Flash Reports on Labour Law June 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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Contact: Marie LAGARRIGUE

E-mail: Marie.LAGARRIGUE@ec.europa.eu

European Commission

B-1049 Brussels

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Country	Labour Law Experts
Austria	Martin Gruber-Risak Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova Albena Velikova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Petr Hůrka
Denmark	Natalie Videbaek Munkholm Mette Soested
Estonia	Gaabriel Tavits Elina Soomets
Finland	Ulla Liukkunen
France	Francis Kessler
Germany	Bernd Waas
Greece	Costas Papadimitriou
Hungary	Tamás Gyulavári
Iceland	Leifur Gunnarsson
Ireland	Anthony Kerr
Italy	Edoardo Ales
Latvia	Kristīne Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Miriam Kullmann Suzanne Kali
Norway	Marianne Jenum Hotvedt Alexander Skjønberg
Poland	Marcin Wujczyk
Portugal	José João Abrantes Isabel Valente Dias
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Barbara Kresal
Spain	Joaquín García Murcia Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar Erik Sinander
United Kingdom	Catherine Barnard

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Executive Summary

National level developments

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

Developments related to the COVID-19 crisis

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

There is no longer a state of epidemiological threat on the territory of **Poland** from 01 July 2023 onwards, which means that a suspension of many employment obligations is ending.

Implementation of EU Directives

In **Austria**, a proposal to transpose Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (hereafter the Work-life Balance Directive) requires parents to share parental leave to be eligible for full parental leave of 24 months/child, while individuals' maximum entitlement to parental leave will be reduced from 24 months to 22 months (single parents being the exception). The proposal strengthens protection in case of deferred parental leave, care leave and a reduction in working time due to care obligations.

In **Spain**, the Work-life Balance Directive has been transposed. Both the Labour Code and the Basic Statute of Public Employees have been amended to introduce a new non-paid parental leave of eight weeks, which can be taken until the child reaches the age of 8 years. This parental leave is non-transferable and can be taken intermittently. The worker has the flexibility to choose whether to take the leave full time or part time.

The **Slovenian** government has published the Proposal of Amendments to the Employment Relationships Act, which—in addition to some other issues—concern the transposition of two EU Directives, namely the Work-life Balance Directive and the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Directive on Transparent and Predictable Working Conditions).

A draft law serves to implement the Directive on Transparent and Predictable Working Conditions in **Liechtenstein**. The employer's obligations to inform employees about the key aspects of the employment relationship have been expanded, minimum requirements for working conditions have been established for various areas, and horizontal provisions have been introduced to enforce the aforementioned provisions, in particular regarding the burden of proof and rules on protection against dismissal.

The **German** Parliament adopted a draft bill which provides for the transposition of EU Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 into national law, laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector. In future, the law on the posting of workers shall also apply in the road transport sector.

In addition, in **Norway**, the regulations on posted workers have been amended. The new provisions concern, among others, the regulation on the posting of workers in the transport sector, a provision granting posted workers the right to bring a lawsuit in Norway to claim the working and wage conditions they are entitled to according to the regulation on posted workers, and a prohibition on retaliation against posted

workers who take legal or administrative steps to claim their rights.

The Whistleblowing Act was published in the **Czech Republic**. The Act will come into force on 01 August 2023. The **Estonian** government has also prepared a draft act to protect whistleblowers. The draft establishes a framework for submitting reports on violations in professional activities, provides follow-up measures and feedback, and protects whistleblowers. The draft relates to Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report violations of Union law (Whistleblower Protection Directive), which aims to protect whistleblowers. The new act is planned to enter into force on 01 January 2024.

A new Act in **Croatia** applies to the conciliatory resolution of labour disputes and implements Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of the freedom of movement for workers into Croatian law.

Collective bargaining and collective action

In **Belgium**, the social partners concluded several collective bargaining agreements on unemployment rights and company supplement schemes, as well as a collective bargaining agreement to extend the provisions in the collective agreements on access to the right to benefits for an early 'landing job' from the age of 55 years onwards.

The Supreme Court of the Republic of **Croatia** ruled on the permissibility of a strike in the public sector in protest of the level of salaries regulated by a decree of the Government of the Republic of Croatia.

In **Norway**, the government intervened with compulsory arbitration in a dispute over the revision of a collective agreement involving the air ambulance service based on the assessment by the Norwegian Health Inspection Authority that a danger to life or health existed. Thus, Parliament enacted the necessary law on compulsory arbitration in the conflict.

In **Slovenia**, several annexes or amendments to the existing sectoral collective agreements have been concluded and published in the Official Journal of the Republic of Slovenia, which mainly adjust the amounts of minimum basic pay and some other work-related payments (for example, annual leave allowance).

Collective redundancies

In **Luxembourg**, a court ruling on social selection during redundancies requires the employer to justify the social selection when dismissing employees. However, it is not yet certain whether it is an isolated case or the beginning of a reversal of existing case law which confirmed that the employer is not required to justify social selection (*selection sociale)*.

Dismissal protection

According to a recent Court ruling in **Luxembourg**, a dismissal was unfair, and the employee was awarded compensation. However, the Court also upheld the employer's counterclaim regarding the fault on the part of the employee, and awarded the employer in return an amount equivalent to half the damages awarded to the employee, including the amounts the employer had to reimburse to the State as unemployment benefits.

The **Finnish** Labour Court ruled that by not making reasonable adjustments, the employer was deemed to have terminated the shop steward's employment contract due to disability in violation of the prohibition of discrimination. In the judgment, the Court also took into account that the CJEU held that Directive 2000/78/ EC prevents dismissal due to disability, which cannot be justified by the fact that the person concerned is not competent, capable and available to perform the

essential tasks required by his/her job, even after reasonable adjustments.

Employee representation

A bill including clarifications about the electorates of professional chambers (*chambres professionnelles*) established in 1924 in **Luxembourg** to uphold socio-professional interests, has been introduced. The voting age has been lowered to cover certain people who had thus far been excluded from the electorate system (e.g. apprentices). Moreover, according to a recent court ruling, it was decided that if the employment contract stipulates flexibility in favour of the employer on certain contractual conditions, the existing prohibition that unlike ordinary employees, the employer cannot impose a unilateral change to the employment contract of staff representatives, does not apply. In the present case, the employee delegate accepted possible changes from the outset and could not object to them.

Staff representatives in **France** who were victims of trade union discrimination brought an action through emergency proceedings before the Judicial Court, requesting their employer to provide information that would allow them to compare themselves with colleagues in a similar situation.

Fixed-term work

A ruling of the **Austrian** Supreme Court dealt with fixed-term employment of theatre actors. The Theatre Workers Act permits the conclusion of consecutive fixed-term employment contracts for theatre actors (ballet dancers). The Supreme Court pointed out that the question whether the conclusion of fixed-term employment contracts for artists in theatres as the normal form of employment is justified does not have to be answered definitively, as even a negative answer to this question would not result in an open-ended contract as requested by the plaintiff. Neither Union nor the national legislature provide for such a legal consequence in case of a violation of the fundamental right enshrined in Article 30 CFR, i.e. the right to not be terminated without good reason.

In **Sweden**, the Labour Court has ruled in a case on a very long (over ten years) fixed-term contract and concluded that it was not in breach of the Fixed-term Work Directive (FTWD).

Amendments to the **Slovenian** Organisation and Financing of Education Act increase the possibilities for concluding a fixed-term contract with a teacher in primary and secondary schools in cases when no candidates applied for the job who meet the prescribed requirements.

Remote work / teleworking

The **German** Federal Institute for Occupational Safety and Health has published a comprehensive report on 'Working from Home' for its 'Working Time Report Germany'.

New developments in the cross-border teleworking regime have been reported in **The Netherlands**.

Temporary agency work

In **Germany**, the State Labour Court Baden-Württemberg ruled on temporary agency work involving three companies. The ruling illustrates the variety of arrangements that companies choose, and which raise the question of their qualification as temporary agency work.

The **Dutch** Supreme Court has ruled on the application of the Gruber Logistics case to a dispute between a temporary work agency based in Luxembourg, and a Dutch sectoral pension fund, interpreting the provisions of the Rome I Regulation.

Transfer of undertaking

The **Spanish** Supreme Court has ruled on a transfer of undertaking, modifying its previous criteria to adapt them to EU law.

A decision of a **Dutch** District Court concerned the interpretation of Directive 2001/23/EC.

Working time

In **Belgium**, a reduced working time scheme allows employees aged 60 years and older to reduce their working time by 1/5 or 1/2 until they retire. In principle, an employee must be 60 years or older to be entitled to break benefits, which are a type of social security unemployment benefit, namely a so-called 'landing job'. However, legislation allows for a lower age limit for entitlement to 'interruption benefits' years under certain conditions, but not below the age of 55.

Amendments to the **Czech** Labour Code have been made with regard to limitations to overtime work in the health care sector and the uninterrupted rest periods of employees.

A **German** administrative court delivered a judgment on the qualification of an employee's rail travel times during the regular transfer of new vehicles by a forwarding agency as working time.

In **Iceland**, legislation has been amended establishing employers' obligation to an objective, reliable and accessible record of their employees' working time.

The **Latvian** Supreme Court in a recent decision issued a contradictory interpretation on the concepts of working time and rest periods.

The **Spanish** Supreme Court has ruled that the stand-by time of health care staff is working time when they are required to remain at the employer's premises and/or need to be permanently available. The case involved staff engaged in emergency medical services and the Supreme Court expressly referred to Directive 2000/34/EC and to relevant CJEU case law.

Two Supreme Court decisions in **The Netherlands** ruled on annual leave issues (payment of wages for periods of statutory and non-statutory annual leave).

In **Romania**, the maximum age of the child for which parents are entitled to sick child care leave has been modified.

Other developments

In several countries, developments on the employment of third-country nationals were reported. In **Hungary**, Parliament passed the Act on Employment of Migrant Workers, which includes new flexible rules that make it easier to employ migrant workers up to a period of three years. In **Luxembourg**, a bill concerning immigration in the broadest sense includes changes to the Labour Code as well. In **Slovenia**, an order determining the occupations in which the employment of foreigners is not linked to the labour market was extended.

Implications of CJEU Rulings

Working time

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

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' and Others.

The present case concerned certain aspects of the organisation of working time of firefighters with the status of civil servants and the calculation of, and remuneration for, hours of night work in Bulgaria.

Under Bulgarian national law, the normal, shorter length of night work provided for workers in the private sector did not apply to public sector workers, such as firefighters. The question posed by the Bulgarian court was whether public sector workers were entitled to the same shorter duration of night work as is the case in the private sector, based on an interpretation of the Working Time Directive (WTD) Article 12(b).

The requests for a preliminary ruling submitted to the CJEU referred to the interpretation of Article 1(3) and Article 12 of Directive 2003/88/EC of the WTD and of Article 2(2) of Council Directive 89/391/EEC on Safety and Health at Work.

The CJEU ruled that the relevant provisions of the WTD and the Directive on Safety and Health at Work must be interpreted as meaning that the WTD applies to public sector workers, such as firefighters, who are considered to be night workers, in so far as those workers carry out their activities under normal circumstances.

In addition, Article 12 of the WTD, read in the light of Article 20 of the Charter of Fundamental Rights of the European Union (EUCFR), must be interpreted as not precluding the normal length of night work fixed at seven hours in the legislation of a Member State for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim. Therefore, this ruling shows that a difference in treatment in terms of working time, night work, across different sectors—*in casu* public and private sector employment—are subject to be tested under the general principle of equal treatment in the EU, provided that the national rules are an implementation of the WTD.

The decision is not expected to have any major implications nor direct relevance in **Bulgaria**, **Croatia**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Latvia**, **Norway**, **Poland**, **Romania**, **Slovenia**, **Slovakia**, **Spain** and the **UK** because the national legislation corresponds to and complies with the CJEU's interpretation.

No amendments to **Bulgarian** legislation will be necessary following the CJEU's decision.

The difference in treatment of workers in **Estonian** national legislation on night work refer to the fulfilment of criteria set by the CJEU ruling, as Estonia's policy considers the most important objective—the health and safety of rescue workers—in defining the conditions for the applicable exceptions.

The **Spanish** Supreme Court, in a ruling on 14 April 2016, affirmed that firefighters working 24-hour shifts are considered night workers, and the relevant legislation, including the WTD, applies to them.

In **Ireland**, firefighters are not 'civil servants' and it has never been in dispute that firefighters are covered by the Organisation of Working Time Act 1997, the general working time regulation. However, firefighters are exempt from the provisions of the 1997

Act regulating 'night work'. On the contrary, in the **UK**, the work of firefighting is performed by those employed in the public sector; there is no private sector equivalent. The Working Time Regulations thus apply to firefighters. In 2018, there was a case where the fire brigades union successfully challenged a system involving 96 hours of continuous duty for firefighters because it was considered contrary to the Working Time Regulations, particularly the provision on night work.

Only minor implications have been reported for the interpretation of **Danish** collective agreements that apply as the legal basis for working time – which inherently involves various working time arrangements for shift work and night work. It is presumed that the varieties would pass the legitimacy test provided by the CJEU.

This ruling may have an impact in some countries, such as in **Austria**, **Belgium**, **Cyprus**, **Germany**, **Greece**, **France**, **Iceland**, **Portugal** and **Sweden**.

This CJEU ruling clarifies the EU law requirements regarding differences in national legislation on night work that implements the WTD. In **Austria** and **Belgium**, there are differences in treatment of night workers employed by private and by public sector employers. Although these differences are not significant, it could be possible that these are not in line with the CJEU's developed criteria in the present decision. Specifically, in **Austria**, the difference in treatment does not refer to certain tasks and their specific nature but to these two types of workers in a global and abstract manner. In **Belgium**, the legislator must bear in mind that according to the CJEU, the WTD also applies to public sector workers, such as firefighters, in so far as the categories of the workers concerned are in a comparable situation. Public sector workers may be subject to less favourable rules on night work than private sector workers, provided that the difference in treatment is based on an objective and reasonable criterion, i.e. relates to a permitted aim and is proportionate to that aim. In **Greece**, although there are no differences in the national legislation concerning the organisation of working time, jurisprudence seems to justify differences between different categories of employees in terms of their statutory or contractual status.

German legislation is in line with the requirements formulated by the CJEU on the application of the WTD to public sector workers. However, regarding the prohibition of discrimination, the legislator has only implemented a small part of the comprehensive prohibition of discrimination contained in Art. 12 lit. b of the WTD and, thus, an interpretation in conformity with EU law is necessary, so that it should be possible to adequately take the requirements formulated by the CJEU into account.

The CJEU's understanding of the objective and reasonable criteria for a difference in treatment is reported as being relevant for **Portuguese** regulations on the working time of firefighters. As a rule, firefighters are subject to general labour regulations. Nevertheless, they may be subject to particularities related to the nature of their professional activity. A potential difference in treatment of these professionals in terms of the general duration of night work may be in line with EU law if it is based on an objective and reasonable criterion.

Two countries deserve special consideration: **France** and **Sweden**, because it seems debatable whether their national provisions are aligned with the CJEU's understanding of the law as expressed in this ruling.

In **France**, the statuses covering the professional activities of firefighters differ greatly. Some firefighters have a military status to whom no limits to working time apply, i.e. the WTD is not applicable to them, and some have a local civil service status with limitations of working time combined with permissible derogations. The WTD is applicable to the organisation of working time of the latter category. The issue of the application of the WTD to French firefighters is not an unknown issue in the country. Indeed, France received a

formal notice from the European Commission regarding the working time of firefighters on stand-by duty of 24 hours, as provided by the Decree of 12 July 2001. A special Decree on working time of firefighters of 18 December 2013 was designed to make the working time conditions of local civil servant firefighters compatible with the requirements of the Directive, particularly when they were working on 24-hour shifts of stand-by duty. However, it was reported that it remains uncertain whether these changes suffice to be considered in compliance with the WTD. According to the case law of the French Supreme Administrative Court, European Union law in general and the WTD in particular must be applied to the regulatory provisions that govern the working time of military personnel. The administrative courts are competent to review them in the context of appeals. In doing so, the courts also determine whether the national provisions comply with European law. A recent decision of the Administrative Supreme Court does not apply to military firefighters, but provides a glimpse of how French courts deal with the applicability of the Directive to the armed forces. It seems that the French judge in this ruling respected the CJEU's position by admitting that the exclusion of the Directive's application depends on the activities of military personnel and not solely on the fact that they are members of the armed forces.

In **Sweden**, the question on the application of the exemption from the WTD for ordinary, planned work tasks or for exceptional situations, is highly relevant from a Swedish perspective and is currently subject to intense discussions and soon-to-enter-into-force collective agreements on working time. The current ones to be replaced, which include collective agreements for rescue teams and some other groups of employees, allow for a 24-hour working time, also in planned situations. This is primarily applied when the firefighter—similarly to a 'personal assistant' in the context of long term care work—is stationed at the workplace during the night, but is usually allowed to sleep at least a significant part of every 24-hour period at the workplace. The new and heavily criticised (by employees) new collective agreements, which are to be applied starting 01 October 2023, stipulate an 11-hour daily rest period for every 24-hour work period, with rest compensation directly following the work shift, if the employee's ordinary daily rest period was reduced for any reason. However, in *extremis*, situations might require some more flexibility, but not on an ordinary basis.

Table 1: Major labour law developments

Topic	Countries
Annual leave	HR LU NL
Collective bargaining and collective action	BE HR IE NO SI
Collective redundancies	LU
COVID-19	PL
Dismissal protection	FI LU
Employee representation/participation	FR LT LU
Enforcement	HR FI FR
Fixed-term work	AT SE SI
Judges	HR RO SI
Occupational health and safety	FR NL NO
Parental leave	AT CZ ES
Part-time work	AT
Posting of workers	DE FI NO
Remote work / teleworking	DE NL
Temporary agency work	DE NL
Third-country nationals	HU LU MT SI
Transfer of undertaking	ES NL
Transparent and predictable working conditions	LI SI
Whistleblowing	CZ EE FR
Working time	AT BE CZ DE ES IS LV NL RO
Work-life balance	AT ES RO SI
Young workers	EE
Sick leave	IS RO

Austria

Summary

(I) A proposal to transpose Directive 2019/1158/EU requires parents to share parental leave to be eligible for full parental leave of 24 months/child, individuals' maximum entitlement to parental leave will be reduced from 24 months to 22 months (single parents being the exception). The proposal strengthens protection in case of deferred parental leave, care leave and a reduction of working time due to care obligations.

(II) Two rulings of the Austrian Supreme Court are of interest from the perspective of EU labour law and deal with (alleged) discrimination of part-time workers and fixed-term employment.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Discrimination of part-time workers

Supreme Court, 9 ObA 20/23s, 29 March 2023

According to a decision of the Austrian Supreme Court in case 9 ObA 30/15z, entitlement of employees to an agreed lump-sum overtime allowance is suspended during parental part-time leave under the Maternity Protection Act or the Paternity Leave Act or other comparable Austrian legislation. Moreover, if the parties to the employment contract concluded an all-in agreement, according to the Supreme Court (cases 9 ObA 83/22d and 8 ObA 22/22a), that part of the remuneration paid in addition to basic remuneration for normal working time for the performance of overtime and extra working hours is suspended during parental part-time work.

In the present case, an employee claimed that this constitutes a discrimination of part-time workers as well as discrimination based on gender/sex because the worker is legally not required to perform overtime and extra working hours, but cannot do so factually due to her situation as a worker.

The Supreme Court pointed out that parental part-time workers are not required to work more than the agreed amount of working time (§ 19d (8) Working Time Act). A complete cessation of overtime work over a longer period of time due to this legal prohibition results in the suspension of the claim during the period of that prohibition because the basis for the agreement of a lump sum for overtime work lies in the mutual assumption that such overtime will actually be performed. From a lump-sum agreement, however, a contractual obligation of the employee to work overtime can at least be implicitly inferred. A lump-sum payment is regularly agreed in case of an expectation of overtime work. If this is the case, the synallagma between the performance of work and remuneration on which the parties based the employment contract would be considerably affected if the employer were required to continue paying the lump-sum overtime compensation although the employee cannot be requested to work overtime. However, if employees on part-time parental leave work extra hours by mutual agreement, they are entitled to the corresponding remuneration by way of individual settlement of the extra work performed. Apart from this, it is not established in this case whether the employees of the defendant could not in fact refuse to work overtime due to their activities and positions. An objectively unjustified unequal treatment of part-time parental leave employees compared with comparable full-time employees or men is therefore not discernible.

It is interesting that the Supreme Court did not reject the claim in general but left open a window for cases in which employees, although not bound to perform overtime/extra hours on a legal basis, still find themselves in a factual situation that leaves them in similar circumstances, i.e. that they are not able to refuse a request to work such hours. If the latter had been the case (and if this had been proven by the plaintiff), the Court might have decided differently. With this important differentiation, the decision seems to be in line with EU labour law.

2.2 Discrimination of fixed-term workers

Supreme Court, 9 ObA 21/23p, 27 April 2023

In this decision, the Supreme Court reiterated its decisions 8 ObA 58/22w (see December 2022 Flash Report) and 9 ObA 11/22s (see January 2023 Flash Report) concerning consecutive fixed-term employment contracts for theatre actors (ballet dancers) according to the Theatre Workers Act (*Theaterarbeitsgesetz* – TAG). It permits the conclusion of consecutive fixed-term employment contracts in § 27 entitled 'declaration of non-renewal', which reads as follows (unofficial translation by the author):

> *"If the theatre employment contract has been concluded for a fixed term and for at least one year, the theatre shall notify the employee in writing by 31 January of the year in which the employment contract ends that the employment contract will not be renewed. If the theatre fails to give such notice or gives notice late, the employment contract shall be extended for another year, unless the employee notifies the theatre in writing at the latest by 15 February of the year in which the employment contract ends that he/she does not accept a renewal of the employment contract."*

The Supreme Court pointed out that the question whether the conclusion of fixed-term employment contracts for artists in theatres as the normal form of employment is justified does not have to be answered definitively, as even a negative answer to this question would not result in an open-ended contract as requested by the plaintiff. Neither Union nor the national legislature provide for such a legal consequence in case of a violation of the fundamental right enshrined in Article 30 CFR, i.e. the right to not be terminated without good reason.

However, even if one were to assume that chain employment contracts without a basis in fact violate Art. 30 GRC or if fixed-term employment contracts are prohibited insofar as they are intended to circumvent protection against unfair dismissal, there is no legal basis for converting such a contract into one of indefinite duration. As already stated in the above-mentioned decisions 8 ObA 58/22w and 9 ObA 11/22s, the Fixed-term Directive is not unconditional and precise enough from which concrete claims can be derived. If, as requested by the plaintiff, the provisions of the Theatre Workers Act were not applied, the claim would not succeed, because it would ultimately remain open which provisions should apply. Neither Austrian labour legislation nor the Fixed-term Directive provide for a specific legal consequence and the Court therefore rejected the claim due to lack of a legal basis for the plaintiff's request.

