REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

The HSI is an institute of the Hans-Böckler-Stiftung

Edition 4/2022
Reporting period: 1 October – 31 December 2022

Content

I. Editorial

HSI Report 4/2022 provides an overview of current case law of the European courts as well as new developments in legal policy in European labour and social law from October to December 2022.

In the case law overview, CJEU decisions in the field of corporate co-determination are usually of fundamental importance. With the ruling in *SAP ballot procedure* (C-677/20), it is now clear that trade unions will continue to be represented on supervisory boards of companies with the legal form of an SE in Germany. Improvements for workers on various individual issues could also result from a wide variety of cases, such as reimbursement of the costs of corrective spectacles for working with display screen equipment (C-392/21). The maximum age limits for joining the police force are also at issue under EU law (C-304/21). Finally, a reference for a preliminary ruling has been made to the Court concerning the consequences of leaving the church on continued employment by a church employer (C-630/22).

The ECtHR also dealt twice with the question of whether gender-specific pension regulations constitute discrimination: A Romanian case (nos. 53282/18 and 31428/20) concerns a lower retirement age for women, and a Swiss case deals with a survivor's pension that is generally only paid to women (no. 78630/12). Furthermore, the Court dismissed the complaint of a female teacher who was considered unsuitable for the Hessian civil service because of anti-constitutional right-wing statements (no. 80450/17), while the complaint of a Spanish reserve officer against disciplinary measures taken for criticising the Constitution was well-founded (no. 74729/17).

For the first time, this report also provides information on proceedings before the European Committee of Social Rights. This category will be continued in the future if there are any decisions or proceedings of interest in terms of labour or social security law.

We hope you enjoy reading and welcome your feedback at hsi@boeckler.de.

The editors
Dr Johanna Wenckebach, Prof. Dr Martin Gruber-Risak and Prof. Dr Daniel Hlava

→ back to overview

II. Proceedings before the CJEU

Compiled and commented by

Dr Ernesto Klengel, Dr Amélie Sutterer-Kipping and Antonia Seeland, Hugo Sinzheimer Institute of the Hans-Böckler-Stiftung, Frankfurt/M.

Translated to English by Allison Felmy

1. General questions

Judgments

Judgment of the Court (Third Chamber) of 20 October 2022 – C-604/20 – *ROI Land Investments*

Law: Article 21 Regulation (EU) No. 1215/2012, Article 6 Rome I Regulation (EC) No. 593/2008

Keywords: International jurisdiction of the German courts – Claim arising from comfort agreement with a foreign company – Applicable law

Core statement: An employee may sue a legal person which has given him or her a letter of comfort on which the conclusion of the employment contract depended, irrespective of that person's domicile, before the court of the place where or from which the employee last habitually performed their work if a hierarchical relationship exists between the legal person and the employee.

Note: The referring court essentially asked whether employees can sue a legal person not domiciled in the territory of a Member State before the court of the place from which the work was last habitually carried out if the legal person is directly liable for the employer's obligations towards its employees under a comfort agreement.[1] Article 21 of the Regulation provides that employees have a forum at the place of habitual employment even if the employer is domiciled in a different country. In the present case, it was questionable whether the defendant, which did not employ the employee itself but issued a letter of comfort for his employer, could be considered an employer within the meaning of the provision.

The Court holds that the provision is based on a concept of employer that must be given an autonomous interpretation under EU law. Therefore, the classification according to Member State law is not to be used for this purpose. An employment relationship is characterised by a hierarchical relationship. Whether the comfort letter can be regarded as an employment relationship depends on the circumstances of the individual case (para. 35). The Court also points out that this determination of jurisdiction for employment relationships is applicable even if the general rule of Article 6(1) of the Brussels Ia Regulation is more favourable to employees, the factor which determines the jurisdiction of the courts according to the law of their own Member State (paras. 37 et seq.).

Judgment of the Court (Grand Chamber) of 18 October 2022 – C-677/20 – *IG Metall and ver.di*

Law: Article 4(4) SE Employee Involvement Directive 2001/86/EC

[1] See also the notes in HSI Report 2/2022, p. 20 (in German); HSI Report 4/2021, p. 12.

Keywords: European Company (SE) – Involvement of employees – SE established by transformation – Election of employee representatives to the supervisory board – Separate ballot to elect trade union representatives to the supervisory board

Core statements: The agreement in force in an SE on the involvement of employees in an election of employee representatives to the supervisory board of the SE must provide for a separate ballot with regard to the candidates proposed by the trade unions if this follows from national law. There is no violation of Union law in this case. It must be ensured that, in the context of this ballot, the employees of this SE, its subsidiaries and establishments are treated equally and that the trade unions represented therein are treated equally.

Notes: In Germany, trade union representatives must continue to be elected to the supervisory board by separate ballot, even if the company has been converted into an SE as a "European company". This is – from the perspective of EU law – the result of the referral proceedings pursued by ver.di and IG Metall.

One way to establish an SE is to transform an existing company. In this case, a "special negotiating body" representing the employees' interests and the company negotiate the future involvement of employees in the company's decision making. Pursuant to Section 21(6) of the German Act on the Involvement of Employees in a European Company (SEBG), the agreement reached must "ensure at least the same degree of employee involvement with regard to all components". According to the German Federal Labour Court (BAG), these components also include that the trade union candidates nominated as employee representatives are elected by separate ballot (cf. Section 16 Mitbestimmungsgesetz - MitbestG (German Codetermination Act)). What was not clear was whether this interpretation of German law is compatible with EU law.

