Flash Reports on Labour Law October 2023

Summary and country reports

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

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Table of Contents

Executive Summary

National level developments

In October 2023, 24 countries (all but **Greece**, **Hungary**, **Iceland**, **Luxembourg**, **Latvia**, **Malta** and **Norway**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Transfer of undertakings

In **Germany**, the Federal Labour Court provided the reasons for its earlier decision that a managing director of a GmbH can fall within the scope of the provisions on transfers of undertakings.

In **Denmark**, a recent ruling from the Danish Labour Court added to the existing case law on the concept of transfers of undertakings, in line with existing practice concerning transfers of cleaning services.

In the **Netherlands**, in its decision following the preliminary ruling of the CJEU in the *Heiploeg* case, the Supreme Court decided that the Dutch pre-pack procedure does not fall under the scope of the Dutch Civil Code.

Working time

In **Italy**, the Court of Cassation ruled on issues related to leaves and overtime work.

In the **Netherlands**, a district court delivered a ruling on the question whether 'log-in time' constitutes working time.

Equal treatment

In **Austria**, the age-discriminatory payment scheme for civil servants and state employees has been amended to ensure that so-called "other" periods of service are considered when establishing the civil servant's level of remuneration without any discrimination.

In **Romania**, a new methodology for eliminating workplace harassment has been adopted.

Plaform work and employment status

In **France**, platform workers (drivers) have a new collective agreement that is in the process of being validated by the authorities. Furthermore, the Court of Cassation has once again reclassified a contractual relationship between a platform worker and the platform as a salaried employment contract.

In **Ireland**, the Supreme Court clarified the approach to be taken when determining the employment status.

Temporary agency work

In **Austria**, the Supreme Court ruled on the possible abuse of rights in the case of temporary agency workers.

In the **Netherlands**, the Court of Appeal and two district courts have interpreted Article 6 (2) of the Temporary Agency Work Directive. Another district court ruled that trade unions are allowed to continue collective proceedings with a view to classifying temporary agency work employment relationships/contracts.

Other developments

In **Austria**, the Supreme Court has issued a ruling that deal with the costs for experts used be the European Works Council, and one dealing with the equal treatment of frontier workers working in one Member State but living in another.

In **Germany**, the Federal Labour Court delivered an important judgment on on-call work.

In **Slovakia**, the Constitutional Court of the Slovak Republic ruled on discrimination and fixed-term employment.

In **Spain**, the Supreme Court referred to the CJEU and concluded that paid leave for family reasons cannot commence on a non-working day or a public holiday.

Table 1: Major labour law developments

Topic	Countries
Collective bargaining and collective action	CY FI FR HR IE PT
Minimum wage	BG CZ EE HR NL
Transfer of undertakings	DE DK NL
Working time	FR IT NL
Platform work / employment status	FR IE
Fixed-term work	CZ ES
Temporary agency work	AT NL
Equal treatment	AT RO
European Works Council	AT
Annual leave	BE
On-call work	DE
Work-life balance	ES

Implications of CJEU Rulings

CJEU Case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In the present case, the CJEU interpreted Article 7 (1) of the Working Time Directive. In this regard, the CJEU decided that a worker who had been unlawfully dismissed and was then reinstated in their employment, is entitled to paid annual leave for the period between the date of dismissal and the date of his or her reinstatement, as he or she is already entitled under national law to wage compensation during that period.

The ruling will reportedly have little to no implications for the majority of countries, as national legislation and case law are already in line with the CJEU's decision. Furthermore, some countries indicated that there is no right to reinstatement in case of unlawful dismissal (e.g., **Belgium**), or reinstatement is only exceptionally awarded as a remedy (e.g., **Estonia**, **Iceland**, **Ireland**). In **Germany**, it was pointed out that the only legal consequence of an unlawful dismissal is the invalidity of that dismissal: a Court order for reinstatement is therefore not required.

In **Denmark**, however, the ruling provides a clarification to the interpretation of national legislation, which lacks comparable rules on wage compensation in the period between unlawful dismissal and reinstatement, or related practice. Similarly, in **Portugal**, the ruling may reportedly be relevant for the interpretation of the rules contained in the Labour Code regarding the consequences of unlawful dismissal.

On the other hand, some countries reported potentially problems of conformity with the CJEU ruling. In **Hungary**, there is no clear legal basis in the Labour Code to consider the period between unlawful termination and reinstatement as working time when calculating the entitlement to paid annual leave. Furthermore, in **Poland**, it was reported how not the entire period between the termination of the employment contract and reinstatement is treated as a period of actual work for the purposes of determining entitlement to paid annual leave.

Austria

Summary

(I) The age-discriminatory payment scheme for civil servants and state employees has been amended to ensure that so-called "other" periods of service are considered when establishing the civil servant's level of remuneration without any discrimination.

(II) The Supreme Court has issued three rulings that deal with the costs for experts used be the European Works Council, the equal treatment of frontier workers working in one Member State but living in another and the possible abuse of rights in the case of temporary agency workers.

1 National Legislation

1.1 Amendment of Civil Servants' Pay Act

In its judgment C-650/21, the CJEU finds that the provision to take so-called "other" periods of service for civil servants and state employees into account was discriminatory on the grounds of age: it had the effect that only "other" periods of service gained after the age of 18 were considered when determining remuneration (see CJEU C-88/08, *Hütter*). The judgment concerned legislation that determined pay for civil servants and state employees who had entered civil service before mid-2015 (from mid-2015 onwards, the remuneration scheme, specifically with regards to taking previous periods of service into account to determine the civil servant's remuneration, has been in compliance with anti-discrimination legislation). Following the CJEU's decision in C-650/21, Austria had to amend its provisions in the Civil Servants' Pay Act on the retroactive consideration of previous years of service when determining the level of remuneration.

On 18 October 2023, the Austrian National Assembly passed the amendment: "other" periods of service are now taken into consideration from 30 June of the year in which the civil servant (or state employee) has completed (or would have completed) his/her ninth year of compulsory schooling Other periods of service are not taken into consideration at 50 per cent (as was previously the case), but at 42.86 per cent.

The amendment, specifically the factor of 42.86 per cent, represented a compromise between civil servants' and state employees' unions to ensure a fair compromise between pay raises due to the increased consideration of (additional) "other" periods of service and the financial implications of pay raises, which must be paid out retroactively from 01 May 2016 onwards. It is also unrelated to the age at which individuals accumulated their "other" periods of service.

Most civil servants and state employees are expected to profit from the new legislation. For those few who do not, and whose remuneration would decrease due to the retroactive reassessment of their level of remuneration, an allowance has been introduced to ensure that those civil servants and state employees continue to receive their last remuneration.

The legislation will enter into force once it has passed Federal Assembly.

2 Court Rulings

2.1 European Works Council

Supreme Court, 29 August 2023, 8 ObA 28/23k

European Works Council Directive 2009/38/EC (hereinafter referred to as EWCD) provides in Article 5 (4) that for the purpose of the negotiations, the special negotiating

body may request assistance from experts of its choice, which may include representatives of competent recognised Community-level trade union organisations. Paragraph 6 regulates that any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management to enable the special negotiating body to carry out its task in an appropriate manner. In compliance with this principle, Member States may lay down budgetary rules on the operation of the special negotiating body. They may in particular limit funding to cover one expert only. A similar provision exists for EWC in Annex I paragraph 6 and 6.

In Austria, the EWCD is transposed in the Labour Constitution Act (Arbeitsverfassungsgesetz – ArbVG). The relevant provisions read as follows (unofficial translation as well as highlights by the author):

§ 186 ArbVG

(1) The central management shall provide the special negotiating body with material requirements free of charge for the proper fulfilment of its tasks to an extent that is ***appropriate*** *to the size of the enterprise or group of enterprises and the special negotiating body's needs.*

(2) The special negotiating body's administrative ***expenses necessary to properly fulfil its tasks****, in particular the costs incurred for the organisation of meetings and each preparatory and follow-up meeting, including the costs of interpretation and* ***the costs for at least one expert****, as well as the special negotiating body members' accommodation and travel expenses and* ***for at least one expert****, shall be borne by the central management.*

In the present case, the amount of costs considered appropriate for an expert was disputed; the plaintiff, a European Works Council (EWC), had claimed costs for translators, experts, lawyers and consultants, which up until then had been borne by a specialised consultancy firm (E* Gmbh). The central management claimed that the plaintiff (the EWC) should have taken advantage of the free advice offered by the Chamber of Labour or the Austrian Federation of Trade Unions. The central management's obligation to bear the costs only starts where the mentioned interest groups reach the limits of their consulting possibilities. The hourly rate of EUR 300 was also considered excessive. An appropriate reimbursement of costs should be based on the Tarif for Attorneys at Law, which is to be applied analogously, and subsidiarily on the Autonomous Fee Criteria of the Bar Association. The average hourly rate for legal services is EUR 180. The obligation to reimburse costs was also limited to one expert per subject matter of the consultation. Therefore, the costs incurred through subcontracting as well as those incurred through the commissioning of additional experts were not to be reimbursed.

The lower courts mostly accepted the claims but rejected the claim concerning attorneys' fees. They were not part of the ruling of the Supreme Court as this part of the ruling was not appealed. This question therefore remains open.

The Supreme Court granted the claim concerning the experts' fees to the full extent. It rejected the argument that the EWC should primarily use the free advice provided by the Chamber of Labour or the trade union. Neither from the principles of proper business management nor from the respective rights and obligations standardised in the EWCD, can it be derived that the EWC, when consulting an expert, may only make use of the—in this case also partially rejected—free information provided by interest representations of a certain Member State. This would also not be compatible with the principle of free choice of expert as provided for in the EWCD and in the Austrian ArbVG (arg. "of its choice"). An expert's task is to replace the lack of the EWC's expertise, i.e. to advise it with regard to concrete questions—often covering several legal systems—to enable it to conduct negotiations with the employer in an informed manner. The selection of expert must therefore be based on the content and significance of the issues to be dealt with.

The Supreme Court pointed out that it was correct that it follows from the limitation to the "necessary administrative expenses" in § 186 ArbVG that a compensation of higher costs than those considered reasonable for expert services rendered is not foreseen in the Act. A claim for compensation is therefore ruled out not only in the case of a deliberate misuse of services. However, which costs can actually be considered reasonable shall be dealt with in a case-by-case basis.

In the present case, the EWC essentially used legal consulting services, although not by an attorney at law. Therefore, the Tarif for Attorneys at Law is not applicable; this is also the case as it only regulates legal services connected to legal procedures and not for the mere provision of legal expertise. Here, the Autonomous Fee Criteria would apply and according to these, the hourly rates amount to between EUR 220 and EUR 400 and have already been deemed to be appropriate in the past.

It was then stressed that, in addition to the proven expertise in the area of the European Works Constitution, it was important for the plaintiff, according to the findings, for a specialised consultancy firm (E* GmbH) to pre-finance the costs of its activities and of commissioned sub-contracted experts. Since the EWC has no assets of its own and the financing by the defendant (the central management) was not secured, this circumstance was also relevant. Whether the expert consulted uses further sub-contracted experts to provide his/her services is ultimately not decisive, as long as no additional costs are incurred as a result. On the other hand, costs may also arise due to the coordination of several experts required for different concrete questions or specialist areas. They may also be regarded to be necessary in individual cases.

The Supreme Court thus concluded that in assessing the costs claimed to be reasonable by the EWC, the Court of Appeal did not exceed the scope of discretion granted by law, even taking into account the complexity of cross-border issues, the considerable total period of time (over two years) and the amount of the costs.

The ruling is important as it clarifies a number of issues connected to the costs for experts used by EWC: whether the EWC is required to primarily take advantage of services provided free of charge by interest organisations (no); whether the costs are limited by tariffs (no); whether the experts may use sub-contracted experts (yes) or whether the costs for coordinating them must also be borne by the central management (yes). This ensures that the services are indeed necessary, and that the costs are appropriate. The question how to calculate the fees of attorneys at law used as experts by the EWC remains open, however. The Austrian Supreme Court deemed all its answers to have been covered by '*acte claire*' and therefore did not initiate a preliminary ruling with the CJEU. This ruling may be of interest for other Member States as well, where courts may be faced with similar questions.

The proceedings also highlight the EWC's weakness when the central management refuses to bear costs it considers inappropriate. In the present case, a specialised consultancy firm had pre-financed the fees over the course of more than two years and very likely also the legal proceedings that ultimately led to this ruling. If this had not been the case, it would have been very likely that the EWC would not have been able to use experts as stated in the EWCD, simply because the central management refused to pay for them. There would have not been any means to pre-finance them and to litigate. This issue should be addressed at EU level to prevent an obstruction of proper functioning of the EWC by non-compliant central managements.

2.2 Equal treatment of frontier workers during the COVID 19-pandemic

Supreme Court, 29 August 2023, 8 ObA 48/23a

the present case examined whether a foreign quarantine measure during the COVID-19 pandemic involving a frontier worker who worked in Austria but lived in the Czech Republic was to be considered an isolation measure under the Austrian Epidemic Act (*Epidemiegesetz*), thus granting the employer a refund for the continuation of payment

in case the employee was quarantined in line with an administrative decision. Interestingly, the two lower courts did not refer to any Union law aspects, especially the prohibition of the discrimination of workers who make use of the freedom of movement. This only played a central role when the dispute was dealt with by the Supreme Court.

The Supreme Court referred to the CJEU's decision in case C-411/22, *Thermalhotel Fontana*, of 15 June 2023 concerning a request for a preliminary ruling by the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof* – VwGH). The CJEU stated that Article 45 TFEU and Article 7 of Regulation (EU) No. 492/2011 on the freedom of movement for workers within the Union must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings affecting a worker as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation. The Austrian VwGH of 20 June 2023 in Ra 2021/03/0098 then ruled that against this legal background, an interpretation under the Austrian Epidemic Act, according to which the mandatory prerequisite for compensation for loss of earnings pursuant to this provision is in any case an isolation ordered (only) by an Austrian authority, is prohibited. Rather, for the purpose of compensation for loss of earnings, isolation measures imposed by authorities of another Member State shall also be taken into consideration if they are comparable to segregation measures in view of their objective, nature and effects, ordered pursuant to the Austrian Act. The Austrian Epidemic Act therefore applied.

2.3 Temporary agency work

Supreme Court, 27 September 2023, 9 ObA 64/23m

The collective bargaining agreement for blue collar temporary agency workers provides that the first month of an employment relationship is to be considered a probationary period during which the employment contract can be terminated by both parties without observing any notice period and without having to provide any good cause (Article IV paragraph 1).

In the present case, a temporary agency worker (TAW) was employed three times. The first two contracts ended by mutual agreement and were continued after a short interruption (about two weeks). The third one ended shortly after the TAW informed the temporary work agency of her illness, making use of the 'easy' immediate termination during the probationary period. The TAW claimed that revoking the probationary period was abusive and claimed damages. The employer countered that the collective bargaining agreement's provisions apply and that the termination was therefore lawful.

The Supreme Court followed the Court of Appeal's decision and ruled that the referral to the probationary period could be an abuse of rights. The assignment of the employee to the same employer to perform the same activity and the termination of the employment relationship during the probationary period does not in itself constitute an abuse of rights. Additional circumstances must be present which indicate that the unfair motive of exercising this right (termination of the employment relationship by the employer during the probationary period) clearly outweighs the fair motive. A criterion for this assessment is also the circumstance how and, if applicable, on which initiative the dissolution of the previous employment relationship had occurred. The Supreme Court pointed out that for the assessment of the question in the present case whether the termination of the TAW's (third) employment relationship during the probationary period by the defendant constituted an abuse of rights, it was particularly relevant whether the termination by mutual consent—according to the assertion of the TAW, who is required to provide evidence—took place on the initiative of the defendant to circumvent the payment of a 'standing time' during the user undertaking's company vacation. However, the court of first instance did not make any findings in this regard, which is why the Court of Appeal was right to set aside the court of first instance's decision and requested additional findings.

This case reflects the practices of the temporary work industry in Austria, which sometimes clearly abuses the weakness of the TAW to cut costs not only by avoiding paying for 'standing times' when the TAW is not assigned to a user undertaking but also to having to continue payment in case of sickness. That they then may makes use of a collective bargaining agreement that includes certain clauses that are very much in favour of the employer is another unpleasant aspect of this case. The avenue the Supreme Court chose is not very convincing but in line with existing case law that applies the collective bargaining agreement's probationary period clause generously (8 ObA 42/05t; 9 ObA 68/21x; 8 ObA 43/21p). A purposive approach should be taken in this context and the application of the probationary period restricted in cases of continuous contracts where the TAW is employed in areas that are completely unrelated with his/her previous line of work – otherwise, the temporary work agency knows who it is employing based on the individual's previous experience with the undertaking and a probationary period therefore is not necessary.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

Under Austrian law, an employee who is reinstated following a successful reinstatement claim is entitled to paid annual leave for the period between the date of dismissal and the date of reinstatement. Hence, Austrian law is in line with CJEU case law.

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) The Royal Decree of 28 September 2023 how the end of service annual leave pay of white collar workers is settled at the next employer following the termination of the employment contract.