The decision again emphasises the limitations of available remedies in case of a potential explicit breach of Union law by Member States, especially in the case of a Directive that is not very precise and leaves leeway in transposing it.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Austrian working time legislation differentiates between private and public sector employees, i.e. of the Republic of Austria, the Federal States and municipalities. All nine Federal States apply their own employment legislation that is very much modelled after the laws applicable to employees of the Republic of Austria. We will therefore only refer to the relevant Act on Public Servants (*Beamtendienstrechtsgesetz* – BDG) which also applies to contractual public employees pursuant to the Act on Contractual Public Employees (*Vertragsbedienstetengesetz* – VBG). Interestingly, the situation for public servants is less flexible, with stricter limits and shorter reference periods, while protection for private sector employees is weaker. This is also a result of the fact that for the latter, the Working Time Directive 2003/88/EC (WTD) has not been properly transposed and that no collective agreements exist for public sector employees. The second factor may justify some differentiations but definitely not all.

The Act on Public Civil Servants in § 48 provides that the working time of regular night workers may not exceed eight hours in a 24-hour period, on average, over 14 calendar days. The working time of 'heavy night workers' shall not exceed eight hours in any 24-hour period during which they perform night work.

The Working Time Act (*Arbeitszeitgesetz* – AZG) in § 12a, on the other hand, does not generally limit working time to eight hours in a 24-hour period, as it assumes that the notion of 'normal working hours' in the WTD means the same as 'normal working time', i.e. all working time that does not constitute overtime. This provision has been criticised in the literature (cf. Klein in Gasteiger/Heilegger/Klein, *Arbeitszeitgesetz*, 7th ed. 2021 § 12a recital 9; Auer-Mayer, in Auer-Mayer/Felten/Pfeil, AZG, 4th ed. 2019, § 12a recital 6) as it does not include regular overtime. The limitation of working time for night workers is established in the Working Time Act, which grants additional rest periods if the average working time of regular night workers over a reference period of 26 weeks exceeds eight hours. This only applies in case of stand-by duty or heavy night work and not to regular night work more generally. Collective bargaining agreements may provide for exemptions. In case of 'heavy night work', the average working time may only exceed eight hours, including overtime, within a reference period of 26 weeks if this is permitted by collective agreement.

The differences in the treatment of night workers employed by private sector employers, on the one hand, and public employers, on the other, although not very significant, do not refer to certain tasks and their specific nature but to these two types of workers in a global and abstract manner. At first glance, it is therefore possible that these differences as pointed out are not in line with the criteria developed by the CJEU in the present decision.

4 Other Relevant Information

4.1 Proposed transposition of Directive 2019/1158/EU on Work-life Balance

A proposal for the transposition of Directive 2019/1158/EU on Work-life Balance was referred to the Parliamentary Committee for Labour and Social Affairs, which requested statements from stakeholders to the proposal by 02 August 2023.

An overview of the main amendments is provided:

Proposed amendment to the Maternity Protection Act 1979 (Mutterschutzgesetz) and the Paternity Leave Act (Väterkarenzgesetz)

Establishment of two non-transferable months of parental leave per parent, while at the same time reducing entitlement to parental leave from two years (24 months) to 22 months. Hence, a total of two years of parental leave will only be granted if shared parental leave is taken. Single parents will continue to be entitled to 24 months of parental leave.

The reduction of entitlement to 24 months of parental leave to 22 months in total stands in stark contrast to Art. 16 para 2 of the Directive, which stipulates that the Directive's implementation shall not constitute grounds for justifying a reduction in the general level of protection in the areas covered by this Directive.

In that context, the proposal refers to Art. 16 para 2, second sentence, according to which the prohibition of a reduction in the level of protection is without prejudice to the right of Member States to introduce, in light of changing circumstances, legislative arrangements other than those in force on 01 August 2019, as long as the minimum requirements laid down in this Directive are complied with. The proposal addresses the fact that long periods of parental leave have changed from a tool that enables women to combine work and family life to an obstacle for women in the labour market. It argues that therefore, a reduction of the individual entitlement to parental leave (for women in relationships with their child's other parent) is based on changed circumstances, not the transposition of the Directive.

In case a parent plans/chooses to (partially) defer their parental leave, s/he is protected against dismissal through the provision of protection against dismissal for cause, i.e. deferred parental leave may not be the cause for dismissal. The employer, upon the employee's request (within five days of receipt of the dismissal), is required to provide a written statement of the reasons for the dismissal within five days. The validity of the dismissal is not affected by failure to provide a written statement of the reasons for dismissal.

The latter is highly unusual in Austrian employment law, as employers are generally not required to provide reasons when issuing a dismissal. Providing reasons allows employees to better assess their chances in court when challenging the dismissal.

Limitation and expiry periods are suspended during maternity leave, as well as during parental leave or absence on the occasion of the birth of a child.

Amendment of the Act on Annual Leave (Urlaubsgesetz)

The Act on Annual Leave contains provisions on care leave. The employee is protected against dismissal based on planned/used care leave through protection against dismissal for cause, i.e. care leave may not be the cause for the dismissal. The employer, upon the employee's request (within five days of receipt of the dismissal), is required to provide a written statement of the reasons for dismissal within five days. The validity of the dismissal is not affected by failure to provide a written statement of the reasons for dismissal.

Amendments of the Labour Contract Law Amendment Act (Arbeitsvertragsrecht-Anpassungsgesetz)

Employees may request a reduction of working hours either due to age (50 years and older) or due to care duties or care leave. In case the employer rejects either of these request, s/he must provide the reasons for rejection in writing.

Amendment of the Equal Treatment Act (Gleichbehandlungsgesetz)

The Act covers any discrimination in connection with parental leave, parental part time and paternity leave, with leave due to family emergencies in case of illnesses and accidents, care leave and the reduction of working time due to care obligations, even if there is no discrimination on the ground of sex.

Belgium

Summary

(I) The social partners concluded several collective bargaining agreements within the National Labour Council on 30 May 2023 on unemployment rights and company supplement schemes which will remain the same, even after 30 June 2023, and concluded a collective bargaining agreement to extend the provisions in the collective agreements on access to the right to benefits for an early 'landing job' from the age of 55 onwards.

(II) CBA No. 172 of 30 May 2023 extends easier access to unemployment benefits for white collar workers until 30 June 2025.

1 National Legislation

1.1 The social security unemployment scheme

The social security unemployment scheme in conjunction with the company supplement for persons aged 60 years and older and the reduced working time system in conjunction with unemployment allowances for older employees from the age of 55 years and older, whose working hours have decreased by 20 per cent or 50 per cent, is referred to as a 'landing job'.

Collective Bargaining Agreement (CBA) No. 165 of 30 May 2023 sets down the conditions for granting a company allowance in case of unemployment due to redundancy for certain older disabled workers and workers with serious physical problems for the period from 01 July 2023 to 30 June 2025.

CBA No. 166 of 30 May 2023 establishes the conditions for granting a company allowance in case of unemployment for certain older workers who are laid off and who have worked night shifts for 20 years, have worked in physically demanding jobs or in the construction industry and have become incapacitated for work for the period from 01 July 2023 to 30 June 2025.

CBA No. 167 of 30 May 2023 introduces a company allowance scheme for certain older long-service employees who have been dismissed for the period from 01 July 2023 to 30 June 2025.

CBA No. 170 of 30 May 2023 establishes the interprofessional framework to adjust the age limit to 55 years of age with reference to access to the right to benefits for a landing job, for workers with long careers, a physically demanding job or for a company in difficulty or in the process of restructuring for the period from 01 July 2023 to 30 June 2025.

Derogating unemployment schemes with a supplement paid by the employer

The social security unemployment system in conjunction with a company supplement scheme, in short 'SSUNCS' (the former early retirement scheme) is a scheme in which older employees aged at least 62 years and older receive unemployment allowances in the form of federal social security benefits in exchange for a substantial number of years of service, supplemented by a supplement paid by the employer until the employee reaches the legal retirement age, and has been dismissed by his/her employer.

Besides this general scheme at the age of 62 years, there are a number of deviating schemes under which a dismissed employee can enter a SSUNCS below the general retirement age of 62 year. Some of these schemes require a collective bargaining agreement concluded in the National Labour Council to introduce the right to early SSUNCSSWT. Three collective bargaining agreements were concluded in the National

Labour Council on 30 May 2023 to implement those derogation schemes for the period from 01 July 2023 to 30 June 2025. The collective bargaining agreements cover the schemes:

- SSUNCS after 20 years of night work, incapacitated construction workers, physically demanding jobs with 33 years of professional seniority;
- SSUNCS for disabled workers and workers with serious physical problems;
- SSUNCS for older employees who are at least 60 years old and have a 40-year career.

In addition to the intersectoral national collective bargaining agreement in the National Labour Council, another collective bargaining agreement at the sectoral level or enterprise level is sometimes required to introduce the right to a different scheme in the sector or enterprise.

'Landing jobs'

The reduced working time schemes allows older employees aged 60 years and older to reduce their working time by 20 per cent or by 50 per cent through a partial suspension of the performance of the employment contract and to receive a specific type of unemployment benefits ('interruption benefits') from the National Employment Service.

The landing job allows older workers to reduce their working time by 1/5 or 1/2 until they retire. In principle, an employee must be 60 years or older to be entitled to break benefits, which are a type of social security unemployment benefit, namely a landing job. However, legislation allows for a lower age limit for entitlement to 'interruption benefits' but not below the age of 55 years for:

- Employees employed in a company that is facing difficulties or undergoing a restructuring;
- Employees with a long career (35 years), a physically demanding job, 20 years of night work or employed in the construction sector with a work disability certificate from the occupational doctor.

Derogations only applies under certain conditions. These include the requirement of a CBA concluded in the National Labour Council. The social partners concluded CBA No. 170 on 30 May 2023 to reduce the age limit to 55 years for the period from 01 July 2023 to 30 June 2025.

Workers of a company facing difficulties or undergoing a restructuring are entitled to the interruption benefits only from the age of 55 years onwards, if the respective company has entered into a CBA that explicitly confirms the application of CBA No 170.

Workers with long careers or with physically demanding jobs are entitled to interruption benefits only from the age of 55 years onwards, when the joint committee representing the worker has concluded a CBA, declared generally binding by Royal Decree, which states that it was concluded in application of CBA No. 170.

1.2 Extension of easier access to economic unemployment benefits for white collar workers until 30 June 2025

Collective Bargaining Agreement No. 172, concluded in the National Labour Council on 23 May 2023, establishing a scheme of complete suspension of performance of the employment contract and/or a scheme of partial work for white collar employees in case of lack of work for economic reasons.

Companies in difficulty may, in case of lack of work for economic reasons, completely suspend the execution of the employment contract for white collar employees or introduce a scheme of partial work for white collar employees with at least two working

days per week. Undertakings facing economic difficulties are enterprises experiencing a substantial decline in turnover, production or orders, or an enterprise that must temporarily lay off blue collar workers for economic reasons.

Access to the economic unemployment scheme for white collar workers is, in principle, limited to enterprises which:

- either have concluded a sectoral collective bargaining agreement (CBA);
- a company CBA;
- or an approved business plan.

In 2021, due to the COVID-19 crisis, the social partners in the National Labour Council concluded supplementary CBA No. 159. That CBA allowed companies facing difficulties to which no CBLA on economic unemployment for white collar employees applied and which did not develop a business plan, could still introduce an economic unemployment scheme. Thus, CBA No. 159 replaced the required CBA or business plan. CBA No. 159 was a fixed-term CBA that expired on 30 June 2023.

On 30 May 2023, the social partners in the National Labour Council concluded CBA No. 172, which continues the scheme contained in CBA No. 159 for the period from 01 July 2023 to 30 June 2025. The new CBA reflects the previous one.

Employees in economic unemployment will receive unemployment benefits. In addition, the employer must pay a supplement for each day not worked. For economic unemployment under CBA No. 172, the minimum amount of the supplement is set at EUR 6.22. There is provision for indexing that amount on 01 January 2024 and on 01 January 2025.

2 Court Rulings

2.1 Guaranteed railway service in case of strike

Constitutional Court, No. 78/2023, 17 May 2023

The Belgian trade unions lodged an action for annulment against the Decree of the Flemish Region of 28 May 2021 on the public law transport company 'Vlaamse Vervoermaatschappij - De Lijn' regarding the continuity of the services in case of a strike. The Decree, following the model of the railways (Federal Law of 29 November 2017), introduced a strike notification procedure, whereby staff members must indicate whether they will participate in the strike in advance or not, so that De Lijn can set up an alternative transport arrangement with work-ready staff. To organise transport, the Decree provides for guaranteed service in local public transport in case of strike, when a sufficient number of staff voluntarily indicate their willingness to work.

In the first plea, the applicants argued that the regional Parliament was not competent to regulate a procedure concerning strikes, as labour law is a federal matter. The Court rejected this argument as the Flemish Region does have jurisdiction, given that the measures are necessary to implement the regional competence with reference to public transport and the impact on federal powers is only marginal.

In the second plea, the trade unions alleged infringement of various articles of the Constitution, the ECHR, the European Social Charter, the Charter of Fundamental Rights of the European Union and ILO Conventions Nos 87, 98, 135, 151 and 158.

The Belgian Constitutional Court reviewed in detail the ECHR's interpretation of international instruments and jurisprudence on strikes, and the views on strike procedures and minimum services of the European Committee of Social Rights and the Committee for Syndicated Freedom and the ILO's Committee of Experts. The Court determined that the Flemish legislator's interference with trade union freedom was not disproportionate. Moreover, the Court found that the rights and expectations of

transport passengers constitute a legitimate interest and that the restriction to the collective rights of staff members were proportionate, given that it is not a genuine minimum service but a procedure that still leaves staff members free to choose whether they wish to strike or not. The prohibitions (e.g. prohibition to obstruct the adjusted transport services) enforced by disciplinary sanctions were also acceptable. The prohibitions did not affect the ability of staff members to organise collective action.

The Constitutional Court thus rejected all pleas and rules in line with its prior case law on 'guaranteed railways service', i.e. Constitutional Court 14 May 2020, No. 67/2020, *Rechtskundig Weekblad* 2021-2022, 581, and Constitutional Court 15 July 2021, No. 107/2021 on penitentiary services, *Rechtskundig Weekblad* 2021-2022, 581.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In the present judgment, a Bulgarian judge asked the Court for further clarification on the concrete distinction made, where the maximum duration of night work in the private sector is seven hours and overtime is subject to a 50 per cent allowance, while the eight hours of night work, which firefighters in the public sector regularly perform, are not considered overtime and are only entitled to a general night work allowance of 0.25 Bulgarian Lev per hour.

The CJEU clarified two important points with regard to Bulgarian firefighters in the public sector. First, Article 12 of the Working Time Directive 2003/88/EC does not necessarily require a lower maximum working time for workers performing night work, but rather some measures in terms of working time, pay, allowances or similar benefits to compensate for the special burden of this type of work.

Second, it follows from the foregoing considerations that Article 12 of Directive 2003/88/EC, read in the light of Article 20 of the Charter, must be interpreted as not precluding the normal duration of night work fixed at seven hours in the legislation of a Member State for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim.

The second point of the CJEU's ruling of 04 May 2023 on the different protection of workers in the private sector from not applying to public sector workers is in some way meaningful for the Belgian legal order. In Belgium, working time is basically regulated for the private sector in the Labour Law of 16 March 1971, as amended several times. In the public sector, the Law of 14 December 2000 on working time applies. Specific regulations are applicable to police and military public servants (Royal Decree of 30 March 2001). The Law of 19 April 2014 establishing certain aspects of the working time of the operational professional members of the assistance zones and of the Brussels-Capital Region Fire and Emergency Medical Service and amending the Law of 15 May 2007 on civil security applies to professional firefighters in terms of working time.

At first glance, the differences in the maximum working time legislation for the private and public sectors do not appear to be very significant and have not yet led to substantial court challenges. The various legislators are aware that they must respect the standards of the Working Time Directive 2003/88/EC. But the regulator will have to keep in mind that protection measures for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and

reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim. The same goes for other differences of legal protection regarding working time of the workers as the categories of workers concerned are in a comparable situation.

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, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The CJEU's decision involves Bulgaria. No amendments to Bulgarian legislation will be necessary following the CJEU's decision.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) Several pieces of legislation have been adopted: the Act on the Register of Employees and Centralised Calculation of Salaries in the Civil Service and Public Services, the Act on Conciliatory Resolution of Disputes, the Amendment to the Act on State Inspectorate, the Regulations on the content of salary calculations, salary compensation, severance pay and compensation for unused annual leave, and the Amendment to the Act on Salaries of Judges and Other Judicial Officials.

(II) The Supreme Court of the Republic of Croatia ruled on the permissibility and legality of the strike organised by a union that is not representative for collective bargaining in the public sector to protest the level of salaries regulated by a decree of the Government of the Republic of Croatia.

1 National Legislation

1.1 The Act on the Register of Employees and Centralised Calculation of Salaries in the Civil Service and Public Services

The Act on the Register of Employees and Centralised Calculation of Salaries in the Civil Service and Public Services has been adopted (Official Gazette No. 59/2023). Its purpose is to regulate the register of employees in the civil service and public services. It is a central database of employees and external collaborators in the civil service and public services, which is maintained for the purpose of quality and efficient management of human resources and the centralised calculation of salaries in the civil service and public services (Article 5(1)). Furthermore, it provides for a centralised calculation of wages in the civil service and public services. It is an information system for calculating and paying wages, other material rights, benefits and other income to employees and external collaborators in the civil service and public services (Article 6(1)). It abolished the Act on the Register of Employees in the Public Sector (Official Gazette No. 34/2011).

1.2 The Act on Conciliatory Resolution of Disputes

The Act on Conciliatory Resolution of Disputes (Official Gazette No. 67/2023) abolished the Conciliation Act (Official Gazette No. 18/2011.). This Act, among others, applies to the conciliatory resolution of labour disputes and implements Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of the freedom of movement for workers into Croatian law.

The purpose of this Act is to promote a conciliatory resolution of dispute as an alternative to the resolution of disputes by the courts. It has been established that the conciliatory resolution of disputes is not sufficiently developed in Croatia because citizens do not trust this tool to resolve disputes, so the courts are overloaded. The novelty is that the Act will establish the Centre for Conciliatory Settlement of Disputes. Its roles will be, among others, to encourage the development of a culture of conciliatory dispute resolution, accrediting institutions for conciliatory dispute resolution, accrediting education programmes for certain types of conciliatory dispute resolution, professional training of mediators, maintaining a registry of mediators, etc.

1.3 The Amendment to the Act on State Inspectorate

The Amendment to the Act on State Inspectorate has been adopted (Official Gazette No. 67/2023). Among others, it regulates the labour inspectorate. The conditions for

establishing an employment relationship at the positions of labour inspector and senior labour inspector have been changed.

1.4 Regulations on the Content of Salary Calculations, Salary Compensation, Severance Pay and Compensation for Unused Annual Leave

The Regulations on the Content of Salary Calculations, Salary Compensation, Severance Pay and Compensation for Unused Annual Leave (Official Gazette No. 68/2023) has been adopted and has abolished the Regulations on the Content of Salary Calculations, Salary Compensation or Severance Pay (Official Gazette Nos 32/2015, 102/2015 and 35/2017). These Regulations prescribe the content of the calculation of the paid salary or salary compensation and paid receipts based on the employment relationship, the content of the salary calculation or salary compensation that the employer was required to pay to the employee, if s/he did not pay them on the due date or did not pay them in full, the content of the calculation of the paid severance pay or compensation for unused annual leave and the content of the calculation of severance pay or compensation for unused annual leave that the employer was required to pay to the employee if s/he did not pay them on the due date or did not pay them in full.

1.5 The Amendment to the Act on Salaries of Judges and Other Judicial Officials

The Amendment to the Act on Salaries of Judges and Other Judicial Officials has been adopted (Official Gazette No. 71/2023). Among the changed coefficients and basis for the calculation of salaries, the title of the Act has been modified. The new title is the Act on Salary and other Financial Rights of Judicial Officials. The Association of Croatian Judges has expressed its dissatisfaction with the manner of calculation of their salaries and that their proposal on the manner of calculation of their salaries has not been accepted.

2 Court Rulings

2.1 Strike in the public sector

Supreme Court, Gž 6/2023-2, 19 June 2023

The Supreme Court of the Republic of Croatia ruled on the permissibility of a strike in the public sector in protest of the level of salaries regulated by a decree of the Government of the Republic of Croatia.

The strike was organised by the non-representative union, the Union of Civil and Local Servants and Employees of the Republic of Croatia, which claimed an increase in job complexity coefficients, which are one of the elements for determining the salary of civil servants and state employees. The coefficients are determined by the Government of the Republic of Croatia by decree.

The Government of the Republic of Croatia asked the court to prohibit the strike because, according to its understanding, the trade union that was organising the strike was not authorised to organise and conduct a strike, and because it was not a type of dispute that warranted a strike, namely because the goals of the strike were not permissible. More precisely, the issues were the following: whether a union that is non-representative for collective bargaining was entitled to organise the strike and whether the goal of the strike was in line with the Labour Act. The issue of dispute was whether the union can organise the strike against the Decree of the Republic of Croatia which regulates the element of the calculation of salaries of civil servants and employees in civil service.

So far, both in legal theory and in case law, there were two statutorily defined types of reasons for organising a strike: economic/social reasons (claims for higher level of rights for employees which could be regulated by collective agreement) and legal reasons (non-payment of remuneration or salary compensation, or a part thereof, if they have not been paid by their maturity date).

The Supreme Court determined that the strike was not in response to a dispute over the conclusion, amendment or renewal of a collective agreement, which can be exclusively requested by a trade union that is representative for collective bargaining, but that this was a strike organised for the purpose of protecting and promoting economic and social interests, which can be organised by a non-representative trade union. The Supreme Court made a distinction between the dispute over the conclusion, amendment or renewal of a collective agreement, one the one hand, and the protection and promotion of economic and social interests, on the other.

Thereby extensively interpreting the norm, the Supreme Court made it possible even for a union that is not representative for collective bargaining to organise a strike for economic/social reasons.

Regarding the type of dispute in connection with which a strike is permitted, the Supreme Court ruled that the circumstance that the salary of civil servants and state employees is regulated by law and the decree does not mean the impossibility of a strike for the purpose of raising the level of salary in an effort to force the executive and legislative authorities to change those regulations in this manner and with such an action. It added that in case of an contradictory understanding of the type of dispute in connection with which a strike is permissible, the Republic of Croatia would be in a more favourable position than other employers because it would not be exposed to the risk of a strike being organised in case of dissatisfied civil servants and employees due to their level of wages. Therefore, the Supreme Court concluded that even in relation to this issue, the strike was permissible and legal.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The working time of night workers in the private sector is regulated in Articles 69-72 of the Labour Act of 2014 (last amended in 2022). It defines night work, night worker, duration of working hours for night workers, prohibition of night work for minors, shift work that includes night work and employers' obligations towards night workers. Since the Labour Act is a *lex generalis* for employment relationships in Croatia, it is applied to employment relationships in the public sector as well, unless otherwise provided for by another (separate) law.

The specificities of night work of firefighters are regulated in the Firefighting Act of 2019 (amended in 2022). When organising night work, as in the case of shift work, the employer is required to provide professional firefighters a daily rest period for a continuous duration of at least 12 hours (Article 54(3) of the Firefighting Act). Furthermore, with the organisation of work in shifts that also include night work, a change of shifts must be ensured so that a professional firefighter works consecutively in the night shift for a maximum of one week (Article 54(6) of the Firefighting Act).

The provisions of the Croatian Labour Act and the Firefighting Act on night work should be read in line with the judgment of the CJEU in joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The CJEU ruled:

Article 1(3) 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 conjunction with Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as meaning that Directive 2003/88/EC applies to public sector workers, such as firefighters, who are considered to be night workers, in so far as those workers carry out their activities under normal circumstances.

