Flash Reports on Labour Law September 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 September 2023, 22 countries (all but **Cyprus**, **Latvia**, **Liechtenstein**, **Lithuania** and **Slovakia**) reported some labour law developments. The following were of particular significance from an EU law perspective:

Transposition of EU directives

In **Greece**, a new law implements Directive (EU) 2019/1152 of the European Parliament on transparent and predictable working conditions in the European Union.

Romania has adopted legislation to implement the already existing rules transposing Directive 2019/1158/EU on Work-life Balance. The norms on the non-transferable two-month period of parental leave are now applicable.

In **Austria**, based on the transposition of Directive 2019/1158/EU on Work-life Balance, provisions on parental leave, (deferred) parental part-time, paid and unpaid care leave and care duties as well as the Act on Equal Treatment were amended.

Collective redundancies

In **Germany**, the Federal Labour Court has published a notice on the continuation of suspended proceedings disputing the consequences of different errors in the notification procedure for mass dismissals.

The **Irish** Workplace Relations Commission has issued another decision holding that an employer has failed both to initiate consultations on a proposal to create collective redundancies and to provide relevant information relating to the proposed redundancies.

Temporary agency work

District Courts in the **Netherlands** have interpreted Article 6(2) of Directive (EU) 2003/88 in a dispute between a temporary work agency and user undertaking, and in another case on a non-competition clause in the employment contract.

Transparent and predictable working conditions

The Supreme Court in the **Netherlands** has ruled that under certain circumstances, employers may have a duty to inform employees about tax amendments that could be relevant to their fiscal position.

In the **UK**, the Workers (Predictable Terms and Conditions) Act 2023 has received royal assent, introducing a new statutory right for workers to request a more predictable work pattern.

Based on a court decision in **Luxembourg**, if, as a result of the loss of the residence/work permit, the contract with a third-country national can no longer be legally performed due to this administrative situation, the employer is entitled, and even required, to put an end to this illegal situation and may therefore dismiss the employee, even with immediate effect.

Working time

In the **Czech Republic**, the Labour Code has been amended. Employees who provide health care services may work an additional eight hours of overtime per week, on average, according to a written agreement concluded between the employer and the employee.

The **Danish** government intends to put forward a new proposal for legislation and has just launched a public consultation on working time regulation. The proposal is based on an agreement between the social partners on how to adapt Danish working time rules to ensure compliance with EU developments.

In **Finland**, a court decision dealt with the stand-by time of firefighters, considering the minimum requirements for working time set out in Working Time Directive 2003/88/EC and CJEU case law on stand-by time.

In **Iceland**, a new case on the interpretation of working time according to the WTD has been decided following an Advisory Opinion issued by the EFTA Court.

The **Polish** Supreme Court has delivered a judgment that clarifies the scope of the exception to perform Sunday trade activities in commercial establishments.

Other developments

In **Austria**, a Supreme Court decision that dealt with the acknowledgement of relevant professional experience is of interest from an EU labour law perspective.

The **German** Federal Civil Court has referred questions to the CJEU for a preliminary ruling on injunctive relief and the concept of non-material damage under the GDPR.

The **Italian** Parliament has converted a law decree approved in July into law to protect workers in case of climatic emergencies.

Among the measures to mitigate or eliminate the consequences of floods and landslides in **Slovenia** in August 2023, additional possibilities for temporary and occasional work of students enrolled in educational institutions during the school year 2023/2024 were introduced, as well as occupations and activities determined that are urgently needed in the recovery after the floods and in which simplified procedures for the employment of foreign workers are foreseen.

Table 1: Major labour law developments

Topic	Countries
Third-country nationals	BE LU MT
Occupational pension schemes	NO
Collective bargaining and collective action	AT FI NL SI UK
Transparent and predictable working conditions	EL NL UK
Remote working/ Teleworking	CZ PT
Collective redundancies	DE IE
On-demand work	EL
Working time	CZ DK EL FI IS PL
Transfer of undertakings	ES
EWC	ES
Migrant workers	Fi SI
Parental leave	AT FR RO
Minimum wage	HU PL RO
Equal pay	FI
COVID-19	LU
Dismissal protection	DE EL ES LU
Holiday pay/compensation	FR DK NL
Information and consultation	IE
Climate emergency	IT SI
Employee’s privacy	IT

Austria

Summary

(I) Based on the transposition of Directive 2019/1158/EU on Work-life Balance, provisions on parental leave, (deferred) parental part-time, paid and unpaid care leave and care duties as well as the Act on Equal Treatment were amended.

(II) A decision of the Supreme Court that deals with acknowledgement of relevant professional experience is of interest from an EU labour law perspective.

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1 National Legislation

1.1 Amendment of the Maternity Protection Act 1979 (Mutterschutzgesetz) and Paternity Leave Act (Väterkarenzgesetz)

As indicated in the June 2023 Flash Report, the transposition of Directive 2019/1158/EU on Work-life Balance has led to numerous amendments in various statutory acts that deal with parental leave, (deferred) parental part-time, paid and unpaid care leave and care duties. The amendments primarily concern the introduction of two months of non-transferable parental leave (it is questionable whether the Austrian transposition complies with the Directive), as well as the employee's right to request the reasons for her/his dismissal in writing in case s/he has any reason to suspect that her/his dismissal was caused by her/him making use of (some of) the rights granted by the amendments. Under Austrian employment law, the employer is generally not required to provide reasons for dismissal (but may be required to justify the dismissal in court); the amendments are thus a novelty in Austrian employment law. Also, limitation periods have been put on hold while the employee exercises her/his rights to engage in care obligations.

The amendments passed the National Assembly on 20 September 2023 but have yet to pass the Federal Assembly. They are set to enter into force on 01 November 2023.

An overview of the main amendments is provided below:

Amendment of entitlement to (unpaid) parental leave.

So far, parents were entitled to 24 months of parental leave each per child (though not at the same time, with the exception of a period of one month when the parents switch their care-giving duties for the first time). The amendment reduces the entitlement to parental leave for each parent to 22 months. In case the parents share their parental leave, their entitlement increases to 24 months. Only single parents or parents whose partner has no entitlement to parental leave continue to remain entitled to 24 months of parental leave.

The amendment thereby aims to establish two months of non-transferable parental leave by reducing the previous entitlement to 24 months per parent to 22 months and granting 24 months of leave only to parents who share their parental leave. While this ensures two months of non-transferable parental leave per parent, the reduction of entitlement of 24 months parental leave to 22 months is in stark contrast to Article 16 para 2 of the Directive, which stipulates that its implementation shall not constitute grounds for justifying a reduction in the general level of protection in the areas covered by the Directive.

In addition, limitation periods to any entitlements the parent acquired before taking leave, be they based on statutory law, collective bargaining agreements or employment contracts, will be on hold until two weeks after the end of the parental leave.

Deferred parental leave

Parents may, under certain conditions, choose not to take their full entitlement to parental leave, but to defer three months of their parental leave and take it up again at any point until the child’s seventh birthday.

The amendment establishes protection against dismissal in case of dismissal because of the intended or taken deferred parental leave. The parent is protected against dismissal for cause, e.g. the deferred parental leave may not be the cause for the dismissal. The employer, upon the employee’s request (within five days of notice of dismissal), is required to provide a written statement of reasons for the dismissal. The dismissal’s validity is not affected by failure to provide a written statement on the reasons for dismissal.

Parental part-time

In establishments of a certain size and if the parent has been employed by the company for at least three years, and reduced working time is included in the company’s statutory framework, entitlement to parental part-time was possible until the child’s seventh birthday. All other parents may agree on parental part-time with their employer, which includes the parent’s right to take their employer to court.

The entitlement to parental part-time has now been extended to the child’s eighth year, though the total amount of parental part-time taken may not exceed seven years. the periods of maternity leave as well as parental leave taken must be deducted from those seven years. The period between the child’s seventh birthday and a (late) start in school must be added to that seven-year period. If parents do not have an entitlement to parental part-time, they may agree with their employer to extend their parental part-time until the child’s eighth birthday.

The employer may only terminate the employment relationship up to the child’s fourth birthday with prior court approval. After the child’s fourth birthday the end of parental part-time, the parent is protected against dismissal for cause, e.g. against any termination based on her/his parental part-time. The amendment now adds that upon the employee’s request (within five days of notice of dismissal), the employer is required to provide a written statement of reasons for dismissal within five days. The dismissal’s validity is not affected by failure to provide a written statement on the reasons for dismissal.

Amendment of the Act on Annual Leave (Urlaubsgesetz)

The Act on Annual Leave contains provisions on (paid) care leave.

The amendment now adds a specific protection against dismissal: the employee is protected against dismissal based on planned/taken care leave through protection against dismissal for cause, e.g. the care leave may not be the cause for dismissal. Upon the employee’s request (within five days of notice of dismissal), the employer is required to provide a written statement of reasons for dismissal within five days. The dismissal’s validity is not affected by a failure to provide a written statement on the reasons for dismissal.

Limitation periods to any entitlements the employee acquired before taking care leave, by they based on statutory law, collective bargaining agreements or employment contracts, will be on hold until two weeks after the end of care leave.

Amendment of the Act on Salaried Employees (Angestelltengesetz) and the General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB)

Limitation periods to any entitlements the employee acquired prior to justifiably not coming to work because of the sickness or accident of a close relative, be they based on statutory law, collective bargaining agreements or employment contracts will be on hold until two weeks after s/he returns to work.

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

Employees may request a reduction of working hours either due to age (50 years and older) or due to care duties or (unpaid) care leave.

The amendment stipulates that in case the employer refuses either of these requests, s/he must provide the reasons for the refusal in writing.

The amendment also adds to the specific protection against dismissal: the employee continues to be protected against dismissal based on planned/taken care leave through protection against dismissal for cause, e.g. care leave may not be the cause for the dismissal. Now, upon the employee's request (within five days of notice of dismissal), the employer is required to provide a written statement of reasons for the dismissal within five days. The dismissal's validity is not affected by failure to provide a written statement on the reasons for dismissal.

Also, limitation periods to any entitlements the employee acquired before taking unpaid care leave, be they based on statutory law, collective bargaining agreements or employment contracts, will be on hold until two weeks after s/he returns to work.

Amendment of the Equal Treatment Act (Gleichbehandlungsgesetz):

The amendment specifies that any discrimination in connection with parental leave, parental part-time and paternity leave, with leave due to family emergencies in case of illnesses and accidents, care leave and the reduction of working time due to care obligations being subject to the (first part of the) Equal Treatment Act, even if there is no discrimination on the ground of sex.

2 Court Rulings

2.1 (Again) Inclusion of service times with previous employers

Supreme Court, 8 ObA 42/23v, 03 August 2023

The plaintiff was a teacher for technical drawing, plastics technology, technical laboratory exercises and applied mathematics in a federal vocational school. Previous to this, he had worked in a company for about 17 years where his responsibilities included developing products and application techniques, writing technical documentation, overseeing product approvals, conducting presentations, overseeing major projects and holding technical training sessions. The teacher claimed that the employer should include all of his previous years of work experience into the calculation of relevant work experience and accordingly, group him into the seniority-based pay scheme. The employer only included ten years of the employee's experience, arguing that the additional years of work experience did not contribute to the teacher being able to perform his job better.

The two courts of lower instance agreed with the employer's reasoning and dismissed the action. The Supreme Court upheld this decision and laid out the development of the relevant legal provisions. In CJEU case C-24/17, 08 May 2019, *Österreichischer Gewerkschaftsbund/Republik Österreich* (ECLI:EU:C:2019:373), the Court held that the limitation to a maximum of ten years of work experience with other employers to be

included in the calculation of relevant work experience breaches Union law, namely the freedom of movement of workers. The Act of Contractual Public Servants (*Vertragsbedienstetengesetz*– VBG) therefore removed this limitation and enabled workers to claim any additional work experience if this was relevant for the present job.

Later the CJEU in its decisions in case C-703/17, 10 October 2019 *Adelheid Krah/Universität Wien* (ECLI:EU:C:2019:850), and case C-710/18, 23 April 2020, *WN/Niedersachsen* (ECLI:EU:C:2020:299) clarified that only identical or equivalent previous work experience should be included in the calculation of relevant work experience to ensure the free movement of workers, whereas this is not the case when only including useful previous work experience. As a result, the Austrian legislator reintroduced the maximum limit of ten years of work experience to be included in Amendment 2020 (BGBl I 153/2020). The draft legislation’s explanatory notes (461 BlgNR 27. GP 10) point out that a maximum period of ten years of ‘useful professional activity’ can be included (§ 26 (3) VBG as amended). Part of the dispute was about whether this provision shall apply due to complex transitional provisions that are not of much interest from a Union law perspective. Consequently, the cap of ten years does not apply, although this did not help the plaintiff in the end.