(II) In the event of termination of the employment contract by the employer during a period of reduced working hours in the context of care leave, severance pay must be calculated on the worker's full-time salary.

1 National Legislation

1.1 Annual leave

It was common administrative practice for many years for new employers to deduct the annual leave pay of untaken leave of white collar workers who had changed employers as a lump sum from the annual leave pay owed by the new employer at the time the white collar worker took his/her main annual leave. There were some discussions, however, that this administrative practice violates the provisions of the Wage Protection Law of 12 April 1965.

To better understand this practice, two introductory remarks are of relevance. The employer of a white collar employee pays an annual leave allowance, which consists of two components: first the employee's regular remuneration, referred to as 'single annual leave pay'; and a second one for each month of work performed (or assimilated periods for the service year in which the leave is due – an allowance equal to 1/12 of 92 per cent of the gross amount of the month in which entitlement to annual leave commences, referred to as 'double annual leave pay'. A special arrangement applies to white collar employees in the event of dismissal or other form of termination of the employment contract; in this case, the former employer must pay out the (end of service) annual leave pay in advance.

A Royal Decree of 28 September 2023, was recently published and defines new rules for the offset of end of service annual leave pay. The Royal Decree follows the proposal formulated by the National Labour Council Opinion No. 2 297 of 01 June 2022.

The new rules apply: firstly, when offsetting the end of service annual leave pay of an employee who changes employers, secondly, when offsetting the annual leave pay of a blue collar worker who becomes a white collar employee.

The information the former employer's annual leave certificates must contain, must be supplemented. They must now include the new rules of settlement.

If requested by the worker, the employer must inform him/her in detail about the method of calculation applied and the offset rules.

The new rules provide for two phases.

In the first phase, each time the white collar employee takes annual leave days with the new employer, which he/she acquired during his/her service with his/her former employer, the new employer will pay for those annual leave days with a deduction of 90 per cent of the employee's gross daily wage of the month in which the white collar employee takes his/her annual leave. Upon taking his/her main annual leave, the new employer also pays the double annual leave pay after deducting the double end of service annual leave pay that was already paid.

In the second stage, i.e. in December of the relevant vacation year, a final settlement of the end of service annual leave pay is due for the single annual leave pay. The employer will then be able to make any necessary corrections.

The employer must inform the white collar employee of any corrections, namely of any amount withheld or paid through the December pay slip.

Similar calculation rules are provided for the payment of annual leave pay to an employee who was employed as a blue collar worker during the previous 'annual leave service year', *i.e.* the year prior to the year in which the annual leave is due.

The new Royal Decree takes retroactive effect as of 01 January 2023, and will apply for the first time to the 2024 vacation year, i.e. vacation service year 2023. In the current vacation year 2023, the settlement of end of service holiday pay may still take place one more in in accordance with the former administrative practice.

2 Court Rulings

2.1 Severance pay in case of dismissal during a period of care leave

Antwerp Labour Court of Appeal, 20 February 2023

In a recently published ruling of the Antwerp Labour Court of Appeal of 20 February 2023 (*Limburgs Rechtsleven* 2023, 250), the Court ruled that in the event of termination of the employment contract by the employer during the period of reduced working hours in the context of care leave to provide medical assistance to or care for a seriously ill family member or relative, the severance pay must be calculated on the full-time salary.

The Antwerp Labour Court arrived at this decision by referring to a recent judgment of the Court of Cassation of 22 June 2020 on part-time time credit in the context of caring for a child under the age of eight years. According to the Belgian Court of Cassation, in that situation, the termination indemnity in case of untimely termination of the employment contract should be calculated based on the employee's full-time salary.

The Cour de Cassation based its decision on the *Praxair*-ruling of the Court of Justice of 08 May 2019, No. C-486/18 on parental leave. The CJEU considered this case in light of Article 157 TFEU on equal pay for men and women.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This CJEU ruling dealt with a Czech case. An employee who had been unlawfully dismissed and later resumed employment following the judicial annulment of his dismissal and in accordance with national law, retains the right to paid annual leave for the period between his dismissal and his reinstatement. The fact that the worker concerned did not carry out actual work in the service of his employer during the period between his wrongful dismissal and his reinstatement was attributable to the employer's actions, leading to the wrongful dismissal. Without those acts, the employee would have been able to work and exercise his right to annual leave. Consequently, the period between the wrongful dismissal and the worker's reinstatement after the judicial annulment of the dismissal must be assimilated to a period of actual work for the purpose of determining entitlements to paid annual leave.

This ruling has only minor implications for Belgian labour law, because in case of unlawful dismissal there is no judicial annulment thereof and no right to reinstatement.

Belgian employment contract law is characterised by the so-called power of dismissal. This means that each party to the employment contract has the option to immediately terminate it by dismissal, even if the dismissal in itself is unlawful. This implies, inter alia, that in the event of unlawful dismissal, the injured party is in principle not entitled to demand further performance or fulfilment of the employment contract. In principle, the injured party cannot claim nullity of the unlawful dismissal, nor can reinstatement

be forced on either party. The only remedy envisaged in employment law is the payment of a fixed amount of severance pay.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

The employment register and employment labour record were established.

1 National Legislation

1.1 Employment register

The National Assembly adopted a law amending and supplementing the Labour Code (promulgated State Gazette No. 85 dated 10 October 2023).

The changes introduce a digitalisation of the employment book, which aims to remove the administrative burden for employers and employees while using paper employment books; to provide permanent access to the electronic employment records for both the employee and employer; to limit the cases of loss of paperwork books; to facilitate the calculation of length of service, etc. The amendments will enter into force on 01 June 2025, except for certain provisions. Below is a summary of the more important changes.

Pursuant of the above pointed amendments and supplements to the Labour Code, by 01 June 2025, the National Revenue Agency must establish an employment register, which contains the uniform electronic labour records of employees (Article 347). The creation and maintenance of the employment register is carried out based on the principles of ensuring accuracy of the stored data, ensuring that they are up to date, providing a suitable environment for data exchange, guaranteeing regulated access to data in the employment register and ensuring information security. Access to the data is provided free of charge in the territorial directorates of the National Revenue Agency. The initial data will be filled in ex officio based on the register of employment contracts and other sources. The format and procedure for storing the data in the employment register, the procedure and the terms for entry of data, deletion and certification of circumstances, and the conditions for access to the data shall be determined by the Regulation, the adoption of which is pending. The processing of personal data in the employment register is carried out in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in relation to the processing of personal data and on the free movement of such data and to repeal Directive 95/46/EC (General Data Protection Regulation) and the Personal Data Protection Act.

There will be no requirement for the employer to submit a notification for the conclusion, amendment or termination of the employment contract, but he/she will be required to enter the relevant data in the employment register established and maintained by the National Revenue Agency. The time limits for the registration of the said information shall remain unchanged, namely: within three days from the conclusion or amendment of the employment contract and within seven days from its termination. The minimum data submitted by the employer to the employment register shall include the information under Article 349, Paragraph 1 of the LC, and the employer must accurately and timely record the changes that have occurred therein. Among the new details submitted to the register is information on the amount of the agreed paid annual leave and the days of paid annual leave, already used in the year of termination of the employment contract. The Council of Ministers must determine the procedure and data required for registration in the employment register according to Regulation 2016/679 until 01 June 2024.

1.2 Single electronic labour record

The above-mentioned law provides for the establishment of a single electronic labour record (Article 347a). This is an electronic document replacing the paperwork book or

service book for civil servants, as of 01 June 2025. This electronic document must contain data and any information related to the employee's labour activity and is an official certification document. The employee has the right to access his/her unified electronic labour record. Parents, guardians and guardians of employees under the age of 18 years have the right to access their respective single electronic employment record until they reach the age of 18. The employee has the right to information about the history of access to his/her unified electronic labour record, except for cases of access by the bodies of pre-trial proceedings under the order of the Criminal Procedure Code and of the State Agency "National security" employers have the right to information about their employees entered by previous employers, with the exception of their amount of wages and benefits received from previous employers. The unified electronic employment record can be used to certify the existence of work experience, when such is required in a competition for a given position after obtaining the candidate's consent.

The labour inspectorate is allowed to enter data into the single electronic labour record on the duration of work experience established by a court decision in case of an employer's refusal to do so or when this is impossible. When the dismissal of the employee is recognised as illegal or the grounds for termination of the employment relationship are corrected, the entry shall be made by the employer who terminated the employment relationship, and in case of refusal or when this is impossible, by the labour inspectorate (Article 350a).

The provisions regulating the obligation to present the workbook upon entry into the employment relationship and upon its termination; the employer's obligation to issue a workbook to all employees that enter into an employment relationship for the first time; the provisions concerning the reissuing of a lost workbook are revoked.

The liability of the employer and of the responsible officials for the unlawful retention of the workbook has now transformed into liability for the damage suffered by the employee due to the employer's failure to enter the relevant data on the termination of the employment contract into the employment register when the employment relationship has been terminated. Accordingly, the employee shall be entitled to compensation in the amount of his/her gross remuneration from the date of termination of the employment relationship until the termination is entered into the employment register.

1.3 Minimum wage

The Council of Ministers adopted Decree No. 193 to determine the amount of minimum wage (promulgated in State Gazette No. 87 of 17 October 2023)**.** From 01 January 2024, the minimum monthly wage will amount to BGN 933 and the minimum hourly wage BGN 5.58 for a normal working time of eight hours and a five-day work week.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The decision in case C-57/22 of 12 October 2023 of the Court (Sixth Chamber) will not have an impact on Bulgarian legislation and national practice in relation to the requirements of Article 7, Paragraph 1 of Directive 2003/88/EC of the European Parliament, and the Council of 04 November 2003 regarding certain aspects of the organisation of working time.

With the entry into force of a court decision by which the dismissal of an employee is recognised as illegal, and he/she is reinstated, the legal consequences of the dismissal are deleted, and it is considered that the employment relationship was not terminated. The time during which the employee was out of work—from the date of dismissal until his/her reinstatement—is recognised as work experience (Article 354, item 1 of the Labour Code). In such cases, the worker has the right to paid annual leave in proportion to the time considered as work experience under Article 354, item 1 of the Labour Code). After returning to work, he/she has the right to use this leave. If the employee does not use the leave he/she is entitled to in full or only uses part of it, he/she is entitled to compensation following the termination of the employment relationship (Article 224 of the Labour Code).

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) The Government of the Republic of Croatia has passed the regulation on the amount of minimum wage for the year 2024.

(II) The representativeness of employers' associations and trade unions for participation in tripartite bodies at the national level has been determined.

1 National Legislation

1.1 Minimum wage

The Government of the Republic of Croatia has passed the Regulation on the amount of the minimum wage for the year 2024.

The amount of the minimum wage for the period from 01 January to 31 December 2024 will amount to gross EUR 840.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In the settled case law of Croatian courts, unfairly dismissed employees are entitled to salary compensation, material and moral damages and reinstatement. Case law on salary compensation deems that if the employee has found another job in the meantime, he or she is only entitled to the difference in salary. This implies that he or she is not entitled to salary compensation in case his or her salary is higher than that of his or her previous employer.

The unfairly dismissed employee is entitled to paid annual leave but based on Article 84 of the Labour Act (Official Gazette Nos. 93/14, 127/17, 98/19, 151/22, 64/23), he/she can take that leave only by 30 June of the following calendar year at the latest upon returning to work. This excludes the accumulation of two or more unused annual leaves.

Based on the CJEU's judgment in this case, the Croatian courts need to amend the settled case law. However, due to the fact of the lengthy labour disputes before the national courts, which last for years, in case of the employee's reinstatement, the employers will have to face the burden of lengthy annual leaves.

4 Other Relevant Information

4.1 Representativeness of employers' associations and trade unions

The Commission for Determining Representativeness identified the following higher level trade union associations as being representative for participation in tripartite bodies at the national level: the Union of Autonomous Trade Unions of Croatia (SSSH), Independent Croatian Trade Unions (NHS) and the Association of Croatian Trade Unions (MHS). On the other hand, the only higher level employers' association representative

for participation in tripartite bodies at the national level is the Croatian Employers' Association (HUP).

The decision on determining the representativeness of higher-level trade union associations for participation in tripartite bodies at the national level is published in Official Gazette No. 120/2023 as is the decision on determining the representativeness of higher-level employers' associations for participation in tripartite bodies at the national level.

4.2 Annexes to the collective agreements in the public sector

The Annex to the Collective Agreement for civil servants and employees in the civil service as well as the Annex to the Basic Collective Agreement for Public Servants and Employees in the public service have been concluded. They regulate, among others, the increase in salaries, Christmas bonus and annual leave allowance.

Cyprus

Summary

Doctors and nurses in state hospitals went on strike.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU Case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In the present case, Article 7 (1) of Directive 2003/88 was interpreted. The CJEU decided that a worker, who had been unlawfully dismissed and was then reinstated in his/ her employment, is entitled to paid annual leave for the period between the date of dismissal and the date of his or her reinstatement, as he or she is already entitled under national law to wage compensation during that period.

This is not likely to have any effect on the Republic of Cyprus' labour law as this is standard practice already. A lawful termination of the employment relationship means that no employment or contractual relationship exists from the time of termination. Article 19 (2) of that same law states that when a worker's employment relationship is terminated within 12 months of him/ her reaching retirement age, the amount of compensation payable is reduced by one-twelfth for every completed month of age during this 12-month period.

An employer who dismisses an employee who was employed for at least 26 weeks is liable to pay compensation calculated on the basis of the employee's duration of service. The length of continuous employment prior to termination is also relevant for assessing whether the employee was dismissed during his/ her probationary period, in which case no right to compensation arises; and for calculating redundancy pay which a redundant employee is entitled to receive from the State's Redundancy Fund. Private sector employees who are unfairly dismissed are entitled to compensation, however, this right is lost when the employee reaches retirement age (65 years).

Employers who employ over 19 employees may be required by the Labour Disputes Court to reinstate an employee whose dismissal was either manifestly unlawful or unlawful and made in bad faith, if so, required by the dismissed employee, as well as to compensate him or her for any loss suffered as a result of the dismissal, provided the amount does not exceed 12 months of wages.

Under Article 3 of the termination of employment law, the employee may either seek reinstatement or, if the relationship between the parties is deemed to be irreparable, damages may be sought. The latter is often the case.

The compensation to which the employee is entitled paid by the employer does not exceed the employee's daily wages for a year.

4 Other Relevant Information

4.1 Strike of doctors and nurses in state hospitals

Around 7 000 doctors and nurses went on an eight-hour strike in public hospitals on 30 October following the collapse of the talks between the unions and the State Health Services Agency (OKYPY). The nursing homes only operated from 7 a.m. to 3 p.m. with security staff and patients who had scheduled appointments with a doctor or were scheduled to undergo surgical procedures and their procedures were not carried out.

The unions have warned that if OKYPY does not proceed to a collective agreement with a content similar to the agreements applied to other semi-government organisations, they will intensify their actions, with the strike only being the beginning.

Czech Republic

Summary

(I) The bill on the consolidation of public budgets contains the limitation of the tax deductibility of certain employee benefits and, in particular, the insurance relating to agreements to complete a job, which will affect the flexibility of employment in the Czech Republic.

(II) An amendment with the objective to stabilise the position of employment agencies and to increase the stability and predictability of the employment of temporary workers and one introducing a statutory indexation mechanism for the minimum wage have been submitted.

1 National Legislation

1.1 Act on the consolidation of public budgets

The Chamber of Deputies approved the bill on the consolidation of public budgets (Print 450). The bill amends tax and insurance regulations and aims to reduce the state budget deficit. The main changes *vis-à-vis* labour relations concern the abolition or limitation of the tax deductibility of certain employee benefits and the extension of social security coverage to agreements to complete a job. Although the bill does not introduce any changes to the Labour Code, the limitation of the tax deductibility of certain employee benefits and, in particular, the insurance relating to agreements to complete an assignment that overlaps in a given calendar month will affect the flexibility of employment in the Czech Republic and the standard of working conditions. In contrast to current legislation, an employee who works under an agreement to complete an assignment is required to pay social security contributions if his/her total income from all such agreements to complete an assignment with one employer reaches 25 per cent of the average wage in the national economy (EUR 400). Insurance coverage will also be extended to cases where the employee's income from agreements to complete a job with all employers in a calendar month reaches 40 per cent of the average wage in the national economy (EUR 640). The bill is subject to approval by the Senate in November, and the proposed effective date of these changes is 01 July 2024.

1.2 Fixed-term work

The draft amendment to Act 435/2004 Sb., on Employment and Other Related Acts approved by the government has been submitted to the Chamber of Deputies as Parliamentary Print 540. The objective is to stabilise the position of employment agencies and to increase the stability and predictability of the employment of temporary workers whose employment relationship is only agreed for the period of their temporary assignment. This will help avoid endless chains of temporary assignments to the same user.

A detailed analysis of the changes have been provided in previous Flash Reports. A number of amendments to the proposal have been tabled, some of which significantly change the content of the original proposal. More information will be provided in the next Flash Report as it is expected that the proposal will have been approved by the Chamber of Deputies and submitted to the Senate.