Article 12 of Directive 2003/88/EC, read in the light of Article 20 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the normal duration of night work set at seven hours in the legislation of a Member State for private sector workers from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation and is proportionate to that aim.

The case is relevant for Cyprus. The Republic of Cyprus regulates working time in 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)), hereafter referred to as WTL.

- Art. 3(1) of WTL stipulates that the WTL establishes the minimum safety and health requirements with regard to the organisation of working time;
- Art. 3(2) stipulates that the material scope covers the following:

  (a) the minimum periods of daily and weekly rest and annual leave, break time and maximum weekly working hours; and

  (b) certain aspects of night work, shift work and the pace of work;
- Moreover, Article 3(3) applies to all enterprises, establishments, holdings and operations in the private and public sectors.

The security forces and seafarers are explicitly excluded, that is, the WTL does not apply to:

- Article 3(4)(a) of the Cypriot WTL: members of the Armed Forces;
- Article 3(4)(b) the Cypriot WTL members of the Police; and
- Article 3(4)(c) the Cypriot WTL seafarers who fall within the scope of the Merchant Shipping (Organisation of Working Time of Seafarers) Act 2003.

In the public sector, the Armed Forces, police, and other security forces are excluded in line with Articles 3(4)(a), 3(4)(b) and 3(4)(c) of WTL. Civil protection services such as public service firefighters and prison staff in Cyprus organisationally fall under the police, but are not explicitly referred to in the section of the law that excludes them from protection. It is therefore unclear whether they are excluded or not. When reviewing the case law on firefighters, such as the cases of *Attorney General v Michalis Kongorizi* (22/05/2006, no. 34/2005, 55/2005, *Γενικός Εισαγγελέας της Δημοκρατίας και Άλλος v. Μιχάλη Κογκορόζη και Άλλου (2006) 1 ΑΑΔ 457* (cylaw.org)) and *Nicoli and others V Republic* (Case number 1471/2015, 15 April 2020*)*, discussed further below, Cypriot courts consider derogations to not apply to firefighters.

Article 2 of WTL defines the relevant terms of the law:

- 'shift work' means any method of organising group work in which workers succeed one another at the same workplace at a certain rate, including rotation, and which may be continuous or discontinuous, requiring workers to perform a task at different times over a given period of days or weeks;
- 'worker' includes medical trainees;
- 'shift worker' means any worker whose working hours are part of a shift work programme; and
- 'night worker' means any worker (a) who regularly works during the night for at least three hours of his/her daily working time; or (b) who is likely to work at least 726 hours of his/her annual working time during the night, unless a lower number of hours is provided for in collective agreements. For the purpose of calculating the above hours, a worker's total daily working time shall be considered if it includes at least three hours of work in the period from 23:00 to 06:00, irrespective of the start and end time of his/her shift, and if the worker works at least 7 consecutive hours;
- 'mobile worker' means any worker employed as a member of the travelling or flying personnel of an undertaking providing passenger or goods transport services by road, air or inland waterway.

Article 2 of WTL defines the duration of 'night time' as the period beginning at 23:00 and ending at 06:00. Article 2 of WTL defines 'night worker' as any worker, who works

> (a) during the night for at least three hours of his or her daily working time on a regular basis (correctly noted by SWD ft.119, p. 22); or
>
> (b) who is likely to perform at least 726 hours of his/her annual working time during the night unless fewer hours are provided for in collective agreements, as noted by SWD (ft.122, p. 23). For the purpose of calculating the above hours, the worker's total daily working time shall be taken into account if it includes at least three hours in the period from 23:00 to 06:00, irrespective of the start and end time of the shift, and the worker works at least 7 consecutive hours.

Article 2 of WTL defines 'shift worker' as any worker whose working hours are part of a shift work schedule. The concepts of shift work and shift worker have been correctly transposed.

There are limits to night work:

- Regular working hours of 8 hours daily on average: Article 9(1) of WTL stipulates that the working time of night workers shall not exceed an average of eight hours per day within a 1-month period or in any other period determined by collective agreements. The law also provides that the 24-hour weekly rest period, i.e. the worker's right to a minimum continuous rest period of 24 hours per week, s. 6(1), is not taken into account when calculating the average;
- An 8-hour limitation for work involving specific hazards or a heavy burden: Article 9(2) of WTL provides that night workers whose work involves specific risks or requires considerable physical or mental strain shall not work more than eight hours during a 24-hour period in which they perform night work. Article 9(3) provides that work involving specific risks or requiring major physical or mental strain, unless specified by the legislation in force or by collective agreement, shall be determined at the enterprise level after consultation between the employer and the employee representatives or their representatives on safety and health matters in accordance with the Act's provisions and in accordance with the written risk assessment, in which the risks associated with night work shall also be assessed.

Measures are in place for the protection of night workers and shift workers:

- Regular health assessments prior to being assigned to perform night work: Article 10 of WTL provides for medical examinations and transfers of night workers to day work. 10(1) provides that every employer shall ensure that employees regularly undergo the necessary medical examinations free of charge to determine their suitability for such work before taking up night work. The WTL does not specify in its transposing legislation how frequently health assessments should take place.
- Right to transfer to day work: Under 10(2) of WTL, where night workers are found to have health problems in the medical examination due to night work, they shall, where possible, be transferred to a day work position for which they are suitable. 10(3) of WTL protects the rights of workers undergoing such medical examinations, as it provides that no person shall disclose the results of a medical examination to any person other than the employee to whom it relates, unless the employee gives his or her written consent.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) Recent legislative developments include approval of the transposition amendment to the Labour Code, including five amendments.

(II) The whistleblowing law has been published.

(III) Compulsory insurance of employment agencies against insolvency has been abolished.

1 National Legislation

1.1 Amendment to Act 262/2006 Sb., the Labour Code and other related acts

The draft amendment to Act 262/2006 Sb., the Labour Code (LC) and other related laws, which was approved by the government and presented to the Chamber of Deputies as Parliamentary Print No. 432/0 in April, passed the first and second readings in the Chamber of Deputies and was approved by the Chamber of Deputies in the third reading on 28 June in the form of five amendments.

Section 93a LC has been inserted. It reintroduces overtime work in the health care sector beyond the general overtime limit set out in section 93 LC, on the basis of a written agreement with the employee, as additionally agreed work in the health care sector. The measure is introduced for a fixed period until 31 December 2028.

An explicit addendum is added to the provisions of section 196(2) LC, stating that parental leave may be requested repeatedly. The current legislation allows for parental leave to be requested at any time until the child reaches the age of 3 years, even repeatedly. In practice, this happens and does not cause any difficulties in application. The purpose of the parliamentary proposal is apparently to explicitly highlight this possibility.

Section 303(3) LC regulates the remuneration of state employees seconded by the employer to management or control bodies of legal persons engaged in business activities for their membership in these corporate bodies (special effect from 01 January 2024).

Section 92 LC is amended in response to the CJEU's judgment of 02 March 2023 in the case C477/21, *MÁV-START* – the provision states that a daily rest period of at least 11 hours must immediately precede a 24-hour continuous rest period for an employee over the age of 18 years. There is no change to the current minimum amount of uninterrupted rest per week in the Czech regulation, i.e. the employee will still have 35 hours of uninterrupted rest. The difference compared to the current legislation is that the employer will have to provide the employee with an uninterrupted daily rest period within the 24-hour cycle at all times, notwithstanding the fact that this is the last shift of the week followed by uninterrupted rest during the week (special effect from 01 January 2024).

Subject to approval by the Chamber of Deputies, the amendment can be expected to enter into force on 01 September this year, if approved by the Senate and signed by the President.

Regarding application issues, the May 2023 Flash Report applies.

1.2 Act 171/2023 Sb., on Whistleblowing

The Whistleblowing Act (Act 171/2023 Sb.) was published in the Collection of Laws on 20 June 2023. The Act will come into force on the first day of the second calendar month following the date of its promulgation, i.e. 01 August 2023. Its content was discussed in the May 2023 Flash Report.

1.3 Abolition of compulsory insolvency insurance for employment agencies

With effect from 01 July 2023, employment agencies will be subject to Act 118/2000 Sb., resulting in the abolishment of the compulsory insurance of employment agencies against insolvency. The Act regulates the protection of employees in the event of the insolvency of an employer. Employees may now apply to the Labour Office for compensation of their wage claims under the conditions set out in the Act.

1.4 Government's intention to reduce the deficit of the state budget

The Czech government has put a savings package on the table. It proposes changes to tax and insurance regulations to reduce the state budget deficit. In terms of labour relations, the main changes are to abolish or limit the tax deductibility of certain employee benefits and to extend social insurance to agreements on work performed outside the employment relationship. The proposal is being discussed with the social partners. The content of the legislative proposal will be discussed in upcoming Flash Reports once the government has approved the regulation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Section 94 of Act 262/2006 Sb., the LC, generally regulates the conditions applicable to night work in the Czech Republic. According to the provision, a night worker's shift may not exceed 8 hours within 24 consecutive hours. If for operational reasons this is not possible, the employer is required to distribute the fixed weekly working time in such a way that the average shift does not exceed 8 hours over a period of no more than 26 consecutive weeks, the average duration of a night shift worker being calculated on the basis of a five-day work week. Night time is defined as the period between 10 pm and 6 am. Night workers are entitled to a premium for each hour of night work in accordance with Section 116 or Section 125 LC.

To ensure that night work is safe and does not endanger the employees' health, the employer must comply with the following legal obligations:

- The employer must ensure that employees working at night are examined by an occupational health service provider in the cases and under the conditions laid down for occupational health services by the Act on Specific Health Services;

- It must provide adequate welfare for night workers, and refreshments in particular;
- It must equip workplaces where night work is carried out with first aid kits and means to summon emergency medical assistance.

In the Czech Republic, firefighters are organised within a region, a company, or as municipal volunteer firefighters.

Regional Fire Rescue Service

People working for the Regional Fire Rescue Service, whose employment relationship is regulated by the Security Corps Service Act (361/2003 Sb.), as amended, are considered members of the Regional Fire Rescue Service (hereinafter referred to as 'officer(s)'). Section 53(5) of the Act provides that where Czech Fire Rescue Service personnel are concerned, a 16-hour shift actually constitutes an overall period of 24 hours during which the officers are on active duty for 16 hours and on standby duty for 8 hours at the place where they are otherwise on duty. Hence, night shifts are not in fact mandated; officers may only be required to be on duty at their workplace ready for action. There is no further regulation on the duration of the night shift. In practice, according to the internal guidelines and regulations of the Regional Fire Rescue Service, officers are members of the fire brigade and it is their duty to engage in various fire and rescue operations. They are also assigned to operation and information centres and ensure the operation of the unit and the activities of special support services. When an officer is called out to an emergency with immediate effect, he/she is entitled to be paid for such work and to overtime pay.

The detailed regulation of night work is thus not contained in a legal regulation but in the internal guidelines and regulations of the Fire Rescue Service, and the same applies to the conditions of such work and to safeguarding firefighters.

Fire Rescue Services organised within a company and volunteer firefighters

People working for a fire rescue service unit organised within a company are employed by the company and their employment relationship is regulated in the Labour Code (Act 262/2006 Sb., as amended). Any night work is governed by the Labour Code (see introductory paragraph). The same applies to municipal volunteer firefighters.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The case concerned the interpretation of rules on night time work in Bulgaria. Under Bulgarian law, the normal, shorter length of night work set for workers in the private sector did not apply to public sector workers, such as firefighters. The question posed by the Bulgarian court was whether the public sector workers were entitled to the same shorter length of night work as the private sector work, based on an interpretation of the Working Time Directive Article 12(b).

The CJEU first reconfirmed that the Working Time Directive (2003/88/EC) must apply to activities of public sector workers, such as firefighters, who are considered night workers, in so far as those activities are carried out under normal circumstances.

Second, the CJEU underlined that the Working Time Directive Article 12(b) does not govern the comparison between health and safety measures between night workers in different sectors or areas (such as public sector vs private sector), but instead equalises the health and safety working conditions between night workers and day workers – as regards the protection or prevention services or facilities which they are to have.

However, the CJEU then proceeded to reformulate the second question on equal treatment of night workers in different sectors. The Court stated that it was apparent from the question by the domestic court that it in fact concerns the applicability of the general principle of equal treatment, laid down in Article 20 of the EU Charter of Fundamental Rights. And that the referring court was uncertain whether the possibly more favourable working conditions of night workers in the private sector should also be applied to night workers in the public sector.

The Court stated that the principle of equal treatment according to which 'everyone is equal before the law' is a general principle of EU law. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned.

If the national court should find that there is a difference in treatment for night work in the private and public sector, and the private sector workers have a more favourable regime than public sector workers, it is irrelevant that a difference is based on whether

the employment relationship is contractual (as in the private sector) or statutory (as in the public sector).

To perform the test whether a difference in the duration of night time work is a breach of the general principle of equal treatment, the referring court should first consider whether the categories of workers concerned are in a comparable situation – in a specific and concrete manner having regard to all the elements which characterise those situations in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates.

If so, the court should then assess whether a difference in treatment is based on an objective and reasonable criterion, that is, whether the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim.

The ruling by the CJEU shows that a difference in treatment in terms of working time, night work, across different sectors—*in casu* public and private sector employment—are subject to be tested under the general principle of equal treatment in the EU, provided that the national rules are an implementation of the Working Time Directive.

In Denmark, the rules on working time are implemented in three different acts. The rules on night work are implemented in the Danish Act on Working Time (No. 896 of 24 August 2004; see here for preparatory works, LFF 2003-01-29 No. 149, (column 3762 ff.)), section 5. The normal working time for night workers may not exceed 8 hours per 24-hour period, calculated by a 4-month reference period.

The Act applies as a main rule to both public sector and private sector workers. The Act does not apply if social partners have entered into a collective agreement that ensures as a minimum the same rights as provided in the Directive, cf. the Working Time Act section 1(1). The system in Denmark entails that working time provisions in collective agreements must, as a minimum, live up to the provisions in the Directive to apply. If the provisions do not live up to the Working Time Directive, article by article, the collective agreement in question does not regulate the working time for the workers in question. Instead, either the Working Time Act or a higher level collective agreement, which lives up to the minimum implementation requirement in the Working Time Act, would apply.

As such, the Working Time Act and collective agreements implementing the Working Time Directive would, as a starting point, correspond to the Court's interpretation.

However, working time—in particular night work and shift work—are issues that vary considerably across sectors, including across collective agreements. The test mandated by the Court is a legitimacy test of all differences. It is the clear assumption, that differences in working time across sectors that 1) live up to the minimum provisions in the Working Time Directive would also 2) pass a legitimacy test – as the differences are always negotiated with the relevant social partners with a view to adapting the working hours to the specific sector in question.

There is no general acquis in Danish labour law that would be in conflict with the new ruling. On the other hand, this, however, has not yet been tested.

Similarly, the Danish Working Time Act does not apply to the extent that other special legislation entails rules on working time that are at least equivalent to the protection level in the Directive, cf. section 1(4). The CJEU's ruling only deals with differences in national protective measures, and it is thus very likely that any Danish legislation adopted under section 1(4) would live up to the 'equal treatment test' if the ruling is given an expansive interpretation.

There are no known differences in similar sectors—private and public—for shift work or night work in Danish legislation. Most often, Danish legislation applies to all workers – regardless of their sector.

In conclusion, the recent CJEU ruling clarifies the EU law requirements to differences in national legislation on night time work that implements the Working Time Directive.

The ruling may have implications for the interpretation of Danish collective agreements that apply as the legal basis for working time – which inherently involves various working time arrangements for shift work and night work. It is presumed that the varieties would pass the legitimacy test provided by the Court.

The ruling may also have implications for the interpretation of Danish legislation that is adopted under section 1(3) of the Working Time Act to the extent that these rules differ from the general rules on night time work in section 5. It is assessed that this would cover very few varieties in legislation about night work and shift work, as Danish legislation on working conditions, including working time, very rarely is sector-specific.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) Many minors work during the summertime. The jobs they take do not require special qualifications. The wage is usually less than the average wage.

(II) Estonia has prepared a draft of the act to transpose the Directive (EU) 2019/1937.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In Estonia, there are two types of rescue service. This is regulated in the Rescue Service Act (hereinafter RSA). Rescue workers are subject to the Civil Service Act, in consideration of the specifications arising from RSA. Rescue workers are also subject to the Employment Contracts Act and other acts regulating employment relationships, in consideration of the specifications arising from RSA (RSA § 1). Rescue service is treated as a special type of civil service (RSA § 2 subsection 3).

The working time and rest period of rescue workers is determined by the Civil Service Act. Rescue workers' working time and rest periods are specified in the Employment Contracts Act, in consideration of the specifications provided in RSA (§ 20 subsection 1).

Therefore, rescue workers who work under an employment contract are subject to the working time and rest period requirements stipulated in the Employment Contract Act, which are based on Directive 2003/88/EC. Thus, according to Estonian law, Directive 2003/88/EC is applicable to public sector employees such as rescue workers (including firefighters) who are considered to be night workers, in so far as they carry out their activities under normal circumstances.

The conditions provided in the Civil Service Act for work performed on public holidays and restrictions to night work do not apply to rescue service, provided working does not harm the rescue workers' health or safety and the working time does not exceed the restriction specified in § 36 of the Civil Service Act.

The restriction to night work provided in the Employment Contracts Act is not applied to rescue workers, provided that working does not harm the rescue workers' health or safety and the working time does not exceed the restriction specified in subsection 1 of § 46 of the Employment Contracts Act (§ 20 subsection 3).

This means, amongst others, that the following general restrictions on night work are limited by RSA:

> (1) An agreement by which an employee who works at least three hours of his or her daily working time or at least one-third of his or her annual working time at night (night worker) is required to work more than eight hours over a 24-hour period, on average, over a calculation period of seven days, is void.
>
> (2) An agreement by which a night worker whose health is affected by a working environment hazard or the nature of his or her work is required to work more than eight hours over a period of 24 hours is void (TLS § 50 lg 2).

Based on the above, it can be concluded that an exception can be made for rescue workers under two conditions (both must be met):

a) if the performance of work does not harm the health or safety of the rescue worker,

b) if the working time does not exceed the restrictions specified in subsection 1 of § 46 of the Employment Contracts Act.

In the Court's judgment of 04 May 2023, the difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim. Essentially, by establishing the above-mentioned conditions, the Estonian policy has considered the most important objective – the health and safety of rescue workers. It can therefore be concluded that the conditions for defining the exception are raised in the decision of the CJEU, and these conditions seem to have been met. National law does not conflict with the overlap of Article 12 of Directive 2003/88/EC and Article 20 of the Charter of Fundamental Rights of the European Union.

4 Other Relevant Information

4.1 Occupations for young workers and their remuneration

The summertime is usually the time of the year when many minors look for a job.

During the summer months of last year (2022), 16 700 young people aged 10–17 years worked (at least one day). In the autumn months, the number of working young people was 5 000, in the winter months 4 000, but by spring, the number rose slightly again, reaching 4 700.

As persons get older, their probability of working increases as well. Sixty per cent of minors who work in the summer are in the age group of 16-17 year olds, in other seasons, the share of this age group rises to 83-84 per cent.

Young people of different ages work in different professions. The group of 10-13 year olds most frequent works in youth work camps (*õpilasmalev)*, which 800 minors worked for last summer. Around 300 youths worked in other simple jobs in horticulture and agriculture and various support jobs. They also worked as cleaners in various institutions (a little over 100 youths).

Work in youth work camps was also most common among the group of 14-15 year olds (1 550 youths). Around 700 youths were employed as unskilled labourers in agriculture and horticulture, and 400 as cleaners. In this age group, there were already a higher number working in sales (470 in total, including 200 shop assistants) and working as waiters or waiters in catering (250) and catering helpers (200).

In the oldest age group (16–17 year olds), sales work was the most common, with nearly 1 000 youths working as shop assistants, and over 200 as cashiers. The field of catering was also popular among this age group, with slightly less than 1 000 youths working as waiters or hall attendants, and in other catering services as customer service workers (for example, counter workers) (over 800). Occupations related to warehousing

also stand out: over 600 goods storers, handlers and loaders were 16-17 years old. Nearly 500 youths of this age group performed simple work in agriculture and landscaping.

An important question when looking for a job is how much a minor shall earn in the given position.

The salary of salespersons in the 1st quarter of 2023, for example was EUR 987, i.e. half of the people working as salespersons earn more and half less than this amount.

Catering customer service refers to persons who serve customers at food counters in various catering establishments. The median salary for this occupational group was EUR 919 in the 1st quarter of 2023.

The median salary of unskilled workers in gardening and landscaping was slightly lower in the same quarter, at EUR 908. It should be noted that these salaries refer to the winter season.

Finally, the average salary of warehouse workers, who fill and keep store shelves in order, was EUR 1 108 in the 1st quarter of 2023 (see here for further information).

4.2 Draft Act on the Protection of Persons Who Inform about Occupational Violations (Whistleblower Protection)

The Estonian government has prepared a draft act to protect whistleblowers.

The draft creates a framework for receiving reports of violations in professional activities, providing follow-up measures and feedback, and protecting the whistleblower. The draft stipulates the personal and substantive scope of the whistleblower's protection, the conditions and extent of protection, and the procedures and channels of notification. The draft also provides for a three-step notification system, i.e. internal and external notification and disclosure to the public. The draft stipulates which institutions and legal entities have the obligation to create an internal notification channel, enabling confidential notification of violations. According to the draft, the obligation to create an external reporting channel rests with the competent authorities, i.e. the state authorities, which have the duty to process violations by law. Since the purpose of notification of a violation is to eliminate the violation as quickly as possible and with little public attention, the institution or company where the violation occurs or has occurred, or the competent state authority for the elimination of the violation, needs to be notified. The whistleblower can choose whether to report within the institution first and then, if necessary, outside or immediately outside the institution.

According to the draft, to receive protection, it is important for the notification to have been duly given and that the person has reasonable grounds to believe that the violation has been initiated or has been committed and that it is a violation within the meaning of this law. The whistleblower must believe, based on objective circumstances, that the information is true at the time of notification.

Notification of a violation does not exclude a person's responsibility for a violation committed by him-/herself. Liability for a misdemeanour is provided for preventing notification of a violation, applying pressure measures, violating the confidentiality of the informer, and knowingly giving incorrect information.

The draft is related to Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report violations of Union law (OJ L 305, 26 November 2019, pp. 17–56) (Whistleblower Protection Directive), which aims to protect whistleblowers.

The new act is planned to enter into force on 01 January 2024 (see here for further information).

Finland

Summary

(I) The Labour Court ruled that by not making reasonable adjustments, the employer was deemed to have terminated the shop steward's employment contract on the basis of disability in violation of the prohibition of discrimination.

