Flash Reports on Labour Law July 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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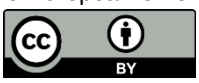

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Executive Summary

National level developments

In July 2023, 27 countries (all but **Cyprus**, **Latvia**, **Lithuania** and **Malta**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Work-life balance

In **Luxembourg**, the draft law transposing the Work-life Balance Directive has been adopted.

In **Austria**, an entitlement to four weeks of unpaid leave, including protection against dismissal, has been introduced for employees whose children enter a rehabilitation facility. Similarly, in **France**, the legislator has improved the protection for families of children with serious health problems and employees who have suffered a miscarriage.

In **Spain**, the Supreme Court has reinforced the principle of equality and non-discrimination on the grounds of sex in relation to leave for family reasons.

Teleworking

In **Luxembourg**, a new law introduces the right to disconnect, while in **Romania**, a new law makes remote working available to employees with children.

Liechtenstein signed the Framework Agreement on the application of Article 16(1) of Regulation (EC) No. 883/2004 for cases of habitual cross-border teleworking.

In **Italy**, the 'Labour Decree' has been transposed into law with the introduction of new rules on smart working.

Working time

In **Germany**, the State Labour Court Munich has ruled that a works council can enforce a regulation on how working hours are to be recorded.

In **France**, the Court of Cassation has handed down several rulings on fixed annual working time in days.

In the **Netherlands**, according to the District Court Amsterdam, having to be present at work 15 minutes before a shift starts is not considered to be working time.

Annual leave

In **Austria**, a decision of the Austrian Supreme Court dealt with the question of forfeiture of annual leave.

In **Belgium**, a new law specifies the obligations of employees who become incapacitated for work during their annual leave.

In **Ireland**, the Labour Court ruled that regular and rostered overtime should be included in the calculation of annual leave pay.

In **Italy**, the Court of Cassation ruled that entitlement to unpaid leave is only lost if the employer can prove that he or she supported and encouraged the employee to take the leave in a timely manner.

In **Portugal**, a recent Supreme Court of Justice ruling analysed the mandatory character of the rules of Portuguese law on vacation and Christmas allowances.

Posting of workers

In **Estonia**, the Labour Inspectorate has made it easier for employers to register workers who are posted to Estonia.

In **Poland**, the draft of the Law on Posting of Drivers in Road Transport has been approved by the legislator.

Platform work

In **France**, platform workers' representatives will be better compensated.

In **Denmark**, a new administrative decision of the Danish public authority for industrial injuries concerns the classification of platform workers, stipulating that Wolt drivers are employees under part of Danish employment law.

Other forms of atypical work

In **Italy**, the 'Labour Decree' has been transposed into law with the introduction of new rules on fixed-term work and agency work.

In the **Netherlands**, a court ruled that a deviation in favour of the employee is not contrary to the Fixed-term Work Directive.

In **Norway**, the EFTA Surveillance Authority has sent a letter of formal notice to Norway for introducing unjustified and disproportionate restrictions on the use of temporary agency workers.

In **Sweden**, the Labour Court has held that a trade union's use of a veto right to end the employer's use of third-party work was ill-founded.

Other developments

The following national developments in July 2023 were particularly relevant from an EU law perspective:

In the **Czech Republic**, the Whistleblowing Act will enter into force on 01 August 2023.

In **Germany**, the Federal Labour Court has ruled that managing directors are not liable for damages if a limited liability company does not pay its employees the statutory minimum wage.

In the **Netherlands**, courts must comply with their 'duty to disclose' under the Brussels I-bis Regulation. Also, since an employee did not habitually carry out his work in the Netherlands, the Dutch courts do not have jurisdiction pursuant to Article 19 paragraph 2 sub a EVEX-II.

In **Poland**, the draft of the Law on Employee Participation in a Company Created as a Result of a Cross-border Conversion, Merger or Division has been approved by the legislator.

Table 1: Major labour law developments

Topic	Countries
Work-life balance	AT FR LU PT ES
Collective bargaining and collective action	HR FI SI UK
Working time	FR DE IE NL
Teleworking	IT LI LU RO
Minimum wage	DE HU SE
Annual leave	AT BE IT
Temporary agency work	IT NO SE
Platform work	DK FR
Fixed-term work	IT NL
Civil servants	BE
Personal documents	BG
Ukrainian citizens	BG
Whistleblowing	CZ
Insolvency insurance	CZ
Cross-border mergers	PL
Posting of workers	PL
International Private Law	NL
Climate emergency	IT

Implications of CJEU Rulings

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The CJEU ruled that Article 1(1) of the Temporary Agency Work Directive, read in conjunction with Article 3(1)(b) to (e) thereof, must be interpreted as meaning that the Directive does not apply to a situation in which a worker is permanently transferred by his or her employer to perform his or her duties subject to the technical and organisational direction of a third-party undertaking, while the employment relationship with that employer is maintained on account of the fact that that worker has exercised his or her right to object to the transfer of that employment relationship to that third-party undertaking. In this regard, the Court held that in order to fall within the scope of the Directive, both where the contract of employment concerned is concluded and when each of the assignments is effectively made, an employer must have the intention to temporarily assign the worker concerned to a user undertaking.

The ruling was reported to lack direct consequences on national legislations that do not provide for a form of permanent assignment comparable to that envisaged by German law in the present case, nor for a right of workers to object to the change of employer in the event of a transfer of the business activity or part thereof by virtue of a legal transaction to another entity.

Interestingly, some country reports (**Austria**, **Latvia**) highlight how national legislation on temporary agency work does not impose limits with reference to the term 'temporary', leading to a situation in which agency workers may be assigned to the same user undertaking for an unlimited period. Similarly, in the **Netherlands**, the legislator has introduced a separate regime for so-called 'payrolling companies': companies that engage employees with the objective of permanently assigning them to a single user undertaking. Under this regime, payrolling companies are excluded from the flexible temporary agency work regime and payrolled employees are granted additional protection.

Austria

Summary

(I) Entitlement to four weeks of unpaid leave, including protection against dismissal, has been introduced for employees whose children are sent to rehabilitation facilities.

(II) A decision of the Austrian Supreme Court dealt with the question of the forfeiture of annual leave.

1 National Legislation

1.1 Unpaid leave to accompany children during rehabilitation

According to the newly introduced §14e AVRAG, employees who have children under the age of 14 years, who have been granted an inpatient stay in a rehabilitation facility by their social insurance institution, have a right to unpaid leave for the maximum duration of four weeks per calendar year to accompany the child to said rehabilitation facility. This right applies regardless whether the child is the employee's own natural, adopted, or foster child, or the child of a partner.

Only one parent is entitled to unpaid leave unless the presence of both parents is therapeutically necessary. In that case, both parents together have a total entitlement to (unpaid) leave of four weeks. They may also share this entitlement between each other, the minimum duration of the leave being one week. Employees may not request payment on legal grounds during their leave to accompany children during rehabilitation.

Employees may not be dismissed (regular termination as well as summary dismissal) without prior court approval from the date of the announcement that they wish to take unpaid leave, during their unpaid leave until four weeks after their unpaid leave ends.

The amendment passed the National Assembly on 05 July 2023, and the Federal Assembly on 12 July 2023, and will enter into force on 01 November 2023.

See Parliamentary Press for further information.

2 Court Rulings

2.1 Forfeiture of annual leave

Supreme Court, 8 ObA 23/23z, 27 June 2023

The Austrian Annual Leave Act (*Urlaubsgesetz* -UrlG) in § 4 (5) provides as follows (unofficial translation of the author):

> *"The holiday entitlement shall lapse after two years from the end of the holiday year in which it arose."*

In the present case, an employee was employed as a gamekeeper and later as the manager of the estate from 2003 until 2020. He only used minimal annual leave and was never requested by his employer to use his annual leave nor informed about the pending forfeiture of that leave. After the termination of his employment contract, he claimed compensation for unused annual leave in the amount of 322.75 days, claiming that he had been unable to use it as without him, the maintenance of the animals and of the estate would not have been assured.

The Supreme Court, similar to the lower courts, stated that the Austrian provision in § 4 (5) UrlG must be interpreted restrictively, taking into account the CJEU's jurisprudence. In 2018, the CJEU ruled in cases C-684/16, *Max Planck Society*, and C-

619/16, *Kreuziger* that Article 31 (2) CFR and Article 7 of the Working Time Directive 2003/88/EC preclude the forfeiture of holiday entitlement without examining whether the employee actually had the opportunity to take the annual leave, e.g. whether the employer provided adequate information. The Austrian Supreme Court then pointed out that the CJEU decisions dealt with German legal provisions according to which the leave had to be used within one year or financial compensation was excluded. At the time, the Austrian Supreme Court therefore still assumed that the three-year limitation period under § 4(5) UrlG was in conformity with EU law, because the employee had a reasonable period of time until then to use his or her holiday entitlement (8 ObA 62/18b; 8 ObS 1/20k; 8 ObS 2/20g; likewise *Rauch, Aufklärungspflichten des Arbeitgebers*, ASoK 2019, 105 [108 f]). By contrast, the legal literature was mostly of the opinion that even if the CJEU decisions were to be criticised for dogmatic reasons and the duties to notify and request an employee to take his or her annual leave were alien to Austrian law—a limitation period of and request obligations are alien to Austrian law—a forfeiture pursuant to § 4(5) UrlG was only possible if the employer requested the employee to take the leave and informed him/her of the impending limitation period (Drs, *Urlaubsverjährung bei Scheinselbständigkeit*, JAS 2020, 225 [240 f]; Auer-Mayer, *Ausgewählte Rechtsprobleme rund um Urlaub und Feiertage*, ZAS 2020/22, 131 f; Friedrich, *Verjährung und Verfall des Urlaubsanspruchs im europäischen Kontext*, ASoK 2021, 137 [144 f]; Niksova, *Das Urlaubsrecht im europäischen Wandel*, wbl 2022, 481 [486]; Kietaibl, *Commentary to 9 ObA 88/20m*, JAS 2022, 42 [47 ff]). In a later decision, the Supreme Court accepted an 'annual leave care obligation' of the employer (9 ObA 88/20m).

The Supreme Court has further developed its line of jurisprudence, explicitly taking into account the CJEU's recent decision in C-120/21, LB v. TO. According to the Court, Article 7(1) of the Working Time Directive 2003/88/EC also precludes a national provision under which entitlement to paid annual leave lapses after the expiry of a period of three years, the duration of which begins at the end of the year in which that entitlement arose if the employer has not actually enabled the employee to exercise that entitlement. Otherwise, the employer could evade its obligations to request and inform the employee about his or her annual leave entitlement and would also benefit from the forfeiture of the annual leave. Due to this CJEU decision, the Austrian Supreme Court acknowledges that the holiday entitlement guaranteed under EU law cannot be time-barred if the employer has not fulfilled its obligation to request and inform the employee about his or her annual leave entitlement. The previous rulings in the cases King, *Kreuziger* and *Max Planck* could still be understood as not being that far reaching. However, the most recent decision in the case of LB v. TO clarifies that the CJEU establishes a separate duty of conduct of the employer with retroactive effect, independent of the concrete possibilities of efficient enforcement of the law.

The employer neither requested the employee to use up his leave nor informed him of the impending limitation period and thus violated its obligation, now established by the CJEU, to ensure that the employee actually used his annual leave, which precludes the limitation of leave entitlement under Art 7(1) of the Working Time Directive 2003/88/EC.

This decision demonstrates—such as in case C-233/20, job medium—that the Austrian legislator is rather reluctant to bring the UrlG in line with European Union legal requirements. In that case, the UrlG was amended in October 2022 (BGBl I 2022/167) but the provision concerning the forfeiture is still too far reaching and does not refer in any respect to the requirement of the employer to request and inform the employee about his or her leave entitlement. The courts have applied the CJEU's recent decision correctly and are bringing Austrian labour legislation in line with the CJEU's jurisprudence. It would be preferable for the law to be more explicit on this to make the situation clear for all employees. It would furthermore clarify that the limitation of the provision of forfeiture only applies to the four weeks provided for in the Working Time Directive and not to the additional one/two weeks provided in Austrian labour law (similar to the lapse of compensation for unused annual leave in case of an unjustified summary dismissal for those additional weeks as provided for in § 10 (3) UrlG).

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The ruling in *ALB FILS KLINIKEN* does not have any implications for Austrian legislation on Temporary Agency Work (TAW) as the Austrian Act on TAW (AÜG) transposing the TAW Directive does not only apply to temporary agency work, but to agency work in general. Long-term/ permanent agency work is common practice in Austria.

This is because the Austrian Act on TAW does not impose limits to temporary agency work with reference to the term 'temporary' in the Directive. Instead, the Act strengthens the entitlement of long-term temporary agency workers: after four years of temporary agency work, the temporary agency worker is entitled to be included in the company's private pension scheme (if such a scheme exists).

Hence, long-term or permanent agency work must comply with the standards provided for in the Act on TAW. This includes, amongst others, the requirement of express agreement by the worker to agency work, entitlement to equal pay and equal treatment as well as entitlement to detailed information on the applicable CBA and other entitlements during agency work.

Finally, it should be noted that under Austrian law, entitlement to contradict a TUPE and to remain employed with the transferor (which was the starting point for the case in *ALB FILS KLINIKEN*) is very restricted under Austrian law (to situations in which the transferee refuses to take on protection against dismissal based on formerly applicable CBAs, or company pensions, or in cases in which a works council representative would lose his or her status and protection against dismissal), and is therefore very rare in practice. An employee who has made use of her/his entitlement to refuse a TUPE could not be required to work for the transferee on the basis of TAW without his/her express consent.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) A new law specifies the obligations of employees who become incapacitated for work during their annual leave.

(II) A new Decree abolishes the permanent appointment of civil servants in the administration of Flemish cities, municipalities and provinces. The same grounds for terminating employment relationships apply as for employment contracts.

1 National Legislation

1.1 Incapacity for work due to illness or accident during annual leave

The Federal Law of 17 July 2023, amending the Employment Contracts Law of 03 July 1978 and the Law of 08 April 1965 establishing the work rules at company level relating to the co-occurrence of annual leave and incapacity for work (*Moniteur belge* 31 July 2023), has been introduced.

This Law regulates the labour law framework of an incapacity for work due to illness or accident that arises during the employee's annual leave, following the adaptation of the legislation on annual leave to bring it into line with the Working Time Directive 2003/88. In this context, if the employee becomes incapacitated for work during his/her annual leave, his/her days of sick leave will no longer be treated as annual leave. This new labour law framework is a response to the National Labour Council's request in its Opinion No. 2.268 of 21 December 2021.

The Law inserts a new Article 31/2 in the Employment Contracts Law of 03 July 1978. It should be read together with the general principles on suspension of the performance of the employment contract due to illness or accident. The new article is limited to establishing certain derogations for the specific situation of an employee who becomes ill during a period of annual leave.

The first paragraph of the new article contains two derogations. On the one hand, an employee who wishes to exercise his/her right to retain his/her annual leave days must immediately inform his/her employer of his/her whereabouts if he/she is not at his/her home address, for example, if he/she is abroad. On the other hand, he/she must submit a medical certificate to the employer, even if this is usually not required. In cases of force majeure, for example, a hospitalisation which makes it impossible for the employee to take action, the medical certificate must be submitted within a reasonable period of time thereafter.

The third paragraph of the new article provides that if an employee, who becomes incapacitated during a period of annual leave, wishes to exercise his/her right to retain his/her annual leave days from the end of the period of disability, he/she must notify his/her intention to his/her employer. This right to the preservation of annual leave is guaranteed by Royal Decree of 30 March 1967, laying down the general arrangements for implementing the Law of 28 June 1971 relating to employees' annual leave.

The Law of 17 July 2023 also supplements the Law of 08 April 1965 on the work regulations at company level. The work regulations must specify the formalities that the employee must complete in case of incapacity for work during the period of annual leave.

The Law will enter into force on 01 January 2024.

1.2 Abolition of the administrative law of permanent appointments of statutory civil servants in the Flemish government

The Flemish Decree of 16 June 2023, amending the Provincial Decree of 09 December 2005, and the Decree of 22 December 2017 on Local Government (cities and municipalities) on the termination of the status of statutory civil servants(the Dismissal Decree), was published in the *Moniteur belge* on 13 July 2023.

Public authorities and public sector companies employ both statutory civil servants and employees with an employment contract. This is also the case for staff in the administration of cities, municipalities and provinces in the Flemish region. Civil servants and employees who have concluded an employment contract with their employer under public law traditionally have completely different legal positions. The Flemish Parliament has opted to standardise the separate dismissal regulations by opting to generalise the more flexible dismissal law for employees and make it applicable to the termination of employment relationships of civil servants who consequently lose their so-called 'administrative permanent appointment'.

The Dismissal Decree introduces a fundamental change in the termination of employment relationships of statutory staff employed in local and provincial administrations. As a result of the Dismissal Decree, the Local Government Decree and the Provincial Decree stipulate that the rules on dismissal as contained in the Employment Contracts Law are made applicable by analogy to statutory staff.

