Flash Reports on Labour Law December 2023

Summary and country reports

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

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Executive Summary

National level developments

In December 2023, 27 countries reported labour law developments (all countries except **DK**, **LI**, **IS** and **LV**). The following were of particular significance from an EU law perspective:

Developments related to the COVID-19 crisis

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

In **Luxembourg**, the Supreme Court delivered a decision on the case of an employee who had refused to wear a face mask despite the face mask mandate that was in place during the pandemic.

A **Swedish** Labour Court ruled that an employer's policy, which did not allow unvaccinated elderly care workers to perform their work, and to thus be considered non-disposable at the workplace, was proportionate.

Implementation of EU Directives

A new measure has been adopted in **Spain** to fully transpose Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (hereafter the Work-life Balance Directive). All workers now have the right to accumulate breastfeeding break times and convert them into full working days of leave.

The **Finnish** government has submitted a bill to Parliament on amending the Act on the Posting of Workers. The European Commission has opened an infringement procedure against Finland regarding the national transposition of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers within the framework of the provision of services (hereafter Posting of Workers Directive), and Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 stipulating specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC on the enforcement requirements and Regulation (EU) No. 1024/2012 (Directive on the Road Transport Mobility Package). According to the Government Bill, changes to the Act on Posting of Workers are proposed to better meet the requirements of these Directives.

A **French** law transposes European Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (hereafter Corporate Sustainability Reporting Directive) into French law, requiring companies to include and publish social and environmental information in their management reports.

A **Dutch** court has interpreted Article 13 of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (hereafter Transparent and Predictable Working Conditions Directive) and, more specifically, in the context of a legal dispute that revolved around an employee who worked as a truck driver for an employer. Two other court decisions in **The Netherlands** concerned the concept of 'transfer of undertaking' as stipulated in Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings,

businesses or parts of undertakings or businesses (hereafter Transfer of Undertakings Directive) and Article 7:662 of the Dutch Civil Code.

The **Norwegian** Parliament has adopted several changes to the country's legislation as part of the transposition of Transparent and Predictable Working Conditions Directive.

Collective redundancies

In **Germany**, there are signs of a change in the case law of the Federal Labour Court on collective redundancies.

Dismissal protection

In **Belgium**, the special rules on dismissal protection of staff representatives on works councils and on committees for safety and health at work have been amended. As a result of the increase in the retirement age in the pension legislation to 66 and 67 years, a recent law raises the age that terminates legal protection against dismissal of employee representatives on works councils and on occupational safety and health committees.

The **French** Cour de Cassation has brought French law into line with European law on the protection of pregnant women against dismissal. A case of the Supreme Court on dismissal of a pregnant woman was also reported in **Spain** according to which the discriminatory intent of the employer was not a requirement for the qualification of a dismissal as null and void. The **Luxembourg** Court of Appeal has adopted case law on dismissal protection of pregnant workers.

Employee representation

In **Hungary**, Parliament passed the Twelfth Amendment of the Constitution (Basic Law) on 12 December 2023, which introduced a new general prohibition of trade unions in the military.

Fixed-term work

The **Luxembourg** Court of Appeal has adopted case law on part-time and fixed-term work. Similarly, in **Slovakia**, it was reported that an important Supreme Court ruling on fixed-term employment was issued.

Posting of workers

The **Luxembourg** Court of Appeal has adopted case law on the posting of workers.

Temporary agency work

In **Germany**, there will be no decision of the Federal Labour Court in the near future on conformity of the so-called group privilege in temporary agency law.

The Employment and Industrial Relations Act, 2002 in **Malta** has been amended to include a set of definitions regarding employment agencies.

Transfer of undertaking

Two district courts in **The Netherlands** have applied the concept of 'transfer of undertaking'. The **Luxembourg** Court of Appeal has adopted two rulings on transfers of undertakings.

Working time

According to the **Belgian** Cour de Cassation, unless a distinct individual or collective agreement is concluded on the remuneration for the time during which an employee is on guard or on call, the employee has the right to his/her regular remuneration for other work performed.

In the **Czech Republic**, with effect from 01 January 2024, changes are being introduced to the labour legislation. More specifically, selected healthcare workers are allowed to work continuously for up to 26 hours, with subsequent compensation for uninterrupted daily rest.

The **German** Federal Labour Court has issued a judgment on the 'right to disconnect'.

The **Greek** government has activated the digital work card, a system for monitoring working hours remotely.

In **Estonia**, case CJEU C-477/21 amends the working time and rest period regulations. The decision will be applied by the Labour Inspectorate.

The **French** Cour de Cassation has once again brought French law into line with European law on effective working time of itinerant workers.

The High Court in **Ireland** ruled that standby periods are not working time.

The **Lithuanian** Supreme Court called for a Directive-conform interpretation of the provisions on on-call duty, imposing the obligation to consider the intensity and nature of the employee's rest time restrictions for qualification of on-call duty periods as working time.

A district court in **The Netherlands** ruled on the question whether an obligation to arrive early prior to a shift constitutes 'working time'.

Other developments

In some countries, developments on the employment of third-country nationals were reported. A new law grants a three-year stay and work permits to migrants who entered **Greece** illegally. The **Irish** government has responded to concerns about staff and skills shortages by expanding the 'critical skills occupation' and 'general employment' lists, making it easier for employers to obtain employment permits for workers from outside the EU/EEA for the specified roles. In **Slovenia**, labour law-related measures have been introduced with regard to the employment of foreigners: new professions have been added to the list of occupations for which the employment of foreigners is not linked to the labour market, all in the area of healthcare.

Moreover, issues on mobile workers were reported in **Austria**, where two court decisions were issued: in one case, the crediting of service times performed for other employers was not necessary if these were regarded as mere domestic situations; in another case, advancements in pay based on the service time performed exclusively for the same employer were not found to be an infringement on the freedom of movement of workers.

Implications of CJEU Rulings

Working time

This Flash Report analyses the implications of a CJEU ruling on annual leave.

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In the present case, the question whether an employee, who does not have symptoms, retains the right to annual leave for the days that coincide with a period of imposed quarantine after the employee had contact with a person infected with a virus, in this case the SARS-CoV-2 virus, was reviewed.

The decision is not expected to have any major implications nor direct relevance in **Austria**, **Bulgaria**, the **Czech Republic**, **Croatia**, **Greece**, **Finland**, **Hungary**, **Italy**, **Ireland**, **Lithuania**, **Latvia**, **Malta**, **The Netherlands**, **Poland**, **Slovakia**, **Slovenia** and **Sweden** because those countries' national legislation corresponds to and complies with the CJEU's interpretation. In many cases, such as in **Cyprus**, **Denmark**, **Ireland**, **Lithuania**, **Luxembourg**, **Slovakia** and **Sweden**, it was reported that no similar case has been decided so far.

In some countries, such as in **Lithuania**, **Finland** and **Ireland**, there is no special regulation regarding the transferability of paid annual leave in case of quarantine while in other countries, such as in **Austria**, **Italy**, **Luxembourg**, **Latvia**, **Poland**, **Romania** and **Spain**, it was reported that special regulations already exist. In certain cases, these regulations are more favourable for the worker than Directive 2003/88/EC as interpreted in case C-206/22, and there is no reason to introduce any amendments to national law (**Austria**, **Luxembourg**, **Poland**, **Romania**, **Spain**). In **Spain**, the government adopted a provision that treats periods of quarantine due to COVID as temporary disability. In **Luxembourg**, periods of quarantine are treated as a period of incapacity for work.

The recent ruling in C-206/22 may have limited implications in **Germany** due to a recent amendment of the relevant law. As from September 2022, the Infection Protection Act was amended. Under the new law, officially ordered quarantine periods are not counted towards holidays. However, this does not apply retroactively to earlier periods.

According to CJEU judgment C-206/22, a period of quarantine cannot, in itself, present an obstacle to the attainment of the purpose of paid annual leave, which is intended to enable workers to rest from carrying out the work they are required to under their contract of employment and to enjoy a period of relaxation and leisure. In **Liechtenstein**, on the other hand, a broader concept of the recreational purpose of annual leave tends to be assumed. This could have led to contrary rulings, which would not, however, violate CJEU judgment C-206/22 a priori.

Norwegian legislation does not give an employee the right to carry over days of leave that were granted to him/her for a period that coincided with a period of quarantine ordered by public authorities. However, considering the CJEU's ruling, it is assumed that this is not problematic under EU law.

This CJEU ruling may be relevant as a guidance for the **UK**, **Portugal** and **Estonia**.

Table 1: Major labour law developments

Topic	Countries
Annual leave	BE ES NL RO SE
Collective bargaining and collective action	AT ES FI SE SI
Collective redundancies	DE
COVID-19	ES LU SE
Dismissal protection	BE ES FR LU NO
Employee representation/participation	BE HU FI
Equal treatment between men and women	ES FI NL
Fixed-term work	LU SK
Maternity (pregnancy) protection	FI FR IT LU
Migrant workers	EL IE LU NL SI
Minimum wage	BG CY CZ
Mobile workers	AT
Occupational accidents	FR PT
Occupational health and safety	AT BE BG HR HU NL NO
Part-time work	FI LU SI
Posting of workers	FI LU SI
Remote work / teleworking / platform work	CZ HR
Remuneration	AT BE FR LU PL PT SI SK
Retirement age	BE HR PT
Temporary agency work	DE MT
Transfer of undertaking	LU NL
Whistleblowing	NL NO
Work-life balance	ES FI
Working time	BE CZ DE EE EL FR IE LT NL

Austria

Summary

(I) No new legislation in the area of labour law has been passed, the CBA for the retail sector, which is important in practical terms, has finally been concluded after seven rounds of negotiations.

(II) Three decisions of interest from the perspective of EU labour law have been published that deal with different aspects of worker mobility as well as with the effects of OSH legislation.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 OSH legislation also establishes obligations for employees vis-á-vis each other

Supreme Court, 8 ObA 68/23t, 17 November 2023

The present case, a liability case, dealt with the question whether the Austrian Occupational Safety and Health (OSH) legislation also provides for obligations for employees vis-à-vis each other. This was unclear as the relevant Austrian OSH Act (*ArbeitnehmerInnenschutzgesetz* – ASchG) does not explicitly state this.

The Supreme Court referred to § 15 (1) sentence 1 OSH-Act (*ArbeitnehmerInnenschutzgesetz* – ASchG*):* Employees must:

> *"apply the protective measures required to protect life, health, integrity and dignity in accordance with this federal law, the ordinances issued in this regard and official regulations, in accordance with their instruction and the employer's instructions".*

§ 15 ASchG implements Article 13 of the Occupational Health and Safety Framework Directive 89/391/EEC. According to its para. 1, everyone is:

> *"obliged to take the best possible care of their own safety and health as well as for the safety and health of those persons affected by his acts or omissions at work in accordance with his instructions and the instructions of the employer".*

Work colleagues are therefore also protected by the OSH regulations under EU law. Interpreted in conformity with the Directive, the Austrian OSH Act and the relevant ordinance are thus clearly also protective laws that must be observed by employees in relation to each other.

This ruling is a textbook example of an interpretation in accordance with EU law and demonstrates how the Austrian Supreme Court uses this methodological approach to close gaps in Austrian legislation.

2.2 Crediting of service times with other employers not necessary if mere domestic situations

Supreme Court, 8 ObA 68/23t, 17 November 2023

An employee of the Federal State of Styria claimed that the limitation of crediting service times with other non-public employers is to be considered a breach of the constitutional

principle of equal treatment, as such times would have to be credited if they had been acquired in another EU Member State. This is due to the direct application of the fundamental freedom of the free movement of workers within the EU.

The Supreme Court did not follow this line of argument. It pointed out that it already—on the basis of the case law of the two courts of public law—had stated that Article 21 (4) sentence 2 of the Austrian Constitution (*Bundes-Verfassungsgesetz* – B-VG) does not obligate the competent (federal or state) legislature to provide for the crediting of periods of service for persons entering the public service. If it does so, however, it is inadmissible to differentiate according to whether the periods of service were completed with the federal government, a state, a municipality or an association of municipalities, and that, against the background of Article 21 (4) B-VG, it would therefore also be unobjectionable for the competent legislator to not provide for any crediting at all (Supreme Court, 8 ObA 71/19b, 24 April 2020). Consequently, the competent legislator is not only free to provide for the crediting of previous periods of service upon entry into the public service, but also to limit this, as long as it does not create a situation that is not covered by Article 21 para. 4 sentence 2 B-VG. This is not the case in the disputed legislation (§ 155 para. 1 Stmk L-DBR). This provision also does not differentiate between periods within and outside Austria when determining the date of advancement, which is why it does not give rise to any constitutional concerns in this respect, either (see also VfGH, G 192/2023, 04 October 2023).

With regard to the crediting of prior service periods, the Constitutional Court is of the opinion that even assuming that a national crediting provision would not apply to a situation with reference to Union law due to its primacy and thus only concerns domestic situations, this provision does not violate the constitutional equal treatment principle in Article 7 B-VG or Article 2 StGG. This is the case because Article 21 (4) B-VG, which only requires state legislation to credit service times with the federal government, a state, a municipality or an association of municipalities, is *lex specialis* on the same level and therefore prevails (VfGH, G 17/2022, 01 July 2022; VfGH, G 59/2022, 01 July 2022). Against this background, the concerns raised by the plaintiff on the grounds of `*discrimination against nationals*´ (also) were not founded.

This decision (again) shows that the direct application of EU law is only possible in cases of transnational mobility and that a different treatment in this case of mere domestic situations is possible. This is due to the fact that the Constitution only explicitly provides for the crediting of service times for newly hired public employees with the federal government, a state, a municipality or an association of municipalities, and not with other employers.

2.3 Advancements in pay based on the service time exclusively with the same employer – no infringement on the freedom of movement of workers

Supreme Court, 9 ObA 32/23f, 23 November 2023

The collective agreement for university employees provides for a pay raise after eight years of service (§ 49 para. 3). Only times with the same university are considered and not with other universities in Austria or abroad or with comparable institutions. The plaintiff, a works council with a university, argued that this restriction infringes on the fundamental right of free movement of workers within the EU and referred to the decision of the CJEU in the *Adelheit Krah* (C-703/17). The Supreme Court rejected the claim in a well-argued decision that not only referred to the case law of the CJEU, but also to the Attorney General *Bobek*'s opinion as well as to the extensive and inhomogeneous Austrian literature on the effects of the *Adelheit Krah* case and beyond.

The Court of Appeals as well as the Supreme Court pointed out that the present case differs significantly from the case of *Adelheit Krah*, as in the latter the university provided for the crediting of relevant previous periods of service for post-doctoral

positions to the extent of four years, over and above the mentioned provisions of the collective agreement. In its reasoning, the CJEU denied both direct and indirect discrimination due to the limited recognition of previous service periods and only dealt with the respective provision it considered discriminatory.

The Supreme Court argued that in *Adelheit Krah*, the CJEU also clarified that a remuneration system which—like the one established by the collective agreement for university employees—links a higher remuneration to the duration of employment with the current employer does not in itself constitute an obstacle to the free movement of workers (para. 67). It pointed out that in *Adelheit Krah*, the CJEU treated the restriction on the free movement of workers in the fact that previous periods of service were credited on the basis of a decision of the university, but only to the extent of four years. However, it cannot be deduced from this decision that national regulations must provide for any crediting at all. There is also no unequal treatment in terms of recruitment—due to a decision by the parties to the collective agreement, no previous experience is taken into account—nor in terms of promotion. All employees must have completed eight years with the same employer to be promoted.

The Supreme Court highlighted that the advancement regulation in the collective agreement is not based on the achievement of academic goals or the success of the activity, but purely on the passage of time. It is therefore exclusively a rule on the duration of service. Persons who do not make any progress in their academic work would also receive the salary advancement if they are employed long enough with the same university.

The Supreme Court also pointed out that even if a limitation of the free movement of workers were to be confirmed, there is in fact a `*genuine loyalty bonus*´, the admissibility of which is generally affirmed by the CJEU, since advancement in pay is made exclusively dependent on the duration of employment in the specific employment relationship with the specific employer. In the case before the CJEU of *Köbler* (C-224/01), the bonus was not dependent on continuous employment with the same employer. The same applies to the classification in *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* (C-514/12), in which employment in different companies belonging to the same local authority was honoured. Neither applies to the present case.

As regards the so-called "returnee cases", the Supreme Court also rejected the argument that employees are deterred from terminating their employment relationship with the defendant to take up employment in another Member State because upon their return to Austria, there is no crediting of previous periods of service. Such mobility decisions are based on a set of circumstances that are too uncertain and too indirect for this provision to affect the free movement of workers (with reference to CJEU case C-437/17bH *, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH*).

It is no surprise that a works council of an Austrian university tried to challenge the provision in the collective agreement based on the decision in *Adelheit Krah* and the legal literature that followed it. At first glance at least, the decision takes a line of argument that is coherent and very much develops the existing case law in the light of the opinion of Attorney General *Bobek.* It distinguishes between pay schemes that are based on periods of professional experience, on the one hand, and those based on the mere duration of service with one employer, on the other. The decision is not really surprising as the court thus "saves" the large number of provisions in Austrian labour law that provide for an increase in rights connected with the length of service with the same employer (esp. notice periods, sick pay). On the other hand, a referral to the CJEU for a preliminary ruling would have decided the questions left open by the decision in *Adelheit Krah*.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

There is no case law on the relationship between quarantine and annual leave, but there is a common understanding that quarantine does not allow the employee to enjoy her/his annual leave as initially planned. General legal principles consequently apply:

In Austria, taking annual leave is subject to an agreement between the employer and employee. Both parties may withdraw from such an agreement for important reasons. Quarantine measures imposed on an employee before he/she went on annual leave allow the individual to withdraw from that agreement due to important reasons, as the employee is—most likely—not only unable to use his/her vacation as planned but is confined to his/her premises. The withdrawal may be a complete or partial withdrawal.

In case the employee is quarantined during his/her vacation, referral is made to the general rules on sickness during annual leave in § 5 para 1 Act on Annual Vacation (*Urlaubsgesetz*):

> *"If an employee falls ill (has an accident) during his/her holidays without having caused this intentionally or through gross negligence, days of illness that fall on working days on which the employee was incapacitated for work due to the illness shall not be counted towards the employee's holiday entitlement, if the illness lasted more than three calendar days."* (unofficial translation by the author).

Consequently, if the employee is quarantined during her/his annual leave for more than three days, the days during which the employee was quarantined do not count as annual leave days.

Case C-206/22 therefore does not have any implications on the more favourable Austrian approach to the relationship between quarantine measures and annual leave days.

4 Other Relevant Information

4.1 Collective bargaining agreements in retail

On 27 December 2023, the social partners managed to agree on a new collective bargaining agreement in the retail sector in their seventh round of negotiations, entering into force on 01 January 2024. The CBA in the retail sector is one of the most broadly applied CBAs, covering approximately 450 000 employees. The increase is below rolling inflation, which is due to the difficult situation in the Austrian retail sector.

Belgium

Summary

(I) According to the Belgian Cour de Cassation, unless a specific individual or collective agreement is concluded on the remuneration for the time during which an employee is on guard or on call, the employee has the right to his/her regular remuneration for other work.

(II) As a result of the increase in the retirement age in the pension legislation to 66 and 67 years, a recent law of 03 December 2023 raises the age that terminates legal protection against dismissal of employee representatives on works councils and on the occupational safety and health committee to 66 years from 2025 onwards and to 67 years from 2030 onwards.

1 National Legislation

1.1 Dismissal protection of staff representatives

The Law of 03 December 2023 amending the Law of 19 March 1991 on special rules of dismissal for staff representatives on works councils and on committees for safety and health at work has been adopted.

The ordinary and candidate employee representatives of works councils and committees for safety and health at work enjoy special dismissal protection under certain conditions. Essentially, these employee representatives can only be dismissed for gross misconduct previously determined by the labour court, or for economic reasons previously determined by the joint committee. However, other incidences can terminate dismissal protection of employee representatives.

Dismissal protection may end when the staff representative reaches the age of 65 years, i.e. the normal legal age of retirement. However, one problem soon arises in this context. Currently, the legal retirement age in Belgium is 65 years. However, in 2025, the normal retirement age will be raised to 66 years and from 2030 onwards, it will be 67 years. It is essential to make legal provision for staff representatives who, due to reaching the statutory retirement age, are dismissed by the employer. To this end, the new law replaces the age of 65 years in the current legislation (Article 2, §2(3) of the Law of 19 March 1991, with the 'statutory retirement age'. The statutory retirement age' currently means 65 years, but will be 66 years from 2025 and 67 years from 2030 onwards.

2 Court Rulings

2.1 Working time and remuneration

Cour de Cassation, S.23.0011.F*, 13 November 2023*

The fact that 'work' and 'working time' are different concepts is reflected in the definition of working time in the Labour Code, to which the Belgian Cour de Cassation referred in its recent ruling: when the employee is at the employer's disposal, it counts as working time, even if he/she does not actually perform any work.

On the basis of the Court of Justice and the Cour de Cassation's case law, it has long been clear that the time during which an employee is on guard or on call can also be considered working time under certain conditions. An application of this can also be found in the Cassation's judgment discussed here. According to the judgment, the period an employee must be permanently at the employer's disposal and is subject to obligations, in particular as regards the period during which he/she must be able to start

or resume work, which objectively and very significantly limits the employee's ability to freely use the time during which he/she is not required to work following a call. The fact that that employee is not required to remain at the workplace, at his/her place of residence or at any other place does not influence this fact.

It is also a foregone conclusion that inactive on-call time should not be compensated in the same amount as the effective performance of work during working hours. A different limited compensation may therefore be determined for inactive on-call time.

In the present case, no specific agreement had been concluded on how inactive on-call work should be compensated. The Court acknowledged that different pay may be provided for work services of a different nature ("*des prestations de travail de nature différente*"). If the per-hour wage is fixed, without a distinction according to the nature of the work performed, then that wage is due for all hours of work performed within the scope of the employment contract.

The final point of the ruling is particularly important. The Court added that the same pay is also due for hours on guard duty that constitute working time ("*les heures de garde à domicile qui constituent du temps de travai*l"). The ruling of the Cour de Cassation rejected the employer's argument that an employee's on-call hours only entitle him/her to the wages paid for other regular work duties ("*la rémunération des autres prestations de travail*") when the parties' agreement or the collective bargaining agreement provides for this for that particular working time ("*for ce temps de travail particulier*"). The conclusion is that unless a specific individual or collective agreement is concluded for the remuneration of the time during which an employee is on guard or on call, the employee has the right to his/her regular wages for other work.

In the same judgment, the Cour de Cassation also decided that a rule of the new law of evidence of the Civil Code is immediately applicable to ongoing proceedings (see Article 3 of the Judicial Code), including with regard to the proof of situations that arose before the entry into force of that rule and can be framed in the performance of an employment contract. This is the rule in Article 8.4 of the new Civil Code, which entered into force on 01 November 2020, and according to which the court may determine, with special justification and in light of exceptional circumstances, who bears the burden of proof when the application of the ordinary rules of proof are manifestly unreasonable.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In the present case, the question whether an employee who does not have symptoms retains the right to annual leave for the days that coincide with a period of quarantine after the employee had contact with a person infected with a virus, in this case the SARS-CoV-2 virus, was reviewed.