(II) The number of posted workers clearly increased in 2022, and there were many shortcomings in terms of compliance with the legislation on posted workers according to the report published by the Occupational Health and Safety Administration.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Dismissal

Labour Court, TT 2023:38, 28 June 2023

The shop steward's employment contract had been made redundant and the shop steward was dismissed due to a substantial and permanent reduction in work capacity. The employer had not obtained consent for the dismissal from the majority of employees represented by the shop steward, because according to the employer, this would have required the disclosure of confidential information related to the shop steward's health to the employees. In the judgment, it was considered that when dismissing an employee due to a substantial and permanent decrease in work capacity, it is possible to request consent by referring to this ground without specifying the health data behind the decreasing work capacity in more detail. The employee representatives could have evaluated the shop steward's work capacity and the ability to cope with the job without the employer having to reveal the confidential information. Since no consent had been requested, the employer had no grounds according to the collective agreement to dismiss the shop steward's employment contract. The employer was required to pay the employee compensation for unjustified termination of the employment contract. The employers' association had to pay a compensatory fine.

The Labour Court considered that it had not been demonstrated that the shop steward would not have been able to cope with the tasks offered at the workplace, even with reasonable adjustments. Thus, according to the Labour Court, the employer did not prove that the shop steward's work capacity had decreased substantially and for such a long period of time that the employer could not reasonably have been required to continue the contractual relationship. Instead, by not making reasonable adjustments, the employer was deemed to have terminated the shop steward's employment contract on the basis of disability in violation of the prohibition of discrimination, which had to be considered a factor increasing the amount of termination compensation.

In the judgment, the Court also took into account that the CJEU has held that Directive 2000/78/ EC prevents dismissal based on disability, and dismissal based on disability cannot be justified by the fact that the person concerned is not competent, capable and available to perform the essential tasks required by the job, even after reasonable adjustments.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Section 8 of the Working Time Act (*Työaikalaki*, 872/2019) defines night work as work carried out between the hours of 11.00 pm and 6.00 am. The Act applies to all work performed under an employment contract as referred to in Section 1, Subsection 1 of the Employment Contracts Act (*Työsopimuslaki*, 55/2001) or within a public service relationship, unless otherwise provided in law.

4 Other Relevant Information

4.1 Posted workers

The number of posted workers has clearly been increasing, but there are many shortcomings of compliance with the legislation.

In 2022, the Occupational Safety and Health Authority conducted nearly 300 inspections related to the posting of workers in Finland. The key issue identified was that companies that post workers to Finland from abroad and contractor companies that use posted workers comply with the Finnish legislation on posted workers. Most operational instructions were given for deficiencies found in the reporting obligation. Numerous shortcomings were also found in terms of pay, recording of working hours and terms of employment.

The number of posted workers in Finland reflects the number of workers reported in companies' initial notifications, which in 2022 was 30 410. This means an increase of about 21 per cent compared to the previous year. The information can be found in the report '*Työntekijöiden lähettämisen valvonta ja lähettämisilmoitukset vuonna* 2022' published by the Occupational Health and Safety Administration.

France

Summary

(I) The French legislator has provided for the establishment of an administrative safety investigation before assignment of workers to safety duties during the 2024 Olympic Games.

(II) Deadlines for notifying the labour inspectorate in the event of fatal work-related accidents and illnesses have been reduced.

(III) The Court of Cassation ruled that whistleblowing has not always been associated with the right to protection and ruled in favour of the communication of pay slips in order to assess trade union discrimination.

1 National Legislation

1.1 2024 Olympic Games: administrative safety investigation before assignment to safety duties

As previously stated in the May 2023 Flash Report, the French legislator adopted a law relating to the 2024 Olympic Games in Paris on 19 May 2023 (Law No. 2023-380 of 19 May 2023 on the 2024 Olympic and Paralympic Games and others provisions; for more details on this law, see May 2023 Flash Report).

This law enacted specific dispositions regarding assignments of temporary workers to safety duties. To guarantee security at the 2024 Olympic and Paralympic Games, Article 11 of the Law of 19 May 2023 opens up the possibility of requesting an administrative security investigation under Article L.114-2 of the French Internal Security Code (Article L.114-2 of the French Internal Security Code), prior to the assignment of temporary workers to sensitive functions (missions directly linked to the security of people or property) in transport companies (public transport of people or transport of dangerous goods which require the adoption of a security plan) or infrastructure management companies.

The aim is to check whether "*the behaviour of the persons concerned gives serious reason to believe that they are likely, in the course of their duties, to commit an act seriously prejudicial to public safety or order*".

This provision, designed to cover the period of the Olympic Games, is temporary. It applies from 01 May to 15 September 2024.

1.2 Work-related accidents and illnesses: employers' reporting obligation in case of death

A decree issued on 09 June 2023 (Decree No. 2023-452 of 09 June 2023 on the obligations of companies regarding work-related accidents and illnesses and posting to construction sites) reinforces the employer's reporting obligations in the event of a fatal accident at work. A new article R. 4121-5 of the French Labour Code (Article R. 4121-5 of the French Labour Code) provides that when a worker is the victim of an accident at work resulting in death, the employer must immediately notify the labour inspectorate.

If the employer does not do so immediately, the employer has no more than 12 hours following the death of the employee to fulfil this obligation, unless he/she can prove that he/she learned of the death after the expiry of the 12-hour period. In this case, the employer has a period of 12 hours, starting from the time when he/she became aware of the worker's death, to inform the labour inspectorate.

The information shall be communicated by any means by a fixed date. The communication must include:

- the name or business name, postal address, e-mail address and telephone number of the company or establishment employing the worker at the time of the accident;
- if need be, the name or company name, postal address, e-mail address and telephone number of the company or establishment where the accident occurred, if different from the employing company;
- the victim's full name and date of birth ;
- the date, time, place and circumstances of the accident ;
- identity and contact details of any witnesses.

If the employer fails to inform the labour inspectorate, he/she is liable to pay a fine up to EUR 1 500, increasing to EUR 3 000 in the event of a repeat offence.

2 Court Rulings

2.1 Whistleblower protection

Social Division, Court of Cassation, No. 22-11.310, 01 June 2023

In the present case, an employee sent an e-mail to the chairman of the company, which was in the restaurant sector, expressing his disagreement with the introduction of a loyalty card. In particular, he stated that 'the legality or regularity of the procedure seemed doubtful' to him.

It should be noted that this employee, the Operations Director, was in charge of a cafeteria and was also a partner since he held 15 per cent of the restaurant's shares.

Then, according to the employer, the employee asked the company to buy his shares and allow him to leave under a common-consent termination of the employment contract. In return, he agreed to not take his warnings about the conditions under which the company was launching its loyalty card any further.

Denouncing an attempt at blackmail, the employer dismissed the Operations Director for serious misconduct and professional incompetence. The letter of dismissal criticised the employee for having used a 'stratagem' to pay for his departure, without explicitly mentioning a 'scheme' involving whistleblowing.

Under the Law of 09 December 2016 (Law No. 2016-1691 of 9 December 2016, as before amended by Act 2022-401 of 21 March 2022), known as the 'Sapin 2 Law', an employee who testifies in good faith to facts constituting an offence or crime of which an individual has become aware in the course of his or her duties or who reports such facts, may not be dismissed, penalised or subjected to a discriminatory measure on these grounds. Any measure taken in breach of these provisions is null and void (Articles L. 1121-2, L. 1132-3-3 and L. 1132-4 of the French Labour Code).

The Court of Appeal ruled that the dismissal was null and void on the grounds that it was clear from the letter of dismissal that the employer had terminated the employment contract in response to the employee's threats.

But was this a whistleblowing case within the meaning of the 'Sapin 2 Law'?

For the Court of Cassation, the Court of Appeal could not conclude that the dismissal was null and void, as the Court of Appeal had failed to assess whether the facts related or testified to by the employee were likely to constitute an offence or crime and that the employer could not legitimately be unaware that through his message, the employee was denouncing such facts.

The case was therefore referred back to another Court of Appeal, which will have to determine whether the facts reported by the employee were indeed likely to be classified a criminal offence.

This decision relates to the law prior to the entry into force of the Waserman law transposing EU Directive No. 2019-37 of 23 October 2019. Nonetheless, it should be noted that although EU law did not contain any specific provisions on whistleblowers prior to Directive No. 2019-37, Directive No. 2019-37 was largely inspired by the Sapin 2 Act. Consequently, we can assume that the solution rendered here should be the same under current law.

Hereby, the Court of Cassation delimits the contours of the protective status of whistleblowers by reminding the trial judge of the need to determine whether the facts denounced are likely to constitute a crime or an offence, failing which the protection linked to the status of whistleblower would not apply. This solution seems strict and limits the protection afforded by whistleblower status. Nevertheless, we believe that it complies with European Union law and the case law of the CJEU.

2.2 Trade union discrimination

Social Division, Court of Cassation, No. 22-13.238, 01 June 2023

Staff representatives who were victims of trade union discrimination brought an action by emergency proceedings before the Judicial Court requesting their employer to provide information enabling them to compare themselves with colleagues in a similar situation.

According to Article 145 of the French Civil Procedure Code (Article 145 of the French Civil Procedure Code), a judge can order investigative measures when 'there is a legitimate reason to preserve or establish, before any trial, proof of facts on which the resolution of a dispute may depend'. This procedural tool is often used in discrimination cases when the employer has evidence that would enable the employee to demonstrate that he or she is a victim of discrimination (for more details, see the March 2022 Flash Report).

In the present case, the employer was ordered to provide, under penalty, numerous documents and information relating to a panel of employees in the same professional category, at the same level or a very similar level of qualification and classification as the staff representatives. The information first related to the identification of employees on the panel: surname, first name, gender, date of birth, age and start date of each employee on the panel hired at the same site, in the same year or in the two preceding or following years (from N-2 to N+2) as the staff representatives.

The judges also required the employer to communicate:

- the qualifications of the employees in the panel when they were recruited and their training courses leading to the qualifications, with the dates on which they were taken;
- some of their pay slips, particularly those that mention career developments or increases.

The employer appealed to the Court of Cassation against the investigative measures.

Firstly, he argued that the staff representatives had not demonstrated that there was a dispute relating to possible trade union discrimination, thus, their claim was not based on a legitimate reason.

The employer also argued that disclosing the panel's employees' personal data as shown on their pay slips was not essential to the exercise of the staff representatives' right to evidence, nor was it proportionate to the aim pursued as provided by the General Data Protection Regulation (GDPR) (General Data Protection Regulation, EU Regulation 2016/679 of 27 April 2016).

In its decision, the Court of Cassation approved the Court of Appeal's decision. Recalling its previous case law, the Court of Cassation stated that the right to protection of

personal data is not an absolute right (Social Division of the Court of cassation, No. 21-12.492, 08 March 2023, see the March 2023 Flash Report). It also pointed out that the right to evidence may justify the production of information that infringes on the individual's personal life, provided that such production is essential to the exercise of this right and that the infringement is proportionate to the aim being pursued (Social Division of the Court of Cassation, No. 19-12.058, 30 September 2020).

The Court of Cassation recalled the procedure to be followed by a judge hearing a request for disclosure of documents on the basis of Article 145 of the French Civil Procedure Code (Social Division of the Court of Cassation, No. 21-12.492, 08 March 2023, see the March 2023 Flash Report).

It is up to the judge :

- to determine whether such disclosure is necessary for the exercise of the right to evidence of the alleged trade union discrimination and proportionate to the aim being pursued;
- if there is a legitimate reason for preserving or establishing, prior to any legal proceedings, proof of facts on which the outcome of a dispute may depend;
- if the information requested is likely to affect the personal lives of other employees, to verify which measures are essential to the exercise of the right to evidence and proportionate to the aim pursued, if necessary by limiting the scope of the production of documents requested.

The Court of Cassation ruled that the staff representatives had a legitimate reason to invoke Article 145 of the Code of Civil Procedure. Their pay slips showed that their career development had been very slow. The table from the mandatory annual negotiations showing the average salaries of employees in the same category revealed that they were only about average.

Therefore, the Court of Cassation held that the staff representatives had to have precise information about their colleagues who were in a similar situation to be able to compare themselves with them, and that disclosure of their first and last names was essential and proportionate to the aim being pursued, namely to demonstrate a situation of trade union discrimination.

Lastly, the Court of Cassation emphasised that the Court of Appeal was not required to detail the reasoning supporting the communication of every item on the pay slips for which the cancellation had not been required by the employer.

The Court of Appeal was therefore able to require the employer to produce evidence enabling the staff representatives to exercise their right to prove trade union discrimination.

While the Court of Cassation confirmed its previous case law, and in particular, the procedure to be followed by trial judges—a procedure already detailed in its decision of 08 March 2023—the Court of Cassation seems to be going even further in defending the right to evidence against the right to protection of personal data. Indeed, the Court of Cassation validated the communication of pay slips without requiring the deletion of personal information. The Court of Cassation even allowed the Court of Appeal to refrain from detailing its reasoning when the deletion of an item from the pay slip containing personal information is not requested. The Court of Cassation therefore limited the obligations of trial judges in their control of the proportionality between the right to evidence and the right to protection of personal data.

Consequently, contrary to the solution reached last March, it seems that the Court of Cassation is moving away from the principle of proportionality at the core of European Union law in order to be more flexible when it comes to communicating personal data. Yet it seems questionable that the transmission of dates of birth is necessary to prove the existence of trade union discrimination.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In this preliminary ruling of 04 May 2023, the CJEU ruled that 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, hereafter the 'Working Time Directive', also applies to public sector workers, such as firefighters, in so far as those workers carry out their activity under normal circumstances. Besides, public sector workers may be subject to less favourable rules on night work than private sector workers, provided that the difference in treatment is based on an objective and reasonable criterion, i.e. related to a permitted aim and is proportionate to that aim.

It is not possible to give a clear and unequivocal answer to the question whether French law complies with the provisions of the Working Time Directive when it comes to the working time of firefighters. Indeed, the statuses covering the professional activity of firefighters differ. A brief review of the rules in force for these statuses will be necessary before considering the consequences of the decision handed down by the CJEU last May.

Legal status of firefighters and provisions on working time and night work

Firefighters of the cities of Paris and Marseille and firefighter members of the Civil Protection Military Training and Intervention Units (*Unités d'Instruction et d'Intervention Militaire de la Sécurité Civile*) have military status, whereas other French firefighters have the status of local civil servants.

Provisions on working time and night work of members of the military

The working conditions of military firefighters are set out in the French Defence Code.

Article L. 4121-5 of the French Defence Code (Article L. 4121-5 of the French Defence Code) provides that: *"Military men can be called up to serve at any time and in any place."*

Therefore, there is no limit provided for their working time. Yet it should be noted that the French Defence Code lays out detailed provisions on health and safety at work (see Articles L. 4123-19 and R. 4123-53 of the French Defence Code, which define obligations on the health and safety of military men).

Regarding night work, there is still no limitation to its duration.

Consequently, the working time conditions of military firefighters do not apply the provisions of the Working Time Directive.

The French legislator considers that the activities of military firefighters correspond to the constitutional principle of the free disposal of armed forces so that derogatory rules apply.

Provisions on working time and night work of local civil servants

Unlike military firefighters, firefighters who have the status of local civil servants benefit from provisions relating to their working time.

Thus, Article 1 of Decree No. 2001-1382 of 31 December 2001 on working time of firefighters (referring to Article 1 of Decree No. 2000-815 of 25 August 2000 on working

time of civil servants) states that the weekly working time of firefighters is set at 35 hours.

Article 2 of Decree No. 2001-1382 of 31 December 2001 states that daily working time may not exceed 12 consecutive hours. When this period reaches 12 hours, it must be followed by a break in service of at least the same duration.

However, Article 3 of Decree No. 2001–1382 of 31 December 2001 allows a circumvention of the duration of working time: a decision of the Board of Directors of the fire and rescue service may, having regard to the tasks of the fire and rescue services and the requirements of the service, and after consulting the technical committee, set the attendance time at 24 consecutive hours. In the present case, the Board of Directors shall set an equivalent period for the half-yearly calculation of working time, which may not exceed 1 128 hours over each six-month period. When the actual working time is part of an attendance cycle of more than 12 hours, the period defined in Article 1 shall not exceed eight hours. Beyond this period, employees are only required to carry out interventions.

Regarding night work, Article 2 of Decree No. 2001-623 of 12 July 2001 (Decree No. 2001-623 of 12 July 2001 taken for the application of Article 7-1 of Law No. 84-53 of 26 January 1984 and relating to the organisation and reduction of working hours in the local civil service) provides that the deliberative body of the local authority or establishment may, after consulting the competent territorial social committee, reduce the annual working time used as a basis for calculating the working time to take account of the hardship linked to the nature of the tasks and the definition of the resulting work cycles, and in particular in the event of night work, Sunday work, staggered working hours, shift work, significant modulation of the work cycle or arduous or dangerous work.

Yet if firefighters benefit from limitations to their working time, this circumstance is not fully provided for in the Working Time Directive.

Application of the Working Time Directive to French firefighters

The issue of the application of the Working Time Directive to French firefighters is not an unknown issue in France (Philipe Laurent, Report on working time in the civil service, May 2016). Since 2012, at least, French authorities have been aware of a need to better protect the working time of firefighters. Indeed, France received a formal notice from the European Commission regarding the working time of firefighters on stand-by duty of 24 hours as provided by the Decree of 12 July 2001.

Decree No. 2013-1186 of 18 December 2013 (Decree No. 2013-1186 of 18 December 2013 on working time of firefighters) was designed to make the working time conditions of local civil servant firefighters compatible with the requirements of the Directive, particularly when they are working on 24 hour stand-by duty. The reference period for assessing the maximum average working time of 48 hours for each 7-day period, including overtime, has thus been reduced to six months. A half-yearly ceiling of 1 128 hours has been set to comply with the maximum limit of 48 weekly hours worked on average over 47 working weeks. The Decree of 18 December 2013 lowered the annual working time ceiling for firefighters to 2 256 hours (instead of the 2 400 hours previously set) and maintained the framework for the use of 12 hours and 24 hours of on-call duty by requiring compliance with at least equivalent rest periods.

However, it is uncertain whether these changes will suffice to be considered as being in compliance with the Working Time Directive.

The Directive did not apply to the military and thus to military firefighters with regard to the constitutional principle of 'free disposal of armed forces' until 2021. However, the CJEU's case law triggered some changes. The CJEU regularly stated that the application of the Working Time Directive may only be excluded in case of exceptional events where the proper implementation of measures intended to ensure the protection of the

population in situations of serious collective risk requires that the employees must deal with an event of this type and to give absolute priority to the objective being pursued by those measures so that it can be achieved (for instance, see: CJEU, case C-132/04, 12 January 2006, *European Commission c/ Spain*).

In a decision of the French Administrative Supreme Court of 17 December 2021 (Administrative Supreme Court, No. 437125, 17 December 2021), the Administrative Supreme Court ruled that the regulatory provisions governing the work of police officers (*gendarmes*) are not contrary to Directive 2003/88/EC of 04 November 2003 regulating working time.

For the doctrine (Jean-Christophe: '*Videlin, Fonctions publiques et RH - Les militaires français et le temps de travail : suite française... mais pas fin'*, La Semaine Juridique Administrations et Collectivités territoriales n° 7, 21 Février 2022, 2059), the Administrative Supreme Court acted as a jurisdictional shield through its ruling: the application of the Working Time Directive and the European case law of 15 July 2021 (CJEU, case C-742/19, 15 July 2021, *B. K. c/ Republika Slovenija*) can be flexible and adapted to the armed forces.

However, it seems illusory to assume that the non-application of the Working Time Directive is permitted for all armed forces. The Administrative Supreme Court ruled that, in principle, the working organisation of military men is compatible with the Directive.

In fact, the Administrative Supreme Court considered that

> "*it is first up to the administrative judge, when hearing a claim against the rejection of a request for the transposition of a directive likely to limit the availability of the armed forces, to verify whether the military men at case are not excluded from the scope of the directive by reason of their activities*".

If they are excluded, the administrative judge shall reject the claim put before it. If they are not excluded, the administrative judge must verify whether national law is compatible with the objectives of the Directive. Assuming, finally, that the administrative judge finds that national law is incompatible with those objectives, it is for the Court to determine whether the application of European Union law would not result in the limits set on the availability of the armed forces depriving them of the guarantees provided by the constitutional requirement of the necessary freedom to use armed force, for the purposes of safeguarding the fundamental interests of the nation.

In the present case, the Administrative Supreme Court concluded that "*it does not appear [...] that the soldiers (gendarmes), which is a component of the armed forces, carry out as a whole, activities that fall within one of the excluded areas from the scope of the Directive of 4 November 2003".*

European Union law in general and the Working Time Directive in particular must therefore be applied to the regulatory provisions that govern the working time of military men, and the administrative court is competent to review them in the context of appeals. In doing so, the court will also determine whether the national provisions comply with European law.

In its decision of 17 December 2021, the Administrative Supreme Court did not consider whether the enforcement of the Working Time Directive deprives of effective guarantees of the constitutional requirement of the free disposal of armed forces. Unsurprisingly, the Administrative Supreme Court stated that there are no measures in European Union law equivalent to the free disposal of armed forces. Indeed, it is essentially within the competence of the Member States.

The ruling therefore provides only a limited response to the police officers (*gendarmes*), but still maintains their organisation of working time. Uncertainty remains for all other members of the French armed forces.

Therefore, this decision does not apply to military firefighters, but does allow us to see how the French courts deal with the applicability of the Directive to the armed forces. It

seems that the French judge respects the CJEU's position by admitting that the exclusion of the Directive's application depends on the activities of military men and not solely on the fact that they are members of the armed forces.

Nonetheless, it appears that the French courts are cautious in recognising non-compliance with the provisions of the Directive by certain branches of the armed forces. It remains to be seen whether the Administrative Supreme Court will 'dare' condemn breaches of the Directive, or whether it will find a way of circumventing the application of the Directive.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The German Parliament adopted a draft bill (20/6496), which provides for the transposition of EU Directive ((EU) 2020/1057) into national law.

(II) The Administrative Court Lüneburg delivered a judgment on the qualification of rail travel times of an employee during the regular transfer of new vehicles by a forwarding agency as working time.

(III) The State Labour Court Baden-Württemberg ruled on temporary agency work involving three companies.

(IV) The Federal Institute for Occupational Safety and Health published an interesting report on teleworking.

1 National Legislation

1.1 Posting of workers in the road transport sector

In future, the law on the posting of workers is also to be applied in the road transport sector. The Federal Government's draft bill (20/6496), which provides for the transposition of the corresponding EU Directive ((EU) 2020/1057) into national law, was adopted on 14 June in the Committee on Labour and Social Affairs of the German Parliament in an amended committee version (see here and here for further information). The draft was adopted in plenary the following day.

2 Court Rulings

2.1 Rail travel times of an employee during the regular transfer of new vehicles by a forwarding agency are working time

Administrative Court Lüneburg, 3 A 146/22, 02 May 2023

With reference to the Working Time Directive, the Administrative Court of Lüneburg ruled that travelling time by rail in connection with the transfer of new commercial vehicles constitutes working time within the meaning of the Working Time Act (*Arbeitszeitgesetz*). According to the definition of Union law, the decisive factor is whether the employee is at the employer's disposal and carries out his or her activities or duties, which the Court affirmed in this case.

2.2 Temporary agency work involving three companies

State Labour Court Baden-Württemberg, 15 Sa 30/21, 04 October 2022

The ruling illustrates the variety of arrangements that companies choose, and which then raise the question of their qualification as temporary agency work.

In the present case, a company as the (contractual) employer had its right to issue instructions exercised by a second company and, in particular, also left the situation-related 'directing' of the employees in specific cases to the second company. The other (second) company, for its part, then enabled a third company to run the business of the third company through its management of the staff.