While statutory staff can currently only be dismissed for professional inadequacy, i.e. as a result of inadequate performance or for disciplinary dismissal, from 01 October 2023 onwards, statutory staff can also be dismissed with due observance of a notice period or dismissal compensation, or through immediate dismissal for gross misconduct.

The Local Government Decree and the Provincial Decree explicitly stipulate that the termination of the status of statutory staff may not be manifestly unreasonable, which implies that the termination must be based on reasons related to the behaviour or suitability of the staff member or based on necessities for the functioning of the administration. It should also not be a termination that would never have been decided by normal and reasonable local management.

Since the same dismissal regulations apply to contractors and statutory employees, the same legal protection will also be offered. For this reason, the labour courts will have jurisdiction to hear disputes concerning the termination of the status of statutory staff. Legal disputes about the dismissal of civil servants no longer fall within the competence of the Council of State.

Further modalities and rules for the termination of statutory employment will still be cast in a regulation by the Flemish government. New rules will be laid down in the implementing regulation decree of the Flemish government regarding definitive resignations, manifestly unreasonable dismissal, special protection against dismissal and outplacement.

The Flemish Dismissal Decree will enter into force on 01 October 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

These proceedings dealt with a specific German legislation arising from a transfer of part of the company's undertaking. One of the employees whose employment contract was to be transferred to the acquiring undertaking as a result of the transfer of part of the undertaking opposed the transfer of his employment contract, resulting in the continuation of his initial employment contract with his employer. However, as a result of the transfer of undertaking, the employee was legally required in the context of a permanent assignment by his initial employer to perform work for the transferee, which in this context acquired both technical and organisational control and the right of instruction over the employee (paragraph 18 of the ruling).

The question then is whether the Temporary Agency Work Directive is applicable. The CJEU answered the question in the negative. Thereby, the CJEU referred, inter alia, to the temporary nature of agency work, which is not intended to limit the application of temporary agency work to jobs that do not exist on a permanent basis or that are filled to replace another worker, since 'temporary' is not used to describe the job to be performed at the user undertaking, but the manner in which a worker is made available to that undertaking (CJEU case, No. C-232/20, 17 March 2022, Daimler AG). According to the CJEU, it is apparent both from the wording of Article 1(1) of the Temporary Agency Work Directive 2008/104 and from the definitions of those concepts together with the concepts of 'user undertaking' and 'assignment', within the meaning of Article 3(1)(d) and (e) of that Directive, that the employment relationship with a user undertaking is, by its very nature, temporary (see to that effect, CJEU case, No. C-681/18 KG paragraph 61, 14 October 2020). According to the CJEU, to be covered by the Directive, an employer must therefore have the intention, both at the time of the conclusion of the employment contract and at the time each of the assignments is agreed, to temporarily assign the worker to a user undertaking. Since this intention was not present in this case, the Temporary Employment Directive did not apply.

This judgment is interesting for the Belgian legal order because it underlines the temporary nature of the employment relationship during assignments to the user undertaking. However, the CJEU ruling has no direct consequences for Belgian employment law because it does not recognise a form of permanent assignment comparable to German law in the event of an employee's refusal to transfer his/her employment contract to the user undertaking.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

The Law on Amendments and Supplements to the Law on Bulgarian Personal Documents has been adopted.

1 National Legislation

1.1 Bulgarian personal documents

The National Assembly (Parliament) adopted the Law on Amendments and Supplements to the Law on Bulgarian Personal Documents (promulgated in State Gazette No. 65 of 27 July 2023).

Pursuant to the new para. 5 of Article 3 administrative bodies, organisations providing public services, persons performing public functions, and bodies of judicial power may only require the presentation of an identity document to certify the explicitly provided circumstances, not having the right to demand and collect copies of Bulgarian personal documents, unless the submission of such copies is expressly provided for in a special law in relation to the obligation for identification of certain categories of natural persons.

The names of foreigners in Bulgarian personal documents are spelled as they are spelled in their foreign travel documents with which they entered the Republic of Bulgaria. When foreigners who are granted asylum, refugee status or humanitarian status do not possess such documents, their names shall be spelled as indicated in a declaration signed by them before the competent authority. The names of these persons in Bulgarian personal documents shall be arranged in the following order: surname/family name/names and other/other name/names, without abbreviations, except when their length exceeds the foreseen technical possibility. When the applicant does not possess a document to certify his/her identity, or when the applicant is a person aged between 14 to 18 years with a parent for whom there is no data in the National Automated Information Fund for Bulgarian Personal Documents – 'National Register of Bulgarian Personal Documents', a birth certificate shall be presented.

Pursuant to Article 24, until the creation of the technical and organisational conditions for issuing Bulgarian personal documents in accordance with the requirements of Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on increasing the security of citizens' personal cards of the Union and of residence documents issued to Union citizens and their family members exercising their right to free movement (OJ, L 188/67 of 12 July 2019), hereinafter referred to as the 'Regulation (EU) 2019/1157', the legislation in force until the entry into force of this law shall apply.

Identity cards that do not meet the requirements of Regulation (EU) 2019/1157, including those issued after 02 August 2021, are valid until 02 August 2031, if their validity period has not expired before this date. The residence cards of family members of citizens of the Union who are not citizens of a Member State, who exercise their right to free movement, which do not meet the requirements of Article 7 of Regulation (EU) 2019/1157, including those issued after 02 August 2021, are valid until 03 August 2026, if they have not expired before then.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This decision will not have any implications on the judicial practice in Bulgaria.

Temporary work agencies carry out their activity after registering with the National Employment Agency under the terms and following a procedure set out in the Employment Promotion Act (Article 74f--74o). The legal regulation of relations between the TWA as an employer and the worker and between the TWA and the user undertaking is established by the Labour Code (Article 107p–107w). The employment contract can only be concluded as a fixed-term contract, until a specific assignment is completed or to replace a worker who is absent from work (in the user undertaking). An employment contract may not contain clauses prohibiting the conclusion of an employment relationship between a user undertaking and a worker during or after the expiry of the assignment.

Upon completion of the assignment for which a worker was leased to a user undertaking, the latter is required to provide the same basic conditions of work and equal treatment to that worker as apply to the undertaking's regular employees who hold the same or similar position, including health and safety working conditions. In the event that there are no workers who hold the same or similar position, the worker who performs a temporary assignment at the user undertaking may not be put in a less favourable position than the other workers employed there.

National legislation does not provide for a right of workers (all workers, not just those with an employment contract with a TWA) to object to the change of employer in the event of a transfer of the business activity or part thereof by virtue of a legal transaction to another entity. In case of a transfer of the employment relationship (change of employer), the worker has the right to unilaterally terminate the employment contract without notice (with the new employer) with a written statement when the conditions of labour substantially deteriorated with the new employer (Article 327, para. 1, item 3a of the Labour Code).

4 Other Relevant Information

4.1 Ukrainian citizens

Three measures with European funding, which are being implemented by the Employment Agency, will be available as of 31 July 2023 to Ukrainian citizens with temporary protection in Bulgaria to successfully integrate them in the labour market. The first of the measures has already been implemented under the Human Resources Development Programme. Ukrainian citizens with temporary protection in Bulgaria, just like Bulgarian citizens, have access to the services provided by the Employment Agency in implementation of Component 1 'Activation' under the 'Starting a job' measure. Specific measures will be introduced for unemployed and inactive persons, including innovative and interactive methods to attract them to the labour market, such as the organisation of events and job fairs, information internet campaigns, job workshops and mobile teams. Under this component, the establishment of Activation Centres is planned to support the integration of unemployed and inactive persons in the labour market. The first six Activation Centres have already been launched in Dimitrovgrad, Kyustendil, Ihtiman, Pernik, Pazardjik and Sliven. They provide services to foster the integration in the labour market, provide information and counselling, organise group events, and identify vacancies for unemployed persons, provide appropriate training for upskilling, as well as validation of professional skills and qualifications.

Croatia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The Labour Act (Official Gazette Nos 93/2014, 127/2017, 98/2019, 151/2022, 64/2023) regulates both: the rights of employees in case of a transfer of undertaking (Article 137) and the rights of temporary agency workers in Croatia (Articles 44-52). Based on the Labour Act, the provisions on agency work would not apply to the facts in the present case because, among others, it lacks temporariness (as derived from Article 44). Furthermore, Croatian law does not provide for retaining the initial contract of employment when the employee objects to the transfer of the employment relationship to the third-party undertaking (as derives from Article 137(1) of the Labour Act). Since no one can be forced to be in an employment relationship with someone with whom s/he does not want to be in an employment relationship, the employee can either request a mutual termination of the employment relationship or terminate it unilaterally. Therefore, the judgment in this case has no implications for Croatian law.

4 Other Relevant Information

4.1 Judicial officers' strike

The Government of the Republic of Croatia decided to reduce the salary and salary supplements of civil servants and state employees during their participation in a strike (Official Gazette No 78/2023). It stated:

> *"To the civil servants and state employees, who participated in the strike announced to the Government of the Republic of Croatia by letter of the Trade Union of State and Local Civil Servants and State Employees of the Republic of Croatia, No. 60/23, dated 29 May 2023, which includes judicial authorities and state attorneys' offices…in the territory of the Republic of Croatia, starting on 05 June 2023 at 7:00 a.m. until the strike demands are met, the salary and salary supplements will be reduced in proportion to the time of participation in the strike, starting from 17 July 2023."*

However, this decision was reversed very quickly (Official Gazette No 87/2023) since the Government of the Republic of Croatia agreed on the payment of a salary supplement to civil servants and employees in judicial authorities and state attorneys' offices (Official Gazette No 87/2023), which ended the strike.

The parties in court cases will continue to suffer the consequences of this long-term strike for a long time due to the accumulated cases and postponed hearings.

Cyprus

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The CJEU ruled that Article 1(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with Article 3(1)(b) to (e) thereof, must be interpreted as meaning that that Directive does not apply to a situation in which, first, the duties performed by a worker are transferred definitively by his or her employer to a third-party undertaking and, second, that worker, whose employment relationship with that employer is maintained on account of the fact that that worker has exercised his or her right to object to the transfer of that employment relationship to that third-party undertaking, may be required, at the request of that employer, to perform, on a permanent basis, the work contractually due for that third-party undertaking and, in that context, be subject to the technical and organisational direction of the latter.

This is an important decision that attempts to provide better conditions of employment of workers in TWA. However, these issues have not been addressed in Cyprus and have not been dealt with in a court or another dispute mechanism.

In the Republic of Cyprus, temporary work is regulated by the Cypriot TWA Law (*Ο Περί της Εργασίας μέσω Επιχείρησης Προσωρινής Απασχόλησης Νόμος του 2012* (174(I)/2012). 'Temporary agency work' is a type of employment relationship in which the employee has an employment contract with the temporary work agency to be temporarily placed at the disposal of one or more user undertakings to complete specific assignments. According to the Labour Department, the legislation does not apply to unskilled workers.

Temporary work agency is translated in Cypriot law as temporary work 'undertaking' or 'enterprise' (*επιχείρηση*) (Article 1 of the Cypriot Temporary Agency Work (TWA Law)), which is closer to the English 'agency' than the official translation of the Directive, which uses the restrictive term 'company' (*εταιρεία*). The rest is a verbatim copy of Article 3§1 (b):

> "*«επιχείρηση προσωρινής απασχόλησης» ή «ΕΠΑ» σημαίνει φυσικό ή νομικό πρόσωπο, το οποίο συνάπτει συμβάσεις εργασίας ή σχέσεις εξαρτημένης εργασίας με προσωρινά απασχολούμενους, με σκοπό να τους τοποθετεί σε έμμεσους εργοδότες για να εργασθούν προσωρινά υπό την επίβλεψη και τη διεύθυνσή τους.*"

The definition of 'temporary agency worker' according to Article 1 of the TWA Law is a verbatim copy of the Greek version of Article 3§1 (c) of the TWA Directive:

> *"«προσωρινά απασχολούμενος»: ο εργαζόμενος ο οποίος έχει σύμβαση εργασίας ή σχέση εξαρτημένης εργασίας με εταιρεία προσωρινής απασχόλησης, προκειμένου να τοποθετηθεί σε έμμεσο εργοδότη για να εργασθεί προσωρινά υπό την επίβλεψη και τη διεύθυνσή του"*

The definition of 'user undertaking' according to Article 1 of the TWA Law is a verbatim copy of the Greek version of Article 3§1 (c) of TWAD, but has an additional element which defines the purpose, i.e. the coverage of extraordinary and/or temporary needs:

> *"«έμμεσος εργοδότης» σημαίνει το φυσικό ή νομικό πρόσωπο για το οποίο και υπό την επίβλεψη και τη διεύθυνση του οποίου εργάζεται προσωρινά ο προσωρινά απασχολούμενος, για κάλυψη έκτακτων ή/και πρόσκαιρων αναγκών·"*

There is no definition of 'assignment' in the TWA Law. However, there is a subsection in Article 1 TWA Law defining the period of assignment, which contains a definition of the relation of 'assignment':

> *"«περίοδος παραχώρησης» σημαίνει την περίοδο κατά την οποία ο προσωρινά απασχολούμενος τίθεται στη διάθεση του έμμεσου εργοδότη για να εργαστεί προσωρινά υπό την επίβλεψη και τη διεύθυνσή του·"*

The Labour Department of the Ministry of Labour defines temporary work agencies restrictively, hence only a handful of agencies are registered with the Labour Department of the Ministry of Labour, and numerous firms in Cyprus that essentially carry out the same tasks are not registered as 'temporary work agencies'. The Labour Department considers that only highly skilled scientific or engineering-related work is covered by the TWA law and not low skilled labour (interview with officer of the Labour Department). Security and cleaning services are a prime example of these arrangements where firms are not registered as 'temporary work agencies'. This is an expanding sector whereby employer 'A' has contracts of employment with employees for the purpose of placing them at the disposal of other firms (employer 'B') to work under the instruction and purpose of the firms with which employer 'A' has a contract.

This is a temporary arrangement whereby the original contract of employment remains in force and employer 'A' may assign the employee to another firm at any time. This process of hiring-out workers creates a kind of tripartite or multiparty employment relationship, which complicates aspects related to the rights and obligations of the parties involved. For the duration of a hiring-out contract, the employees are required to work for employer 'B', which exercises discretion and managerial authority. It is therefore assumed that employer 'B' has vicarious liability pertaining to matters connected with employment for the purposes of work for the duration of the hiring out. Unless otherwise agreed, employer 'A' is responsible for the payment of wages, for granting annual leave and the payment of severance pay in the event of dismissal.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) The draft amendment to the Labour Code was rejected by the upper house of Parliament.

(II) The Whistleblowing Act will enter into force on 01 August 2023.

(III) Compulsory insolvency insurance for employment agencies was abolished.

1 National Legislation

1.1 Amendment to the Labour Code

The draft amendment to Act 262/2006 Sb., the Labour Code (LC) and other related laws, initially approved by the Chamber of Deputies, was rejected on 27 July 2023 by the upper house of Parliament of the Czech Republic, i.e. the Senate. The Senate proceeded to adopt two amendments to the bill, postponing the bill to 01 January 2024 and allowing employers and employees to agree otherwise on the scheduling of work in agreements on work performed outside the employment relationship. More specifically, employers under section 74(2) LC will be required to schedule an employee's work in writing and to inform the employee of this schedule at least 3 days in advance, unless the two parties agree to a different notification period. The wording proposed by the Senate also allows the employer and employee to agree otherwise.

Should the Chamber of Deputies of the Parliament of the Czech Republic outvote the Senate at its next meeting, the original bill will be approved, and the two amendments mentioned above will be scrapped (the original wording and content of the bill has been regularly reported on in detail in previous Flash Reports). In this case, the bill will come into force on 01 October 2023.

While postponing the effective date of the bill to 01 January 2024 will strengthen the bill's effectiveness on the whole and give sufficient time to users, especially employers, to establish staff-related processes for the proper application of the bill, it will also further delay the transposition of EU law. In addition, the Senate's proposed wording of section 74(2) LC will allow both the employer and employee to dismiss the work scheduling requirement in their agreement for the performance of work or in the agreement to carry out an assignment, potentially contradicting the minimum requirements for predictability of work under Article 2(a) and (b), Article 4(2)(l) and (m) and Articles 10 and 11 of the TPWC Directive.

1.2 The Whistleblowing Act

The Whistleblowing Act (Act 171/2023 Sb.) will enter into force on 01 August 2023. The Act's content has been discussed in previous Flash Reports.

1.3 Abolition of compulsory insolvency insurance for employment agencies

Employment agencies are subject to Act 118/2000 Sb. effective from 01 July 2023. The Act regulates the protection of employees should their employer face insolvency, causing the abolishment of compulsory insurance of employment agencies against insolvency. Employees may now apply to the Labour Office for compensation of their wage claims under the conditions set out in the Act.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The present case law does not affect Czech labour law. Czech labour law, and in particular Act 262/2006 Sb., the Labour Code (LC) or any other labour law regulation for that matter does not allow for the permanent transfer or permanent assignment of an employee to another employer while maintaining the employment relationship with the current employer, as permitted by section 613a(6) of the German Civil Code (BGB) and section 4 of the TVöd.