1.3 Minimum wage

The Ministry of Labour and Social Affairs has submitted a draft amendment to the Labour Code for external comments. It aims to introduce a statutory indexation mechanism for

the minimum wage based on the value of the average wage in the national economy, thereby establishing the method of its regular indexation and increasing its predictability and link to the income generally generated by employment in the country. In addition, the draft amendment reduces the number of guaranteed wage levels and, in one version of the draft, proposes the complete abolition of the guaranteed wage in the legislation. It also addresses the plurality of trade unions within an employer when concluding a collective agreement. The current wording of Section 24 LC does not allow an employer to conclude a collective agreement unless all the trade unions operating under the employer agree on a common procedure. Unfortunately, this often leads to a stalemate which makes it impossible for employees to exercise their right to collective representation in regulating their working conditions. Under the draft amendment, the trade union with the most members, namely the employer's employees, would have the right to conclude a collective agreement, unless half of all the employer's employees declare that they do not support such a procedure. As an alternative, it also allows employees to designate another trade union to which they give their mandate to negotiate a collective agreement.

The draft amendment is generating a great deal of interest from commentators, particularly the social partners, and a large number of substantive comments and a complex legislative process can be expected on the road to its submission to the government. With this in mind, the draft amendment will be discussed in more detail in future Flash Reports in light of legislative developments.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The procedure described by the referring court is based on older and established Czech case law (Decision of the Supreme Court of the Czech Republic 21 Cdo 2343/2003, SJ 4/2004, p. 287) pertaining to Section 69 (1) LC, relating to a specific situation where the employment relationship has not been properly terminated, thus making the employee eligible to compensation for wages or salary in the amount of average earnings to compensate him/her for the damage suffered, in which the provisions of Section 208 LC on obstacles to work on the part of the employer do not apply.

Section 69 (1) LC states that if the employer has given the employee an invalid notice of termination and the employee has immediately informed the employer in writing that he/she insists on maintaining his/her employment with the employer, the employment relationship continues, and the employer is required to compensate the employee for wages or salary. Thus, the law deals with the employee's loss of earnings during the period when he/she was unable to work under his/her employment contract with the employer because the employer wrongfully terminated the employment relationship. Although the provision in question deals only with compensation for lost wages, it could be inferred from the wording of the provision, as well as from its meaning and purpose, that the employment relationship continued. If the employee was no longer assigned any work due to an unlawful act on the part of the employer, this fact may be considered an obstacle to work on the part of the employer pursuant to Section 208 or, ultimately, in light of existing Czech case law, a special obstacle to work, which, however, is considered to be the performance of work pursuant to Section 348 (1)(a) LC, even for the purposes of annual leave.

It can thus be considered that the wording of the Czech Labour Code does not contradict the Court of Justice's judgment. Contradicting the judgment of the Court of Justice is existing case law, which treats the interpretation and application of Section 69 as a special procedure that differs from the treatment of obstacles to work on the part of the employer and their full credit towards leave.

It should be noted in furtherance to the preliminary ruling that according to the required Euro conform interpretation of Article 69 (1) LC, in light of Article 7 (1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, the employee is entitled under Czech law to paid annual leave for the entire period during which he/she was unable to work because of the invalid termination of his/her employment. In the case of a continuing employment relationship, it will be necessary to take all the leave, without the possibility of reducing it or providing financial compensation for its non-taking.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

A recent ruling from the Danish Labour Court adds to the existing case law on the concept of transfers of undertakings. The ruling is in line with existing practice concerning transfers of cleaning services.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Transfer of undertaking

Labour Court ruling, 25 October 2023, case 2021-6076, Fagbevægelsens Hovedorganisation for Fagligt Fælles Forbund mod Dansk Arbejdsgiverforening for DIO for OKS Service A/S

The case concerned a potential transfer of undertaking of cleaning services from one service provider (Rema Rengøring) to another (OKS Service). Both companies provided cleaning services for a Danish municipality under a contract, and provided cleaning services for several schools, among others.

OKS Service took over seven cleaners from Rema Rengøring, who had been working for the cleaning services that OKS Service had taken over from Rema Rengøring. OKS Service did not take over any tangible assets, only the cleaning activity. OKS Service employed a total of 23 employees to perform the cleaning services.

The Labour Court ruled that no transfer of undertaking had taken place, cf. the Act on Transfer of Undertakings, section 1. The Act implements Directive 2001/23/EC.

The decisive question was whether the transferor had taken over 'a major part of the workforce in terms of number and skills', cf. C-13/96 Süzen.

The Danish law on the transfer of cleaning services was established in former Labour Court rulings of 24 September 2013, AT 2013.0458 and AR 2013.0760. In the present case, the Labour Court clarified that an assessment whether the transferred activity constitutes a considerable part of the enterprise should be assessed on a case-by-case basis. What is decisive is whether the number of employees taken over are able to consistently perform the activity. Within the cleaning industry, this would normally only be possible if the majority of the workforce is transferred – however, this does not establish a clear 50 per cent limit, but must be assessed in detail.

In the current case, there were seven cleaners. The trade union argued that the majority of cleaners performed cleaning services in the specific school where the claimant worked. The employer's association, on the other hand, argued that this was not the majority, as the transferee's company counted 23 cleaners.

The question was therefore whether the 'majority' should be considered in relation to the entire cleaning enterprise and services performed by the transferor/transferee or in relation to the cleaning services performed at each school.

The Labour Court concluded that the assessment should be considered in relation to the cleaning services in their entirety and not only to the transfer of employees to perform services at each of the individual institutions/schools. Taken as a whole, the transfer included only a small share of the total number of employees. Furthermore, there was no indication that the transferred employees were considered 'key personnel'.

Thus, the transfer of services did not constitute a transfer of undertaking in the understanding of the Transfer of Undertakings Act.

The employee concerned could not direct a claim for outstanding salary and pension contributions from the period of employment with the former employer against the new employer.

The ruling is in line with EU law, including CJEU case law on transfers of undertakings. The Danish Labour Court also relied on existing case law of the CJEU and the Danish courts.

It has consistently been held that for cleaning services, it is decisive whether the transferor has taken over 'a major part of the workforce in terms of their number and skills'.

The ruling confirms existing practice that the reference is not per unit of workers that are transferred, but the reference is the entire enterprise of the receiving company. As such, the ruling adds nothing new to Danish law.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The case concerned the dismissal of an employee which was ruled unfair by a court ruling three years later. The employee then resumed her employment. That year, she requested to take unused annual leave transferred from the three year-period. The employer denied the request, as the employee had not been assigned to perform work between her dismissal and the reinstatement.

Despite the refusal, the employee did not show up for work on the dates she had requested leave for, and she was therefore dismissed for unlawful absence. The employee filed a claim of financial compensation for her unused holiday for the three-year period.

The CJEU found that Article 7(1) of Directive 2003/88/EC must be interpreted as precluding national case law according to which a worker is not entitled to paid annual leave for the period between unlawful dismissal and reinstatement on the ground that the worker did not perform work and was already entitled to wage compensation during the period.

The new CJEU ruling confirms that the main provision of the ruling in C-762/18 also applies, even if the employee receives wage compensation in the interim period. Wage compensation is used to compensate lost income. The right to annual leave is an individual right that cannot be interpreted narrowly.

In the same manner as the ruling in C-762/18, the CJEU's case law on annual leave and reinstatement may have implications for Danish law from a technical point of view, but in practice, the situation will rarely arise.

Under Danish law, there is no general duty to nullify or reinstate the employee in case of unlawful termination. A legal basis for reinstatement only applies in rare situations that are regulated by law, e.g. the Act on Equal Treatment of Men and Women, the Equal Pay Act, and the Act on Freedom of Association. A legal basis to claim reinstatement is also provided in some collective agreements in case of an unreasonable dismissal, such as the LO/DA General Agreement in section 4(3) litra E.

However, even when a claim for reinstatement has legal basis, it is very rarely applied due to the damage to mutual trust and confidence in the relationship between the employee and the employer. Cooperation based on mutual trust and confidence has

often become impossible as a consequence of the (attempted) dismissal and the ensuing judicial dispute.

The legal basis for re-instatement can be supplemented by a speedy assessment procedure to avoid 'a break' in the employment relationship. Most notably, this is found in the Act on Freedom of Association. In addition, the court can suspend a dismissal during the proceedings, as well as give suspensory effect in case of an appeal of the ruling of the first instance, cf. sections 4b (1) and (2). The effect is that the employee continues his/her employment relationship until the issue of reinstatement is settled by the courts. For this reason, it is highly unlikely that there is an interim period under this Act in particular.

Under Danish law, the right to annual leave is regulated in the Danish Holiday Act (No. 230 of 12 February 2021). The question of a right to paid annual leave from the employer in a potential interim period is not addressed in the preliminary works, and was not the subject of legal proceedings. In other words, there are no similar or comparable rules on wage compensation in the period between unlawful dismissal and reinstatement as in the recent CJEU case.

The right to pay or annual leave during an interim period is usually not regulated in the legal basis for reinstatement mentioned above. Particularly for the protection against unfair dismissal under the LO/DA General Agreement, case law asserts that the employee has a right to pay in the interim period, cf. rulings No. 618.1994 and No. 2009.0449. The right to annual leave is not specifically addressed in the rulings, however.

The legal status of the interim period is in itself not entirely clear in Danish law—as examples of reinstatement cases are very limited—and economic issues are often resolved as a matter of damages for the economic loss.

The right to *accrue* annual paid leave by the employer in the interim period is not addressed in case law, statutory provisions or collective agreements. As a general rule, annual leave is only accrued in periods where the employee is employed (and receives his/her salary) from the employer.

A right to *accrue* paid annual leave in the interim period is provided as part of the unemployment benefits scheme available to members of unemployment insurance funds. Approximately 70 per cent of all employees are members of unemployment insurance funds.

A right to take paid annual leave in the interim period may be provided by accrued, but untaken, paid annual leave from the 'former' employer, who must deposit accrued and untaken paid annual leave with the publicly administered Holiday Fund upon the termination of any employee for any reason.

The CJEU has again clarified the right to paid annual leave as a fundamental right of the employee.

In the Danish context, the clarification is of similar importance as the ruling in CJEU C-762/18 for the accrual of paid annual leave during the interim period in the few instances where reinstatement can be and is claimed, and where there is a break between the end of the notice period and actual reinstatement.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

Trade unions and employers have agreed on the new minimum wage. As of 2024, the new monthly minimum wage will amount to gross EUR 820.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The present decision concerned a situation in which the employee had to be compensated for unused leave for the period during which the employee was unable to work due to a labour dispute related to the termination of the employment contract. Such a situation can arise when an employee requests reinstatement.

The implications of the said judgment on Estonian labour law is limited. According to the Estonian Employment Contract's Act, it is not possible to apply for reinstatement of an employee in case of illegal termination of the employment contract. In case of illegal termination of the employment contract, the possible protection measure is the payment of compensation in the amount of three months' average salary.

The situation mentioned in the court decision could only become relevant if the termination of the employment contract is contested by either a pregnant woman or an employee entitled to maternity leave or an employee representative. In such situations, there is a possibility of reinstatement provided by law. For such circumstances, the CJEU interpretation is relevant.

The same situation may arise in the case of civil servants, whose service relationships are regulated in the Civil Service Act. In the case of civil servants, there is also no provision for reinstatement in case of illegal termination of employment.

Only in specific situations can the reinstatement be claimed. An official who is pregnant during the release from service, who has the right for maternity leave, paternity leave or adoptive parents leave or who is raising a child under the age of seven, is entitled to demand, upon the unlawful release from service, the reinstatement into service and remuneration for the period of forced absence from the service.

4 Other Relevant Information

4.1 Minimum wage

The labour market parties, i.e. the representatives of the Central Union of Estonian Employers and the Central Union of Estonian Trade Unions, agreed on the minimum wage for 2024. According to the agreement, the minimum wage will rise by EUR 95 from EUR 725 to EUR 820.

As a result of the agreement, the minimum salary will increase by 13.1 per cent and will make up 42 per cent of the average salary predicted by Bank of Estonia in 2024.

The EUR 820 gross minimum wage per month will help smooth out the decrease in the purchasing power of the minimum wage caused by inflation and improve the economic situation of many families.

The Central Union of Employers stated that new agreements shall take into account both the good will agreement on the minimum wage concluded in the spring and the actual business situation and prospects. Employers are now more uncertain about the future than in the spring, because the Estonian economy has declined for six quarters in a row, foreign demand remains weak, and the competitiveness of companies is under strong pressure. Considering these conditions, it was agreed to increase the minimum wage for next year, which should meet both the high expectations of contractors and real possibilities of employers.

The longer term goal of the labour market parties is to reach a minimum wage of half the average wage by 2027.

Finland

Summary

A report of the tripartite working group of the Ministry of Economic Affairs and Employment, which prepared draft amendments to the industrial peace legislation to improve industrial peace in the labour market, has been issued for comments.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

There is no case law in Finland concerning situations that would be similar to the constellation in case C-57/22 preventing employees from receiving the paid annual holiday they are entitled to in case of illegal dismissal.

4 Other Relevant Information

4.1 Proposed amendments to industrial leave legislation

A working group report containing proposed legislative amendments related to the industrial peace legislation has been issued for comments. The amendments have been prepared by a tripartite working group which was not unanimous in its work. The Ministry of Economic Affairs and Employment has requested comments on the report to be returned by 23 October 2023.

The working group's report proposes amending the sanction system concerning unlawful strikes. The level of compensatory fines would be raised, with the maximum amount set at EUR 150 000 and the minimum amount at EUR 10 000. According to the working group's report, the level of compensatory fine could be reduced below the minimum amount or fully waived for a special reason. Moreover, the working group proposes employees who continue an industrial action which the Labour Court has deemed unlawful would be subject to pay compensation in the amount of EUR 200 to the employer. The purpose of the amendments is to reduce the number of unlawful industrial actions.

According to the report, when an obligation to maintain industrial peace is in force, a solidarity action could not be carried out if the way it is carried out or its harmful consequences for those not party to the main dispute were to be manifestly disproportionate to the objective being pursued. When an industrial peace obligation is not in force, the above-mentioned restriction would only apply to situations where the industrial action's aim is to conclude a collective agreement. The body implementing the solidarity action would have to ensure the continuation of services or operations necessary for the functioning of society.

The duration of political industrial actions would be limited. According to the working group report, the maximum duration of political work stoppages would be 24 hours, and that of other industrial actions would be two weeks.

It is proposed in the report that those organising a solidarity action or political industrial action in the form of a work stoppage would have to notify the National Conciliator's Office, the employer affected by the industrial action, if possible, and, the parties to a collective agreement no later than seven days before it starts if the industrial peace obligation were in force.

The Government Programme includes proposals on improving industrial peace. The tripartite working group addressed issues related to industrial peace covering 03 July to 15 October 2023. Its task was to draw up a report in the form of a government proposal. Following the consultation round, preparatory work will continue. The government aims to submit its proposal on legislative amendments on industrial peace to Parliament on 01 February 2024.

France

Summary

(I) Platform workers (drivers) have a new collective agreement that is in the process of being validated by the authorities. The Court of Cassation has once again reclassified a contractual relationship between a platform worker and the platform as a salaried employment contract.

(II) Exceeding the maximum number of hours of night work no longer requires a separate injury to entitle an employee to damages.

1 National Legislation

1.1 Coverage of the consequences of occupational exposure to asbestos

A decree dated 14 October 2023 improves the coverage of the consequences of occupational exposure to asbestos by creating Table 30 ter relating to larynx and ovary cancer caused by the inhalation of asbestos dust. The decree of 14 October also sets out the conditions under which occupational diseases are covered, as well as the list of workplaces likely to cause these diseases.

2 Court Rulings

2.1 Platform work

Social Division, Court of Cassation, 27 September 2023, No. 20-22.465

The Court of Cassation has ruled on the issue of platform workers. This is a ruling which, in law, essentially adds nothing new. The ruling can be interpreted as a new impetus for the process of reclassifying contractual relationships in France. In the present case, a courier who had entered into a delivery services contract with the company "Tok Tok Tok" requested that it be reclassified as an employment contract. The courier based his claim on the existence of a relationship of subordination, in particular because the company provided the service provider with an assignment order setting out the conditions under which the service was to be performed and made available to him the equipment to be used to perform the service, as well as a bank card enabling him to purchase the product to be delivered. In addition to these elements, the service provider was required to indicate his availability times on an application at least two days in advance, and to accept all assignment orders proposed during these times while remaining reachable. The Court of Cassation censured the decision of the lower courts, which dismissed the courier's claim. The Court criticised the Paris Court of Appeal for making its decision "without carrying out a comprehensive analysis of the actual conditions in which the delivery driver carried out his activity". This ruling can therefore be seen as setting a course for the lower courts, according to which they should identify the slightest indication of the existence of a bundle of factors that make it possible to establish a relationship of subordination.