The State Labour Court (LAG) assessed this according to the concrete circumstances as the hiring out of workers to the second company.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The CJEU ruled that Art. 1(3) of Directive 2003/88/EC must be interpreted as meaning that Directive 2003/88/EC applies to public sector workers, such as firefighters, who are considered to be night workers, in so far as those workers carry out their activities under normal circumstances. The Court also ruled that Art. of Directive 2003/88/EC, read in the light of Article 20 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the normal duration of night work fixed at seven hours in the legislation of a Member State for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim.

Regarding the first question, German law seems to be in line with the requirements formulated by the Court: according to Section 14 of the Working Hours Act (*Arbeitszeitgesetz*, ArbZG), the requirements for night work may be waived in the case of "*temporary work in emergencies and in exceptional cases which occur irrespective of the will of the persons concerned and the consequences of which cannot be remedied in any other way, especially if raw materials or foodstuffs are in danger of spoiling or the results of the work are in danger of failing*" (section 14(1) of the ArbZG). In addition, a derogation may be granted "*if a relatively small number of workers is temporarily engaged in work, the non-performance of which would jeopardise the result of the work or cause disproportionate damage*" (section 14(2) No. 1 of the ArbZG).

As regards the second question, the German legislator has only implemented a small part of the comprehensive prohibition of discrimination contained in Art. 12 lit. b of the Directive. However, there is the necessity of an interpretation in conformity with EU law (if necessary, including the so-called principle of equal treatment under labour law, as developed by the courts), so that it should be possible to adequately take into account the requirements formulated by the CJEU (see Ulber, in: Preis/Sagan (eds.), *Europäisches Arbeitsrecht*, 2nd ed. 2019, note 7.212).

4 Other Relevant Information

4.1 Report of the Federal Institute for Occupational Safety and Health on teleworking

The Federal Institute for Occupational Safety and Health (*Bundesanstalt für Arbeitsschutz und Arbeitsmedizin,* BAuA)) has published a comprehensive report on 'Working from Home' for its 'Working Time Report Germany'. According to the report, evaluations of the BAuA Working Time Survey 2021 indicates that employees who work from home on the basis of an agreement with the employer enjoy better working conditions in general. However, the study also shows that working time spent at home is recorded less frequently (64 per cent) than total working time (79 per cent).

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, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time –night workers)

The judgment is of relevance for Greece because the Court underlines that comparability between categories of workers must be assessed not in a global and abstract manner, but in a specific and concrete manner, having regard to all of the elements that characterise those situations.

Greek jurisprudence seems to justify differences between different categories of employees on their statutory or contractual status. Therefore, the judgment is of importance for Greek legislation, even if such a difference concerning the organisation of the working time does not exist.

4 Other Relevant Information

A new Minister of Employment, Mr A. Georgiadis, has been appointed.

Hungary

Summary

(I) Parliament will pass the Act on the Legal Status of Employed Persons in Public Education in July 2023.

(II) Parliament passed the Act on Employment of Migrant Workers in Hungary on 13 June 2023, which will come into force on 01 November 2023.

1 National Legislation

1.1 Act on the legal status of workers in public education

Parliament will pass the Act on the legal status of employed persons in public education and amendment of related Acts in July 2023 (the Act has not been passed, so the number of the Act and the official text is still missing; the draft is available here).

The draft is a full employment code of teachers and other workers in public education. The new employment code, consisting of 158 articles, takes workers in public education out of the scope of Act 33 of 1992 on Public Employees (Public Employee Act). The legislation has gradually eliminated the scope of the Public Employee Act, first in the cultural sector, later with a separate Act for health care staff, and finally teachers.

Workers in public education fall under the scope of this new Act. It introduces a series of fundamental changes in working conditions, such as a new pay system based on personal performance. This new Act will have to be monitored in terms of implementation of the relevant EU Directives (Article 154 contains the list of the relevant EU Directives).

1.2 Act on employment of migrant workers in Hungary

Parliament passed the Act on Employment of Migrant Workers in Hungary on 13 June 2023, which will come into force on 01 November 2023 (the Act has not yet been published in the Official Journal, the draft is available here).

The Act consists of 14 articles and focuses on the residence and work permit of third-country nationals. The new flexible rules make it easier to employ migrant workers in Hungary up to a period of three years (Article 6).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The employment relationship of firefighters is regulated in Act 42 of 2015 on the service relationship of workers in law enforcement bodies. This Act harmonised Directive 2003/88/EC on working time (see the harmonisation clause in Article 364 of the Act). According to Article 2 of the Act, night work means any work between 22:00 and 6:00 hours. This complies with the same provision of the Labour Code (Article 89, Act 1 of

2012) and the Working Time Directive. The Act also contains specific rules on extra payment for night work (Article 289/C). The rules on extra payment differ from the rules of the Labour Code, however, the difference (higher payment) is reasonable.

Therefore, the Hungarian provisions comply with the judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Legislation has been amended establishing employers' obligation to an objective, reliable and accessible record of their employees' working time.

1 National Legislation

1.1 Working time

On 09 June 2023, the Act on Facilities, Hygiene and Safety at Workplaces No. 46/1980 was amended following the ruling of the CJEU in case C-55/18.

According to Art. 57(a) of the Act, employers are now required to establish an objective, reliable and accessible record of their employees' working time, which *inter alia*, includes information about daily and weekly average working hours as well as information on what time the work is performed, consecutive rest periods and weekly days off. Information must also be provided on cases in which the rules on rest periods and weekly days off according to this law or collective agreements have been deviated from, as well as information on whether the employees in such cases were granted a rest period later.

Despite the above rule, it is sufficient that the employee's working hours are recorded in the employment contract, if the relevant employee's working hours are regular as a rule, and deviations from those working hours must be recorded separately in accordance with the rule.

The employee must be able to access the above information 12 months back.

2 Court Rulings

2.1 Sick leave

On 28 June 2023, a ruling was passed in Supreme Court case No. 5/2023 on the sick leave of individuals who undergo a sex change. According to Icelandic law and collective agreements, the reason for such a procedure is included under the definition of sickness. However, the employer argued that the Act on Sexual Autonomy No. 80/2019 had changed this, as gender discrepancy could no longer be considered a sickness.

The court referred to the fact that the objective of Act No. 80/2019 is to prescribe the right of individuals to define their gender and to thus guarantee the privacy rights of those who enjoy constitutional protection. Thus, the law does not take a position on whether gender discrepancy can be considered an illness, and nothing in the law or the preparatory work indicated that the intention was to limit the rights of those covered by the law.

In the present case, the employee had obtained two medical certificates about his incapacity for work, and in the presence of the second doctor in court it was stated that the operation had been urgent to prevent the employee's incapacity for work. When the employer received these certificates, he neither called for further explanations nor tried to have them overturned. In view of this, the Court ruled that the employee had proved that based on the collective agreement, he had the right to pay due to sick leave.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In Iceland, the Act on Facilities, Hygiene and Safety at Workplaces No. 46/1980 provides for rules on working time as well as collective agreements.

The provisions do not apply to those who work in road transport and fall under the laws and regulations dealing with driving and the rest time for drivers, etc. in domestic transport and during transport within the European Economic Area, to senior managers or others who decide on their own working hours. In addition, the provisions do not apply to special circumstances related to public sector activities, such as necessary security activities and urgent investigative interests in the field of law enforcement, work related to civil defence activities and monitoring duties for avalanche prevention.

While it is not obvious that the provisions of the Act must be amended, it is possible that certain collective agreements must be amended with regard to the Court's conclusion on the definition of night workers.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) The Labour Court reports a significant increase in employment rights referrals.

(II) The Industrial Relations News (IRN)/Chartered Institute for Personnel Development (CIPD) Pay and Employment Practices Survey indicates that most employers are unwilling to engage in collective bargaining.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

This decision has no specific implications for Ireland.

First, firefighters are not 'civil servants' and it has never been in dispute that firefighters are covered by the Organisation of Working Time Act 1997 ('the 1997 Act'): see, for instance, case C-214/20, *Dublin City Council*. It is the case, however, that firefighters are exempted from the provisions of the 1997 Act regulating 'night work', namely section 16: see the Organisation of Working Time (Exemption of Civil Protection Services) Regulations 1998 (S.I. No. 52 of 1998).

Secondly, there are no provisions in the 1997 Act requiring that 'overtime' or even 'night work' should be paid at a higher rate. Those are matters that are left to collective bargaining to determine.

Thirdly, the provisions of the 1997 Act on Night Work apply, in general, equally to workers in the private and public sectors. Employers of persons employed in activities specified in the Schedule to the Organisation of Working Time (General Exemptions) Regulations 1998 (S.I. No. 21 of 1998 as amended by S.I. No. 817 of 2004, S.I. No. 819 of 2004 and S.I. No. 576 of 2018), however, are also exempted from the application of section 16.

Section 16 defines 'night time' as meaning 'the period between midnight and 7 a.m. on the following day' and 'night worker' is defined as meaning an employee who normally works at least three hours of his or her daily working time during 'night time'.

4 Other Relevant Information

4.1 Labour Court

The Labour Court's Annual Report 2022 reveals that its work is now dominated by employment rights cases. Of the 1 198 referrals to the Court in 2022, 78.3 per cent fell into the latter category, whereas in 2019, that figure was only 59.5 per cent. The largest

number of employment rights referrals concerned the Organisation of Working Time Act 1997 (248), followed by the Payment of Wages Act 1991 (204), the Unfair Dismissals Act 1977 (125) and the Employment Equality Act 1998 (92).

4.2 IRN/CIPD Survey

The annual survey of Industrial Relations News (IRN) subscribers/Chartered Institute for Personnel Development (CIPD) members indicates that only 42 per cent of respondents engage in collective bargaining with a trade union. Of those respondents who do not recognise trade unions, 74 per cent stated that they would be unwilling to consider collective bargaining with trade unions as part of any system brought in by the government to implement Directive 2022/2041/EU on adequate minimum wages. This indicates the scale of the challenges involved in implementing the Directive.

Other 'take-aways' from the survey are that 50 per cent of respondents had to change their probation period following implementation of Article 8 of Directive 2019/1152/EU on transparent and predictable working conditions with effect from 16 December 2022 (see S.I. No. 686 of 2022). A significant number of respondents indicated that they expected to face requests from employees to work remotely: 43 per cent up from 39 per cent in 2022, 37 per cent of which involved working remotely outside of Ireland.

Italy

Summary

A protocol on gender discrimination has been signed.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Working time is regulated in the Legislative Decree of 08 April 2003 No. 66, implementing Directives 93/104/EC and 2000/34/EC. It applies to all sectors of activity, both public and private.

According to Article 1, a 'night worker' is a person who works at night-time (from midnight to 5 am), with at least three of his/her working hours corresponding to his/her normal working time or any worker performing work during the night time for at least part of his/her working time according to the rules defined by collective bargaining. If collective bargaining does not specify what a 'night worker' is, it is considered someone who performs at least three hours of night work for a minimum of 80 working days per year. On the other hand, someone who only works night shifts occasionally is not a 'night worker'.

Article 2 provides that some rules of the Decree cannot be applied to firefighters due to the specific nature of the service they perform.

Firefighters' national collective bargaining agreement, Article 17, specifically specifies their working time. It provides that shifts should normally be as follows: 12 hours of day-time work (day shift), 24 hours of rest, 12 hours of work including night-time hours (night shift), 48 hours of rest. This timetable can be arranged differently in case of urgent interventions, natural disasters (Article 18) or other emergency situations (Article 21). Specific rules are laid down for the working time of firefighters operating in small islands and disadvantaged areas (Articles 19-20).

The working time of Italian firefighters complies with Directive 2003/88/EC because Legislative Decree of 08 April 2003, No. 66 applies to firefighters, who are considered to be night workers, when they carry out their activities under normal circumstances. Specific rules are adopted exclusively on the specific nature of particular tasks being performed, such as during an emergency or natural disaster or for workers operating in isolated or disadvantaged locations. Furthermore, after a night shift, an additional rest period is granted, and it is twice as long as that after the day shift.

4 Other Relevant Information

4.1 Gender discrimination

I.N.L. (Ispettorato Nazionale del Lavoro- National Labour Inspectorate) and Consigliera Nazionale di Parità (National Advisor on Equal Opportunities), 08 June 2023

I.N.L. and Consigliera Nazionale di parità signed a Protocol to promote the full application of the legislation on equal opportunities for men and women and take effective action to fight gender discrimination.

The parties are committed to sharing any useful information on violations of which they become aware in the performance of their respective institutional activities. The inspectorate, in particular, will sensitise its local offices to communicate to the advisor any discriminatory situation of gender discrimination found during the inspections.

Latvia

Summary

The Supreme Court in its decision provides a contradictory interpretation on the concepts of working time and rest periods.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working time

Supreme Court, SKA – 614/2023, 13 June 2023

On 13 June 2023, the Senate of the Supreme Court adopted a decision in case SKA – 614/2023 which is a contradictory interpretation of the concepts of 'working time' and 'rest periods' as provided by the regional court (see ECLI:LV:AT:2023:0612.A420210021.17.L). Specifically, the claimant, a customs official, was moved for work to another border crossing point which was a 2.5 hour drive from his home. He claimed that this constituted a breach of his human rights due to the disproportionately long time he spent travelling to and back from work and constituted a considerable financial expense for fuel. The Senate agreed with the finding of the regional court that according to the criteria distinguishing 'working time' from 'rest periods' as defined by the CJEU in cases C-151/02, *Jaeger*, C-14/04, *Dellas* and C-437/05, *Vorel*, the time the claimant spent travelling to and back from work could not be considered working time. At the same time, the respondent, the Ministry of Finance, failed to demonstrate that the claimant in fact had sufficient time to rest, taking into account the fact that he had to spend 5 hours each day travelling to and back from work. The respective judgment contradicts the fact that the same period of time cannot be considered 'working time' and 'rest period'. In addition, it highlights the shortcomings in national legal regulation as it does not explicitly regulate the situation in which the employer changes his/her place of work which is far from his/her place of residence (official).

3 Implications of CJEU Rulings

3.1 Working Time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The organisation of work in shifts is allowed according to the Labour Law (*Darba likums*, OG No.105, 06 July 2001, applicable to all employees, Articles 139 and 140) and the Law on Service in the System of the Interior and Imprisonment System (*Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums*, Official Gazette No. 101, 30 June 2006, applicable to firefighters, Article 28), which means that there is an equal treatment of workers in both sectors – private and public, thus the issue on compatibility with Article 20 of the CFREU does not arise in the context of Latvian national legal regulation.

It follows that the decision of the CJEU in joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21has no implications on Latvian law.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

The draft law (with an accompanying report) on transparent and predictable working conditions serves to implement Directive (EU) 2019/1152. The employer's obligations to inform employees about the essential aspects of the employment relationship are expanded, minimum requirements for working conditions are established with regard to various areas, and horizontal provisions are introduced to enforce the aforementioned provisions, in particular regarding the burden of proof and rules on protection against dismissal. The draft law was sent for consultation that will last until 21 July 2023, after which the government will evaluate the comments received and submit a report and motion to Parliament.

1 National Legislation

1.1 Transparent and predictable working conditions

Background information

The present project serves to implement 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. It replaces Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

Directive (EU) 2019/1152 aims to improve working conditions by promoting more transparent and predictable employment conditions, but without overly restricting the scope for design in contract law. The labour market is to remain adaptable.

Summary of the major points

The aim of the draft law is, as mentioned, to adapt Liechtenstein law to Directive (EU) 2019/1152. This is to be achieved through three central points:

- The employer's obligation to inform employees about the essential aspects of the employment relationship are expanded in relation to the currently applicable law;
- Minimum requirements for working conditions are established with regard to the maximum duration of the probationary period, multiple employment, minimum predictability of work, the employee's request for a transition to another form of work, and with regard to mandatory training;
- So-called horizontal provisions are introduced to enforce the aforementioned provisions, in particular new rules on the burden of proof and rules on protection against dismissal.

The enactment of the proposed provisions requires the amendment of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB, LR 210.0).

Stage of the adoption process and next steps

The Liechtenstein government has submitted a draft law with an accompanying report, which was sent for consultation. The consultation will last until 21 July 2023, after which the government will evaluate the comments received and submit a report and motion to Parliament.

The draft law can be found in *Vernehmlassungsbericht der Regierung betrffend die Abänderung des Allgemeinen bürgerlichen Gesetzbuches (Umsetzung der Richtlinie (EU)*

2019/1152 über transparente und vorhersehbare Arbeitsbedingungen in der europäischen Union).

For the relevant EU Directives/Regulations/policy/thematic key words, see 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.

Importance of the developments
The amendment is of considerable importance. It is an important issue for the economy, the labour market, workers and employers. Some important issues are newly regulated in the area of the definition of the employment contract, on-call work, information about the content of the contract, request for a more secure job, mandatory training, the probationary period, protection against dismissal, and evidentiary and procedural issues.

Departing from previous lines of reasoning

The amendment departs from previous lines of reasoning because no new laws are created, but the existing structures are used to implement the changes. All amendments are incorporated in the Civil Code, where the employment contract law has always been regulated.

Likely implications in the legal and political area

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

Likely implications for the EU aquis

The main purpose of the amendment is to implement Directive (EU) 2019/1152. An initial review of the draft law reveals that the government is seeking implementation in line with the mentioned Directive.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In cases C-529/21 to C-536/21 and C-732/21 to C-738/21, the CJEU (Sixth Chamber) ruled as follows:

Article 1(3) 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, read in conjunction with Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as meaning that Directive 2003/88/EC applies to

public sector workers, such as firefighters, who are considered to be night workers, in so far as those workers carry out their activities under normal circumstances.

Article 12 of Directive 2003/88/EC, read in the light of Article 20 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the normal duration of night work fixed at seven hours in the legislation of a Member State for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and is proportionate to that aim.

The following statements of the Court in No. 63 of the judgment are important to understand the present case: it will therefore be for the referring court to determine, first, whether the categories of workers concerned are in a comparable situation; secondly, whether there is a difference in treatment of those categories; and, thirdly, whether that difference in treatment is based on an objective and reasonable criterion, that is, whether the difference relates to a legally permitted aim pursued by the legislation being considered, and whether it is proportionate to that aim.

In Liechtenstein law, night work is mainly regulated in the Employment Act (*Gesetz über die Arbeit in Industrie, Gewerbe und Handel, Arbeitsgesetz*, ArG, LR 822.10.). This Act is applicable—with some exceptions—to all private and public establishments (Art. 1(1) of the Employment Act).

According to Art. 10(1) in conjunction with Art. 16 of the Employment Act, work performed between 23:00 and 6:00 is considered night work.

The State Personnel Act (*Gesetz über das Dienstverhältnis des Staatspersonals, Staatspersonalgesetz*, StPG, LR 174.11) does not mention night work. By contrast, the related ordinance, the *State Personnel Ordinance (Verordnung über das Dienstverhältnis des Staatspersonals, Staatspersonalverordnung*, StPV, LR 174.111), contains a few provisions on night work. According to Art. 52(a) of this Ordinance, 'night work' means work performed from 23:00 to 6:00.

This basically means that under Liechtenstein law, night work is defined in the same way for public sector employees as for private sector employees.

This was just the opposite in the present cases, which were subject to Bulgarian law and had to be decided by the CJEU. The general Bulgarian regime governing night work is set out in the Labour Code, which provides that night work may not exceed '7 hours' in any 24-hour period and that overtime, which is work carried out outside the scheduled working time, gives rise to an increase in pay, which, it would seem, amounts to 50 per cent (CJEU C-529/21 to C-536/21 and C-732/21 to C-738/21 no. 22). By contrast, the applicants in the main proceedings carried out night work between 22:00 and 6:00, completing '8 hours' of night work per 24-hour period (CJEU C-529/21 to C-536/21 and C-732/21 to C-738/21 No. 21).

Under the outlined Liechtenstein rules, it is therefore not to be expected that a case comparable to those under Bulgarian law could occur. It can be assumed that Liechtenstein law is in line with the case law of the CJEU.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

The government has proposed to amend the Labour Code to introduce the new right of employee representatives to appoint (elect) their representative to management or supervisory boards of public budgetary institutions and public institutions. This would be the first expansion of participatory rights since the labour law recodification in 2016, when this right was first introduced for state and municipalities enterprises only.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The case dealt with by the CJEU concerned the difference in legal regulation of night-time work for firefighters in the private sector (regulated by the employment legislation, i.e. Labour Code) and the public sector (regulated by administrative laws). This difference in treatment does not exist in Lithuania. In Lithuania, there are no special rules which would allow for firefighters in the public sector to derogate from the obligations arising from the provisions of Directive 2003/88/EC, transposed by the Labour Code.

4 Other Relevant Information

4.1 Extension of participation in public sector

The Ministry of Internal Affairs has proposed and the government has agreed to expand the right to participation in the public sector. Currently, the right to appoint (elect) one member to the management or supervisory board is envisaged for state and municipality enterprises only and does not exist for other types of economic, public or business entities, be it private or public.

Proposal No. 2-16937(6) provides for the possibility of employee representatives to elect (appoint) at least one member of the collegial management or supervisory board in:

- Budgetary institutions (‘*biudžetinės įstaigos*’), from 01 October 2023; and
- Public institutions (‘*viešosios įstaigos*’), from 01 May 2024.

The proposal aims to implement the recommendations to increase the effectiveness and promote good governance in public sector.

The proposal to amend the Labour Code accordingly has been submitted to the Parliament of the Republic of Lithuania.

Luxembourg

Summary

(I) Multiple new bills that address minor issues have been introduced, including on work permits, employment and skills management programmes to address societal and technological change.

(II) Another bill implements the labour law aspects of Directive (EU) 2019/2121.

1 National Legislation

No new laws or decrees have been published, but a number of new bills have been introduced.

1.1 Cross-border transformations, mergers and divisions

Projet de loi n° 8255 modifiant le Code du travail aux fins de transposer la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières

The purpose of this bill is to transpose the labour law components of Directive 2019/2121 on cross-border transformations, mergers and divisions; company law aspects are being transposed by another bill (No. 8053).

In Luxembourg, this applies to public limited companies, partnerships limited by shares and limited liability companies.

While the transposition of the previous Directive (No. 2017/1132) already regulated employee participation in the event of cross-border mergers in the Labour Code, the aim is to extend this component to company transformations (change of legal form) and divisions. While these cross-border operations are important for the proper functioning of the European internal market, their impact on employee representation must also be taken into account; 'the cross-border operation must not unduly prevent employee participation' (Recital 30 of the Directive) and 'the circumvention of employee participation rights through a cross-border operation must be prevented' (Recital 31).

The draft law remains close to the European text and incorporates some of the existing legislation for transformations, introducing only those changes required by the new Directive.

Three separate sections will be added to the Code, with very similar rules for mergers, conversions and divisions.

Therefore, when one of these operations is planned, the existing rules on staff delegations in terms of information and consultation on the developments of the company (Art. L. 414-3 to L. 414-5) are applicable to the consultation.

The Directive and draft law are primarily focussed on employee 'participation'. This is achieved through employee participation in the development of company law. In Luxembourg, for example, 'employee participation' occurs in the form of co-management in public limited companies with 1 000 or more employees; approximately one-third of the administrative body consists of employee representatives. These rules (L. 426-1 to L. 426-11) will also apply, except that the threshold is not 1 000 employees, but 4/5 of this threshold (in accordance with the Directive), i.e. 800 employees.