According to the jurisprudence of the Supreme Court, periods of previous service may also be only partially relevant if the significant climb up the career ladder would have also occurred in case of a shorter previous period of employment. In the Court of Appeal’s opinion, the plaintiff's previous periods of service at the private company that exceed ten years were not to be included because the plaintiff had not sufficiently demonstrated that his professional experience exceeding ten years would have led him to climb further up the career ladder as a vocational school teacher. The Supreme Court therefore upheld the Court of Appeal’s decision.

This decision reiterates that including the previous work experience of public servants is like a ‘never-ending story’, which is partly the result of national legislation trying to transpose relevant decisions of the CJEU. Now the relevant Act (VBG - § 26) includes all equivalent (’*gleichwertige’*) previous work experience without any limitation and useful (‘*nützliche*’) pervious work experience of up to ten years. This provision seems to be in line with the prerequisites of the CJEU in its decisions *Krah/Universität Wien* and *WN/Niedersachsen.* In the latter case, the CJEU (in para 28) points out that for relevant professional experience to be included, equivalent professional experience should, on the one hand, be distinguished from any other type of professional experience that is merely beneficial to the performance of the duties of a school teacher, on the other hand. The principle of freedom of movement for workers as enshrined in Article 45 TFEU does not require professional experience to be included in full that, without being equivalent, is merely beneficial for the performance of teaching duties (para 31). Therefore, as already mentioned, the Austrian provision and the present decision seem to be in line with Union law.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Traditionally in fall, negotiation ‘season’ for collective bargaining agreements start. The CBA in the metal industry is customarily the first to start negotiations and sets the bar for CBAs in other sectors. The trade unions have demanded a pay raise of 11.6 per cent (the inflation rate being 9.6 per cent). This request is considered as being moderate by economists.

For more information, see this press article.

Belgium

Summary

(I) An illegally employed worker from a non-EU country can benefit from a rebuttable presumption of a minimum employment period of three months and compensation for the work performed.

(II) The legislative non-discrimination amendments in the Law of 28 June 2023 respond to a drive to harmonise legal standards on protection against discrimination in Belgium, as well as to certain recommendations as formulated by the Commission for the Evaluation of Federal Anti-discrimination Laws and of various European obligations, notably concerning effective and dissuasive sanctions. The law aims to clarify the interaction between the existing protected criteria and aims to adapt some of them so that they are in line with the development of concepts and their interpretation, e.g. multiple discrimination, discrimination based on an alleged characteristic, discrimination by association, etc.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Employment of illegally staying and working third-country nationals – Compensation of

Appeal Labour Court of Brussels, 06 March 2023

Applicant O., a Moroccan national, was unlawfully residing in Belgium. He claimed that from 28 January 2015 to 12 December 2017, he worked as a labourer for company T, a butcher's shop. He allegedly received a salary of EUR 40 per working day. His work consisted of preparing meat and cleaning the premises.

On 12 December 2017, a labour inspectorate found that two workers, including O., were employed by the butchery. These workers had not been registered with the National Social Security Office, had no work permit and were not residing in the country lawfully.

The manager of the butchery stated that the work period had started on 08 December 2017. The workers had only worked three or four hours. O.'s employment ended on 12 December 2017 without notice or severance pay.

He brought the case before the Brussels French-speaking Labour Court. According to a judgment of 10 May 2021, the Court ordered the butchery to pay the workers compensation in the amount of EUR 216.48 for work performed from 08 to 12 December 2017 and severance pay of EUR 1 410.18.

O. appealed against this, seeking higher compensation for the work he had performed.

The Court considered that the labour inspectorate’s findings did not rule out that the claimant had been employer for a longer period.

If there was any doubt about the duration of employment, the case was to be resolved in the worker’s favour. The latter could base his claim on Article 7 of the Law of 11 February 2013 establishing sanctions and measures for employers of illegally staying third-country nationals. This law provides for the transposition of EU Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. An illegally

employed worker from a non-EU country can benefit from a rebuttable presumption of a minimum employment period of three months.

The Court declared that the appeal was partially well-founded. It modified the judgment insofar as it only ordered the company to pay a claim for four days instead of three months, namely for the period between 13 September and 12 December 2017.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Non-discrimination

The Law of 28 June 2023 amends the Law of 30 July 1981 penalising certain acts motivated by racism or xenophobia, the Law of 10 May 2007 fighting certain forms of discrimination and the Law of 10 May 2007 fighting discrimination between women and men (*Moniteur belge* 10 July 2023).

A law has been published that introduces a number of changes to the three major federal laws to fight discrimination:

- The Racism and Xenophobia Law,
- the Anti-Discrimination Law 2007,
- and the Gender Law 2007.

These laws heavily rely on the Race Equality Directive 2000/43/EC, the Equality Framework Directive 2000/78/EC and the Gender Equality Directive 2006/54/EC.

Since those three laws build on the same structure, the novelties are the same across the three laws (see the Memorandum of Understanding, Parliamentary Documents, Chamber of Representatives, 2022-23, No. 55-3366/001). These general laws are important in the field of labour law.

Multiple discrimination refers to discrimination that results from breaches against more than one protected criterion. From now on, multiple discrimination is also explicitly recognised in the three federal discrimination laws.

Two forms of multiple discrimination are distinguished: cumulative discrimination and intersectional discrimination.

Cumulative discrimination covers situations that arise when a person is discriminated against as a result of a distinction based on multiple protected criteria that are added together but remain separable.

The Memorandum of Understanding to the Law provides the example of refusal to hire an applicant both on the basis of gender and on the basis of age, because the employer believes, for example, that men and older people prevent the formation of a close-knit group of staff.

Intersectional discrimination encompasses situations that occur when a person is discriminated against as a result of a distinction based on multiple protected criteria that interact and become inseparable.

The explanatory memorandum provides the example of a hotel refusing entry to a woman of Asian descent because it is suspected that she will provide sexual services to customers.

For cases of multiple discrimination, it is now expressly provided that the court shall consider the cumulation of criteria and must assess whether or not it is appropriate for the lump sum damages to be cumulated.

From now on, the three discrimination laws also expressly provide for protection against discrimination by association. This is intended to cover situations in which a person is discriminated against because of his/her close relationship with an individual who fulfils a protected criterion.

The Memorandum of Understanding provides the example of a worker who is discriminated against because of his child's disability.

Bulgaria

Summary

The Law on Amendments and Supplements to the Employment Promotion Act has been adopted. It introduces new measures to increase the effectiveness of public sector employment.

1 National Legislation

1.1 Employment promotion

The National Assembly (Parliament) adopted the Law on Amendments and Supplements to the Employment Promotion Act (promulgated *State Gazette* No. 82 of 29 September 2023). The aim of the amendment is to increase the effectiveness of public sector employment and of training policy and to include measures to stimulate participation in the labour market, faster and sustainable employment of unemployed persons who are disadvantaged and to support their adaptation to the workplace. The new provisions will create conditions for increasing the quality of employment and training services provided by the Employment Agency, improve the tools for meeting employers' labour needs and reduce the administrative costs for employers and the Directorates of the Labour Office in terms of mediation employment and training services for older groups in the labour market.

The incentives applied until now are being replaced by a new measure to stimulate the employment of individuals from disadvantaged groups in the labour market on a full-time or part-time basis. Employers will have an opportunity to request training for the individuals they hire, as well as to make a mentor available who will help them acquire or restore their work habits and adapt to work.

In line with the new regulations, jobseekers will be able to use mediation services for information, employment, referral to training programmes and other measures, and validation of professional knowledge, skills and competences in all Directorates of the 'Labour Office', regardless of their place of registration. To reduce obstacles to employment, the penalty for terminating the registration of the unemployed person is reduced from six to three months. The penalty for persons whose participation in subsidised employment is terminated by disciplinary dismissal, is modified from a ban on registration with a labour office to a ban on participation in employment or training financed by the state budget.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

A new Agreement on the Establishment of the Economic and Social Council has been concluded.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 New agreement on the establishment of the Economic and Social Council

In accordance with the new decisions of the Commission for Determining the Representativeness of higher-level trade union and employer associations in tripartite bodies at the national level, a new agreement on the establishment of the Economic and Social Council (Official Gazette No. 106/2023) has been concluded, the content of which is the same as the previous one (Official Gazette No. 28/2020). It was concluded by the Minister of Labour, and the presidents of three representative umbrella trade union associations and the only representative umbrella employers' association.

Czech Republic

Summary

(I) The amendment to the Labour Code will enter into force on 01 October 2023. Employees who provide health care services may work an additional eight hours of overtime per week, on average, according to the agreement.

(II) The Ministry of Labour and Social Affairs issued a decree setting the rate of lump-sum hourly reimbursement of costs for remote working. A lump sum compensation of at least CZK 4.60 for one hour of remote working can be agreed with the employee, though it is also possible to agree that the employer will not cover the costs of remote working.

1 National Legislation

1.1 Amendment to Act No. 262/2006 Sb., Labour Code and other related acts (Parliamentary Print 423/0)

The Chamber of Deputies overruled the Senate's proposal and approved an amendment to the Labour Code in the wording ratified by the Chamber of Deputies in June this year. The amendment to the Code was subsequently promulgated on 19 September in the Collection of Laws under No. 281/2023 Coll. The amendment to the Labour Code will enter into force on 01 October 2023. The content of the amendment has been discussed in detail in previous Flash Reports (see also June 2023 Flash Report).

The issue discussed in the Chamber of Deputies on the re-approval was the reintroduction of the so-called additional agreed overtime work in the health care sector, with a maximum of eight hours per week on average, and in case of emergency medical services with a maximum of 12 hours per week on average. This additional overtime can be performed on the basis of a written agreement concluded between the employer and the employee. The legislation contained in Section 93a LC has been reinserted in the Labour Code after previously being repealed in 2013.

Employees providing health care services, exhaustively listed in Section 93a (1) of the LC, may work overtime within the standard agreed regime of eight hours per week, on average, and an additional eight hours per week, on average, according to this agreement. The Labour Code imposes restrictions on the conclusion of such an agreement.

1.2 Decree setting the rate of flat-rate reimbursement of costs for remote working

The Ministry of Labour and Social Affairs issued Decree No. 299/2023 Coll., setting the rate of a lump-sum hourly reimbursement of costs for remote working. If the employer and the employee who performs remote working agree on a lump sum reimbursement of costs, the employee is entitled to CZK 4.60 (EUR 0.20) for one hour of remote working.

In general, according to Section 190a of the LC, the employer is required to reimburse the costs actually incurred by the employee while working remotely. Instead of reimbursement of proven expenses, it is possible to agree on a lump sum compensation with the employee of at least the amount of CZK 4.60 for one hour of remote working. This amount of compensation is tax deductible for employers.

However, Section 190a (2) of the LC allows the employer to agree with the employee that he/she will not cover the costs of remote working.

The decree will also enter into force on 01 October 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Denmark

Summary

The Danish government intends to put forward two new proposals for legislation and has just launched a public consultation on the proposals. The first proposal concerns working time regulation and the second one concerns annual leave.

1 National Legislation

1.1 Proposal for legislative amendment on working time

In Denmark, the Working Time Directive has been transposed in three statutory acts. Since the adoption of the Directive, the CJEU has ruled on its interpretation in many judgments. Some of these, including the decision in case C-55/18, 14 May 2019, CCOO on the recording of working time, have given rise to considerations in relation to the implementation of the Working Time Directive in Danish law. The Danish social partners have been involved in the work behind this new legislative proposal. The main features of the new proposal are:

- The possibility to opt out of the maximum weekly working time (Article 22) under certain conditions;
- The duty for employers to measure employees' daily working time (as a consequence of the CCOO judgment in case C-55/18, 14 May 2019);
- Implementation of the exemption in Article 17 for some groups of employees concerning registration of working time.

The proposal is based on an agreement between the social partners on how to adjust the Danish working time rules to ensure compliance with EU developments.

The proposal is now under public consultation.

If and when the legislative proposal is finally adopted, the legislative changes will be commented on in more detail.

The link to the legislative proposal under public consultation can be found here.