Pursuant to section 43a LC, an employer may, on the basis of a written agreement, temporarily, i.e. for the period specified in the agreement, assign its employee to another employer. The employee then performs work for the employer to whom he/she has been temporarily assigned, remains under employment of the employer to whom he/she has been temporarily assigned, and upon termination of the temporary assignment (upon expiry of the agreed period, termination of the assignment or by agreement) resumes to perform work for the original employer.

If an employer permanently transfers its tasks to another employer, any associated employment rights and obligations are transferred accordingly pursuant to section 338 *et seq* LC, provided the conditions laid down in the Labour Code and/or other statutory provisions are met, in effect constituting a transposition of Directive 2001/23/EU. According to Czech legislation, however, the legal transfer of rights and obligations results in the transfer of the employment relationship to a new employer, thus resulting in a legal change of employers and ending the employment relationship with the original employer. The employee may defend the transfer, but only by giving notice pursuant to section 51a LC, which will ultimately, however, terminate the employment relationship entirely.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

A new administrative decision of the Danish public authority for industrial injuries concerns the classification of platform workers, stipulating that Wolt drivers are employees under (part of) Danish employment law.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The case concerned an interpretation of the Temporary Agency Work Directive, Article 1(1) and 2. The German employee in the present case argued that the German national rules were in breach of the Directive, as they allowed for a permanent assignment of employees.

The CJEU relied as in earlier case law on an interpretation of the definitions in Articles 1 and 3 of the Directive. It follows that the purpose of entering into the employment relationship must be to assign the employee to a user undertaking, and that the assignment to the user undertaking in its nature is temporary. The CJEU concluded that an employer that has entered into an employment agreement must conclude a separate agreement when assigning that employee (temporarily) to a user company. In the present case, there was no intention of the original employer to assign the employee to the user undertaking, as the employment relationship was only upheld due to the employee's right to object to a transfer to a new employer under the German legislation. There had thus not been a risk of abuse or circumvention of the Directive.

The ruling will likely only have limited implications for Danish law.

The ruling clarifies that permanent work assignments fall outside the Directive's scope, as it is a precondition for the 'application' of the Directive as such that the employee is temporarily assigned to a user undertaking.

The ruling confirms that recruitment agencies fall outside the scope of the Directive, as the preconditions for temporary agency work will typically not be met in these relationships. This also applies to companies that have no intent of temporarily assigning employees to a user undertaking. Danish case law seems to be aligned with this understanding of the Directive's scope. In the Industrial Arbitration ruling of 7 August 2019 (FV 2018.0172), the court concluded that a company that had temporarily assigned only 2-3 per cent of its employees to a user undertaking did not constitute a temporary work agency. The affected workers could thus not rely on the collective agreement for temporary agency workers (which implemented the Directive).

4 Other Relevant Information

4.1 Platform work

Administrative decision by the Danish Labour Market Insurance (AES)

A recent administrative ruling concerned the employment status of food delivery drivers for the platform company Wolt in Denmark in relation to industrial injuries. In general, Wolt claims that their drivers are independent contractors, which is also the designated status in their employment contract with Wolt, and the drivers are thus not subject to Danish employment legislation.

The status of Wolt drivers under Danish employment law and/or industrial relations law has not yet been tested. However, administrative rulings have emerged in other areas of law in recent years. The rulings in other areas of law do not directly influence the status of employees covered by employment law/industrial relations law. Each area of law has its own definitions and assessments of employees' status.

Earlier this year, the Danish Board of Taxation held that a Wolt driver was an employee in relation to taxation law. This means that Wolt must register income and withhold and report taxes on behalf of each driver. If the driver is an independent contractor, he or she is responsible for registering and paying taxes on his/her own behalf. The ruling, which was a private request by a Wolt driver, will apply to all Wolt drivers.

The ruling is a private ruling, hence it is not publicly available.

The recent decision of the Labour Market Insurance—a public authority that deals with occupational injury cases—arrived at the same conclusion. A Wolt driver is an employee according to the Danish Workers' Compensation Act (industrial injuries). Wolt is considered the drivers' employer, as it has the right to instruct the injured person at the time of the injury. The assessment took into account that when the injured person had accepted the assignment through the Wolt app, he/she was subject to the guidelines and instructions issued by Wolt.

The consequence of the decision was that Wolt was liable for the specific injury. In addition, Wolt may also be deemed liable for past industrial injuries of other drivers (and be ordered to pay compensation). Furthermore, Wolt is required to take up mandatory labour market insurance for all their drivers. It is not yet clear whether Wolt will appeal the administrative decision.

A link to the decision is not publicly available.

See here for further information.

Estonia

Summary

The Estonian Labour Inspectorate has made it easier for employers to register workers who are posted to Estonia.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The CJEU's decision has some implications for Estonia's legal system and clarifies the legal situation of temporary workers in user undertaking. The implications of said judgment on the Estonian legal order is moderate. The legal aspects related to transfers are regulated in the Law of Obligations Act. Pursuant to § 182 (2) of the Law of Obligations Act, with the transfer of equipment and rights that belong to the company, all obligations related to the transferor's company are transferred to the transferee, including obligations arising from employment contracts with the company's employees, unless otherwise provided by law. The consent of the creditor or the other contracting party is not required for the transfer of an obligation or contract, unless otherwise provided by law. The general principle related to the transfer of employment contracts is also regulated in § 112 of the Employment Contracts Act. According to this provision, all employment contracts are transferred to the transferee. The same principle applies to temporary workers. As regards temporary agency workers, no special protection measures in the case of transfers of employment contracts apply compared to workers who are not temporary agency workers.

4 Other Relevant Information

4.1 Registration of posted workers

According to the Act on Working Conditions of Employees Posted to Estonia, the employer is required to register employees posted to Estonia with the Labour Inspectorate before the employee commences employment.

Previously, workers posted to Estonia had to be registered by filling out the registration form available on the Labour Inspectorate's website and send it to the Labour Inspectorate by e-mail. Such submissions are now easier and more user-friendly thanks to the Labour Inspectorate's self-service environment.

From 17 July, seconded employees must register in the Labour Inspectorate's TEIS information system.

The following data must be submitted to TEIS when registering the posting notice:

- the name of the posted employee's employer, personal or registry code, field of activity, residence or location, and data on means of communication;
- the name of the contact person representing the posted employee's employer and the details of the means of communication;
- the number of posted employees, their names, personal identification codes or dates of birth and numbers of identity documents;
- the expected duration of the assignment and the planned start and end date;
- name, personal or registry code, field of activity, residence or location and data of communication means of the client and/or of the person with whom the posted employee will be working in Estonia;
- the name of the contact person representing the customer and/or the person with whom the posted employee works in Estonia and the data of the means of communication;
- information about which field of activity the seconded employee will work in Estonia and the address of the seconded employee’s place of work.

Finland

Summary

The Ministry of Economic Affairs and Employment appointed two tripartite working groups, one of which is tasked with preparing legislative amendments related to industrial peace and other legislative amendments related to local level bargaining.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

There are specific provisions on temporary agency work in the Employment Contracts Act (*Työsopimuslaki*, 55/2001). In the context of temporary agency work, the company that hires out employees is their employer, but the work is performed for the user undertaking. For employees this means that they conclude an employment contract with the company that is hiring them out, even though the place of work is the user undertaking.

4 Other Relevant Information

4.1 Tripartite working groups dealing with industrial peace and local bargaining

On 03 July 2023, the Ministry of Economic Affairs and Employment appointed two tripartite working groups, one of which is tasked to prepare legislative amendments related to industrial peace and the other to develop legislative amendments related to local level bargaining. The groups will prepare legislative reforms to be included in the Government Programme.

According to the Government Programme, the government will prepare proposals to improve industrial peace, which will be submitted to Parliament during the autumn session 2023. In accordance with Nordic practice, the exercise of the right to political industrial action will be limited to protests that last no longer than one day. Moreover, according to the Government Programme, the government will amend the legislation so solidarity actions become subject to the duty to notify in accordance with the proportionality assessment and the Act on Mediation in Labour Disputes (*Laki työriitojen sovittelusta*, 420/1962). In the future, solidarity action that is proportionate in relation to the objectives and effects that only affect the parties to the labour dispute will be legal. The level of a compensatory fine for unlawful industrial action will be increased, with the maximum amount set at EUR 150 000 and the minimum amount set at EUR 10 000. An employee who continues a strike which the Labour Court has found to be an unlawful industrial action will be subject to a penalty payment of EUR 200 for participating in an industrial action that has been found to be illegal.

According to the Government Programme, local collective bargaining is a tool for developing a company's operations and improving its competitiveness. Successful local bargaining is based on trust, information on the company's situation, and mutual ability to utilise the opportunities offered by legislation and collective agreements. The government will reform the legislation to increase opportunities for local bargaining at company level. Its vision is for local collective bargaining to be equally possible in all companies, regardless whether the company is a member of an employers' association or what type of employee representation system is in place at the company. In addition, according to the Government Programme, the government will expand the conditions for local bargaining by removing bans from the labour legislation on local bargaining in non-organised companies that comply with a generally applicable collective agreement. Labour legislation will be amended to allow company-specific collective agreements to derogate, by agreement, from the provisions of the labour legislation from which a derogation is now only possible by means of a national collective agreement.

To prevent the establishment of non-genuine, so-called yellow trade unions, the provisions of the Collective Agreements Act (*Työehtosopimuslaki*, 436/1946) concerning the parties to company-specific collective agreements will be specified so that the above-mentioned possibilities to derogate from a company-specific collective agreement will require the collective agreement to have been concluded by the employees' side either by a national employee association or an employee association belonging to it.

The drafting of legislation will be based on the report of a tripartite working group completed on 07 June 2016 without the part that does not allow for local bargaining in companies without a shop steward. Local bargaining will be made possible at company level so that a shop steward, an elected representative, another representative elected by the staff can be a party to the agreement. Provisions on the protection of an elected representative and another representative elected by the staff for a fixed term will be laid down in law at the same level as they are currently laid down for shop stewards. Opportunities for training and adequate access to information will be ensured for persons elected for the tasks.

The duties of the Labour Court will be expanded so that it will deal with, in a separate format, disputes on the interpretation of local bargaining in collective agreements concluded in the so-called field of general applicability. Sufficient resources will be secured for the Labour Court to ensure fast processing times.

According to the Government Programme, the government's proposals to increase local collective bargaining will be prepared so that they can be submitted to Parliament during the spring session 2024.

The working group dealing with industrial peace will work until 15 October 2023 while the working group dealing with local level bargaining will work until 31 January 2024. The task of the working groups is to prepare a report in the form of a draft government proposal.

France

Summary

(I) The legislator has improved the protection for families of children with serious health problems and employees who have suffered a miscarriage.

(II) Platform workers' representatives will be better compensated.

(III) The Court of Cassation has handed down several rulings on fixed annual working time in days.

1 National Legislation

1.1 Protection for families of children with serious health problems

Law No. 2023-622 of 19 July 2023 aimed at improving the rights of families of children suffering from a particularly serious illness, disability or accident was enacted. Parents will now be protected against dismissal, be granted more leave and easier access to remote working.

The French legislator had already strengthened the system of support and protection for parents who are caring for a seriously ill or disabled child, in particular as regards:

- treatment of paediatric cancer, which in particular facilitates the renewal of parental leave (see Law No. 2019-180 of 8 March 2019 aiming to strengthening the care of paediatric cancer);
- authorisation of doubled parental leave when the child's health status requires this (see Law No. 2021-1484 of 15 November 2021 to improve the conditions in which parents are present with a child whose pathology requires sustained support).

The new law provides for protection of parents against the termination of their employment contract during parental leave. The same protection applies if parental leave is split up or taken on a part-time basis (see Article L. 1225-4-4, 1st paragraph of the French Labour Code). The penalty for failure to observe the protection of parents is nullity of the dismissal (see Article L. 1225-71 of the French Labour Code). However, during periods of protection, the employer may terminate the employment contract if he/she can prove that the employee is guilty of gross misconduct or gross negligence, or that he/she is unable to maintain the contract for a reason unrelated to the health status of the employee's child (see Article L. 1225-4-4, 2nd paragraph of the French Labour Code).

The legal minimum duration of leave related to a child's health status is extended in the following cases:

- Death of the employee's child aged 25 years or younger, of a person aged 25 years and younger who is effectively and permanently dependent on the employee or, regardless of age, of a child who is him- or herself a parent. The duration is increased from 7 working days to 14 working days.
- Announcement of the onset of a disability of the employee's child, a chronic pathology requiring therapy or cancer. The duration of the leave is increased from 2 working days to 5 working days.

To facilitate the use of remote working of employees who provide care, the law stipulates that the Collective Bargaining Agreement (CBA) or, failing that, the charter drawn up by the employer introducing remote working, must specify the terms and conditions for access to remote working to employees who are providing care for a child, parent or close relative (see Article L. 1222-9, II of the French Labour Code).

1.2 Protection for employees who have suffered miscarriages

Law No. 2023-567 of 07 July 2023 aimed at protecting employees who have suffered a miscarriage from dismissal and improves their compensation through two measures:

- elimination of the waiting period for the payment of daily social security benefits in the event of incapacity for work following a miscarriage before the 22nd week of amenorrhoea. In the absence of clarification in the law, and unless there is a more favourable provision in the CBA, the waiting period applicable to supplementary compensation paid by the employer will continue to apply, i.e. seven days (see Articles L. 1226-1 and D. 1226-3 of the French Labour Code);
- a ban against termination of the employee's employment contract during the ten weeks following a medically certified miscarriage between the 14th and 21st week of amenorrhoea. However, the employer may terminate the contract if it can prove that the employee is guilty of serious misconduct or that it is unable to continue the contract for a reason unrelated to the miscarriage (see Article L. 1225-4-3 of the French Labour Code).

However, if the employee is employed under a fixed-term contract, the miscarriage does not prevent this contract from expiring (see Article L. 1225-6 of the French Labour Code).

The ban on the termination of the employment contract applies to employees from 09 July 2023, the day after the law is published.

Failure to comply with this prohibition may entitle the employee to compensation of at least six months' salary (see Articles L. 1235-3-1 and L. 1225-71 of the French Labour Code).

1.3 Platform workers' representatives

Representatives of platform workers were already entitled to a flat-rate compensation for their hours as representatives paid by the French authority in charge of social dialogue between platform workers and platforms (*Autorité des relations sociales des plateformes d'emploi* (*ARPE*)).

Decree No. 2023-682 of 27 July 2023 on a supplementary allowance to compensate platform workers' representatives introduces the possibility of providing for the creation of an additional compensation in a CBA financed by contributions from signatory platform organisations. The text refers to an agreement between these organisations and the *ARPE* to determine the terms and conditions for the collection and payment of this additional allowance and empowers the director of the *ARPE* to collect the contributions and pay the allowance.

2 Court Rulings

2.1 Fixed annual working time in days and collective bargaining agreement

Social Division, Court of Cassation, 05 July 2023, No. 21-23.222; Social Division, Court of Cassation, 05 July 2023, No. 21-23.387; Social Division, Court of Cassation, 05 July 2023, No. 21-23.294

The Court of Cassation is regularly called upon to rule on the validity of CBAs providing for the implementation of a fixed annual working time in days. The Court of Cassation reviews whether the provisions of these agreements protect employees' health and safety (see, for example: Social Division, Court of Cassation, No. 20-20.572, 14

December 2022 (in December 2022 Flash Report); Social Division, Court of Cassation, No. 18-19.752, 06 November 2019.

The Court has ruled that any CBA on a fixed annual working time in days must guarantee that reasonable working hours and daily and weekly rest periods are respected (see in particular: Social Division, Court of Cassation, No. 09-71.107, 29 June 2011; Social Division, Court of Cassation, No. 15-22.758, 08 November 2017).

Thus, Article L. 3121-64 of the French Labour Code provides for mandatory clauses to be incorporated in CBAs to meet the requirements of the Court of Cassation. The management and work force must now specify:

- the terms and conditions under which the employer ensures the assessment and regular monitoring of the employee's workload;
- the terms and conditions under which the employer and employee periodically exchange views on the employee's workload;
- the balance between the employee's professional activity and personal life;
- the employee's remuneration, as well as the organisation of work in the company;
- and finally, the terms and conditions under which the employee may exercise his right to disconnect.

The Court of Cassation has recently issued a number of rulings concerning various CBAs:

- The CBA of the automobile sector and related activities of 15 January 1981, as amended on 03 July 2014 (see Social Division, Court of Cassation, No. 21-23.222, 05 July 2023);
- The agreement of 11 April 2000 on the organisation and reduction of working hours, attached to the CBA for service providers in the tertiary sector of 13 August 1999 (see Social Division, Court of Cassation, No. 21-23.387, 05 July 2023);
- the CBA of the construction industry of 12 July 2006, as amended by amendment No. 3 of 11 December 2012 (Social Division, Court of Cassation, No. 21-23.294, 05 July 2023).