Account is also taken of cases where the participation system is that of a European company subject to such a system. If this is the case, the companies involved in the operation may decide, without prior negotiation with employee representatives, to

submit to the system provided for in European companies (reference to Regulation No. 2157/2001).

In any event, any company resulting from one of these transactions governed by an employee profit-sharing scheme must take the necessary measures to ensure that profit-sharing rights are protected for a period of four years (previously 3 years) following the transaction.

1.2 Work permits and immigration

Projet de loi n° 8227 portant modification: 1° du Code du travail ; 2° de la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration; 3° de la loi modifiée du 18 décembre 2015 relative à l'accueil des demandeurs de protection internationale et de protection temporaire

This bill concerns immigration in the broadest sense, but also includes changes to the Labour Code.

First, the rules have been adapted to close a loophole. The Code penalised the employment of third-country nationals residing in the country 'illegally', but not third-country nationals residing 'legally' albeit without a work permit.

As regards the presumption that the employment relationship lasted for three months, it will be added that evidence of the contrary can only be provided in 'writing'; this means that an employer who has not drawn up a contract in due and proper form will, in practice, be unable to rebut this presumption.

The case becomes criminal when certain aggravating circumstances are present. To put an end to certain ambiguities in case law, the aggravating circumstances will be clarified.

Administrative and criminal penalties have been increased to bolster deterrence.

The Labour and Mines Inspectorate (*Inspection du travail et des Mines)* will be authorised to record these offences.

The bill also changes the procedures for applying to the Job Administration (ADEM) for authorisation to recruit a third-country national. The one-month waiting period will be abolished if ADEM has already established that no jobseeker is available for the profile being sought. The aim is to reduce the amount of time wasted by companies and to provide more guarantees for recruitment planning. The aim is also to attract talents to Luxembourg at a time when there is a labour shortage in all sectors, especially for the official list of occupations declared to be 'very short of labour'. Ultimately, the aim is to remain competitive and attractive to employers and to facilitate the recruitment process to not slow down the development of businesses and the establishment of new companies in Luxembourg.

Legislation on obtaining residence permits will also be simplified to deal with the shortage of labour and talent.

A final section of the bill concerns the reception of applicants for international protection, with a view to bringing it into line with European law.

1.3 Electorate of the Chamber of Employees and staff delegation

Projet de loi n° 8233 portant modification : 1° de l'article L.413-4 du Code du travail et 2° de la loi modifiée du 4 avril 1924 portant création de chambres professionnelles à base élective

This bill includes certain clarifications regarding the electorate.

As a reminder, Luxembourg established professional chambers (*chambres professionnelles*) in 1924 to defend socio-professional interests. People who meet the

criteria are automatically members of the chamber and must pay the fees set by the chamber. While employers are divided among three chambers, employees are now grouped together in the Chamber of Employees (*Chambre des salariés)*.

However, as regards the electoral lists for the Chamber of Employees, it has been noted that the current system means that certain people are excluded, in particular apprentices, jobseekers who receive a benefit and those entitled to financial aid or who are covered by a measure to promote employment. The same applies to employees and apprentices on parental leave. In principle, however, these people remain members of the Chamber of Employees and should therefore be entitled to vote. The bill will clarify this.

To take account of apprentices in particular, the voting age will be lowered to 16 years. It should be noted that the age of 16 years was introduced for employee representatives in 2016, while for political elections (legislative, municipal and European), the plan to reduce the voting age was abandoned following a referendum that rejected the proposal (80 per cent).

Another uncertainty the draft intends to clarify is whether people whose contracts are suspended, for example due to parental leave, are eligible to be employee delegates. It will be made clear that this is the case.

1.4 Forward-looking management of employment and skills

Projet de loi n° 8234 portant: 1° introduction d'un programme de gestion prévisionnelle de l'emploi et des compétences et 2° modification du Code du travail

The aim of this bill is to introduce forward-looking management of jobs and skills (*Gestion prévisionnelle de l'emploi et des compétences*) by organising the training and retraining of employees whose jobs are at risk by technological, environmental, regulatory or societal change.

It is based on the findings of several studies according to which a large number of professions will disappear or undergo significant transformation. Intensive 'reskilling' or 'upskilling' would therefore be necessary to maintain employees' employability. The rate of Luxembourg companies offering training to most of their staff is lower than the EU average (32 per cent compared with 35 per cent).

First, the bill introduces a new protected title of 'approved consultant' (*consultant agréé*) or 'approved consultancy firm' (*entreprise de conseil agréée*), requiring approval from the Ministry of Labour. This approval is conditional on certain professional knowledge and experience.

The law defines the 'forward-looking employment and skills management programme' (*programme de gestion prévisionnelle de l'emploi et des compétences*) as a 'programme aimed at Luxembourg companies and their employees affected by the new requirements and developments in the labour market due to technological, environmental, regulatory or societal trends'. An 'impacted employee' (*salarié impacté)* is defined, in brief, as an employee whose job is affected by these trends and who needs to be retrained or upgrade his/her skills with at least 125 hours of training to secure his/her employability.

The establishment of such a programme is optional for companies. Companies that are aware of changes in their activities, business lines or skills requirements and wish to preventively invest in the skills of their staff may apply to the Job Administration (ADEM) to take part in the programme. They must meet a number of conditions, including a clear view of the structural trends in the economic market that will impact them in coming years and their strategic direction.

It must then provide an approved consultant and submit a quotation.

In an initial preparatory phase, the approved consultant carries out a number of tasks, including an analysis of the situation, identification of the departments and positions

undergoing profound change and of the employees affected and eligible. A training plan and budget is also drawn up. A final report is then drawn up and evaluated by ADEM.

If this programme is validated, the company must implement it within 2 months and choose the training courses for which it wishes to enrol the affected employees, who must comply with certain quality criteria.

The Employment Fund will contribute to training costs. This aid cannot be combined with other assistance for continuing vocational training. The rate of reimbursement will depend on the size of the company; the scheme clearly favours SMEs.

During the preparatory phase, one day of consultation is added for each employee affected. Certain other exceptional or additional costs may also be covered.

A tripartite monitoring committee will be set up, consisting of government representatives, employers' representatives and trade union representatives to monitor the progress of the new scheme.

The staff delegation is informed and consulted at several stages, in particular when the mechanism is set up and the training plan is drawn up.

1.5 Gradual early retirement

Proposition de loi n° 8243 portant modification de l'article L. 584-2 du Livre V du Code du travail Titre VIII Chapitre IV Préretraite progressive

Gradual early retirement (*préretraite progressive)* allows older people to reduce their working hours before retiring on a full-time basis to make room for younger people to be hired.

To qualify, the individual must be at least 57 years old. Furthermore, under current legislation, phased early retirement can only be granted to employees who have worked at least 75 per cent of their working hours over the last 5 years. According to the authors of a proposed law, this criterion is not sufficiently flexible and has led to a rejection of many applications. Account should be taken of the fact that many people decide at the end of their career to reduce their working hours, particularly since the pandemic. A reduction in working hours, even a temporary one, of less than 75 per cent, excludes employees from the progressive early retirement scheme. According to the proposed text, it would be sufficient to have only worked an average of 75 per cent over the last 5 years.

As this is a bill of the parliamentary opposition, there is little guarantee that it will be adopted.

2 Court Rulings

2.1 Right to evidence

Cour Supérieure de Justice, No. CAL-2020-00766, 09 February 2023

Two recent decisions concern the admissible evidence before the courts.

In the first case, an employee sought to establish that an employment relationship already existed prior to the date specified in the written contract that had been signed. Unlike the employer, the employee was allowed to prove this by any means. In the present case, the employee had engaged in text message exchanges with two of the directors. The latter argued that the evidence should be rejected on the grounds that it was an invasion of privacy and confidentiality. The Court of Appeal followed French case law, which in turn is based on the principles set out by the European Court of Human Rights.

Thus, in matters of evidence, an infringement of privacy and the secrecy of communications could be justified by a party's (in this case the employee's) right to evidence. In the presence of two rights of identical normative force, the judge must apply the principle of proportionality and determine on a case-by-case basis which right should prevail.

The decision thus recognises a 'right to evidence' (*droit à la prevue)* that must be balanced against other interests.

Cour Supérieure de Justice, No. CAL-2022-00607, 09 February 2023

In a second case, an employer needed photos of the company Christmas party that an employee had saved on his work computer. Since the employee had been absent, a work colleague searched the computer in a directory entitled 'Photos', and came across a number of photos of a private nature, including 15 with sexual connotations.

This discovery served as grounds for the employee's dismissal. The employee did not dispute the existence of the photos per se, but argued that such evidence would constitute a violation of his privacy.

The Court found that there was no invasion of privacy, in particular because the files were easily accessible, and the title 'Photos' did not reveal the private nature of the directory's contents.

The evidence was therefore admissible. The misconduct was also considered serious enough to justify dismissal, especially as the employer's corporate purpose was to help victims of violent offences, including sexual offences.

2.2 Compensation for unfair dismissal

Cour Supérieure de Justice, No. CAL-2020-00774, 26 January 2023

When dismissal is declared unfair, the employee is entitled to compensation for the resulting damage. The damage is assessed on the principle that 'all the damage, nothing but the damage' is to be compensated, i.e. at least in theory, on the basis of the actual loss. This can be broken down into material loss (loss or reduction of income over a reasonable period of time to find a new job) and immaterial loss.

There are many cases in which judges refuse or reduce compensation for loss because the employee, by not actively seeking employment, has breached the obligation to moderate his/her loss.

However, a recent Court ruling recognised that compensation may also be affected by the employee's behaviour prior to dismissal. The case concerned an employee who had requested redeployment on the grounds of ill health. This procedure entailed a ban on dismissal until the end of the procedure. The employee was reclassified but was not satisfied with the decision. He appealed to the Court but did not inform the employer and did not return to work. The employer dismissed him for unjustified absence. Only later was he informed that the proceedings were continuing.

The Court held that, by law, the contract was suspended during the appeal proceedings, and that the dismissal was therefore unfair. However, it concluded that during the period of suspension, it was only the primary contractual obligations that were suspended and not the secondary obligations, in particular, the duty of loyalty and the obligation of good faith (*bonne foi*). By remaining passive and not informing the employer of the appeal, the employee would have breached this obligation.

Accordingly, the dismissal was unfair, and the employee was awarded compensation. However, the Court also upheld the employer's counterclaim for fault on the part of the employee, and the Court awarded the employer in return an amount equivalent to half

the damages awarded to the employee, including the amounts that the employer had to reimburse to the State as unemployment benefit.

2.3 Changes to the employment contract

Cour Supérieure de Justice, No. CAL-2022-00227, 23 February 2023

As an exception to ordinary contract law, the Labour Code allows an employer to unilaterally modify an employment contract, subject to compliance with a certain procedure, which requires notice and reasons to be given. In the present case, an employee had been declared unfit by the occupational physician to carry heavy loads. Until then, he had worked close to his workplace, which he could reach on foot. The employer decided to transfer him to a workplace 38 kilometres away, requiring him to travel half an hour by car.

The employee contested the validity of this decision.

The first question was whether this constituted a substantial change to the contract. The contract did not stipulate any flexibility as to the workplace. The judges deduced that the parties attached particular importance to the location of the workplace. A change from a location very close to the employee's home to a remote location was therefore a substantial change that the employer could only impose on the basis of sufficient grounds.

In a second stage, however, the judges ruled that the employer had just grounds for taking this decision, since at the initial workplace, there was no position corresponding to the employee's residual capacities. The employee's claims were therefore dismissed.

2.4 Modification of the employment contract - delegates

Cour Supérieure de Justice, No. CAL-2021-00890, 16 March 2023

Staff representatives benefit from specific protection against changes to their contract; unlike ordinary employees, the employer cannot impose a unilateral change on them (Article L. 415-10 (1) of the Labour Code).

However, it was decided that if the contract stipulates flexibility in favour of the employer on certain contractual conditions, this prohibition does not apply. In the present case, the employee delegate accepted a possible change from the outset and could not object to it.

It was agreed that the employee could be assigned to other tasks. The Court confirmed the validity of this clause, which allows reassignment within the limits of the delegate's abilities and skills. After analysing the previous and new positions, the Court concluded that there had been no unjustified downgrading of the employee's responsibilities and dismissed the claim.

2.5 Social selection during redundancies

Cour Supérieure de Justice, No. CAL-2019-00956, 05 January 2023

In the case of individual redundancies, the employer must give sufficient and precise reasons for job cuts. However, case law has consistently confirmed that the employer is not required to justify the social selection (*selection sociale)*. In other words, unless the employee can demonstrate abuse, once the employer has documented the economic reasons, it is free to choose the employees affected by the reduction in the workforce without having to explain its choice.

However, a recent decision held that an economic justification that fails to specify the reasons why the dismissed employee's job is being eliminated rather than that of another employee is not sufficiently precise.

This ruling, which is not yet certain whether it is an isolated case or the beginning of a reversal of case law, therefore requires the employer to justify the social selection when dismissing employees.

2.6 Leave requests

Cour Supérieure de Justice, No. CAL-2019-00804, 12 January 2023

According to the Labour Code, the choice of leave dates is, in principle, up to the employee, and it is the employer's responsibility to refuse the request on valid grounds (business needs, competing requests from other employees, etc.).

In principle, case law considers that the employee must wait for the employer's agreement before being able to take time off, although this does not seem to be entirely in line with the law.

However, a recent decision qualifies this approach in cases where there is no formal procedure for validating requests for leave. An employee who requests leave and is absent without the employer's approval is not unjustifiably absent and is not at fault. In other words, if the employer does not actively intervene to refuse the request, the employee is entitled to leave on the date requested without having to wait for the employer to return the request.

2.7 Time limit for invoking serious grounds

Cour de Cassation, No. CAS-2022-00063, 09 February 2023

Under the French Labour Code, an employee or employer wishing to terminate an employment contract with immediate effect because of misconduct on the part of the other party may only invoke this misconduct in the month in which he or she became aware of it.

In case of misconduct that extends over a period of time, the question arises as to whether the date of becoming aware of the misconduct occurred at the beginning or only at the end.

A recent ruling by the Court of Cassation was particularly harsh on the employer; the decision had set the start of the one-month period for invoking facts or misconduct likely to justify dismissal with immediate effect on the last day of the employee's unjustified absence. The Court accepted that the period began on the date on which the employer became aware of the facts.

Cour Supérieure de Justice, No. CAL-2020-00856, 26 January 2023

The same problem arose for the Court of Appeal in a case in which the employer had not paid the salary for several months before the employee resigned. The employee had therefore known for a long time that his employer was at fault, but nevertheless remained in his service. Could he still validly resign with immediate effect after several months?

The Court held that this was the case and did not raise the issue of the one-month time limit being time-barred, despite the fact that the employer had explicitly invoked it.

2.8 Indexation and annual salary increases

Cour Supérieure de Justice, No. CAL-2021-00063, 26 January 2023

In Luxembourg, salaries are subject to a mechanism for automatic adjustment to the cost of living by reference to an official index. Particularly in periods of high inflation, several successive deadlines require employers to adjust salaries at short intervals, leading them to consider systems to avoid these increases.

This ruling confirms that this system is a matter of public policy. The employee cannot waive it in a contractual clause.

Nevertheless, in accordance with the principle of favourability (*principe de faveur* – possibility to derogate from the law if it is more favourable for the employee), a contractual clause that provides an advantage of the same nature to the employee, i.e. a remuneration system that compensates for the increase in the cost of living, is valid.

The question arises whether the parties can agree that salary increases, such as annual increments, should already contain and include future index adjustments.

The Court of Appeal did not rule it out completely in its decision, but did set out certain requirements. It must be clearly stipulated that the increase is made in anticipation of future indexation; the intention of the parties must therefore be to adapt the salary to the index. This was not the case here, as the salary increase was in fact given in consideration of the quality of the work.

Furthermore, this clause should be contained in the written employment contract and not in unilateral documents, such as the letter accompanying the pay rise.

2.9 Tacit resignation

Cour Supérieure de Justice, No. CAL-2021-00705, 16 March 2023

Although employees are in principle required to resign in writing, case law accepts the validity of oral or even tacit resignations (*demission orale ou tacite)* if it is certain that the employee has expressed a clear, unequivocal and unvitiated desire to terminate the contract.

The Court has recognised that an employee concluding a full-time employment contract with another company is tantamount to tacit resignation.

Since the employee had signed this contract before being dismissed by his former employer, the resignation preceded the dismissal. Consequently, the dismissal could no longer have any effect, so the employee's claims for compensation were rejected.

2.10 Warnings and dismissal

Cour Supérieure de Justice, No. CAL-2022-00410, 16 March 2023

It is settled case law that by virtue of the '*non bis in idem'* principle, a warning exhausts the employer's power to impose sanctions, which means that the employer can no longer impose other sanctions for the same acts.

According to established case law, however, this does not prevent the employer from imposing a sanction (such as dismissal) on the basis of new facts, while also invoking the facts that previously gave rise to a warning.

However, the specific feature of this case was that the employer had issued a warning (because of insults and inappropriate language) and that new events occurred within a short space of time. The employer dismissed the employee before he received the warning.

The Court ruled that in this case, the dismissal was not justified. The very essence of a warning is to make the employee aware that his/her behaviour is not accepted, that he/she is invited to improve his/her conduct and that the employer reserves all rights with regard to the employee, including the right to resort to more radical measures, such as termination of the employment contract, in the event of further misconduct.

If an employer dismisses an employee on the basis of new facts that occurred after a warning had been issued, but the warning had not yet been received by the employee, the latter had no chance of correcting his behaviour, so that the new facts do not necessarily constitute gross misconduct.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Having analysed the decision, it does not seem to have major implications in Luxembourg. There are no specific night shift rules for firefighters in the public sector.

The answer to the second question is so broad and general that an impact assessment is not possible.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Under Maltese law, many public sector employees are subject both to the employment laws applicable to private sector employees and to collective agreements. As a general rule, collective agreements are applicable to most workers such as medical care workers (doctors, nurses, carers and so on), armed forces and police forces. Hence, one would need to examine whether such collective agreements are aligned with this ruling of the CJEU.

In Malta, such collective agreements are not publicly available and are, as a general rule, not attainable by the general public, mainly because the unions would want to keep such information confidential.

It is, however, to be expected that public sector employees are entitled to better conditions than the minimum established in law and, as such, are in a position that would, as a minimum, be better than the one obtained under employment law at the national level.

Any difference in treatment in collective agreements (if identified and if it exists) would undoubtedly not be discriminatory but would rather be based on some objective criteria, which would make such a difference perfectly lawful, reasonable, proportionate and objective and, as such, would be quite unrealistic to believe that any collective agreement would allow any difference in treatment which would, in essence, be discriminatory and illegal.

4 Other Relevant Information

4.1 Working conditions of third-country nationals

The fact that there are many third-country nationals who work under appalling conditions (see e.g. here for further information, and based on practical experience), and the fact that the Maltese economy depends to a very large extent on low-skilled, low-income foreign workers, which lends itself to more abuse (see here for an article published in July but which ties very aptly to this issue).

The Maltese are no longer working in low-skilled jobs and are moving to office-based (as it were) employment in financial services and public administration (see here).

The Maltese economic model depends on workers who are imported from abroad – with most workers being third-country nationals. The Finance Minister has urged to change the economic model.

The most alarming of these trends is that Malta's low-skilled workers are facing a race to the bottom in terms of working conditions, with some of them being treated very badly (as reported in previous reports). This is seen daily and experienced daily. This economic model is wrong because it only works because it offers the lowest conditions possible (and sometimes even in violation of employment law) to workers.

Netherlands

Summary

(I) The new Pension Act has been adopted.

(II) Dutch courts interpret the Rome I Regulation, Directive 2001/23/EC and Directive 2003/88/EC.

(III) The Minister for Poverty Policy, Participation and Pensions has announced additional steps to improve the so-called 'Job Agreement' for people with an occupational disability and shared her vision on the bill 'Participation Act in Balance'. Employers and employees need to provide their vision on the reintegration path of a sick employee. New developments on cross-border teleworking have been introduced. Non-competition clauses will be reformed. The STAP education budget has been modified.

1 National Legislation

1.1 Pension Act

The new Pension Act (*Wet toekomst pensioenen*) has been adopted. The law will take effect on 01 July 2023. On that date, a transition phase of several years will be initiated during which employers and employees will have to make agreements about adjusting their pension schemes, which will then be implemented by their pension administrators. The new Pension Act has three goals:

- a supplementary pension that accrues faster;
- a more personal and clearer pension accrual; and
- a pension system that is more in line with people who are no longer working for the same employer for 40 years.

As in the current system, employers and employees will pay contributions, pension administrators will invest the contributions made and pay out the pension benefits. Pension will still be accrued jointly and financial risks will still be shared. Despite these unchanged elements, the adoption of the new Pension Act entails a huge reform of the Dutch pension system. There are two major changes.

First, defined benefit agreements will no longer be the leading type of pension agreement, with defined contribution agreements replacing them. Employees will receive less guarantees about their level of pension, eliminating the need to cut pensions, if necessary, as an ultimate measure. Instead of receiving a fixed amount of pension, a participant's pension will consist of all contributions paid on their behalf, plus investment returns. Participants will receive estimates on the level of their expected pension to plan their finances.

Second, contributions paid by employees at any age and the investment result thereof will be added to employees' pensions. In the current system, all employees pay the same amount or percentage of contribution and received the same amount of pension accrual in return. This means that there is an implicit subsidy from young employees to older ones, as contributions for young employees can be invested for a longer time and at higher risk, thus yielding higher returns than contributions for older employees. Young employees therefore receive too little accrual in return for their contributions, with older employees receiving too much (subsidised by the young). A different job, a change to self-employed work or unemployment at the end of the career has additional consequences, as this 'subsidy' is missing later in life. This will change in the new system, in accordance with the third goal of the legislation as mentioned above.

As the adoption of the new Pension Act is in fact a starting point for an extensive transition process, updates on future developments will be provided frequently.

2 Court Rulings

2.1 Annual leave

Supreme Court, ECLI:NL:HR:2023:816, 09 June 2023

This case concerned a dispute between NS, the largest train company in the Netherlands, and a number of employees. On the basis of a 2016 collective agreement, NS had granted employees a non-statutory period of annual leave. Moreover, employees were granted an irregularity allowance for their statutory period of annual leave with retroactive effect to 2012. According to the collective agreement, NS did not have to pay an irregularity allowance for the non-statutory period of annual leave, but some employees disagreed. Moreover, employees also claimed pay and the irregularity allowance for the non-statutory hours they had used to reduce the work week (*werktijdverkorting*).

The Supreme Court ruled in favour of the employees. According to the Supreme Court, an entitlement to time off falls under the term 'annual leave' if, at the time it is granted, it is for the purpose of recuperation and relaxation. If entitlement to time off was granted for this purpose, the nature of this entitlement does not change if the employee later uses the hours for other purposes. The moment of awarding the leave is decisive. Moreover, the obligation to continue paying full wages applies to both statutory and non-statutory periods of annual leave. This also applies to an irregularity allowance, because it is part of the salary on the basis of Article 7:639 Dutch Civil Code.

The outcome of this case is the result of Article 7:634 Dutch Civil Code, which does not distinguish between the payment of wages during periods of statutory annual leave (which corresponds with Article 7 Directive 2003/88/EC) and periods of non-statutory annual leave (which have a purely national character), and which does not allow for deviations to the detriment of the employee.