Such a quarantine measure, which aims to prevent the spread of an infectious disease by isolating those who may develop its symptoms, differs in its objectives from the right to annual leave, which is to ensure rest and time off for the employee. A quarantine measure, such as the onset of incapacity for work due to illness, is an unforeseeable event that is independent of the will of the person and is imposed by the government.

However, according the CJEU, the situation of an employee in quarantine differs from the situation of an employee who is on sick leave, and who is physically or mentally hampered by his/her illness. A quarantined employee, like during annual leave, can rest from the duties he/she is required to perform under his/her employment contract and, consequently, has time off. It is true that quarantine affects the conditions under which an employee can use his/her time off, but it cannot be said that this measure in itself impairs that employee's right to effectively exercise his/her right to annual leave.

Consequently, insofar as the employer fulfils its obligations, the employer cannot be required to compensate the employee for the adverse consequences of an unforeseeable event, such as a government-imposed quarantine measure, which prevents the employee from fully enjoying his/her right to paid annual leave.

To comply with European legislation which guarantees employees four weeks of paid annual leave, from 01 January 2024, employees who become unfit for work during their leave can carry over those leave days to a later date. Such leave days are lost under the current regulations.

Employees who cannot take their annual leave due to any one of the following reasons will retain those leave days until the end of the 24-month period following the year in which the leave was acquired but not taken:

- industrial accidents or occupational diseases;
- other accidents or illnesses;
- maternity leave;
- adoption leave;
- foster care leave (five days/year for the foster parent).

The employer is required to compensate the employee with holiday pay for annual leave days not taken in December of the applicable leave year. This is an advance on normal pay for the deferred leave days.

Employees who fall ill or have an accident during their annual leave can carry over their leave entitlements to a later date in the leave year, subject to certain formalities (Royal Decree of 08 February 2023 amending Articles 3, 35, 46, 60, 64, 66 and 68 and introducing Article 67bis in the Royal Decree of 30 March 1967 on the implementation of the laws on employees' annual leave, *Moniteur belge* 16 March 2023).

This new legislation will enter into force on 01 January 2024 (see March 2023 Flash Report).

The Belgian legislation does not guarantee that an employee, who does not have any symptoms, will retain the right to annual leave for the days that coincide with a period of quarantine after the employee has had contact with a person infected with a virus, in this case the SARS-CoV-2 virus.

The Belgian legislation seems to be in line with the ruling in CJEU case C-206/22 of 14 December 2023*, Sparkasse Südpfalz.*

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

The Law of the State Budget of the Republic of Bulgaria for 2024 established the amount of minimum salary.

1 National Legislation

1.1 Minimum salary

The Law of the State Budget of the Republic of Bulgaria for 2024 adopted by the National Assembly (promulgated in State Gazette, No. 108 of 30 December 2023) established the amount of minimum salary at BGN 933 (EUR 471).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The national legislation of the Republic of Bulgaria does not include distinct rules on carry-over days of paid annual leave granted to an employee who does not have any symptoms while in quarantine ordered by a public authority due to the fact that the employee had been in contact with a person infected with a virus.

Pursuant to Article 162 of the Labour Code, the employee is entitled to leave for temporary disability due to general sickness or occupational disease, employment injury, sanatorial treatment or urgent medical examinations or tests, quarantine, suspension from work prescribed by the health authorities, provision of care for a sick or quarantined family member, urgent need to accompany a sick family member to a medical examination, test or treatment procedure, as well as taking care of a healthy child that has been dismissed from a facility by reason of a quarantine imposed on the facility or on the child. The health authorities are authorised to grant such leave. For the time of temporary disability leave, the employee is entitled to a cash benefit over a period and in the amount specified in the Social Insurance Code.

Article 175 para. 1 of the Labour Code provides that if the employee is granted another type of paid or unpaid leave during his/her annual leave (which also includes leave for temporary disability for work), the use of paid annual leave shall be interrupted upon the worker's request and the balance used later by agreement between the employee and the employer. The interrupted leave can be used until the end of the calendar year for which it is due or can even be postponed to the following year. The legal situation of civil servants is identical (Article 58 paragraph 2 of the Civil Servant Act).

The rules on mandatory isolation (quarantine) are established in Article 61 et seq. of the Health Act. The director or deputy director of a regional health inspectorate issues an order of quarantine and notifies the respective individual. The conditions and procedure for carrying out the mandatory quarantine are determined in an Ordinance of the Minister of Health. All employees quarantined by the health authorities can obtain sick leave for the duration of the isolation (quarantine). The period of imposed quarantine is equal in legal terms with the period of temporary incapacity for work due to general illness.

The review of judicial practice and that of public administrative bodies shows that there are no disputes on the application of the rules established by the Labour Code, the Civil Servant Act and other legal acts establishing rules on the use of paid annual leave and the interruption of leave in the event of quarantine, as well as with regard to ensuring the possibility of later use of paid annual leave the employee is entitled to.

4 Other Relevant Information

4.1 Ratifications

The National Council on Working Conditions has adopted draft laws on ratification of two International Labour Organization Conventions (ILO) - No. 155 on Safety and Health at Work of 1981 and No. 187 on the Promotion of Safety and Health at Work of 2006. The bills must be approved by the Council of Ministers and the National Assembly to enter into force. The reasons for the adoption of these bills are for Bulgaria to have ratified all ten essential ILO Conventions, guaranteeing the basic principles and rights in the field of labour and the implementation of the highest international labour standards. Healthy and safe working conditions are a prerequisite for a healthy and productive workforce. They are also an important reason for both the sustainability and competitiveness of the economy, as well as for improving the quality and security of labour.

Croatia

Summary

(I) A set of new regulations on health and safety at work has been adopted.

(II) The Code of Ethics for Police Officers has been issued.

(III) Since the provisions of the Labour Act on Digital Platform Workers will begin to apply from 01 January 2024, it was necessary for the Minister of Labour, Pension System, Family and Social Policy to adopt the relevant regulations: Regulations on Work Records Using Digital Work Platforms and Regulations on the Method and Deadlines for Checking the Amounts Realised by Work Through Digital Work Platforms.

(IV) The Decision on the Minimum Daily Salary of a Seasonal Worker in Agriculture for the Year 2024 has been issued.

(V) The Act on Civil Servants as well as the Act on Salaries in Civil Service and Public Services has been adopted.

(VI) The age for mandatory retirement of soldiers has been raised.

1 National Legislation

1.1 Health and safety at work

A set of new regulations on health and safety at work has been adopted (Official Gazette No. 148/2023):

- Regulations on the Protection of Employees from Exposure to Noise at Work;
- Regulations on the Protection of Employees from Vibrations at Work;
- Amendment to the Regulations on the Protection of Employees from Exposure to Hazardous Chemicals at Work, Exposure Limit Values, and Biological Limit Values.

Regulations on the Protection of Employees from Exposure to Noise at Work establishes the minimum requirements for the protection of employees from risks to their safety and health that arise or may arise due to exposure to noise, especially risks to hearing. It implements Directive 2003/10/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) into Croatian legislation.

Regulations on the Protection of Employees from Vibrations establishes the minimum requirements for the protection of employees from risks to their safety and health, which arise or may arise due to exposure to mechanical vibrations. It implements Directive 2002/44/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) into Croatian legislation.

The purpose of the Amendment to the Regulations on the Protection of Employees from Exposure to Hazardous Chemicals at Work, Exposure Limit Values, and Biological Limit Values is to implement Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work as amended by Directive 2022/431 into national law.

1.2 Code of Ethics for Police Officers

The Minister of the Interior Affairs, with prior consent of the Government of the Republic of Croatia, has issued the Code of Ethics for Police Officers (Official Gazette No

145/2023). It contains moral and ethical standards and rules of conduct that police officers are required to adhere to on duty and outside of duty.

1.3 Digital platform workers

Since the provisions of the Labour Act on Digital Platform Workers will start to apply from 01 January 2024, it was necessary for the Minister of Labour, Pension System, Family and Social Policy to adopt the relevant regulations: Regulations on Work Records Using Digital Work Platforms and Regulations on the Method and Deadlines for Checking the Amounts Realised by Work Through Digital Work Platforms (both have been published in Official Gazette No. 150/2023). The first one prescribes the form, content, management method and deadlines for submitting data to work records using digital work platforms. The other one regulates the method and deadlines for checking the amounts earned by working through the platforms for the purpose of exceptional exemption from the application of the legal presumption of the existence of an employment relationship of a natural person who performs work via a digital work platform. Namely, according to Article 221.n(1) of the Labour Act, there is no legal presumption of the existence of an employment relationship in case, when in a particular quarter of the calendar year, the person who worked for the digital platform did not earn more than 60 per cent of the gross amount of the minimum wage in Croatia.

1.4 Act on Civil Servants

The new Act on Civil Servants has been adopted (Official Gazette No. 155/2023).

The new Act on Civil Servants, in addition to absorbing the provisions of the current law (rights and obligations, conflict of interest, rulebook on internal order, Civil Service Committee, employee schedule, transfer, promotion, training, state exam, making available, responsibility for violations of official duties and termination of civil service) with certain amendments, introduces a centralised system for employment, which includes planning for admission to civil service, submission of candidate applications electronically, candidate testing electronically and other activities related to employment. The purpose is "to establish a more objective and transparent system for the recruitment of the most competent candidates and the creation of assumptions for the construction of a professional, efficient and user-friendly public administration in the Republic of Croatia." (Proposal of the Act on Civil Servants)

Furthermore, a new system for assessing work efficiency is being introduced, and the assessment will be the basis for rewards and salary increases for civil servants, as well as the termination of the civil service relationship of a civil servant whose work is rated 'unsatisfactory'.

1.5 Act on Salaries in Civil Service and Public Services

A controversial Act on Salaries in Civil Service and Public Services (*Zakon o plaćama u državnoj službi i javnim službama*) has been adopted (Official Gazette No. 155/2023). Prior to its adoption, several trade unions had expressed their disagreement. They had organised a petition against its adoption. The reasons for their disagreement with the new Act were as follows:

- The new Act provides for the evaluation of civil and public servants for their potential job advancement exclusively by the director of the institution, not by users of services, associates and colleagues;
- The new Act limits the number of graded officers with the best grades in a rigorous manner;

- The new Act prescribes the termination of the employment contract of the civil/public servant when her/his work is rated as 'unsatisfactory' in a single year;
- The role of trade unions will be weakened, because the new Act prescribes that salary supplements regulated by that Act cannot be collectively bargained;
- The salaries are not transparent because the new Act does not prescribe the job complexity coefficients, without which the amount of salary cannot be determined.

Furthermore, some authors emphasised other shortcomings of this Act. For instance, Prof. *Đulabić* criticised the Act because it only partially regulates salaries in the public sector. Namely, it defines as many as 15 categories of employees (Article 2 and Article 51) in civil and public services to which this Act does not apply or is applied to a very limited extent. According to *Đulabić*, certain solutions on the evaluation of employees contained in this Act are not adjusted to some public services and consequently, are practically unenforceable. For example, it is prescribed (Article 10(3)) that the head of the institution shall evaluate employees annually, and the head of public services is evaluated by the body that appointed him/her (Article 10(5)). It will cause problems when evaluating the work of deans of higher education institutions or principals in primary and secondary schools. It is stipulated that the dean, as the head of a public institution, evaluates all employees annually, and the faculty council evaluates the dean, because it is the body that elects him/her. The inconvenience is that the majority of faculty councils consist of teachers (or their representatives, depending on the structure of the higher education institution), which the dean as the leader needs to evaluate beforehand. Or after the council evaluates the dean – it is not clear from the wording of this Act. The same applies to primary and secondary schools. The head of the school is appointed by the school board, and the school board partly consists of school employees. It can be concluded that the new Act leads to a reciprocity in evaluation, so it follows that the head of the school evaluates the employees, and thereafter (or before – this is not yet known) the employees evaluate the head of the school. (*Đulabić, Vedran. Što (ne)uređuje Zakon o plaćama u državnoj službi i javnim službama*, IUS-INFO, 21 December2023).

Apart from the mentioned shortcomings of this Act, it should be added that this Act prescribes the criteria for evaluating jobs, and some of the criteria could widen the gender pay gap. Namely, the overlapping criteria are evaluated twice: responsibility and influence on decision-making, on the one hand, and the management, on the other. Since, the statistics show that the managerial positions are predominately occupied by male civil/public servants and since there is no managerial position without the responsibility and influence on decision-making, it means that the overlapping criteria are evaluated twice in favour of men in managerial positions.

1.6 Salary of seasonal workers in agriculture in 2024

The Minister of Labour, Pension System, Family and Social Policy, with the approval of the Minister of Finance, has issued the Decision on the Minimum Daily Salary of a Seasonal Worker in Agriculture for the Year 2024 (Official Gazette No 153/2023). It amounts to EUR 16.64 net.

1.7 Mandatory retirement of soldiers

The Government of the Republic of Croatia has issued the Decree on Amendments to the Law on Service in the Armed Forces of the Republic of Croatia (Official Gazette No. 158/2023). With this Decree, the government has amended the provision on the mandatory retirement of soldiers with open-ended contracts of service in the Armed Forces of the Republic of Croatia. Instead of mandatory retirement at the age of 45 years, from now on, they will retire at the age of 50.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

During the lockdown, there were cases of breaches of the right to annual leave by employers in Croatia. Some employers unilaterally decided when the workers would take annual leave without prior agreement with them. Some workers only realised that they were on annual leave when their payslips were delivered. Such workers were put in an unequal position because those workers who had not taken annual leave were requested to take it, while the same could not be done with workers who had already taken it. There were also cases of workers who worked remotely from their homes, and employers who treated those days as annual leave. The trade unions consulted in the survey conducted by Grgurev and Potočnjak in 2021 found that the Ministry of Labour contributed to illegal procedures related to the taking of annual leave. In the opinion of the Ministry of Labour, the taking of annual leave is an option that was available to employers during the lockdown. As a result, the purpose of annual leave had been misused, and the rights of workers subordinated to economic interests. For more details, see: *Grgurev/Potočnjak. Radni odnosi u vrijeme pandemije COVID-19, Primjena prava za vrijeme pandemije COVID-19 / Barbić, Jakša (ur.). Zagreb: Hrvatska akademija znanosti i umjetnosti*, 2021 p. 58 and 59.

The judgment of the CJEU in case C-206/22 that national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus is in line with the EU law and will have no implications for Croatian law, as the Ministry of Labour promoted the taking of annual leave as an option available to employers during the lockdown, which was a greater encroachment on the workers' right to annual leave.

4 Other Relevant Information

Nothing to report.

Cyprus

Summary

A decree to increase minimum wage has been issued.

1 National Legislation

1.1 The Minister of Labour has issued a decree to increase the national minimum wage to EUR 1 000

The employers' association has expressed its disagreement, but stated that it will abide by the decree. It argues that according to its own studies, the relevant analysis of the macroeconomic data, the challenges of the economy and the resilience of businesses, the decision of the Minister is unjustifiable. The Employers' Federation OEV argues that the government's decision to endorse the Ministry of Labour's explanatory memorandum for a 6.5 per cent increase in the minimum wage in one year is not substantiated based on the criteria set out in the relevant decree. The employers' association asserts that the views of the employers' organisations and the arguments put forward regarding the increased operational costs of businesses since the pandemic, the negative impact of the wars in Ukraine and Gaza, and the energy crisis were not taken seriously. The views expressed by the Chamber of Employers KEVE are similar, pointing out that employers who will be requested to increase the ESM from EUR 940 to EUR 1 000 as of 01 January, will carry a labour cost of 6.5 per cent.

The trade union movement responded in part positively to the government's decision to increase the minimum wage, noting the improvement. SEK argued that it is with the persistence and documentation of the trade union movement that the government decided to increase the minimum wage to EUR 1 000 but expressed concern that the regulation of the ESM's hourly rate of return is still missing.

The other major trade union, PEO, however, is more critical, as it believes that even with the increase decided by the government, the purchasing power of the minimum wage has not been fully restored. PEO estimates on the basis of its own documented data that the increase in the ESM could have been up to 15 per cent and not only 6.4 per cent. PEO noted that it was not satisfied with the increase in the minimum wage. A statement from the union asserts that:

> *"despite the improvement in minimum wage, the result of the struggle and demands of the workers that started from the moment the previous government issued the decree on minimum wage, the amount announced falls short."*

The union added that the 1.7 per cent increase in minimum wage for recruitment and 6.4 per cent increase after six months of service with the same employer does not fully restore the minimum wage's market value. Based on the data submitted by the PEO to the evaluation committee, the erosion of the minimum wage by inflation is in excess of 14 per cent. This figure is particularly significant considering that the minimum wage is used in its entirety to cover the worker's basic minimum needs. The level determined does not reflect the high increase in the cost of living. Even more unfavourable, according to the PEO, is the data on minimum wage for recruitment, which under the decision is not increased at the same rate as the wage after six months of service (from EUR 885 to EUR 900). The main problem for the PEO continues to be the failure to explicitly determine the hourly rate of the minimum wage, something that the President of the Republic himself had identified during the pre-election period as a serious weakness in the decree issued by the previous government.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The Court of Justice ruled that EU law does not require that the days of paid annual leave during which the worker is not sick but in quarantine on account of having been in contact with a person infected by a virus be carried over. This is because paid annual leave is intended to enable workers to rest from performing the work they are required to under their contract of employment and to enjoy a period of relaxation and leisure. Unlike an illness, a period of quarantine does not, in itself, present an obstacle to the attainment of those purposes. Therefore, the employer is not required to compensate for the disadvantages arising from an unforeseeable event such as quarantine, which could prevent its employees from taking full advantage of their right to paid annual leave in the manner they wish. During the COVID-19 pandemic, the Court found that EU law does not require an employee who is placed under quarantine during paid annual leave be able to carry over that leave, as quarantine is not comparable to an illness.

No such matter has been decided in Cypriot courts. The Republic of Cyprus regulates working time in the *Laws on Annual Leave with Pay*, which regulates the general framework for paid leave and the law purporting to transpose the WTD, the *Law on Organisation of Working Time*, herein referred to as WTL. The WTL Article 7(3*)* provides that all employees are entitled to four weeks of paid leave in accordance with the terms and conditions provided by the legislation or the collective agreements and/or the practice on obtaining the right and granting leave. Article 5(1) of the Law on Paid Leave provides for the duration of the leave. The duration of an employee's leave who has worked not less than 48 weeks within the leave year is 20 working days in the case of an employee who has worked a five-day week, and 24 working days in the case of an employee who has worked a six-day week. Provided that where an employee is entitled by law, custom, collective agreement or otherwise to a period of leave that is longer than the days provided, the number of days in such a longer period shall be substituted for the days provided for in this Article as long as the law, custom, collective agreement or otherwise remain in force.

As for the minimum period and accumulation of paid leave, Article 7(1) of the Cypriot law on paid leave states that a leave period shall include a continuous period of not less than nine days. Also, Article 7(1) allows based on an agreement between the employer and the employee for leave to be accumulated up to a maximum of two years.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) With effect from 01 January 2024, changes are being introduced to the labour legislation, establishing the right to leave for employees who work under agreements on work performed outside the employment relationship, to modify the continuous weekly rest period, to adapt the definition of illegal work, to introduce liability for subcontractors in the construction industry, to change the obligations of employment agencies and the scope of work in the health sector.

(II) Minimum wage and certain rates of wage guarantees will also be increased and an adjustment to the amount of lump-sum compensation for teleworking costs will be made.

1 National Legislation

1.1 Amendment to the Labour Code (LC) (transposition)

A provision introduced in Act No. 281/2023 Coll. establishes the right to leave for employees working under agreements on work performed outside the employment relationship and modifying the uninterrupted weekly rest period in response to the case law of the CJEU. It will enter into force with effect from 01 January 2024 (more details on the content of the amendments are available in the November 2023 Flash Report).

1.2 Amendment to Act No. 435/2004 Coll., on Employment and Other Related Acts

Act No. 408/2023 Coll., which amends Act No. 435/2004 Coll. regulates, in particular, the obligations of employment agencies, changes the definition of illegal work and introduces the liability of contractors in the construction industry for unpaid wages (additional information on the content of the changes is available in the November 2023 Flash Report).

1.3 Amendment to the Labour Code to modify the regulation of working time of doctors and other health professionals

Act No. 413/2023 allows selected healthcare workers to work continuously for up to 26 hours, with subsequent compensation for uninterrupted daily rest (for more details on the content of the amendments, see November 2023 Flash Report).

1.4 Government Decree 396/2023 Coll. increasing the minimum wage and the guaranteed wage

With effect from 01 January 2024, the level of minimum wage will be increased to CZK 18 900 per month and CZK 112.50 per hour of work. At the same time, the guaranteed wage will be increased in the first, second, third and last eighth work groups. The wages in the other work groups have not been increased. According to Section 112 LC, the guaranteed wage is the lowest wage level for a given work group (one to eight).

1.5 Decree of the Ministry of Labour and Social Affairs No. 397/2023 Coll. on determining the amount of lump sum compensation for teleworking

With effect from 01 January 2024, the lump sum compensation for remote working is updated to CZK 4.50 per hour of remote work. The Decree is to be issued periodically with effect from 01 January of each calendar year on the basis of Section 190a(4)(a) LC. The amount shall be based on the data of the Czech Statistical Office on household consumption adjusted to the teleworking model, namely for one adult in an average household in the Czech Republic for one hour of work.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The Czech legislation does not contradict the case law in question. Ordered quarantine is considered to be a personal obstacle to work on the part of the employee according to Section 191 LC. Section 217(4) of the LC stipulates that the employer may determine the use of leave for the period of obstacles to work on the part of the employee (and therefore also for the period of the ordered quarantine) only with the consent of the employee him-/herself.

If a leave has already been approved by the employer and during that time quarantine is ordered for the employee, then, according to Section 219(1), the leave is legally interrupted for the duration of the quarantine, unless the employee declares that he/she wishes to continue to take leave. Leave not taken in a calendar year is carried over in accordance with the law to the following calendar year (Section 218(3) LC). It does not extinguish.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

No new developments have been reported this month.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The case concerned an interpretation of the right to carry over annual leave—as regulated in the Working Time Directive (2003/88/EC) and Article 31(2) of the Charter—in case of quarantine. A German employee had been granted paid annual leave for the period from 03 to 11 December 2020, but on 02 December 2020, was ordered by a public authority to quarantine (until 11 December) on account of that employee having been in contact with a person infected with a virus. The employee was not sick during the quarantine, and a request to carry over his days of annual leave planned for December was rejected by his employer.

The CJEU recalled that the right to annual leave has the dual purpose of allowing the worker to both rest from performing the work he/ she is required to under his/her employment contract and to enjoy a period of relaxation and leisure.

The CJEU found that a period of quarantine is not, in itself, an obstacle to the attainment of the purpose of paid annual leave. Provided that the employer does not subject the worker to any obligation, which may prevent him/her from freely and without interruption pursuing his/her own interests to neutralise the effects of work on their safety or health, the employer cannot be required to compensate the employee from an unforeseeable event such as quarantine. Although quarantine is likely to affect the conditions under which workers enjoy their free time, it cannot be considered that in itself, quarantine undermines the worker's right to the actual benefit of their paid annual leave.