1.2 Proposal for legislative amendment on uncollected holiday funds

As of 01 September 2020, a new holiday model of 'concurrent paid holidays' was introduced in Denmark in 'The New Holiday Act'.

As in the former scheme, accrued holiday payments cannot be paid out in cash, as holiday payments can only be paid out when holidays are taken.

After the new Holiday Act entered into force in 2020, there was an unexpected high amount of uncollected holiday funds. The expectation was that employees would mostly collect holiday funds on an ongoing basis due to the model of concurrent holiday. Instead, many employees accrued holiday funds that have not been collected because the employees did not take their right to holidays before the expiry of that holiday (spending) period (holidays accrued in the period 01 September to 31 August of the following year (12 months accrual period), can be spent in the period 01 September to 31 December the following year (16 months spending period)).

Under the former holiday regulations, there was an option to pay out small amounts of holiday pay for holidays that had not been 'used' because the employee had not taken the holidays.

The government proposes to re-introduce this 'de minimis threshold', according to which small amounts of uncollected funds are automatically outpaid to the employee if certain conditions are met. The aim is to reduce the sum of uncollected holiday funds in the future.

The proposal is currently under public consultation.

The link to the new Holiday Act, L 230 of 12/02/2021 can be found here.

The link to the legislative proposal under public consultation can be found here.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

Since October, employees at construction sites must be registered using a special chip card.

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1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Registration at construction sites

Since 01 October 2023, construction companies have to register major construction projects, the contract chain and the relevant employees with the Tax and Customs Board. The purpose of this new obligation is to ensure fair competition and reduce the payment of so-called envelope wages (not officially declared wages) in the construction sector.

The Tax and Customs Board has broadly estimated the tax loss resulting from the payment of envelope wages at EUR 99.8 million per year. The calculated tax deficit related to the construction sector is over EUR 20 million per year.

According to the rules, only individuals who have been properly trained for work, who are officially employed and are paid a fair wage, may work on the construction site. Since the share of envelope wages and VAT fraud is high in this sector, the companies that abide by the rules and pay the mandatory taxes are disadvantaged.

With the introduced change, construction companies will be able to start ordering special chip cards for their employees as of October, the issuance of which will start in November, and will then have to start recording the working time those employees spend on the site. The data is transferred to the contract chain and the duration of work to the information system created by MTA, which gathers information about the customer of the construction service, the construction object, the registration system used, primary and subcontractors and employees working on the construction site.

The chip cards give the employee a sense of security that his/her working hours are being correctly recorded and that any mandatory taxes have been paid to the state. It provides the state with a dataset based on which algorithms can detect anomalies and help identify tax risks and direct expensive audit resources to the right places.

Electronic registration is mandatory for construction sites where the construction duration exceeds 30 working days and where at least 20 people work at the same time, or the total volume of the site is over 500 person-days. This affects approximately 1 000 objects annually.

The obligation to register concerns objects whose construction begins after 01 October 2023 or whose construction is in progress and the expected completion date is later than 01 October 2024.

The unified employee chip card allows the registration of employees at every construction site where the builder has the right to work. To maintain innovation and flexibility when collecting data, the general contractor is free to use, if necessary and possible, other means of identification in addition to the employee's card, which is compatible with the central registration system (including a mobile application).

The purpose of this innovation is to ensure a fair competitive environment in construction. Only persons who are properly trained for work and who are officially employed may perform work on construction sites.

Finland

Summary

An action plan to prevent and fight foreign labour exploitation will be prepared by the Ministry of Economic Affairs and Employment by the end of 2023.

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1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Stand-by time

Labour Court, TT 2023:45, 01 September 2023

The question dealt with by the Labour Court, TT 2023:45, 01 September 2023 was whether the time counted as stand-by time of part-time firefighters who performed crew stand-by duty should be considered working time. In the interim judgment, the confirmation request was accepted for the period during which the firefighters had a justified reason to assume that when the alarm sounded, they had to be on stand-by and reach the fire station in about five minutes. Evaluating the circumstances as a whole, the obligations imposed on the firefighters during their stand-by period had objectively and very significantly affected their ability to freely use the time during which they were not required to perform actual work tasks, and to use this time for their private interests. The Court rejected the confirmation request for the period during which the firefighters had been aware of the stand-by instruction given by the rescue service for all stand-bys in which the departure time was defined as 15 minutes.

The Labour Court considered the minimum requirements for working time set out in the Working Time Directive 2003/88/EC and the CJEU rulings on stand-by time, mentioning the judgment in case C-580/19, 09 March 2019, Stadt Offenbach am Main.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Action plan to prevent and fight exploitation in the labour market

The Ministry of Economic Affairs and Employment will prepare an action plan to prevent and fight exploitation in the labour market by the end of 2023. In recent years, a record number of cases or suspected cases of work-related exploitation have been exposed in Finland. New forms of work also create new forms of labour exploitation.

The government aims to tackle the exploitation of foreign labour with broad-based and effective measures. Measures relate to the residence permit procedure as well as to supervision and inter-authority cooperation once the residence permit holders have entered Finland. One goal is to make the legislation on punishments stricter in accordance with the Government Programme. Another aim is to improve opportunities for cooperation between public authorities by ensuring that the authorities have the right to obtain and provide information on their own initiative, for example. In addition, occupational safety and health resources would thereby be more efficiently targeted. Moreover, a registration obligation for invoicing companies to crack down on

opportunities to conceal employment relationships as business activities would be created.

It has been recognised in the work against labour exploitation that there is a need to better identify and detect abuse and to improve the position of foreign workers by promoting their integration and social inclusion. In addition to exploitation in employment relationships, wild berry picking and the status of foreign pickers currently entails significant risks. According to the Ministry of Economic Affairs and Employment, a need for new solutions will be considered in the preparation of the action plan.

4.2 Report on gender impact of collective agreements on equal pay

The research and development project 'Gender impact of collective agreements on equal pay' of the Ministry of Social Affairs and Health examined the impact of Finnish collective agreements on equal pay. The study consisted of two phases. First, a survey of parties to collective agreements was carried out, aiming at an overview of gender impact assessments in the agreements and negotiations leading to their conclusion. Both one private sector and one public sector agreement were chosen for more in-depth analysis. Pay formation, pay system and pay transparency clauses of the agreements were studied through legal analysis and interviews. The implementation of the agreements at the workplace level was also studied by means of interviews.

According to the project report (*'Työehtosopimusten sukupuolivaikutukset samapalkkaisuuden näkökulmasta´-tutkimushanke, Sosiaali- ja terveysministeriön raportteja ja muistioita* 2023:35), there is a need to increase pay transparency and ensure that all pay components are included in the context of equal pay. Collective bargaining should pay closer attention to equal pay, which requires better knowledge of equality and non-discrimination when gender impacts are assessed.

France

Summary

(I) Procedures for taking adoption leave and leave for the arrival of an adopted child have been further clarified by decree.

(II) French lawmakers will likely transpose Directive 2020/1828 on class actions in the near future.

(III) On 13 September 2023, the Court of Cassation issued a series of rulings on various topics to bring its case law into line with European Union law.

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1 National Legislation

1.1 Adoption leave and leave for the arrival of an adopted child

A decree of 12 September 2023 on adoption leave and leave for the arrival of an adopted child clarifies the provisions of Law No. 2022-219 of 21 February 2022 aiming to reform adoption.

The period for taking adoption leave has been defined, as well as the possibility of splitting it (see Article D. 1225-11-1 of the French Labour Code.). The period for taking leave for the arrival of an adopted child has also been defined (see Article D. 3142-1-3 of the French Labour Code.).

1.2 Bill on the legal framework of class action

The Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC has not yet been transposed into French law (the French legislator has thus exceeded the transposition deadline set by European Union law). The transposition of the Directive into French law was initiated in December 2022 with the introduction of a bill in the French National Assembly. Adopted during its first reading by the National Assembly on 08 March 2023, the bill is currently being evaluated by the French Senate. If it enters into force, the bill will not radically alter the existing group action procedure under French law but will nevertheless introduce some significant changes.

In addition to unifying all existing class actions under a single legal framework, the text will broaden the scope of the mechanism and the criteria defining the associations authorised to use class actions.

The bill also provides for the introduction of the new cross-border class action mechanism into French law provided for in the Directive on representative actions, and for the creation of a civil fine designed to penalise professionals who fail to comply.

The main changes with regard to French labour law relate to trade unions. Provisions of the French Labour Code will be repealed (see Section 2 on specific provisions for class action, Chapter IV, Title III, 1st Book of the French Labour Code).

Unlike other associations entitled to class actions, representative trade unions (within the meaning of Articles L. 2122-1, L. 2122-5 or L. 2122-9 of the Labour Code or Article L. 221-1 of the General Civil Service Code, and representative trade union organisations of the judiciary) could only be authorised to bring a group action for certain types of breaches.

Nevertheless, the new provisions would enable representative trade union organisations to act not only in discrimination cases, but also with regard to the protection of personal

data or when seeking to put an end to an employer's failure to comply or to compensate for damage caused by this failure to several persons placed under the authority of this employer.

2 Court Rulings

2.1 Suspension of contract of employment

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

- parental leave;
- non-occupational illness, occupational illness or accident at work when the period of suspension exceeds one year (see Article L. 3141-5 of the French Labour Code.).

The Court of Cassation has regularly alerted French legislators to the need to bring the provisions of the Labour Code into line with European Union law (see 2013 Annual Report of the Court of Cassation; 2018 Annual Report of the Court of Cassation).

Indeed, the Court of Cassation previously stated that unless the legislator intervenes, the Court cannot, in application of Directive 2003/88/EC, set aside the effects of a contrary national provision in a dispute between private individuals, and therefore between an employee and a private-law employer (see Social Division, Court of Cassation, 13 March 2013, No. 11-22.285.).

On the contrary, the Directive is directly applicable to relationships between employees and a public employer or a private employer managing a public service (see Social Division, Court of Cassation, 22 June 2016, No. 15-20.111.).

However, in its 2018 Report, the Court of Cassation clarified the European Court of Justice's (CJEU) position on the invocation of the provisions of Article 31(2) of the Charter in the absence of transposition. According to the CJEU, it may be directly invoked by an employee in a dispute with his/her private-law employer, and the national court must therefore preclude any national legislation that does not comply (see CJEU, case C-569/16, 06 November 2018).

Consequently, in the absence of any reaction from the legislator, the full Social Division made spectacular changes to its case law on 13 September 2023 to guarantee the effectiveness of leave entitlements guaranteed by European Union law.

The solution may apply immediately to current disputes as the Social Division of the Court of Cassation already ruled that legal certainty cannot prevent the application of new case law (see Social Division, Court of Cassation, 18 May 2011, No. 09-72.959; Social Division, Court of Cassation, 10 Apr. 2013, No. 12-16.225.).

2.2 Paid leave and parental leave

Social Division, Court of Cassation, No. 22-14.043, 13 September 2023

In the present case, an employee whose employment contract had been suspended due to illness, followed by prenatal leave from 01 to 19 August 2018, maternity leave from 20 August to 16 February 2019 and parental leave from 17 February, brought an action before the employment tribunal a few months after her employment contract had been terminated by mutual agreement, seeking compensation for paid leave not taken.

The case was dismissed by the Court of Appeal in accordance with the legislation and case law in force at the time. The employee appealed to the Court of Cassation.

Until now, an employee who went on parental leave without having taken his/her paid leave, lost the benefit of that leave. The Court of Cassation usually ruled that since the employee's decision to take parental leave was binding on the employer, the employee him-/herself made it impossible to exercise his/her right to leave and could therefore not claim compensation for leave not taken (see for instance: Social Division, Court of Cassation, 5 May 1999, No. 97-41.241; Social Division, Court of Cassation, 28 January 2004, No. 01-46.314.). This was not the case, however, if the employer had made it impossible for the employee to take his/her paid leave before going on parental leave (see for instance: Social Division, Court of Cassation, 2 June 2004, No. 02-42.405.).

This solution was contrary to European Union law. In fact, the rights acquired or in the process of being acquired by the worker on the date of the commencement of his/her parental leave are maintained as he/she is entitled to them until the end of the leave, i.e. these rights apply at the end of his/her leave (according to Clause 5 (Employment and non-discrimination rights), point 2 of the revised framework agreement on parental leave set out in the annex to Directive 2010/18/EU of 08 March 2010).