The CBA of the automobile sector and related activities of 15 January 1981, in the version resulting from the amendment of 03 July 2014, authorises fixed annual working time in days for executives:

- with permanent contracts or fixed-term contracts of three months or more;
- who are not subject to collective working hours;
- who have autonomy in the organisation of their working hours to enter into a fixed annual working time in days based on 218 days per year.

The agreement of 11 April 2000 on the reorganisation and reduction of working hours, attached to the CBA for service providers in the tertiary sector of 13 August 1999, authorises fixed annual working time in days based on a maximum of 214 days for managers who have a high degree of autonomy in the organisation of their work.

These two agreements provide for a certain number of guarantees which, however, according to the Court of Cassation, do not allow for effective and regular monitoring so that any workload that is incompatible with reasonable working hours can be remedied in good time.

The provisions of these collective agreements are therefore not such as to guarantee that the workload remain reasonable and ensure a good distribution of the employee's overtime work, and to therefore ensure the protection of the employee's health and safety.

The first agreement merely provides that:

- the daily workload must be distributed in such a way as to ensure that the employee's professional responsibilities are compatible with his or her personal life;
- Companies are required to ensure regular individual monitoring of the employees concerned and are invited to introduce appropriate workload indicators;
- In view of the specific nature of fixed-term day contracts, compliance with contractual and legal provisions must be ensured by means of a declaratory system, with each employee on a fixed-term day contract being required to complete the fixed-term contract monitoring document provided for this purpose;
- The document for monitoring the package must show the number and date of days worked as well as the positioning and qualification of days not worked and must reiterate the need to respect a reasonable workload;
- each year, the employee must have a meeting with his or her line manager, the purpose of which is to review whether the workload is in line with the number of days provided for in the fixed-rate agreement and to take corrective action in the event of any proven inadequacy.

The second agreement stipulates that:

- the employer is required to set up procedures for checking the number of days or half-days worked by drawing up a summary document which must show, in particular, the classification of rest days such as weekly rest, paid leave, contractual leave or days of reduced working hours;
- This document can be kept by the employee under the employer's responsibility;
- Executives covered by a fixed number of days must have an annual meeting with their line manager during which the organisation of their work, the length of the working day and the resulting workload must be discussed.

For the Court of Cassation, both agreements are insufficient. The individual agreements on fixed annual working time in days signed on the basis of these two agreements are therefore null and void. Employees may claim overtime, and it will be up to the courts to verify the existence and number of such hours (see, for instance: Social Division, Court of Cassation, No. 13-20.891, 04 February 2015). The employer, for its part, may claim reimbursement of undue rest days (see, for examples: Social Division, Court of Cassation, No. 17-28.234, 06 January 2021; Social Division, Court of Cassation, No. 18-16.937, 04 December 2019).

It should be noted, however, that Article L. 3121-65 of the French Labour Code allows the employer to remedy the absence or inadequacy of provisions on monitoring the employee's workload in the collective agreement that sets up the fixed annual working time in days. To do so, the employer must draw up a document to monitor the days and half-days worked, ensure that the workload is compatible with respect for rest periods and organise a meeting once a year with the employee.

As with conventional provisions, the Court of Cassation will review whether the measures put in place by the employer provide sufficient guarantees for the protection of the employee's health.

The CBA of the construction industry of 12 July 2006, as amended by amendment No. 3 of 11 December 2012, authorises fixed annual working time in days based on 218 days per year for employees:

- whose working hours cannot be predetermined;
- who have genuine autonomy over their working hours in the organisation to carry out the responsibilities entrusted to them.

Above all, according to the Court de Cassation, it makes it possible to monitor and remedy the risk of an employee being overworked. Its provisions therefore meet the requirements relating to the right to health and rest by making it possible to monitor reasonable working hours and daily and weekly rest periods.

The CBA stipulates that:

- the organisation of employees' work must be regularly monitored by their superiors, who must ensure that any work overload is dealt with and that minimum rest periods are respected;
- the employer or the employee for whom he/she is responsible must keep an individual record of days and half-days worked, rest days and days of leave (specifying the type of rest: weekly, paid leave, etc.);
- this individual monitoring document must enable a regular and cumulative review of working days and rest days to encourage that all rest days are taken during the financial year.

These measures are therefore sufficient, according to the Court of Cassation, to prevent the risk of overworked employees and that such situations are remedied in good time.

Individual fixed annual working time in day agreements concluded on the basis of this collective agreement are therefore valid.

The Court of Cassation seems to have eased its case law on fixed annual working time in days compared with its position last December (see December 2022 Flash Report and especially Social Division, Court of Cassation, No. 20-20.572, 14 December 2022), by allowing an employer to remedy the shortcomings of the CBA setting out the terms and conditions of the fixed annual working time in days. Nonetheless, the Court of Cassation is still very demanding, as demonstrated by the two cases handed down on the same day which annulled CBAs that set up fixed annual working time in days.

However, it is still uncertain how the Court of Justice of the European Union will perceive this change in direction. Nevertheless, it seems that this new direction makes it possible to respect the right to rest and the protection of workers as defended by European Union law, while reducing the sources of legal uncertainty associated with the introduction of fixed annual working time in days in French companies.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

Under French Law, provisions about temporary work are outlined in the French Labour Code in articles L. 1251-1 and following.

Temporary work is defined as follows by the French Labour Code:

"*The purpose of temporary work is for a temporary employment agency to make an employee available on a temporary basis to a client for the purpose of carrying out an assignment.*

Each assignment gives rise to the conclusion of :

1° A contract between the temporary work agency and the contracting company, known as the "user company";

2° An employment contract, known as an "assignment contract", between the temporary worker and his employer, the temporary employment company.

Where the user is a legal entity governed by public law, this chapter applies, subject to the provisions of section 6".

Besides, the French legislator has made the use of temporary work subject to strict conditions.

In accordance with European Union law, the purpose and effect of a temporary assignment, whatever the reason for it, may not be to fill a job on a permanent basis linked to the normal and permanent activity of the user company.

Even more so, the French Labour Code sets out specific temporary tasks for which such an assignment contract is possible.

Finally, articles L. 1251-9 to L. 1251-10 of the French Labour Code prohibit the use of temporary workers.

It follows from the above that the French judge, in applying the aforementioned articles, would have applied the same solution as the CJEU in a case with similar facts. Indeed, as the French legislator limits the use of temporary work, and therefore the qualification of temporary worker, it is to be assumed that a worker such as the claimant in the CJEU's decision would not have been recognised as a temporary worker.

Finally, it should be noted that the French judge ruled that the provisions of Article L. 1224-1 of the Labour Code relating to the transfer of undertakings are applicable to temporary worker. Consequently, the rules relating to the employee's refusal of his transfer would have been applied.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Labour Court has ruled that the managing directors are not liable for damages if a limited liability company does not pay its employees the statutory minimum wage.

(II) The State Labour Court Munich has ruled that a works council can enforce a regulation on how working hours are to be recorded.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Liability of managers regarding payment of statutory minimum wage

Federal Labour Court, 8 AZR 120/22, 30 March 2023

The Federal Labour Court has ruled that the managing directors are not liable for damages if a limited liability company (*GmbH*) fails to pay its employees the statutory minimum wage. According to the Court, the directors may have to pay a fine under the Minimum Wage Act (*Mindestlohngesetz*, *MiLoG*). However, the relevant provision does not qualify as a so-called protective law under section 823(2) of the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) in favour of the company's employees in relation to the managing director(s).

Under section 823(2) of the BGB, a person is liable to pay damages to another if he or she 'violates a law intended to protect another'. In the view of the Court, the relevant provision of the MiLoG is no such law.

The Federal Labour Court reached the same conclusion in a parallel case (judgment AZR 199/22, 30 March 2023). In that case, however, the lower court (State Labour Court Saxony, 1 Sa 77/19, 17 September 2019) had assumed a protective law and had affirmed the managing director's liability.

2.2 Position of works councils on the recording of working time by the employer

State Labour Court Munich, 4 TaBV 24/23, 22 May2023

Following a decision of the Federal Labour Court (judgment 1 ABR 22/21, 13 September 2022, see September 2022 Flash Report) on a statutory obligation of employers to record working time, the State Labour Court Munich has ruled that a works council can enforce a regulation on how working hours are to be recorded.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The CJEU has ruled that Article 1(1) of Directive 2008/104/EC

> *"must be interpreted as meaning that that directive does not apply to a situation in which, first, the duties performed by a worker are transferred definitively by his or her employer to a third-party undertaking and, second, that worker, whose employment relationship with that employer is maintained on account of the fact that that worker has exercised his or her right to object to the transfer of that employment relationship to that third-party undertaking, may be required, at the request of that employer, to perform, on a permanent basis, the work contractually due for that third-party undertaking and, in that context, be subject to the technical and organisational direction of the latter".*

The CJEU's decision concerns so-called staff secondments (*Personalgestellung*) in the public service in Germany. The decision was based on a request for a preliminary ruling by the Federal Labour Court, 6 AZR 390/20 (A), 16 June 2021.

In Germany, the conformity of German law with Union law has been controversial. In the literature, it is predominantly denied (cf. only *Hamann*, in: Schüren/Hamann (eds.), *Arbeitnehmerüberlassungsgesetz*, 6th ed. 2022, § 1 AÜG note 670 with further references).

4 Other Relevant Information

4.1 Ban on so-called work contracts and subcontractor chains

The parliamentary group *Die Linke* in the German Bundestag has called on the Federal Government to introduce a ban on so-called work contracts and subcontractor chains in the courier, express and parcel services sector.

4.2 Parliamentary hearing on temporary agency work

In a hearing in the competent committee of the German Bundestag, a majority of the invited experts spoke out against changes in the law on temporary agency work. The hearing was based on motions that had been tabled earlier by the parliamentary groups *Die Linke* (20/5978) and the *AfD* (20/6003), respectively.

The AfD parliamentary group had demanded that companies in the parcel sector should only be allowed to employ a maximum of 15 per cent external staff. In addition, temporary agency workers should receive the same wages as employees directly employed by the user undertaking from the first day on.

In its motion, *Die Linke* parliamentary group had demanded that the Federal Government abolish the so-called collective agreement opening clause. *Die Linke* had pointed out that the principle of equality applied to temporary agency work, which should guarantee the same working and employment conditions. However, the opening clause in collective agreements allows a circumvention of this principle of equality with the help of collective agreements. Furthermore, according to *Die Linke*, temporary agency workers should receive a flexibility surcharge of ten per cent on their wages.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

Greek law does not provide for the possibility of workers to object to the transfer of their employment relationship and to continue being considered employees of the transferor. There is no possibility of permanent assignments of temporary agency workers while maintaining their initial contract of employment. The judgment therefore does not have any implications for Greek labour law.

4 Other Relevant Information

4.1 Transparent and predictable working conditions

The Greek Ministry of Employment announced that in September 2023, a bill implementing the Directive on Transparent and Predictable Working Conditions will be presented for a vote in Parliament. It should be noted that Greece is delayed in implementing the respective Directive.

Hungary

Summary

The annual agreement on the minimum wage for 2023 will be renegotiated if the inflation is higher than 18 per cent.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

In the Hungarian Labour Code, the employee does not have the right to object to the transfer of his/her employment relationship to a third-party undertaking. Hence, the situation that arose in the present case cannot materialise in Hungary.

Employers may assign workers to work for another employer (secondment), but the assignment may only last up to 44 days per year (Act 1 of 2012 on the Labour Code (Labour Code), Article 53 (2)). The duration of this assignment in derogation from the employment contract (44 days) may be increased by collective agreement (Article 57 of the Labour Code). Permanent secondment of an employee is unlawful, and the employee may therefore refuse to work for another employer (Article 56 of the Labour Code).

Temporary agency work may be based on a temporary agency work employment relationship, however, an employment contract cannot be amended into a temporary agency work contract after it has already been concluded (Article 218 of the Labour Code). How to establish a temporary work agency is also regulated (Article 215 of the Labour Code). The basic definitions (temporary agency work, agency, assignment, agency worker) are all in line with the judgment (Article 214 of the Labour Code). Hence, the employer (agency) must have the intention to temporarily assign the worker concerned to a user undertaking.

Temporary agency work must be temporary, as the assignment to the same user company (even from different agencies) may not exceed five years (Article 214 of the Labour Code).

The detailed provisions of the Labour Code (Article 214-222) are thus in compliance with the reasoning of the CJEU judgment.

4 Other Relevant Information

4.1 Possible mid-term amendment of the minimum wage

The minimum wage is usually increased at the beginning of the year (01 January 2023). In recent years, the government has shown stronger involvement in the social partners' negotiations to set the annual minimum wage. In accordance with this new policy, the minimum wage for 2023 was based on the tripartite agreement concluded in the main

tripartite body for social dialogue, the Permanent Consultation Forum of the Private Sector and the Government ('VKF') (see Minimum Wage Agreement 2023).

In accordance with this VKF agreement, Government Decree (based on Article 153 of the Labour Code) No. 573/2022 determined the following increases in two types of minimum wage from 01 January 2023:

- The minimum wage (the general minimum) was increased by 16 per cent to HUF 232 000 gross (EUR 612; at the exchange rate at the time of writing was EUR 1 = HUF 379). The exchange rate has witnessed considerable changes (up and down) in 2023);
- The guaranteed minimum wage (minimum wage for jobs requiring secondary education) was increased by 14 per cent to HUF 296 400 gross (EUR 782).

The Hungarian minimum wage (the general minimum) is the second lowest in the EU in 2023 (slightly higher than in Bulgaria).

The agreement contains additional relevant elements. The parties recommended wages to ' keep their real value'. Furthermore, the government, the employers' associations and the trade unions have committed to renegotiating the agreement if the inflation exceeds 18 per cent in July. Inflation in Hungary was the highest in the EU in 2023 (21.5 per cent in May and 20.1 per cent in June), despite the slow increase from its peak in December 2022 at 24.5 per cent (see National Bank Inflation Report, June 2023).

This would be the very first mid-year increase of the minimum wage since its introduction in 1988. This clause only requires a renegotiation of the agreement, but leaves the rate of this second increase in 2023 to the parties.

The macroeconomic official statistical report on July 2023, including the inflation rate, will be published at the end of August. Therefore, the renegotiation obligation depends on whether inflation will be over 18 per cent in July. The agreement will be concluded at the end of August at the earliest. It is still open whether this will happen for the first time in the history of the Hungarian minimum wage system.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The ruling is unlikely to change the interpretation of Directive 2008/104/EC, which has been transposed into Icelandic law through the Act on Temporary Work Agencies No. 139/2005. Icelandic courts do not seem to have ruled on this issue and therefore it is unlikely that the ruling will have direct and immediate implications on the interpretation of existing legislation.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

The Labour Court has ruled that regular and rostered overtime should be included in the calculation of annual leave pay.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Organisation of working time

Labour Court, DWT2313, 29 June 2023

Regulation 5(1)(a) of the Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997 (S.I. No. 475 of 1997) expressly and unambiguously excludes 'overtime' from the calculation of annual leave and public holiday pay. Previous decisions of the Labour Court, such as Carlow County Council v Coughlan and Morrin, DWT2228 and DWT233, ruled that the calculation of a worker's annual leave payment did not have to include 'regular and rostered' overtime. In light of the CJEU's decisions in case C-385/17, *Hein* and case C-514/20, *Koch*—neither of which were brought to the Labour Court's attention in those decisions—that Court has now ruled that a claimant is entitled to have regular and rostered overtime included in his or her pay while on annual leave, notwithstanding Reg. 5(1)(a): Carlow County Council v Ryan, DWT2312. The worker in this case was employed by a local authority and it remains to be seen whether the same approach will be taken if a similar case arises in the private sector.

In a related decision involving the same parties—DWT2313—the Labour Court ruled that the inclusion of overtime did not arise in the calculation of public holiday pay as this was not a matter covered by Directive 2003/88/EC and the case law thereunder.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This decision has no implications for Ireland. First, under Irish law, a worker has no right to object to a transfer of his/her contract of employment. Secondly, there is no equivalent or similar statutory provision in Irish law to para. 4(3) of TVoD. Notwithstanding those two matters, the arrangement here would not be regarded as falling within the scope of the legislation transposing Directive 2008/104/EC – the Protection of Employees (Temporary Agency Work) Act 2012.

4 Other Relevant Information

Nothing to Report.

Italy

Summary

(I) The 'Labour Decree', approved in May, has been transposed into law with the introduction of new rules on fixed-term work, agency work and smart working.

(II) A new Law Decree has been approved by the Italian government to protect workers in the event of a climate emergency.

(III) The Court of Cassation dealt with gender discrimination and leave.

1 National Legislation

1.1 Fixed-term work, agency work and smart working

The Act 03 July 2023 No. 85 transposes the Law Decree of 04 May 2023 No. 48 into law with some modifications for fixed-term contracts, agency work and smart working.

Article 24:

Fixed-term work

In the event of renewal of a fixed-term contract, the reason for renewal must only be stated if the overall duration of relationships exceeds 12 months (previously, this had to always be indicated).