Under Danish law, the right to annual leave is regulated in the Danish Holiday Act, L 230 of 12 February 2021. It follows from Section 22(1) that an employee is entitled to carry over up to four weeks of annual leave to the subsequent holiday period, if that employee has been prevented from taking leave due to the exhaustive list of special circumstances mentioned in Sections 12-14. Those special circumstances include sick leave (Section 12), strikes or lockouts (Section 13), and other 'special circumstances' (Section 14). Section 14(2) gives authority to the Minister of Employment to specify which special circumstances may prevent an employee from taking annual leave.

The Ministerial Order No. 1072 of 29 October 2019 on the holiday obstacles list what other special circumstances amount to a holiday obstacle. The list is exhaustive.

In 2021, the Order was revised in light of the COVID-19 pandemic and the list also includes:

> *"the performance of necessary work related to public security and health in the regional and municipal health authorities and in home care and nursing homes under very extraordinary circumstances, when a disease is categorised as critical to society according to the Act on Epidemics, Section 2(6)."*

The list does not mention cases in which a person, who is on leave, is ordered to quarantine by a public authority.

During the COVID-19 pandemic, the Ministry of Employment released a memorandum on questions relating to quarantine and holiday obstacles in March 2020. The Ministry's interpretation at that time was that quarantine due to an employee being at 'high risk' of infection amounted to a holiday obstacle (with the consequence that leave cannot be taken). The rationale was that the same (government) measures were imposed on 'high-risk' employees as they were on sick employees and therefore, the employee should be considered to be on sick leave within the meaning of the Holiday Act. This implied that annual leave days not taken due to a quarantine imposed by a public authority could be carried over to the next holiday year.

The 'memorandum' has not been subject to interpretation by the courts. There have been no disputes concerning the right to carry over any annual leave days, where the obstacle to taking leave was a quarantine imposed by a public authority. A memorandum is not legally binding for workers or employers, however, most of these situations were resolved pragmatically during the COVID pandemic. Legal disputes were not brought before the courts.

In one industrial arbitration case, the arbitrator rejected the argument that government-imposed quarantine should be considered 'working time' (FV 2021.1126). The case concerned a quarantine imposed by a public authority on an individual upon arrival in Denmark after having performed work for an employer in Norway. The quarantined days were part of a rotation of working days/days off, and the quarantine days were placed on the employee's days off. The question was whether the quarantined days should be considered 'working' days under the collective agreement, and as such should be remunerated or should entitle the employee to extra days off at another time in the worker's rotation schedule. The umpire took into consideration that the workers did not perform work during the days in quarantine and that these days were not moved to working days in the rotation schedule. Also, the collective agreement's concept of days off did not guarantee 'real free time'. Furthermore, it was acknowledged that the workers were able to spend time with their families (most, at least) during the period of quarantine, and to spend their time in their house as they pleased. Finally, the workdays in Norway were not imposed by order of the employer, but had been voluntarily agreed with the workers –for workers infected with COVID-19, alternative workplaces without quarantine restrictions were prioritised. The work schedules including quarantines were not a unilateral order by the employer. For these reasons, the umpire determined that the quarantine days would not entitle the employee to compensatory off-days in the schedule, nor should they be remunerated as working days.

Although the ruling did not concern working time in the understanding of the Working Time Directive, namely the health and safety aspects of working time, but instead understood working time as established in the collective agreement, namely as a contractual duty and a mutual obligation for the parties, the ruling indicates that quarantine imposed by public authorities can be considered as time off. This approach would align with the new CJEU ruling's approach to quarantine as am obstacle to annual leave.

In conclusion, the new CJEU ruling clarifies that government-imposed quarantine does not necessarily amount to a so-called holiday obstacle. As the Danish ministerial order does not specifically list quarantine as a holiday obstacle, although the rules were revised in connection with the COVID pandemic, quarantine imposed on the employee is presumably not considered a holiday obstacle under Danish law. This has not been

clarified by case law, however. The broad interpretation of the Ministry of Employment given in its memorandum of 2020 is not legally binding. Should Danish courts find that quarantine does not entitle an employee to carry over annual leave not taken, the CJEU has now clarified that this result would not contradict EU law.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

CJEU C-477/21 amends the working time and rest period regulations. The decision will be applied in Estonia by the Labour Inspectorate.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

This judgment clarifies situations in which the employee has an important reason preventing him/her from using his/her days of annual leave. The impact of the Court's decision on Estonian legal regulations is important, as it also contributes to the interpretation of Estonian law. According to the Employment Contracts Act (ECA), the right of an employee to interrupt his/her annual leave according to § 69 (6) ECA is formulated as follows:

> *"An employee has the right to interrupt, postpone or prematurely terminate annual leave due to significant reasons related to the person of the employee, in particular due to a temporary incapacity for work, maternity leave or participation in a strike. The employee has the right to request the unused part of the annual leave immediately after the obstacle to using the annual leave ceases to exist or, by agreement of the parties, at another time. The employee is required to notify the employer of an obstacle to using the annual leave at the first given opportunity".*

Estonian law does not clearly define what the significant reasons related to the person of the employee are. § 69 (6) ECA only provides a sample list of personal reasons related to the employee. The quarantine case discussed in the CJEU's judgment is important because it also helps interpret the Estonian law and explains that quarantine in itself is not a valid reason for interrupting annual leave.

4 Other Relevant Information

4.1 Working time and rest period

CJEU case C-477/21, 02 March 2023, MÁV-START

In the first months of 2024, the Labour Inspectorate will carry out advisory supervision of compliance with the new working time and rest period requirements based on the European Court's decision on scheduled work that entered into force in the spring.

The change in working time and rest period requirements is the result of a court decision. No amendments of the law have been a made yet.

The Estonian Employment Contract Act stipulates that an employee must have a daily rest period (of at least 11 consecutive hours) and a weekly rest period (of at least 48 consecutive hours in the case of normal working hours or at least 36 consecutive hours in the case of cumulative working hours).

According to the Court's decision, the daily rest period must precede the weekly rest period, i.e. the employee must be guaranteed consecutive daily and weekly rest periods at least once a week (11 hours + 36 hours or 48 hours = 47 hours or 59 hours in total).

Trade unions and employers agree that the health of employees must be protected and that those employers who, for various reasons, face difficulties preparing work schedules based on this new interpretation should be supported.

When supervising working time and rest period requirements, the Labour Inspectorate will apply the new interpretation from 01 January 2024, but in the first few months, the focus will be on supporting employers and advising them on how to implement the new requirements.

The State's objective is not to fine employers immediately (2024), but, if necessary, to support them to switch to work schedules that entail longer rest periods. The European Court's decision on the interpretation of working time and rest periods has introduced a new situation, the implementation of which requires more thorough preparation and society needs to be ready for these changes as well. Unfortunately, there is a number of employers who are facing difficulties adjusting their work schedules and finding an appropriate workforce. Although the fulfilment of the new requirements must be continued, changes in employers' work organisation will be necessary.

Establishing new rules is quite challenging for certain employers in terms of ensuring uninterrupted work organisation and availability of services. It should also be taken into account that if the meaning of the Court's interpretation is to protect employees' health, the actual effect may be the opposite for employees whose working hours is based on the work schedule. If an employee takes longer breaks from their main job, they may engage in side jobs elsewhere to maintain their income, which may not increase their actual time off. Such risks and indirect effects must definitely be considered in the near future.

Finland

Summary

(I) A Government Bill concerning amendments to the Act on Posting Workers has been submitted to Parliament.

(II) In its judgment on an application for a precautionary measure, the Supreme Court has held that a strike can be considered prohibited by law if it immediately, concretely and seriously endangers the fulfilment of other fundamental rights, such as the protection of life and health or the environment.

1 National Legislation

1.1 Government Bill on posting of workers

The government has submitted its bill on amending the Act on the Posting of Workers (Government Bill HE 101/2023) to Parliament. The European Commission has opened an infringement procedure against Finland regarding the national transposition of the Directive on the Posting of Workers and the Directive on the Road Transport Mobility Package. According to the Government Bill, changes to the Act on Posting Workers (*Laki työntekijöiden lähettämisestä*, 447/2016) are proposed to better meet the requirements of these directives. It is proposed for the provisions on the obligation to notify the builder and the main contractor about posting of workers, as well as the contractor's operational obligation to include contacting the contractual partner at the request of the occupational safety and health authority; the related negligence fee would be repealed. The provision on the right of the occupational safety and health authority to request a certificate of salary payment, if necessary, shall, moreover, be clarified.

In addition, changes to the eligibility criteria of the posting company's representative and the information required in the posting notification are proposed. According to the Government Bill, the monitoring conditions for drivers posted in road transport would be enhanced by specifying the storage time obligation for the required documents and the right of the occupational safety and health authority to request translations. To protect the posted worker, a provision on the prohibition of countermeasures and an obligation to pay damages as a penalty for violating the prohibition are proposed to the Act on the Posting of Workers. The provisions would ensure the posted workers' right to claim their entitlements in accordance with the Act on the Posting of Workers before the authorities and courts.

The proposed legislative changes are intended to enter into force on 01 April 2024.

2 Court Rulings

2.1 Prohibiting an industrial action as a precautionary measure

Supreme Court KKO:2023:95, 22 December 2023

In their application, companies requested a precautionary measure prohibiting the trade union from targeting the strike it organised after the end of the general applicability of a collective agreement to essential jobs and functions at the companies' district heating power plants and wastewater treatment plants. According to the companies, the strike was contrary to the accepted principles of morality and not permitted by law, as it posed a risk to the lives and health of the residents of the factory locations and to the environment.

The Supreme Court asserted that a strike can be considered as impermissible by law if it immediately, concretely and seriously endangers the fulfilment of other fundamental

rights, such as the protection of life and health or of the environment. The companies had not adequately proven that the strike would have caused such a risk, and thus no prerequisites existed for prohibiting the strike as a precautionary measure in accordance with Chapter 7, Section 3 of the Code of Judicial Procedure (*Oikeudenkäymiskaari*, 4/1734).

According to the judgment, the Supreme Court's jurisprudence demonstrates that industrial actions approved by the Finnish legal order incorporate the protection of fundamental rights as part of the freedom to form trade unions and organise, which is guaranteed in Section 13 of the Constitution of Finland (*Suomen perustuslaki*, 731/1999). The right to industrial action is also recognised as a human right in several international agreements binding Finland (KKO 2018:61, paragraph 16 and KKO 2020:50, paragraph 9). The right to strike is recognised, inter alia, in paragraph 4 of Article 6 of the European Social Charter and as part of the freedom of assembly and association in accordance with Article 11, paragraph 1 of the European Convention on Human Rights. In the jurisprudence of the European Court of Human Rights, the right to strike has been considered one of the most important means of the State to secure the freedom of a trade union to protect the occupational interests of its members (for example, Wilson, National Union of Journalists and Others v. United Kingdom 02 July 2002, paragraph 45).

The Supreme Court has stated in its jurisprudence that an industrial action can be prohibited mainly when the use of such a measure is expressly restricted in the national legislation or European Union law, which means that the restriction can be invoked in a relationship between private parties. A precautionary measure can also be successful in a situation where, due to its implementation method, goals or consequences, the industrial action should be considered contrary to law or accepted principles of morality, or unreasonable on grounds established in jurisprudence (KKO 2000:94, KKO 2018:61, paragraph 18 and KKO 2020:50, paragraph 10).

According to the judgment, the Supreme Court has also stated that the considerable excessiveness of industrial action measures in relation to the goals pursued by them can in some situations give rise to the conclusion that the measures are contrary to accepted principles of morality or unreasonable. However, the Supreme Court has held that when considering the prerequisites for a precautionary measure, the starting point in this evaluation must be the permissibility of the right to industrial action (KKO 2020:50, paragraph 19).

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

There is no legislation in Finland on situations in which the carry-over of days of paid annual leave would not be permitted in respect of a period that coincides with a period of quarantine as referred to in the judgment. Provisions of annual leave in the legislation and collective agreements apply.

4 Other Relevant Information

4.1 Tripartite working group to support equality goals of the Government Programme

On 13 December 2023, the Ministry of Social Affairs and Health appointed a tripartite working group with the task of supporting the equality goals related to working life and family leave included in the Government Programme. The Programme's goals include eliminating discriminatory practices in working life, targeting more effective measures

against discrimination based on pregnancy and family leave, finding ways to distribute the costs of parenting more evenly and continuing to work for a more even distribution of family leave.

The working group has been set up to deal, in particular, with themes related to pregnancy discrimination and family leave. The goal is to form a vision on how the policies of the Government Programme could best be implemented. To support the goal, a legal report on reducing pregnancy and family leave discrimination will be prepared.

4.2 Tripartite working group to prepare changes to the Co-operation Act

The Ministry of Economic Affairs and Employment has appointed a tripartite working group to prepare amendments to the Co-operation Act (*Yhteistoimintalaki*, 1333/2021). Legislative changes being prepared are part of the government's package of labour market reforms. The Government Programme's entries related to the Co-operation Act have been divided into three themes: the scope of application of the Act based on the number of employees; the duration of change negotiations; and board representation of employees.

According to the Government Programme, the government will raise the threshold for applying the Co-operation Act to the level permitted by EU provisions, namely to companies and corporations that regularly employ 50 or more employees. Currently, the Act applies to companies and corporations employing at least 20 employees. Moreover, the requirements of the Co-operation Act concerning the minimum duration of change negotiations will be reduced by half. Currently, change negotiations must be held for at least six weeks or 14 days, depending on the subject of the negotiations. In addition, the Government Programme states that any need to amend the Co-operation Act concerning, e.g. the board representation of employees, will be assessed.

The working group's first term will run from 11 December 2023 to 20 June 2024. During this period, the working group will prepare a report on raising the threshold for applying the Co-operation Act and reducing the duration of change negotiations. The report will be prepared by 20 June 2024 in the form of a government bill. The second term of the working group will run from 01 January 2025 to 31 March 2025. During that term, the working group will discuss a report of the Ministry of Economic Affairs and Employment on the need to amend board representation. The report is set to be completed in early 2024.

France

Summary

(I) Several laws were published at the end of the year and will come into force at the beginning of 2024 and partially in 2025. The law on full employment, which amends employment assistance and creates a new operator in charge of this assistance, and the law for improved profit sharing with employees within companies. An ordinance has been published to transpose the European directive on the new obligations of companies in terms of sustainability.

(II) The Cour de Cassation has once again brought French law into line with European law on the protection of pregnant women against dismissal. The same applies to effective working time of mobile workers. Finally, the scale of compensation for dismissal without real and serious cause introduced by President Macron has once again been applied by a French Court of Appeal.

1 National Legislation

1.1 Full employment law

Law No. 2023-1196 of 18 December 2023 was published on 19 December 2023. Among other measures, it provides for the creation of 'France Travail' (which will replace "*Pôle Emploi"* with expanded responsibilities) from 01 January 2024. The law also establishes a National Employment Committee and Territorial Employment Committees at regional, departmental and local levels.

All job seekers will be automatically registered with France Travail, no later than 2025:

1. jobseekers currently covered by *Pôle emploi;*
2. applicants for the SSA (armed forces health service), and spouses, common-law partners or past partners;
3. young people seeking support from local missions;
4. people with disabilities seeking support from *Cap Emploi* (job centre).

The law contains a number of provisions relating to support to access or return to employment. Specifically, Article 2 stipulates that all jobseekers registered with the France Travail operator—including RSA (active solidarity income) recipients—must sign an employment contract. Under this contract, the signee must work at least 15 hours a week. These provisions will come into force on a date to be set by decree, but no later than 01 January 2025. This contract must determine the objectives agreed with the signee according to the needs of the jobseeker. As a reference tool, the contract must provide for an action plan in relation to the professional project and the accompanying and/or training measures. It will specify, depending on the situation of the jobseeker,

> *"the level of intensity of the support necessary which corresponds to a weekly period of activity of at least 15 hours"*

(a provision that can be adapted to individual situations, with the option to reduce or eliminate the weekly period of activity in case, for example, of health problems, childcare, etc.).

5. The new Article L. 5411-5-1 of the Labour Code describes the new guidance and support system for jobseekers, and in particular the role of the departmental councils. These provisions will also enter into force on a date to be set by decree, but no later than 01 January 2025.
6. All those registered will be referred to the support structure that is best adapted to their needs: this can be a France Travail advisor, but also, depending on the situation, local missions, the Departmental Council, *Cap Emploi*, etc.

7. Every jobseeker has rights but also duties, as is currently the case.
8. Measures for workers with disabilities are planned with the aim of improving their access to employment in consultation with *Cap Emploi*: adapting the common law, simplifying the coordination of actors, strengthening employers' commitment.
9. Provision is also made for the care of young children to eliminate care responsibilities as an obstacle to parents' resumption of activity (in particular, the establishment of early childhood centres by municipalities from 2026).

In Decision No. 2023-858, 14 December 2023, the French Constitutional Council expressed two reservations about the text:

- the minimum duration of 15 hours must be adapted to the signee's personal and family situation and limited to the time needed for the required support, without being able to exceed the legal working hours in the case of salaried employment;
- the regulatory authority must respect the principle of proportionality of penalties when setting the duration of the penalty and the proportion of income or benefits that may be suspended or withdrawn.

1.2 Annual social security financing law

The Social Security Financing Law for 2024 was finally adopted on 04 December 2023, and published on 27 December 2023, following the annulment by the Constitutional Council of certain measures in its 'Human Resources/Payroll' section. The following measures are of particular relevance:

- With effect from 01 January 2024, the prescription or renewal of sick leave by videoconference may not be ordered for more than three days, or have the effect of extending the duration of sick leave already in progress to more than three days;
- From a date to be set by decree, but no later than 01 July 2024, women who have undergone a termination of pregnancy for medical reasons will be able to receive daily allowances in the form of sickness benefits covered by social security without a waiting period while they are absent from work.

The text adopted includes a measure providing for the direct suspension of the payment of daily social security benefits following an employer's medical examination and, apart from certain exceptions, in the event of a report by the supervising doctor concluding that the absence from work or its duration were not justified. This provision was censured by the Constitutional Council. It was therefore not included in the law published and is therefore not applicable.

1.3 Profit-sharing law

Law No. 2023-1107 of 29 November 2023 "*transposing the national interprofessional agreement on the sharing of profit within the company*" translates into law a series of measures negotiated by the social partners at the request of the government to improve the distribution of wealth. The law extends certain existing measures but also provides for the creation of new systems to be implemented within companies. The main measures of this law are set out below.

Companies can now pay two bonuses per calendar year

Until now, employers could only pay one Value Sharing Bonus (VSP) per calendar year, with the option of splitting the payment into up to four parts (one per quarter), see Law 2022-1158 of 16 August 2022, Article 1, IV. The law now allows employers to pay two VSPs within the same calendar year, with the option of splitting the payment of each bonus into up to four parts (one per quarter). When two bonuses are paid within the same calendar year, their combined amounts are exempt up to the same overall limit of EUR 3 000 or EUR 6 000 per year, depending on the case. This measure entered into

force on 01 December 2023. Companies wishing to do so may therefore pay a second PPV for 2023, provided they take the necessary steps in good time (implementation, payment, etc.).

The enhanced exemption scheme will be maintained from 2024 to 2026 for companies with fewer than 50 employees

Given the strong use of the VSP by companies with fewer than 50 employees as a profit-sharing tool, the enhanced exemption scheme has been extended for three years for these companies. Thus, in companies with fewer than 50 employees, the enhanced social and tax exemption scheme, i.e. exemption from social security contributions, general social contribution and contribution for the repayment of social debt and income tax for VSP paid to employees receiving less than three minimum wages (SMIC in French), will be maintained from 01 January 2024 to 31 December 2026.

No changes will be introduced for companies with 50 or more employees: the enhanced exemption scheme will end on 31 December 2023 (see Law 2022-1158 of 16 August 2022, Article 1, VI). Where the income tax exemption does not apply, employees will nonetheless be able to 'exempt' their VSP from income tax by allocating it to an employee savings plan or a company pension savings plan.

Possibility to place the VSP in an employee savings plan or a company pension savings plan and thus exempt it from income tax

Until now, a VSP that did not qualify for income tax exemption could not be tax exempted in any other way. The law allows employees to invest all or part of the VSP in one of the following savings plans, if they have joined one:

- a company or inter-company savings plan (PEE, PEI in French);
- a collective retirement savings plan (PERCO in French) for companies in which such plans still exist;
- collective company pension savings plan (PERE-CO in French) or compulsory company pension savings plan (PERE-OB in French).

Employees will thus be able to benefit from income tax exemptions for the sums blocked, up to a ceiling of EUR 3 000 or EUR 6 000 per year and per beneficiary. The employee will have to allocate the VSP within a period to be set by decree (to be published).

Once the sums have been invested, they must also comply with the period of unavailability, except in the event of early release associated with the savings plan concerned. The employer will be required to inform the employee of the sums allocated to the VSPs and of the period within which the employee may submit a request for allocation to the savings plan. In addition, employers are authorised to top up the VSPs allocated to a savings plan if such top-up is provided for in the plan rules and within the general top-up limits laid down in the French Labour Code.

In addition, the law provides for the creation of new measures.

- On an experimental basis, companies with 11 or more employees that are not required to set up profit-sharing schemes (i.e. '11 to less than 50 employees') and that have made a net profit for tax purposes of at least 1 per cent of sales for three consecutive financial years will be required to set up a value-sharing scheme.
- Companies required to set up profit-sharing schemes (i.e. those with '50 or more employees') and at least one trade union representative must, under certain circumstances, enter into negotiations on profit-sharing in the event that they have earned an exceptional profit.
- An experimental profit-sharing scheme has also been introduced for associations, foundations, cooperatives and mutual societies with 11 or more employees.

- A new optional mechanism, the 'company value-sharing plan', allows for a bonus to be paid to employees within a social and tax incentive framework, when the company's profits increase over three years.

1.4 Sustainability of the corporate governance of commercial companies

Ordinance No. 2023-1142 of 06 December 2023, published on 07 December 2023, transposes European Directive 2022/2464/EU (Corporate Sustainability Reporting Directive) into French law, requiring companies to publish new social and environmental information in their management reports. The French text still needs to be supplemented by decrees.

This Directive requires the publication of 'sustainability' information, i.e. information that measures the company's impact on environmental, social and corporate governance issues, as well as the impact of these issues on the development of the company's business, results and situation. The aim of the French ordinance is therefore to

> *"meet the growing need for extra-financial data expressed by financial institutions, which use it in their investment decisions and risk management policies".*

This information (otherwise known as the 'sustainability report') will have to be included in companies' management reports and will therefore replace the current declaration of extra-financial performance (DPEF in French). They will have to be audited by the statutory auditors or by other auditors.

This sustainability report will have to be submitted from 2025 onwards (information based on 2024 data) by companies listed in a regulated market, which exceed certain thresholds, or which are parent companies of a group exceeding set thresholds.

The French ordinance does not incorporate the thresholds of the European directive as they currently stand. We will have to wait for the publication of an implementing decree to transpose them into French law.