In addition, the CJEU ruled that European Union law (Clause 2, point 6 of the framework agreement on parental leave of 14 December 1995, which appears in the annex to Directive 96/34/EC of 03 June 1996 as amended by Directive 97/75/EC of 15 December 1997, incorporated into Directive 2010/18) precludes a national provision under which workers, who make use of their right to parental leave, lose paid annual leave entitlements acquired during the year preceding the birth of their child (see CJEU, case C-486/08, 22 April 2010).

Appealing to the Court of Cassation, the employee, who expressly invoked Clause 5 of the framework agreement set out in the annex to Directive 2010/18 of 08 March 2010, provided the Court with an opportunity to bring its case law into line with European law.

In its reversal ruling, the Social Division of the Court de Cassation stated that it is the employer's responsibility to take appropriate measures to ensure that the employee can effectively exercise his/her right to paid leave and in the event of a dispute, to prove that he/she took the steps legally required of him/her to do so (see Social Division, Court of Cassation, 13 June 2012, No. 11-10.929; Social Division, Court of Cassation, 21 September 2017, No. 16-18.898.). Besides, it must be interpreted from Article L. 3141-1 and Article L. 1225-55 of the French Labour Code, in the light of Directive 2010/18/EU, that where the employee did not have the possibility 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 acquired by the date of the commencement of parental leave must be carried over after the date of resumption of work.

2.3 Right to paid leave and non-occupational illness, occupational illness or accident at work

Social Division, Court of Cassation, No. 22-17.340, 13 September 2023 ("Case 1")

Social Division, Court of Cassation, No. 22-17.638, 13 September 2023 ("Case 2")

In both cases, the Court of cassation had to determine whether employees were entitled to paid leave while their employment contract was suspended for non-occupational illness (Case 1) and occupational illness and accident at work (Case 2).

Article L. 3141-3 of the French Labour Code relates the right to leave to the performance of actual work. Under the terms of the aforementioned Article L. 3141-5, periods of suspension of the employment contract due to an accident at work or an occupational illness are treated as actual work for the purposes of determining the duration of the leave, but only up to 'an uninterrupted period of one year'. After one year, the employee no longer acquires any right to paid leave.

On the other hand, periods of absence due to non-occupational illness are not included among the assimilated absences listed in Article L. 3141-5 of the French Labour Code. They are therefore not eligible for paid leave for the duration of the work stoppage.

Around 200 collective bargaining agreements contain supra-legal provisions which, subject to certain conditions, treat all or part of the periods of absence due to non-occupational illness as periods of actual work for the purpose of acquiring paid leave (see for instance: Syntec, national collective agreement for the metallurgy industry).

However, Article 7 of Directive 2003/88/EC of 04 November 2003 concerning certain aspects of the organisation of working time provides for entitlement to paid leave of at least four weeks per year. This entitlement to leave is not affected if the employee is absent for health reasons during the leave entitlement period, as European Union law makes no distinction between employees who are absent for sickness during the reference period and those who actually worked during the leave entitlement period (see CJEU, case C-282/10, 24 January 2012).

The Court dismissed the application of the provisions of Article L. 3141-3 of the French Labour Code insofar as they make the acquisition of paid holiday entitlements by an employee whose employment contract is suspended by the effect of sick leave due to a non-occupational illness conditional on the performance of actual work and ruled that the employee is entitled to his paid holiday entitlements in respect of this period (Case 1).

It also ruled out the application of the provisions of Article L.3141-5 of the French Labour Code insofar as they limit the periods of suspension of the employment contract to an uninterrupted period of one year due to an accident at work or occupational illness that are treated as actual working time during which the employee may acquire paid leave entitlements, holding that the employee may claim his paid leave entitlements for the entirety of this period (Case 2).

Consequently, from now on, employees may acquire paid leave during periods when their employment contract is suspended due to non-occupational illness, occupational illness or an accident at work for more than one uninterrupted year.

It should also be noted that, even if under European law, employees are entitled to four weeks of paid annual leave., the Court of Cassation ruled that the principle of non-discrimination on the grounds of health meant that the statutory five weeks' paid leave and to leave under collective bargaining agreements had to be applied.

2.4 Starting point of the legal prescription for an action for payment of holiday pay

Social Division, Court of Cassation, No. 22-10.529, 13 September 2023

In the present case, a person who had worked with a training institute from March 2001 to June 2018 brought an action before the employment tribunal for recognition of the existence of an employment contract and for various salary and compensation claims.

Her claim was dismissed in a first trial but was partially upheld by the Court of Appeal. Her status as a teacher under a permanent employment contract was recognised, the termination of her employment on 20 June 2018 was annulled, and she was reinstated. She was awarded compensation for eviction, as well as back pay, bonuses and compensation for paid leave for 2015–2016, 2016–2017 and 2017–2018.

However, the teacher claimed compensation for paid leave from the 2005–2006 reference period. Dismissed on this point by the Court of Appeal in application of the Court of Cassation's traditional case law, she appealed, enabling the Court of Cassation to develop its case law along the lines set out by the CJEU.

As the payment of paid leave is subject to the rules applicable to the payment of wages (see Article D. 3141-7 of the French Labour Code), the action for payment is subject to the three-year limitation period set out in Article L. 3245-1 of the French Labour Code (see Article L. 3245-1 of the French Labour Code) applicable to wages.

In ruling that the claim for the payment of paid leave for a reference period prior to the three years covered by the three-year limitation period was time-barred, the Court of Appeal applied the settled case law of the Court of Cassation, according to which the starting point of the limitation period for an action for payment of paid leave is the termination of the statutory or contractual period during which the paid leave could have been taken (see Social Division, Court of Cassation, 14 Nov. 2013, No. 12-17.409; Social Division, Court of Cassation, 29 March 2017, No. 15-22.057.).

However, in a judgment of 22 September 2022, the CJEU ruled that the loss of the right to paid annual leave at the end of a reference period or of a carry-over period can only occur if the employer has put the worker in a position to exercise that right in good time (see CJEU, C-case 120/21, 22 September 2022).

Therefore, the Social Division of the Court of Cassation now holds that where the employer raises the defence of limitation, the starting point for the limitation period for the payment of paid leave must be the termination of the statutory or contractual period during which the paid leave could have been taken, provided that the employer can prove that it took the steps required by law to ensure that the employee was able to exercise his/her right to paid leave.

The judge will therefore have to check that the employer is indeed in a position to invoke the statute of limitations against the employee's action.

From now on, employers will only be able to raise the limitations on an action for payment of compensation for paid leave if they can demonstrate that they have fulfilled their obligation to inform the employee of the paid leave period and the order of departure. Otherwise, the limitation period will not have started to commence.

In this case, the penalty could be severe for the employer if the referring court of appeal finds that the employer did not allow the employee to take his/her full entitlement to paid leave for ten years.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) The Federal Civil Court has referred questions to the CJEU for a preliminary ruling on injunctive relief and the concept of non-material damage under the GDPR.

(II) The Federal Labour Court has published a notice on the continuation of suspended proceedings that dispute the consequences of different errors in the notification procedure for mass dismissals.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Injunctive relief and the concept of non-material damage under the GDPR

Federal Civil Code, VI ZR 97/22, 26 September 2023

The Federal Civil Court (*Bundesgerichtshof*, BGH) has referred questions to the CJEU for a preliminary ruling on the interpretation of provisions of the General Data Protection Regulation (GDPR) with regard to the existence of a claim for injunctive relief under EU law by the data subject whose personal data have been unlawfully disclosed by the controller by means of onward transfer, or on the possibility of recourse to national law in this respect, receptively, and on the concept of non-material damage within the meaning of Article 82(1) of the GDPR.

In the present case, the plaintiff sued the defendant for injunctive relief and compensation for non-material damage due to the disclosure of personal data. He was in an application process with the defendant, which took place via an online portal. In the course of this process, an employee of the defendant also sent a message intended for the plaintiff only to a third person not involved in the application process via the portal's messenger service. The message stated, among other things, that the defendant could not meet the plaintiff's salary expectations.

The plaintiff claims that his (non-material) damage does not lie in the abstract loss of control over the disclosed data, but in the fact that at least one other person who knows the plaintiff and potentially also former employers of the plaintiff now has knowledge of circumstances that are subject to discretion. It could be possible that the third party working in the same industry had passed on the data contained in the message or had been able to gain an advantage as a competitor for possible positions in the application process by having knowledge of the information. In addition, the claimant felt that 'getting the short end of the stick' in the salary negotiations was a disgrace which was now evident.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Communication on the status of suspended proceedings

The Federal Labour Court (*Bundesarbeitsgericht*, BAG) has published a notice on the continuation of suspended proceedings involving disputes on the consequences under dismissal law of different errors in the notification procedure for mass dismissals. In the meantime, the reason for the suspension has ceased to apply, namely the publication of the relevant CJEU decision.

The Sixth Senate of the Court had suspended several proceedings. The Senate wanted to wait for the CJEU's decision in case C-134/22 before deciding on the sanctions in case of violations of the employer's obligations under section 17 (1), (3) Dismissal Protection Act (*Kündigungsschutzgesetz*, KSchG). As this decision was issued on 13 July 2023, the reason for suspension ceased to apply. The Sixth Senate will hear two cases on 14 December 2023. On the same day, case 6 AZR 155/21 for which the Senate had obtained the CJEU's preliminary ruling will also be heard.

Greece

Summary

Law 5053/2023 implements Directive (EU) 2019/1152.

1 National Legislation

1.1 Transparent and predictable working conditions in the European Union

Law 5053/2023 implements Directive (EU) 2019/1152 of the European Parliament on transparent and predictable working conditions in the European Union.

Information on working conditions

Articles 5-8 of Law 5053/2023 implement the Directive's provisions concerning information of employees' working conditions. The previous legislation (Presidential Decree 156/1994 having transposed Directive 91/533/EEC) has been replaced by this new one.

Compared to the previous legislation, the new provisions provide that the information on the employees' working conditions shall include a) the place of work, b) where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine his or her place of work, and the registered place of business or, where appropriate, the domicile of the employer, c) information on training entitlement, d) duration and conditions of the probationary period, the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, if the work pattern is entirely or mostly unpredictable.

Additional information shall also be provided concerning workers sent to another Member State or to a third country to perform work.

The probationary period

Pursuant to a provision introduced during the financial crisis (Article 17 of Law 3899/2010), a service up to 12 months was considered a probationary period. There was therefore no reason to provide an additional special probationary period in the contract, as the employee might be dismissed during the first 12 months without prior notice and without being entitled to any severance pay.

Article 4 of new law 5053/2023 (Article 1A Labour Code) provides that where an employment relationship is subject to a probationary period, that period shall not exceed six months, and in the event of a fixed term contract, shall not exceed ¼ of the expected duration of the contract and in any case not six months.

However, Article 19 of the new law 5053/2023 modifies the definition of the probationary period. It no longer qualifies a service up to 12 months as a probationary period. Instead, it provides that during the first 12 months of the employment contract, the employer is entitled to dismiss the employee without prior notice and without being entitled to any severance pay. In other words, during this period, the employer is not entitled to respect the main conditions of dismissal.

This provision does not seem to be in line with the Directive. The period from six months up to 12 months is in reality a probationary period, even if legislation adopts another definition for it. This period will function as a probationary period, taking into account that the main conditions for a legal dismissal will apply.

Parallel employment

Article 9 of Law 5053/2023 provides that an employer shall neither prohibit a worker from taking up employment with other employers outside his/her established work schedule, nor subjects a worker to adverse treatment for doing so.

This clause is only permitted on the basis of objective grounds such as health and safety, the protection of business confidentiality, the integrity of public service or the prevention of conflicts of interests.

Until the new law was introduced, the working time provisions applied on a 'pre-worker' basis. If the worker was employed by more than one employer, the total duration of all employment contracts was considered to determine whether the provisions concerning the maximum daily and weekly working time were respected.

The new Law 5053/2023 (Article 9) provides that the provision concerning weekly working time and break periods shall be respected. However, the national provision (Article 186 of Code of Individual Labour Law) concerning maximum daily working time is not included as a provision. Therefore, it seems that the implementation of the Directive constituted grounds for reducing the level of protection already previously afforded to Greek workers concerning maximum daily working time.

On-demand work

The legal situation of on-demand work in Greece is not entirely clear. On-demand work is not directly regulated by Greek law. It is, however, no longer explicitly prohibited. It seems to be possible on the basis of contractual freedom (Article 361 of Civil Code). Yet even in that case there is always an essential number of fixed working hours and another (less essential) number of flexible hours.