2.2 Maximum weekly working time for night workers

Social Division, Court of Cassation, 27 September 2023, No. 21-24.782

In line with several of its previous positions on non-compliance with working hours, the Court of Cassation has taken a clear position on night workers: "Exceeding the maximum weekly working time for night workers alone gives rise to a right to compensation". In France, the maximum work week for night workers is calculated over

a 12-week period and may not, in principle, exceed 40 hours. However, under certain conditions, a company, establishment or branch agreement may provide for this maximum to be exceeded where this is justified by the specific characteristics of the sector's activity. It should also be remembered that in 2016, French case law established the general rule that any breach by the employer must, in principle, cause harm to the employee in order to give rise to a claim for damages. The ruling in question is one of a number of exceptions to this principle that have been made by the Court of Cassation. In fact, in cases where the maximum working time is exceeded, compensation is self-executing without the need to demonstrate a separate loss. According to the Court of Cassation, this solution is in line with the objective of guaranteeing the health and safety of workers by ensuring that they take a rest period and effectively comply with the limits on maximum working hours set out in Directive 2003/88/EC of the European Parliament concerning certain aspects of the organisation of working time and Directive 2002/15/EC of the European Parliament on the organisation of the working time of persons performing mobile road transport activities (the case concerned a transport driver with night worker status who, following his dismissal, claimed compensation for the employer's failure to comply with maximum working hours). It is very likely that this solution will soon be extended to cases of non-compliance with the maximum daily working time for night workers.

2.3 New legal tool for terminating collective agreements

Social Division, Court of Cassation, 04 October 2023, No. 22-23.551

In its ruling of 04 October 2023, the French Supreme Court of Cassation paved the way for a new method of terminating collective agreements of indefinite duration. It is now possible to terminate the application of a branch collective agreement by means of a revision-extinction amendment, provided that a new agreement is intended to replace it. Prior to this ground-breaking ruling, it was possible to legally sign away a collective agreement by terminating it or calling it into question.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In September, the Court of Cassation was asked the same questions as dealt with in the ruling in question. France had to bring its national law into line with European law on annual leave. More specifically, on 23 September 2023, the Court of Cassation handed down a series of rulings on the acquisition of paid annual leave during sick leave. The issue before the high court centred around the same concept as the ruling in question: the apprehension of actual work.

Contrary to Article 7 of Directive 2003/88/EC of 04 November 2003 and Article 31 (2) of the Charter of Fundamental Rights of the European Union, the French Labour Code does not take into account periods of suspension of the contract of employment due to:

- parental leave;
- non-occupational illness, occupational illness or accident at work when the period of suspension exceeds one year.

The Court of Cassation has therefore, through an extensive interpretation of Article 7 of EU Directive 2003/88/CE of 04 November 2003, together with Article 31 of the Charter of the Fundamental Rights of the EU, confirmed that :

- an employee whose employment contract is suspended due to a non-occupational illness is entitled to paid leave for this period,

- Employees on leave due to an occupational illness or accident continue to earn paid leave after an uninterrupted period of one year

Moreover, although European Union law guarantees a minimum of four weeks of annual leave, the rules laid down by the Court de Cassation are valid for five weeks of paid leave legally required in France. This means that holiday entitlement does not stop at the end of the fourth week but continues until the statutory and collective bargaining minimum holiday entitlement has been reached.

4 Other Relevant Information

4.1 New collective agreement for platform drivers

On 06 October 2023, the Employment Platforms Social Relations Authority (ARPE in French) issued an opinion on the approval of an agreement concluded as part of the social dialogue between the platforms and the self-employed workers who use them for their activity in the employment sector of drivers (VTCs in French). The agreement dated 19 September 2023 will come into force within one month unless the professional organisations of the platforms are recognised as representative in the sector. As a reminder, the agreement concerns the transparency of the operation of VTC reservation centres and the conditions for suspending and terminating referral services in the VTC platform sector.

4.2 Bill on unemployment

The bill for full employment”” presented by the French Labour Minister in July 2023 was adopted by the National Assembly on 10 October 2023. In particular, the National Assembly approved the creation of the *France Travail* operator, which will replace *Pôle Emploi* with enhanced missions. It also approved the creation of the *Réseau pour l'emploi* network. Another major measure adopted by the National Assembly was the generalised and automatic registration with the France Travail operator of jobseekers, young people requesting support from *Missions locales*, people with disabilities requesting support from *Cap Emploi* and claimants of the active solidarity income (RSA in French). In the case of the latter, the National Assembly also approved making this income conditional on a minimum weekly working time of 15 hours. On Monday 23 October 2023, the deputies and senators meeting in a joint committee reached an agreement on the text. The final stage before the text is adopted is validation by a vote in both houses of Parliament.

Germany

Summary

The Federal Labour Court delivered an important judgment on on-call work, and provided the reasons for its earlier decision that a managing director of a GmbH can fall within the scope of the provisions on transfers of undertakings.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 On-call work

Federal Labour Court, 18 October 2023, 5 AZR 22/23

The Court's decision concerned so-called on-call work (`*Arbeit auf Abruf*`). If the employer and the employee agree that the employee is to perform his/her work according to the workload (on-call work), they must, according to section 12 (1) sentence 2 of the Part-Time and Fixed-Term Contracts Act (`*Teilzeit- und Befristungsgesetz*, *TzBfG*') stipulate a specific duration of weekly working hours in the employment contract. If they fail to do so, section 12 (1) sentence 3 of the TzBfG closes this loophole in that a work week of 20 hours is deemed to have been agreed by law.

The Court has now ruled that another duration of weekly working hours may be assumed by way of supplementary interpretation of the contract. However, this is only the case if the legal fiction of section 12 (1) sentence 3 of TzBfG is not an appropriate regulation in the employment relationship in question, and there are objective indications that the employer and employee would have made a different provision and agreed to a higher or lower duration of weekly working hours upon conclusion of the contract if they had been aware of the gap.

Section 12(1) of the TzBfG reads as follows:

"Employers and employees may agree that the employee must perform work in accordance with the workload (on-call work). The agreement must specify a certain duration of weekly and daily working hours. If the duration of the weekly working time is not specified, a working time of 20 hours is deemed to have been agreed. If the duration of daily working time is not specified, the employer must utilise the employee's work performance for at least three consecutive hours in each case."

2.2 Transfer of undertaking

Federal Labour Court, 20 July 2023, 6 AZR 228/22

On 20 July 2023, the Federal Labour Court ruled that in the event of a transfer of undertaking pursuant to Section 613a of the Civil Code (`*Bürgerliches Gesetzbuch*, *BGB*`), the employment relationship with a managing director of a GmbH, but not the position as the executive body, is transferred to the transferee if the legal relationship between the executive body and the company is based on an employment relationship. The reasons for this decision are now available.

Firstly, the Court refers to the so-called principle of separation contained in Section 38 (1) of the German Limited Liability Companies Act (`*GmbH-Gesetz*`). Accordingly, a distinction must be made between the relationship between the executive body and the employment relationship. Both are independent of each other in their existence.

In this specific case, the Court assumed that an employment relationship had existed between the parties involved. In the Court's opinion, this was not precluded by the fact that a GmbH's managing director regularly worked on the basis of a service contract. It is true that an obligation to follow instructions, which goes beyond the usual entrepreneurial right of a company to issue instructions to a managing director and which is so strong that it suggests the status of the managing director in question as an employee, can only be considered in "extreme exceptional cases". However, this only applies to cases in which, contrary to the designation of the contract as a service contract, an employment contract can be assumed due to its actual implementation. However, if the parties had explicitly agreed on an employment relationship—as in the present case—it would regularly be qualified as such.

In such a case, section 14 (1) No. 1 of the German Dismissal Protection Act (`*Kündigungsschutzgesetz*, *KSchG*`) is also applicable. According to this, the application of the KSchG is excluded to a large extent "*in companies of a legal entity for the members of the body that is appointed to legally represent the legal entity*". The legal fiction of section 14 (1) No. 1 of the KSchG also comes into effect if the employment relationship underlying the position in the executive body is an employment relationship. A different understanding is also not required from the perspective of EU law. Protection against socially unjustified dismissals regulated in the first section of the KSchG does not fall within the scope of application of Union law (see already BAG of 21 September 2017 – 2 AZR 865/16).

However, section 613a of the BGB is applicable. The provision is based on Union law and must therefore be applied and interpreted in accordance with Union law. According to Article 2 (1) lit. d, (2) of Directive 2001/23/EC, the national definition of employee applies. Accordingly, any person who is protected as such under the labour law of a Member State is to be considered an employee within the meaning of the Directive. Since, according to section 613a (1) sentence 1 of the BGB, only rights and obligations arising from an employment relationship are transferred. The position as executive body, on the other hand, the legal basis of which is not the underlying employment relationship, is not transferred. Contrary to the assumption of the State Labour Court, EU law also does not require a restriction (teleological reduction) of section 613a BGB. Managing directors who work on the basis of an employment relationship are also subject to the protection of the Directive.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The CJEU ruled that Article 7(1) of Directive 2003/88

> *"must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed and then reinstated in his or her employment, in accordance with national law, following the annulment of his or her dismissal by a decision of a Court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of his or her reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer as the latter did not assign him or her work and as he or she is already entitled, under national law, to wage compensation during that period"*.

The decision is likely to be of limited significance in Germany, if only because the legal consequence of an unlawful dismissal is the invalidity of that dismissal (see section 1 (1) of the KSchG:

> *"The termination of an employment relationship with an employee whose employment relationship has existed in the same business or company for more than six months without interruption is legally invalid if it is socially unjustified."*).

This is determined by the Court in the dismissal protection proceedings (see section 4 sentence 1 of the KSchG:

> *"If an employee wishes to assert that a dismissal is socially unjustified or legally invalid for other reasons, he must file an action with the labour court within three weeks of receipt of the written notice of dismissal for a declaration that the employment relationship has not been terminated by the dismissal."*).

A Court order for reinstatement is therefore not required.

4 Other Relevant Information

Nothing to report.

Greece

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

Pursuant to Article 5 of Law 539/1945, upon termination of the employment relationship, the worker shall be entitled to financial compensation for any unused paid annual leave.

The purpose of the right to paid annual leave is to enable the worker to both rest from the work he or she is required to perform under the contract of employment and to enjoy a period of relaxation and leisure.

Where a worker is unlawfully dismissed but is later reinstated by a judicial decision, he/she is entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement. The reason is that the worker was unable to perform his/her duties for a reason that was unforeseeable and beyond his/her control.

The Greek Supreme Court has stated that the unlawfully dismissed employee, who is later reinstated by a judicial decision, is entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement (AreiosPagos 110/1990, EErgD 50, 369). Therefore, Greek law is in line with the CJEU's case law and the above judgment has no implications for Greece.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

Act 1 of 2012 of the Labour Code contains all the relevant provisions on the calculation of annual paid leave. Article 83 (2) of the Labour Code states that

"as regards entitlements arising after the employment relationship was reinstated in connection with the duration of employment, the time between the termination (cessation) of the employment relationship and the day of reinstatement shall be regarded as time spent in employment".

Since entitlement to paid annual leave based on employment in the period between unlawful termination of employment and reinstatement is an entitlement arising before the employment relationship was reinstated, Article 83 (2) cannot be the legal basis of such a claim and the related judgment.

Article 115 contains the specific rules on calculation of the entitlement to annual leave:

"(1) Employees are entitled to paid annual leave based on their working time, comprising vested vacation time and extra vacation time.

(2) For the purposes of Subsection (1), working time shall include:

a) any duration of exemption from work as scheduled;

b) any duration of paid leave;

c) any duration of maternity leave;

d) the first six months of leave of absence without pay for caring for a child (Section 128);

e) any duration of leave taken up to three months for the purpose of actual voluntary reserve military service;

f) the duration of exemption from work specified in Paragraphs a)-m) of Subsection (1) of Section 55 and in Subsection (5) of Section 55".

Point f) above refers to Article 55 of the Labour Code, which lists the compulsory exemptions from work:

(1) Employees shall be exempt from the requirement of availability and from work duty:

a) if incapacitated for work, for the duration thereof, or if unable to perform his or her job due to health reasons, for the duration thereof;

b) if receiving treatment in a healthcare institution related to a human reproduction procedure, as specified in the relevant legislation;

c) for the duration of mandatory medical examinations;

d) for the length of time required to donate blood, for a period of at least four hours;

e) if they are nursing mothers, for one hour twice daily, or two hours twice daily in the case of twins during the first six months of breastfeeding, and thereafter for one hour daily, or two hours daily in the case of twins until the end of the ninth month;

f) for two working days upon the death of a relative;

g) for the duration of classes in the case of employees pursuing secondary school studies, for the duration of training if participating in initial and continuing training by agreement of the parties;

h) for the duration of engagement in firefighting operations in a voluntary or industrial fire brigade;

i) when called upon by the court or an authority, or for the duration of participating in proceedings in person;

j) for up to ten working days a year during the period of preparation of lawful adoption, for the purpose of visiting with the child to be adopted in person;

k) for any duration of absence due to personal or family reasons deserving special consideration, or as justified by unavoidable external reasons;

l) for up to five working days a year for the purpose of providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of extensive care or support for a serious medical reason; or

m) for any duration specified by employment regulations".

The relevant provisions do not contain a specific legal basis for considering the period between the unlawful termination and the reinstatement as time spent at work when calculating the entitlement to paid annual leave. Therefore, the court cannot really find a provision to argue that the employee is not entitled to paid leave for this period.

In case law, the decision of the Supreme Court (No. BH2018. 25) addressed a similar problem. The public employee had worked under the scope of Act 33 of 1992 on public employees, where certain provisions of the Labour Code must be applied, such as Articles 55 and 115 of the Labour Code regarding entitlement to annual leave. Accordingly, the Court stated that the employee is entitled to annual leave based on the period of exemption from work during half of the notice period. This decision was based on Point m) of Article 55 (1) of the Labour Code (see above) on the following case of exemption from work:

"for any duration specified by employment regulations".

As Article 115 (2) of the Labour Code contains a reference to this point as a case of working time, this period of exemption from work shall also be the basis for calculating annual leave. Employment regulation means legislation, collective agreements and works agreements, and the binding decisions of the conciliation committee adopted according to Section 293.

There is a slight analogy between the period of exemption from work during the notice period, on the one hand, and the period between unlawful termination of employment and reinstatement, on the other. However, their legal nature is rather different, since in the former case, the Labour Code orders exemption from work, but in the latter, the employee makes it impossible for the employee to work as a consequence of unlawful termination of employment. Therefore, the reference to Point m) of Article 55 (1) and Point f) of Article 115 (2) would not be a solid legal basis.

In short, there is no clear legal basis in the Labour Code to consider the period between unlawful termination and reinstatement as working time when calculating the entitlement to paid annual leave. Therefore, it is very difficult for the courts to find a legal basis to come to this conclusion in order to comply with the CJEU's judgment.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This ruling will noy have any implications for Icelandic labour law, as the right to reinstatement following an unlawful dismissal is not guaranteed in Icelandic law.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) The government announced an increase in the national minimum hourly rate of pay.

(II) The Supreme Court clarified the approach to be taken when determining the employment status.

1 National Legislation

1.1 Minimum wage

In July 2023, the Low Pay Commission recommended the national minimum hourly rate of pay to be increased from EUR 11.30 to EUR 12.70, as stated in LPC No. 19 (2023). The government has now accepted this recommendation and the increase will be implemented with effect from 01 January.

2 Court Rulings

2.1 Employment status

The issue of whether a person is employed under a "contract of service"—and is thus an employee—or under a "contract for services"—and is thus self-employed—was given detailed consideration by the Supreme Court in *Revenue Commissioners v Karshan (Midlands) Ltd* [2023] IESC 24. Having reviewed the extensive case law from Ireland and other common law jurisdictions, Murray J., delivering the unanimous decision of the Court, said that the issue in any given case, particularly in relation to those engaged in occasional and intermittent work, should be resolved essentially by reference to the answers to the following:

- Does the contract involve the exchange of wage or other remuneration for work?
- If so, is the contract one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
- If so, does the employer exercise sufficient control over the putative employee to render the contract one that is capable of being a contract of service?
- If these three questions are answered in the affirmative, the decision maker must then determine whether the terms of the contract, interpreted in light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of service, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
- Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the decision maker to adjust or supplement any of the foregoing.

The dispute in this case was whether the Tax Appeal Commissioner ("the Commissioner") was entitled to conclude that drivers, who provided delivery services for the company's pizza business, were "employees" for tax purposes. This depended on a finding that the drivers were employed under contracts *of service*. The company

contended that the drivers were engaged as independent self-employed contractors under contracts *for services*. The Commissioner ruled in favour of Revenue and on appeal, the High Court upheld that decision. A majority of the Court of Appeal, however, allowed the company's appeal, deciding that the Commissioner had erred in finding that the drivers were employees. Revenue then obtained leave to appeal to the Supreme Court.

