the Slovenian Legal Information System pisrs.si) were adopted by the National Assembly and published in the OJ: '*Zakon o spremembah in dopolnitvah Zakona o evidencah na področju dela in socialne varnosti (*ZEPDSV-A*)'* (OJ RS 50/2023, 05 May 2023, p. 4221-4223).

The amendments entered into force on 20 May 2023, and will start to apply after 6 months from their entry into force, i.e. on 20 November 2023.

They introduce stricter and more detailed regulations on employers' obligation to register working time and some other work-related data.

An obligation of employers to record various details of working time, including their employees' daily working time, has already been explicitly prescribed in the legislation (Labour and Social Security Registers Act) and is clearly confirmed in case law (see, for example judgment of the Administrative Court, No. I U 69/2017-11, 14 November 2017 (ECLI:SI:UPRS:2017:I.U.69.2017.11); judgment of the Higher Labour and Social Court, No. Pdp 98/2018, 14 March 2018 (ECLI:SI:VDSS:2018:PDP.98.2018) and many others). However, the labour inspectorate has proposed several times in its annual reports to further develop the regulation in this regard to improve the efficiency of supervision of working time regulations.

The amendments clarify the personal scope, i.e. who is covered by these rules. The definition of worker is clarified and includes not only employees who work on the basis of an employment contract, but also persons working on other legal bases (contract work, student work, etc.).

The amendments define in more detail what information must be registered (time of arrival and of departure from work, time used for breaks during working time, the hours worked under special working conditions arising from the organisation of working time, such as night work, etc., hours worked during irregularly distributed working time or during temporarily reassigned working time, total number of working hours per week, month or year, indicating also the reference period taken into account, etc.).

The records may be kept electronically or manually. However, the employer is required to keep electronic records in case of violations of employer obligations with reference to working time and its records. The workers have the right to access the information in the register of working time, and the employers have the obligation to regularly provide

them with summaries from the registry (on a monthly basis, together with the monthly payment of wages; as well as on request once per week).

2 Court Rulings

2.1 Working time –right to a rest break during daily working time

Higher Labour and Social Court, No. Pdp 94/2023 (ECLI:SI:VDSS:2023:PDP.94.2023), 02 March 2023

In its judgment, the Court decided that the worker's right to a rest break during the working day had been respected and referred to the Working Time Directive 2003/88/EC and CJEU case law, in particular to the CJEU's judgment in case C-107/19, 09 September 2021, *XR*.

The case concerned a policeman who worked border control. The Court decided that the nature and intensity of the claimant's work was such that he was able to take a break during working hours, considering the low workload at the border crossings he worked at, even though he was not allowed to leave his workplace and was required to interrupt his break to pass the border control. The Court, *inter alia*, explained and took into account that it was possible for the worker to use his break time during daily working hours in several parts. It also emphasised that the fact that the worker had to remain at work during his break time did not mean that he was prevented from taking the break. According to the Court, the modalities of guaranteeing the right to a break during working hours thus depends on the nature and intensity of the work being performed by the employee.

The Court explained that if it is known (in advance) that the work will not run continuously, that the work is not based on a consistent work pattern, that there is no increase in frequent and unpredictable work situations that require an immediate response, and that there are no such intense or frequent commitments that objectively and significantly affect the employee's ability to dispose of his/her break time within the framework of acceptable limitations, the employee does not have to be explicitly guaranteed a special break during his/her working hours, since he/she already has the possibility to interrupt his/her work and take breaks, taking into account the nature of the respective work during and in between the performance of work.

The question remains how to appropriately define the boundary between the nature and (low) intensity of work which actually allows the taking of a break during working time. The Court clearly states that this must be assessed on a case-by-case basis.

3 Implications of CJEU Rulings

3.1 Working time

CJEU case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The case has no direct implications for Slovenian law, since such progressive retirement schemes in which a worker does not work at all for several years at the end of his/her employment relationship but is still considered employed do not exist in Slovenia. If a worker is partly retired and works part time, he/she performs work for a given number of hours per week/per month/per year in line with the part-time work regime. The general labour law rules governing the right to annual leave of part-time workers apply correspondingly. Slovenian courts follow the relevant CJEU case law and refer to relevant CJEU judgments on the right to annual leave. However, the approach of Slovenian courts is rather narrow when assessing whether the worker has been prevented from taking annual leave and is entitled to a payment of allowance in lieu, and quite strictly apply national provisions that limit the accumulation of entitlements to annual leave by a worker who has been incapacitated for work due to illness by

restricting the carry-over period at the end of which the right to paid annual leave is lost.