For the purpose of calculating the 12 months, only contracts concluded after the entry into force of Law Decree 48/2023 must be considered (05 May 2023).

Agency work

Permanent agency workers employed under apprenticeship contracts shall not be included in the maximum number of permanent agency workers that an employer can hire (20 per cent of the permanent staff).

Smart working

Article 28 bis: until 03 September 2023, vulnerable workers have the right to smart working. The employer must support remote working, also by assigning different tasks to the employee without a change in pay. 'Vulnerable workers' are those who are affected by diseases referred to in the Decree of the Minister of Health of 04 February 2022.

Article 42: private sector employees have the right to smart working until 31 December 2023, only if they have children under the age of 14 years, provided that agile work is compatible with the nature of their work and that the other parent is not a beneficiary of social benefits or does not work.

1.2 Climate emergency

The Law Decree 28 July 2023 No. 98 aims to protect workers in the event of a climate emergency.

To cope with exceptional climatic situations, including extraordinary heat waves, in the period between 01 July – 31 December 2023, the *Cassa Integrazione Guadagni* can be used in the construction, stone, mining and agriculture sectors (Articles 1-2).

The Ministry of Labour and the Ministry of Health must facilitate the conclusion of agreements between employers' associations and trade unions for the adoption of

agreed guidelines and procedures to protect the health and safety of workers in the event of a climate emergency. These agreements may be transposed by a Decree of the Ministers of Labour and Health (Article 3).

2 Court Rulings

2.1 Gender discrimination

Court of Cassation, No. 18668, 03 July 2023

Providing the same minimum height requirements for men and women for employment as a train conductor is gender discrimination.

A woman had been excluded from the selection procedure for the recruitment of train conductors because she lacked the minimum height requirement, which was established as 1.60 meters for both men and women. The Court reiterated the principle that the provision of the same minimum height requirement for the recruitment of men and women constitutes indirect discrimination where that limit is not objectively justified, not relevant and proportionate to the tasks associated with the required qualifications.

2.2 Unpaid Leave

Court of Cassation, No. 19659, 11 July 2023

Entitlement to unpaid leave is only lost if the employer can prove that he or she has supported and encouraged the employee to take the leave in a timely manner.

An employee who was dismissed for just cause had demanded the payment of unpaid leave accrued in the period before his protective suspension commenced prior to effective dismissal. According to the Court, the fact that the worker was first suspended due to the commission of a crime and later dismissed for just cause did not affect his right to compensation for the leave accrued in the previous period and not used. The Court recalled three CJEU rulings: C-569 and C-570/2016, *Stadt Wuppertal*; C-619/2016, *Sebastian W. Kreuziger*; C-684/2016, *Max Plank*.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The situation deal with in this case cannot arise under Italian law.

According to Article 2112 Italian Civil Code, in case of a transfer of a business unit,

> "*considered to be the establishment of a functionally independent and organised economic activity, identified as such by the transferor and the transferee at the time of its transfer*",

employment relationships continue to remain with the transferee and the employee retains all of his/her rights.

On the other hand, if an employee remains employed by the transferor, he/she cannot be posted to a transferee for an indefinite period, because the assignment can only be concluded for a fixed term. Only work agencies can post employees to a user undertaking indefinitely.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

As already reported on the CJEU's decision in case C-681/18 JH, the biggest problem is the fact that Latvian law does not define what is 'temporary' within the meaning of assignments of temporary agency workers. This in practice leads to a situation in which temporary agency workers are assigned to the same user undertaking for an unlimited period. In addition, Latvian law does not explicitly regulate situations in which, as in the present case, an employee is permanently assigned to work at another company. The status of such workers is uncertain, especially in terms of equal treatment of the employees of the undertaking where the employee actually works.

It follows that the CJEU's decision in case C-427/21 has no implications on Latvian law as it does not ensure any rights to workers who permanently work for another employer than the one with which he/she has an employment contract.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

In case C-427/21, the CJEU (Sixth Chamber) ruled as follows:

Article 1(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with Article 3(1)(b) to (e) thereof, must be interpreted as meaning that that Directive does not apply to a situation in which, first, the duties performed by a worker are transferred definitively by his or her employer to a third-party undertaking and, second, that worker, whose employment relationship with that employer is maintained on account of the fact that that worker has exercised his or her right to object to the transfer of that employment relationship to that third-party undertaking, may be required, at the request of that employer, to perform, on a permanent basis, the work contractually due for that third-party undertaking and, in that context, be subject to the technical and organisational direction of the latter.

It is essential for the understanding of the present case that the national legislation concerned (German law) permits the permanent assignment of workers (CJEU C-427/21 no. 19). However, the CJEU ruled that for an employment relationship to fall within the scope of Directive 2008/104, both where the contract of employment concerned is concluded and when each of the assignments is effectively made, an employer must have the intention to temporarily assign the worker concerned to a user undertaking (CJEU C-427/21 no. 44). Furthermore, a permanent transfer of the duties performed by a worker for the undertaking with which he/she concluded a contract of employment to a third-party undertaking cannot give rise to an employment relationship of a temporary nature with the latter undertaking (CJEU C-427/21 No. 47).

The case decided by the CJEU would not fall under the concept of temporary agency work under Liechtenstein law. Article 19 of the Ordinance to the Act on the Placement of Workers and the Temporary Agency Work (*Verordnung zum Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsverordnung*, AVV, LR 823.101) provides as follows:

1) Temporary agency work includes temporary agency work in the narrow sense *('Temporärarbeit')*, temporary agency work in the broader sense *('Leiharbeit')* and temporary agency work in the sense of occasional leasing of employees to user undertakings *('gelegentliches Überlassen von Arbeitnehmern an Einsatzbetriebe')*.

2) Temporary agency work in the narrow sense occurs when the *purpose* and duration of the employment contract between the employer and the employee are limited to a single assignment at a user undertaking.

3) Temporary agency work in the broader sense exists if an annual turnover of CHF 100 000 is achieved from the commercial activity; the purpose of the employment contract between the employer and the employee is primarily to provide the employee to the user undertaking and the duration of the employment contract is independent of individual assignments.

4) Temporary agency work in the sense of occasional leasing of employees to user undertakings exists if the purpose of the employment contract between the employer and the employee is that the employee primarily works under the employer's authority; the employee is only exceptionally assigned to a user undertaking and the duration of the employment contract is independent of any assignments.

These provisions show that all forms of temporary agency work under Liechtenstein law require the purpose of the employment contract to be the assignment of workers to user undertakings. This was precisely not the case in the present constellation.

Article 18 of the Act on the Placement of Workers and the Temporary Agency Work (*Gesetz über die Arbeitsvermittlung und den Personalverleih, Arbeitsvermittlungsgesetz*, AVG, LR 823.10) points in the same direction. It provides that the temporary work agency must clearly indicate in the public advertisement of job offers that the employee is hired for temporary agency work.

In other words, the present case does not fall under the concept of temporary agency work under Liechtenstein law.

4 Other Relevant Information

4.1 Cross-border teleworking

Liechtenstein signed the Framework Agreement on the application of Article 16(1) of Regulation (EC) No. 883/2004 in cases of habitual cross-border teleworking (LR 0.831.109.106.1) on 30 May 2023. It entered into force on 01 July 2023.

Liechtenstein 'Landesgesetzblatt' No. 272 of 05 July 2023.

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The preliminary ruling in the case *ALB FILS KLINIKEN* is of little relevance for the Lithuanian legal system because Lithuanian law does not provide for the possibility to 'borrow' or 'lend' an employee to another employer, unless a formal 'temporary work' relationship is established.

On the other hand, Lithuanian law also does not provide for a clear answer to situations in which the employee opposes the transfer of the employment relationship in case of a transfer of undertaking or part thereof. There are no statutory provisions and there are no collective bargaining agreements that address this issue. In practice, it would mean that the employee would be dismissed (the contract of employment would be terminated) by the original employer, with the notice period observed and with the payment of severance (Article 57 of the Labour Code).

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

Two new laws deal with the right to disconnect and the implementation of the Work-life Balance Directive. Other laws deal with public holidays and work on Sundays.

1 National Legislation

1.1 Right to disconnect

Loi du 28 juin 2023 portant modification du Code du travail en vue d'introduire un dispositif relatif au droit à la déconnexion

A new law introduces the right to disconnect (*droit à la déconnexion*), but is essentially limited to requiring companies to find individual solutions in consultation with the social partners. The law as such does not define what the right to disconnect consists of, nor does it lay down minimum rules that must be complied with.

The law applies in all cases where company employees use digital tools for professional purposes.

The regime for the right to disconnect outside working hours must be defined. These rules must:

- Be adapted to the company or sector's specific situation;
- Indicate, where applicable, the practical arrangements and technical measures for disconnecting from digital tools; awareness-raising and training measures; and compensation arrangements in the event of exceptional derogations from the right to disconnect.

This regime shall be defined:

- Either by means of a collective agreement (*convention collective)*; a collective agreement may cover a sector, an economic branch or a company or group of companies; the regulation on disconnecting is not a mandatory clause, but a mandatory subject for negotiation on any collective agreement;
- Either by means of a subordinate agreement (*accord subordonné*) at company level (which presupposes a framework collective agreement for the sector or branch defining the main principles);
- In the absence of such an agreement, at company level, with due regard for the powers of the staff delegation (*delegation du personnel*), if any:
    - In companies with fewer than 15 employees, there is no staff delegation. Unlike in other areas (e.g. health and safety, harassment), there is no obligation for the employer to consult directly with the workforce;
    - In companies with between 15 and 149 employees, the delegation must be informed and consulted;
    - In companies with 150 or more employees, the staff delegation has co-decision powers, hence the arrangements must be adopted by mutual agreement between the employer and the staff delegation.

The powers of the staff delegation apply to both the introduction and modification of such a regime.

Failure to introduce such a system is punishable by an administrative fine of between EUR 251 and EUR 25 000, to be imposed by the Director of the Labour Inspectorate after an unsuccessful injunction by a labour inspector.

The law provides for a very long implementation period as these administrative penalties can only be imposed three years after the law comes into force. The main reason for this is that it corresponds to the ordinary renegotiation period for collective agreements (the maximum duration of collective agreements beyond which they may be denounced).

The law adds that

> "*in all cases, this system must ensure compliance with the legal or contractual provisions applicable to working time".*

It is on this point that the law ultimately fails to address the major issue. The authors of the bill themselves stated that

> "*the right to disconnect derives directly from the legal provisions relating to working hours and the health and safety of employees*" (see government amendments).

In a strict interpretation of the national rules on working hours, which only reflect the European rules in this specific area, employees should not be available at all outside of their regular working hours. However, this strict solution does not correspond either to common practice or to companies' needs.

The aim of the law is thus not to introduce the right to disconnect as such (which already exists), but to require companies to implement it in practice:

> "*even if this right already exists, it is quite useful to put in place mechanisms to encourage respect for these principles and their practical implementation*".

1.2 Implementation of the Work-life Balance Directive

Loi portant modification du Code du travail

The draft law transposing Directive 2019/1158 has been adopted. It has not yet been published in the Official Journal.

With regard to extraordinary leaves, it should be noted that Luxembourg's legislation had already been adapted previously in connection with 10 hours of paternity leave.

Carer's leave and time off from work on grounds of force majeure

The following extraordinary leaves have been introduced:

Leave on grounds of force majeure linked to urgent family reasons in the event of illness or accident making the employee's immediate presence away from work indispensable

According to the Directive, Member States may limit this right 'to a specific amount each year or by case'. In Luxembourg, the limit of this leave is one day within a 12-month period of employment. It is questionable whether such a restriction complies with the Directive. However, if Luxembourg's legislation is taken in its entirety, it likely complies with the Directive, since there are many situations of *force majeure* that provide for other types of leave.

Leave to provide personal care or assistance to a family member (son, daughter, mother, father, spouse or partner) or to a person living in the same household as the employee)

This family member must require considerable care or assistance for a serious medical reason that reduces his or her capacity and autonomy, rendering him or her incapable of compensating for or coping independently with physical, cognitive or psychological impairments or health-related constraints or demands. This condition must be certified by a doctor.

This leave is limited to 5 days over a 12-month period of employment.

These leaves are prorated for part-time employees. The employee must notify the employer no later than on the day of his or her absence that he or she will be exercising his or her right to take leave. On the third day, the employee must submit a medical certificate for the leave under b).

During the leave, the employee's right to his or her salary is maintained. Of that salary, 50 per cent is reimbursed by the State, up to a maximum of five times the unskilled minimum wage. The law sets down detailed provisions for the reimbursement procedure.

The employment contract remains in force during the leave.

The law also introduces the aforementioned special leaves in the public sector with several adjustments to the system for postponing parental leave.

Flexible working arrangements

As regards flexible work arrangements, each employee will be entitled to a meeting with his or her employer for the purpose of requesting flexible working arrangements, provided that:

- They have at least 6 months' continuous service with the employer;
- The employee is the parent of a child under the age of nine or provides personal care or assistance to a family member (in accordance with the conditions for extraordinary leave described above).

The employer must review the request and respond within one month, taking into account its own needs and those of the employee. In the event of rejection or postponement, the reason for rejection must be sent to the employee by registered mail.

The law defines 'flexible forms of work' as the possibility for employees to arrange their work schedules, including teleworking, flexible working hours or a reduction in working time for a specified period. The Directive allows for the duration of these measures to be limited, and Luxembourg has opted for a maximum of one year.

Once the duration of flexible work arrangements ends, the employee has the right to return to his or her previous work schedule. He/she may request an early return to his or her previous work schedule if a change in circumstances justifies this; the employer must review such a request and respond within one month, again weighing up the company's needs against the employee's.

The law determines a fine of between EUR 251 and EUR 2 500 where the employer 'fails to comply' with these obligations. This covers cases where the employer fails to agree to a meeting or to provide reasons for a rejection or postponement. It is less clear whether the sanction also covers cases where the employer's reasons are unfounded or insufficient. It is also unclear how the employee can challenge the grounds for rejection. It is not envisaged for the judge to decide to grant the flexible forms of work requested. The employee would probably simply be entitled to damages.

Protection against reprisal

The employer may not dismiss an employee on the grounds that he or she has requested such leave (carer's leave, *force majeure*) or flexible working arrangements or has benefited from them. A termination of the contract would be null and void; this nullity can be declared following an accelerated procedure before the Labour Court. The employee is also protected against reprisals.

1.3 Sunday work in museums

Loi du 28 juin 2023 portant modification de l'article L.231-6 du Code du travail

The law announced in the February 2023 Flash Report has been adopted. It extends the exceptions to the ban on Sunday work to museums.

The change is justified in particular because until now, the legal basis was uncertain (the exception for 'public performance enterprises' was used), the cultural role of museums is important and Sunday openings are necessary to fulfil this mission.

1.4 Bill on Public Holidays

Projet de loi n° 8266 portant modification 1° du chapitre II du titre III du Livre II du Code du travail et 2° de l'article 28-4 de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat

This bill aims to clarify the legislation on public holidays to take account of the situation when two public holidays coincide, as will be the case in 2024 for Ascension Day and Europe Day (09 May 2024).

As is the case with public holidays that fall on a Sunday, the employee will be entitled to a compensatory day off. This day off shall in principle be taken individually within 3 months of the date of the public holiday in question. This ensures that employees benefit from the 11 statutory public holidays provided for in the Labour Code. The rules applicable to employees who work on such a 'double' public holiday have also been adapted along the same lines.

1.5 Compensation for employers for the impact of a 3rd index band

Projet de de loi n° 8260 portant dérogation aux articles 55 et 56 du Code de la sécurité sociale en relation avec l'accord entre le gouvernement, l'UEL et les organisations syndicales OGBL, LCGB et CGFP du 07 mars 2023

This bill has been deposited in the context of the automatic indexation of salaries (adjustment to the cost of living). Due to the high inflation rates, there have been several successive adjustments, which are mandatory for all employers.

The National Statistical Institute (STATEC) forecasts that three tranches (3 x 2.5 per cent) will be applicable in 2023, and tripartite negotiations were held to mitigate the impact on employers. It was decided that employers would be compensated for the third 2.5 per cent increase in 2023. This compensation will take the form of a temporary adjustment to the contributions that employers must pay to the 'Employers' Mutuality' (*Mutualité des Employeurs*; a body that collectivises the cost of maintaining the remuneration among employers of sick employees during periods not covered by the health insurance system). This bill implements the technical details of this agreement by reducing contribution rates over the period 2024 to 2026, with a view to reducing the administrative burden on the Mutuality as much as possible. One particular technical concern was to avoid negative contribution rates. The cost to the State, which will ultimately bear the cost of this compensation, is estimated at EUR 360 million.

This bill was already adopted during the first reading.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This decision will have no implications for Luxembourg. Luxembourg law does not provide for a right to object to the transfer of the employment relationship. If the situation falls within the scope of the rules on transfers of undertakings, the employee must accept the transfer; if not, he or she cannot be transferred without his/her agreement.