This type of employment relationship seems to have been rather rare, and was only observed in specific sectors in Greece (e.g. medical sector, emergency situations). On-demand work might be rare due to the strict regulation of part-time employment (see below).

Several scholars argue that some forms of on-demand work, such as zero-hours contracts, could be considered abusive and contrary to the principle of good faith (Article of 281 of Civil Code) and are therefore illegal (see I. Skandalis, Working time, 2017, pp 44 ff. D. Zerdelis, on demand work and the limits of flexible organization of working time, Deltio Ergatikhs Nomothesias 2023, pp. 193).

Given that on-demand work is a form of part-time work, the contract must be concluded in writing (see Article 38(1) of Law 1892/1990) and include some relevant information, such as place of work, working time, periods of work and salary.

Part-time employees shall also only perform work over and above their contractually agreed working hours if they are in a position to perform it and refusal to do so is contrary to the requirements of good faith. The employee is entitled to refuse to perform overtime work when such overtime is continuously required or in the event that s/he has other employment or has family obligations that prevent him/her from performing overtime work (see Article 38(9) of Law 1892/1990).

Finally, in the event of performance of work beyond the fixed contractual hours, part-time employees are entitled to an increase of 12 per cent on the paid hourly wage for each hour of overtime (see Article 38(11) of Law 1892/1990).

The new provision of Law 5053/2023 (Article 10) provides that where a worker's work schedule is entirely or mostly unpredictable, the employer shall only be able to require the worker to work if both of the following conditions are met: (a) the work takes place within predetermined reference hours and days, (b) the worker is informed by his or her employer of a work assignment within a reasonable time in advance of not less than 24 hours.

Where one or both of these requirements is not fulfilled, the worker shall have the right to reject a work assignment without adverse consequences.

Moreover, where an employer cancels a work assignment after the specified deadline, the worker is entitled to compensation corresponding to the wages of that work.

The employment contract shall specify the number of minimum fixed hours. On-demand (non-fixed) hours may be triple the amount of fixed hours. In other words, if the fixed amount of working hours is ten per week, the employer is entitled to request the employee to work 30 more hours.

It is debatable whether through the adoption of this new provision in Greek law abusive practices in terms of recourse to this form of work are likely to be tackled as required by the Directive.

Finally, if the employer requests the employee to work in addition to the guaranteed hours, no increase on the paid hourly wages is provided as in the case of traditional part-time work (see Article 38 para 11 of Law 1892/1990).

Finally, it should perhaps be noted that no remuneration is provided for the employee's availability. Only hours of effective work are paid. It cannot, of course, be ruled out that the parties to the contract provide for such a clause.

Days of employment

The new Law 5053/2023 (see Articles 26 and 27) provides that in companies where employees are normally employed five days a week, employers may employ them for one additional day. In this case, an increase of 40 per cent on the paid hourly wage is provided.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report .

4 Other Relevant Information

Nothing to report.

Hungary

Summary

(I) Two proposals will have an impact on employment protection: training rules on health and safety at work, and deduction of trade union membership fees in the public sector. The draft has not yet been debated in Parliament, and the social partners fiercely oppose these potential amendments.

(II) Although there is no obligation to renegotiate the minimum wage, some discussions between the social partners and the government are taking place on this topic.

1 National Legislation

1.1 Draft Act on simplification of state procedures related to labour rights

The government published a draft in August 2023 on several measures to simplify the operation of the state. In this regard, two proposals will have an impact on employment protection.

First, Article 14 would amend the rules on information and training provided by the employer for employees on health and safety at work. Presently, Article 55 requires employers to provide training on health and safety at work. According to the new Subsection 2a), this training may be replaced by an electronic information letter containing the general education material published by the minister responsible for employment. This amendment may have a negative effect on health and safety at work, but may also have an impact on litigation on the employer's liability for damages.

Second, according to the amendment of several acts on public sector employment (see Articles 7, 66, 97, 98, 102, 109, 110, 115 of the Draft), the employer would no longer be required to deduce the amount of trade union membership fee and transfer this amount to the trade union. This obligation would remain in the private sector, but would be abolished in the entire public sector. This will surely contribute to a further drop in the number of trade union members in the public sector. This amendment will therefore contribute to the weakening of social dialogue in the affected sectors. It is remarkable that education is one of the affected sectors, which may be relevant in the light of the strike conflicts between trade unions and the government in recent years (see earlier Flash Reports).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Potential mid-year increase of minimum wage

As indicated in the August and September 2023 Flash Reports, the minimum wage for 2023 was based on a tripartite agreement. The government, employer organisations

and trade unions committed in this agreement to renegotiate the minimum wage if inflation exceeds 18 per cent in July 2023. The inflation was 17.6 per cent in July 2023, thus, there is no obligation to renegotiate the minimum wage. There is no further information on the status of these negotiations.

Iceland

Summary

A new case on interpretation of working time according to the WTD has been decided following an Advisory Opinion from the EFTA Court.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Working Time

Icelandic Court of Appeal, No. 197/2022, 15 September 2023

On 15 September 2023, a court ruling was passed in the Icelandic Court of Appeal in case No. 197/2022, following an Advisory Opinion of the EFTA Court in case E-11/20 of 15 July 2023.

The court ruling concerned the question whether the time spent travelling outside normal working hours by an employee to a location other than his fixed or habitual workplace to carry out his activity or duties in that other location, as required by his employer, constitutes 'working time' within the meaning of Article 2(1) of Working Time Directive. The employee in the present case had travelled abroad on two different occasions to Israel and Saudi Arabia with a considerable amount of travel time falling outside his working time.

The District Court in Reykjavík, the EFTA Court and the Court of Appeals all considered this time to be working time within the meaning of Article 2(1) of the Directive and that the employee should therefore have been paid accordingly for those trips.

This ruling is a further clarification on the concept of working time in Icelandic law and could as such have implications on Icelandic labour law.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

The Workplace Relations Commission has issued another decision holding that an employer has failed both to initiate consultations on a proposal to create collective redundancies and to provide relevant information relating to the proposed redundancies.

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1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Collective redundancies

Workplace Relations Commission, ADJ-00039722, 15 September 2023, Cox v Debenhams Retail

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

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

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

Section 9 of the Protection of Employment Act 1977, which transposes Directive 98/59/EC, provides:

> (1) Where an employer proposes to create collective redundancies, he/she shall, with a view to reaching an agreement, initiate consultations with employees' representatives.
>
> (2) Consultations under this section shall include the following matters—
>
> > (a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or mitigating their consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining employees made redundant;
> >
> > (b) the basis on which it will be decided which particular employees will be made redundant.

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

Section 10(1) of the 1977 Act provides:

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

A non-exhaustive list of the information that must be supplied is set out in section 10(2).

Many of the employees lodged complaints with the Workplace Relations Commission ('WRC') contending that the company had not complied with the requirements set out in sections 9 and 10 of the 1977 Act and a number of 'test cases' were selected by agreement with the trade unions. The complaints were, first, that the consultation process should have commenced on 09 April at the latest; second, that the consultation process entered into on 17 April was not 'meaningful'; and third, that the information provided was incomplete.

The WRC Adjudication Officer considered various CJEU decisions—including case C-44/08, 10 September 2009, *Fujitsu Siemens*; case C-235/10, 03 March 2011, *Claes*; and case C-16/17, 07 August 2018, *Bichat*—and the High Court decision in *Tangney v Dell Products* [2013] IEHC 622. He concluded that the 'strategic decision' which exerted 'compelling force' on the employer was taken on 08 April 2020 and that the consultation process should have begun no later than on the 9th, and that relevant information had not been shared with the union representatives during the process which did take place, to enable them to formulate constructive proposals. Consequently, there was a breach of both section 9 and section 10. Section 11A of the 1977 Act limits the amount of compensation that can be awarded for each breach of the Act to four weeks' remuneration and the adjudication officer decided to award two weeks' remuneration. Accordingly, the complainant was awarded EUR 1 800 (being EUR 245 x 2 x 2): *Cox v Debenhams Retail (Ireland) Ltd* ADJ-00039722. It is understood that the earlier decision in *Crowe v Debenhams Retail (Ireland) Ltd* ADJ-00038906 (discussed in the May 2023 Flash Report), where the complainant was awarded four weeks' remuneration for each breach of the Act, has been appealed to the Labour Court.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Italy

Summary

(I) The Italian Parliament has converted a Law Decree approved in July into law to protect workers in case of climatic emergencies.

(II) The Italian Privacy Authority dealt with investigative reports commissioned by an employer.

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1 National Legislation

1.1 Climate emergency

The Act 18 September 2023 No. 127 converts the Law Decree 28 July 2023 No. 98 into law.

The Act modifies the content of Article 3 of the Law Decree (*see* July FR). According to the new Article 3, "*The Ministries of Labour and of Health shall convene the social partners to sign special agreements to adopt guidelines and procedures to ensure health protection and the safety of workers exposed to climatic emergencies*".

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Privacy

On 06 July 2023, the Italian Privacy Authority adopted a provision (published in the Privacy Authority's newsletter on 11 September 2023) providing that the employer is required to transmit to the employee all data collected during an investigation, including those not relevant for a disciplinary proceeding. In fact, the employee has the right to access his/her personal data in a complete and updated format, including those contained in the report of the investigating agency commissioned by the employer to collect information about him/her.

Luxembourg

Summary

There have been no developments in national legislation and no new bills have been introduced.

1 National Legislation

No new bills, law or decrees have been introduced.

Two Grand-Ducal Regulations have been issued, namely the Grand-Ducal Regulation of 25 September 2023 modifying the Grand-Ducal regulation of 28 December 1990 for another, the Grand-Ducal Regulation of 25 September 2023 modifying the Grand-Ducal Regulation of 29 December 1986, which aims to digitise meal vouchers (‘*chèques-repas*’) and increase their value to bring them into line with inflation, with a maximum tax exemption of EUR 12.20 per day. Taking the employee’s personal contribution of EUR 2.80 into account, the meal voucher may amount to EUR 15 as of 2024.

2 Court Rulings

Some of the Court of Appeals’ recently published cases may be worth mentioning.

2.1 Dismissal in the event of loss of residence or work permit

Cour Supérieure de Justice, No. CAL-2022-00205, 27 April 2023

For third-country nationals residing illegally (or nationals residing legally but without a work permit), the law imposes obligations on employers to verify their status prior to recruitment and prohibits them from recruiting a person with an irregular status.

The Court of Appeal thus considered that employers are required not only to check at the time of onboarding a third-country national whether he/she possesses a work permit, or even a residence permit, but also to ensure throughout the period of employment that the person’s administrative situation is in order.

If, as a result of the loss of the residence/work permit, the contract with a third-country national could no longer be legally performed due to this administrative situation, the employer is entitled, and even required, to end this illegal situation and may therefore dismiss the employee, even with immediate effect.

2.2 Termination by mutual agreement does not constitute a final settlement of accounts

Cour *Supérieure de Justice, No. CAL-2022-00449, 27 April 2023*

In practice, it has been observed that in terminations by mutual agreement, the parties stipulate clauses such as "*that they have mutually discharged all obligations that may have arisen from their employment contract*".

The Court had to rule on the validity of such clauses, since an employer relied on such a clause because an employee was claiming back unpaid wages in court. It ruled that the clause did not prevent the employee from making such a claim, since the written document did not meet the conditions imposed on formal “*receipt in full and final settlement of accounts*” (‘*reçu pour solde de tous comptes*’*;* Article L. 125-5 of the Labour Code), in particular the handwritten details and information relating to the period

of notice of termination and formalities designed to protect employees who waive their rights.

2.3 Compensation for hours during which the employee has not performed any actual work

Cour *Supérieure de Justice, No. 44403, 11 May 2023*

By virtue of the reciprocal nature of the employment contract, i.e. the reciprocity between the work performed by the employee and the salary paid by the employer, it is a matter of principle that in the event of unjustified absence, the employee is not entitled to his/her salary.

On the other hand, case law accepts that a salary is due as soon as the employee was present or at the employer's disposal. The fact that she did not perform the tasks requested, that her work was unsatisfactory or that the volume of work performed was below average, does not in principle justify the withholding of all or part of the employee's salary. The only way for the employer to respond to such a situation is to use his/her disciplinary powers.