The decree only defines broad categories of companies: micro, small, medium and large (as well as small group, medium group and large group companies). French law is thus aligned with the terminology used in the Accounting Directive.

To be implemented, this ordinance must be followed by a decree specifying the information that must be included in the sustainability report that will form part of the company management report.

Specifically, the ordinance has an impact on the role of the Social and Economic Committee (SEC). Under French law, the SEC is *"informed of the environmental consequences of the company's activity"*. The ordinance consolidates this information. From 01 January 2025, the SEC must:

- Be consulted on information relating to sustainability during consultations on strategic orientations, the economic and financial situation of the company and its social policy;
- Have at its disposal the documents shared annually with the general meeting of shareholders or with the general meeting of companies, the communications and copies shared with shareholders, as well as the auditors' report and, where applicable, the report certifying the information on sustainability during the annual consultation on the economic and financial situation. These documents must be provided by the employer.

Finally, the employer's obligation to include environmental information on investments in the economic, social and environmental database has been removed.

2 Court Rulings

2.1 Dismissal procedure during maternity leave

Cour de Cassation, No. 22-15794, 29 November 2023

In a ruling handed down on 29 November 2023, the Court of Cassation ruled that employers may not initiate dismissal proceedings during the period of absolute protection attached to maternity leave. The case concerned an employer who had sent a letter to an employee on maternity leave, inviting her to an interview prior to dismissal. The Court of Cassation, in compliance with the rules laid down by the CJEU on the prohibition of preparatory acts for dismissal during the period of protection linked to maternity (CJEU, case c-460/06, 11 October 2007) complies with European law.

Under French law, it is prohibited to terminate an employee's employment contract if she is medically certified as being pregnant, during all the periods of suspension of the employment contract to which she is entitled by virtue of maternity leave, whether or not she avails herself of this right, and by virtue of paid leave taken immediately after maternity leave, as well as during the ten weeks following the expiry of these periods (see Article L. 1225-4 of the French Labour Code).

However, the employer may terminate the contract if he/she can prove that the employee has engaged in serious misconduct unrelated to the pregnancy or that it is impossible for the employer to continue the employment relationship for reasons unrelated to the pregnancy or childbirth. In this case, the termination of the employment contract may not take effect or be notified during the maternity leave or during the paid leave taken immediately afterwards.

If the employer dismisses an employee without complying with the protection rules, the dismissal is deemed to be null and void.

In the past, the question has arisen as to whether an employer may take preparatory measures for dismissal during the period of absolute protection. A new case submitted to the Court of Cassation gave it the opportunity to clarify its case law. In judgment No. 15-26250, 01 February 2017, the Supreme Court stated:

> "*that an employer is prohibited not only from notifying an employee of dismissal, for whatever reason, during the period of protection [...], but also from taking preparatory measures for such a decision.*"

This time, in a published ruling, it states:

> "*Thus, the employer may not initiate the dismissal procedure during the period of absolute protection, in particular by sending the letter convening the preliminary interview. Such a letter constitutes a preparatory measure for dismissal. It is irrelevant that the interview would take place after this period has ended.*"

It should be noted here that the Cour de Cassation specifies that the employer may not initiate the dismissal procedure during the protection period, "in particular" by sending the letter convening the prior interview. This is therefore not the only prohibited preparatory measure, as other cases have demonstrated.

2.2 Effective working time for mobile workers

Cour de Cassation, No. 20-22.800, 25 October 2023

In a ruling handed down on 23 November 2022, the Court of Cassation, under the influence of European Union law, opened up the possibility of reclassifying the travel time of an itinerant employee between his home and his first client, and then between his last client and his home, as actual working time.

The question of the classification of travel time between the employee's home and place of work arises differently in the case of itinerant workers, who have no fixed workplace, whose duties consist exclusively of working for clients and who are therefore constantly travelling from one client to the next, in accordance with their employer's instructions.

On this issue, the Court of Cassation had previously held that the trip made by itinerant employees between their home and the first and last client was not covered by Article 2 of Directive 2003/88/EC defining working time, but by Article L. 3121-4 of the Labour Code.

Article L. 3121-4 of the French Labour Code states that:

> *"The time spent travelling to and from the place of performance of the employment contract does not constitute actual working time.*
>
> *However, if it exceeds the normal commuting time between home and the usual place of work, it shall be compensated either in the form of rest or financial compensation."*

The Court of Cassation considered that the method of remunerating employees in a situation in which they did not have a fixed or usual place of work and travelled daily between their home and the sites of the first and last client designated by their employer did not fall within the scope of Directive 2003/88/EC but rather within those of the provisions of national law, in particular those of Article L. 3121-4 of the Labour Code.

The Court of Cassation considered that in the case of itinerant employees, travel time in excess of normal commuting time did not constitute actual working time and had to be compensated, either in the form of rest or financial compensation.

Consequently, an itinerant employee was not entitle to payment for overtime worked during the return travel between his/her home and client.

However, this position was contrary to European decisions, and national case law continued to consider that the question of reclassifying travel time as actual working time for employees who had to travel to perform work at clients was a matter for national law.

With the impetus of the CJEU, the Court of Cassation recognised in its decision of 23 November 2023 the obligation to interpret Articles L. 3121-1 and L. 3121-4 of the Labour Code in the light of Directive 2003/88/EC.

Thus, according to the Court of Cassation, if during the time an itinerant employee spends travelling between his/her home and the sites of his/her first and last clients, the employee is at the employer's disposal and complies with its instructions without being able to freely pursue his/her personal interests, this time is actual working time, in which case it must be taken into account in the payment of salary and in the calculation of overtime.

According to the Court of Cassation, it would therefore be appropriate to carry out an in concreto assessment to determine whether the travel time of itinerant employees does indeed constitute actual working time.

2.3 Employer's inexcusable fault in an accident at work

Cour de Cassation, No. 21.20,740, 16 November 2023

The Cour de Cassation in a ruling dated 16 November 2023 stated that an employer was inexcusably at fault after two helicopters flying in close formation collided, resulting in the death of an employee.

The judges held that it was the employer who took the decision to organise the flight of the two helicopters in close formation. The organisation of this flight corresponded to a

scenario defined by the employer, who wished to film the flight as part of the shooting of a television programme.

The judges considered that the flight in formation of the helicopters carrying passengers represented a risk, which the employer had chosen to take, and which was the direct and certain cause of the collision between the aircraft that resulted in the death of the victim.

They considered that the employer could have taken measures to protect the passengers from the accident, by excluding the possibility of the helicopters flying in formation or by modifying their flight paths.

They deduced that in the absence of a test flight without passengers, verification of the existence of a means of communication between the aircraft or between them and the ground or mention of a risk of collision in the safety and security plan, the employer had not taken the necessary precautions.

Thus, the employer, who was or should have been aware of the danger resulting for his employee from the close formation flight of the helicopter in which he was a passenger and who did not take the necessary measures to protect him, committed an inexcusable fault.

2.4 New application of the redundancy pay scale

Cour de Cassation, No. 21-24.075, 06 December 2023

In a ruling handed down on 06 December 2023, the Cour de Cassation recalls that under Article L.1235-3 of the French Labour Code, if an employee is dismissed for a reason that is not genuine and serious and there is no possibility of reinstatement, the judge shall award him/her compensation payable by the employer, the amount of which is between the minimum and maximum amounts that vary according to the amount of the employee's monthly salary and his/her duration of service expressed in complete years.

It thus censured the Bourges Court of Appeal, which had awarded an employee a sum representing more than three months' salary,

> *"whereas for an employee with a one year complete seniority in a company that usually employs fewer than eleven employees, the minimum amount of compensation is half a month's salary, and the maximum amount is two months' salary".*

The Court of Appeal had ordered the employer to pay the employee the sum of EUR 7 000 in damages for dismissal without real and serious cause, on the grounds that the employee had nearly 20 months of seniority and received a gross monthly salary of EUR 2 057.38, and had not found a job, despite having searched. His age complicated his professional reintegration, and he was receiving a solidarity allowance after having received the back-to-work assistance allowance, and he had been depressed since his dismissal three years earlier.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

Initially, employers could impose six days' paid leave on their employees between 26 March 2020 and 30 June 2021. The law on managing the emergence from the health crisis ultimately extended the scheme until 30 September 2021, and authorised employers to impose eight days of paid leave (authorisation to impose two days in addition to the first six if the employer had already used this scheme since March 2020).

The aim was to enable companies to get organised in the face of the scale and duration of the health crisis.

A large number of temporary legal provisions had been put in place on an exceptional basis since March 2020 to simplify the organisation of companies faced with the effects of the health crisis. Among the legal provisions put in place exceptionally was the taking of paid leave.

Subject to a company or industry agreement:

Employers may require employees to take paid leave, even before the start of the period in which it is normally due to be taken. The employer may change the dates of leave already taken and the agreement must stipulate the number of days of paid leave that may be imposed or moved, up to a limit of six working days. The agreement must also stipulate the notice period for taking paid leave, subject to at least one full day's notice. The employer may split paid leave without the employee's agreement. The employer may temporarily suspend the right to simultaneous leave for spouses or partners in a civil partnership within the same company.

Without a company or industry agreement:

The employer may require the employee, with at least one full day's notice, to take or modify:

- days of reduced working time (RTT);
- days or half-days under a fixed annual working week agreement. The employer must still give the employee at least one full day's notice;
- the days deposited in the time savings account and determine the dates when the company's difficulties or exceptional circumstances so require.

This option, which ran until 30 September 2021, could only apply to a total of ten rest days (RTT, rest days under a fixed-rate agreement, rights in the time savings account). It had to be in the interests of the company, given the economic difficulties caused by the coronavirus.

The favourable measures for employers ceased on 30 September 2021.

As a reminder, the French Cour de Cassation ruled:

- that employees who are ill or have had an accident will be entitled to paid leave earned during the period of absence, even if the absence is not related to an accident at work or an occupational disease (Cass. soc., 13 September 2023, aff. jtes. No. 22-17.340, No. 22-17.341 and No. 22-17.342, published in the "*Bulletin*", which underlines their importance);
- in the event of an accident at work, the calculation of paid leave entitlements will no longer be limited to the first year of absence from work (Cass. soc., No. 22-17.638, 13 September 2023, published in the "*Bulletin*");
- the remuneration to be taken into consideration for the calculation of holiday pay is the employee's total remuneration, including bonuses and allowances paid in addition to salary if they are paid in return for, or on the occasion of, work (Cass. soc., No. 22-10.529, 13 September 2023, published in the "*Bulletin*");
- in the case of paid holiday pay, the three-year limitation period only applies if the employee was able to take his/her annual leave during the reference period in question (Cass. soc., No. 22-11.106, 13 September 2023, published in the "*Bulletin*");
- that when the employee is unable to take his/her annual paid leave during the reference year due to the exercise of his/her right to parental leave, the paid leave earned by the date of the start of the parental leave must be carried forward to

the date on which the employee returns to work (Cass. soc., No. 22-14.043, 13 September 2023, published in the "*Bulletin*").

These cases are not related to COVID situations.

In a 2022 ruling, the social chamber of the Court of Cassation was asked to interpret Articles 2 to 4 of Order No. 2020-323 of 25 March 2020 concerning emergency measures relating to paid leave, working hours and rest days (Cass. soc., No. 21-15.589, 06 July 2022).

In that case, a trade union had applied to the interim relief judge of the Court of First Instance to put an end to the manifestly unlawful disturbance resulting from the implementation of memos dated 26 March and 29 April 2020 drawn up by several companies in a pharmaceutical group, and relating to the application of Articles 2 to 4 of the Order of 25 March 2020, restoring the rights of the employees concerned.

These notes provided for the obligation to take rest days or days saved on the time savings account, both for employees who were unable to telework during the period of confinement and for employees who were unable to telework and were kept at home after 04 May 2020 to look after a child under the age of 16 years or because of their vulnerability to COVID-19 or that of the person sharing their home. The companies appealed to the Court of Cassation against the ruling of the Paris Court of Appeal, which held that the measures taken by the companies in the memorandum of 29 April 2020 constituted a manifestly unlawful disturbance.

The Court of Appeal was criticised for having:

- ruled that the provisions of Article 20 of the Amending Finance Act No. 2020-473 of 25 April 2020 (post-containment partial activity scheme) were imperative, having substituted, as from 01 May 2020, the partial activity scheme for the derogatory work stoppage scheme previously enjoyed by employees prevented from working due to the need to look after children under the age of 16 years or because of their vulnerability, the partial activity scheme to the derogatory work stoppage scheme from which these employees had benefited until then, to deduce that the companies of the Sanofi group should have placed them on partial activity as of that date and could not therefore require them to take rest days pursuant to Articles 2 and 4 of order No. 2020-323 of 25 March 2022; and
- considered that the employer had to justify economic difficulties of its own in order to have recourse to the derogation provided for in Articles 2 and 4 of the order of 25 March 2020.

In its ruling of 06 July 2002, the Court of Cassation overturned the decision of the lower courts, holding that recourse to the measures provided for in Articles 2 to 4 of the ordinance was not limited solely to situations of economic hardship. These provisions could be used by the employer when the health crisis had an impact on the operation of the company. It was up to the employer to prove the reality of the impact of the health crisis on the operation of the company, without the judge being able to substitute his/her assessment for that of the employer on the choice to make use of these exceptional measures if this proof was provided, an employer of employees in this particular situation (unable to work face-to-face for personal reasons for certain employees) was not required to resort to partial activity, and thus to national solidarity, and could decide to ensure the maintenance of remuneration and benefits arising from the employment contract, despite the employees' inability to work. However, in this case, the employer could not apply the provisions of Articles 2 to 4 of Order No. 2020-323 of 25 March 2020 to these employees, on the grounds that they were incapacitated for work, and required them to take rest days. These measures were designed to respond to the specific situation of the company and could not be used because of the personal situation of certain employees who were incapacitated for work.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Labour Court has issued a judgment on the 'right to disconnect'.

(II) There will be no decision of the Federal Labour Court in the near future on the conformity of the so-called group privilege in temporary agency law.

(III) There are signs of a change in the case law of the Federal Labour Court on collective redundancies.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 'Right to disconnect'

Federal Labour Court, 5 AZR 349/22, 23 August 2023

The Federal Labour Court recently published the reasons for its decision. The Court had ruled that an employee is required to acknowledge an instruction from the employer communicated by text message, even in his/her time off, if he/she is aware on the basis of a company regulation that the employer will specify the work to be performed on the following day in terms of time and place.

The Court based its decision primarily on Section 241(2) of the Civil Code. The decision states verbatim:

> *"According to Section 241(2), each party to the employment contract is obliged to take into account the rights, legal interests and interests of its contractual partner. This serves to protect and promote the purpose of the contract. In the employment relationship, the contracting parties may therefore be obliged to take measures to ensure performance in order to realise the interest in performance. This also includes the obligation to create the conditions for the fulfilment of the contract in cooperation with the other party, to prevent obstacles to fulfilment from arising or to remove them and to ensure that the other party achieves the desired performance success."*

In its decision, the Court also deals with the relevant case law of the CJEU. The Court then states the following:

> *"In the case in dispute, the secondary obligation to take note of the concretisation of the service does not significantly impair the plaintiff´s ability to freely organise his free time within the meaning of this case law. Working time in the sense of labour law therefore does not exist. The rest period is not interrupted by the notification. The plaintiff is free to choose the time at which he takes note of the instruction. The actual moment of taking note of the text message is so insignificant in terms of time that it cannot be assumed that the use of free time is significantly impaired in this respect, either. In its case law on on-call duty, the CJEU has also not addressed the issue that the 'call' to work is working time within the meaning of the Directive."*

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The CJEU held that Article 7(1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union

> *"must be interpreted as not precluding national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus."*

From September 2022, the Infection Protection Act was amended. Under the new law, officially ordered quarantine periods are not counted towards annual leave. However, this does not apply retroactively to earlier periods.

4 Other Relevant Information

4.1 No decision of the Federal Labour Court on the conformity of the so-called group privilege in temporary agency law

At the beginning of the year, the State Labour Court Hanover (judgment 5 Sa 212/22, 12 January 2023) ruled that it could be left open whether Section 1(3) No. 2 of the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG) contradicts EU law, as this provision cannot be interpreted in accordance with EU law and must therefore be applied. Due to the fundamental importance of the decision and in particular "*due to the European law problem of the group privilege*", the Court allowed an appeal to the Federal Labour Court.

Section 1(3) of the AÜG reads as follows:

> *"With the exception of Section 1b sentence 1, Section 16 (1) number 1f and (2) to (5) as well as Sections 17 and 18, this Act shall not apply to the hiring out of employees (...) between group companies within the meaning of Section 18 of the Stock Corporation Act, if the employee was not hired and employed for the purpose of being hiring out".*

The compatibility of this provision with the Temporary Agency Work Directive is often questioned in the literature. Critics argue that the legislator's assumption that intra-group temporary agency workers are not covered by the Directive is incorrect. The Directive, it is further argued, does not contain a group privilege that would allow the legislator to deviate from the Directive's level of protection to the detriment of employees (see only *Hamann*, in: Schüren/Hamann, *Arbeitnehmerüberlassungsgesetz*, 6th edition, 2022, Section 1 para. 634 et seq.).

The Federal Labour Court has now announced that the hearing before the Court that was set for 05 December 2023 has been cancelled as the parties have reached an agreement. The hearing in parallel proceedings—9 AZR 111/23—was also cancelled due to an agreement between the parties.

4.2 Position of Federal Labour Court on collective redundancies

There are signs of a change in the case law of the Federal Labour Court on collective redundancies.

The Sixth Senate of the Federal Labour Court has informed that it intends to revise its case law in that a dismissal in the context of a collective redundancy is invalid due to a

breach of a statutory prohibition within the meaning of Section 134 of the German Civil Code, if, at the time of its declaration, no or incorrect notification pursuant to Section 17 (1), (3) of the Act on Dismissal Protection (*Kündigungsschutzgesetz*, KSchG) has been made. This represents a significant deviation from the case law of the Second Senate of the Federal Labour Court since its ruling 2 AZR 371/11, 22 November 2012. With its decision of 14 December 2023, the Sixth Senate has formally asked the Second Senate whether it adheres to its legal opinion and suspended the legal dispute until the answer to this enquiry is received.

Section 17(1) of the KSchG reads as follows:

> *"The employer is obliged to notify the employment agency in advance 1. in companies with generally more than 20 and less than 60 employees, more than 5 employees, 2. in companies with generally at least 60 and fewer than 500 employees, 10 per cent of the employees regularly employed in the company or more than 25 employees, 3. in companies with generally at least 500 employees, at least 30 employees within 30 calendar days. Other terminations of the employment relationship initiated by the employer are equivalent to dismissals".*

Section 17(3) of the KSchG reads as follows:

> *"At the same time, the employer shall forward a copy of the notification to the works council to the employment agency; it must contain at least the information prescribed in paragraph 2, sentence 1, nos. 1 to 5. The notification pursuant to subsection (1) shall be made in writing and shall be accompanied by the works council's statement on the dismissals. If there is no statement from the works council, the notification shall be valid if the employer can credibly demonstrate that he/she informed the works council at least two weeks before submitting the notification pursuant to subsection (2), first sentence, and if he/she explains the status of the consultations. The notification must contain information on the name of the employer (…). In agreement with the works council, the notification should also include information on the gender, age, occupation and nationality of the employees to be made redundant. The employer must send a copy of the notification to the works council. The works council may submit further comments to the employment agency. It must forward a copy of the statement to the employer."*

The decision of the Sixth Senate is related to the decision of the CJEU, case C-134/22, 13 July 2023 (and to the Opinion of Advocate General *Pikamäe* delivered on 30 March 2023). Following the CJEU's decision, it was to be expected that the Sixth Senate would declare the violation of Section 17(3) sentence 1 KSchG to be irrelevant with regard to the validity of the dismissal (*cf* Federal Labour Court, 6 AZR 155/21, 27 January 2022 (A)). However, the Senate now indicates that it intends to go even beyond this consequence. It is therefore not just a matter of removing the individual legal relevance of the obligation to send a copy of the works council notification to the employment agency, as discussed by the CJEU. Rather, the Sixth Senate is implementing its concerns expressed in May (Federal Labour Court, 6 AZR 157/22, 11 May 2023 (A); see May 2023 Flash Report). It seems that the Sixth Senate denies the individual-protective nature of the Directive as such and therefore seems no longer to see any grounds for invalidating dismissals in future in cases of violations of Section 17 of the KSchG.

Greece

Summary

(I) The Greek government has activated the digital work card, a system for monitoring working hours remotely.

(II) A new law grants a three-year stay and work permits to migrants who entered Greece illegally.

1 National Legislation

1.1 Digital Work Card

The Greek government has activated the digital work card, a system for monitoring working hours remotely. This reform was included in Law 4808/2021. Ministerial Decisions are needed, however, for the gradual implementation of the Digital Work Card. The new system will gradually be expanded throughout the labour market.

The digital work card was introduced by large companies (banks, supermarkets with over 250 employees) on 01 July 2022. All information related to workers' working time, shifts, breaks, etc. is declared electronically.

A ministerial decision (113169/28.12.2023 - Off. Gaz. 7421/B/2023) signed by the Labour Minister expands the implementation of the Digital Work Card. From early 2024 as a pilot and as a mandatory requirement after 01 May 2024, the Card will be implemented in companies that belong to industrial and retail sectors. Companies engaged in the energy, oil and mining sectors are excluded, however. Many other companies such as hotels will also be excluded.

A grace period of three months for administrative sanctions shall apply to industrial firms that have not yet implemented the measure by 01 April 2024, while the grace period is four months for firms engaged in retail trade, meaning that sanctions will effectively start to apply as of 02 May 2024. For small businesses from both sectors, which employ fewer than ten employees, administrative sanctions will start to apply as of 13 May 2024.

The Digital Work Card does not apply to board members and managers, and specifically to those who exercise managerial authority over other company employees or who are authorised to make managerial decisions autonomously or to represent the company.

1.2 Work permits for migrants

Greece's Parliament has approved a new law (Article 193 of Law 5078/2023 that will grant three-year work permits to migrants to address the country's labour shortage).

The law envisages granting a three-year stay and work permit to migrants who entered Greece illegally. This concerns some 30 000 undocumented migrants from non-EU countries who live in Greece and have been working, albeit irregularly, for a minimum of three years.

To be eligible for the permit, according to the law, certain conditions must be met: the illegal migrant must have a job offer from an employer in Greece; must have resided in Greece for at least three consecutive years without a residence permit on 30 November 2023; and must continue to have resided in Greece past that November date.

The deadline for applying for such a permit has been set to 31 December 2024.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

Article 61 para.1 of Law 4886/2022 on the benefits of working parents in the private sector provides that parents employed in the private sector are entitled to work remotely for a period of up to five working days if their children contract COVID-19. If remote work is not possible, parents are entitled to a special leave for that same period in relation to a COVID-19 infection of their children, which is granted for the first four days of the leave, while any other type of absence can be used for the fifth day of such leave.