2.2 Annual leave

Supreme Court, ECLI:NL:HR:2023:955, 23 June 2023

In the present case, the Supreme Court applied the criteria deriving from the *Max Planck* and *LB* cases. Is an employer required to pay out periods of statutory and non-statutory annual leave that were accrued but not taken by an employee during his/her employment? The Court of Appeal had answered this question in the affirmative as regards the period of statutory annual leave (which corresponds with Article 7 Directive 2003/88/EC). In the Court of Appeal's opinion, the employee's entitlement to these days of annual leave had not lapsed after the period of five years as follows from Article 7:642 Dutch Civil Code, because the employer had not put forward sufficient facts and circumstances from which it could be concluded that he had complied with the duty of care and information towards the employee, which, pursuant to the *Max Planck* judgment, rests on him as the employer.

The Supreme Court pointed to the *LB* case, in which the CJEU held that Article 7 Directive 2003/88/EC and Article 31(2) of the EU Charter of Fundamental Rights must be interpreted as precluding national legislation under which a worker's entitlement to paid annual leave acquired over a reference period lapses at the end of a three-year period beginning at the end of the year in which that entitlement arose, if the employer has not actually put the worker in a position to exercise that entitlement. There can be no reasonable doubt that the same applies to a five-year limitation period. The Court of Appeal was therefore right to disapply Article 7:642 Dutch Civil Code.

The Supreme Court's interpretation *Max Planck* and *LB* seems correct. It should be noted that, different from the judgment under 2.1 above, this judgment only concerned periods of statutory annual leave and not also periods of non-statutory annual leave. Unlike Article 7:634 Dutch Civil Code (see under 2.1), Article 7:642 Dutch Civil Code leaves room for making such a distinction.

2.3 Private international law: interpretation of Rome I Regulation

Supreme Court, ECLI:NL:HR:2023:969, 23 June 2023

This case concerned the application of the *Gruber Logistics* case to a dispute between Presta, a temporary work agency based in Luxembourg, and VLEP, a Dutch sectorial pension fund within the meaning of the Compulsory Participation in a Sectoral Pension Fund Act 2000 ('Wet Bpf 2000'). On the basis of a Mandatory Decree of the Minister of Social Affairs and Employment (see *Staatscourant* 2009, 65 (not available online), and *Staatscourant* 2013, 15217), participation in VLEP is mandatory for companies that fall under the scope of the Mandatory Decree. Between 2012 and 2017, Presta posted workers to Dutch companies in the fresh meat and meat processing industry. Therefore, with regard to these employees, Presta fell under the scope of the Mandatory Decree.

The Court of Appeal had held that the employment contracts contained a choice for Luxembourg law and that Dutch law would apply if the parties had not made a choice of law on the basis of Article 8 Rome I Regulation. Therefore, in the Court of Appeal's opinion, the employees could not lose protection of mandatory rules of Dutch law, including the Wet Bpf 2000 and the Mandatory Decree. In cassation, the Supreme Court ruled that the Court of Appeal failed to examine whether the level of protection provided by these (Dutch) rules is higher than that of the (Luxembourg) law chosen by the parties, which is mandatory on the basis of the *Gruber Logistics* case. This examination is therefore to be performed by a (different) Court of Appeal.

Though the interpretation by the Supreme Court of *Gruber Logistics* seems correct, it is unsure whether the Wet Bpf 2000 and the Mandatory Decree can be regarded as law that is applicable to 'an individual employment contract' within the meaning of Article 8 Rome I Regulation. The applicability of Article 8 Rome I Regulation was not, however, part of the dispute between the parties and seems to be based on a (potentially wrongful) assumption.

2.4 Transfer of undertaking

District Court Zeeland West-Brabant, ECLI:NL:RBZWB:2023:3815, 25 April 2023 (published 07 June 2023)

This case concerned the interpretation of Directive 2001/23/EC. The employee joined Company A, a care farm with resident clients and clients with intellectual and/or mental disabilities, on 01 November 2021 for an indefinite period as a personal support worker. On 12 May 2022, a purchase agreement was concluded between an employee of Company A and Company B, whereby the material and immaterial assets (including land and buildings) of Company A were taken over by the employee's company (hereafter: 'employer'). The employee became incapacitated for work on 31 May 2022 due to long-COVID. With effect from 07 September 2022, the employer started operating the care farm under a new name. The resident's clients remained. In addition, 11 out-of-town clients continued their day care activities and the animals remained on the farm, as well as various movable property. Besides the employee, six other employees had been employed by Company A. These six employees were taken over by the employer with effect from 07 September 2022. The employee remained employed by Company A, which also paid her salary until October 2022. Thereafter, the employee no longer received a salary, as Company A's insurance did not cover the employee's salary because it ceased to exist. The employee worked for the employer during September

and October 2022 for the purpose of reintegration. The employee claimed that a transfer of undertaking had taken place as of 07 September 2022. On the basis of the circumstances above and in line with the CJEU's standing case law, the District Court found that a transfer of undertaking had indeed taken place. The employer therefore has to pay the wages applicable under the employment contract with effect from 01 November 2022 and must continue to employ the employee.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

Firefighters in the Netherlands generally fall under the scope of the Working Time Act and the Working Time Decree. After C-397/01 to C-403/01, *Pfeiffer and others*, Article 2:6 Working Time Act was invalidated for the Working Time Directive and also applies to the activities of the state fire brigade in so far as they carry out the normal task of a fire brigade. Only in case of special events of such gravity and magnitude that the general interest of protecting public order and safety and public health must temporarily take precedence over the interest of protecting the health and safety of firefighters (such as natural disasters, technological catastrophes, attacks, major accidents, etc.), an exception may be made. This is in line with the judgment of 04 May 2023.

Moreover, firefighters are subject to a collective agreement, which currently is the CAO Veiligheidsregio's.

In general, night shifts under the Working Time Act are defined as a shift within which more than one hour is worked in the period between 24:00 and 06:00 hours (Art 1:7(1)(d) Working Time Act). A maximum of 10 hours per night shift has been set (Art 5:8(1) Working Time Act). More specifically, the general rules in the collective agreement determine that the normal working time is organised between 7:00-24:00 hours, which is more favourable than the statutory provision (Art. 4:2 CAO Veiligheidsregio's). Out-of-day working hours, i.e. those hours falling outside the period of normal working time, are compensated as follows (Art. 3:12 CAO Veiligheidsregio's):

- 50 per cent of the official's hourly rate of pay for hours worked outside the day window between Monday 00:00 and Friday 24:00;
- 75 per cent of the official's hourly wage for hours worked on Saturday;
- 100 per cent of the official's hourly wage for hours worked on Sundays and public holidays mentioned in Art. 4:5(3).

An official holding a position with a job grade 11 or higher shall not be entitled to such an allowance.

The general rules laid down in Art. 4:1 to 4:7 CAO Veiligheidsregio's do not apply to firefighters in duty rosters (*brandweerpersoneel in dienstroosters*), (Art. 4:8). Moreover, firefighters in duty rosters are not entitled to an allowance for irregular service (Art. 3:11 CAO Veiligheidsregio's) and overtime compensation (Art. 3:18 CAO Veiligheidsregio's). For them, the local rules apply as they were applicable on 31 December 2015. No information is available on these local rules following which no specific examples can be provided. It is expected that these local rules provide for specific night work provisions determining the period during which work is to be considered night work, a maximum number of hours that may be spent in night work, and the level of compensation paid for working during the night.

4 Other Relevant Information

4.1 The job agreement

The Minister for Poverty Policy, Participation and Pensions, Carola Schouten, has announced additional steps to improve the so-called 'Job Agreement' (*Banenafspraak*), a social agreement to enhance job opportunities for people with an occupational disability. As agreed in the social agreement in 2013, companies and the government must have created 125 000 extra jobs for these people by 2026.

In recent years, many steps have been taken to create extra jobs for people with an occupational disability, with many employers having jointly created 72 809 additional jobs by the end of 2021. However, according to Minister Schouten, points of improvement are necessary to achieve the target goal in 2026. In a letter to the House of Representatives, the Minister points out five concrete steps towards improvement. The Minister wants to:

- Broaden the target group that falls under the scope of the social agreement;
- Strengthen the commitment for people who do not belong to the target group—despite broadening the target group—but who (temporarily) do need support to get started;
- Further explore wage cost subsidies in the Wajong (a benefit for young disabled persons) and in the WIA (a benefit for those who are permanently or partially unable to work due to invalidity or illness);
- Submit the simplified job agreement bill. The bill introduces a quota: if employers fail to create sufficient jobs annually for people with an occupational disability, they will be required to open a minimum number of positions. The goal of this bill is to simplify the rules for the job agreement (*Banenafspraak*);
- Make an extra effort to identify people who are covered by the job agreement but who are not yet working.

4.2 The Minister's vision for a new Participation Act

In a letter to the House of Representatives, the Minister for Poverty Policy, Participation and Pensions, Carola Schouten, shared her vision on the bill 'Participation Act in Balance' (*Participatiewet in Balans*) that is now open for internet consultation. The starting point of this bill—with a view to the right to social assistance—is to focus on people, to increase legal certainty for welfare recipients and to give professionals sufficient discretion when deciding on social assistance applications.

In a letter, the Minister explained her line of thinking, ambition and vision for a new Participation Act on the basis of the following principles:

- *A realistic view on humanity (mensbeeld) in the Participation Act*:

  The current Participation Act is largely based on humans as 'uniform' rational beings. Research has shown that assumptions in the law do not always match people's behaviour and ability to act. Therefore, the Participation Act must be reviewed from the perspective of people and implementation: what do we ask of people, to what extent is this understandable and feasible for professionals, and how can differences between people and the situation in which they find themselves be taken into account?

- *Strengthening and support of intrinsic motivation*:

  The Minister wants to switch to a policy that focusses on intrinsic motivation of people instead of emphasising the extrinsic motivation of the law or its

implementation. She specifically wants to look at how to strengthen spontaneous (and intrinsic) compliance, how rule violations can be prevented and if it does happen, to see how it is handled depending on someone's situation.

- *An appropriate perspective on participation*:

  Furthermore, the Minister calls for a different interpretation of the principles and objectives of the Participation Act. Therefore, additional indicators must be developed that show how the amended law achieves its goals, for example in terms of simplicity, human dimension and trust.

- *An adequate social minimum*:

  An important pillar of the current Participation Act is a guarantee income at the level of the statutory social minimum. This income (together with any supplementary allowances) must be sufficient for people to provide for necessary subsistence costs and to fully participate in society. At the same time, the social assistance benefit cannot be too high in order to guarantee solidarity within the system. The Minister has asked an independent committee to investigate what different household types need to make ends meet and to be able to participate in society.

- *An effective but also predictable and understandable safety net*:

  The current safety net has established with a view to complementarity. This means that a social assistance benefit supplements income up to the social minimum and any form of other income is therefore deducted from the benefit. Even though this might sound logical, in practice it leads to complexity in the settlement of income (when working in addition to receiving the benefit), since the law does not define or demarcate what the concept of income entails. The Minister wants to therefore develop a description of complementarity and, following that, determine options for translating this into new legislation.

In coming months, the Minister will develop this vision in a programme that will examine policy theories.

4.3 Employers and employees required to record their vision of a reintegration path

The reintegration of workers who have been on sick leave is considered crucial. Therefore, as of 01 July 2023, both the employer and employees must record their (short- and long-term) views on reintegration agreements when drawing up and adjusting the joint action plan and during the first-year evaluation. The employer and employees can adjust their views regularly, if necessary.

The new regulation codifies already existing practice and is intended to promote dialogue between the employer and the employee on the employee's reintegration. It is expected that this will contribute to a successful reintegration trajectory. The obligation to add the visions of the reintegration path will apply to documents drafted after 01 July 2023.

4.4 New developments on cross-border teleworking

From 01 July 2023, the rules in Regulation (EC) No. 883/2004 will be regularly applied again. To facilitate working from home in a Member State that is not the Member State in which the worker habitually works, a multilateral framework agreement has been concluded, which has been signed by the Minister of Social Affairs and Employment. At present, preparations are underway to be able to manage online requests based on

Article 16 Regulation (EC) No. 883/2004 for cross-border teleworking. It is expected that given the short implementation period, the Social Insurance Bank (*Sociale Verzekeringsbank*) will be able to start fully assessing requests as of 01 January 2024. Moreover, the government is committed to concluding bilateral tax treaties with neighbouring Member States aimed at preventing the burden of double taxation because of working in two Member States for workers who make use of cross-border teleworking.

4.5 Reforming non-competition clauses

The aim is to prevent the unnecessary use of non-competition clauses (*non-concurrentiebedingen*) to not unreasonably inhibit labour mobility. The Minister of Social Affairs and Employment will prepare a bill to modernise non-competition clauses, proposing the following changes:

- Limiting the duration of non-competition clauses;
- Requiring the definition, specification and justification of the geographical scope of non-competition clauses;
- In permanent employment contracts, non-competition clauses will have to justify 'the serious business interest' (this is already the case for fixed-term employment contracts);
- If the clause is invoked by the employer, he/she will in principle have to pay the employee compensation, set at a percentage of the employee's last-earned salary determined by a statutory provision.

4.6 STAP-budget

The Dutch government has decided that no resources will be released for the STAP budget (budget for training – STimulans Arbeidsmarkt Positie: Incentive for improvement of labour market position) as of 2024. This decision has been made for budgetary reasons. Until 2024, the government will use the remaining STAP budget in a different way. From September, the STAP budget will be made available more specifically for training courses for the labour market. The government is now investigating how this can be properly implemented. One of the measures being considered is making only programmes recognised by the Ministry of Education, Culture and Science eligible for the STAP budget.

Norway

Summary

(I) Definitions of harassment and sexual harassment have been included in the Working Environment Act of 2005.

(II) Some changes have been made to the regulations on posted workers.

(III) Some changes have been made to the Public Procurement Act.

(IV) The government has interfered and decided that an industrial conflict concerning the air ambulance service shall be resolved by compulsory arbitration.

1 National Legislation

1.1 Definition of harassment and sexual harassment

Changes have been made to the Working Environment Act of 2005 (WEA) to include definitions of harassment and sexual harassment in the Act's regulation on harassment (LOV-2023-06-16-37). The new definitions correspond to those already contained in the Equality and Anti-Discrimination Act of 2017. Furthermore, changes in the WEA have been made to clarify the tasks of the safety representatives concerning the psychosocial work environment. The changes are done to fulfil the obligations under ILO Convention No. 190 concerning the elimination of violence and harassment in the world of work (2019), which was ratified simultaneously. The new legislation will enter into force 01 January 2024 (FOR-2023-06-16-943).

1.2 Changes in the regulations on posted workers

Changes have been made to the regulations on posted workers (FOR-2005-12-16-1566), cf. Directive (EU) 2020/1057. The new regulation concern, among others, the regulation on the posting of workers in the transport sector, a provision granting posted workers the right to bring a lawsuit in Norway to claim the working and wage conditions they are entitled to according to the regulation on posted workers, and a prohibition on retaliation against posted workers who take legal or administrative steps to claim their rights. The new regulation can be found here.

1.3 Changes in the Public Procurement Act

The Public Procurement Act (LOV-2016-06-17-73) contains provisions that grant the Ministry authority to impose certain requirements on state, county and municipal authorities, as well as public legal entities in their procurement activities. Among others, the Ministry can impose requirements on limitations to the number of tiers in the supply chain to the execution of public contracts in industries facing particular challenges related to labour market crime. The Ministry can also impose the same obligations on these public contracting authorities to include clauses in service and construction contracts that ensure wages and working conditions are not inferior to those set out in applicable regulations on universally binding collective agreements or nationwide collective agreement for the relevant industries. Changes have been made to the Public Procurement Act, expanding the regulatory powers so that the Ministry can introduce new measures aimed at fighting labour market crime and social dumping through the public procurement regulation. The new regulation is available here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The Working Environment Act contains regulations on working time in Chapter 10 and implements Directive 2003/38/EC. Firefighters are employed at the municipal level in Norway. The Working Environment Act's regulation on working time applies in both the private and public sectors, and no specific night work legislation applies to firefighters. According to the Working Environment Act Section 10-11, the main rule is that work between 9.00 p.m. and 6.00 a.m. is considered night time work. Other working time regimes can be agreed upon in collective agreements (on certain levels), and such an agreement is entered into by the fire and rescue service. The agreement is available here.

Consequently, the national regulation on night time work differs significantly from the present case. The judgments do not seem to have clear implications for Norwegian law.

4 Other Relevant Information

4.1 Government interference in industrial conflicts

In March, the government decided to intervene with compulsory arbitration in a dispute over the revision of a collective agreement involving the air ambulance service. A limited strike had been initiated on 05 March 2023 and gradually increased. The government's decision to interfere was based on the assessment by the Norwegian Health Inspection Authority that there was a danger to life or health. The Minister of Labour informed the parties about the decision on 19 March 2023, and the union called off the strike. Parliament enacted the necessary law on compulsory arbitration in the conflict (LOV-2023-06-09-23) in June, available here.

Poland

Summary

There is no longer a state of epidemiological threat on the territory of Poland from 01 July 2023, which means that a suspension of many employment obligations are ending.

1 National Legislation

1.1 End of state of epidemiological threat

According to the Ministry of Health Regulation (*Rozporzadzenie Ministra Zdrowia z 14 czerwca 2023 r. w sprawie odwolania na obszarze Rzeczpospolitej Polskiej stanu zagrozenia epidemicznego*; the full text of the regulation is found here), the state of epidemiological threat ends on 30 June 2023. The following are the implications:

- An employer will have 180 days from the end of the threat to refer employees for periodic examinations;
- An employer will have 60 days to refer employees for periodic OHS training;
- All documents that are not delivered by post within the period of threat will be considered to have been delivered after 14 days from the end of the state;

  Also, from that time onwards, all non-delivered documents will be considered to have been delivered in accordance with the regulations that applied before the state of threat;
- From the end of the threat, an employer will no longer be permitted to suspend a social fund, or deduct it from the employee's pay or leave allowance.

  During the period of threat, an employer could suspend a company's social benefits fund and all deductions to contribute to such funds because of a decline in turnover or major increase in burdens on a fund;
- During the period of threat, either party to a non-competition agreement could terminate the agreement upon termination of employment (or service/agency contract) by giving 7 days' notice.

  That will no longer be possible after the state of threat ends;
- An employer will no longer be permitted to reduce severance pay or compensation paid to an employee due to a decrease in turnover.

  During the threat, severance pay or different forms of compensation associated with the termination of a contract cannot exceed 10 times the minimum wage (monthly rate) if there was a decrease in turnover or major increase in burdens on a fund, or both. The maximum severance pay will be set at 15 times the minimum wage (monthly rate);
- An employer will no longer have an unfettered right in law to send an employee on compulsory unused annual leave of up to 30 days without the obligation to comply with a leave plan;
- All residence and work permits, which expired during the threat, will remain valid only for another month, which means that employees should file for up-to-date documents before 31 July;
- Certificates of disability, which expired during the period of threat, will remain valid depending on the date of issuance. Certificates that were to:

a) expire before/on 31 December 2020, will remain valid until 31 December 2023,

b) expire between 01 January 2021 and 31 December 2021, will remain valid until 31 March 2024

c) expire between 01 January 2022 and 05 August 2023, will remain valid until 30 September 2024;

unless another certificate is issued sooner.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

According to Article 151^7 of the Labour Code, a night time shift covering 8 hours from 9 p.m. to 7 a.m. should be specified in a collective agreement or in the work rules. An employer who is not required to introduce work regulations (*regulamin pracy*) should inform an employee of night time working hours in writing.

To adapt the Polish legislation to the standards applicable in the European Union, on 01 January 2004, the Labour Code introduced a concept of night worker, which is a worker whose working time schedule provides for at least 3 hours of work at night every day or at least 1/4 of whose working time during a reference period is performed at night time.

The working time of a night worker may not exceed 8 hours per day if he/she performs work which is particularly hazardous or involves physically or mentally demanding work.

A list of particularly hazardous work or physically or mentally demanding work shall be established by the employer in agreement with the company trade union organisation. If there is no trade union organisation at the employer's establishment, such a list is established by the employer together with the workers' representatives elected in a procedure adopted by the employer concerned and after consultation with a doctor providing medical care to the workers, taking into account necessity to ensure the safety and protection of workers' health at work.

This restriction does not concern cases when a rescue operation is necessary to save human life or health, to protect property or the environment, or to recover from a breakdown. This exception also covers firefighters. It is very narrow, and therefore, in most cases, the application of this provision will be in line with the CJEU's ruling. Nevertheless, Polish law could be interpreted as regular activities with the objective of 'fighting fire or providing help in another way', although these activities 'are carried out under normal circumstances', are nonetheless covered by the exception.

The employee is entitled to an allowance amounting to at least 20 per cent of the hourly rate based on the minimum remuneration, per every hour of work during night time. The company's remuneration rules may provide for a higher allowance.

The additional remuneration for night work of employees who perform such work permanently outside the establishment may be replaced by a flat rate payment. The amount of the flat rate payment should correspond to the expected number of working hours during night time.

However, it should be kept in mind that the legislature introduced prohibitions and restrictions to night work for certain groups of employees. It is absolutely prohibited to employ pregnant women (Article 178 § 1 of the Labour Code) and youth in night work (Article 203 § 1 of the Labour Code). Therefore, an employee who employs a worker during night time must change her working time schedule during pregnancy so that she can perform work during day time, and if this is impossible or impracticable, the employer must transfer the employee to a different post which does not have to be performed at night. Otherwise, the employer must grant the employee a leave from work with pay for the given period.

Employees who have to care for their children or for the children of their spouses, as well as adopted children (Article 178 § 2 of the Labour Code) may only be employed during night time upon their written consent. This document should be stored in the employee's personal files.

4 Other Relevant Information

Nothing to report.

Portugal

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, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

This ruling concerns the interpretation of Articles 1(3) and 12 of Directive 2003/88/EC, of 04 November, concerning certain aspects of the organisation of working time, as well as of Article 2(2) of Directive 89/391/EEC of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work.

In the present case, the workers who had the status of civil servants and worked as firefighters, considered that their night work constitutes overtime in so far as it corresponds to the difference between the normal duration of night work applicable to them and the normal duration of night work applicable to workers in the private sector. In this case, overtime does not give rise to an increase in remuneration as provided for by the Bulgarian Labour Code (but only to an additional remuneration of BGN 0.25 per hour) and, therefore, the firefighters argued that the method of calculating the remuneration for night work provided for by the Law of the Ministry of the Interior, applicable to firefighters, is discriminatory and that they should be subject to the most favourable regime, namely the general regime.

After analysing the case, the CJEU ruled that Article 1(3) of Directive 2003/88/EC, read in conjunction with Article 2 of Council Directive 89/391/EEC of 12 June 1989 *"must be interpreted as meaning that Directive 2003/88/EC applies to public sector workers, such as firefighters, who are considered to be night workers, in so far as those workers carry out their activities under normal circumstances".* In addition, the CJEU also considered that

> *"Article 12 of Directive 2003/88/EC, read in the light of Article 20 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the normal length of night work fixed at seven hours in the legislation of a Member State for workers in the private sector from not applying to public sector workers, such as firefighters, if, in so far as the categories of workers concerned are in a comparable situation, that difference in treatment is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by that legislation, and it is proportionate to that aim".*

Under Portuguese law, the general rules envisaged in the Labour Code (approved by Law No. 7/2009, of 12 February, as subsequently amended, hereinafter PLC) state that night work is rendered over a period with a minimum duration of seven hours and a

maximum duration of 11 hours, between 00:00 and 05:00 hours (Article 223 (1) of PLC). The night work period may be determined by a collective bargaining agreement, provided that it complies with the abovementioned provision. In the absence thereof, night time lasts from 22:00 until 07:00 (Article 223 (2) of PLC).