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 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This judgment underpins the necessity to have a definition in place of what constitutes 'temporariness' in the concept of temporary agency work. Whilst it is arguably not desirable to set a fixed period, it is indisputable that what often starts off as a temporary work arrangement in fact becomes a 'supply of workers' agreement.

This is frequently the case in Malta, with one exception, namely that the worker remains, with all intents and purposes of the law, an employee of the temporary work agency. Hence, a worker would be employed by a temporary work agency, and 'supplied' to a user undertaking but remains permanently employed by the user undertaking. In practice, many temporary work agency agreements with user undertakings specify that for a temporary agency worker to become fully employed by the user undertaking, a specific sum has to be paid to the temporary work agency by the user undertaking and usually (though no statistics are available but this is clearly happening in practice) the cut-off date would be after one year. Hence, the temporary agency worker would have to remain employed with the temporary work agency for one year at the end of which the user undertaking is free to engage the worker directly, subject to the payment of a fee to the temporary agency work.

What is the line of demarcation between temporary agency contracts and supply of labour contracts?

The judgment, seen from this late, is quite logical. The moment that the 'temporariness' ends and the arrangement becomes permanent, the application of Directive 2008/104 no longer applies but is regulated by the laws regulating labour supply.

The implications are that the supply of labour contracts are not covered by the Directive but it may also very well mean that legislative interventions may be necessary to ensure that workers are being 'supplied' within the framework of a supply of workers agreement and to ensure that their rights and conditions are fully protected.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) Draft bills for labour market reforms have been published online.

(II) Dutch courts must comply with their 'duty to disclose' under the Brussels I-bis Regulation.

(III) A court ruled that a deviation in favour of the employee is not contrary to Directive 1999/70/EC.

(IV) Having to be present at work 15 minutes before a shift starts is not considered to be working time.

(V) Because an employee did not habitually carry out his work in the Netherlands, the Dutch courts do not have jurisdiction pursuant to Article 19 paragraph 2 sub a EVEX-II.

1 National Legislation

1.1 Draft bills for labour market reforms

As mentioned in the April 2023 Flash Report, the Dutch government is currently developing an extensive package for labour market reforms. Some updates on the legislative developments in relation to this issue are provided. Several draft bills have been published online. The public can comment on these and the Ministry of Social Affairs and Employment will take these into account in the further design of these drafts. The draft bills that have been published online are highlighted below:

Strengthening the position of flexible workers

As explained in more detail in the April 2023 Flash Report, there will be stricter rules regarding on-call contracts, temporary contracts and temporary agency work. The draft bill aims to strengthen the position of flexible workers.

Unemployment benefits for people over the age of 60 years

A special unemployment benefit (IOW) is currently available to jobseekers over the age of 60 years and 4 months who are entitled to the WW (fit for work) or WGA (partially fit for work) benefit. This group is less likely to find work again after losing their job. The right to enter the IOW was planned to expire on 01 January 2024, but a draft bill extends that right by four additional years. Due to this amendment to the law, the IOW benefit will remain available in the coming years to individuals who are not yet entitled to state pension.

Lower costs for overtime performed by staff with a permanent contract

The possibilities for staff with a permanent contract to work overtime will be expanded. Due to the design of the Dutch law on unemployment benefits (WW), employers pay a lower WW contribution for employees with a permanent contract and a higher WW contribution for employees with a flexible contract. However, if an employee with a permanent contract performs an average of over 30 per cent overtime in a calendar year, the higher contribution must be paid retroactively. This makes it less financially attractive for employers for overtime to be performed by permanent staff. At present, employees with permanent contracts averaging 35 hours per week or more are exempt from this higher contribution. Once the bill goes into effect, all contracts with an average of over 30 hours per week will also fall under this exception.

2 Court Rulings

2.1 Brussels I-bis Regulation

Court of Appeal Arnhem-Leeuwarden, ECLI:NL:GHARL:2023:6122, 18 July 2023

This case concerned the jurisdiction of the Dutch court on the basis of the Brussels I-bis Regulation (1215/2012). The employee was employed by Elburg Foods B.V. A request by Elberg Foods to terminate the employment contract was rejected by the District Court. In appeal, the Court of Appeal ruled that it did not have jurisdiction to hear the application. On the basis of Article 22(1) Brussels I-bis Regulation, the employer's claim can only be brought before the courts of the Member State in whose territory he or she resides. Since the employee resided in Germany at the time of initiation of the application, only German courts, in principle, had jurisdiction. On the basis of Article 26 Regulation Brussels I-bis Regulation, the court of a Member State before which the defendant appears has jurisdiction as well. However, paragraph 2 of this article provides that if the employee is a defendant, the court before which he or she appears shall, prior to accepting jurisdiction under paragraph 1, verify that the defendant has been informed of his or her right to contest the court's jurisdiction as well as of the consequences of appearing or not appearing before the court (the so-called 'duty to disclose'). In fulfilment of the duty to disclose, the Court of Appeal at the beginning of the oral hearing read these articles to the parties. At this, the hearing was adjourned to give the employee and his lawyer the opportunity to confer. After the adjournment, the employee informed the court that he disputed the court's jurisdiction. This meant that the Court of Appeal did not have jurisdiction to hear the application. The Court of Appeal declined jurisdiction and set aside the District Court's order, as it also lacked jurisdiction to hear the application.

2.2 Fixed-term work

District Court North-Holland, ECLI:NL:RBNHO:2023:6468, 23 March 2023

This case dealt with the question to what extent a collective agreement can deviate from Article 7:668a Dutch Civil Code concerning the existence of an open-ended employment contract. The law does not provide for a literal possibility to deviate from the 36-month period laid down in Article 7:668a Dutch Civil Code (after which an employment contract is automatically converted into an open-ended contract) in a collective agreement by limiting it to 24 months, as was the case in this collective agreement. In the District Court's opinion, however, it is possible in a collective agreement to deviate from the statutory period of 36 months. Article 7:668a Dutch Civil Code does not state that a deviation in favour of the employee is prohibited, nor has this been the case in legislative history. It is also important to note that Article 7:668a Dutch Civil Code is partly intended to comply with Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work (hereinafter: Directive 1999/70). Given the wording and purpose of Directive 1999/70, the statutory 'chain of contracts' regime should be interpreted as allowing derogations from it by collective agreement in favour of the employee, even if there is no specific legal basis for doing so. That interpretation is most consistent with the worker protection sought by Directive 1999/70 and with the premise that an open-ended employment contract is the norm. It is also in line with the principle that Member States and social partners can maintain or introduce provisions that are most favourable to workers. The conclusion, therefore, is that it follows from Article 7:668a Dutch Civil Code and the legislative history that the deviation from that rule in the collective agreement in favour of employees is not contrary to the law and not void, but valid and a possibility, also in the light of the duty to interpret national legislation in conformity with EU directives. Therefore, an open-ended employment contract between the parties arose.

Although it cannot be stated that allowing deviations in favour of employees in a collective agreement follows from the duty to interpret Article 7:668a Dutch Civil Code

in conformity with Directive 1999/70 (as the Directive contains no obligation to allow such a deviation), doing so seems to be in line with the Directive's objective.

2.3 Working time

District Court Amsterdam, ECLI:NL:RBAMS:2023:3904, 23 June 2023

This case concerned the question whether being present at work 15 minutes before the shift starts should be considered working time and whether it should therefore be paid. The employee worked for a temporary work agency and was assigned to work as a luggage handler at Schiphol Airport (as the user undertaking). According to Schiphol's internal regulations, employees must present themselves 15 minutes before the official start of their shift to register in the shift list and pick up the relevant keys and phone. The reason why an earlier arrival of 15 minutes has become a house rule is because in the past, employees did not arrive until 6:00 a.m. sharp and were not in their positions until around 6:15 a.m. or later. Because of this provision of earlier arrival, the employee claimed back payments. The District Court ruled that in order to be able to claim that an earlier arrival of 15 minutes is working time that should be financially compensated, a determination would need to be made of what the employee was required to do during those 15 minutes, the extent to which the employer had authority over the employee and whether the employee was receiving instructions from his employer during the 15 minutes prior to the start of his shift. Given that the employee's statement was insufficient to assume that the 15 minutes that the employee had to be present before the start of his shift counted as working time, the District Court ruled in favour of the temporary work agency.

This ruling deviates from the ruling of the Court of Appeal The Hague, reported on in para. 2.2 of May 2023 Flash Report (ECLI:NL:GHDHA:2023:738, JAR 2023/158 m.nt. Eleveld), which dealt with a similar situation, i.e. the employee had to be present 10 minutes before the beginning of the shift to be able to start working the minute the shift started. It is arguable that the District Court's ruling is not in line with earlier Dutch case law and the CJEU's case law.

2.4 Place of habitual work

District Court Zeeland-West-Brabant, ECLI:NL:RBZWB:2023:4629, 04 July 2023

This case concerned a dispute between Resource Consulting, a Swiss supplier company, and a Dutch employee (a cargo pilot). As of 01 January 2023, Resource Consulting dismissed the employee, who, in turn, claimed financial compensation for the dismissal.

The main question in this case concerned the jurisdiction of the Dutch court and the interpretation of 'where the employee habitually carries out his work'.

According to the employee, the Dutch court had jurisdiction on the basis of Article 19 paragraph 2 sub a Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter: EVEX-II), because the Netherlands is the country from where he habitually carried out his work. According to Resource Consulting, however, the employee's habitual country of work could not be determined—and the court would therefore have to fall back on the place where the business that employed the employee was or was situated, which in this case was Switzerland—or that at least the Netherlands could not be regarded as the employee's habitual country of work.

The District Court ruled that the question whether the Dutch court had jurisdiction in this case was (indeed) governed by EVEX-II. In the Koelzsch judgment, the CJEU provided an assessment framework for the transport sector with regard to Article 19 paragraph 2 sub a EVEX-II (to assess 'where the employee habitually carries out his

work'). According to the CJEU, account must be taken of all of the elements characterising the worker's activity. Specifically, it must be established in which state:

- the employee carries out his/her transport orders;
- the employee receives instructions for his/her orders and organises his/her work;
- the work tools are located;
- the transport is primarily carried out;
- the goods are unloaded;
- the employee returns after his/her assignments.

The District Court applied all of the six criteria mentioned above. First, the Court found that the employee operated various cargo flights to and from different airports, all of which were outside the Netherlands (criterium 1). Secondly, the employee received instructions for transport orders—such as the routes of the cargo flights and other relevant information such as the weather and information about the destination—when he was outside the Netherlands. At home, he only received his work schedule and the information for the scheduled flight from Schiphol. However, since he worked according to a fixed schedule and had only very little to organise from home, the Netherlands could not be considered the place where he received instructions and where he organised his work (criterium 2). Moreover, the work instruments—in this case, the aircraft to carry out the transport orders—were located outside the Netherlands (criterium 3). In addition, the transport took place outside the Netherlands (criterium 4), and the goods were unloaded outside the Netherlands (criterium 5). During the transport, the employee did not enter Dutch territory. Nevertheless, after carrying out the assignments, the employee returned to the Netherlands (criterium 6).

Apart from the sixth criterium, none of the other criteria pointed to the Netherlands as the employee's habitual country of work. With regard to the aforementioned Koelzsch judgment, the Supreme Court ruled in its judgment of 17 March 2023 that all six criteria formulated by the CJEU were to be taken into account. Accordingly, the District Court ruled that—in this case—the employee did not habitually carry out his work in the Netherlands. This means that the Dutch court had no jurisdiction pursuant to Article 19 paragraph 2 sub a EVEX-II.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

Dutch law (statutory law or collective agreements) does not contain a provision that gives an employer the right to permanently assign an employee to a user undertaking to whom the employer has transferred his undertaking. Furthermore, under Dutch law, an employee does not have the right to retain his or her employment contract with the transferor after objecting to the transfer (informing the transferee). Instead, the employment contract automatically ends on the date of the transfer (ECLI:NL:HR:1988:AB9979). Therefore, a situation such as the one in *ALB FILS KLINIKEN* cannot arise in the Netherlands.

However, the *ALB FILS KLINIKEN* case is relevant in a broader context. As was reported in the December 2022 Flash Report in relation to a judgment of a District Court, Dutch law does not contain any statutory provisions that prohibit the permanent assignment of a temporary agency worker to the same user undertaking. Instead, the Dutch legislator has introduced a separate regime for so-called 'payrolling companies': companies that engage employees with the objective of permanently assigning them (which is interpreted as 'exclusively') to a single user undertaking. Under this regime, payrolling companies are excluded from the flexible temporary agency work regime and

payrolled employees are granted additional protection. In short, with regard to employment conditions and dismissal, payrolled employees have the same rights as employees who are directly employed by the user undertaking.

There is an ongoing debate in Dutch literature whether the payrolling regime can be considered an appropriate measure to ensure the temporary nature of agency work within the meaning of Article 5(5) Directive 2008/104. The *ALB FILS KLINIKEN* case provides arguments that assert that this is the case, or at least to conclude that the treatment of payrolled employees is not contrary to the Directive. On the basis of *ALB FILS KLINIKEN*, it can be argued that payrolled employees do not fall under the Directive's scope, since they are not assigned with the intention to temporarily work for the user undertaking and furthermore, do not need the protection of the Directive, because the payrolling regime grants them a level of protection that goes beyond the protection provided by the Directive. In a broader context, the judgment in *ALB FILS KLINIKEN* provides further arguments in favour of Member States not being required to interpret Article 5(5) of the Directive literally by prohibiting the permanent assignment of employees as such and that instead, protection such as the payrolling regime is also permitted. However, this cannot be said with certainty. The Dutch legislator is currently considering adopting explicit safeguards to prevent agency workers from being made permanently available to a user undertaking, such as a maximum period for the assignment of the same worker to the same user undertaking (see *Kamerbrief over Hoofdlijnen Arbeidsmarkt*, p. 12).

Finally, the need for an intention to assign a worker to a user undertaking to be present both 1) where the contract of employment concerned is concluded, and 2) when each of the assignments is effectively carried out (*ALB FILS KLINIKEN* case, para. 44) seems more restrictive than the Dutch implementation of the Directive. For example, in corporate groups, an employee will sometimes be assigned to work for his/her employer, but is later posted to a different company within the same group, for example because his/her position at his/her original employer is terminated. Under Dutch law, this would constitute an assignment within the meaning of the Posting of Workers by Intermediaries Act (*Waadi*), which has transposed the Directive. Due to the specifics of the case, it is uncertain whether the Court's judgment in *ALB FILS KLINIKEN* can be fully applied to this and other situations. As a result—and since the Directive represents minimum harmonisation—it is unlikely this case will have implications for the Dutch approach.

4 Other Relevant Information

4.1 Bogus self-employment in Dutch health care

An agreement has been signed to fight bogus self-employment in the Dutch health care sector. The signing parties are Minister Helder (Long-term Care and Sport), Minister Van Gennip (Social Affairs and Employment), State Secretary Van Rij (Tax and Tax Authorities) and six sector organisations in the health care sector. The agreement entails plans, including tax measures, to prevent employees from resigning and then returning to the same job as 'self-employed' workers. The government will take the first step to put these plans into action, after which steps will follow in the health care sector.

4.2 Funds for sheltered work and social development companies

The Minister of Social Affairs and Employment aims to create more 'sheltered jobs'. Such jobs are intended for individuals who can only work in a 'sheltered' environment under adapted circumstances, and not for a regular employer. The Minister has announced a structural investment of EUR 64.7 million for sheltered work. More specifically, municipalities will receive an additional amount of EUR 2 157 per sheltered workplace from 2024 onwards. Furthermore, the Minister intends to further stimulate sheltered

work in the short term and has developed an extensive package of measures to reach this goal with the cooperation of the municipalities. In addition, a total budget of EUR 63.9 million will be made available in 2024 for social development companies that specialize in helping people who need extra support finding and keeping a job.

4.3 Funds for training and guidance of people with a vulnerable labour market position

The Minister of Poverty Policy, Participation and Pensions has made EUR 70 million available from the European Social Fund (ESF+) for training and guidance for people to improve their position on the labour market. The subsidy is intended for individuals who have difficulty finding or keeping a job, such as job seekers, status holders (refugees with residence status) and displaced persons from Ukraine, people without further education or people with a low income from work.

The projects for which the funds are intended will have a maximum duration of two years. The ESF+ will pay 40 per cent of the project's costs, while the rest of the costs will be covered by the applicant party. The funds can be used for:

- Projects aimed at providing training and guidance;
- A subsidy for wage costs if employers hire and train someone who is on welfare;
- Support outside of work, such as housing, care, finances and health.

Training and development funds and social partners can apply for a subsidy from the Ministry of Social Affairs and Employment until the end of January 2024.

4.4 Funds to help status holders find work

The Dutch government intends to help more status holders (refugees with a residence status) find work. Therefore, EUR 37.5 million will be made available over the next three years to achieve this goal. Most of these funds will go to regional connectors, starter jobs trials and a subsidy scheme for employers to make it easier to employ status holders.

Norway

Summary

The EFTA Surveillance Authority has sent a letter of formal notice to Norway for introducing unjustified and disproportionate restrictions on the use of temporary agency workers.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

The CJEU's interpretation of the scope of Directive 2008/104 on temporary agency work does not seem to have clear implications for Norwegian law.