An employer pursued a different route by demanding reimbursement of the relevant wages in the form of damages claimed on the basis of the principles of civil liability ('*dommages-intérêts'*). The employee had in fact been dismissed due to significant failings in the performance of his contract and non-compliance with working hours. An expert report confirmed that nearly 400 of his working hours had not actually been effectively worked, corresponding to a salary of around EUR 7 000. The dismissal was therefore declared justified.

However, the employer's claim for compensation was not upheld. After pointing out that under Article L. 121-9 of the Labour Code, an employee is only liable in the event of intentional or gross misconduct, the Court summarily held that a lack of commitment and productivity, however considerable, cannot oblige the employee to pay back the corresponding salary as damages.

2.4 A pandemic does not as such justify the exercise of the right of withdrawal

Cour *Supérieure de Justice, No. CAL-2022-00225, 08 June 2023*

In accordance with Article 8(4) of the Framework Directive on Health and Safety (No. 89/391), a worker who, in the event of serious and immediate and unavoidable danger, leaves his/her workstation and/or a dangerous area must suffer no disadvantage and be protected against unjustified consequences.

This rule is transcribed nearly verbatim in Article L. 312-4 (4) of Luxembourg's Labour Code.

In the present case, an employee was accused by his employer of unjustified absence. The employee invoked his right to withdraw from work in view of the COVID-19 pandemic, which at the time entailed numerous travel restrictions.

The Court did not follow this reasoning. The mere existence of the COVID-19 pandemic did not constitute a serious and immediate danger for a non-vulnerable person and this did not allow for the exercise of the right of withdrawal.

2.5 Legal action does not constitute a claim against dismissal

Cour *Supérieure de Justice, No. CAL-2022-00798, 08 June 2023*

The time limit for bringing an action for unfair dismissal before the Labour Court is three months (from the date of the statement of reasons, in most cases). This period may be interrupted and converted into a new one-year period if the employee sends the employer a written statement in which he/she claims that the dismissal was unfair.

An employee had lodged an application with a Labour Court that was territorially incompetent; when he applied to the competent judge, the employer argued that his application was time-barred because the three-month time limit had been exceeded. The question then arose as to whether the application to the first court could amount to a letter of complaint. The appeal judges replied in the negative, pointing out that only a letter addressed directly to the employer can have this effect. The second application to the competent judge was thus no longer admissible.

2.6 Compensation period for material damage: a strictly objective approach?

Cour *Supérieure de Justice, No. CAL-2022-00453, 08 June 2023*

When a court declares a dismissal unfair, it awards the employee compensation for the non-material loss as well as for the material loss he/she has suffered. The material damage compensates for the loss of salary for a period considered to be causally linked to the dismissal, i.e. a period considered by the Court to be sufficient for an employee who is making reasonable efforts to find another job.

The Court pointed out that the criteria to be taken into consideration for determining the length of this period are the employee's seniority, age and position in the labour market. The fact that in this case the employee was 57 at the time of his dismissal could therefore be taken into consideration.

However, employees often argue that they were hindered in their job search by personal factors, such as their health status. Case law is generally strict, but in this decision, the judges seemed to have been particularly strict. The employee had difficulty finding a job. He also claimed that he had suffered from knee and hip problems for years but had put off surgery to be able to continue working for his employer.

The appeal judges were not moved by these considerations and emphasised that personal problems such as an employee's illness, which had nothing to do with the dismissal, were not to be considered. Thus, the health problems predated the dismissal and the appellant's "*decision to wait until February 2020 before undergoing surgery was her personal choice and it is not for the employer to assume the consequences*".

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Clampdown on temporary work agencies

The Prime Minister has announced a clampdown on temporary work agencies. The underlying reason for this clampdown is that most workers in temporary work agencies are third-country nationals which may be artificially increasing the population in Malta. Furthermore, there are serious concerns about the level of protection of these temporary workers' working conditions. In certain industries, the allure of employing temporary agency workers is precisely that, namely of precluding working conditions equal to those applicable to comparable workers at the user undertaking.

Practice clearly demonstrates that in some cases not even the minimum conditions to which any Maltese employee is entitled are available for such employees. However, nobody as yet seems to have challenged the matter at the political level, the problem being that the soaring Maltese population numbers are rendering daily life more challenging and is hence leading to a (possible) erosion in the ruling party's popularity.

The population growth problem has also been raised by various social partners with calls to act now. The Malta Chamber of Commerce, for example, has issued a statement in which it clearly manifests its concern about the current situation in the country and the way that challenges are being addressed, arguing that the present economic model, which is exclusively reliant on population growth rather than on an increase in GDP is unsustainable and will at this rate push the infrastructure to a breaking point.

In September 2023, the Prime Minister stated that the situation will be addressed by clamping down on temporary work agencies which have also been accused (not formally but in legal circles) of not being fully transparent about their salary structure.

Hence, Malta seems to be gearing towards an improved regulation of temporary work agencies, though how that will be achieved is still unclear since no legal instruments, even in a draft format, have been published to date.

Netherlands

Summary

(I) The Supreme Court ruled that under certain circumstances, employers may have a duty to inform employees about tax amendments that may be relevant to their fiscal position.

(II) District Courts have interpreted Directive (EU) 2019/1152, Directive (EU) 2003/88 and the European Social Charter.

(III) The King's speech containing the draft budget will continue to ensure a general level of well-being.

(IV) The Senate has rejected the law on working wherever you want. The STAP budget will continue in a modified form for the rest of 2023.

(V) The Minister of Social Affairs and Employment will soon prohibit flash deliveries by children under 16 years.

(VI) An informal expert meeting on the temporariness of temporary agency work assignments between labour law experts and the Ministry of Social Affairs and Employment has taken place.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Duty to provide employees' information about changes in tax treaties

Supreme Court, ECLI:NL:HR:2023:1276, 22 September 2023 (published 22 September 2023)

This case concerned a dispute between KLM (*Royal Dutch Airlines*) and a number of pilots. The ruling revolves around the central question as to whether the employer had a duty to provide the employees information about changes in tax treaties (in this case, between the Netherlands and Switzerland) that affected them in a negative way. The pilots argued that KLM's alleged failure to provide timely warnings about the repercussions of a regulatory change and its omission to withhold income tax starting from 2012 must be regarded as a violation of good employment practices (*goed werkgeverschap*) as enshrined in Article 7:611 Dutch Civil Code. The pilots claimed that KLM should be held accountable for the income tax assessments imposed in the years 2012 to 2017, or alternatively, be required to compensate them for the damages resulting from these assessments.

In appeal, the Court of Appeals dismissed the pilots' claims. As tax regulations vary significantly from one jurisdiction to another, it is not within KLM's purview to monitor and communicate every tax amendment. Furthermore, the Court emphasised that the primary purpose of the obligation to withhold income tax primarily serves other objectives and is not primarily intended to safeguard the interests of the pilots.

The Supreme Court acknowledged the validity of the Court of Appeals' reasoning that employees are generally responsible on their own for ensuring correct compliance with their tax obligations, and employers typically do not possess an advisory role in this

context. Nevertheless, the Supreme Court emphasises that under certain circumstances, an employer may be required, as part of its role as a responsible employer, to inform employees of significant regulatory changes that may affect their tax position, especially when the information in question is equally important for the employer's responsibility to withhold and remit wage tax. Moreover, the Supreme Court stipulated that the extent to which employees may experience adverse consequences from unfamiliarity with the information in question is an important factor in this regard. The Supreme Court overturned the Amsterdam Court of Appeal's judgment and referred the case to the Court of Appeal in The Hague for further consideration and decision.

2.2 Compensation of unused paid annual leave after termination

District Court Limburg, ECLI:NL:RBLIM:2023:4667, 08 August 2023 (published 21 September 2023)

This case concerned, *inter alia*, the question whether the employee is entitled to compensation for unused paid annual leave after termination of the employment contract. There is no dispute between the parties that the employee had 18.3 outstanding statutory hours of paid annual leave as of 31 December 2021. The question was whether those hours had expired on 01 July 2022. On 01 September 2021, the employee became incapacitated for work as a result of which she was no longer able to take the 18.3 hours of remaining leave. The District Court deemed that the employee falls under the scope of Article 7:640a Dutch Civil Code, which provides that the entitlement to paid annual leave lapses six months after the last day of the calendar year in which the entitlement was acquired, unless the employee was not reasonably able to take leave until that time. Moreover, the employee argued that the employer had not encouraged her in a timely manner to make use of the right to paid annual leave and had not pointed out to her that those hours would lapse if she did not take them. Referring to the CJEU's case law of 6 November 2018 (ECLI:EU:C:2018:872, *Kreuziger*) and (ECLI:EU:C:2018:874, *Max-Planck-Gesellschaft*)) concerning Article 7 of Directive 2003/88/EC, the District Court ruled that the employee's claim in respect of hours of annual leave relating to 2021 was permissible on this ground.

2.3 Interpretation of Article 13 of Directive (EU) 2019/1152

District Court Oost-Brabant, ECLI:NL:RBOBR:2023:4377, 04 September 2023 (published 8 September 2023)

This case concerned the interpretation of Article 13 of Directive (EU) 2019/1152. In 2018, Beter Horen, a hearing healthcare company, entered into a training costs agreement with an employee. Under this agreement, the employee committed to participating in a two-year training programme to become an audiologist, with Beter Horen providing financial support. In 2020, the employee completed the training. In 2023, the employee decided to transfer to another company.

Subsequently, the employer demanded reimbursement of the training costs amounting to EUR 9 924.33 with reference to the training costs agreement. The employee, however, claimed that the training costs clause was void under Article 7:611a Dutch Civil Code, as the training was essential for his position of audiologist. Moreover, the employee argued that the training costs clause was legally invalid due to inadequate communication of the financial risks.

The District Court, in its ruling, referred to Article 13 of Directive (EU) 2019/1152. This provision states that Member States shall ensure that where an employer is required by Union or national law or by collective agreements to provide training to a worker to carry out the work for which he or she is employed, such training shall be provided to the worker free of cost. With reference to recital 37 of the preamble of Directive (EU) 2019/1152, the Court stipulated that this obligation does not cover vocational training

or training the workers are required to undergo to obtain, maintain or renew a vocational qualification, as long as the employer is not required to offer it under Union law, national law or collective agreements. This exception has been implemented in Article 7:611(4) Dutch Civil Code.

The District Court ruled that the employee's training entailed an educational qualification that was required to be appointed to the position of audiologist, a position that the employee had not yet been able to perform while undergoing the training. In the District Court's view, it was therefore evident that the training course completed by the employee constituted training to obtain a professional qualification. It was neither argued nor demonstrated that the employer was required under Union law, national law or collective agreement to offer the training free of charge. Furthermore, the Court ruled that the employee had been sufficiently informed about the financial consequences of the training costs clause. The agreement contained an appendix with a breakdown of the training costs and the clause itself contained a clear repayment obligation. The training costs clause was therefore valid.

2.4 Interpretation of Article 13 of Directive (EU) 2019/1152 and Article 6(2) of Directive 2008/104/EC

District Court Midden-Nederland, ECLI:NL:RBMNE:2023:4201, 16 August 2023 (published 12 September 2023)

This case concerned the interpretation of Article 13 of Directive (EU) 2019/1152 as well as Article 6(2) of Directive 2008/104/EC.

Interpretation of Article 13 of Directive (EU) 2019/1152

In 2021, an employee entered into a temporary employment contract with an employer. The contract included a training costs clause that covered expenses (predominantly) related to driving lessons. In 2022, the employee cancelled the agreement, triggering a contractual obligation to repay 75 per cent of the training costs, as stipulated in the training costs clause. Subsequently, the employee claimed that the training costs clause was legally invalid.

To review the legal validity of the training costs clause, the District Court referred to Directive (EU) 2019/1152. It ruled that 'the complete driving lesson package' falls outside the scope of the Directive, since the driving lesson package cannot be considered compulsory training under Union law, national law or a collective agreement. Therefore, the training costs clause was valid and the employee had to reimburse the employer (75 per cent of the training costs).

Interpretation of Article 6(2) of Directive 2008/104/EC

Additionally, the employer had included a non-competition clause in the employment contract, which became a point of contention when the employee terminated his contract in December 2022 and, subsequently, entered into a permanent contract with the organisation where he had previously worked as a temporary agency worker.

To examine the legal validity of the non-competition clause, the District Court referred to Directive 2008/104/EC. Article 6(2) of this Directive states that clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the hirer and the temporary agency worker after his/her assignment are null and void or may be declared null and void. This provision has been implemented in Article 9a Waadi (*Wet allocatie arbeidskrachten door intermediairs*).