4 Other Relevant Information

4.1 Collective bargaining

The platform workers at Glovo and Wolt (food delivery couriers) went on strike. The two companies refused to initiate negotiations with a view to concluding a collective agreement with the trade union Mladi plus, representing these platform workers, and explicitly denied these workers the right to organise and to collective bargaining – arguing that they are self-employed or student workers and have not concluded a contract of employment and are therefore not employees (see here for further information). The case raised a lot of criticism from the trade unions representing these platform workers. ETUC issued a support letter. In this letter, ETUC rightly pointed to the fact that the right to organise in trade unions and to bargain collectively is a fundamental right and refers to the recently adopted Commission Guidelines on Collective Agreements for Solo Self-employed Persons. These fundamental collective labour rights must also be recognised and respected in the case of platform workers.

Several collective agreements have been amended (adjustment of wages and other work-related payments, such as reimbursement of work-related costs and similar), for instance:

- the Collective Agreement for Postal and Courier Services ('*Aneks št. 1 h Kolektivni pogodbi za poštne in kurirske dejavnosti*', Annex, OJ RS No 58/23, 26 May 2023, p. 5053-5054);
- the Collective Agreement for the Newspaper, Publishing and Bookselling Sector ('Aneks h Kolektivni pogodbi časopisnoinformativne, založniške in knjigotrške dejavnosti', OJ RS 57/23, 19 May 2023, p. 4976-4977).

Spain

Summary

(I) A new rule requires a specific assessment of the extreme climatic conditions to prevent harm to employees while they are at their workplace.

(II) The President has called for general elections in July. That means Parliament will cease its regular activity and no significant developments are expected in coming months.

1 National Legislation

1.1 Health and safety at work

There is a new legal provision that explicitly requires the employer to adopt appropriate measures to protect workers who work outdoors and in workplaces that cannot be enclosed from any risks associated with adverse weather conditions, including extreme temperatures.

1.2 Equality and non-discrimination

The Royal Decree of 2009, which regulates the 'Equality in the workplace' provisions for employers has been amended. These new rules place significant importance on the implementation of previous equality plans within the undertaking.

2 Court Rulings

2.1 Religion teachers in public schools

Tribunal Supremo, Sala de lo Social, STS 1956/2023, 25 April 2023

The teaching of the Catholic religion in public schools is guaranteed based on an agreement between Spain and the Holy See in 1979. Persons who teach Catholic religion are directly hired by the public administration, which is their employer. They are not hired by the Catholic Church, but their true employer does not have complete freedom to decide who to hire: the public administration can only choose from among those who have a certification of 'adequacy' previously issued by the Catholic Church. This particular situation has led to many conflicts in the past because these teachers used to be hired on a year-by-year basis (under fixed-term contracts), after the issuance of a required 'certification of adequacy' by the authorities of the Catholic Church. Problems used to arise when a worker who had been hired in previous years could no longer be hired because the Catholic Church decided to no longer consider him/her 'adequate', refusing to issue the certification to him/her. The Spanish courts, even the Constitutional Court, have had to deal with this situation for decades, because the reasons for 'inadequacy' were often related to the workers' private life. For instance, the Church hierarchy often decided to withdraw the 'certification of adequacy' when the religion teacher married a previously divorced person, or when the worker was formerly a priest but decided to get married instead.

This is a complex issue because it is not a dismissal per se, but a non-renewal of the contract, and is not necessarily the employer's decision, but depends on a third party, namely the religious authorities, which issue or withdraw the required certification of adequacy. These situations demand a case-by-case analysis involving considerations of

fundamental rights to family and private life, discrimination, freedom of religious belief and the right to religious practice.

In this scenario, CJEU, case C-282/19, 13 January 2022, MIUR and Ufficio Scolastico Regionale per la Campania, considered the Italian system for recruitment of religion teachers in public schools, very similar to the Spanish one, against the framework agreement on fixed-term work annexed to Council Directive 1999/70/EC, as it implies an unjustified exclusion from the rules to prevent abuses in the use of successive fixed-term contracts.

Moreover, it stated that

> *"the requirement to hold a suitability certificate issued by an ecclesiastical authority for the purposes of allowing those teachers to provide Catholic religious education does not constitute an 'objective reason' within the meaning of Clause 5(1)(a) of the framework agreement",*

which is therefore inadequate to justify the fixed-term nature of the relationship.

Spanish legislation has been modified to fully respect EU law. Fixed-term employment contracts are no longer permissible for this purpose, except in case of 'interim contracts', that is, contracts to substitute employees entitled to return to their job due to a justified reason (sick leave or parental leave). This Supreme Court ruling confirms this approach.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

This ruling is not expected to have any implications for Spain. According to Article 38 of the Labour Code and the case law of the Supreme Court, workers have the right to take annual leave, even in a different year, when they were unable to do so due to parental leave or sick leave in the year in which entitlement to that leave arose. Annual leave cannot be substituted by financial compensation, except when the worker could not enjoy this right, for example when the employment contract is terminated. There is no legal provision in Spain that leads to a similar situation as that in Germany. In a case such as that, the worker would have had the right to financial compensation if he had not been able to take the days of leave due to illness.