Having considered the five matters set out above, the Supreme Court ruled that the Commissioner was entitled to conclude that the drivers were employees engaged under contracts of service. The evidence disclosed close control by the company over the drivers while they were at work and, although there were some features of their activities that were consistent with their being independent contractors engaged in business on their own account, the Commissioner was entitled to conclude that the preponderance of the evidence pointed to the drivers carrying on the company's business rather than their own.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

There are no legislative provisions in Ireland similar to those involved here. A significant point of difference between the two jurisdictions is that employees in Ireland, who are wrongfully or unfairly dismissed, are rarely awarded reinstatement as a remedy. In the vast majority of cases, the remedy awarded is compensation for the financial loss sustained as a result of the dismissal. In those rare cases where reinstatement is awarded, the employee is entitled to reinstatement in the position he or she held immediately before the dismissal on the terms and conditions on which he/ she was employed immediately before the dismissal, together with a term that the reinstatement shall be deemed to have commenced on the day of the dismissal. It follows that such an employee is entitled to be paid full arrears of salary. The implication of this CJEU decision is that such an employee would also be entitled to carry-over his/her accrued annual leave.

4 Other Relevant Information

Nothing to report.

Italy

Summary

The *Corte di Cassazione* dealt with issues related to leaves and overtime work.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Leaves and overtime work

Corte di Cassazione, 10 October 2023, No. 28320

The Court ruled that a clause in a collective agreement providing for a restrictive concept of remuneration for leaves, excluding certain items relating to night work or overtime, is legitimate only if night work or overtime work are mere means of service performance, which could be terminated at any time, and not when they constitute a typical feature of the employment relationship.

In the present ruling, the Court recalled the European Social Charter (Article 4), the Charter of Fundamental Rights of the European Union (Articles 23 and 31), the European Pillar of Social Rights 2017 (Point 6a), Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union and some CJEU rulings.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The Court of Justice dealt with annual leaves and unlawful dismissals in Italy in the ruling C- 37/19 (CJEU 25 June 2020, joint cases C-762/18 and C- 37/19). Both in that ruling and in those at stake, the CJEU does not censure national law, but national judicial interpretation. Indeed, in a civil law system, such as the Italian one, "national case law" that is based on national law that is not compliant with European case law, the decision is not legitimate.

In Italy, there are two types of reinstatement. In the first case, protection is strong because the reinstated employee is entitled to all lost wages, starting from the day of dismissal to the day of actual reinstatement. In this case, compensation automatically covers also leaves not taken.

In the second case ("weak protection"), the employer is entitled to reinstatement and to a compensation that does not cover all lost wages. In this case, annual leave is not specifically paid.

According to the Italian Constitutional Court of 23 April 2018, No. 86, the sums paid to an unlawfully dismissed employer are compensation, as they are the consequence of "*contra ius*" conduct of the employer. Moreover, the correlation between the lost wages and the amount of compensation is reasonable because it is based on the lost profit.

The CJEU ruling does not clarify whether Italian law on unlawful dismissals (as interpreted by the Italian Constitutional Court) is compliant with European law, because the question does not concern the legislation on annual leave, but precisely the protection against unfair dismissals.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The CJEU decision in case C-57/22 YQ does not have direct implications on Latvian legal regulation and its application in practice. According to a decision of the Senate of the Supreme Court in case SKC-2241/2016, in case a notice of dismissal is deemed unlawful and reinstatement is ordered, there is no legal ground for compensation of unused paid annual leave, as compensation in lieu is permissible only in case of termination of the employment relationship. It follows from this finding that an employee retains his/her right to paid annual leave in case of reinstatement for the entire period he/she did not make use of it. Moreover, Latvian legal regulation does not limit the use of the right to paid annual leave and there is no carry-over period for use of this right, Article 149 (5) of the Labour Law.

It follows that Latvian case law complies in substance with the interpretation given by the CJEU in case C-57/22.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

According to Decision No. 111/2020 of the EEA Joint Committee, notified by the Liechtenstein government on 12 October 2023, Directive (EU) 2018/131 is to be incorporated into the EEA Agreement.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This decision is of little practical relevance for Liechtenstein.

First, it should be noted that the principle of freedom of termination applies under Liechtenstein law. This means that no specific reasons are required to terminate an employment contract, not even on the part of the employer. The termination must simply not be abusive. Even if the contract is terminated abusively, the termination is not null and void, but the terminating party must pay a monetary severance payment. This also means that the employee is not reinstated in his/her job (cf Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210.0), section 1173a, Article 45(1) (freedom of termination), Article 46 (abusive termination), Article 47 (severance payment)).

The same system of sanctions applies in the event of unjustified termination without notice. Here, too, there is no reinstatement, but only claims for damages and severance payments (cf Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210.0), section 1173a, Article 56(1) (claim for damages), Article 56(3) (severance payment)).

There is an exception, for example, according to Article 49(2).

In line with the decision of the competent Czech court in the present case, the worker was not entitled to paid annual leave for the period between the date of the unlawful dismissal and the date of her reinstatement on the ground that during that period, the worker had not actually performed work for the employer, as the latter had not assigned her any work, although she was entitled, under national law, to wage compensation during that period.

This case would have been decided differently under Liechtenstein law, namely in line with the CJEU's decision. If the employee cannot work because the employer does not assign her work, it is a case of failure to accept performance *('Annahmeverzug', 'Gläubigerverzug')* (Cf. Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210.0), section 1173a, Article 17).

On the one hand, this means that the employer continues to be required to pay the employee's salary, but the employee is not required to make up the time that has been lost. On the other hand, it is undisputed that the employment relationship continues during this period. The corresponding period must therefore be included in the

calculation of paid annual leave. The *pro rata temporis principle* is expressly laid down in the law (cf. Liechtenstein Civil Code (Allgemeines bürgerliches Gesetzbuch, LR 210.0), section 1173a, Article 30(2)).

Section 1173a Article 31 of the Liechtenstein Civil Code gives the employer the right to reduce annual leave in certain cases. This provision was derived from Swiss labour law (Article 329b of the Swiss Code of Obligations = Schweizerisches Obligationenrecht, SR 220). According to the prevailing doctrine, it is undisputed that the employer may not reduce annual leave if the prevention of work is not due to the fault or the person of the employee, in particular in the case of failure to accept work performance (see Portmann/Wildhaber, Schweizerisches Arbeitsrecht, 4th ed., Zurich/St. Gallen 2020, No. 506).

In conclusion, it can be stated that Liechtenstein law is fully in line with the judgment in CJEU case C-57/22.

4 Other Relevant Information

4.1 Decision No. 111/2020 of the EEA Joint Committee

The Government has notified Decision No. 111/2020 of the EEA Joint Committee amending Annex XVIII to the EEA Agreement (see Liechtenstein Landesgesetzblatt no. 381 of 12 October 2023). According to this decision, the following Directive is to be incorporated into the EEA Agreement: Council Directive (EU) 2018/131 of 23 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, 2006, as approved by the International Labour Conference on 11 June 2014 (text with EEA relevance).

4.2 Liechtenstein's EEA presidency in 2/2023

Liechtenstein is holding the EEA presidency in the second half of 2023 and is committed to the proper functioning of the EEA. Delayed incorporation of EU legislation into the EEA Agreement stands in the way of equal participation in the single market and can lead to distortions of competition. During its presidency, Liechtenstein is focusing on accelerating this process through improved cooperation and coordination with Iceland and Norway.

Newsletter "SEWR-News" 3/2023

Lithuania

Summary

The government has proposed a reshaping of the system of sanctions in case of illegal work.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

Lithuanian labour law covers specifically covers the issue deal with in the present case and its provisions are in full conformity with the interpretation given by CJEU in the case C-57/22. The timeframe between dismissal from work and the reinstatement by the labour dispute resolution body (Commission of Labour Disputes or court) is referred to as 'the period of involuntary idle time' (in Lithuanian – '*priverstine pravaiksta*') (Article 218 (2) of the Labour Code). Article 127 (4) of the Labour Code explicitly states that the period of involuntary idle time shall be included in the number of working days of the year of employment for which annual leave is granted.

4 Other Relevant Information

4.1 Proposal to adapt the sanctions for illegal work

The Lithuanian government proposes changes in Decree No. 810 of 25 October 2023, Registry of Legal Acts, 2023 No. 21023 to the Law on Employment, which would partially reshape the system of sanctions for illegal work activities. The future law, if adopted, would impose severe sanctions for employers when using undeclared work. The Ministry of Social Security and Labour considers that domestic cases of illegal work of legally working national residents should be considered (and punished) in the same manner as the work of illegally staying third-country nationals—the activity which shall be banned in accordance with harmonising Directive 2009/52/EC—is another seemingly erroneous interpretation of the Directive. This is not the first time when the (partially wrongly) perceived European legal requirement is transposed in a way to impose the European stipulation on domestic (different) situations (in 2021, the amendments to the Labour Code introduced the liability of national subcontractors in purely national subcontracting cases).

Luxembourg

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The ruling will have only limited impact on Luxembourg's labour law. In principle, unjustified and unfair dismissal (*'licenciement abusive')* only gives rise to a right to damages and does not lead to nullity and reinstatement.

Nullity may only be requested by the employee if it is explicitly provided for. In this case, the nullity must generally be requested in court within a very short timeframe (15 days/ one month from termination depending on the case), and the judge will rule on the case using an accelerated procedure. Cases of nullity are often associated with a specific capacity of the employee (e.g. staff representative, pregnant women, etc.) and therefore, do not give rise to in-depth debates. In addition, nullity is rarely requested by such protected employees. Other cases of nullity could give rise to more in-depth legal debates in court (e.g. discriminatory dismissal, protection of whistleblowers, etc.), but such cases are rare in practice.

In short, cases of nullity are therefore very rare in Luxembourg. In any case, we are not aware of any case law that has ruled on the impact of reinstatement on the entitlement for paid annual leave. However, since nullity is retroactive to the date of unlawful dismissal, case law draws the conclusion that the employee's salary is due, even in the absence of work. Following the same logic, it would therefore be consistent to accept that the employee may also claim annual leave for the period between dismissal and reinstatement, even if he/she was able to rest and did not engage in strenuous work impacting his/her health or safety. There is therefore no obstacle for Luxembourg to comply with the interpretation given by the CJEU.

4 Other Relevant Information

4.1 Legislative elections

The legislative elections for the Chamber of Deputies have just taken place. Talks about a coalition agreement are underway between the Liberal Party (DP) and the Christian Social Party (CSV). Information on the direction the agreement will take in terms of employment relationships will be shared in due time. The expected coalition between these parties leads us to assume that there will be some stability in terms of labour law legislation.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The Annual Leave National Standard Order, 2018 is silent on the issues arising from the judgment under review. The Annual Leave National Standard Order clarifies, however, that annual leave continues to accrue during periods of maternity leave (see Regulation 5) and injury and sick leave (see Regulation 6). If one were to extrapolate the principles underlying the annual leave national standard order and to apply it to the facts of the case under review, the result would have to be the same because in both instances, there are no tasks assigned to the employee (in the present case, despite the employee's request to be provided with tasks) and during the periods, the employee would still be entitled to a salary, in spite of not performing any tasks for the employer.

The difference lies in what constitutes an unfair dismissal and its consequences. Under Maltese law, a dismissal enters into force when the employer dismisses the employee. If the employee submits a claim against the employer for unfair dismissal, the Industrial Tribunal has to rule on whether the specific dismissal was indeed unfair and whether the employee is entitled to compensation. There is no formula on what constitutes compensation – it is mostly decided on a case-by-case basis. However, the payment of compensation is not deemed to include any payment for any vacation leave, even if the Industrial Tribunal determines the dismissal to have been unfair. The important point to note, however, is that even if the Industrial Tribunal were to rule that the dismissal has been unlawful and orders reinstatement, it is not considered that the employee has been in employment since the original dismissal date and hence the employee would not be entitled to wage compensation for said period and consequently, the employee would not be entitled to the vacation leave accrued during that period. Therefore, it is submitted that whilst Maltese law makes it clear that during periods of other types of leave (as aforementioned) annual leave continues to accrue, the facts of the case under review make it rather unlikely for it to have any real implications under Maltese law.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) Three different internet consultations have been launched: the clarification of assessment employment relationships and the legal presumption of the Employment Relationship Act, the amendments to the SLIM regulation, and the amendments of reintegration obligations in the second year of sickness for employees of small- and medium-sized employers.

(II) The government has introduced a new bill aiming to increase the employment opportunities for individuals with an employment impairment and has introduced a legislative proposal concerning the admission of agency work.

(III) The Supreme Court delivered its ruling in the *Heiploeg* case.

(IV) The Court of Appeal and two district courts have interpreted Article 6 (2) of the Temporary Agency Work Directive. Another district court ruled that trade unions are allowed to continue collective proceedings with a view to classifying (temporary agency work) employment relationships/contracts.

(V) A district court delivered another ruling on the question whether 'log-in time' constitutes working time.

1 National Legislation

1.1 Internet consultation on the 'amendments to SLIM regulation'

Medium-sized enterprises and large companies in the agriculture, hospitality or recreation sectors in the Netherlands can claim an annual subsidy from the SLIM (*Stimuleringsregeling Leren en ontwikkelen in MKB-ondernemingen*) regulation. This regulation helps entrepreneurs promote learning and development within their company. To improve and clarify the regulation, a number of adjustments have been initiated. The amendment is now open for consultation.

Through the amendment, the maximum eligible hourly rate for external consultants will increase from EUR 125 to EUR 135 per hour (excluding VAT). This adjustment aligns with the changing economic circumstances. Additionally, a pay slip will be requested to ascertain the accuracy and market alignment of the reported wage costs for internal hours.

The SLIM regulation offers subsidies for various activities. Two of these activities required clarification. First, the updated guidelines clarify that organisations can apply for a "learning culture scan". This scan sheds light on the type of development needed to strengthen the organisation's learning environment. Second, the term 'method' in the regulation will change to 'learning and development method', primarily focusing on the learning and development of employees in the organisation. Applicants for the SLIM grant must explain how their method contributes structurally to the learning culture in their company.

1.2 Internet consultation on the amendments of reintegration obligations in the second year of sickness for employees of small- and medium-sized employers

This proposed act is designed to bring clarity and flexibility to small- and medium-sized employers in managing sick employees and their reintegration. The act is part of the labour market package presented in April with related measures for more security for

workers and more flexibility for entrepreneurs, specifically, the 'Measure wage payment during sickness'.

The government proposes giving small- and medium-sized employers the possibility, under certain conditions, to conclude the reintegration of the sick employee after one year of sickness (so-called first track). The cut-off applies from the start of the second year of sickness. A predetermined moment for the first track's closure is necessary to attain the intended clarity this law seeks to provide.

In case of closure of the first track, the employer is no longer required to reserve the employee's position (even after full recovery), and the employee is not required to reintegrate into the same organisation.

If the employee fully recovers during his/her second year of illness, both the employer and employee will continue their efforts for the remainder of the second year to facilitate the employee's return to work for another employer. The obligation for wage payment and reintegration will continue for 104 weeks. This period will not be reduced. For severely ill employees, the expectation is that they will continue to reintegrate with their own (small- or medium-sized) employer after the first year of sickness. The idea behind this exception is that reintegration is easier that way (given their familiarity with the company and job) and the financial incentives remain in place.

1.3 Internet consultation on the proposed act on clarifying employment relations and the legal presumption

The Ministry of Social Affairs and Employment started the internet consultation on the proposed act, which aims to restore the balance between employment and self-employment, on the one hand and, on the other, working with and as employees.

This legislative proposal is part of an overarching aim for a labour market reform that ensures a better balance between security and flexibility in the labour market and future-proof social security. The government presented its Letter elaborating a labour market package in July 2022, further elaborated in the Letter on labour market reform of April 2023 (see also April 2023 Flash Report).

This proposal aims to fight false self-employment, thereby clarifying the notion of working in the service of ('in dienst van') as laid down in Article 7:610 Civil Code. Identifying false self-employment is the main problem. There are three causes for the current problems surrounding false self-employment: (1) an uneven playing field between different forms of contract; (2) limited enforcement on false self-employment; and (3) a highly blurred boundary line between employees and self-employed persons.

Thus, it is proposed to provide a clear assessment framework for self-employed persons and employing entities, which relies on existing EU and national case law. The three main elements structuring the 'working in the service of' standard (work-content steering, organisational embedding, and—as a counter indication—working for one's own account and risk) will be further specified by indicators. While the main elements are planned to become part of Article 7:610 Civil Code, the indicators will most likely be laid down in a regulation ('Algemene Maatregel van Bestuur').

1.4 Bill to increase employment opportunities for individuals with an employment impairment

The Dutch Cabinet has introduced a new bill that aims to simplify the jobs agreement and quota system, making it easier and more attractive for employers to hire people with an employment impairment. The jobs agreement, published in 2013, aimed to create 125 000 additional jobs for individuals with work impairments by 2026. However, as of the end of 2022, only 81 000 jobs had been created. The new law intends to

increase the number of job opportunities for those with employment impairments and create a more inclusive labour market with equal opportunities for all.

To achieve this, the government proposes several improvements. Firstly, employers will be entitled to a labour cost benefit of up to EUR 2,000 per employee per year if they hire someone from the job's agreement. Currently, this benefit is limited to a maximum of three years. However, under the new law, employers will be able to retain this benefit as long as the employee remains employed with them. Additionally, employers and employees will no longer have to apply for a special statement to receive the labour cost benefit, thus reducing administrative burdens.