First, there are no specific rules on the 'supply of staff' that give the employer a right to permanently assign the worker to work for another undertaking under its supervision and direction. A contract of supply of staff in Norwegian law is classified as either the hiring of a worker or as the subcontracting/contracting of services, depending on a broad assessment. Supervision and direction by the user entity are an indication that the worker has been hired, cf. the Working Environment Act (WEA, LOV-2005-06-17-62) Section 14-12 (5).

As regards the hiring of workers, Norwegian law applies two sets of rules. One set is for the hiring of workers from undertakings whose activity is to hire out labour (temporary work agencies), cf. the WEA Section 14-12 ff and the Act on State Employees (ASE, LOV-2017-06-16-67) Section 11. These rules transpose Directive 2008/104 on temporary agency work. According to these rules, an employee may not be permanently assigned to work for a third party (undertaking) under its supervision and direction. The hiring of workers from temporary work agencies has been restricted by regulations parallel to the restrictions on fixed-term work, and further restrictions have recently been introduced (see Flash Report 12/2022).

There is a second, more lenient set of rules for hiring of workers from undertakings other than those whose activity is to hire out labour (WEA Section 14-13 and ASE Section 12). The main requirement is for the hired employee to be permanently employed by the lessor. This type of hiring is considered to fall outside the scope of the Directive, cf. Prop. 74 L (2011–2012) p. 22. The rules in WEA Section 14-13/ASE Section 12 do not meet the requirements of the Directive of equal treatment, etc.

In other words, the scope of the provisions that transpose the Directive into Norwegian law is determined by the distinction between the two sets of rules, i.e. whether the undertaking's activity is to hire out labour. This depends on a concrete assessment in light of the purpose of the provisions. WEA Section 14-13/ASE Section 12 aim to regulate situations in which a 'regular' undertaking has a need to hire out workers as an alternative to dismissals or temporary lay-offs, or when hiring occurs sporadically only. To be regulated by these provisions, the minimum requirements are that the hiring

out must take place within the main areas of activity of the lessor, and that the hiring may not affect more than 50 per cent of permanent employees. Furthermore, to prevent circumvention, how the specific situation correspond to the purpose of the provisions. If the hiring does not fall under WEA Section 14-13/ASE Section 12, the stricter rules in WEA Section 14-12 ff/ASE Section 11 apply.

The present case does not seem to call this distinction—and thus the scope of the provisions transposing the Directive into Norwegian law—into question.

4 Other Relevant Information

4.1 Restrictions on the use of temporary agency work

In January 2023, the EFTA Surveillance Authority (ESA) opened an own initiative case to review newly adopted measures in Norway which restrict the use of temporary agency workers (see December 2022 Flash Report and March 2023 Flash Report).

On 19 July 2023, the EFTA Surveillance Authority (ESA) sent a letter of formal notice to Norway for introducing unjustified and disproportionate restrictions on the use of temporary agency workers. A letter of formal notice is the first step in an infringement procedure against an EEA EFTA State. Norway now has two months to express its views before ESA decides whether to take the case any further.

In the formal notice, ESA found Norway to be in breach of Directive 2008/104 on temporary agency work and Article 36 of the EEA Agreement on the freedom to provide services. In ESA's view, the newly introduced restrictions cannot be justified on grounds of general interest since the objective pursued goes against the Directive's two-fold aim of protecting temporary agency workers and providing flexibility in the labour market. In addition, ESA finds that the restrictions are not proportionate. Norway has not demonstrated that they are actually suitable to achieving the objective of increasing permanent and direct employment in a consistent and systematic manner. Nor has it been demonstrated that the restrictions are necessary and that no alternative and less restrictive measures are available. ESA's decision is available here.

Poland

Summary

The draft of the Law on Posting of Drivers in Road Transport and the draft of the Law on Employee Participation in a Company Created as a Result of a Cross-border Conversion, Merger or Division have been approved by the legislator.

1 National Legislation

1.1 Minimum wage

On 01 July, the statutory minimum wage was raised. Currently, the minimum wage amounts to PLN 3 600 for employment contracts (around EUR 750), and PLN 23.50 per hour for civil law contracts. This is the second increase in minimum wage in 2023. In January 2023, the minimum wage was raised in comparison to 2022. It amounted to PLN 3 490 for employment contracts (around EUR 727), as well as PLN 22.80 per hour for civil law contracts. Thus, in 2023, minimum wage has already been increased twice. Under the Law on Minimum Wage, if the indicator of expected prices for commodities and services next year is at least 105 per cent, then the minimum wage will be modified twice a year, i.e. in January and in July. This situation occurred in 2023.

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

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

1.2 Posting of drivers in the road transport sector

On 28 July 2023, the Law on Posting of Drivers in the Road Sector was approved by Parliament. As the next stage in the legislative process, the new Law will be transmitted to the President.

The new Law implements Directive 2020/1057 and sets down rules in relation to Directive 96/71 and Directive 2014/67 on the posting of drivers in the road transport sector. It aims to improve drivers' working conditions and to facilitate the activities of road transport operators. At the same time, the draft at stake goes beyond the implementation of the abovementioned Directive, and amends the Law on Working Time of Drivers in terms of issues related to remuneration.

The draft and its substantiation are available here.

The information on the legislative process is available here.

The new Law applies to road transport operators that have their seat in another EU Member State or in a third country which temporarily posts a driver to perform work in the territory of Poland within the framework of road transport services.

The Law determines the principles of the posting of workers in the road transport sector, the supervision over the observance of the regulations on the posting of drivers, information duties connected to posting, cooperation between the Road Transport Inspectorate and the State Labour Inspectorate, cooperation with competent authorities from other states, and sanctions for violations of the regulations in force. In matters not regulated by the respective Law, the Law of 10 June 2016 on the posting of workers within the framework of the provision of services applies (consolidated text: Journal of Laws 2021, item 1140, with further amendments).

A road transport operator that posts drivers to Poland is required to safeguard the employment conditions set down in the Law of 10 June 2016 on the posting of workers within the framework of the provision of services. The main duty of the road transport operator from another EU Member State is to report the posting of the driver using the public interface connected to the IMI system, at the latest when the posting commences, and to ensure that the driver has the required documents, in paper or electronic form, which must be produced in case of a road check. The road transport operator from the third country must report the posting to the State Labour Inspectorate through the State Labour Inspectorate's website. It should also provide the driver with written confirmation of the posting, to be produced in case of a road check.

Controls of posting of drivers consists of road checks carried out by the Road Transport Inspectorate, while the the posting and employment conditions are checked by the State Labour Inspectorate.

An operator that posts a driver to Poland and that violates the duties set down by the Law is subject to pecuniary fine for each violation, ranging from PLN 2 000 to PLN 3 000 (around EUR 450 and EUR 670, respectively).

Moreover, the Law on Posting in the Road Transport Sector amends the Law of 16 April 2004 on the working time of drivers (consolidated text, Journal of Laws 2022, item 1473).

The amendment pertains to the remuneration of drivers. It simplifies the calculation of taxes and social security contributions. Moreover, the driver, who is considered a posted worker for the purposes of Directive 96/71, remuneration in the meaning of the law of the country to which the driver has been posted can be paid in two instalments, on the same date of the month determined in advance: the first instalment no later than within the first 10 days of the next calendar months, the second instalment no later than until the 21st day of the next calendar month.

The legislative process was relatively short since the draft was submitted by the government on 01 June 2023. It is expected that the new Law will soon be signed by the President, and will take effect 14 days after it has been published in the Journal of Laws.

1.3 Employee participation in cross-border companies

The draft of the Law on Employee Participation in the Company Created as a Result of a Cross-border Conversion, Merger or Division of Companies has recently been subject to the legislative process. The draft aims to transpose Directive 2017/1132 relating to certain aspects of company law (codification), and Directive 2019/2121 on cross-border conversions, mergers and divisions.

The draft and its substantiation are available here.

Information on the legislative process is available here.

The new Law will abrogate the Law of 25 April 2008 on employee participation in a company created as a result of the cross-border mergers of companies (consolidated text: Journal of Laws 2019, item 2384) which transposed Directive 2005/56 on Cross-border Mergers of Limited Liability Companies.

The cornerstones of the new Law can be summarised as follows. The Law determines the forms of employee participation in a company created as a result of cross-border conversions, mergers or divisions of companies, as well as rights and duties of employees and the managing or administering body of a company that is the subject of a cross-border conversion, merger or division. The forms of employee participation are: the right to designate or elect the specified number of members of the supervisory board, or a board of directors; the right to recommend the members of the supervisory

board or board of directors; the right to object to the designation of some or all of the members of the supervisory board or board of directors (Article 1).

The Law specifies the duties of the special negotiating body, the basic task of which is to conclude an agreement with the competent body of the company under transformation (Article 3). The members of the special negotiating body are elected in accordance with the legal regulations of the given Member State (Article 4). The special negotiating body should be set up immediately after the plans to transform the company have been announced (Article 5). The members of the special negotiating body should be designated by the representative company trade union organisation (Article 12). The negotiations with the competent body of the company that is subject to the conversion, merger or division should be completed within 180 days. The parties to the negotiations may decide to extend the negotiations up to one year (Article 24). The agreement should, in particular, determine its scope of application, the rules of employee participation, the day when the agreement takes effect, the period of its binding force and cases where the agreement can be re-negotiated (Article 28).

The Law determines standard rules of employee participation (Chapter No. 3). Standard rules imply that in a company created as a result of a cross-border conversion, merger or division, employees: 1) have the right to designate, or to elect, or to recommend members of the supervisory board or board of directors; or 2) employees have the right to object to the designation of some or all of the members of the supervisory board or board of directors in the number that is equal to the highest number of employee representatives in the supervisory board or board of directors (Article 30). The standard rules of employee participation should apply where parties decide so, or where the agreement between employee representation and the competent company body has not been concluded (Article 31-32). There is no obligation to introduce standard rules on employee participation if in the companies under conversion, merger, or division such rules did not exist (Article 34). If in companies under transformation there have been various forms of employee participation and the agreement has not been concluded, the special negotiating body shall decide which form of employee participation will apply (Article 35). Employee representatives shall decide on the composition of the supervisory board or board of directors, on the manner of how to recommend the members of the supervisory board or board of directors, on the manner of how to express an objection against designated members of the supervisory board or board of directors at the newly created company (Article 36). Where the seat of the company is Poland, the employee representatives shall decide on the composition of the supervisory board or board of directors proportionally to the number of employees employed in the given Member State(s) (Article 37).

Individuals who represent those employees employed in Poland in the supervisory board or board of directors shall be elected in direct and secret ballots, according to the protocol adopted by the special negotiating body or the employee representatives (Article 45).

Any individual involved in the negotiations is required to refrain from disclosing the information that has been declared by the company to be confidential (Article 47).

The employer may not terminate an employment contract with or without notice, neither to modify the employment contract and remuneration to the detriment of the employee who is a member of a special negotiating body, a member of employee representative body, or a member of a supervisory board or board of directors, unless consent by the board of a company trade union organisation representing the employee has been given, or where an employee is not represented by the trade unions, consent has been given by the regional labour inspector. The trade union organisation or labour inspector shall publish their opinion within 14 days. Failure to do so amounts to consent to terminate the employment contract (Article 52).

The draft was submitted by the government in April and was accepted by the Sejm (the lower chamber of Parliament) on 26 May. However, on 26 June, the Senate (upper

chamber of Parliament) voted against the bill. The Senate's recommendation to abolish the draft was based on formal grounds, because the draft refers to the specific articles of other statutes that have not been laid down yet. The Sejm has not yet responded to the Senate's position.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

In Poland, temporary work is regulated in the Law of 09 July 2003 on the employment of temporary agency workers (consolidated text: Journal of Laws 2023, item 1100).

According to Article 1, the Law sets out the principles for a temporary work agency to employ temporary workers, as well as the principles for assigning workers and individuals who are not temporary agency workers, to perform work for the user undertaking. A temporary worker can be employed on the basis of a fixed-term employment contract, and individual workers can be hired out on the basis of a civil law contract.

Article 2 item 3 of the Law provides that 'temporary work' means the performance of the following tasks for a specific user undertaking, for a term no longer than specified in the Law: a) seasonal, periodic or casual work; b) work that the user undertaking's regular employees would not be able to perform on time; and c) work that falls within the scope of the duties of an absent employee of the user undertaking. Article 20 of the Law imposes time limits on the recourse to temporary work. The maximum period of temporary work for a given user undertaking is 18 months within a 36-month period. It should therefore be emphasised that national legislation does not permit the permanent assignment of workers.

Under Polish law, the temporary agency would thus have to employ the worker with the intention of temporarily assigning him/her to a user undertaking. A situation such as that at issue in the dispute would not fall within the scope of the Law on Temporary Workers since it relates to the permanent transfer of employee duties to another entity. It seems that in such a situation, i.e. the continuation of the employment relationship of the worker concerned by a permanent transfer of his/her duties would be covered by Article 23 of the Labour Code, which pertains to a transfer of an undertaking. According to Article 23 § 1 LC, if a work establishment or part of it is transferred to another employer, that employer, by operation of the law, becomes a party to the existing employment relationship. Thus, the employee rights would be sufficiently protected. It should also be noted that under Polish law, an employee does not have the right to object to the transfer of an undertaking, but within two months after the transfer has been made, he/she can terminate the employment contract without notice, upon seven days of prior notification.

The Labour Code of 26 June 1974 (consolidated text: Journal of Laws 2022, item 1510, with further amendments) is available here.

The judgment in case C-427/21 does not imply the need to introduce any amendments in national labour law.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) Some of the amendments to Portuguese labour law related to parenthood protection have been regulated in their social support dimension.

(II) A recent Supreme Court of Justice ruling concerned the mandatory character of the rules of Portuguese law on vacation and Christmas allowances.

1 National Legislation

1.1 Regulation of recent amendments to labour legislation

On 05 July 2023, Decree Law No. 53/2023 (see here for a summary of the Decree Law) was published in the Official Gazette, which regulates some of the amendments to Portuguese labour law, implemented within the context of the 'Decent Work Agenda', through Law No. 13/2023 of 03 April (on this law, see April 2023 Flash Report).

The so-called 'Decent Work Agenda' introduced a set of measures with the aim of improving working conditions and the conciliation between personal, family and professional life. This Decree Law intends to regulate this regime in its social support dimension.

Decree Law No. 53/2023 provides for the application of the following social security benefits in situations covered by the parenthood protection regime identified below:

- In cases in which the initial parental leave is combined with part-time work (which is one of the novelties of the 'Decent Work Agenda'), beneficiaries shall be entitled to the corresponding initial parental benefit;
- The mother's exclusive initial parental allowance is granted for a period of 42 consecutive days after childbirth;
- The periods of the father's exclusive initial parental allowance are as follows:
    - 28 days of compulsory parental leave, consecutive or interpolated of at least 7 days, of which 7 days shall be taken consecutively immediately after the child's birth and the remaining 21 days shall be taken in the 42 days period following the birth of the child;
    - 7 days of optional parental leave, consecutive or interpolated, provided that they are taken simultaneously with the mother's initial parental leave.
- Adoption allowance shall, in addition to the initial parental allowance, include the father's exclusive initial parental allowance and the extended parental allowance, and shall also apply to foster families;
- The initial and the extended parental allowance increase to 90 per cent and 40 per cent of remuneration, respectively, when parental responsibilities are effectively shared;
- Some social benefits, such as the initial and the extended parental allowance, are now cumulated with income from work.

This Decree Law entered into force on 06 July 2023 and shall take effect from 01 May 2023.

2 Court Rulings

2.1 Vacation and Christmas allowances

Supreme Court of Justice, No. 158/20.2T8MTS.P1.S1, 07 July 2023

In this judgment, the Supreme Court of Justice ruled that it is mandatory to pay vacation and Christmas allowances foreseen in Portuguese law to an employee whose employment contract is performed in Portugal, even if the parties have chosen Irish law to govern the employment contract and such law does not require the payment of such allowances.

This decision was grounded on Article 8 (1) of the Rome I Regulation (Regulation EC No. 593/2008, of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations) which stipulates that

> *"an individual employment contract shall be governed by the law chosen by the parties (…)"*

although

> *"such a choice of law may not (…) have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article".*

Under paragraph 2 of Article 8 of the referred Regulation,

> *"to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract*".

According to the Supreme Court, the provisions of the Portuguese Labour Code that provide for vacation and Christmas allowances are mandatory and cannot be derogated by agreement between the parties. Therefore, the Court ruled that in the present situation, these benefits would always be due, regardless of the annual amount of remuneration paid to the employee.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This ruling concerned the interpretation of Article 1(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

According to Article 1(1), this Directive *"applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction"*. From the definitions of 'temporary work agency' and 'temporary agency worker' contained in Article 3 (1) (b) and (c) of the same Directive, such contracts of employment are concluded with workers to assign them to user undertakings. In addition, according to the definition of 'user undertaking' and 'assignment' specified in Article 3(d) and (e), the employment relationship with a user undertaking is by its nature temporary.