4 Other Relevant Information

4.1 General elections

General elections will be held on 23 July 2023 This call for elections was unexpected, and as a result, some draft bills will not become actual laws. Specifically, a draft bill that would have granted new leaves and rights to workers to attend to family matters will be postponed.

Sweden

Summary

(I) The Labour Court has held that a change of public transportation operators did not constitute a transfer of undertakings.

(II) A trade union has announced that it will take Sweden to the European Court of Human Rights for violation of Article 11 ECHR.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertakings

Labour Court AD 2023 No. 29, 10 May 2023

A company contracted to operate public transportation in parts of a Swedish region was replaced by another company. Due to the change in operators, the company that used to operate the public transportation terminated the employment contracts of bus drivers. The termination of employment contracts was announced approximately 6 months before the last day of the operating contract. At that time, it was clear whether the new company would only use some of the buses previously used by the former company. Also, it was clear that the new company had initiated a recruitment process to find drivers, but had not concluded any employment contracts. The trade union representing the bus drivers that had been dismissed initiated a legal procedure against the first company claiming that it had breached its duties as transferor under the Transfer of Undertakings Directive (2001/23). According to Article 4 of that Directive, it is not allowed for the transferor or the transferee to dismiss employees on the grounds of a transfer of undertaking.

In its judgment, the Labour Court held that it had been unclear for the transferor at the time of termination of the employment contracts that the undertaking would be transferred to another company. The Court stressed that as regards the responsibility of the transferor, it is what was known at the time of the termination of employment contracts that must be clarified. According to the Court, the question whether the future transfer was known shall be examined with regard to "*such circumstances that may be practically assessed with certainty*" at the time of termination of the employment contracts.

In its assessment whether the change of operators constituted a transfer in the meaning of the Transfer of Undertakings Directive, the Court recognised with reference to the CJEU's case law that such a change of operators often constitutes a transfer of undertaking. However, in the present case, the Court held that it was not clear for the potential transferor at the time of termination of the employment contracts that the undertaking would be transferred to another operator. The Court held that there are differences in how the notion of transfer is assessed by businesses that are dependent on substantive assets and others. If a business is dependent on substantive assets that are not being transferred, the Labour Court does not usually consider this to be a transfer of undertaking. The operation of public transport, according to the Swedish Labour Court's judgment, is such a business that typically is dependent on substantive assets. Normally, a change in public transportation operators does not constitute a transfer unless also a majority of assets (usually the buses) are transferred. In its judgment, the Court noted that no transfer of assets had been necessary in the CJEU's

ruling in case, C-298/18, 27 February 2020, *Grafe and Pohle*. The Labour Court stated that that judgment had been dependent on the formation of the public authority's call for tenders and that it was an exception.

In the present case, the Court held that no transfer of undertaking had taken place as the potential transferor only knew that 22 of 196 buses would be moved. In that situation, the Court held that the bus operator could not be considered 'an operational concern'. The Court furthermore stated that the fact that a majority of the employees would not be moved as well indicated that no transfer of undertaking had occurred. The transferor was not prevented by the special dismissal protection rule to terminate the employees' contracts.

In the court proceedings, the trade union urged the Labour Court to request a preliminary ruling by the CJEU on the issue of how a transfer of undertaking should be proven. The question included to what extent such a fact is considered certain (level of proof) and the allocation of the burden of proof. The Court held that what the trade union was actually requesting was not a level of proof requirement, but a factual assessment of the transfer notion. Nonetheless, the Court held that it was so uncertain that a transfer of undertaking would take place that the requirements of foreseeability that follow from the "*so called principle of legal certainty*" meant that the employer could not be sanctioned. Nor were there any other reasons for asking the CJEU for a preliminary ruling. Hence, the claim was rejected.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, case C-192/22, 27 April 2023, FI vs. Bayerische Motoren Werke AG (organisation of working time – paid annual leave)

The case has implications for Sweden's regulations as the Swedish rules on annual leave rights are similar to the German ones that were held to be incompatible with EU law in the present case (see The Annual Vacations Act, *Semesterlagen* [1977:480]).

4 Other Relevant Information

4.1 European Court of Human Rights

The Swedish Dockworkers Union has announced that it will take Sweden to the European Court of Human Rights for violation of Article 11 of the European Convention of Human Rights. According to the trade union, the situation with competing collective agreements means that freedom of association is at risk.

United Kingdom

Summary

(I) There have been some developments in the Retained EU Law (REUL).

(II) The Strikes (Minimum Services Levels) bill is still in the process of adoption.

(III) There is a new draft bill on the fair allocation of tips.