The District Court ruled that the Directive applies to all temporary agency workers. As a result, the District Court interpreted national law in conformity with Article 6(2) of the

Directive and concluded that the non-competition clause was null and void. The District Court ruled that the employer will be prohibited from using the clause to impose a penalty on the employee.

2.5 Dispute between a temporary work agency and user undertaking

District Court Midden-Nederland, ECLI:NL:RBMNE:2023:3344, 12 July 2023 (Published 11 September 2023)

This case concerned the interpretation of Article 6(2) of Directive 2008/104/EC, and more specifically, a dispute between a temporary work agency and a user undertaking.

The temporary work agency (hereafter: the employer) entered into a hiring agreement for a temporary agency worker on 25 July 2022. Under this agreement, the employer hired out a temporary agency worker to the user undertaking commencing on 15 August 2022. The hiring agreement stated that compensation (EUR 12 000) would have to be paid if the user undertaking entered into an employment relationship with the temporary agency worker for the same or a different position within one year after the start of the assignment. In spite of this clause, the user undertaking decided to retain the services of the worker after an early termination of both the employment contract and the hiring agreement on 27 August 2022. The employer claimed the compensation stated in the abovementioned clause in the hiring agreement. The hirer, however, claimed that the clause was not applicable, since no 'employment relationship' had been established because the worker was self-employed.

According to the District Court, Article 9a Waadi (*Wet allocatie arbeidskrachten door intermediairs*) should be interpreted in compliance with Directive 2008/104/EC. Moreover, the term 'employment relationship' should be interpreted in accordance with the *Ruhrlandklinik* judgment of the CJEU. The District Court explained that paragraph 27 of the *Ruhrlandklinik* judgment demonstrates that according to the CJEU, an employment relationship exists if a person works for another person for a certain period of time and under that person's authority, and provides services and receives compensation in return. The legal qualification under national law, the form of this relationship, as well as the nature of the employment relationship between these two persons are not decisive in this respect.

The District Court ruled that it should have been clear to the user undertaking that the term 'employment relationship' does not exclusively mean an employment contract but also situations in which a person performs services for another person and under his/her direction for a certain period of time and receives compensation in return. The user undertaking should have been aware that the clause was meant to prevent the temporary agency worker from entering the service of the hirer without the agency receiving compensation. The Court therefore concluded that the hirer has to pay compensation to the employer.

This approach of the District Court appears to be in conflict with Article 6(2) of Directive 2008/104/EC regarding access to employment. The demand for compensation when a user undertaking enters an employment relationship with a temporary agency worker could be regarded as 'a way of having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker' as depicted in Article 6(2) of Directive 2008/104/EC.

2.6 Fundamental right to collective action

District Court Midden-Nederland, ECLI:NL:RBMNE:2023:4972, 07 September 2023 (published 22 September 2023)

This case concerned the fundamental right to collective action. The District Court, as is usual in the Netherlands, applied the standard of Article 6(4) of the European Social

Charter (ESC). The employer ran an artisan bakery with 17 shops in several towns in the Netherlands. The employer was a member of the Dutch association for bread and pastry bakers (NBOV). In spring 2023, the NBOV and the Dutch association for the bakery (NVB) on behalf of employers, and the trade unions FNV and CNV on behalf of employees, started negotiations on a new collective agreement. The NVB arrived at an agreement with the unions, but the NBOV, so far, has not. The stumbling block is the wage demand made by the unions (16 per cent). On 06 September 2023, the FNV announced that it would call on its members working for the employer to lay off work from Thursday 07 September at 15:45 h until Saturday 09 September at 17:30h. The employer asserted that this strike was unlawful and therefore claimed in summary proceedings that the strike should be prohibited. In addition, the employer claimed that the FNV should be ordered to rectify a press release it had issued.

The District Court stated that Article 6(4) ESC gives workers the right to take collective action in the event of conflicts of interest over collective agreements. This right entails that a workers' organisation may, in principle, choose the means to achieve its objective, if the action can reasonably contribute to the effective exercise of the right to collective bargaining. The employer argued that the strike called by the FNV did not fall under the scope of the ESC because the strike did not contribute to the effective exercise of the right to collective bargaining: the NBOV would not change its mind because of this action and would not agree to FNV's wage demands. The District Court followed FNV's position that the collective action contributed to the effective exercise of the right to collective bargaining. By targeting the larger companies in the industry, FNV expected that the NBOV would move in the direction desired by FNV. According to FNV, 100-150 staff members were involved, which would be one of the larger companies within the industry. The employer did not dispute this but argued that collective action at a company of its size could never exert enough pressure to get the NBOV to reach an agreement. However, the District Court considered that as with any collective action, there is no certainty about this in advance. At the same time, neither could it be said with certainty that the strike could not have any effect at the employer. FNV sufficiently justified its choice for the strike at the employer's premises and made it plausible that this action could contribute to an effective exercise of the right to collective bargaining. This brought the collective action within the scope of Article 6 ESC. There were no circumstances that make it socially urgent to prohibit the announced strike. As there was no question of unlawful publication by FNV, there was no need to rectify its press release.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 King's speech (Kamerstukken II 2023/24, 36 410, No. 1, 19 September 2023)

This year's focus of the draft budget devised by the outgoing government will be on continuing to ensure a general level of well-being. Some key issues the draft budget for 2024 aims at include: reducing insecurity while supporting vulnerable groups, taking measures to prevent (child) poverty, reducing the income tax burden for employees earning the statutory minimum wage level (*verhoging arbeidskorting*), exempting employers from paying a high tariff on the unemployment insurance for those employees with an employment contract of 30 hours per week or more who work overtime and an increase in the training subsidy SLIM for SMEs from 2024 until 2027.

4.2 Proposal for a law on working wherever you want rejected (*Kamerstukken* I 2022/23)

On 26 September 2023, the Senate (*Eerste Kamer*) rejected an initiative bill from the House of Representatives (*Tweede Kamer*) that would regulate that an employee's home office or workplace request be treated the same as, for example, requests on working hours (extension and reduction). With this amendment, a home office or workplace request would have been treated the same as other requests under the Act on Flexible Working (*Wet flexible werken*). Most parties were, in principle, in favour of introducing such a right for employees, yet it was feared that it would create a too heavy burden on employers. Another issue that was raised were the cross-border implications of the proposed rule.

4.3 Renewed STAP budget

The STAP budget will continue in a modified form for the rest of 2023. As of 18 September 2023, a new round of applications could be submitted. Following a motion in the House of Representatives (*Tweede Kamer*), the experiences of previous rounds and the cut in the STAP budget, the remaining funds will be used in a more targeted way. Therefore, this subsidy can only be applied for (parts of) recognised study programmes by the Ministry for Education, Culture and Science (*ministerie van Onderwijs, Cultuur en Wetenschappen*). As a result, although fewer programmes are available than in the previous rounds, they are said to be more in line with the labour market (demands). The budget for the coming application period is EUR 10 million. Anyone interested can again apply for up to EUR 1,000 in subsidies for training and development. A next round will start on 15 November 2023.

4.4 Letter of the Minister of Social Affairs and Employment on prohibiting flash deliveries by children under 16 years

To ensure that work is performed under safe and healthy conditions, even more so when it comes to work performed by children, the aim must be to protect the child. Given the risks involved with food delivery by children under 16 years, such work has already been prohibited by law since 01 July 2020. Yet the Labour Inspectorate has detected some overlaps of food delivery and flash delivery: working under time pressure, during the same peak hours during the day, often by young people and young adults, on the road similar means of transportation with a backpack or bins for the orders. During deliveries, there is a risk of collision hazard, work pressure, aggression and violence and physical strain through heavy backpacks. The combination of factors means that flash delivery will be treated similar to food delivery. That is why the Detailed Rules on Child Labour (*Nadere Regeling Kinderarbeid)* will include a ban on the independent and commercial delivery of groceries by children up to 16 years of age, which involves participation in traffic using a vehicle (such as a bicycles or e-bikes). This explicitly establishes that this is labour with unacceptable safety risks for a child. Violation of this prohibition is inherently dangerous and therefore directly penalised.

4.5 Informal expert meeting on the temporariness of temporary agency work assignments

On 06 September 2023, an informal expert meeting with five labour law experts and social partners active in the temporary agency work sector was organised by the Ministry of Social Affairs and Employment. The key objective of that meeting was to discuss the question whether EU (case) law requires Member States to adopt a law limiting the duration of the assignment

Norway

Summary

The Supreme Court has ruled that in case of late enrolment in an occupational pension scheme, the claim for payment of a pension premium is subject to a three-year limitation period.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Limitation Act and Late Enrolment in Occupational Pension Scheme

Court of Appeal, HR-2023-1637-A, 7 September 2023

The case dealt with the question whether a claim on late enrolment in an occupational pension scheme was subject to limitation in accordance with the Limitation Act (LOV-1979-05-18-18).

The Court of Appeal had decided with final effect that a musician who had played concerts in a local church for many years had been a permanent employee of the parish from 2013. Consequently, the parish had the obligation to carry out a late enrolment of the musician in the parish's occupational pension scheme.

The Supreme Court determined that the claim for payment of a pension premium, which would be a consequence of late enrolment, was subject to limitation under section 2 of the Limitation Act. This implied that late enrolment could only take place from a point in time three years before the limitation period was interrupted by a writ of summons, not from the time of permanent employment. Considerable emphasis was placed on the fact that the claim for premium payment was the dominant effect of the late enrolment.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Poland

Summary

(I) The statutory minimum wage for 2024 has been determined by a Government's Ordinance.

(II) The Supreme Court has delivered a judgment that clarifies the scope of the exception to perform Sunday trade activities in commercial establishments.

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1 National Legislation

1.1 Minimum wage

On 14 September 2023, the Ordinance of the Council of Ministers on the amount of minimum wage for the performance of work and the amount of the minimum hourly rate in 2024 was enacted (Journal of Laws 2023, item 1893).

As of January 2024, the minimum wage will amount to PLN 4 242 for workers with an employment contract (around EUR 915), and PLN 27.70 per hour for workers with a civil law contract. As of July 2024, the minimum wage will amount to PLN 4 300 for workers with an employment contract (around EUR 928), and PLN 28.10 per hour for workers with a civil law contract.

In 2023, the minimum wage amounts, respectively, to PLN 3 490 and PLN 22.80. As of July 2024, the minimum wage will be 19.4 per cent higher in comparison to 2023.

According to the Law on Minimum Wage, if the subsequent year's indicator of expected prices for commodities and services is at least 105 per cent, then the minimum wage should be modified twice a year, i.e. in January and in July. This situation will arise in 2024 (as was the case in 2023). In 2024, the minimum wage will amount to 54.4 per cent of the average wage in the national economy (and 55.2 per cent as of July 2024).

The Ordinance of 14 September 2023 on minimum wage in 2024 is available here.

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

It should be emphasised that the minimum wage has been continuously raised in recent years. As in previous years, the Social Dialogue Council did not reach an agreement on the next year's statutory minimum wage. Therefore, the competence to determine the amount of minimum wage has been exercised by the government. There are no respective adjustments in the public sector. For example, the remuneration of a teacher who starts his/her professional career after having graduated will only be a little higher than the statutory minimum wage. On the one hand, the raise in the minimum wage can be considered a major social achievement. On the other hand, the impact of the new minimum wage on the economic situation (e.g. the inflation rate) is not clear at present and remains to be seen.

2 Court Rulings

2.1 Ban on Sunday work in shops

Supreme Court, case III KK 155/23, 13 September 2023

In Poland, the Law of 10 January 2018 on limiting trade on Sundays, public holidays and some other days in principle prohibits Sunday work in shops (consolidated text: Journal of Laws 2023, item 158).

The Law can be found here.

There are numerous exceptions to this rule (see also the January 2018 Flash Report, with further references). According to Article 6 section 1 item 10 of the Law, trading activities are permitted in shops that are located in institutions that perform activities in the domain of culture, sport, education, as well as tourism and leisure. Regular commercial establishments have in addition offered the possibility to rent sport equipment, for example. On 13 September 2023, the Supreme Court delivered the judgment (case III KK 155/23) that clarified that such situations do not fall within the scope of the abovementioned exception, and such an additional activity does not make it possible for the commercial activities to perform regular trading activities on Sundays.

The judgment can be found here.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) A specific programme was created to support processes of qualification of workers.