Furthermore, the distinction between employers in terms of their responsibility to provide additional jobs will be removed. Instead, there will be a single job agreement for all employers, emphasising the importance of employment and participation rather than which employer someone works for.

The bill also maintains the quota regulation, which penalises employers who fail to meet the agreed number of jobs with a levy. Nevertheless, changes to the regulation will reward companies that perform well by providing them with a higher labour cost benefit. This bonus aims to encourage companies to hire more individuals with disabilities, ultimately increasing job opportunities for this group.

By simplifying the jobs agreement and quota system, the Dutch government seeks to create a more inclusive labour market and provide equal opportunities for individuals with employment impairments. The proposed improvements, such as extending the labour cost benefit and removing administrative burdens, aim to incentivise employers to hire more people with disabilities. These efforts align with the government's goal of reaching the agreed target of 125 000 additional jobs by 2026.

1.5 Law on the admission of agency work

On 6 October 2023, the Minister of Social Affairs and Employment presented the Legislative proposal for a law on the admission of agency work (*Wet toelating terbeschikkingstelling van arbeidskrachten*). Earlier, we reported about a legislative proposal for a compulsory certification system of temporary work agencies (TWAs) (see also December 2022 Flash Report). The legislative proposal presented on 06 October goes a step further, as explained in the accompanying Letter that was published on 10 October 2023, by seeking to introduce a public admission system for TWAs. From 2026, TWAs may only supply workers if they have been authorised to do so by the Minister of Social Affairs and Employment. To be admitted, TWAs must be able to demonstrate compliance with relevant laws and regulations, submit a certificate of conduct (*Verklaring Omtrent het Gedrag; VOG*) and provide financial security. User undertakings may only do business with authorised TWAs. The Netherlands Labour Authority supervises the admission requirement and can fine both TWAs and user undertakings if they do not comply with the rules of the admission system. Combined with intensified enforcement, the measures in the bill aim to ensure that it is only possible for bona fide TWAs to supply workers. As already mentioned, the earlier legislative proposal proposed to introduce a compulsory certification system. Following the advice of the Council of State of 29 March 2023 (No. W12.22.00200/III), the government decided to not propose a public-private certification system, but a public-law admission system. The admission system is considered to be simpler and more effective and to allow all parties in the system, public and private, to better fulfil their roles.

1.6 Minimum wage

On 01 January 2024, the statutory minimum wage will increase by 3.75 per cent. That means that employees aged 21 years and over will receive EUR 13.27 per hour (gross). This is a regular indexation; every six months, the minimum wage rises along with the

collective wage. At the same time, the government is introducing a new law for the minimum hourly wage on 01 January 2024 (see also July 2023 Flash Report).

Introducing a uniform statutory minimum hourly wage means that there will no longer be statutory minimum daily, weekly and monthly wages. An employee's monthly wage will thus be determined by the actual number of hours worked. This addresses the inequality that those currently working 40 hours have a lower hourly wage than people who work 36 hours.

See here for the exact statutory minimum hourly wage levels as of 01 January 2024.

2 Court Rulings

2.1 Pre-pack procedure

Supreme Court, 06 October 2023, ECLI:NL:HR:2023:1372 (Heiploeg)

In its decision following the preliminary ruling of the CJEU in the *Heiploeg* case, the Supreme Court, unsurprisingly, came to the conclusion that the Dutch pre-pack procedure does not fall under the scope of Article 7:666 Dutch Civil Code (the implementation of Article 5 (1) Directive 2001/23/EC). The Dutch pre-pack procedure, specifically the position of the 'prospective insolvency administrator' and the 'prospective supervisory judge', is not governed by statutory or regulatory provisions. This is in line with the CJEU's judgment. It is therefore up to the Dutch legislator to provide the pre-pack with a legal basis.

2.2 Temporary agency work

District Court Overijssel, 26 September 2023 (published 02 October 2023), ECLI:NL:RBOVE:2023:3846

This case concerned the interpretation of 'access to employment' as codified in Article 6 (2) Directive 2008/104/EC and more specifically, a dispute between a temporary work agency and a former employee. The former employee sought to work directly for the user undertaking after completing his assignment as a self-employed worker. To accomplish this, he requested the temporary work agency to negotiate on his behalf to conclude an employment contract with the user undertaking. The former employee signed a meditation contract with the temporary work agency which stated that in return for the negotiations, the employee had to pay a fee.

The question was whether this mediation agreement violated Article 9a Waadi, which implements Article 6 (2) Directive 2008/104/EC. The employee claimed that the fee for the negotiation on his behalf qualified as 'any clause prohibiting (…) the conclusion of an employment contract after his assignment' which would constitute a violation of Article 9a Waadi, the implementation of Article 6 (2) Directive 2008/104/EC. The District Court ruled that the employee was free to negotiate the conclusion of an employment contract with the user undertaking(which he had done before requesting the temporary-work agency to mediate). In the end, it had been the employee who started working as a self-employed worker for the user undertaking. The fact that the former employee had asked the temporary work agency to negotiate on his behalf meant that it was reasonable for the temporary work agency to request a fee. This fee does not qualify as a clause within the meaning of Article 6 (2) Directive 2008/104/EC. Therefore, the Court denied the employee's claims.

Court of Appeal Amsterdam, 22 August 2023 (published 09 October 2023), ECLI:NL:GHAMS:2023:2207

This present case involved the interpretation of Article 6 (2) Directive 2008/104/EC focusing on a dispute between a temporary work agency and a former employee. In this

case, the former employee entered into an employment contract with a different employer, but performed tasks for the former user undertaking, contravening the non-solicitation clause. The former employee claimed that the non-solicitation clause violates Article 9a Waadi (which implements Article 6 (2) Directive 2008/104/EC). The Court of Appeal clarified that Article 9a Waadi applies when the former employee enters into an employment contract with the user undertaking. However, it does not extend to situations in which the employee concludes a contract with a different employer to work for the former user undertaking.

This interpretation is consistent with the aim of the Temporary Agency Workers Directive, which aims to enhance the position of temporary agency workers and facilitate their transition to permanent employment. As a result, the Court of Appeal concludes that the Waadi does not apply in this specific situation.

District Court Rotterdam 05 October 2023 (published 23 October 2023), ECLI:NL:RBROT:2023:9483

This was another case on the interpretation of Article 6 (2) Directive 2008/104/EC, particularly involving a temporary work agency and an employee. In this case, the employee claimed that there is a clause prohibiting the conclusion of an employment contract with the user undertaking before the employment contract has ended. According to the District Court, Article 9a Waadi should be interpreted in compliance with Directive 2008/104/EC. Article 6 (2) Directive 2008/104/EC states that 'any clauses prohibiting the conclusion of the employment contract *after* his assignment are null and void'. The District Court ruled that the employee is still on his assignment with the temporary work agency. Therefore, the employee's claim was denied.

2.3 Working time

District Court The Hague, 03 August 2023 (published 11 October 2023), ECLI:NL:RBDHA:2023:14542

The central question in this case was whether the time the employee claims to have needed before the start of her shift to be able to start her work (call operations) for the employer should be considered working time within the meaning of Directive 2003/88/EC. The employer's scheduling rules state that employees are required to be present ten minutes before their shift and to have completed their log-in. In ECLI:NL:GHDHA:2023:738 (see also May 2023 Flash Report), a case involving the same employer, this 10-minute rule was deemed to be working time, since, *inter alia*, the employee had to report to his supervisor ten minutes before the start of his shift. This entailed that it was irrelevant how much time was involved in starting up/logging in. Unlike the employee in that case, however, the employee in the current case performed her work at home. According to the District Court, this left her free to organise her time until the start of her shift. During that time, she did not have to perform any work and the employer had no control over her and how she wanted to arrange that time. In the opinion of the District Court, the ten-minute rule in this case did not mean that that time qualifies as working time.

2.4 Collective bargaining

Court of Amsterdam 11 October 2023, ECLI:NL:RBAMS:2023:6389 (FNV and CNV/Temper)

This case between the trade unions FNV and CNV and the platform Temper addressed the question whether trade unions can act as exclusive representatives (see on this particular aspect: Rb. Amsterdam 13 July 2022, ECLI:NL:RMABS:2022:4035) on behalf of all Temper workers in the context of legal proceedings aimed at protecting the similar

interests of other persons, insofar as it protects those interests pursuant to its statutes and insofar as those interests are adequately safeguarded (Article 3:305a Civil Code). The Court of Amsterdam decided to open the possibility for Temper workers to opt-out of this collective proceeding initiated by the trade unions. The opt-out possibility of Article 1018f(1) Civil Procedure Code allowed Temper workers to express that they do not want to be bound by any judgment resulting from the court proceedings. Without opt-out, Temper workers would be bound by the outcome of the proceedings.

Out of 61 292 Temper workers who received the invitation to express their opt-out, 20 398 opted out (not corrected for duplicates) (see on this aspect: Rb. Amsterdam 31 May 2023, ECLI:NL:RBAMS:2023:3585). As explained by Temper, it is likely that the number of unique opt-out declarations is about a quarter lower than the total number of opt-out declarations, resulting in 15.298 opt-outs, which is the number the Court took into account.

According to the Court, while this number is large, there is no reason to end the collective proceedings in general. It acknowledges that the trade unions also have more ideal interests to ensure a fair labour market where workers' rights are generally respected and where there is no unfair competition. Thus, the collective proceedings will be continued in so far as it addresses the question whether Temper workers can be classified as temporary agency workers or employees, as well as whether Temper has violated the registration obligation for temporary work agencies laid down in Article 7a Waadi. The classification of the contracts concluded follows from the law and is mandatory in nature, and therefore it is not (entirely) at the discretion of the parties involved in the legal relationship, including the Temper workers.

Other claims seeking confirmation that Temper, inter alia, violates the equal treatment principle for temporary agency workers laid down in Article 8 Waadi (implementation of Article 5 Directive 2008/104/EC) and/or the generally binding ABU Collective Agreement, that the contractors of Temper are jointly and severally liable based on Article 7:616a Civil Code, and that Temper has violated the prohibition to charge any fees in exchange for arranging for them to be recruited by a user undertaking following Article 9 Waadi (implementation of Article 6 (3) Directive 2008/104/EC) only serve to protect the interests of Temper workers and will therefore not be part of the collective proceedings.

The case will be dealt with by the Court of Amsterdam on 22 November 2023.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This case concerned the right to paid annual leave when a worker is unlawfully dismissed and then reinstated in his/her employment by decision of a court. The CJEU ruled that the worker is entitled to paid annual leave during the period between the date of dismissal and the date of the reinstatement. In Dutch law, a distinction must be made between two different ways in which the employment contract can be reinstated by the Court: (1) the termination of the employment contract can be annulled, and (2) the employment contract can be reinstated.

(1) The termination of the employment contract is annulled

If the Court rules that the termination of the contract must be annulled, the employment contract will continue retroactively and the rights and obligations arising from it will continue to exist even during the period between the termination and the court order.

In short, if the termination of the contract is annulled because the termination was unlawful, the worker will be entitled to all rights arising from it. For instance, salary,

pensions, bonuses and paid annual leave still must be paid. This is in line with the CJEU case.

(2) The employment contract is reinstated.

The employment contract can be reinstated in the following situations (Article 7:682 Civil Code):

- After a successful appeal in court against a termination for which permission has been granted by the Netherlands Employees Insurance Agency (*UWV*) or a collective dismissal committee.
- On appeal against a termination accepted by the District Court or a dissolution of the employment contract by the District Court.
- In the event of a breach of re-employment obligation.

If the employment contract is reinstated by the court, the court shall, in accordance with Article 7:682(6) Civil Code, determine the date on which the employment contract shall be reinstated and make provisions regarding the legal consequences of an interruption of the employment contract. The same applies to an appeal as stipulated in Article 7:683(4) Civil Code.

Regarding the content of the provision of legal consequences of interruption of the employment contract, the court has considerable freedom. However, the law determines that the court "*shall* make provisions" (italics added), suggesting that the court is required to make these provisions.

With regard to these provisions, the Parliamentary History mentions, for instance, compensation for income damages and compensation for pension damages (*Kamerstukken I* 2013/14, 33 818, nr. C, p. 110-111 en 114). Regarding the application of the CJEU's case, in Dutch law, the court shall make provisions on the legal consequences of interruption of the employment contract. In conjunction with the Parliamentary History, paid annual leave can be included in these consequences.

4 Other Relevant Information

Nothing to report.

Norway

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In the event of a dispute before the court on whether an employment relationship has been legally terminated in accordance with the Working Environment Act Section 15-7, the employee as a main rule has the right to remain in his/her post during the negotiations and during the case proceedings, cf. Section 15-11. There is a rather narrow exception: if requested by the employer, and if the court finds it "unreasonable" for the employee to remain in his/her post, the court may decide that the employee must leave the post. In the event of summary dismissals (with no notice period) in accordance with Section 15-14, the rule is similar, but opposite: the main rule is that the employee shall leave his/her post, and the court may decide otherwise—granting the right to remain in the post—if requested by the employee.

An employee who challenges the dismissal may demand the dismissal to be found invalid, which implies that the employment relationship continues cf. Section 15-12 (1). The employee may also claim compensation, cf. Section 15-12 (2). If the employee challenges the dismissal but does not want the employment relationship to continue, he/she may choose to *only* demand compensation. This is usually the case where the employee has not remained in the post. Compensations shall be fixed at the amount the court deems reasonable given the employee's financial loss, the circumstances relating to the employer and the employee and other facts of the case, cf. Section 15-12 (2).

A situation as in the present case—where an employee has been dismissed and later reinstated after the dismissal has been found invalid by the court—will therefore rarely occur in Norway. If the situation arises, the regulatory approach in Norway is to consider the right to leave as separate from the right to holiday pay.

The right to paid annual leave is implemented in the Norwegian Holiday Act (LOV-1988-04-29-21). Here, the right to annual leave ('feriefritid') is regulated as a right that is separate from the right to holiday pay ('feriepenger'), cf. Chapter II and Chapter III, respectively. Simply put, holiday pay is accrued through wages from the employer in the qualifying year and paid during annual leave taken the following year, i.e. the holiday year. This regulatory structure has led the ESA to question whether the Norwegian implementation of the right to paid annual leave is in accordance with Directive 2003/88/EC Article 7. Against this background, the Norwegian government has announced that the Holiday Act will be reformed, see also March 2023 Flash Report.

In a situation as in the present case, the normal approach for the employee would be to take regular annual leave in the holiday year after reinstatement, while the lack of accrued holiday pay for the period between dismissal and reinstatement can be addressed in the compensation claim. We are not aware of any case where the employee has requested days of annual leave during the period from dismissal to reinstatement in addition to regular leave after reinstatement.

If so, it is possible that the Holiday Act can be interpreted to allow such a claim in light of the present ruling. The act stipulates that leave days not taken by the end of the holiday year shall be transferred to the following holiday year, cf. Section 7 (3) subsection 2. The preparatory works state that there are no limitations on the right to transfer days of leave not taken, cf. Ot.prp. No. 65 (2007-2008) chapter 2.5.2.

Whether holiday pay can be claimed for the transferred leave is another question. Holiday pay is calculated on the basis of "wages paid in the qualifying year", cf. Section 10. It is an unresolved issue whether this provision, in light of the present ruling, can be interpreted so that holiday pay is accrued.

4 Other Relevant Information

Nothing to report.

Poland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

Under Polish law, any termination of an employment contract is effective, even if the employer has violated statutory provisions. A dismissed employee can challenge the dismissal before the labour court (Article 44 of the Labour Code, hereinafter: LC). In case of termination of an open-ended or fixed-term employment contract, an employee can claim reinstatement to a previous position or receive financial compensation (Article 45 § 1 LC).

According to Article 47 LC, an employee who resumed employment due to reinstatement has the right to remuneration for the period during which he/she was unemployed, but for no more than two months or, where the notice period was three months, for no more than one month. If an employment contract has been terminated with an employee covered in Article 39 LC (i.e. an employee of pre-retirement age) or with an employee who is pregnant or on maternity leave or in the period from the day when an employee filed a request for granting maternity leave or a part thereof to the end date of such leave, remuneration shall be paid for the entire period of unemployment. The above shall also apply to cases where the termination of an employment contract is subject to restrictions by operation of a special provision (e.g. with regard to trade union officers or employee council members).

Article 51 § 1 LC determines that in case of an employee who has taken up employment following reinstatement, the time of unemployment for which remuneration has been awarded shall be included in the period of employment.

Thus, the labour court's judgment on reinstatement has *ex nunc* effect, i.e. it re-establishes an employment contract *pro futuro*, and there is an interval in the employee's period of employment. Article 51 § 1 LC clearly determines that only the period for which remuneration has been awarded is considered part of the employee's period of employment. According to Article 47 LC, for those employees who do not enjoy special protection against dismissal (e.g. pregnant female employees, trade union officers, employee council members), remuneration can only be awarded for a period of two months or one month, depending on the length of the period of notice.