Greek law provides that the days of sickness during annual leave are not counted; these leave days shall be granted later. This rule does not concern a quarantine period due to COVID-19, as the purpose of quarantine is not comparable with that of sick leave. Therefore, a period of quarantine cannot, in itself, present an obstacle to the attainment of the purpose of paid annual leave, which is intended to allow workers to rest from performing the work they are required to under their contract of employment and to enjoy a period of relaxation and leisure. This is line with the decision of the CJEU.

Therefore, the judgment has no implications for Greece.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) The Parliament passed the Twelfth Amendment of the Constitution (Basic Law) on 12 December 2023, which introduced a new general prohibition of trade unions in the military.

(II) According to Article 49 (1) of Act 93 of 1993 on Occupational Safety, there was a compulsory medical examination at the time of establishing an employment relationship in order to assess the worker's capacity for work. Parliament passed a law on 12 December 2023, which abolished the general medical examination obligation.

1 National Legislation

1.1 General prohibition of trade unions in the Army

Parliament has passed the Twelfth Amendment of the Constitution (Basic Law) on 12 December 2023, which includes the following new text in Article 45 (8):

> *(8) It is prohibited to establish or operate a trade union in relation to the legal status of regulars in the Hungarian Army. Other forms of interest representation in relation to the legal status of regulars in the Hungarian Army may be established and operated in accordance with the special rules contained in the Decree of the Government.*

This introduces a new general prohibition of trade unions in the military service. There is no official explanation for this remarkable change. The only existing trade union (Trade Union in the Army) has been dissolved and will continue its work as an association. Two national trade union associations opposed the proposal in November.

1.2 Medical examination of capacity for work

According to Article 49 (1) of Act 93 of 1993 on Occupational Safety, a compulsory medical examination existed at the time of establishment of an employment relationship to assess the worker's capability to perform the given scope of work. However, Parliament passed an amendment of this provision on 12 December 2023 to reduce the administrative burdens for employers and employees. Article 6 of the new law abolishes this general obligation, as medical examinations will only be necessary if a law specifically requires employers in relation to a defined group/category/sector of workers to order such an examination, or the employer voluntarily undertakes this obligation (amended Article 49 (1) of the Occupational Safety Act).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

An employee is incapacitated for work during a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with

a virus. This is clearly regulated in Article 44 g) of Act 83 of 1997 on compulsory health insurance services. Incapacity for work is an exemption from the requirement of availability and from work duty (Article 55 (1) a) of the Labour Code).

According to Article 124 (1) of the Labour Code:

> *"Annual leave shall be allocated according to the working days stipulated in the work schedule."*

Since exemption from work (such as quarantine under Article 55 (1) a) of the Labour Code) is not a working day that is entered in the work schedule, thus, paid leave cannot be allocated on those days. This gives rise to the right to carry over days of paid annual leave.

It must be noted that there is no provision in the Labour Code that clearly states that paid leave days cannot be allocated on days during exemption from work. At the same time, this can be concluded, since the day of exemption from work is not a working day that is entered in the work schedule. In accordance with this interpretation, this is the general practice in the labour market.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

No new developments have been reported this month.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The CJEU case will not have any implications for Icelandic law, as such cases have not arisen in Iceland, but a likely outcome of such a case would be in line with the German Labour Court's decision.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

(I) The government has expanded the employment permits system.

(II) The High Court ruled that standby periods are not working time.

1 National Legislation

1.1 Employment permits

The government has responded to concerns about staff and skills shortages by expanding the 'critical skills occupation' and 'general employment' lists, making it easier for employers to obtain employment permits for workers from outside the EU/EEA for the specified roles: see the Employment Permits (Amendment) (No. 3) Regulations 2023 (S.I. No. 680 of 2023). The former list now includes, inter alia, chemical engineers and meteorologists and the latter list now includes, inter alia, electricians, mechanics and social care workers. An additional 2 700 permits for the meat, dairy and horticultural sectors will also be available. The minimum salaries payable to those obtaining general employment permits will increase to EUR 30 000 with effect from 01 January 2024. The expansion of the system follows a public consultation on the employment permits system and the Outcome of the Review of Employment Permits Occupation Lists carried out by the Department of Enterprise, Trade and Employment.

2 Court Rulings

2.1 Working time

The High Court, IEHC 719, Walsh v Kerry

The High Court has upheld decisions of the Labour Court that a retained firefighter was not 'working' for his employer during periods when he was 'on standby', awaiting a call-in in the event of a fire or other alert: *Walsh v Kerry County Council* [2023] IEHC 719.

The claimant received a 'retainer' fee to reflect the fact that he was on standby 24/7 and additional payments in respect of periods when he was called-in. He was required to reside and work within a 'reasonable' distance of the fire station and was further required to be at the fire station within ten minutes of receiving the alert. There was, however, a minimum requirement of 75 per cent attendance at alerts. The average number of alerts per annum over the previous six years was 52.

The claimant ran a 'Bed & Breakfast' with his partner and was engaged in other activities such as organising golf tours.

In coming to its decision that the periods of standby were not 'working time', the Labour Court considered the CJEU decisions in case C-518/15, 21 February 2018, *Matzak*; case C-580/19, 09 March 2021, *Stadt Offenbach*; and case C-214/20, 11 November 2021, *Dublin City Council*. The Labour Court concluded that the constraints placed on the claimant did not have a very significant impact on the management of his free time and, consequently, the time spent on standby was not 'working time'.

Appeals from the Labour Court are submitted to the High Court, but only on points of law. Here, the High Court ruled that the Labour Court had applied the correct legal test, emanating from CJEU case law, and was entitled to reach the conclusion that the constraints on the claimant were not such as to 'objectively and very significantly' affect him from freely pursuing his business and social interests during periods on standby.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

This situation has not arisen in Ireland nor is it covered expressly in Part III of the Organisation of Working Time Act 1997 ('the Act') which provides, in Section 19, for a minimum of four weeks paid annual leave per year. The position of a worker on annual leave who was required to quarantine has not arisen, but the answer would have depended, as in this case, on whether the worker had to quarantine because he/she was infected with the COVID virus or because he/she had been in contact with someone who was infected. If the former, then the annual leave could be carried over pursuant to Section 20(1)(c) of the Act. If the latter, then the annual leave could not be carried over, as Section 19(2) of the Act only provides that a day that would be considered a day of annual leave shall not be regarded as such, if the employee concerned is 'ill' on that day and furnishes to his or her employer a medical certificate to that effect.

4 Other Relevant Information

4.1 Labour market statistics

The Central Statistics Office has published its most recent Employment, Occupations and Commuting series based on the 2022 census data. The main highlights are that the number of people at work has increased by 16 per cent since 2016 to 2.3 million. Of those at work, 53 per cent are male. Of those at work, 14 per cent work part time, but only 7 per cent of male workers work part-time compared to 23 per cent of female workers. The number of self-employed fell from 313 000 in 2016 to 309 000 in 2022.

The data also reveals that 32 per cent of the workforce (747 961) work from home at least one day a week with nearly 204 000 persons working fully remote. Of those working remotely, 15 per cent did so for one day a week; 17 per cent for two days; 16 per cent for three days; 10 per cent for four days; and 33 per cent for five days or more.

Italy

Summary

The Constitutional Court dealt with discrimination against a pregnant woman.

1 National Legislation

1.1 Budget law

On 29 December 2023, the Italian Parliament approved the State budget for the financial year 2024 and the multi-year budget for the period 2024–2026. The budget law contains some provisions on social security, as well as on tax matters. A detailed description will be provided in the January 2024 Flash Report.

2 Court Rulings

2.1 Discrimination against a pregnant woman

Corte costituzionale, No. 211*, 04 December 2023*

According to the Italian Constitutional Court, delaying the placing in service of the winner of a public competition because she is pregnant is discriminatory, and therefore unconstitutional.

The case concerned the winner of a public competition for assistant inspector of the penitentiary police, who, because of her pregnancy, had not been able to attend the subsequent training course (the passing of which was necessary for definitive recruitment) by being admitted to the first subsequent training course, which, however, took place 12 years later. According to the Constitutional Court, deferring the entry of the winner of the competition into the role because she is absent due to maternity is an unjustified unequal treatment of women and compromises women's timely access to employment and involves the risk of discouraging participation in competitions and even the choice of maternity.

In the ruling, the Constitutional Court referred to Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and CGUE 06 March 2014 C-595/12, Napoli.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In Italy, according to Article 26, co.1, Law Decree 17 March 2020 No. 18, converted into Act 24 April 2020 No. 27,

> *"the period spent in quarantine with active surveillance or in fiduciary residence with active supervision of which Article 1, paragraph 2, letters h) and i) of Decree-Law 23 February 2020, No. 6, by private sector workers, is treated as a disease for the purpose of the intended economic treatment in the reference legislation and is not computable for the purposes of compositional period".*

Therefore, in Italy, during the COVID pandemic, a period of quarantine ordered by a public authority of a worker who had been in contact with a person infected with the virus was treated as sick leave and not annual leave.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

No developments were reported this month.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The CJEU decision in case C-206/22 does not have any implications for Latvian legal regulations. On 21 March 2020, the amendments to the Law on Maternity and Sickness Insurance were adopted, envisaging the right to sickness leave (and statutory social allowance) not only for those infected with COVID-19, but also those in quarantine due to having been in contact with infected persons. Such national legal regulation, in principle, excludes the possibility to consider periods coinciding with quarantine as annual leave.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

No new developments have been reported this month.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In case C-206/22, the CJEU (First Chamber) ruled as follows:

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 and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus.

In the present case, an employee in Germany was granted paid annual leave for the period from 03 to 11 December 2020. On 02 December 2020, the competent authority ordered this employee to quarantine for the period from 02 to 11 December 2020, on the ground that he had been in contact with an individual infected with the SARS-Cov-2 virus (CJEU case C-206/22 paras 7–8).

According to the case law of the *Bundesarbeitsgericht* (Federal Labour Court, Germany), the sole purpose of the right to paid annual leave is to release workers from their obligation to work while ensuring that their leave is paid. The employer is not, however, responsible for the conditions under which leave is taken. The provisions applicable under German law require the employer to carry over the days of leave granted only where workers can demonstrate incapacity for work that arises during the period of leave. Mere quarantine does not amount to incapacity for work (CJEU case C-206/22 paras 11–12).

The CJEU has confirmed this approach from the perspective of European labour law. The Court stated that such a worker is in a situation that is different from that of a worker on sick leave, who is subject to physical or psychological constraints caused by illness. A period of quarantine cannot, in itself, present an obstacle to the attainment of the purpose of paid annual leave, which is intended to enable workers to rest from performing the work they are required to under their contract of employment and to enjoy a period of relaxation and leisure. Although quarantine is likely to affect the conditions under which workers enjoy their free time, it cannot be considered that it undermines in itself those workers' right to have the actual benefit of their paid annual leave. During the period of annual leave, workers cannot be made subject by their employer to any obligation, which may prevent them from pursuing freely and without interruption their own interests to neutralise the effects of work on their safety or health.

Consequently, provided that the employer satisfies those obligations, it cannot be required to compensate for the disadvantages arising from an unforeseeable event, such as quarantine ordered by a public authority, that would prevent its employees from taking full advantage of their right to paid annual leave. Directive 2003/88/EC is not intended to ensure that any event capable of preventing workers from enjoying fully and in the manner they wish a period of rest or relaxation is a reason for granting workers additional leave so as to ensure that the purpose of annual leave is attained (CJEU case C-206/22 paras 42–45).

Liechtenstein has largely adopted the labour law of Switzerland. As it is a small country, court decisions are relatively rare. The Liechtenstein courts therefore regularly follow Swiss case law and doctrine. The legal question addressed by the German courts and the CJEU is not expressly regulated under Liechtenstein and Swiss law and as far as can be seen, has not yet been decided by a Liechtenstein or Swiss court.

The legal interpretation under German law and the CJEU's ruling appears entirely understandable in the light of Liechtenstein and Swiss law. However, the opinions expressed by experts during the pandemic went predominantly in the opposite direction. For example, it was argued that annual leave is not only intended to provide recreational value in the narrower sense (recovery from work), but also contains a social component, such as the need to meet up with friends more often or to pursue hobbies more intensively (see, for example, the corresponding statement by Roger Rudolph in SRF, "Was passiert bei Corona-Quarantäne statt Ferien?, 28 October 2020; cf., e.g., also Jusletter No. 71, 08 February 2021). Case law also generally attaches great importance to the fact that employees must have sufficient time to prepare and plan their annual leave (Wolfgang Portmann and Isabelle Wildhaber in: Schweizerisches Arbeitsrecht, 2020).

Against this background, it would come as no great surprise if the case had been decided differently in Liechtenstein or Switzerland. This would not constitute a violation of CJEU judgment C-206/22, as the CJEU has only ruled that the refusal to carry over annual leave does not violate EU law. However, this decision does not rule out the possibility that a carry-over of annual leave may be permissible.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

The Lithuanian Supreme Court called for a Directive-conform interpretation of the provisions on on-call duty, imposing the obligation to consider the intensity and nature of the employee's rest time restrictions for qualification of on-call duty periods as working time.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 On-call duty at home of security services worker

Lithuanian Supreme Court, 20 December 2023, No. e3K-3-328-684/2023

The Lithuanian Supreme Court clarified the notion of 'on-call duty' when this duty is performed at home. The Labour Code of 2016 introduced a new system of on-call duty with the following categories of on-call time:

- active on-call time, when on-call duty is an essential key element of the work function assigned to the employee by contract (for example, guard, on-call duty guard, security guard, etc.);
- passive on-call time, when an employee is required to be present at a place specified by the employer and is on standby to perform his or her functions, as needed;
- and passive on-call duty at home.

This is the time spent by an employee outside of the workplace (e.g. at home) but during which he/she is on standby to perform certain activities or travel to his/her workplace if the need arises during normal rest hours. The legislator expressly indicates that this period (of standby) shall not be considered working time unless activities are actually performed (Article 118 (4) of the Labour Code). In the case before the Lithuanian Supreme Court, the worker of the security services firm, who had been placed on on-call work duty at home, argued that the entire on-call period at home should be considered working time in the light of Directive 2003/88/EC.

The Lithuanian Supreme Court reviewed the national legislation (Article 122 of the Labour Code) in the light of Directive 2003/88/EC. First, it confirmed that there is no third category of the notion 'time' in the context of working time regulations – the time employees spend within the scope of either 'working time' or 'rest periods' and therefore 'on-call duty at home' can also be considered both – as both working time or a rest period, depending on the actual circumstance. It confirmed that the attribution of certain periods of time (regardless of their qualification in the contract as 'passive on-call duty') depends on the factual intensity of restrictions to use the time as leisure and rest time. Given the fact that the employee was required to be ready in 1.5 minutes to respond, he had to be ready to respond on a permanent basis during on-call duty, the Court agreed that the nature and intensity of the employee's restrictions allows for a classification of this on-call duty at home as 'working time'.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In Lithuania, there was no similar case in which an employee claimed the carry-over of days of (granted) paid annual leave if they coincided with the imposed quarantine. Similarly, Lithuanian law does not qualify quarantine as a period of sick leave. Quite the opposite approach was taken – in case of (possible) contact with the virus, the law first required the employer to consider remote working, and if possible, to offer this opportunity to the employee. If there was no possibility to work remotely, the worker would be considered as being on idle time (partially compensated by the employer) (Article 47 (3) of the Labour Code). If the employee refused to work remotely, he/she would be suspended from work without pay (Article 49 (3-1) of the Labour Code).

There is no special regulation about the transferability of paid annual leave in case of quarantine.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

The Luxembourg Court of Appeal has adopted case law on the posting of workers, transfer of undertakings, part-time and fixed-term work, multiple employers and the protection of pregnant workers.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Posting of workers

Cour Supérieure de Justice, No. CAL-2019-00682, 05 October 2023

In the present case, an employee recruited in Luxembourg, whose contract had been expressly made subject to Luxembourg employment law, reached the age of 65, which is the legal retirement age in Luxembourg. Under Luxembourg law, the employment contract terminates automatically upon reaching retirement age. Under French law, on the other hand, the fact that an employee reaches a certain age or is entitled to a retirement pension cannot result in automatic termination of the contract.

The employee claimed that French law was applicable, and that he had therefore been unfairly dismissed by his employer. The employer asserted that the matter was governed by Luxembourg law.

The Court began by clarifying that a distinction must be made between temporary and permanent posting (*détachement*). Where work is performed abroad, Luxembourg law is only applicable to the contractual relationship if the posting is temporary, not if it is permanent. If the secondment is permanent, on the other hand, the entire contract becomes subject to the other country's (in this case, French) law.

In the Court's view, the concept of temporary posting presupposes first that the employee has actually performed the work for which he/she was engaged in a State other than the one in which he/she was subsequently required to work. This was the case here.

Referring to European directives on posting of workers and the case law of the European Union, the judges noted that the concept of "limited period" does not have a fixed duration in labour law. The posting remains temporary as long as it is limited in time and a connection with Luxembourg is maintained.

In the light of various factual elements, the Court concluded that a link with Luxembourg had been maintained. Under these circumstances, it held that the employee's posting to France had been temporary.

Consequently, the "country where the work is habitually carried out" within the meaning of Art. 8 of EC Regulation 593/2008 (Rome I) was Luxembourg, and Luxembourg law was therefore applicable.

The question was whether French employment law should not, nevertheless, apply to the issue of retirement. In this respect, the Court determined that certain rules considered to be part of the host State's public policy are applicable to employees posted there. However, the contractual rule relating to retirement under French law was not one of them. Consequently, this rule could not be considered to be a mandatory overriding provision that applied in any event.

As Luxembourg law was consequently applicable, the contract was terminated because the employee had reached retirement age and not because of the employer's will.

2.2 Transfer of undertakings

Cour Supérieure de Justice, No. CAL-2019-01170, 16 November 2023

The Court of Appeal again dealt with a question of a transfer of undertaking in the context of a notarial activity. Under a different composition, the Court of Appeal had determined that notaries did not fall under the (national and European) provisions on transfers of undertakings, as notaries do not perform an "economic activity". This ruling was overturned by the *Cour de Cassation*, as reported in a previous Flash Report (see June 2023 Flash Report).

The Court of Cassation had thus decided that notaries fall within the scope of the rules on transfers of undertakings. However, it remained to be seen in the present case whether the conditions had, in fact, been met. Faithfully adopting the principles set out in European case law, the judges noted that for a transfer of undertaking to take place, two criteria must be met: the continued existence of an organised set of means of production and the pursuit of an identical or similar activity.

They emphasised that the legal classification of the transaction leading to a transfer of undertaking is not relevant, as the list provided by law is not exhaustive; specifically, it may involve the continuation of a notarial activity following the death of the notary.

The rules on takeovers of notarial practices in Luxembourg are indeed fairly specific, bearing in mind that there are a limited number of notaries and that posts are attached to specific localities. The question arose whether the activity had been maintained.

The Court answered in the affirmative: a notary's practice is continued if, initially, a large number of tasks are continued by a notary from another residence, and then a new notary continues the practice on the premises of the former notary's practice, taking over most of the equipment (movable assets).

In the present case, the existence of a transfer of undertaking had been unfavourable for the employee, who claimed indemnities due in case the employer deceases. The heirs argued that the employment relationship had been transferred rather than terminated.

Cour Supérieure de Justice, No. CAL-2023-00037, 30 November 2023

In another case involving the transfer of an undertaking, the situation was more straightforward. An employee claimed continuation of his employment contract due to a transfer of undertaking, even though his employer had ceased operating a restaurant at the end of July and had opened another restaurant in mid-November.

In the Court's view, as the customers of a restaurant are normally attached to the essential elements of such an establishment, such as its location, type of cuisine or setting, a return of customers is not established when, after several months, the employer opens another restaurant in a different location and a different type of cuisine and layout.

Combined with the interruption of activity for several months and the absence of proof that employees had been taken over in the new restaurant, this failure to take over customers was decisive for the Court in concluding that no transfer of undertaking had taken place.

2.3 Protection of pregnant women vs. irregular situations

Cour Supérieure de Justice, No. CAL-2023-00496, 19 October 2023

Pregnant women are protected against dismissal. If the employer is in possession of the pregnancy certificate (*certificate de grossesse)* and dismisses the employee anyway, she has the option of applying to the Labour Court under an accelerated procedure to have the dismissal declared null and void.

Usually, if the court determined that the dismissal occurred despite the submission of a pregnancy certificate, it has no choice but to declare the dismissal null and void and order the pregnant employee to be reinstated in her job.

In present case, however, the dismissal was with immediate effect because the employee, as a third-country national, was no longer in the country legally due to her expired work permit.

The Court found that the employment of third-country nationals in an irregular situation was prohibited and constitutes a criminal offence on the part of the employer.

It therefore ruled that the irregular situation of an employee who is no longer in possession of a work permit constitutes an "objective cause" that justifies the termination of the employment contract, even when she is pregnant.

As a result, the claim for nullity was dismissed.

It is interesting to note that in the present case, the judge weighed two reciprocal considerations against each other: protection of the pregnant woman and protection of the labour market. The dispute thus pits a personal right against economic policy considerations. In any event, both the protection of pregnant women and the rules on the admission of third-country nationals to the European labour market are anchored in European law. There would probably have been grounds for taking the European texts into consideration, or even for submitting a preliminary question to the ECJ, but neither the parties nor the judge ventured down that path.

2.4 Part-time work

Cour Supérieure de Justice, No. CAL-2021-00812, 26 October 2023

The Labour Code provides for a specific procedure that enables the employer, subject to compliance with certain formalities and an obligation to state the applicable reasons, to unilaterally amend the employment contract to the detriment of the employee (*modification unilatérale et défavorable du contrat de travail*).

The question arose whether this procedure can be applied to part-time employees.

According to Article L. 123-4 (2) of the Labour Code applicable to part-time employees, any change in the distribution of working hours over the days of the week can only be made by mutual agreement between the parties.

According to the Court, this Article refers to a different situation and was not applicable. It therefore accepted that no legal obstacle existed to making such a change.

The law provides for a stricter framework for flexibility in the working hours of part-time employees, since they have often chosen this form of contract due to other constraints, such as family commitments or another professional or voluntary occupation.

In the present case, the change was from 36 hours a week to 24 hours a week.

However, the question might also arise as to whether an employer could use this procedure to require an employee to change from full-time to part-time work, or vice versa. The situation would probably have to be assessed more critically, particularly in the light of clause 5(2) of Directive 97/81/EC of 15 December 1997.

2.5 Use of fixed-term contracts

Cour Supérieure de Justice, No. CAL-2020-00094, 16 November 2023

Apart from a few specific situations, the use of fixed-term contracts in Luxembourg is globally far more restrictive than required by Directive 1999/70/EC.

However, an exception, which in 1989 represented a kind of political compromise, was introduced for "jobs for which it is customary to not take recourse to a fixed-term contract" (*emplois pour lesquels il est d'usage constant de ne pas recourir au CDI*). A Grand Ducal regulation, which has never been amended since, lists the jobs concerned.

The dispute concerned a person who had been hired as a "general coordinator" (*coordinateur general*) by an association to prepare a Luxembourg city's bid to become the European Capital of Culture. The association itself had been set up solely for this specific project. Several fixed-term contracts were concluded.

The employee questioned whether the use of the fixed-term contract had been justified.