(II) An ordinance setting the limit value up to which the compensation for teleworking does not constitute income for tax purposes or a basis for social security contributions was published.

(III) The Portuguese Business Confederation has presented a proposal on the Social Pact to the government.

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1 National Legislation

1.1 Processes for qualification and requalification of workers

Ordinance No. 282/2023, of 14 September 2023, creates the so-called *'Programa Qualifica Indústria'*, aimed at micro, small and medium-sized enterprises in industrial sectors to support processes of qualification and requalification of workers, preventing future unemployment.

This ordinance entered into force on 15 September 2023 and will be in place until 31 December 2024.

1.2 Teleworking

Ordinance No. 292-A/2023, of 29 September 2023, approved limits for compensation due to workers for the additional costs arising from teleworking that do not constitute income for tax purposes or a basis for social security contributions.

The Decent Work Agenda, approved by Law No. 13/2023, of 03 April 2023 (see April 2023 Flash Report), amended several rules on teleworking. In this context, it was established that the compensation paid to workers by the employer for additional expenses incurred by the workers as a direct result of teleworking is, for tax purposes, considered to be a cost for the employer and do not constitute income for workers, up to the limit of the amount to be defined by ordinance. The ordinance published on 29 September 2023 intends to define the referred tax/social security exemption limit.

This ordinance entered into force on 01 October 2023.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Proposal of Social Pact

On 19 September 2023, the Portuguese Business Confederation (CIP), a strong and wide-ranging employers' confederation in Portugal, presented a proposal for a Social

Pact to the government containing 30 measures, including *i)* voluntary payment to workers of a 15th month free of taxes and social security contributions and *ii)* the creation of complementary retirement instruments in companies. The proposal will be discussed with the government and the remaining social partners and may imply changes to the labour and social security legislation in the future.

Romania

Summary

(I) The norms on the non-transferable two-month period of parental leave are now applicable.

(II) The minimum wage has increased.

1 National Legislation

1.1 Parental leave

Romania has transposed the Work-life Balance Directive 2019/1158 through several legislative acts, including Emergency Ordinance No. 164 of 29 November 2022, amending and supplementing Government Emergency Ordinance No. 111/2010 on parental leave and the monthly allowance for child-rearing. In accordance with the provisions of Article 5(2) of the Directive, the new legislation extends the non-transferable parental leave period from one month to two months of the total leave period for a parent who did not initially request this right.

Although adopted at the end of the previous year, the new provisions did not actually apply because the Ordinance stipulated that they would only come into effect upon the publication of the implementing rules in the Official Gazette.

Government Decision No. 865/2023 was published, amending and supplementing the Methodological Norms for the Application of the Provisions of Government Emergency Ordinance No. 111/2010 on parental leave and the monthly allowance for child-rearing, approved by Government Decision No. 52/2011, published in the Official Gazette of Romania No. 844 of 19 September 2023. The legislative act:

- extends the non-transferable parental leave period to two months;
- supplements the monthly allowance for children born from twin, triplet or multiple pregnancies by 50 per cent, under certain conditions, starting with the second child;
- clarifies the procedure for granting parental leave and insertion incentive from the age of two years to three years of the child;
- clarifies the procedure for granting the monthly allowance and insertion incentive for personnel in the defence, public order and safety system.

1.2 Minimum wage

Government Decision No. 900/2023 on the establishment of the guaranteed minimum gross national monthly wage, published in the Official Gazette of Romania No. 877 on 28 September 2023, stipulates that the national minimum wage will be raised to LEI 3 300 (approx. EUR 660) per month, excluding allowances, supplements, and other additions. Consequently, in October 2023, the hourly minimum wage will be LEI 19.960 for full-time work of 165.333 hours per month. This represents an increase of 10 per cent compared to the previous minimum wage of LEI 3 000.

The minimum wage in the construction sector remains at LEI 4 000 gross, while in agriculture and the food industry, it will remain LEI 3 000 gross, with the government set to revise these special minimum wages in November.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) Among the measures to mitigate or eliminate the consequences of floods and landslides in Slovenia in August 2023, additional possibilities for temporary and occasional work of students enrolled in educational institutions during the school year 2023/2024 were introduced, as well as occupations and activities determined that are urgently needed in the recovery after the floods and in which simplified procedures for the employment of foreign workers are foreseen.

(II) The rules on the issuance and termination of a residence permit of cross-border workers have been amended.

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1 National Legislation

1.1 Temporary and occasional work of students

As one of the measures following the August floods in Slovenia, the Decision on the Emergency Measures in Personnel Administration Required for Smooth Operations of Educational Institutions (‘*Sklep o nujnih kadrovskih ukrepih za nemoteno delovanje vzgojno-izobraževalnih zavodov’* OJ RS No 98/23, 15 September 2023, p. 7889) was adopted and entered into force the day after its publication. It introduces additional possibilities for temporary and occasional work of students enrolled in educational institutions during the school year 2023/2024, if this is necessary to mitigate or eliminate the consequences of floods and landslides in August 2023.

1.2 Employment of foreign workers

As one of the measures following the August floods in Slovenia, the Order Determining the Occupations and Activities Necessary to Eliminate and Prevent the Consequences of Floods and Landslides and in which foreign workers can be employed *(‘Odredba o določitvi poklicev in dejavnosti, ki so nujni za odpravo in preprečitev posledic poplav in plazov in v katerih se lahko zaposlujejo tuji delavci’*, OJ RS No 98/23, 15 September 2023, p. 8259-8260) was adopted and entered into force the day after its publication. The Order was issued on the basis of the Intervention Measures to Eliminate the Consequences of Floods and Landslides of August 2023 Act (see August 2023 Flash Report, under 1.3) which—among others—introduces simplified procedures for the employment of foreign workers *(‘Zakon o interventnih ukrepih za odpravo posledic poplav in zemeljskih plazov iz avgusta 2023 (ZIUOPZP)’*, OJ RS No. 95/23, 01 September 2023, p. 7489-7521, Article 89 and subseq.).

1.3 Cross-border workers

The rules on the manner in which a residence permit is issued, the method of fingerprinting and the way in which termination of a residence permit is indicated have been amended *(‘Pravilnik o spremembah in dopolnitvi Pravilnika o načinu izdaje dovoljenja za prebivanje in potrdila o pravicah obmejnega delavca, načinu zajemanja prstnih odtisov, načinu označitve prenehanja ter ceni izkaznice dovoljenja za prebivanje in potrdila o pravicah obmejnega delavca’*, OJ RS No 98/23, 15 September 2023, p. 7691-7888).

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Collective bargaining

An annex to the collective agreement for metal sector has been adopted *('Dodatek št. 6 h Kolektivni pogodbi za kovinsko industrijo Slovenije'*, OJ RS No 100/23, 29 September 2023, p. 8427-8428) which concerns the adjustment of wages.

Spain

Summary

No new government has yet been formed following the general elections in July. Until then, no significant developments are expected in the field of labour law.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Methods for spreading union information

Tribunal Supremo. Sala de Io Social, ECLI:ES:TS:2023:3619, 12 September 2023

Article 81 of the Labour Code grants workers' representatives the right to utilise a 'notice board' within the workplace to inform workers of developments. In the past, there have been many conflicts about whether this 'notice board' allows workers' representatives to request a corporate email address for this purpose (conclusion: not always). The issue discussed in this ruling was slightly different. Initially, the unions had access to a corporate email address, but the undertaking replaced it with an app and requested the unions to use it. The Supreme Court deemed this change acceptable due to the better functioning of the app, which was also user-friendly. Additionally, the union failed to demonstrate any harm resulting from this change. This doctrine also applies to European Works Councils.

2.2 Severance payment (transfer of undertakings)

Tribunal Supremo. Sala de Io Social, ECLI:ES:TS:2023:3623, 12 September 2023

According to the Labour Code, one of the elements for the calculation of severance payment following an unfair dismissal is seniority. In case of a transfer of undertakings (one or several), seniority must take previous employment relationships with former employers into account, not only the duration of the most recent contract. Directive 2001/23 is explicitly mentioned.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

Nothing to report.

Sweden

Summary

(I) The Labour Court has held that a security clearance interview may motivate sensitive and personal questions and does not entail the right to being accompanied by a trade union representative.

(II) The Discrimination Ombudsman has filed a complaint on discrimination to the Supreme Court.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Security clearance and union rights

Arbetsdomstolen, AD 2023 nr 47, 06 September 2023

In relation to a security clearance test, a policewoman was asked personal questions. During the interview, the woman was not allowed to be accompanied by a trade union representative. The court dealt with the question whether the situation was a breach of the freedom of association rights as well as whether the personal questions were discriminatory. In its judgment on September 6, the court held that the reason for not allowing a trade union representative was motivated by the standards set out for security clearance by the Swedish Security Police. Hence, it did not infringe her freedom of association rights. The court also clarified that even if security clearance may motivate personal questions that would not have been asked otherwise, discrimination is not allowed. The court held that the questions that had been asked could have also been asked a comparable (male) policeman in an equivalent situation. Therefore, the court held that there had been no discrimination.

The judgment is important as it confirms the standards that apply during a security clearance interview. Security clearance as a topical labour law issue has arisen in Sweden over the last years. Swedish law is still relatively undeveloped on issues relating to security clearances. The court's judgment further clarifies the law.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

4.1 Discrimination

The Swedish Discrimination Ombudsman has filed a complaint for an extraordinary *trial de novo* (breaching the normal *res judicata* effect) to the Swedish Supreme Court for a grave procedural error in the Labour Court in its handling of a default judgment in a discrimination damages matter. Even though the plaintiff claiming compensation for discrimination had requested damages in the amount of SEK 100 000, the Labour Court, in the absence of the defendant, held that the plaintiff was only entitled to damages in the amount of SEK 75 000.

This is not the first time Swedish procedural law and EU discrimination law are in conflict. The CJEU in case C-30/19, 15 April 2019, Braathens Regional Aviation, held that Swedish procedural standards were not compatible with the right to a fair trial in discrimination matters.

United Kingdom

Summary

(I) the REUL Bill has received royal assent and is now an Act.

(II) In the context of the Strikes (Minimum Services Levels) Act, there is a consultation on use in respect of doctors' strikes.

(III) The Workers (Predictable Terms and Conditions) Act 2023 has received royal assent, introducing a new statutory right for workers to request a more predictable working pattern.

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1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Nothing to report.

4 Other Relevant Information

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

As reported previously, the REUL Bill has received royal assent and is now an Act. In summary, the default is that all Retained EU Law will remain, except the 587 pieces listed in the Schedule to the Act. In the area of employment, there are a number of measures but none that are significant in the post-Brexit world, notably removing rules on posting of workers and removing rules on drivers' hours during foot and mouth in 2001.

The Act contains extensive powers for the executive to revoke or restate Retained EU Law (which will be called 'assimilated law' after 31 December 2023). Section 14 contains the widest powers and these have been used as the basis for The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023, which turns off yet more secondary legislation including in the field of labour law the Sex Discrimination Act 1975 (Application to Armed Forces, etc.) Regulations 1994 (S.I. 1994/3276), which the government asserts 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.' (see Retained EU Law Revocation Explainer).

4.2 The Strikes (Minimum Service Level) Act 2023

As reported in the August 2023 Flash Report, this Bill has now become an Act. According to the government:

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

The draft code of practice has now been published and is open for consultation.

The government is now consulting on the first use of the Regulations:

The government is considering introducing MSL regulations that would require some doctors and nurses to work during strikes in order to protect patient safety, the Health and Social Care Secretary has announced.

The consultation, launched on 19 September 2023, considers introducing MSLs that would cover urgent, emergency and time-critical hospital-based health services—which could cover hospital staff, including nurses and doctors—and seeks views on a set of principles for setting MSLs in regulations. It will also seek evidence to inform decisions on the expansion and scope of MSLs. This follows the consultation earlier this year on introducing minimum service levels in ambulance services, and brings the UK in line with countries like France and Italy whose services continue in times of industrial action.

4.3 The Workers (Predictable Terms and Conditions) Act 2023

The Workers (Predictable Terms and Conditions) Act 2023 has received royal assent, introducing a new statutory right for workers to request a more predictable working pattern.

The government says 'If a worker's existing working pattern lacks certainty in terms of the hours they work, the times they work or if it is a fixed term contract for less than 12 months, they will be able to make a formal application to change their working pattern to make it more predictable. Once a worker has made their request, their employer will be required to notify them of their decision within one month.' ACAS will consult over a draft code of practice in the Autumn.

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