Consequently, where a labour court finds a dismissal unlawful and annuls it, the period between the date of that dismissal and that of reinstatement is considered retroactively as forming part of the period of employment with the given employer, provided that the remuneration for this period has been awarded (in principle, for a period of two months or for a period of one month). Only this period is considered to determine the length of

the employee's annual leave. In other words, not the entire period between the termination of the employment contract and reinstatement is treated as a period of actual work for the purposes of determining entitlement to paid annual leave.

4 Other Relevant Information

4.1 Possible development in the field of labour law following the parliamentary elections

On 15 October, parliamentary elections took place in Poland. The opposition political parties, i.e. Platforma Obywatelska *('Civic Platform')*, Trzecia Droga *('Third Way')* and Lewica *('Left-Wing Party')* won the majority. There are good chances that a coalition government consisting of these political parties will form, and that it will subsequently modify the previous course of policy actions.

It is expected that under the new parliamentary majority, the rule-of-law state will be re-introduced. Moreover, it can be expected that some labour law issues will represent topics of debate and potential legislative actions. Firstly, there might be a discussion on the ban on Sunday trading activities in commercial establishments. The prohibition of such activities was introduced in 2018 (see also January 2018 Flash Report). The Civic Platform declared its intention during the electoral campaign to abolish the ban on trading activities. Instead, employees would be entitled to double remuneration in exchange for work on Sunday, and at least two free weekends per month.

Secondly, during the electoral campaign, several social policy issues were highlighted by the Left-Wing Party. These refer to increased labour market stability, including the fight against long-term civil law contracts and bogus self-employment, as well as regulating the situation of platform workers. Raising the minimum wage, strengthening the prohibition of discrimination in employment (including reducing the gender pay gap), improving social dialogue, reducing the amount of weekly working time, as well as introducing the right to disconnect have also been mentioned.

The abovementioned issues have been raised in the political context of the electoral campaign. It can be expected, however, that some social policy matters will be discussed in the months to come. It seems that the potential legislative actions may first and foremost relate to the prohibition of Sunday trade activities and working time issues.

Portugal

Summary

(I) The Appeal Court of Lisbon ruled that the right to strike is a fundamental right enshrined in the Constitution, but is not, however, an absolute right and may therefore be subject to restrictions in cases where the possibility of collision may arise between the right to strike and other fundamental rights.

(II) The government and social partners entered into an agreement for the improvement of income, wages and competitiveness.

(III) The State Budget Law proposal for 2024 has been presented, which contains some labour-related measures.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Right to strike and minimum services

Ruling of the Appeal Court of Lisbon, 11 October 2023, No. 2568/23.4YRLSB-4

In this judgment, the Appeal Court of Lisbon ruled that the right to strike is a fundamental right enshrined in Article 57 of the Portuguese Constitution, but is not, however, an absolute right and may therefore be subject to restrictions in cases where the possibility of collision may arise between the right to strike and other fundamental rights. The minimum services that impose the provision of work during the strike action consist of a typical situation of restrictions to the right to strike. The minimum services are limited to the services necessary to ensure the safety and maintenance of both equipment and premises, as well as the minimum services necessary to ensure that essential social needs are adequately met.

In this ruling, the Court analysed the scope of the minimum services set forth in the law and ruled that under Article 57(3) of the Portuguese Constitution and Article 537(1) and 538(5) of the Portuguese Labour Code, a strike likely to entail the risk of paralysing the healthcare services must be accompanied by a definition of minimum services in accordance with the principles of necessity, adequacy and proportionality. However, in the present case, the strike was related to IT workers (who provide services for hospitals) and not workers who directly provide healthcare services (doctors, nurses, operational assistants) and, therefore, the Court concluded that the imposition of minimum services would depend on whether the absence of these IT workers during the strike period would have an impact on the provision of healthcare and on the measure of such an impact. The provision of services by the IT workers were deemed to not be essential to ensure the provision of healthcare services, nor would their participation in the strike have an impact, and hence the Court ruled that the minimum services established by arbitration decision are illegal. Thus, the fact that the strike occurs in a company or establishment that belongs to one of the sectors of activity included in the legal list as being intended to meet society's essential needs is not enough, *per se*, to conclude that the provision of minimum services is mandatory.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This ruling concerned the interpretation of Article 7 (1) of Directive 2003/88/EC, of 04 November 2003, concerning certain aspects of the organisation of working time, according to which

> *"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting to, such leave laid down by national legislation and/or practice".*

In the present case, the worker was unlawfully dismissed and then reinstated in her employment. After the reinstatement, the employer refused to grant her the unused annual leave related to the period between the date of her dismissal and the date of her reinstatement (*i.e.* the period between 01 January 2014 and 10 January 2017) on the grounds that the worker had not performed work during that period.

The CJEU analysed whether Article 7 (1) of Directive 2003/88/EC is compatible with national case law by virtue of which a worker who has been unlawfully dismissed and then reinstated in his/her employment in accordance with national law, following the annulment of his/her dismissal by a court decision, is not entitled to paid annual leave for the period between the date of dismissal and the date of reinstatement.

According to the CJEU, *"in certain specific situations in which the worker is incapable of carrying out his or her duties, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked",* as was the case in which a worker has been unlawfully dismissed and later reinstated in her employment, has not, during the period between the date of the unlawful dismissal and the date of her reinstatement, been given the opportunity to perform actual work for her employer. As referred to by the CJEU, *"the fact that the worker has not, during the period between the date of his or her unlawful dismissal and the date of his or her reinstatement, actually carried out work for his or her employer is the consequence of the latter's actions that led to the unlawful dismissal, without which the worker would have been in a position to work and to exercise his or her right to annual leave".* For this reason, according to the CJEU, *"the period between the date of the worker's unlawful dismissal and the date of his or her reinstatement, in accordance with national law, following the annulment of that dismissal by a judicial decision, must be treated as a period of actual work for the purposes of determining entitlement to paid annual leave".*

Based on the arguments referred to above, the CJEU ruled in case C-57/22 that

> *"Article 7 (1) of Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed and then reinstated in his or her employment, in accordance with national law, following the annulment of his or her dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of his or her reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer as the latter did not assign him or her work and as he or she is already entitled, under national law, to wage compensation during that period".*

Under Portuguese law, workers who are unlawfully dismissed are entitled to: *(i)* their remuneration that corresponds to the period from the date of dismissal to the date of the court's final decision and *(ii)* the reinstatement under the same exact terms and conditions of employment or an indemnity set by the court between 15 and 45 days of

the employee's base remuneration and seniority premiums, with a minimum of three months' pay (Articles 389 to 391 of the Portuguese Labour Code).

The remuneration referred to in *(i)* includes the remuneration corresponding to the annual leave period as well as vacation and Christmas allowances. Therefore, a worker who has been unlawfully dismissed is entitled to receive the remuneration he/she would have received during the vacation period if the dismissal had not occurred.

However, there is no specific provision regarding the effects of a judicial decision that declares the dismissal of a certain worker unlawful in what concerns his/her right to take annual leave relating to the period between the date of dismissal and the date of the court's final decision. In this regard, it should be noted that Portuguese case law tends to consider that a worker who has been unlawfully dismissed is not entitled to enjoy, following reinstatement, the referred annual leave period, because the grounds and purposes of this entitlement would not apply to a worker in this situation. As stated by the Supreme Court of Justice, *"unlawful dismissal does not entitle the dismissed worker to actual holiday entitlement for the period between the dismissal and reinstatement, after the latter has taken place"* nor the right to receive compensation for the violation of his/her holiday entitlement by the employer (Ruling of 19 June 2013, Process No. 111/11.7TTPTG.E1.S1).

The CJEU's ruling seems to point towards recognition of the right of a worker who has been unlawfully dismissed to take annual leave that relates to the period between the date of dismissal and the date of reinstatement. In that sense, this ruling may be relevant for the interpretation of the rules contained in the Portuguese Labour Code regarding the consequences of unlawful dismissal.

4 Other Relevant Information

4.1 Agreement between the government and social partners

On 07 October 2023, the government and social partners entered into the *"Reinforcement of the Medium-Term Agreement for the Improvement of Income, Wages and Competitiveness".*

This document contains an assessment of the implementation of the "*Medium-Term Agreement for the Improvement of Income, Wages and Competitiveness"* entered into on 09 October 2022 (see Flash Report of October 2022) as well as the establishment of new commitments, such as:

(i) Increase in wages per worker by 5 per cent in 2024;
(ii) The minimum national monthly wage will reach EUR 820 in 2024;
(iii) Creation of tax and social security incentives for the provision of housing by the employer;
(iv) Strengthening complementary retirement instruments;
(v) Enhancing the promotion of conciliation between personal, family and professional life;
(vi) Tax incentive in 2024 applicable to workers' profit sharing up to the limit of one monthly base salary and a maximum amount of five times the amount of the national minimum wage, provided that the employer has increased the salary of its employees in 2024 in line with the terms or with the above stipulated points in this agreement.

4.2 2024 State Budget Law proposal

The State Budget Law proposal for 2024 (Law Proposal No. 109/XV/2) was presented on 10 October 2023. This proposal includes some labour-related measures, such as (i) the exemption from taxes and social security contributions on the income in kind of employees resulting from the use of permanent housing in the Portuguese territory made available by the employer, and (ii) the exemption from taxes on the profit share

distributions to the benefit of employees up to a limit of five times the national minimum wage (which will depend on the employer increasing by at least 5 per cent, on average, the fixed remuneration per employee in 2024).

Romania

Summary

A new methodology for eliminating workplace harassment has been adopted.

1 National Legislation

1.1 Workplace harassment

By Government Decision No. 970/2023, published in the Official Gazette No. 939 on 17 October 2023, the Methodology for the Prevention and Fight Against Gender-Based Harassment and Moral Harassment in the Workplace was approved.

With the aim of ensuring equal opportunities and treatment between women and men in the field of work, specifically recognising the right of every citizen to a workplace free from violence and harassment, and encouraging the maintenance of a work culture based on mutual respect and dignity, both public institutions and private companies have the obligation to implement this methodology, developed based on the Guide for the Prevention and Fight Against Gender-Based Harassment and Moral Harassment in the Workplace. The guide is included as an annex to the new Government Decision.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

According to Article 80 (2) of the Romanian Labour Code, at the employee's request, the Court that annuls the termination of the employment contract can restore the situation prior to the issuance of the dismissal decision. Therefore, if the court approves the employee's action to annul the dismissal, and the employee is reinstated, it is considered that the employment contract never ceased. The employee is reinstated to the previous situation, as if the termination had not been issued as a result of the nullity of the termination, and the individual's status as an employee is retroactively recognised.

In accordance with Article 144 (1) of the Labour Code, the right to paid annual leave is guaranteed to all employees. Consequently, the reinstated employee will continue to be entitled to all the rights he/she would have enjoyed had the termination not been issued, including financial rights and the right to take unused annual leave. It is irrelevant whether the employee effectively performed work for the employer that issued the illegal dismissal, just as it is irrelevant whether the employee temporarily worked elsewhere during the period of the proceedings.

Thus, the Romanian legal system has already integrated the interpretation provided by Article 7 (1) of Directive 2003/88/EC through the CJEU's decision in case C-57/22.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

A decision of the Constitutional Court of the Slovak Republic on discrimination and fixed-term employment relationships was published.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Fixed-term work

According to Article 48 paragraph 2 of the Labour Code (Act No. 131/2001 Collection of laws - Coll. - as amended), a fixed-term employment relationship may be agreed for maximum two years. A fixed-term employment relationship may be extended or renewed at most twice within a two-year period. But according to Article 48 paragraph 6 of the Labour Code, a further extension or renewal of an employment relationship for a fixed term of up to two years or over two years can be agreed with a teacher in higher education or a creative employee in science, research or development if there are objective reasons relating to the character of the activities of the teacher in higher education or creative employees in science, research or development as stipulated in special regulations.

On 22 March 2022, the National Council of the Slovak Republic (Parliament) as part of the amendment of Act No. 131/2002 Coll. on universities and on the amendment of certain acts also approved the amendment of Article 77 (filling posts of university teachers and function posts of associate professors and professors). (Act No. 137/2022 Coll.).

According to the new Article 77 paragraph 5, the post of university teacher may be concluded on the basis of a single competition for a maximum of five years.

The cited provisions were challenged by a group of opposition members of the National Council of the Slovak Republic at the Constitutional Court of the Slovak Republic as discriminatory. According to their submission to the Constitutional Court, a serious discrimination against teaching staff of universities must have occurred in relation to other staff who are not covered by the provisions in question. In their opinion, these contradict the following provisions of the Constitution of the Slovak Republic:

- Article 1 paragraph 1 ("*The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion*.") and paragraph 2 ("*The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.")*,

- Article 12 paragraph 1 (*"All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are inviolable, inalienable, imprescriptible, and indefeasible.")* and paragraph 2 ("*Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation, or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against, or favoured on any of these grounds*.")

In connection with Article 36 paragraph 1 letter b) of the Constitution ("*Employees shall have the right to fair and satisfactory conditions of work. The law shall ensure, in particular: the protection from arbitrary dismissal and discrimination at work*.").

The Constitutional Court of the Slovak Republic decided at a closed plenary session on 24 October 2023 that it did not agree with the proposal of the deputies in question. According to the Constitutional Court, the provisions of the Labour Code and the Act on Universities, which relate to the fixed-term employment relationship of university teachers, are in accordance with the Constitution of the Slovak Republic.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

According to Article 101 of the Labour Code (Act No. 131/2001 Collection of laws – Coll. – as amended), an employee who, during the continuous duration of an employment relationship with the same employer, performed work for the employer for at least 60 days within the calendar year shall be entitled to annual paid leave or a proportionate part thereof, unless the employment relationship lasted continuously throughout the entire calendar year. A day shall be considered a working day where the employee worked the greater part of their shift; parts of shifts worked across various days shall not be summed up.

Employees shall be entitled to wage compensation in the amount of their average earnings for the period of drawn paid holiday (Article 116 paragraph 1 of the LC). Employees shall be entitled to wage compensation at the rate of their average earnings for the part of paid holiday in excess of four weeks of basic scope of paid holiday that they were unable to draw before the end of the following calendar year (Article 116 paragraph 2 of the LC).

According to Article 79 paragraph 1 of the Labour Code if an employer gave the employee an invalid notice, or terminated the employment relationship in an invalid manner with the employee immediately or within a probationary period, and if the employee informed the employer that he/she insists on retaining his/her employment with the employer, his/her employment relationship shall not terminate, with the exception of a court decision that it cannot be justly required from the employer to further employ the employee. The employer shall be required to provide the employee with wage compensation. The employee shall be entitled to such compensation in the amount of average earnings from the day he/she announced to the employer that he/she insists on maintaining his/her employment, until the employer enables him/her to continue working, or if the court decides on the termination of the employment relationship.

If the overall time for which an employee should receive wage compensation is greater than 12 months, at the request of the employer, the court may reduce his/her obligation to compensate the wage for a period exceeding 12 months, or not grant the employee compensation for a period exceeding 12 months. Wage compensation can be awarded for a maximum of 36 months (Article 79 paragraph 2 of the LC). The provision of paragraph 2 does not apply to the notifier of crime or other antisocial activity if the employment relationship has ended when providing protection pursuant to a special regulation (Article 79 paragraph 3 of the LC).

The Supreme Court of the Slovak Republic, with similar legislation in the Labour Code No. 65/1965 Coll. (valid until 31 March 2002), decided that for the period during which the employee is entitled to compensation for wages due to the invalid termination of the employment relationship, he/she is not entitled to compensation for wages for unused paid annual leave (R 32/2010).

Considering the cited provisions of the Labour Code, consistent respect for the judgment in question of the Court of Justice would probably require a certain change in the legislation. The legal regulation of the invalidity of the termination of the employment relationship is similar to that in the Czech Republic.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The amendments to the Employment Relationships Act transposing Directives 2019/1152/EU and 2019/1158/EU and introducing some other improvements of workers' rights have not yet been enacted due to the suspensive veto by the National Council.

(II) The government has extended the measure of partial reimbursement of salary compensation to temporarily laid-off workers which is one of the measures to mitigate or eliminate the consequences of floods and landslides in Slovenia in August 2023.

1 National Legislation

1.1 Transposition of EU law

The Act Amending the Employment Relationships Act ('Zakon o spremembah in dopolnitvah Zakona o delovnih razmerjih (ZDR-1D)') was passed by the National Assembly on 26 October 2023, however, the National Council—at the proposal of an interest group of employers—vetoed it (i.e. a suspensive veto), meaning that the National Assembly will have to reconsider the Draft Act, According to the rules on procedure, an absolute majority vote is needed for its adoption (it seems that this rule should not pose major problems, since an absolute majority was already achieved during the first voting by the National Assembly, although nothing is certain).

An important part of these amendments to the ZDR-1 is devoted to the transposition of two EU Directives, which have not yet been fully transposed into national law, namely Directive 2019/1152/EU of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union and Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU insofar as it relates to the exercise of employment rights and obligations.