According to Article 224 (1) of PLC, night workers are workers who provide at least 3 hours of normal night work daily or who perform work during the night period as part of their annual working time corresponding to 3 hours per day or otherwise defined by collective bargaining agreement. The two criteria for qualifying a night worker are alternative.

The legal framework applicable to civil servants envisages in Law No. 35/2014, of 20 June, as subsequently amended ('*Lei Geral do Trabalho em Funções Públicas*', hereinafter referred to as LGTFP), does not exclude firefighters from its scope of application. Under this Law, the working time provisions set forth in the PLC shall apply to public employment relationships, with the necessary adaptations and without prejudice to the rules explicitly envisaged in the LGTFP. There are no specific rules concerning the provision of night work for civil servants.

However, it should be noted that within private sector employment relationships regulated by the PLC, the normal period of work cannot, as a rule, exceed 8 hours per day and 40 hours per week (Article 203 (1) of PLC), while the LGTFP stipulates that the normal period of work applicable to public sector employment relationships corresponds to 7 hours per day and 35 hours per week, except in exceptional cases (Article 105 of LGTFP).

Furthermore, for instance according to the Statute of the Professional Firefighters of Local Administration (Decree Law No. 106/2002, of 13 April), the professional fire brigades are subject to the regime of duration and working hours of the public administration, with the possibility of carrying out 12 hours of continuous work. The service of the staff of professional fire brigades is permanent and mandatory, and employees must ensure the service when summoned by the competent authorities (Article 25 of the referred Decree Law No. 106/2002).

Considering the above, we may consider that, as a rule, firefighters are subject to the general labour rules (PLC or LGTFP). Nevertheless, they may be subject to particularities related to the nature of their professional activity. Considering the recent case law of the CJEU, a potential difference of treatment of these professionals in terms of the general duration of night work may be in accordance with EU law if it is based on an objective and reasonable criterion. This understanding of the CJEU seems to be relevant for interpreting the Portuguese rules on working time.

4 Other Relevant Information

Nothing to report.

Romania

Summary

(I) The maximum age of the child for which parents are entitled to sick child care leave has been modified.

(II) A proposed amendment to the special pension system for magistrates has been submitted for promulgation.

1 National Legislation

1.1. Sick child care leave

Law No. 179/2023, published in the Official Gazette No. 567 on 23 June 2023, amended Article 26(1) of Government Emergency Ordinance No. 158/2005 on sick leave and health insurance benefits, extending the age limit of the child for which employees are entitled to sick child care leave**.**

Previously, employees had the right to paid leave to care for a child up to the age of 7 years, whereas they now have the right to care for a child up to the age of 12 years.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

According to Article 125 of the Romanian Labour Code, work performed between the hours of 22:00 and 6:00 are considered night work. A night worker is: a) an employee who performs at least 3 hours of night work during his/her daily working time; b) an employee who performs night work for at least 30 per cent of his/her monthly working time.

The legislation does not differentiate between night workers in the private and in the public sector, such as firefighters. The normal duration of night work is also 8 hours, just like daytime work. For categories of staff (such as certain medical experts) for which the normal duration of working time is 7 hours per day, and the legal regime for overtime hours is the same as the general one.

Therefore, it is not assumed that the decision of the Court of Justice of the European Union will bring about changes in the practices of the Romanian courts.

4 Other Relevant Information

4.1 Reform of the magistrates' pension system

The National Recovery and Resilience Plan (NRRP) of Romania sets a limit of 9.4 per cent of gross domestic product for pensions and introduces measures to eliminate special pensions that are not based on contributions. Magistrates, who currently enjoy a lower retirement age and higher pensions than the contribution-based system, are

the main focus of these measures. A draft law has been adopted to eliminate special pensions for magistrates and raise the retirement age as part of the implementation of the NRRP. According to the draft law, the pension amount will not exceed the salary, and the retirement age will increase to 60 years. In response, magistrates have suspended their court activities despite legal restrictions on strikes outlined in Law No. 367/2022 on social dialogue, calling it a 'protest'.

As a compromise solution, the current draft law provides for a 5-year postponement of the new rules. Essentially, until 2028, magistrates will retire under the current provisions of the law. Judges and prosecutors can retire regardless of their age if they have 25 years of service and will receive a pension calculated at 80 per cent of their gross salary and allowances from the last month of their activity.

The draft law has been voted on in Parliament and has now been submitted for promulgation.

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, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The legislation of the Slovak Republic essentially corresponds to these requirements.

As regards firefighters, their civil service and legal relations related to the creation, changes and termination of civil service are regulated by Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps, as amended. This Act regulates the working hours in Articles 85 to 92. These provisions, however, do not regulate night work.

Night work is primarily regulated in the Labour Code (Act No. 311/2001 Coll. as amended), for private and public sector employees. According to Article 12 paragraph 6 of the Act, the Labour Code applies to the legal relations of members of the corps only if this Act expressly provides for it.

Article 193 of Act No. 315/2001 Coll. establishes which provisions of the Labour Code are appropriately applied to civil service relationships of members of the corps. As regards the legal regulation of working hours, the provisions of Articles 85 and 86, Articles 88 to 90, Article 95 and Articles 98 and 99 of the Labour Code shall apply (the Labour Code regulates working hours in Articles 85 to 99).

As far as night work is concerned, all night work-related provisions apply to these relationships. Among others, these are the provisions of Article 90 paragraphs 7 and 8 and Article 98 of the Labour Code.

Article 90 of the Labour Code regulates the beginning and end of working time. According to Article 90 paragraph 7, a night shift is a work shift the greater part of which falls within the time period between 22:00 hours and 06:00 hours. According to paragraph 8, unless the employer agrees otherwise in writing with the employee, the employer cannot schedule working hours so that the employee works night shifts for two consecutive weeks, except if the nature of the work or the conditions of operation do not allow to schedule working hours otherwise.

It should also be mentioned that Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps basically does not regulate health and safety at work. According to Article 193 of the Labour Code, the provisions of Articles 146 to 150 of the Labour Code on labour protection shall be applied to the civil service relationship of members of the corps.

According to Article 147 paragraph 1 of the Labour Code, the employer, within the scope of its competence, is required to consistently ensure the safety and health protection of

employees at work and for that purpose, take the necessary measures, including ensuring prevention, the necessary means and a suitable system for managing labour protection. The employer is required to improve the level of labour protection in all activities and adapt the level of labour protection to changing realities. Further obligations of the employer in the field of safety and health protection at work are regulated by a special act (paragraph 2).

According to Article 148 paragraph 1 of the Labour Code, employees have the right to safety and health protection at work, to information about the dangers arising from the work and work environment and about measures to protect against their effects. Employees are required to pursue their own safety and health at work and that of persons affected by their work. Further rights and obligations of employees in the field of safety and health protection at work are regulated by a special act (paragraph 2).

The special act which both cited provisions mention is Act No. 124/2006 Coll. on safety and health protection at work, as amended. This Act stipulates the general principles of prevention and basic conditions for ensuring health and safety at work, and for preventing risks and factors causing occupational accidents, occupational diseases and other health damages from work (Article 1 of the Act). According to Article 2 paragraph 1 of the Act, this Act applies to employers and employees in all sectors of the production sphere and non-production sphere.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The Constitutional Court has decided that judges' salaries are too low.

(II) Several annexes or amendments to the existing sectoral collective agreements have been concluded which adjust the amount of minimum basic pay and some other work-related payments (for example annual leave allowance).

(III) Trade unions and employers' organisations are complaining that the government is violating the rules on social dialogue.

(IV) The Proposal of Amendments to the Employment Relationships Act has been published.

1 National Legislation

1.1 Employment of Foreign Nationals

The Order determining the occupations in which the employment of foreigners is not linked to the labour market was extended until 31 December 2023 (*'Odredba o spremembi Odredbe o določitvi poklicev, v katerih zaposlitev tujca ni vezana na trg dela'*, Official Journal of the Republic of Slovenia (OJ RS) No. 67/23, p. 6108). The list of such occupations has remained the same and was last amended in December 2022 (adding medical doctors and specialists in general medicine to this list). See also December 2022, June 2022 and December 2020 Flash Reports.

1.2 Fixed-term employment in the education sector

Amendments to the Organisation and Financing of Education Act (*'Zakon o spremembah in dopolnitvah Zakona o organizaciji in financiranju vzgoje in izobraževanja* (ZOFVI-P)', OJ No 71/23, 30 June 2023, p. 4269-6250) increase the possibilities for concluding a fixed-term contract with a teacher in primary and secondary schools in cases when no candidates applied for the job who meet the prescribed requirements (amendments to Article 109 of the ZOFVI, consolidated text of the Act can be found here).

2 Court Rulings

2.1 Remuneration of judges

The decision of the Constitutional Court of the Republic of Slovenia (No U-I-772/21, 01 June 2023, published in OJ RS No 72/23, 03 July 2023, p. 6387-6406) concerns the remuneration of judges.

The Constitutional Court decided that judges' salaries are too low, and as a result, the constitutional principle of judicial independence and the principle of separation of powers are being violated.

The Constitutional Court emphasised that salaries must be high enough to meet personal needs or the needs of their families, and that the demand for salary increases refers to the dignity of the profession. Judges' salaries must correspond to the role of judges and their responsibilities, whereby it must be taken into account that the judicial service requires strict restrictions on the provision of additional earnings. The Constitutional Court also emphasised the importance of the stability of the judges' salaries and the need of regular adjustments; since they have significantly lost their real

value in the last decade, this principle was not respected. The rise in judges' salaries lags behind the growth of the average salary in the country.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The case is of no particular relevance for Slovenian law. In Slovenia, general labour law rules on working time and night work also apply in the public sector and to the firefighters.

4 Other Relevant Information

4.1 Collective bargaining

Several annexes or amendments to the existing sectoral collective agreements have been concluded and published in the OJ RS, which mainly adjust the amounts of minimum basic pay and some other work-related payments (for example, annual leave allowance). See, for example, Amendments to the Collective Agreement for the Construction Industry ('*Spremembe in dopolnitve Kolektivne pogodbe gradbenih dejavnosti'*, OJ RS No. 67/23, 22 June 2023, p. 6112; adjustment of annual leave allowance which is paid once annually in addition to regular salary – minimum EUR 1 350); Annex to the Collective Agreement for the Hospitality and Tourism Industries ('*Aneks h Kolektivni pogodbi dejavnosti gostinstva in turizma Slovenije*', OJ RS No. 63/23, 09 June 2023, p. 5473; the annual leave allowance set at the minimum of EUR 1 500); Annex to the Collective Agreement for the Slovenian Electricity Industry ('*Aneks št. 5 h Kolektivni pogodbi elektrogospodarstva Slovenije*', OJ RS No. 64/23, 16 June 2023, p. 5690-5691; and Annex to the Collective Agreement for the Slovenian Coal Mining Industry ('*Aneks št. 2 h Kolektivni pogodbi premogovništva Slovenije'*, OJ RS No. 64/23, 16 June 2023, p. 5690-5691).

Annex to the Collective Agreement for Police Officers ('*Aneks št. 3 h Kolektivni pogodbi za policiste*', OJ RS No. 71/23, 30 June 2023, p. 6257-6258) regulates certain rights of trade union representatives, i.e. the number of hours paid for trade union activities. The consolidated text of the Collective Agreement for Police Officers with amendments can be found here).

The Government of Slovenia and the police trade unions also concluded the agreement on the resolution of the position of police officers in the context of adaptation operations of the police after the accession of the Republic of Croatia to the Schengen area ('*Sporazum o razreševanju položaja uslužbencev policije v okviru prilagajanja delovanja policije po vstopu Republike Hrvaške v schengensko območje*', OJ RS No. 64/23, 16 June 2023, p.5751-5752). It concerns the redeployment of police officers at border control with Croatia following Croatia's accession to the Schengen area, the rights of those police officers and the role of trade union in the entire process.

4.2 Amendments to the Employment Relationships Act and Proposal for the new Long-term Care Act and social dialogue

The government has published the Proposal of Amendments to the Employment Relationships Act, which—in addition to some other issues—concern the transposition of two EU directives, namely the Directive on Transparent and Predictable Working

Conditions and the Work-Life Balance Directive. The text (only in Slovenian) can be found here.

The government also published the proposal for the new Long-term Care Act.

Trade unions and employers' organisations are not satisfied with the social dialogue in general and the process in which the new acts and amendments are being prepared and are complaining that the government is violating the rules on social dialogue and the functioning of the Economic and Social Council.

Spain

Summary

(I) Directive (EU) 2019/1158 has been transposed with new measures improving work-life balance, such as a new parental leave option.

(II) The Supreme Court has ruled on the stand-by time of health care staff and a transfer of undertaking.

1 National Legislation

1.1 Work-life balance

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers has been transposed. The Labour Code and the Basic Statute of Public Employees have been amended to introduce a new non-paid parental leave of eight weeks, which can be taken until the child reaches the age of 8 years. This parental leave is non-transferable and can be taken in fractions. The worker has the flexibility to choose whether to take the leave full time or part time.

Additionally, there is also a new right to take time off from work on grounds of force majeure for urgent family reasons in case of illness or accident, making the worker's immediate attendance indispensable. The worker has the right to be paid in this case. The maximum time off from work is equivalent to four days annually.

Furthermore, the right to adapt working hours to enhance work-life balance has been expanded, extending beyond the care of children under the age of 12 years to include other family members and even non-family dependent persons living together.

The duration of leave in the event of an accident or serious illness of a family member has been increased from 2 to 5 days.

Registered partners will receive equal treatment to that of married couples with reference to these types of leaves.

Any dismissal or adverse treatment resulting from the exercise of these rights is considered null and void.

2 Court Rulings

2.1 Stand-by time

Supreme Court, No. 413/2023, 07 June 2023

The Supreme Court reiterates that the stand-by time of health care staff is working time when they are required to remain at the employer's premises and/or need to be permanently available. The case involved staff engaged in emergency medical services and the Supreme Court expressly referred to Directive 2000/34/EC and to relevant CJEU case law (e.g. CJEU of 9-3-2021, case C-344/19).

2.2 Transfer of undertaking

Supreme Court, No. 416/2023, 07 June 2023

Transfers of undertaking have been a sensitive issue in Spain, and the Supreme Court's rulings have not always been in line with CJEU case law. However, the Spanish Supreme Court has modified the previous criteria to adapt them to EU law. It has already been reported that a transfer of undertaking occurs when a subcontractor ends its activity

and it is replaced by the main undertaking if a transfer of assets or a succession of staff occurs. This also applies in the case of outsourcing of certain services by a public administration. After the subcontracting agreement comes to an end, if the public administration decides to perform the service using its own resources, the rules of transfers of undertaking apply when the relevant requirements are met.

However, as stated by the CJEU, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity (CJEU Somoza Hermo, case C-60/17). The Spanish Supreme Court has applied that doctrine in a case involving cleaning staff. The public administration decided to carry out the cleaning service previously outsourced using its own resources and staff. The Supreme Court concluded that no transfer of undertaking had taken place.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

This ruling is not expected to have an impact on Spanish law. The Supreme Court, in a ruling on 14 April 2016, affirmed that firefighters working 24-hour shifts are considered night workers, and the relevant legislation, including Directive 2003/88/EC, applies to them.

The response to the second question in this CJEU ruling appears to be in line with Spanish law. The scenario would be different if the CJEU had required identical treatment between the private and public sectors since the regulations concerning working time for public and private employees differ in Spain. Nonetheless, it is worth noting that firefighters work in the private sector, theoretically allowing for a comparable situation. The relevant rules in the Labour Code and the applicable collective agreement could establish different provisions for night work compared to those governing firefighters who work in the public sector. Both legal frameworks would need to comply with the Directive, but one may offer more favourable conditions than the other.

4 Other Relevant Information

4.1 Unemployment

There has been a decrease in unemployment by 49 260 persons in May. There are currently 2 739 110 unemployed people in Spain.

Sweden

Summary

(I) The Swedish government has initiated an inquiry to improve the system on security clearances.

(II) The Labour Court has ruled in a case on a very long (more than ten years) fixed-term contract and concluded that it was not in breach of the Fixed-term Work Directive (FTWD).

1 National Legislation

1.1 Security clearances

The Swedish government has initiated an inquiry of the system of security clearances. The inquiry, inter alia, aims to assess the possibilities of publicly prohibiting employees from continuing to work after having lost a security clearance. The procedural possibilities for appealing a decision on security clearance shall also be assessed.

2 Court Rulings

2.1 Fixed-term employment contracts

The Swedish Labour Court ruled in an important case, AD 2023 No. 33, on fixed-term employment contracts of personal assistants. In its judgment, the Court held that a collective agreement, which in practice means that employees can be employed in fixed-term employment contracts indefinitely, was legitimate despite its clear deviation from statutory law as well as from the explicit intent of the Fixed-term Work Directive (FTWD).

The situation for special assistants is very unique but affects a significant share of the labour market. The Swedish care for (some) persons with a disability is organised as rights, with increasing entitlement to support, not least through a 'personal assistant', which is a care worker who assists the person with a disability in leading his or her ordinary life. Assistance may include eating, intimate hygiene, social interaction and similar issues. Some disabled persons might be entitled to personal assistance 24/7, which means the assistants will be working very closely with the individual who has disabilities. These personal assistants can be employed publicly through municipalities, but also in private entities, non-profits or for-profits. Also, individuals with a disability can employ their assistants directly. Contracts can be permanent or fixed-term, and similar or identical provisions have been applied in collective agreements since 1994.

The Swedish Employment Protection Act provided for the possibility to employ staff under a 2-year 'ordinary fixed-term employment' contract (*allmän visstidsanställning*) at the time when the collective agreement was entered into. However, this provision in the Act could (and can still) be derogated from also *in pejus* in collective agreements. For the employment of personal assistants, the collective agreement stated that fixed-term contracts could be terminated once the employer's need for the services was no longer necessary. In practice, the special employment form under the collective agreement meant that an employee could be employed under indefinite, different fixed-term employment contracts.

In the specific case, an employee had been working under such fixed-term employment contracts since 2008, for an employer who employed approximately 70 employees on a year-round basis. Under the collective agreement, such employment contracts were clearly valid. Interestingly, the trade union brought legal action against the collective agreement they themselves had signed and adhered to for 28 years, claiming that it

was contrary to the Swedish Employment Protection Act as well as the FTWD. The trade union also urged the Labour Court to request the CJEU for a preliminary ruling.

The Labour Court did not refer the case for a preliminary ruling to the CJEU. In its judgment, the Labour Court held that the applicable articles of the FTWD did not have direct effect. Therefore, the Labour Court asserted that the Directive cannot prevail over the collective agreement. Consequently, the Labour Court held that there was no need to request the CJEU for a preliminary ruling.

As regards the claims in substance, the Labour Court concluded that Article 5.1 in the FTWD prescribes Member States to take measures to prevent misuse of successive fixed-term contracts. The article did not have direct effect and was not applicable in the present case because the employee had been working under a single fixed-term contract with the employer (since at least 2008). The Labour Court also found that the application of the collective agreement, with its far-reaching derogations, did not in an inappropriate manner undermine the employee's employment rights, due to the circumstances of the case, including the special working conditions and the status of the collective agreement. Hence, the Court ruled in favour of the employer.

To conclude, the case is the most recent example of Swedish possibilities to derogate *in pejus* from statutory law (also law stemming from EU law). While this possibility is less commonly used in other Member States, it is a general feature in Swedish labour law and the application is often very far-reaching. While personal assistance is a very special form of work, highly dependent on the personal relationship between the assistant and the client, the status of the particular employer has not been taken into account in the case (as the Court's argument made such discussions less important). A situation in which a private, individual client employs several assistants for his or her own personal support, or if this is done by a large for-profit organisation with perhaps 100s of employees and clients, might make a difference. The possibility to reorganise the work and re-assign assistants to some other client is, naturally, much more viable in larger care organisations. The justification in Article 5.1 (objective reasons) in the FTWD does not have to be applied similarly in both large companies and in more individualised situations. It should also be noted that the Swedish Employment Protection Act has been subject to a revision since the dispute in the case arose. The statutory limitation is currently 1 year (special fixed-term employment), but this would, based on the reasoning of the Court, not have altered the situation in any way.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

The first question in the case on the application of the exemption from the Working Time Directive (WTD) for ordinary, planned work tasks or for exceptional situations, is highly relevant from a Swedish perspective and is currently subject to intense discussions and soon-to-enter-into-force collective agreements on working time. The current ones to be replaced, which include collective agreements for rescue teams and some other groups of employees, allow for a 24-hour working time, also in planned situations. This is primarily applied when the firefighter as a 'personal assistant' (see above) is stationed at the workplace during the night, but is usually allowed to sleep at least a significant part of every 24-hour period at the workplace. This deviation from the daily rest provisions in the WTD and the transposing Swedish Working Time Act is made possible through the far-reaching option to derogations in collective agreements. The new and heavily criticised (by employees) new collective agreements, which are to be applied starting 01 October 2023, stipulates an 11-hour daily rest period for every 24-hour period, with rest compensation directly after the shift, if the employee's ordinary daily

rest period was reduced for any reason. However, in *extremis*, situations might require some more flexibility, but not on an ordinary basis.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

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

(II) The Minimum Services Levels Bill is still subject to consultations.

(III) The Bill of Rights bill has been dropped.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Working time

CJEU, joint cases C-529/21 to C-536/21 and C-732/21 to C-738/21, 04 May 2023, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (night work) and Others (working time – night workers)

In the UK, the work of firefighting is performed by those employed in the public sector; there is no private sector equivalent. The Working Time Regulations apply to firefighters. In 2018, there was a case where the fire brigades union successfully challenged a system involving 96 hours of continuous duty for firefighters because it was considered contrary to the Working Time Regulations, particularly the provision on night work. The UK is therefore compliant with the obligations as outlined in this decision.

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. In the field of employment, there are a number of measures, but none is significant in the post-Brexit world, notably removing rules on posting of workers and removing rules on drivers' hours during foot and mouth in 2001.

However, other key aspects of the Bill are to be retained, including turning off the supremacy of EU law, 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) was concerned about a number of these provisions and hence the legislation was shuttled between the Lords and the Commons to try to achieve an agreement. The Bill has now received Royal Assent and is now an Act, but a number of its provisions will not come into force until 01 January 2024.

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. This was discussed in the last report.

For completeness, on 29 June 2023, the Financial Services and Markets Bill 2022-23 (FSM Bill) received Royal Assent. This Act contained similar powers to the REUL Act but in respect of financial services.

4.2 The Strikes (Minimum Service Level) Bill

This Bill is still being shuttled between the Commons and the Lords.

4.3 The Bill of Rights bill

This Bill, due to a repeal of the Human Rights Act 1998, which incorporated the European Convention on Human Rights into UK law, has been dropped. The Justice Secretary, Alex Chalk MP, confirmed on 27 June 2023 that the government would not proceed with the Bill.

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