The Court began by recalling the general principles: recourse to an open-ended contract is the principle in labour law. Recourse to a fixed-term contract is an exception that must fall within the limits defined by the texts that strictly regulate it.

To benefit from the exception for jobs for which it is common practice to not use a fixed-term contract, the employer must establish proof of this practice, which requires it to demonstrate that the job in question is generally filled by employees hired under a fixed-term contract.

The purpose of a fixed-term contract, whatever its reason, cannot be to fill a job on a permanent basis that is linked to the "normal and permanent activity of the company", a concept that the judge must assess on a case-by-case basis.

However, the activity of a general coordinator is part of the permanent activity of an association in the cultural field.

The main lesson to be learned from this decision is that the fact that the employer's structure is only set up for a project of limited duration does not in itself allow recourse to a fixed-term contract. In such a situation, the employer is required to conclude a permanent contract and to dismiss the employee at the end of the project on economic grounds, respecting the notice period for dismissal.

2.6 Multiple employers

Cour Supérieure de Justice, No. CAL-2021-00958, 14 December 2023

In the concept of the Luxembourg Labour Code, an employment relationship is concluded between two parties, the employer and the employee.

However, practice shows that an increasing number of groups of companies want to employ the same employee to work for several entities in the group. Legislation does not provide a clear and optimal solution for this situation. Employer groups under French law do not exist in Luxembourg. In practice, "global employment contracts" are concluded with several employers, but the legal regime has not yet been fully clarified.

Similarly, Luxembourg case law has adopted the theory of co-employment (*co-emploi)* from French case law in situations where the formal employer is no more than an empty shell, entirely controlled and directed by another structure. This is an application of the principle of the fictitious company, which thus becomes legally transparent. Whereas under normal circumstances, employees cannot bring claims against their employer's parent company, they can do so in a factual situation of co-employment.

In a judgment of 14 December 2023, the Court extended the concept of co-employment to a situation that slightly differed from the previous two. It concerned an employee who had been placed at the disposal of another company. This company exercised a

certain amount of control over his day-to-day work, defining his working hours and schedule, agreeing to holidays and deciding on reassignments. It also had influence over career development and requests for part-time work. The employee was also subject to the health, safety and working condition rules of the company in which he worked on a daily basis.

According to the Court, a situation of co-employment may arise when the company that recruited the employee places him/her at the disposal of another company, which decides the organisation of work, working hours, leave and assignment and has an influence on career development, part-time work and disciplinary powers, while ultimately bearing the employee's salary costs.

An employee may be under the joint authority of two companies, alternatively or jointly receiving instructions and falling under the control of both entities. Dual employers imply dual subordination.

For the period during which there is joint authority, the two entities are to be considered the employee's employers.

The dispute arose because the employee, after taking part-time parental leave (to which he was entitled, in principle), wanted to continue working part-time. The "user company" then terminated the "secondment". The judgment did not rule on this particular issue but given that the "user company" was considered a co-employer, this decision probably amounted to dismissal.

It is difficult to grasp the nuance between the situation in this case and a genuine "*mise à disposition de salariés*", which is prohibited under Luxembourg law, since it would circumvent the restrictive rules governing temporary agency work. In principle, however, a "*mise à disposition"* is defined by the transfer, even if only partial, of the employer's authority, which appears to have been the case in this instance. Nevertheless, according to our analysis, case law is becoming increasingly open to the practice of regularly using "secondments" of employees or making experts available, i.e. workers who are integrated into the user company's structure for a few months.

2.7 Termination by mutual agreement

Cour Supérieure de Justice, No. CAL-2022-01121, 07 December 2023

The rules laid down by the Luxembourg Labour Code for the validity of a termination by mutual agreement of an employment contract (*résiliation d'un commun accord)* are fairly strict. A written document signed in duplicate must be drawn up.

While in the past, the Court has acknowledged exceptions, for example because a second contract was concluded with the same company or a related company, it applied this rule rigorously in the present case.

It was shown that the employee had entered into another employment contract. However, in the Court's view, the conclusion of a new employment contract with a company that is not shown to be part of the same group is not equivalent to termination by mutual agreement, as there is no legal provision prohibiting an employee from being bound simultaneously by different employment contracts with several employers.

The question whether it is impossible—in the light of European provisions—to combine jobs that exceed maximum daily or weekly working hours was not discussed in this case.

2.8 Bonuses and gifts

Cour Supérieure de Justice, No. CAL-2022-00169, 16 November 2023

The payment of bonuses is not mandatory under Luxembourg law. It is accepted that such a payment may become an acquired right (*droit acquis*) when it is made

continuously, consistently and generally (consistency, permanency, regularity; *constance, fixité, généralité*).

However, it is also acknowledged that the employer can avoid being bound by an acquired company custom when it clearly stipulates that any bonus remains purely voluntary.

The validity and effectiveness of such clauses are accepted in case law. The Court has just clearly reaffirmed this.

For the theory of acquired right to be invoked, the employee must not only demonstrate the material element (consistency, permanency, regularity), but also an intellectual element, namely that the employer acted with the awareness of granting this right on a compulsory basis. In the case of an explicit clause, this cannot be the case. Granting a benefit (in this case, a relatively rare occasion, an adjustment of contributions to the supplementary pension plan to the cost of living) sporadically does not give rise to an acquired right.

Cour Supérieure de Justice, No. CAL-2023-00103, 14 December 2023

Another decision clearly confirms the validity of voluntary clauses. Thus, stipulations between parties providing for discretionary, voluntary or unbound bonuses paid to employees do not come up against any legal provision of public order and are in principle valid.

Similarly, the fact that an employer has paid bonuses in the past does not constitute a waiver of a voluntary clause stipulating that such bonuses are discretionary.

2.9 Refusal to wear a mask – COVID-19

Cour Supérieure de Justice, No. CAL-2022-00548, 09 November 2023

The Court dealt with the case of an employee who had refused to wear a mask despite the obligation that existed during the pandemic to wear one.

In a normal situation, such repeated refusal would typically have justified dismissal. In this case, however, there were two specific circumstances. Firstly, the employee had a medical certificate exempting him in principle from wearing a mask. Secondly, the Court criticised the employer for organising several face-to-face meetings in a small room that did not allow for safety distances to be respected, without providing any explanation or justification as to why this was necessary. The dismissal was therefore declared unfair.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The decision should have no implications for Luxembourg.

During the COVID-19 pandemic, the rules on quarantine in the event of contact with an infected person were initially laid down in emergency regulations and then in legislation, with numerous changes. In principle, quarantine orders were treated the same way as certificates of incapacity for work (*certificat d'incapacité de travail*). The primary purpose of this alignment was to ensure that the employee's salary and medical expenses were covered.

After a certain stage, it was possible to obtain derogation certificates allowing the employee to work remotely during the quarantine period.

There does not seem to be any case law that deals with the issue of postponing leave in relation to quarantine. However, given that quarantine is treated as a period of incapacity for work, there is a strong likelihood that a court would have considered that leave was deferred when it could not be used up at the end of the year due to the

imposition of quarantine. However, the case law on the postponement of leave is based on European case law. In view of the C-206/22 ruling, a court would probably now align its decision with the case law on the question of carry-over at the end of the year.

The situation could be different where, as in C-206/22, leave has been granted and then a quarantine occurs during that period. In fact, incapacity for work interrupts leave under Article L.233-11 of the Luxembourg Labour Code, a provision of national origin that existed before the European regulations introducing a right to annual leave. In this case, a court would probably have considered that the alignment of quarantine to a period of incapacity for work meant that leave was interrupted by quarantine.

4 Other Relevant Information

Nothing to report.

Malta

Summary

The Employment and Industrial Relations Act, 2002 has been amended to include a set of definitions regarding employment agencies.

1 National Legislation

1.1 Employment and Industrial Relations Act, 2002

The Employment and Industrial Relations Act, 2002 has been amended to include a set of definitions which had already been introduced by means of the Employment Agencies Regulations, 2023. The main definitions are the following:

`Outsourcing agency´ means a natural or legal person, and in the case of a legal person whose objects in its memorandum of association include the performance of the relevant activities as well as all activities ancillary or incidental thereto, but do not include such objects which are not compatible with the services of an outsourcing agency, who enters into contracts of employment or employment relationships with employees, and who assigns, whether on a regular or on an irregular basis, the employees to user undertakings to work there temporarily, by being physically present at the premises of the user undertaking or working remotely "*under the supervision, direction and control of the outsourcing agency"* (emphasis added), whether or not such an activity is the main or ancillary activity of the outsourcing agency.

The following definition of a `temporary work agency´ has also been introduced:

`Temporary work agency´ means a natural or legal person, and in the case of a legal person whose objects in its memorandum of association include the performance of the relevant activities as well as all activities ancillary or incidental thereto, but do not include such objects which are not compatible with the services of a temporary work agency, who enters into contracts of employment or employment relationships with temporary agency workers and who assigns, on a regular or on an irregular basis, the temporary agency workers to user undertakings "*to work there temporarily under their supervision"* (emphasis added), direction and control, whether or not such activity is the main or ancillary activity of the temporary work agency.

The difference between the two becomes immediately apparent – in the first case, the employee remains under the supervision of the outsourcing agency, whilst in the second case, the employees work under the supervision of the user undertaking. Furthermore, if one then refers to the Employment Agencies Regulations (see also November 2023 Flash Report), it becomes evident that outsourcing refers mainly to a certain set of activities, professional and technical activities listed in the First Schedule of the Employment Agencies Regulations, whilst temporary agency work refers to other activities that do not involve those in the First Schedule of the Employment Agencies Regulations.

It would appear, *prima facie*, that the legislator wants to exempt the First Schedule activities (i.e. outsourcing activities) from the protection afforded to the temporary agency workers under the Temporary Agency Workers Regulations, 2010, because temporary work agency under the Employment Agencies Regulations now does not include services provided through outsourcing agencies. This begs the question: is the fact that the outsourcing agency workers work under the supervision of the outsourcing agency itself sufficient to exclude such workers from the protection of the Temporary Agency Workers Regulations, 2011? If this were not the case, these regulations and their implications would be in breach of European labour law. However, the legislator may very well have "forgotten" (for want of a better word) to cross-refer the 2023

Regulations and consequent 2023 amendments to the Employment and Industrial Relations Act, 2002 and hence, only time will tell. However, on the other hand, the fact that the definitions and the relative distinction between outsourcing agencies and temporary work agencies were included in the Employment and Industrial Relations Act, 2002 could very well mean that it also applies to the Temporary Work Agencies Regulations, 2010, which automatically means that outsourcing agencies workers are excluded from the application of Temporary Agency Workers Regulations, 2010.

As already submitted previously, the Employment Agencies Regulations and the consequent amendment of the Employment and Industrial Relations Act in December 2023 are yet to be tested and hence, the observations contained herein are only what emerges from the written text. Whether the text, as written, will remain and/or whether practice will fine-tune the definitions in the law (through the appropriate channels) remains to be seen. There is also undoubtedly abuse, even in the sector of the services provided by the (now-called) outsourcing agencies. The main question remains: does the fact that the work is performed under the supervision and direction of the outsourcing agency render it sufficient to state that such workers have sufficient protection against discrimination, for example? And again, the main problem with these regulations is that Maltese law, unlike other systems, does not define what "temporary" means. It may simply be too early to determine such matters. However, it is interesting to note that such a simple legislative intervention may actually deprive a set of workers from the protection afforded to these particularly vulnerable workers, even if the work is technical or professional and offered through outsourcing agencies.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

This is a very interesting decision because the question whether annual leave days continue to accrue during a period of quarantine leave has been discussed many times since the onset of the pandemic.

Maltese law appears to be aligned with the ruling of the CJEU in this judgment because Article 6 of the Vacation Leave National Standard Order, 2018 states the following:

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

It is clear that Maltese law is in line with the CJEU judgment, but it must be stated that the CJEU's decision is 'right' in its application. A problem arises when the employer expects the employee to remain cooped up at home during the quarantine period, but the problem is not one of law but one of employer and employee expectations. It is a case in which the employer wants to have its cake and eat it, too – and it is a matter that requires more good faith and common sense than legislative intervention.

Hence, the implications of the CJEU judgment are clear and unequivocal: the law in Malta is correctly applied in this regard. The CJEU's judgment also respects and is

aligned with the *raison d'être* of annual leave. It is submitted that it is also in the economic interests of the employer that annual leave does not accrue during a period of quarantine leave. It is only fair and equitable that the pandemic burden be carried by both parties of the employment contract – whilst it may be deemed unfair for the employee to not have his/her annual leave days, which would have accrued during the quarantine leave period, and the quarantine leave is a form of imposition on the employee (and employer), it is not fair either that the employer has to pay twice for the fact that the employee may have come into contact with an infected individual. In Malta, it became clear that some employees purposely hosted individuals in their homes to expose them which would render the employee subject to quarantine leave – even that is abusive and unfair.

So, all in all, even from a social perspective (which may very well be outside the scope of the present report), the CJEU judgment is based on sound legal reasoning and ultimately respects the element of good faith in employment relationships.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) A district court ruled on the question whether an obligation to arrive early prior to a shift constitutes 'working time'.

(II) Two district courts have applied the concept of 'transfer of undertaking'.

(III) A letter to Parliament accompanies a report on migrant workers.

(IV) An internet consultation has started on working with reprotoxic substances.

(V) Two letters to Parliament address the gender pay gap and simplify income support.

(VI) A progress letter and report have been published: one on addressing financial concerns, poverty and debts, and one on equal labour market opportunities.

1 National Legislation

1.1 Broadening the scope of the Whistleblower Protection Act

Whistleblower Protection Act (*Wet bescherming klokkenluiders*) came into force for large employers (at least 250 employees) on 18 February 2023. On 17 December 2023, it also entered into force for medium-sized employers, i.e. employers with 50 or more employees in both the public and private sectors.

2 Court Rulings

2.1 Training costs

District Court Midden-Nederland, ECLI:NL:RBMNE:2023:6119, 17 November 2023, (published 01 December 2023)

This case concerned the interpretation of Article 13 of Directive 2019/1152 and, more specifically, a legal matter that revolves around an employee who worked as a truck driver for an employer from 10 October 2022 to 01 February 2023.

Prior to commencing employment, the employee completed two courses that are necessary to obtain 'Code 95', a requirement for professional truck driving. The employer deducted EUR 551.00 for these courses from the employee's final pay, resulting in a disagreement. The employee argued that Article 7:611a Civil Code (pertaining to employer-funded training) is applicable and therefore requested full payment for the courses and additional wages for the course days.

The District Court rule that Article 7:611a Civil Code does not apply in this case for various reasons. Notably, the employee had attended the courses before commencing employment, and the provision primarily concerned agreements under the employment relationship. Additionally, the Court clarified that the Article does not cover courses necessary for initial job requirements.

However, while acknowledging the employee's internal repayment regulation in its post-employment policy, the Court ruled that this was not binding during the pre-contractual period. The Court emphasised that any financial agreements related to training should be clearly communicated in writing. Since the employer had failed to document the repayment arrangement, the deduction was deemed unjust. The Court awarded EUR 551.00 to the employee but rejected additional wages for the course days, considering he was not an employee during that period.

2.2 Transfer of undertakings

District Court Rotterdam, ECLI:NL:RBROT:2023:11131, 28 November 2023 (published 04 December 2023)

ECLI:NL:RBROT:2023:11394, 27 October 2023 (published 08 December 2023)

These cases both concerned the concept of 'transfer of undertaking' as laid down in Directive 2001/23/EC and Article 7:662 Civil Code. ECLI:NL:RBROT:2023:11131 concerned the alleged transfer of an undertaking consisting of the provision of crew to ships, specifically to the company SB, from Fairwind Ltd (Fw) to VMS. The District Court concluded that no transfer of undertaking had taken place. First, there was no transfer by 'agreement'. VMS disputed that SB had terminated the crew management agreement with Fw and that from that point in time, SB no longer used the services of Fw and instead used those of VMS. Furthermore, the provision of crew by Fw to SB did not constitute an 'economic entity'. Contrary to Fw's contention, Fw appeared to have several clients, whereas SB used several contractors to provide it with crew. Also, the number of crew members made available by Fw to SB constantly fluctuated. Finally, it had not been established that Fw's identity had been retained because no crew members were taken over and only a few employees with a history with Fw were employed by VMS after applying for jobs, with an interruption of several months between the employment contracts. There were no other indications that the identity had been retained.

ECLI:NL:RBROT:2023:11394 concerned the alleged transfer of an insurance undertaking. HDI is an insurer. One of HDI's insurance portfolios was the motor insurance portfolio. HDI phased out the motor insurance portfolio from 01 July 2021. On 01 January 2022, this portfolio had entered full 'run off', meaning that no new motor insurance policies were being offered from that date onward. HDI transferred the run-off portfolio to X with effect from 01 July 2022. For the continuation of the claim settlement of the run-off portfolio, Y was contracted. The employees claim a declaratory judgment that there was no transfer of undertaking from HDI to X and/or Y. The District Court rejected the declaratory judgment. At the time, the run-off portfolio was transferred from HDI to X, the claims settlement of this portfolio having passed directly (in an indivisible moment) to Y. Therefore, there was a transfer by 'agreement'. Moreover, the District Court established that the claims division, which was responsible for the activities relating to the claims settlement of the run-off portfolio, had functioned continuously and independently from 01 July 2021 until the transfer of the portfolio to X and Y on 01 July 2022. It must therefore be considered that already one year before the transfer, a new (slimmed-down) economic unit (part of HDI's business), capable of pursuing an economic activity with its own objective, had been created. It is also not in dispute that until 01 July 2022, employees at HDI were continuously working within this unit as (supporting) claims handlers of the run-off portfolio. It therefore cannot be said that the employees' work had completely "dried up" at the time of the transition of this portfolio as of 01 July 2022. With regard to identity retention, the District Court considered that the activities related to the claims handling of the run-off portfolio must be classified as labour-intensive, since without the specialised staff in this field, the work cannot be carried out. It is also not in dispute between the parties that Y continued the activities in question (the work relating to the claims handling of the run-off portfolio) uninterruptedly and took over HDI's staff in charge of this task. HDI also stated, without dispute, that it had transferred all items necessary for the activities, including customer and insurance data, claims files, data and receivables to Y. The employees have also not disputed that, at the time of the transfer of the activities relating to the run-off portfolio on 01 July 2022 to Y, they continued to perform the same work without interruption, i.e. the work they had previously performed as of 01 July 2021 for HDI. Admittedly, it is to be expected that at some point, no more claims will arise from the run-off portfolio and that employees will (also) have to carry out other tasks at Y, but that does not alter the fact that, in line with the *Ellinika Nafpigeia* judgment, the identity

of the economic unit was preserved at the time of the transfer. There was therefore a transfer of (part of an) undertaking from HDI (through X) to Y.

Both rulings aptly apply the *Spijkers* criteria and seem in line with the CJEU's case law.

2.3 Working time

District Court Haarlem, ECLI:NL:RBNHO:2023:12036, 29 November 2023 (published 13 December 2023)

This is yet another case concerning the question whether an obligation to arrive early prior to each shift constitutes 'working time' within the meaning of Directive 2003/88/EC. In the present case, the employee, a customs officer at Schiphol, had to physically report to his supervisor 15 minutes prior to the start of his shift. The District Court qualified the quarter-hour as working time. During this time, the employee was available to the employer and reported to his supervisor, who recorded his presence. He received instructions about his work at a specific gate and used the quarter-hour to go there. Thus, the employee was at the disposal of the employer during that quarter-hour. The District Court emphasised that the employee's actions were carried out under the authority of the employer and that employee did not have free use of his time. It also considered the supervisor's instructions as work instructions. The fact that the employee could not freely allocate his time and that the exact work location was known only after receiving instructions were highlighted as factors contributing to the consideration of that quarter-hour as working time. Private activities in the quarter hour were limited and were not considered free time. As a result, the quarter-hour constituted working time.

The ruling seems to be in line with the CJEU's case law.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

Dutch law is in line with the CJEU's ruling. On the basis of Article 7:635(1)(d) jo. 7:636(1) Dutch Civil Code, periods in which the employee has not performed the contractually agreed work for a reason that goes against his/her will can only be considered annual leave if the employee agrees and on the condition that the employee remains entitled to the statutory minimum period of annual leave of Article 7:634 Dutch Civil Code (which reflects the minimum of four weeks of Directive 2003/88/EC). This exception does not apply to the statutory minimum period of annual leave but only the period that exceeds that minimum. In other words: with regard to the statutory minimum, periods in which the employee does not perform the contractually agreed work for a reason that is against his/her will cannot be considered annual leave. However, it should be emphasised here that mandatory quarantine (during which the employee is not ill) that coincides with a period of agreed annual leave does not fall under Article 7:635(1)(d) jo. 7:636(1) Dutch Civil Code. These provisions only apply to periods in which the employee is not entitled to pay by an employer (Article 7:635(1) Dutch Civil Code). This would be the case when the employee is unable, for example, to perform his/her work and not entitled to continued payment of his/her wages as a result of a union-led strike in which the employee does not willingly participate on the basis of case law of the Supreme Court. If an employee is required to quarantine during a period of agreed leave, s/he remains entitled to pay. As a result, time spent in mandatory quarantine during a period of agreed leave can be regarded as annual leave.

The CJEU's ruling raises the question whether, under Dutch law, an employee can, by reason of a mandatory quarantine, unilaterally revoke his/her annual leave that was already been agreed upon by the employee and the employer. In principle, this is not

possible. On the basis of Article 7:638(5) Dutch Civil Code and parliamentary history (*Kamerstukken II* 1962/63, 7168, Nr. 3, p.8), periods of leave that are agreed upon by the employee and the employer are, in principle, binding for both. Though an employer may, on the basis of Article 7:368(5) Dutch Civil Code, modify already determined annual leave periods on the basis of compelling reasons, the employee does not have that right (see also Court of Appeal Arnhem-Leeuwarden, ECLI:NL:GHARL:2016:3991, 24 May 2016). Instead, the employee can try and invoke the principle of good employership to revoke the previously agreed period of leave (Article 7:611 Dutch Civil Code). On the basis of good employership, the employer should have a reasonable interest in retaining the days of annual leave (cf. Supreme Court, ECLI:NL:HR:2019:1734, 08 November 2019). However, an employer will quite often be able to point to a reasonable interest in not modifying the agreed annual leave. Possible reasons the employer could use include that he/she already established an annual leave schedule for the staff, is expecting busy periods after the end of the corona crisis and is anticipating problems because of staff wanting to take annual leave after the end of the corona crisis. Therefore, a successful claim by the employee based on Article 7:611 Dutch Civil Code might be unlikely. By way of comparison, reference can be made to District Court Rotterdam, ECLI:NL:RBROT:2020:4731, 29 May 2020. The District Court held that in a situation in which the employer and employee had agreed upon certain annual leave days, the fact that the employee ultimately did not go on annual leave because of the corona situation was within the employee's own sphere of risk. Consequently, the employer was allowed to consider the agreed annual leave days as having been taken.