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 Retained EU Law (Revocation and Reform) Bill

It will be recalled that in the original draft of the Bill, it was due to sunset all 3 745 pieces of retained EU legislation, unless saved in some form. As reported in previous Flash Reports, there was grave and widespread concern about the government's approach. In mid-May, the government announced an important change of heart. Now the default is that all Retained EU Law will remain, except the 587 pieces listed in the Schedule to the Bill. There are a number of measures in the employment fields, but none is significant in the post-Brexit world, with the exception of the removal of rules on the posting of workers and on drivers' hours during foot and mount in 2001.

However, other key aspects of the Bill will remain, including ending the supremacy of EU law, the direct effect and general principles as well as encouraging courts to be more enthusiastic about departing from pre-Brexit case law. The Bill also contains extensive powers for the executive to revoke or restate retained EU law (which will be called 'assimilated law'). The Lords (the Upper House) are concerned about a number of these provisions and the legislation is therefore currently quite volatile (shuttling between the Lords and the Commons to try to arrive at an agreement). However, the general direction is clear and most significantly, the default is now different.

But this is not the end of the story. The government has published a document on encouraging growth and a consultation paper on reform of certain employment rights. A summary of the aim of the consultation paper can be found in this letter from the government to the Lords:

> *"Dear Lord Hendy and Lady Finlay,*
>
> *REUL REPORT STAGE - DAY 1*
> *On Monday 15 May during report stage of the Retained EU Law (Revocation and Reform) Bill, I committed to write to you both responding to points on workers' rights made at the beginning of the debate.*
>
> *On 12 May the Government launched a consultation seeking views on reforms to the Working Time Regulations, and the Transfer of Undertakings (Protection of*

Employment) Regulations (TUPE). This followed the announcement, and publication, of the paper Smarter Regulation to Grow the Economy on 10 May, which referenced these proposals. We want to use this consultation as part of our ongoing dialogue with businesses and workers to set out an employment rights framework that will retain our global position as a dynamic, vibrant, and flexible economy. The proposals are now out to public consultation, and ACAS, trade unions and others are able to comment. …

Regarding the requirements on business to record working hours – the Government is consulting on removing retained EU case law that imposes time-consuming and disproportionate requirements on business for working hour records to be kept for almost all members of the workforce. This change could help save businesses around £1bn a year. These proposals do not remove rights, increase health and safety or accident risks, or change entitlements. Instead, they remove unnecessary bureaucracy in the way those rights or entitlements operate, allowing business to benefit from the freedoms we have through Brexit. With regards to holiday pay, we want to reduce burdens on business by simplifying complex holiday pay and entitlement legislation so it is easier for employers to calculate annual leave entitlement and holiday pay for their workers. The Government is consulting on proposals to merge the current two separate annual leave entitlements in the Working Time Regulations into one pot of statutory annual leave, whilst maintaining the same amount of statutory annual leave entitlement overall. Combining the two existing leave entitlements into a single pot of statutory annual leave aims to reduce the costs that businesses, especially small businesses, face when trying to understand which legal framework applies and will help ensure that workers are receiving consistent amounts of holiday pay for their entire entitlement. The statutory annual leave entitlement amount will not change, and we will continue to provide a statutory annual leave entitlement greater than the EU's required minimum of 4 weeks. The consultation also seeks views on how holiday pay is currently calculated and how we could define a single rate of holiday pay for the entire statutory annual leave entitlement.

There was mention of consultation requirements for redundancies for SMEs. I assume this relates to the announcement regarding the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) mentioned above. We recognise the administrative burden businesses face when a business transfers to a new owner and will simplify and clarify the transfer process. That is why the Government is consulting on changes to the TUPE regulations. These changes will reduce the complexity of the regulations for businesses and simplify and clarify the transfer process. However I must emphasise that we are ensuring that workers' rights continue to be protected."

The letter concludes:

"Turning to the points made by Lady Finlay. I can reassure her that the Government has no intention of abandoning our strong record on workers' rights, having raised domestic standards over recent years to make them some of the highest in the world. To make good on this promise, the consultation makes clear the areas of employment law where the Government will not make any changes, including the system of maternity, paternity, adoption or parental leave. We also attach great importance to health and safety and of course the regulatory regime provides other safeguards to help prevent fatal accidents supported by the Health and Safety Commission."

Hence, changes to UL labour law will be introduced, but these are modest in comparison to earlier plans.

4.2 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 in deciding whether to identify a person in a work notice. This was adopted unopposed.

Most of these changes were rejected by the Commons. The Bill is back in the Lords this week.

4.3 The Employment (Allocation of Tips) Act 2023

The Employment (Allocation of Tips) Act 2023 has received royal assent. This bill is intended to ensure that workers receive all the tips that are paid to them in a way that ensures a 'fair' allocation (to be explained in a code of practice). Further details can be found here.

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