This part of the proposed amendments has not been problematic, but the employers' side strongly opposed some other solutions in the draft act (for example, provisions that aim to improve the protection against dismissal for workers' representatives) and criticised the process of preparing and adopting the amendments which, according to their view, did not respect the principles of social dialogue, etc.

The social partners negotiated the amendments to the Employment Relationships Act for several months without any success (the first version went to a public hearing in June 2023 (see also June 2023 Flash Report under 4.2) despite strong opposition from the employers' side who—in response—withdrew from the Economic and Social Council in July; in October, all three social partners reconvened and tried again to find a compromise solution, but again did not succeed), therefore, the government decided—also under pressure that the two EU Directives had to be transposed to avoid further infringement actions and fines—to submit the draft Act to Parliament, however, a version that was more strongly reflected the trade unions' interests, while at the same time emphasising that negotiations and social dialogue will continue to prepare for the second round of amendments and that both parties, the trade unions and the employers' organisations, will have the opportunity to participate with additional proposals.

In this first round of amendments to the Employment Relationships Act, the following was envisaged (the most important solutions are presented below on the basis of this text adopted by the National Assembly and submitted to the National Council, and which was then vetoed by the latter), with a 'disclaimer' that this has not yet become part of the Slovenian legal order and is formally still just a proposal/Draft Act:

- five days of unpaid care leave (in case of care responsibilities for a family member or a person that shares the household with the worker and who requires extensive care and support for health reasons; the worker must inform the employer in advance);
- five days of paid leave for victims of domestic violence (for arranging legal matters, dealing with the consequences of domestic violence, etc.);
- special protection in employment relationships for workers-carers and victims of domestic violence;
- better provisions regulating the right of a worker to be heard (in the event of a warning issued before a dismissal, an employer must give a worker the opportunity to prepare a statement concerning the alleged violations; detailed provisions on time limits and the procedure, the role of workers' representatives etc.);
- additional provisions improving legal certainty in the event of a warning before a dismissal;
- the right to disconnect (worker's right not to be called by the employer during the daily or weekly rest periods, holidays and other justified absences from work; obligation to introduce measures in this respect, reverse the burden of proof);
- provisions concerning transparent and predictable working conditions, e.g. the worker can request an alternative, more predictable and more secure form of employment, where available; the employer is required to provide a reasoned response to the worker's request; the employer must provide the worker in writing with information relating to the employment relationship entered into;
- improved protection for workers' representatives (for example, the suspension of the effect of a dismissal until the decision of the first instance labour court, an increased compensation during work suspension (from 50 per cent increased to 80 per cent of their salary), increased legal protection in case of a warning before dismissal; possibility of establishing a special fund for reimbursing such compensation);
- possibility of proposing a fixed-term part-time employment contract for better work-life balance, for workers with a child under the age of eight years, for workers who are carers in case of caregiving, for victims of domestic violence;
- possibility of proposing work from home schemes for improved work-life balance;
- changed time limit for the use of annual leave (a worker shall have the right to use his/her entire annual leave not used in the current calendar year or by 30 June of the following year for reasons of absence due to illness or injury, parental leave or childcare leave, by 31 March of the year that follows the year to which the leave can be transferred from the previous year);
- the non-discriminatory subsidiary liability of a contractor for the non-payment of salary to a worker in the context of subcontracting (a contractor for whom a subcontractor performs a service will be subsidiarily liable for the non-payment of salary to the worker by the subcontractor's employer; subsidiary liability will apply to the construction industry;
- some minor improvements in relation to temporary agency workers;
- some minor changes and clarifications in relation to posted workers;
- improved protection of children who work during holidays (working time of children under the age of 15 years who perform light work during school holidays may not exceed six hours per day or 30 hours per week; at least two uninterrupted weeks of rest).

1.2 A partial reimbursement of salary compensation to temporarily laid-off workers

The government has prolonged the urgent floods-related measure of partial reimbursement of salary compensation to temporarily laid-off workers due to the floods in August 2023 (see also August 2023 Flash Report under 1.3) until the end of November 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The CJEU has determined that Article 7 (1) of Directive 2003/88/EC (WTD) must be interpreted as precluding national case law by virtue of which a worker who was unlawfully dismissed and then reinstated in his/her employment, in accordance with national law, following the annulment of his/her dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of his/her reinstatement in his/her employment on the grounds that during that period, that worker did not actually carry out work for the employer as the latter did not assign him/her any work and as he/she is already entitled, under national law, to wage compensation during that period.

According to Article 159 of the Employment Relationships Act ('Zakon o delovnih razmerjih (ZDR-1)', OJ RS No. 21/2013, as later amended), every employee has the right to paid annual leave which may not be shorter than four weeks. An employee obtains the right to paid annual leave by entering into an employment relationship. The entitlement to paid annual leave is based on the existence of an employment relationship, the duration of the leave depends (among others) on the length of the period of employment, whereby the periods of justified absence from work, including sick leave and similar, are counted as periods of employment. There is no provision in the Employment Relationships Act which would explicitly regulate the issue raised in case C-57/22.

Before the judgment in joined cases C-762/18 and 37/19 from June 2020 (see also July 2020 Flash Report), the Slovenian courts denied the right to compensation in lieu of unused annual leave in respect of the period between the unlawful dismissal and reinstatement arguing that granting compensation for unused annual leave would mean that the employee would have received two compensations for the same period and that the employee did not perform work during that period and was therefore able to regenerate (see, for example judgments of the Higher Labour and Social Court, No. Pdp 62/2013 13.3.2013; ECLI:SI:VDSS:2013:PDP.62.2013; and No. Pdp 1191/2015 of 21 July 2016 (ECLI:SI:VDSS:2016:PDP.1191.2015.

Slovenian labour courts took the CJEU's judgment in joint cases C-762/18 and 37/19 into account and have adapted their case law on annual leave. See the judgment of Supreme Court No. VIII Ips 24/2021, 29 March 2022 (ECLI:SI:VSRS:2022:VIII.IPS.24.2021, which extensively refers to the CJEU judgment in C-762/18 and 37/19 and fully follows its argumentation, as well as the judgment of Supreme Court No. VIII Ips 38/2021, 28 June 2022 (ECLI:SI:VSRS:2022:VIII.IPS.38.2021) where the same interpretation was confirmed.

This judgment will therefore have no direct implications for Slovenia's legal order since the case law in Slovenia is already in line with this CJEU judgment.

4 Other Relevant Information

4.1 Collective bargaining

The Trade Union of Casino Workers of Slovenia ('Sindikat igralniških delavcev Slovenije') acceded to the already concluded sectoral Collective Agreement for the Hospitality and Tourism Industries ('Pristop h Kolektivni pogodbi dejavnosti gostinstva in turizma Slovenije (Uradni list RS, št. 56/18), OJ RS No. 107/23, 20 October 2023, p. 9157).

The Minister of Labour, on the proposal of the representative trade union in the sector, extended the validity of the Collective Agreement for Public Utility Services to the entire sector, i.e. all employers in this sector ('Sklep o ugotovitvi razširjene veljavnosti', OJ RS No. 106/23, 13 October 2023, p. 8945).

4.2 Equal opportunities for women and men

The Resolution on the National Programme for Equal Opportunities for Women and Men until 2030, adopted by the National Assembly in September, was published in the Official Journal ('Resolucija o nacionalnem programu za enake možnosti žensk in moških 2023–2030 (ReNPEMŽM23–30)', OJ RS No. 105/2023, p. 8772-8819). Many goals and measures address equal opportunities in the world of work.

Spain

Summary

The Supreme Court referred to the CJEU and concluded that paid leave for family reasons cannot commence on a non-working day or a public holiday .

1 National Legislation

1.1 Employment of foreigners

In accordance with the legislation on employment of foreigners, this Resolution publishes the "Catalogue of Hard-to-Fill Jobs" in Spain for the fourth quarter of 2023. As its name suggests, this catalogue lists occupations for which there is inadequate coverage from Spanish workers. Therefore, the recruitment of foreign workers who are not already in Spain is permitted.

The Catalogue of Hard-to-Fill Jobs must be approved by the government each quarter of the year. For several years, starting from the onset of the economic crisis, such occupations were quite limited and mainly included the professional sports sectors (both athletes and coaches) and maritime work.

For the first time in over a decade, the catalogue was expanded this summer to include technical roles in the construction sector, such as carpenters, electricians and crane operators. The catalogue for the fourth quarter of 2023 maintains this expansion.

2 Court Rulings

2.1 Paid special leave for time off from work

The Spanish Labour Code grants workers several different types of special paid leaves, allowing them to take time off work to address specific needs and obligations. Among others, Article 37 (3) of the Labour Code provides five calendar days for marriage or establishing a domestic partnership, two days in case of death of a spouse, domestic partner, or close relative, five days in case of a serious accident, illness, or hospitalisation of family members, and one day for moving from the habitual residence.

The Supreme Court referred to the CJEU's ruling of 04 June 2020 (case C-588/18) and concluded that these paid leaves cannot commence on a non-working day or a public holiday. In such cases, the leave must start on the first working day after the public holiday.

2.2 Fixed-term work in public employment

As already reported numerous times, fixed-term employment in public administration has a long and arduous past in Spain, and largely remains unresolved. Interim contracts (replacement contracts) are common and can be used in two situations in accordance with the relevant legal provisions. Firstly, in cases in which an employer needs to substitute workers with the right to keep their jobs. Such contracts end when the substituted worker returns. Secondly, the employer can hire an interim worker while the selection process is underway for a vacant job. Labour law established a maximum duration for interim contracts in this particular case (three months), but only applies to private employers. This type of interim (replacement) contract in public administration had no specified duration limit and could last for years. There was no strict obligation for public administration to initiate the selection process at a particular moment, because the Supreme Court had provided a lot of flexibility.

The CJEU stated multiple times that Spanish law was not in compliance with EU law. Following the CJEU case C-726/19, 03 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*, the Supreme Court modified its previous doctrine with the aim of adapting it to CJEU case law.

Such interim contracts may now not last longer than three years during a selection process. Should the duration exceed this limit, the Supreme Court deems the interim contract to have become a permanent one.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

This ruling will not have any implications in Spain, because the Supreme Court reached the same conclusion in a ruling of 12 July 2022. This ruling refers to CJEU ruling QH and states that the worker has the right to take the annual leave accrued during the period between his/her dismissal and reinstatement.

4 Other Relevant Information

4.1 Unemployment

The number of unemployed people increased in September by 19 768, i.e. the total number of unemployed people is currently 2 722 468. This is the lowest number of unemployed people in any September since 2008.

Sweden

Summary

The Swedish Parliamentary Ombudsman has harshly criticised a public employer that continuously registers the employees' criminal records through an external monitoring company.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

The situation in the case before the CJEU is of some relevance for Swedish legislation following the recently updated Swedish Employment Protection Act (Lagen om anställningsskydd). The previous legislation, in most situations, forced the employer to continue employing the employee during a dispute on the fairness of his/her dismissal. Even if the employee might have been relieved from performing his/her duties, the employment relationship was maintained until the final court decision was issued. After a legislative reform in 2022, this is no longer the case and the employment relationship is terminated upon the expiry of the (paid) notice period, even if a dispute arises. The situation before the CJEU could therefore, from October 2022, have also occurred in Sweden. The Swedish Vacation Act (Semesterlagen) states that annual leave cannot be forced upon the dismissed employee during the notice period (§ 14). In line herewith, the Labour Court already in 1985 ruled that the same situation applies following the annulment of the termination and the continuation of the employment relationship while the dismissal case was under litigation before the courts (AD 1985 No. 55). The possibility of annulling the termination during the litigation period was revoked in October 2022. However, the government clearly states in the preparatory work (Prop. 2021/22:176 p. 111) that the subsequent reinstatement of an unfairly dismissed employee must return the employee to the very same position as though the (unfair) dismissal had never taken place. The government clarified that this includes "salary and other benefits which might have been lost" (translated from Swedish), also including the calculation of time in employment.

Based on the statements in the Swedish preparatory works, Swedish labour law is in line with the decision by the CJEU.

4 Other Relevant Information

4.1 Integrity of public employees

The Swedish Parliamentary Ombudsman (Justitieombudsmannen) has severely criticised the Municipality of Södertälje (Södertälje kommun) for violating employees' integrity. The municipality's practice to continuously evaluate reports from a private company on the employees' recent criminal records in the name of preventing organised

crime. The records, to a very large extent, fell outside the scope of the obligatory or sometimes facultative control of (some) criminal records during the recruitment process in specific categories of employment, primarily in schools and preschools which involve children. The Parliamentary Ombudsman concluded that the controls and records of the employees constituted a substantial violation of personal integrity, which had been applied without consent and without support by relevant legislation. The illegal records disrespect principles in the Swedish Constitution; The Instrument of Government, (Chapt 2 § 6 Regeringsformen) as well as in the European Convention of Human Rights (Article 8).

United Kingdom

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Holiday pay

In Chief Constable of Northern Ireland v Agnew, 2023, UKSC 33 is a significant case on back claims of holiday pay. The facts are complex but have been helpfully summarised by Daniel Barnett:

"*The Claimants were police officers and civilian staff working for the police in Northern Ireland. They brought claims for underpayment of holiday pay after having historically received basic pay only during periods of annual leave. The parties agreed that there had been an underpayment, Bear Scotland v Fulton the EAT had previously concluded that deductions could only be linked in a series if there was a gap of three months or less between each deduction."*

The Supreme Court in Agnew has now held that where a series of deductions are all based on an employer failing to properly meet its obligations to pay holiday correctly, but for the mandatory cut off after three months which was set out in Bear Scotland, they would otherwise constitute a series, employees should be able to link each deduction. To hold otherwise would produce unfair consequences.

The Supreme Court concluded that the period during which a claim can be brought is three months from the date the last payment was made, but that this three-month limit does not restrict or qualify the meaning of a "series" of deductions.

Whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that question, all relevant circumstances must be taken into account, including in relation to the deductions at issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances. Whether or not the deductions were more or less than three months apart is not, from this point onwards, relevant."

3 Implications of CJEU Rulings

3.1 Paid Annual Leave

CJEU case C-57/22, 12 October 2023, Ředitelství silnic a dálnic

In case C-57/22 Ředitelství silnic a dálnic the Court ruled that Article 7 (1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time must be interpreted as precluding national case law by virtue of which a worker who was unlawfully dismissed and then reinstated in his/her employment, in accordance with national law, following the annulment of his/her dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and the date of her reinstatement in his/her employment on the ground that, during that period, that worker did not actually perform work for the employer as the latter had not

assigned him/her work and as he/she is already entitled, under national law, to wage compensation during that period.

This issue has not arisen so far in the UK case law and so there is no equivalent provision to this effect. The UK courts, even post-Brexit, will have regard to the Court's ruling where this issue arises. That said, reinstatement is very rarely awarded in unfair dismissal cases in the UK.

4 Other Relevant Information

4.1 The Workers (Predictable Terms and Conditions) Act 2023

As reported last month, the Workers (Predictable Terms and Conditions) Act 2023 has received Royal Assent, introducing a new statutory right for workers to request a more predictable working pattern.

The government says 'If a worker's existing working pattern lacks certainty in terms of the hours they work, the times they work or if it is a fixed term contract for less than 12 months, they will be able to make a formal application to change their working pattern to make it more predictable. Once a worker has made their request, their employer will be required to notify them of their decision within one month.' Acas has issued a consultation on a new statutory Code of Practice on handling requests for a predictable working pattern, following the enactment of the Workers (Predictable Terms and Conditions) Act 2023, which is expected to come into force around September 2024.

4.2 Director of Labour Market Enforcement Strategy

Margaret Beels was appointed Director of Labour Market Enforcement in November 2021. Her Labour Market Enforcement Strategy for 2023 to 2024 was submitted to government in March 2023. The 2023 to 2024 Strategy covers four main themes:

- improving the radar picture
- improving focus on effectiveness
- better joined-up thinking
- better engagement and support with businesses and workers to improve state-led enforcement of employment rights

The strategy makes 12 recommendations to be taken forward by the director's office, the Department for Business and Trade, Home Office and by the three labour market enforcement bodies:

- Gangmasters and Labour Abuse Authority (GLAA)
- Employment Agency Standards Inspectorate (EAS)
- HMRC National Minimum Wage and National Living Wage team (HMRC NMW)

Of perhaps most interest was Ms Beale's statement:Progress on establishing a Single Enforcement Body (SEB) for labour rights, a previous commitment for this government, has stalled with no sign that Parliamentary time will be found during the term of this government. Several benefits would have stemmed from a new overarching enforcement body, including making it easier for workers to know where to go for help, more effective use of resources and pooling of intelligence, better support for compliant employers, and new powers and sanctions (BEIS, 2021). Crucial enforcement gaps—such as enforcing holiday pay for vulnerable workers and regulation of umbrella companies—remain outstanding. A broader Employment Bill could also have sought to tackle the ongoing uncertainty over employment status, aligning tax and labour law approaches, and in doing so helping those working in the growing gig economy and other sectors. The benefits of having a SEB are widely recognised. The author shares

the disappointment of the majority of stakeholders who fed into the Call for Evidence in 2022 around the lack of progress here.

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