4 Other Relevant Information

4.1 Migrant workers

Letter to Parliament, Accompanying annual report on migrant workers 2023, 01 December 2023

The Minister of Social Affairs and Employment shared the outline response to the 2020 annual report on migrant workers from other EU Member States with the Lower House. The annual report describes the progress of the implementation of the 2020 recommendations to improve the position of labour migrants in the Netherlands and fight abuses. In 2020, the *Aanjaagteam Bescherming Arbeidsmigranten* (Roemer Commission) presented the report 'No second-class citizens'. This report contains 50 recommendations and which measures have been realised by the central government, the social partners, the municipalities and the provinces; which measures will take effect in coming years—subject to Parliament approval of the legislative proposals—and which measures will require a decision on the method of implementation. The annual report thus also provides an overview of what remains to be done in coming years before the advice of the *Aanjaagteam* is fully implemented. In addition to this annual report, the website launched in 2023 provides an up-to-date overview of the status and progress of the measures proposed and taken.

4.2 Health and safety

Internet consultation on working with reprotoxic substances, 04 December 2023

The EU has amended the Chemicals Directive (EU) 2002/431, with the stricter rules that already apply to substances that can cause cancer or DNA damage also applying to reprotoxic substances. Employers will have to take more precautions to protect their employees from the risks of these substances. In addition, EU limit values are set for the substances benzene, nickel compounds and acrylonitrile.

To this end, adjustments to the Working Conditions Decree (*Arbeidsomstandighedenbesluit*) and the Working Conditions Regulations

(*Arbeidsomstandighedenregeling*) have been drafted. On two points, these adaptations go beyond the EU's Directive. First, a retention period of 40 years for the registration of exposure by companies is adopted. This already applies to carcinogenic substances but is longer than the five years specified by the EU Directive. This will make it easier to determine the effects of exposure. Secondly, stricter rules will apply in the Netherlands compared to the Directive for reprotoxic substances for which it is unclear whether a safe value exists. Employers in this case must always keep exposure as low as technically possible.

The amendments to the Working Conditions Decree and Working Conditions Regulations have now been published here. Anyone can respond to these amendments via the website until 29 December 2023.

4.3 Gender pay gap

Letter to Parliament, CBS Monitor Gender pay gap, 07 December 2023

To visualise the wage gap, the Central Bureau of Statistics (CBS), commissioned by the Ministry of Social Affairs and Employment, periodically conducts research on wage gaps between women and men in the Netherlands. The Monitor Wage Differences Between Men and Women, 2022 survey contains an updated design compared to previous editions. The 2022 Monitor shows that women's hourly earnings in the business sector in 2022 was, on average, 16.4 per cent lower than that of men. The relative difference in hourly wages between women and men has narrowed since 2014. The latest figures on the pay gap show that there is not yet an equal position in the labour market for women. For the pay gap to decrease, it is important to further strengthen the position of women in the labour market. During this cabinet period, several measures have been taken, including increasing the benefit rate of paid parental leave, which took effect on 02 August 2022, from 50 per cent to 70 per cent of the daily wage and undertaking efforts to tackle pregnancy discrimination by focussing on raising awareness by improving the provision of information both to (pregnant) employees and to employers.

4.4 Income support

Letter to Parliament, Simplifying income support for people, 08 December 2023

The government wants to simplify the income support system to improve social security and participation in the Dutch labour market. The complexity of existing regulations, diverse administrators and conditions has left many individuals uncertain about their rights, obligations and income. This uncertainty has resulted in non-utilisation of available support programmes, leading to repayments and debts. Additionally, there is a reluctance among individuals to take steps towards (more) employment due to these complexities.

Key urgent challenges that have been identified include the financial struggles individuals with disabilities face, who incur significant expenses related to healthcare, housing and transportation. Additionally, complications arise in cases where individuals are obligated to repay excessive benefits, particularly when extending across two consecutive tax years. This proves problematic since the benefits are recaptured on a gross basis while initially disbursed to individuals on a net basis.

Through the Income Support Simplification for People (VIM) programme, the government not only addresses these immediate challenges, but also explores long-term simplifications for a future income support system that is more comprehensible and straightforward. The 'VIM programme' is tasked with developing a plan that includes scenarios and practical solutions. This forward-looking approach involves consideration of existing research, ongoing simplification processes, successful examples from other countries, and insights from scientists and unconventional thinkers in society.

4.5 Inclusive labour market

Progress letter, Programme for an Inclusive Labour Market, 18 December 2023

Minister Van Gennip, Ministry of Social Affairs and Employment, has sent a progress letter on the status of the Inclusive Labour Market Programme (VIA) and the implementation of the VIA Work Agenda to the Dutch Parliament.

The report focuses on the Inclusive Labour Market Programme with the goal of fostering equal job opportunities for all, irrespective of their background. The report highlights findings from a recent SCP (Netherlands Institute for Social Research) study indicating persistent job market inequality, particularly for individuals with a non-European migration background. This underscores the urgency of taking proactive measures to address these disparities.

Several proposed measures outlined in the report include the extension of anti-discrimination legislation to cover intern selection, the establishment of diversity labs to help employers adopt organisational processes for smoother progression of individuals with a migration background into higher positions, and collaboration with HR and Diversity and Inclusion (D&I) professionals. Additionally, efforts are introduced to improve guidance for individuals transitioning from social assistance or unemployment to employment and to enhance transparency in the job progression process while reducing labour market discrimination.

Collaboration with stakeholders is a key aspect of the programme, involving initiatives such as supporting employers through the VIA programme, which focuses on objective recruitment and selection, launching diversity labs to facilitate organisational adjustments, working closely with HR and D&I professionals, and partnering with municipalities to provide improved guidance for individuals seeking employment.

4.6 Tackling poverty and debt

Progress report on Tackling financial concerns, poverty and debt, 19 December 2023

Carola Schouten, the Minister for Poverty Policy, Participation and Pensions, has forwarded a progress report to the Dutch Parliament on tackling financial concerns, poverty and debts. The report indicates positive trends in poverty reduction. However, challenges remain, particularly in addressing problematic debts.

The Central Planning Bureau (CPB) showed that child poverty has decreased from 9.1 per cent in 2015 to 6.2 per cent in 2023, with an expected further decrease to 5.1 per cent in 2024 and 4.6 per cent in 2025. In addition, the overall poverty rate has declined from 6.3 per cent in 2015 to 4.8 per cent in 2023. Despite these positive trends, concerns persist due to increased reliance on social services. Moreover, the percentage of households with problematic debts has increased to 8.8 per cent in 2023 due to issues with tax authorities.

To address the growing debt problem, the government is implementing measures such as shortening the standard duration of debt settlements and improving municipal debt assistance. Furthermore, efforts are being undertaken to ensure those in poverty can participate in society. These social inclusion measures include: increased funding for organisations supporting children and initiatives for school meals, menstrual products and food aid. The report emphasises the need to address individual stories behind the poverty statistics.

Norway

Summary

(I) Several legislative changes entered into force on 01 January 2024.

(II) Parliament has adopted several changes in the legislation as part of the Transposition of EU Directive 2019/1152.

(III) The Supreme Court has issued an important judgment clarifying what constitutes a report on issues of concern in relation to the legislation on whistleblowing.

1 National Legislation

1.1 New legislation entered into force 01 January 2024

Several legislative amendments that were adopted during 2023 entered into force on 01 January 2024. These amendments are described in previous Flash Reports. The most important amendments to the Working Environment Act of 2005 include a definition of harassment (see also June 2023 Flash Report), a new definition of the concept of employee supplemented by a presumption of employee status and extended employer responsibility in group corporate structures concerning dismissal protection (see also March 2023 Flash Report).

1.2 Implementation of EU Directive 2019/1152

Parliament has adopted a number of changes to the Working Environment Act and the State Employees Act as part of the transposition of EU Directive 2019/1152 (LOV-2023-12-15-88). The changes include, among others, new requirements concerning information in employment contracts and two presumption rules: the first rule states that if the employer fails to inform the employee that the employment relationship is temporary, the employee may assume that the employment relationship is permanent. The same applies to part-time contracts, where a lack of information about the scope of the position will lead to the employee's claimed scope being assumed to apply. In both cases, the employer must clearly prove the case is otherwise. Furthermore, the changes comprise new rules on probationary periods and a new provision entitling temporary and part-time employees to request a form of employment with more predictable and secure working conditions.

The changes will enter into force on 01 July 2024.

2 Court Rulings

2.1 Supreme Court judgment clarifying what constitutes a report on issues of concern

The Working Environment Act of 2005 Chapter 2 A contains regulations on whistleblowing, and Section 2 A-1 states that an employee has the right to report issues of concern in the employer's undertaking. In its judgment of 21 December 2023 (HR-2023-2430-A), the Supreme Court clarified what constitutes such a report.

The background of the case was as follows: an employee representative had assisted a work colleague during a meeting with, among others, an HR manager, where the colleague was given an oral warning. On the following day, the employee representative sent an e-mail to a manager in the company, criticising the HR manager's behaviour during the meeting. In a subsequent meeting, the employee representative received a written warning on account of the e-mail he had sent, after which he was reassigned.

The employee representative filed a lawsuit against the employer, claiming that the reassignment was invalid and demanded compensation for damages based on unlawful retaliation, cf. the Working Environment Act Section 2 A-4 and Section 2 A-5.

The proceedings before the Supreme Court were limited to the question whether the employee representative's e-mail must be considered "a report on issues of concern" within the meaning of the Working Environment Act.

The Supreme Court's majority of four (out of five) justices concluded that the e-mail met the requirements for whistleblowing. Whether there were reasonable grounds for the employer to perceive the e-mail as reporting issues of concern in the company and whether there was any truth to what had been stated was considered decisive. The e-mail expressed more than the employee representative's disagreement with the company's oral warning to the colleague. It referred to behaviour contrary to a rule in the company's work regulations on considerate and correct conduct, and therefore described an issue of concern in the company. The Court of Appeal's judgment, which had concluded that the e-mail was not whistleblowing, was thus set aside.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The right to paid annual leave is regulated in the Act of 29 April 1988, No. 21 relating to Annual Leave (LOV-1988-04-29-21). An employer and employee can agree (in writing) on a carry-over of up to 12 days of leave to the following year, cf. Section 7 of the Act. In case of illness, the employee has the right to carry over the respective days to the following holiday year. The requirement is for the employee to have been completely incapacitated for work, cf. Section 9 paragraph 1 and Section 7 paragraph 3. The legislation does not give an employee the right to carry over days of leave that were granted to him/her for a period that coincided with a period of quarantine ordered by public authorities. However, considering the CJEU's ruling, it is assumed that this is not problematic under EU law.

4 Other Relevant Information

Nothing to report.

Poland

Summary

After the new government is appointed, it can be expected that some social policy and labour law matters (including, inter alia, prohibition of Sunday trading activities and working time) will constitute topics of debate and legislative actions.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In Poland, annual leave is subject to the Labour Code. The consolidated text is available here.

The Labour Code expressly regulates situations in which the worker is not able to begin the scheduled annual leave under specific circumstances, and it also regulates situations in which the worker must interrupt his/her annual leave.

Article 165 LC provides that if the worker is not able to begin his/her leave on the specified date due to reasons justifying his/her absence from work, and in particular due to:

> *1) temporary incapacity for work due to illness;*
>
> *2) isolation because of a contagious disease;*
>
> *3) call-up for military manoeuvres in the passive military reserve force, performance of territorial military service on a rotating basis or of service in the active military reserve force, for up to three months;*
>
> *4) maternity leave;*

the employer is required to re-schedule the leave to a later date.

According to Article 166 LC, as regards any part of a leave which has not been taken due to:

> *1) temporary incapacity for work due to illness;*
>
> *2) isolation because of a contagious disease;*
>
> *3) participating in military manouvres in the passive military reserve force, performance of territorial military service on a rotational basis or of service in the active military reserve force, for up to three months;*
>
> *4) maternity leave;*

the employer is required to grant it at a later date.

In other words, if the scheduled annual leave period overlaps with a worker's justified absence from work, the employer is required under the Labour Code to grant the leave

or part thereof at a later date. Both Article 165 LC and Article 166 LC expressly indicate, inter alia, "*isolation because of contagious disease*". The period of quarantine imposed by a public authority on the ground that the worker had been in contact with an individual infected with the SARS-Cov-2 virus falls within the scope of the abovementioned provisions. Thus, in case of a government-ordered quarantine, the employer is required to carry-over the period of annual leave and to grant it to the worker at a later date. Polish law is even more favourable to the worker than Directive 2003/88/EC as interpreted in case C-206/22, and there is no reason to introduce any amendments to the national law.

4 Other Relevant Information

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

On 13 December, the President appointed a new government, with Donald Tusk as the new Prime Minister. The appointment of the new government follows the parliamentary elections that took place on 15 October. The majority in Parliament has been won by the opposition political parties, i.e. *Platforma Obywatelska* (Civic Platform), *Trzecia Droga* (Third Way) and *Lewica* (Left-Wing Party).

It is expected that some social policy and labour law matters will be topics of debate and legislative actions in the near future. The legislative actions might relate to raising remuneration in the public sector, the prohibition of Sunday trading activities and working time issues (for further analysis, see October 2023 Flash Report, Section 4.1.).

Portugal

Summary

(I) The government has set the statutory retirement age for 2025.

(II) The government has approved the annual update to the social support index, work accidents pensions and other social security benefits.

(III) The legal regime applicable to the Work Compensation Fund and the Work Compensation Guarantee Fund has been amended.

(IV) The State Budget Law for 2024 has been published, which contains some labour-related measures.

1 National Legislation

1.1 Statutory retirement age

Ordinance No. 414/2023 of 07 December has set the statutory retirement age within the Portuguese general social security system for 2025, which will be 66 years and seven months. This Ordinance entered into force on 01 January 2024.

1.2 Annual update of social support index

Ordinance No. 421/2023 of 11 December provides the annual update of the value of the social support index (*indexante dos apoios sociais*) that is used as reference for the calculation of the amount of several social benefits. The amount of the social support index for 2024 is EUR 509.26. This Ordinance entered into force on 01 January 2024.

1.3 Annual update of work accidents pensions

Ordinance No. 423/2023 of 11 December provides the annual update of the work accidents pensions for 2024, establishing that such pensions will be updated to the amount resulting from the application of a 6 per cent increase. This Ordinance entered into force on 01 January 2024.

1.4 Annual update of pensions

Ordinance No. 424/2023 of 11 December provides the annual update of pensions and other social security benefits granted by the social security system as well as of the pensions under the convergent social protection scheme awarded by the CGA and pensions for permanent incapacity for work and for death due to occupational disease for the year 2024. This Ordinance entered into force on 01 January 2024.

1.5 Work compensation funds

Decree law No. 115/2023 of 15 December, amends the legal regime applicable to the Work Compensation Fund (*Fundo de Compensação do Trabalho*) and to the Work Compensation Guarantee Fund (*Fundo de Garantia de Compensação do Trabalho*).

The Work Compensation Fund has been converted into a closed accounting fund with the purpose of: *(i)* supporting costs and investments in worker's housing; *(ii)* supporting other investments made by mutual agreement between employers and employee representative structures, such as nursery schools and canteens; *(iii)* financing the

qualification and certified training of workers; and *(iv)* paying up to 50 per cent of the compensation due for the termination of the employment contract of workers included in the Work Compensation Fund.

With the entry into force of this decree law, the obligation to join and pay contributions to the Work Compensation Fund are abolished. In addition, the obligation to pay contributions to the Work Compensation Guarantee Fund will be suspended until the end of the Medium-Term Agreement to Improve Incomes, Wages and Competitiveness entered into with social partners. This decree law entered into force on 01 January 2024.

1.6 2024 State Budget Law

Law No. 82/2023 of 29 December approves the State Budget Law for 2024. This law, which entered into force on 01 January 2024, includes some labour-related measures such as *(i)* 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)* exemption from taxes on the profit share distributions to the benefit of employees up to the amount of a fixed monthly remuneration, with the 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 of its employees in 2024).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

This case concerned the interpretation of Article 7(1) of Directive 2003/88/EC concerning certain aspects of the organisation of working time.

In the present case, an employee had been ordered by the German competent authorities to quarantine during a period in which he had been granted paid annual leave, on the ground that he had been in contact with an individual infected with the SARS-Cov-2 virus. The employee requested the days of paid annual leave granted for the period coinciding with that of the imposed quarantine be carried over, which the employer rejected.

According to the CJEU, the right to paid annual leave, envisaged in Article 7(1) of Directive 2003/88/EC, has the dual purpose of enabling the employee to both rest from performing his/her functions and to enjoy a period of relaxation and leisure. Therefore, the purpose of the right to paid annual leave is different from that of the right to sick leave, which is to enable the employee to recover from an illness. In the light of those differing purposes, the CJEU concluded that an employee, who is on sick leave during a period of previously scheduled annual leave, has the right at his/her request and to ensure that he/she actually uses his/her annual leave, to take that leave during a period which does not coincide with a period of sick leave.

In the present case, the CJEU considered that during the quarantine, the employee was not in a situation of incapacity for work and, thus, his situation was different from that of an employee who is on sick leave and subject to physical and psychological constraints caused by the illness. In fact, the CJEU explained that a period of quarantine cannot, in itself, present an obstacle to the attainment of the purpose of paid annual

leave, which is intended to enable employees to rest from performing their work and to enjoy a period of relaxation and leisure.

For these reasons, the CJEU ruled that Article 7(1) of Directive 2003/88/EC

> *"must be interpreted as not precluding national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus".*

The issue analysed in the CJEU's ruling was also discussed in Portugal during the COVID-19 pandemic.

According to Article 237 (4) of the Portuguese Labour Code (hereinafter, "PLC"), the right to paid annual leave aims to provide the employee with physical and psychological recovery, conditions of personal availability, integration in family life and social and cultural participation.

Portuguese law stipulates that the enjoyment of annual leave does not commence or is suspended *"when the employee is temporarily prevented by illness or other fact that is not attributable to him"*, provided that such fact is communicated to the employer (Article 244 (1) of PLC).

The exceptional regime approved within the context of the COVID-19 pandemic contained some rules that could be relevant for the analysis of the issue at stake, such as: (i) Order No. 2875-A/2020 of 03 March 2020, which establishes that the temporary impediment to perform the professional activity due to the risk of contagion with COVID-19 was equal to a disease with hospitalisation for the purposes of granting the employee social security's sickness allowance, except in case the employee was able to telework; and (ii) Decree Law No. 10-A/2020 of 13 March, which states that the prophylactic isolation of employees due to serious risk to public health imposed by the health authorities should be treated as a situation of disease. These rules state that a prophylactic isolation should be treated as a situation of disease, namely for the purpose of entitling the employee to receive social security benefits. It was not clear, however, whether such prophylactic isolation should have an identical impact on the exercise of the employee's annual leave entitlement as in case of sickness.

In Portugal, one of the arguments normally invoked to sustain that prophylactic isolation (even if the employee is not sick) should be considered an interruption of an annual leave period or its postponement was, precisely, that such situation prevented "normal" enjoyment of vacation and full compliance with the objectives inherent to the recognition of the annual leave right set forth in Article 237 (4) of PLC. In addition, it was argued that prophylactic isolation falls within the reference contained in Article 244 (1) of PLC to *"another fact that is not attributable"* to the employee.

Nevertheless, some arguments point in the opposite direction. Portuguese doctrine typically considers that the "other facts", apart from sickness, that can determine a postponement or suspension of annual leave are related to situations of impossibility of performing work due to a fact not attributable to the employee, such as a work accident or compliance with a legal obligation. In case of prophylactic isolation, only employees who cannot provide their services under a teleworking regime would be "unable" to work and, therefore, this argument would imply a different treatment regarding enjoyment of vacation, depending on whether employees can perform their work remotely or not.

Although the CJEU's ruling is not decisive for resolving the issue in the light of Portuguese law considering the legal regime described above, it contributes to clarifying that quarantine, in itself, does not prevent the fulfilment of the two purposes of the right to paid annual leave envisaged in Article 7(1) of Directive 2003/88/EC.

4 Other Relevant Information

Nothing to report.

Romania

Summary

Magistrates are not entitled to additional annual leave for working in hazardous conditions.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Annual leave for Magistrates

The salary-related legislation in the public sector stipulates that magistrates are entitled to a salary supplement if they carry out their activities in difficult, harmful or hazardous working conditions. Simultaneously, the Labour Code in Article 147 (1) provides that workers who work under difficult, hazardous or harmful conditions are entitled to additional annual leave of at least three working days.

Given these provisions, a question has arisen in judicial practice whether magistrates who benefit from the salary supplement for work in difficult, harmful or hazardous conditions also have the right to additional annual leave.

The High Court of Cassation and Justice—the panel for resolving legal issues in labour law—issued Decision No. 79/2023, which is mandatory for all courts in the country. According to this decision, issued on 11 December 2023, the High Court of Cassation and Justice ruled that magistrates are not entitled to the 35 days of annual leave provided by Law No. 303/2004 with at least three days per year of additional leave regulated by the Labour Code for employees working under difficult, hazardous, or harmful conditions.

In its reasoning, the High Court of Cassation and Justice pointed out that the term 'harmful conditions', which grants the right to additional leave, does not have a legally identical content to the term 'harmful conditions' in the salary-related legislation for public sector personnel.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In Romanian legislation, quarantine leave is granted to employees who are prohibited from continuing their activity due to suspicion of the presence of a contagious disease for the duration specified in the certificate issued by the public health department (Law No. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk (published in the "Official Gazette of Romania", No. 884 f 28 September 2020). Essentially, quarantine leave suspends the employment contract according to Article 50 letter g) of the Labour Code. Although Article 145 (5) of the Labour Code expressly refers to the interruption of annual leave only in specific cases of suspension

> *("In situations in which a temporary incapacity for work or maternity leave, maternal risk leave, or leave to care for a sick child arises during annual leave, it shall be considered interrupted. The employee will complete the remaining*

days of leave once the temporary incapacity for work, maternity leave, maternal risk leave, or childcare leave has ceased. When not feasible, the days not used will be rescheduled."),

annual leave cannot continue under simply any circumstances when the employment contract is suspended. Consequently, annual leave cannot be taken during quarantine leave because taking annual leave requires the existence of an active contract.

According to Article 146(2) of the Labour Code, if, for justified reasons, the employee cannot take, in whole or in part, the annual leave to which they are entitled in the respective calendar year, the unused annual leave will be carried over for a period of 18 months. One of these 'justified reasons' is the suspension of the employment contract.

It is worth noting that, similar to sick leave, the period of quarantine leave is treated like a working period for the purpose of determining annual leave.

In conclusion, the Romanian legal norms are more favourable for the employee than the interpretation given by the CJEU to Article 7 (1) of the Working Time Directive in case C-206/22. Therefore, there is no issue when taking quarantine leave at the same time as annual leave, given that during quarantine leave, the contract is suspended, while annual leave does not suspend the employment contract. The carry-over of the unused annual leave days will, therefore, occur mandatorily if during the scheduled annual leave period, there is a cause for suspending the contract, such as a quarantine ordered by the public health authorities.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

Court rulings on the principle of equal remuneration of employees and fixed-term employment were issued.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Principle of equal remuneration of employees

Judgment of the Supreme Court of the Slovak Republic, file No. 2Cdo/279/2020, 28 November 2022

The principle of equal remuneration of employees for the same work (Article 119a of the Labour Code) is not breached if the employer, taking into account "*other objectively measurable criteria*", which include the complexity and difficulty of the employee's work, his/her responsibility and work experience, sets the amount of remuneration differently for work performed by individual employees.