The CJEU ruled that Directive 2008/104/EC does not apply in a situation such as that at issue, in which *i)* the duties performed by a worker are transferred definitively by his employer to a third-party undertaking, and *ii)* the worker, whose employment relationship with the employer is maintained on account of the fact that the worker

exercised his/her right to object to the transfer of his/her employment relationship to the third-party undertaking, may be required, at the request of his/her employer, to contractually perform work on a permanent basis for that third-party undertaking and in that context, be subject to the technical and organisational direction of the latter.

Directive 2008/104/EC was transposed into Portuguese law through Articles 172 to 192 of the Portuguese Labour Code (hereinafter, 'PLC').

According to this legal framework, temporary agency work implies that two different legal relationships are established among the parties:

- A labour relationship between the temporary work agency and the temporary worker under which the temporary worker undertakes to perform work for a user undertaking in exchange for remuneration, remaining bound to the temporary work agency (Article 172(a) and (b) of PLC);
- An agreement for the use of temporary agency work entered into between the temporary work agency and the user undertaking in which the former agrees to temporarily assign and in exchange for remuneration, a temporary worker to the latter (Article 172(c) of PLC).

Under Portuguese law, the agreement for the use of temporary agency work is temporary—its duration may not exceed the period strictly necessary to meet the need of the user undertaking (Article 175(3) of PLC), with a maximum limit, including renewals, of 2 years, as a rule, or 6 or 12 months in specific cases (Article 178(2) of PLC)—and must be grounded on a temporary need of the user undertaking (Article 175 of PLC).

For these reasons, in case of a permanent transfer to a third-party undertaking of the duties performed by the worker, the regime of the temporary agency work envisaged in the PLC does not apply. This conclusion is aligned with the CJEU's understanding held in the present case and this judgment therefore does not have implications for Portugal.

4 Other Relevant Information

Nothing to report.

Romania

Summary

A new law makes remote working available to employees with children.

1 National Legislation

1.1 Remote working

Law No. 241/2023 amending Law No. 53/2003 the Labour Code, published in the Official Gazette of Romania No. 673 on 21 July 2023, introduces the right for a specific category of employees to work remotely. Accordingly, employees who have children up to the age of 11 years who are under their care are entitled to work from home or telework for 4 days per month if the nature or type of their work is compatible with remote working. If both parents are employees, only one of them can benefit from this scheme.

As an exception to the provisions of Law No. 81/2018 on the regulation of teleworking, which requires the employer to provide the necessary equipment for remote working to teleworkers, employees who request to exercise this right must have all the necessary means to fulfil their duties as outlined in their job description.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

Romanian law seems to be in line with the ruling of the Court of Justice of the European Union in case C-427/21. The Labour Code, which transposed Directive 2008/104/EC in Articles 88-102, defines the temporary agency work contract as a contract concluded by a temporary work agency with the intention of temporarily assigning the worker to a user undertaking.

A 'regular' employee may be required to perform work for a third party (e.g. a client of the employer), thus becoming subject, both organisationally and technically, to the authority of the third party undertaking. However, this does not turn the third party undertaking into a user undertaking, nor does it transform the employee into a temporary agency worker.

In case of temporary agency work, the duration of an assignment may not exceed 24 months with the possibility of extension of up to 36 months (Article 90 of the Labour Code). However, in the context presented, an employee may be requested to permanently perform work for a third-party undertaking, as this request does not qualify as an assignment within the meaning of Directive 2008/104/EC.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

Labour law aspects related to the temporary transfer of an employee by an employer or a temporary work agency are governed by the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll.', as amended).

The Labour Code does not explicitly deal with the transfer of rights and obligations of temporary agency workers in the event that the duties performed by an employee are transferred definitively by his or her employer to a third-party undertaking. Due to the absence of a clear legal regulation, the question is left to judicial practice.

According to Article 28 paragraph 1 of the Labour Code, if an economic unit, which for the purposes of this Act is an employer or a part of an employer, is transferred, or if the task or activity of the employer or a part of it is transferred to another employer, the rights and obligations derived from labour law relations are transferred to the employer and subsequently to the transferred employee.

According to Article 58 paragraph 1 of the Labour Code, the employer or temporary work agency according to a special regulation *(*Act No. 5/2004 Coll. on employment services, as amended*)* can agree in writing with an employee covered by an employment relationship that he/she will be temporarily assigned to perform work for a user undertaking. Temporary assignments cannot be agreed for the performance of work that the competent public health authority has classified as being category 4 work according to a special regulation *(*Act No. 355/2007 Coll. on protection, support and development of public health, as amended*)*.

To prevent abuse of this type of employment, an amendment to the Labour Code was adopted by Act No. 14/2015 Coll. and limits the maximum length of temporary assignments and the number of temporary successive assignments. Since 01 March 2015, according to Article 58 paragraph 6 of the Labour Code, temporary assignments can be agreed for a maximum of 24 months. Temporary assignments to the same user undertaking may be extended or repeated up to four time within the following 24 months; this also applies in the case of temporary assignments of the same worker by a different temporary work agency for the same user undertaking. Repeated (again agreed) temporary assignments are assignments by which a worker is temporarily assigned to the same user undertaking within six months after the end of his/her previous temporary assignment and if it is a temporary assignment for the reason stated in Article 48 paragraph 4 letters b/ or c/, before the expiry of four months after the end of the previous temporary assignment. The provisions of the first and second sentence

shall not apply to temporary assignments for the reasons stated in Article 48 paragraph 4 letter a/.

Article 48 paragraph 4 letters b/ or c/ of the Labour Code assert:

> *"b) the performance of work in which it is necessary to increase employee numbers significantly for a temporary period not exceeding eight months in the calendar year,*
>
> *c) the performance of work that is linked to the seasonal cycle, which repeats every year and does not exceed eight months in the calendar year (seasonal work)."*

Article 48 paragraph 4 letter a/ of the Labour Code:

> *"a/ substitution of an employee during maternity leave, paternity leave, parental leave, leave immediately linked to maternity leave, paternity leave, parental leave, temporary incapacity for work or an employee who has been given long-term leave to perform a public function or trade union function.)"*

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

The Higher Education Trade Union of Slovenia has signed a strike agreement. Several collective agreements and annexes to sectoral collective agreements have been concluded.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This case is of no particular relevance for Slovenian law since the legal regulation of such situations differs completely from that in Germany.

According to Article 75, paragraph 7 of the Employment Relationships Act ('*Zakon o delovnih razmerjih* (ZDR-1)', Official Journal of the Republic of Slovenia (OJ RS) No. 21/13 et subseq.), if a worker opposes the transfer and the performance of work for the transferee, the employer may extraordinarily cancel the employment contract, i.e. dismiss the employee with immediate effect, without any period of notice and without any protection and rights. In such a situation, if an employee refuses/objects to the transfer, he or she does not enjoy any employment protection similar to that provided for in German legislation (i.e. retaining the same working conditions that applied prior to the transfer); the employer can dismiss such an employee. The ZDR-1 does not foresee any possibility for the employer to permanently assign such an employee to a third-party undertaking to which his or her previous duties have been permanently transferred.

4 Other Relevant Information

4.1 Strike in higher education frozen

On 19 July 2023, the Minister of Higher Education and the Higher Education Trade Union of Slovenia (*Visokošolski sindikat Slovenije*) signed a strike agreement, and the strike has been frozen until the end of this year (the first independent strike in higher education was organised by the above mentioned trade union in March 2022, followed by its continuation in spring 2023; the demands concerned wages and working conditions in higher education). The Trade Union of the University of Maribor, which is part of the Higher Education Union, publicly distanced itself from this agreement; according to them, the agreement has more possible negative than positive consequences for the employees in higher education, and appeared as a 'take it or leave it' offer during the holidays and with unreasonable time pressure. (Strike Agreement*, 'Stavkovni sporazum'*, OJ RS No. 79/23, 21 July 2023, p. 6930-6931)

4.2 Collective bargaining

Several collective agreements and annexes to sectoral collective agreements have been concluded (for air traffic control – OJ RS No 83/23, 31 July 2023, p. 7015-7034; for *Radiotelevizija Slovenija* – OJ RS No 79/23, 21 July 2023, p. 6932-6934; for trade sector – OJ RS No 74/23, 07 July 2023, p. 6487-6488; for road passenger transport sector – OJ RS No 74/23, 07 July 2023, p. 6488; for the metal products and foundry industry – OJ RS No 74/23, 07 July 2023, p. 6488).

Spain

Summary

(I) The government has approved a regulation to develop provisions that support undertakings in times of economic crisis.

(II) The Supreme Court has reinforced the principle of equality and non-discrimination on the ground of sex concerning leave for family reasons.

1 National Legislation

1.1 Promotion of internal flexibility to avoid dismissals

As mentioned in previous Flash Reports (see, e.g. December 2021 Flash Report), the Labour Reform has promoted measures to provide employers with additional legal tools to deal with difficult financial situations by offering alternatives to the termination of employment contracts, such as suspending contracts, reducing working hours, or changing working conditions. When a firm faces such difficult times due to an economic crisis, a new system called RED ('Network') is established to provide financial support to the firm. There were some gaps in the legal provisions of the Labour Code, and a regulation has now been approved to clarify certain procedural aspects.

2 Court Rulings

2.2 Leave for family reasons

Supreme Court, No. 3501/2022, 06 July 2023

Traditionally, labour rights to reconcile work and family obligations were primarily granted to women. After 1999, most of these rights were also extended to men, but they could only exercise those rights if the mother worked. Women, on the other hand, were not subject to such limitations. Spanish law has been adapted with the aim of promoting co-responsibility, so both men and women can exercise these rights under the same conditions. The Supreme Court confirmed that these rights cannot depend on the status of the other parent, neither for men nor for women, with explicit reference to CJEU case law (rulings C-5/12, 19 September 2013, *Marc Betriu Montul*, or C-222-14, 16 July 2015, *Konstantinos Maïstrellis*).

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

This ruling will not have any implications in Spain. The Law on Temporary Agency Work distinguishes between workers employed with the aim of being assigned to a user undertaking to temporarily work under its supervision and direction, and so-called 'structural staff', i.e. workers hired to perform tasks directly for the temporary work agency. These workers are considered regular employees and are not governed by the Law on Temporary Agency Work but by the Labour Code. This case could raise certain issues on the transfer of undertakings (there is no explicit right to object to a transfer of the employment relationship under Spanish law), but not concerning temporary agency work.

4 Other Relevant Information

4.1 General elections

General elections took place in Spain on 23 July 2023. The election was tight, so it is uncertain whether Parliament will be able to appoint a Prime Minister anytime soon. If there is no agreement, the elections will have to be repeated at the end of the year.

4.2 Unemployment

Unemployment decreased by 50 268 persons in June, i.e. there are currently 2 688 842 unemployed persons in Spain.

Sweden

Summary

(I) The Swedish Supreme Court has decided to not permit a review of a judgment, asserting that a trade union could not exclude a member for political reasons.

(II) The Labour Court has held that a trade union's use of a veto right to end the employer's use of third party work was ill-founded.

1 National Legislation

1.1 Minimum wage

An inquiry on the implementation of the Minimum Wage Directive (2022/2041) was published in June and in line with the Swedish legislative procedure, sent for formal consideration to different actors in July. The position in the inquiry is that Swedish law is compliant with the Directive. Considerations must be sent to the Labour Market Department by 01 November 2023.

2 Court Rulings

2.1 Trade union membership

Supreme Court, 05 July 2023

In a decision of 05 July 2023, the Swedish Supreme Court decided not to permit a review of a judgment from December 2022 by the Svea Court of Appeal, asserting that a decision by a trade union to exclude a member for being politically active in the Sweden Democrats was unfounded. The concerned trade union's member magazine states on its website that the trade union is considering an application to the European Court of Human Rights.

2.2 Temporary agency work

Labour Court, AD 2023 no 43, 28 June 2023

On 28 June 2023, the Labour Court ruled in a matter concerning temporary agency work. Under Section 38 of the Swedish Co-Determination Act (*lag [1976:580] om medbestämmande i arbetslivet*), an employer bound by a collective agreement must negotiate with the trade union prior to using a third party to perform work (i.a. hiring temporary agency workers). If the trade union finds that the use of a third party to perform work violates either the collective agreement or statutory labour law, the trade union may use a 'veto' right that prohibits the employer to proceed with its planned decision (Section 39). These rules were put to the test in a case where an employer bound by a collective agreement wanted to use temporary agency workers to perform work. The plaintiff trade union claimed that the equal treatment principle set out in Article 5 of the Temporary Agency Work Directive (2008/104) were being challenged by the use of temporary agency workers. According to the trade union, it was therefore motivated to use its veto right to prevent the hiring of temporary agency workers. The Labour Court held in its judgment that the trade union's veto was ill-founded as the use of temporary agency workers could not constitute a violation of the collective agreement between the parties. However, after the trade union's use of its veto right, the employer again used temporary agency workers to perform work but without negotiating with the trade union. Consequently, the Labour Court held that it was a formal mistake by the employer to not have negotiated the use of temporary agency workers with the trade

union under Section 38 of the Co-Determination Act. Hence, the trade union was entitled to compensation.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

In its judgment, the CJEU held that the Temporary Agency Work Directive (2008/104) is not applicable to every situation when an employee performs work for a third-party undertaking. According to the judgment, there must have been an intent to temporarily assign an employee to a user undertaking (para. 44–48).

From the Swedish perspective, this judgment has no implications. Pursuant to Section 1 of the Swedish Agency Work Act (*Lag om uthyrning av arbetstagare* [2012:854]), a prerequisite for the Act to apply is that the agency worker has the 'intent' to assign a worker to a user undertaking. Hence, the Swedish transposition of the Temporary Agency Work Directive is compliant with the interpretation of the CJEU in its *ALB Fils Kliniken* judgment.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Temporary agency work

CJEU case C-427/21, 22 June 2023, ALB FILS KLINIKEN

In case C-427/21 LD, the Court ruled 'Article 1(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with Article 3(1)(b) to (e) thereof, must be interpreted as meaning that that Directive does not apply to a situation in which, first, the duties performed by a worker are transferred definitively by his or her employer to a third-party undertaking and, second, that worker, whose employment relationship with that employer is maintained on account of the fact that that worker has exercised his or her right to object to the transfer of that employment relationship to that third-party undertaking, may be required, at the request of that employer, to perform, on a permanent basis, the work contractually due for that third-party undertaking and, in that context, be subject to the technical and organisational direction of the latter.'

This issue does not seem to have arisen in the UK courts so far. However, it is likely that the British courts would reach the same decision.

4 Other Relevant Information

4.1 Retained EU Retained EU Law (Revocation and Reform) Act 2023

The REUL Bill has received royal assent and is now an Act, but a number of its provisions will not come into force until 01 January 2024. This legislation has been extensively discussed in previous editions of this report. In summary, the default is that all retained EU law will remain in place except the 587 pieces listed in the Schedule to the Act. In the area of employment, there are a number of measures, but none are 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 have been retained in the Act, including terminating the supremacy of EU law, its direct effect and general principles as well as encouraging courts to be more enthusiastic about departing from pre-Brexit case law. The Act also contains extensive powers for the executive to revoke or restate retained EU law (which will be referred to as 'assimilated law').

4.2 The Strikes (Minimum Service Level) Act 2023

This Bill has now become an Act. According to the government:

- The minimum service levels balance the ability of workers to strike with the rights of the public, who expect the essential services they pay for to be available when they need them.
- Government will now launch a public consultation on the reasonable steps unions should take to ensure that their members comply with a work notice issued by the employer.

The Strikes (Minimum Service Level) Act has received royal assent in Parliament, ensuring that workers maintain their right to strike whilst ensuring the public access to the essential services they need.

Government will now proceed with plans to implement minimum service levels for passenger rail services, ambulance services and fire and rescue services.

Minimum service levels will ensure that specific minimum services are available during periods of strike action.

This will help protect the general public's safety and ensure availability of essential services when these are needed – whether catching the train to work or being able to call an ambulance in an emergency.

This will follow public consultations on the most appropriate approach for delivering minimum service levels in passenger rail and blue light services. The government is currently analysing responses and will respond in due course.

A public consultation will also be launched this summer on reasonable steps unions must take to comply with a work notice issued by employers under minimum service levels legislation.

This government firmly believes that the ability to strike is an important part of industrial relations in the UK, rightly protected by law, and understands that an element of disruption is inherent to any strike. But the public expects government to act when their essential services are put at risk.

4.3 Charter for Seafarers

In response to the mass redundancies at P&O in March 2022, the government published a policy paper, A Nine Point Plan for Seafarers. One element of this plan was a Charter for Seafarers which has now been published. This is a voluntary agreement, setting standards for seafarers. It is 'primarily aimed at, although not limited to, those vessels in scope of the Seafarers Wages Act [2023]. The provisions of the Seafarers' Charter apply to all those working aboard vessels, at all grades, ranks and roles'. The detailed requirements are set out in a separate document.

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