Article 119a *of the Labour Code – Act No. 311/2001 Collection of Laws (Coll.):* Wage for equal work and for work of equal value stipulates:

> *"(1) Wage conditions shall be agreed without any form of sex discrimination. The provision of the first sentence applies to all remuneration for work and benefits that are paid or will be paid in relation to employment pursuant to the other provisions of this Act or special regulations.*
>
> *(2) Women and men have the right to equal wage for equal work and for work of equal value. Equal work or work of equal value is considered to be work of the same or comparable complexity, responsibility and urgency, which is performed in the same or comparable working conditions and at producing the same or comparable capacity and results of work in employment relationship for the same employer.*
>
> *(3) If the employer implements a system of job evaluation, the evaluation shall be based on the same criteria for men and women without any sexual discrimination. In the evaluation of the work of women and men, employers may use other objectively measurable criteria in addition to those stated in paragraph 2 if they can be implemented to all employees without regard to sex.*
>
> *(4) Paragraphs 1 to 3 shall also apply to employees of the same sex if they perform equal work or work of equal value.)"*

2.2 Fixed-term employment relationship

Judgment of the Supreme Court of the Slovak Republic, file No. 9Cdo/273/2020, 30 November 2022

When the employer only mentions a reference to the fact that the employee performs work defined in the collective agreement as a reason for re-extending the employment relationship, the employment contract lacks a substantive reason for the temporary nature of such an agreement for a fixed-term employment relationship, which would be

in line with the content of the legal provision of Article 48 paragraphs 4 and 5 of the Labour Code.

Article 48 of the Labour Code – Act No. 311/2001 Collection of Laws (Coll.): Fixed-term employment relationship stipulates

> *"(4) A further extension or renewal of the fixed term employment relationship to two years or over two years may be agreed only in the following reasons of*
>
> *a) substitution of an employee during maternity leave, paternity leave, parental leave, leave immediately following maternity leave, paternity leave or parental leave, temporary incapacity for work or an employee who has been released for a long time to perform a public function or trade union function,*
>
> *b) the performance of work in which it is necessary to increase employee numbers significantly for a temporary period not exceeding eight months of the calendar year,*
>
> *c) the performance of work that is linked to the seasonal cycle, which repeats every year and does not exceed eight months in the calendar year (seasonal work),*
>
> *d) the performance of work agreed in a collective agreement.*
>
> *(5) The reason for extension or renewal of a fixed-term employment relationship under paragraph 4 shall be stated in the employment contract."* (emphasis added)

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

This question the basic source of labour law, the Labour Code, Act No. 311/2001 Collection of Laws (Coll.), as amended, does not expressly (specifically) regulate.

According to Article 111 paragraph 1 of the Labour Code, the scheduling of paid annual leave shall be determined by the employer following consultation with the employee in accordance with the paid annual leave time-table established with prior consent of the employee representatives in a way so employees can take their paid annual leave in full by the end of the calendar year. When negotiating annual leave, the employer's tasks as well as the justified interests of the employee must be taken into consideration. The employer shall determine the employee's annual leave schedule for a duration of at least four weeks per calendar year if he/she is entitled to paid annual leave, and if obstacles to work on the part of the employee do not prevent the granting of such paid annual leave.

Where paid annual leave is provided for in several parts, one part shall at least last a minimum of two weeks, unless the employee and employer agree otherwise. The employer must inform the employee of the paid annual leave schedule at least 14 days in advance. Exceptionally, this period may be reduced, provided the employee consents to it (Article 111 paragraph 5 of the Labour Code).

It follows from the provisions of Article 111 to Article 115 of the Labour Code that the employer is responsible for the employee's leave in its entirety. This means that the employer plans and determines the entire amount of the employee's leave while respecting the rules established in the cited provisions. As already mentioned, the employee must be notified of the start of his/her annual leave at least 14 days in advance, unless otherwise agreed with the employee.

The provision of Article 112 paragraph 2 of the Labour Code also warrants mention. According to this Article, an employer may not schedule of paid annual leave for a period

when an employee is known to be temporarily incapacitated for work due to disease or accident, or for a period during which the employee is on maternity leave, paternity leave or parental leave. For other periods of work obstacles on the part of the employee, the employer may only schedule the employee's paid annual leave at his/her request only.

In case of an ordered quarantine, an employee cannot be required by the employer to take annual leave for the duration of the quarantine (Article 112 paragraph 2, last sentence of the Labour Code). This provision therefore contains a legal limitation to the employer's authority in scheduling an employee's leave.

Therefore, whether the employer is aware that the employee has been ordered to quarantine by the public health authorities is an important question for scheduling and determining the duration of leave. If the employee did not notify the employer of the quarantine order, the employer can proceed in accordance with Article 111 to Article 115 of the Labour Code. If the employer was informed about the quarantine order, a scheduling of annual leave by the employer without consulting the employee would violate legal regulations.

Another important question then is how to assess the situation when the employee later (after using up his/her leave) informs the employer that he/she was in quarantine at the time when he was supposed to take the leave.

As already stated, Slovak labour law (Labour Code) does not expressly (specifically) regulate this issue. There is no published court decision on this issue yet.

It is likely that the reason for the employee not notifying the employer that he/she has been ordered to quarantine at the time of the quarantine would probably play an important role. If there was no fault on the part of the employee, then the already used days of paid annual leave for the calendar year that overlapped with the period of quarantine should be carried over subsequently, even if the employee was not recognised as being temporarily incapacitated for work due to disease or accident.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

The Health Care, Labour and Social Care Intervention Measures Act introduces certain labour law-related measures (temporary reassignment, restrictions to the use of annual leave and restrictions of the right to strike in healthcare as well as an extension of the period during which sick pay is covered by the employer) and, among others, also amends the Employment Relationships Act.

1 National Legislation

1.1 Emergency measures in healthcare and amendments to the Employment Relationships Act

The Health Care, Labour and Social Care Intervention Measures Act ('*Zakon o interventnih ukrepih na področju zdravstva, dela in sociale ter z zdravstvom povezanih vsebin (ZIUZDS)*', Official Journal of the Republic of Slovenia (OJ RS) No. 136/23, 30.12.2023, p. 12749-12761) was passed at the end of December 2023.

Many provisions of the Act regulate certain details of the transformation of a voluntary supplementary health insurance, a flat rate monthly payment into the mandatory health insurance contribution as of 01 January 2024. According to Health Minister Valentina Prevolnik Rupel, the primary aim of the emergency bill is to provide certain legal bases for the new mandatory contribution. The Act also aims to eliminate certain organisational weaknesses of the healthcare system and unreasonably long waiting periods in healthcare. It introduces a number of permanent and temporary measures, most of them in the area of healthcare and health insurance, but some of them are also relevant for labour law.

Many measures address the staff shortages in healthcare, in particular in family medicine. Among them are, for example, the supplement payment/bonuses for extra workload foreseen for certain professions in family medicine (Article 14 of the ZIUZDS) and the measures to facilitate the employment of healthcare staff from abroad, including an extension of lower language requirements (Articles 15, 16 and 17 of the ZIUZDS), and others.

The Act also regulates several special measures in healthcare in case of extraordinary circumstances such as natural and other disasters (Articles 5, 42 to 51 of the ZIUZDS). The three most important labour law-related measures among them are the following:

- temporary reassignments of healthcare staff to other institutions, according to urgent needs, are regulated in detail (Article 53 of the ZIUZDS);
- restrictions with respect to the use of annual leave (Article 44, para 1 of the ZIUZDS);
- restrictions to the right to strike (Article 44, para 2 of the ZIUZDS).

The trade unions and organisations representing doctors argued that systemic changes had no place in an emergency bill and should be subjected to social dialogue. In addition, the employers' organisations strongly criticised some solutions in the Act, in particular those imposing additional financial burdens on employers.

For example, the Act reintroduces a longer 30-day period during which a sick pay/sickness benefit is covered by the employer (this period was shortened to 20 days in January 2022, see also January 2022 Flash Report). This is regulated in Article 27 of the ZIUZDS, which amends the Employment Relationships Act, its Article 137, paras 3 and 4 ('*Zakon o delovnih razmerjih (ZDR-1)*', OJ RS No. 21/13 et subseq.), and Articles 33 and 34 of the ZIUZDS, which amend the Healthcare and Health Insurance Act ('*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju (ZZVZZ*)', OJ RS No. 9/92 et

subseq.) in respect of the sickness benefit covered by the health insurance from the 31st day of absence and which is now capped at 2.5-times the average gross monthly salary in the country.

1.2 Social security contributions during temporary work abroad

The Decree on Salaries and Other Remuneration of Service Members of the Slovenian Armed Forces fulfilling obligations assumed in international organisations or through international agreements (`*Uredba o plačah in drugih prejemkih pripadnikov Slovenske vojske pri izvajanju obveznosti prevzetih v medn. organizacijah oziroma z mednarodnimi pogodbami'*, OJ RS 67/08 et subseq.) and the Decree on the Salaries and Other Earnings of Public Employees Working Abroad (`*Uredba o plačah in drugih prejemkih javnih uslužbencev za delo v tujini'*, OJ RS 14/09 et subseq.) have been amended (OJ RS No. 132/23, 22 December 2023, p. 12263 and p. 12264): provisions that the salary paid for work performed in Slovenia was the basis for the calculation of social security contributions during temporary work abroad for the members of the Slovenian Armed Forces and for public employees working abroad were abrogated with effect from 01 January 2024.

The provision of Article 144, para 2 of the Pension and Disability Insurance Act (`*Zakon o pokojninskem in invalidskem zavarovanju (ZPIZ-2)*', OJ RS No. 96/12 et subseq.), which enabled Slovenian companies that temporarily posted workers abroad to pay social security contributions at a reduced rate on the basis of the corresponding salaries paid for work in Slovenia was already abrogated in April 2023 with effect from January 2024 as well (see also April 2023 Flash Report).

1.3 Employment of foreign nationals

The order determining the occupations in which the employment of foreigners is not linked to the labour market was amended (`*Odredba o spremembi Odredbe o določitvi poklicev, v katerih zaposlitev tujca ni vezana na trg dela',* OJ RS No. 130/23, 21 December 2023, p. 11887).

The new professions were added to the list, all in the area of healthcare (new points 15 to 17 of the first paragraph of Article 2 of the Order), and the Order was extended until 30 June 2024.

1.4 Posted workers

The new application form for the A1 certificate for posted workers was published in the Official Journal (`Pravilnik o obrazcu vloge za izdajo potrdila A1´, OJ RS No. 129/20, 20 December 2023, p. 11645-11654), following the new Transnational Provision of Services Act from April 2023, which applies from 01 January 2024 (see also April 2023 Flash Report).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The CJEU decided that Article 7(1) of Directive 2003/88/EC (Working Time Directive) and Article 31(2) of the CFREU must be interpreted as not precluding national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus.

The judgment is of no particular relevance for the Slovenian legal order. There are no similar cases in the database of national case law and there are no obstacles in Slovenian law that would prevent from interpreting the relevant provisions on annual leave in line with this CJEU judgment. According to Slovenian law, the carry-over of days of paid annual leave is foreseen in case of sickness, but there is no such provision that would require the carry-over of days of paid annual leave in case of ordered quarantine during that period.

4 Other Relevant Information

4.1 Collective bargaining

Several annexes to sectoral collective agreements have been concluded and published in the Official Journal:

- Annex to the Collective Agreement for the Paper and Paper-converting Industry (‘*Aneks št. 7 h Kolektivni pogodbi za papirno in papirno-predelovalno dejavnost’*, OJ RS No. 121/23, 01 December 2023, p. 10392),
- Annex to the Collective Agreement for the Graphics Sector (‘*Aneks št. 7 h Kolektivni pogodbi grafične dejavnosti*’, OJ RS No. 126/23, 15 December 2023, p. 11480),
- Annex to the Collective Agreement for the Extraction and Processing of Non-Metallic Minerals Industry (‘*Aneks k tarifni prilogi h Kolektivni pogodbi za dejavnosti pridobivanja in predelave nekovinskih rudnin Slovenije’*, OJ RS No. 126/23, 15 December 2023, p. 11481),
- Annex to the Collective Agreement for the Slovenian Coal Mining Industry (‘*Aneks št. 3 h Kolektivni pogodbi premogovništva Slovenije*’, OJ RS No. 129/23, 20 December 2023, p. 11749).

They mainly concern the adjustment of wages and other work-related payments.

Spain

Summary

A new measure has been adopted to fully transpose Directive (EU) 2019/1158. All workers now have the right to accumulate breastfeeding break and convert it into full working days of leave.

1 National Legislation

1.1 Work-life balance

As mentioned in the June 2023 Flash Report, Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-life Balance for Parents and Carers was transposed through a provision of 28 June. The Labour Code and the Basic Statute of Public Employees were amended to introduce a new non-paid parental leave of eight weeks, which can be taken until the child reaches the age of eight years. This parental leave is non-transferable and can be taken in fractions. The worker has the flexibility to choose whether to take the leave on a full-time or part-time basis.

Other rights were also recognised then, but the government deemed that the transposition was incomplete. On 19 December 2023, a new Royal Decree Law amending Article 37(4) of the Labour Code was issued which allows for the accumulation of the breastfeeding break in full workdays. According to this Article, the workers (both women and men) have the right to a one-hour break to care for their infant during feeding times until the infant reaches the age of nine months. So far, the possibility of converting these breaks into full days of leave (approximately one month of leave fully paid) required an agreement (in a collective bargaining agreement or the employment contract). This amendment grants the worker the right to this accumulation without the need for a separate agreement, and the government explicitly links this right to Directive 2019/1158.

2 Court Rulings

2.1 Right of assembly

Sección del tribunal constitucional, ECLI:ES:TC:2023:164, 21 November 2023

The government did not permit a union (UGT) to hold a rally on 08 March 2021 (Women's Day) due to COVID restrictions (third wave of the pandemic). The right to hold rallies is a fundamental one according to the Spanish Constitution, hence the restrictions must be interpreted very strictly. The Constitutional Court considered that the prohibition was not proportional according to the facts: only 250 attendees in an open space and on a working day, all of them wearing masks and respecting the safety distance. The Court deemed that people could meet in commercial premises, even in bars and pubs, under similar conditions, so it did not find sufficient justification for the government ban. The risk of contagion at the rally would not have been higher than the risk present in the other permissible activities.

2.2 Dismissal of a pregnant woman

Tribunal Supremo, Sala de lo Socia, ECLI:ES:TS:2023:5502, 12 December 2023

According to Spanish labour law, there are three possible qualifications for dismissals: fair, unfair and null and void. A dismissal is fair when a valid ground exists and formal requirements are met. However, it is unfair if no valid ground exists and/or the formal

requirements are not met. In such cases, the employer (or the workers themselves if they are representatives) has a choice between reinstatement or termination of the contract combined with the payment of severance pay. The dismissal is null and void when it violates a fundamental right. In this case, the worker must be reinstated and can claim additional financial compensation (damages). This aligns with Article 18 of Directive 2006/54.

Article 55(5)(b) of the Labour Code also establishes that the dismissal of pregnant women is null and void. The Constitutional Court and the Supreme Court have interpreted this Article and have concluded that the dismissal of a pregnant woman could be fair or null and void, but never unfair. The dismissal will be considered fair if a valid ground exists and formal requirements are met. It is null and void in any other case, even if the employer did not know that the woman was pregnant. Therefore, the discriminatory intent is not a requirement for the qualification of a dismissal as null and void.

However, discriminatory intent has effects, as this ruling shows. The additional financial compensation for damages requires presence of discriminatory intent. Therefore, if the employer did not know that the worker was pregnant, the dismissal is null and void, but the worker does not have the right to claim damages.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The only references to periods of quarantine are those linked to COVID. For such cases, the government adopted a provision that aligned the quarantine with temporary disability. Article 38(3) of the Labour Code gives the worker the right to carry over days of paid annual leave when they coincide with temporary disability. Therefore, Spanish law is more favourable than EU law on this particular issue. However, this alignment with temporary disability does not apply to other periods of quarantine, if they exist.

4 Other Relevant Information

4.1 Unemployment statistics

The number of unemployed persons fell by 24 573 people in November, hence the total number of unemployed persons is 2 734 831. This is the lowest number of unemployed persons in any November since 2007.

Sweden

Summary

(I) The Labour Court determined that a corporate neutrality policy was non-discriminatory against religious signs and clothes (headscarves).

(II) The Labour Court ruled that an employer's policy, which did not allow unvaccinated elderly care workers to perform their work, and to thereby be non-disposable at the workplace, was proportionate.

(III) The Supreme Court has revoked two decisions of the Labour Court on annual leave in cases of insolvency on the grounds of substantive defects.

(IV) The Tesla industrial conflict is still ongoing and spreading to other Nordic countries.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Religiously related signs (headscarves)

Labour Court AD 2023 No. 71, 13 December 2023

The Labour Court ruled in case AD 2023 No. 71 on religious discrimination (Directive 2000/78/EC) whereby an employee's use of religious headscarves violated corporate neutrality policy. The company, which was involved in security and safety-related issues in the Stockholm subway, stated in its explicit `neutrality policy´ that employees were not allowed to carry political, philosophical or religious symbols or manifestations during working time that involved work-related contacts (clients and partners). Based on the CJEU's case law and with references to both the Directive and the EU Charter, the Labour Court concluded that truly neutral policies that did not only focus, for example on Muslim signs but any political, philosophical or religious expressions, did not violate the Discrimination Act or EU Anti-discrimination Law.

2.2 COVID-19 vaccination policy

Labour Court AD 2023 No. 75, 20 December 2023

The Swedish Labour Court issued a ruling on COVID-19 policies in case AD 2023 No. 75. An employer operating a geriatric clinic that provides care for elderly patients had issued a COVID policy containing a requirement for all staff to get vaccinated with the COVID vaccine. The employees who did not comply with this requirement were considered to be non-disposable by the employer and did not receive remuneration. The Labour Court concluded that the vaccine policy was in line with the recommendations of the Swedish public health authorities and that the implementation of the policy was based on a balanced risk assessment. The employees were not subject to dismissal but were not allowed to continue to perform their work and were therefore not paid. The Court ruled that the policy was proportionate in relation to a legitimate purpose and determined that the employees had not been at the disposal of the employer and therefore had no justifiable claims to payment.

2.3 Supreme Court revocation of decisions based on substantive defect (*resning*)

On 15 December, the Swedish Supreme Court issued a decision to revoke two previous decisions of the Labour Court, on grounds of substantive defect, one of which, AD 2022 No. 26, was reviewed in a previous Flash Report (see May 2022 Flash Report). The Supreme Court concluded that the Labour Court's application of the insolvency law was flawed in relation to the protection of the rights to annual leave and compensation if that right could not be exercised. The Flash Report of May 2022 addresses precisely those elements:

> *"It is noteworthy that the Labour Court did not mention the extraordinary strong right that claims for annual leave days and compensation are granted under EU law. The CJEU has, e.g. held that a claim for annual leave compensation cannot be precluded after the death of the employee (Bauer et al., C-569/16 and C-570/16, EU:C:2018:871). In the light of the CJEU's case law, it is not clear whether Swedish insolvency law is compatible with EU law as it allows annual leave claims to be subject to insolvency composition."*

The case has now been remitted to the Labour Court for a new hearing, along with a similar case involving the same employer and the case of insolvency (AD 2022 No. 44). It is very unusual that Labour Court cases are revoked by the Supreme Court due to substantive defects.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

The CJEU's ruling in *Sparkasse Südpfalz* states that the right to annual leave can also be exercised while an employee is in quarantine, even if that person is not sick. The CJEU concluded that EU law on annual leave

> *"not precluding national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker"*

during his or her period of quarantine. It seems that the CJEU is distributing the consequences of an imposed quarantine (but not sickness as such) between the employee, who has taken annual leave days, and the employer, with an emphasis on the employee.

From a Swedish perspective, this ruling has given rise to only limited discourse so far, while the exact same situation has not yet been reported in Sweden, at least not according to any legal sources. It must also be noted, however, that Sweden's COVID regulations were much less restrictive than those in most other countries, and that no compulsory lockdowns were ordered in Sweden, only recommendations were issued. If the authorities had imposed a strict quarantine on an individual (which is only legal in individual cases) during his/her planned annual leave, the employee would have been entitled to postpone the equal amount of leave days according to the 15 § Vacation Act. This was, however, not the case more generally during the pandemic in Sweden. If the employee exercises his/her right to replace his/her annual leave with full-time sick leave, hence postponing his/her annual leave, the employee's compensation during that time (80 per cent) will be paid by the employer during the first two weeks, and if the sick leave exceeds those two weeks, the health insurance will compensate a share (up to 80 per cent) of the employee's salary.

The most significant Swedish collective agreement in the care sector, AB 20, states (§ 10) that the (public) employer can preclude the employee from working during a period of quarantine to prevent the spread of disease. The employee, however, is compensated with his/her ordinary payment and benefits during the preclusion from his/her workplace, but this is unlikely to reflect the exact same situation as the German case that came before the CJEU.

4 Other Relevant Information

4.1 The Tesla conflict

The longstanding industrial conflict, currently a strike and corresponding sympathy measures urging Tesla Sweden to sign a collective agreement with IF Metal, has still not been resolved. It is, on the contrary, reported that it is spreading and escalating in other Nordic countries.

United Kingdom

Summary

The Retained EU Law (REUL) Act legislation is now in force.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Annual leave

CJEU case C-206/22, 14 December 2023, Sparkasse Südpfalz

In case C-206/22 the Court ruled that Article 7(1) of Directive 2003/88/EC does not preclude national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority on account of that worker having been in contact with a person infected with a virus.

There has been no case law so far in the UK on this issue. The guidance from the Court of Justice, although not binding on UK courts since it occurred post-Brexit will therefore be useful.

4 Other Relevant Information

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

As previously reported, the REUL Bill received royal assent and is now an Act. All its key provisions came into force/operation on 01 January 2024. The default is that all Retained EU law will remain except the 587 pieces listed in the Schedule to the Act which are now repealed, together with some other legislation listed in SI 2023/1143. In the labour law field, The Sex Discrimination Act 1975 (Application to Armed Forces etc) Regulations 1994 (S.I. 1994/3276) is also turned off. The government says this is a tidying up exercise:

> *"This piece of legislation no longer has any legal effect as the Sex Discrimination Act 1975 was repealed by the Equality Act 2010. As a result, the Sex Discrimination Act 1975 (Application to Armed Forces etc) Regulations 1994 are obsolete."*

In the employment fields, a number of measures were introduced but are insignificant in the post-Brexit world, notably removing rules on posting of workers and removing rules on drivers' hours during foot and mouth in 2001.

Retained EU Law is now called assimilated law; the principle of supremacy of EU law is turned off and the general principles of law also no longer apply.

The new legislation on working time and other matters (SI 2023/1426) reported last month has also come into force. Guidance has also been published on the operation of the working time aspects.

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