This question has now been clarified by the CJEU, occasioned by SAP's course of action. The company chose to transform a public limited-liability company into an SE. Its participation agreement provides that the supervisory board will be smaller. Though it has room for employee representatives, no separate ballot is provided for to elect a representative of the trade unions represented in the company. The trade unions were represented on the supervisory board of the public limited-liability company (Section 16 MitbestG). The BAG considered the petition of the trade unions ver.di and IG Metall to establish that the trade union representatives had to be represented on the supervisory board to be successful under German law. The court found that trade union participation on the supervisory board is a characteristic element of employee participation which must according to Section 21(6) SEBG be maintained in the course of the transformation.

However, this interpretation of the SEBG was not legally binding. If Union law stipulates that trade union participation is not a defining element of co-determination, German law would have to be interpreted accordingly.

The CJEU has now taken a clear position on this: Also, according to Article 4(4) of the SE Employee Involvement Directive, employee involvement in the newly created organisation must have "at least the same level … as [that] existing within the company to be transformed into an SE". The extent of the previous involvement, however, is determined by national law and practice, which the Court justifies correctly and in detail with grammatical, systematic, teleological and historical arguments (paras. 31 et seq.). The CJEU's statement that the Directive is intended to safeguard the level of employee participation (paras. 43 et seq.) should be emphasised. The emphasis on this objective will be relevant for further questions of interpretation, especially in the context of Article 4(4) of the SE Employee Involvement Directive.[2]

[2] Cf. for example *Voßberg*, NJW 2022, 3548, 3550 et seq.

Another positive aspect of employee involvement in the SE is found in its cross-border dimension. According to the prevailing view, German law only grants active voting rights for the election of employee representatives on the supervisory board to employees of establishments located in Germany.[3] However, this national focus is not explicitly stated in the MitbestG. The case law and the prevailing view in the literature justify this – quite dubiously for today's legal situation – with the will of the historical legislature and the principle of territoriality,[4] which has been accepted by the CJEU at least for independent foreign subsidiaries, but not generally regarded as mandatory.[5] As a result, employee representatives from foreign trade unions either have no representation on the German supervisory board, even though they are affected in the same way by corporate decisions, or they have to be elected "on the ticket" of the German trade unions in elections held in Germany.[6] The CJEU can now be understood to mean that employee involvement in the SE compulsorily includes the workforces in other EU countries under EU law. Participation agreements to the contrary and also the statutory solution for SE works councils without an agreement in Section 36(1) and (3); Section 8(1) SEBG could be interpreted in conformity with the Directive or be contrary to the Directive.[7]

Even after this ruling by the Grand Chamber of the CJEU, the structural problem of co-determination rights being undermined by the additional possibilities provided by EU law for companies to organise their activities remains[8] – and with it the need for action.[9] Securing the participation rights of employees as an objective of the SE Employee Involvement Directive is no more than a safety net. If, in time, an SE exceeds a threshold value relevant under co-determination law, the extension of co-determination in the SE that this is supposed to trigger under German law will not materialise. However, the decision in the present case helps to prevent an overly aggressive form of avoidance of co-determination.

Judgment of the Court (Ninth Chamber) of 27 October 2022 – C-544/21 – *Stadt Mainz*

Law: Article 15(1), 15(2) lit. g and 15(3) Services Directive 2006/123/EC, Article 49 TFEU

Keywords: Freedom to provide services – Fees for architects and engineers – Fee agreement falling below minimum rates – Direct effect of EU law and possible inapplicability of national rules

Core statements: The Services Directive 2006/123/EC does not apply to a case in which a contract was concluded before the entry into force of that Directive and that contract has exhausted all its effects before the expiry of the deadline for transposition of the Directive. According to the established case-law of the CJEU, a new rule of law is applicable from the entry into force of the act introducing it; while it is not applicable to legal positions created and definitively acquired under the old law, it is applicable to their future effects as well as to new legal positions. Anything else only applies – subject to the prohibition of retroactive

[3] Excerpt *Henssler* in: Habersack/Henssler, Mitbestimmungsrecht, 4th ed. 2018, Sec. 3 MitbestG marginal no. 43 et seq. with further references;

[4] *Deinert*, Betriebsverfassung in Zeiten der Globalisierung (Works Constitution in Times of Globalisation), HSI publication series vol. 38, p. 26 et seq.

[5] CJEU of 18 July 2017 – C-566/15 – *TUI,* in depth *Heuschmid,* HSI-Newsletter 3/2017, note under II (in German).

[6] Currently, for example, Matías Carnero, chair of the SEAT S.A. works council and general secretary of the UGT, is a member of the supervisory board of the VW Group.

[7] Cf. *Seitz*, NZG 2022, 1556, 1560.

[8] *Sick*, Erosion als Herausforderung für die Unternehmensmitbestimmung, in: Mitbestimmung der Zukunft, I.M.U.-Mitbestimmungsreport Nr. 58, p. 13 et seq.

[9] A legal policy response to the presence of companies with a foreign legal form without a corresponding corporate co-determination with administrative headquarters in Germany is formulated by *Seifert*, Gesetzentwurf zur Erstreckung der deutschen Mitbestimmung auf Auslandsgesellschaften, I.M.U.-Mitbestimmungsreport No. 65, Düsseldorf 2021.

effect of legal acts – if special provisions are made together with the new regulation specifically regulating the conditions for its temporal validity.[10]

In order to examine whether provisions of the HOAI 2002, which sets minimum fees for the services of architects and engineers, could infringe the freedom of establishment, the referring court must set out specific connecting factors between the HOAI and EU law.

Judgment of the Court (Second Chamber) of 22 December 2022 – C-392/21 – *Inspectoratul General pentru Imigrări*

Law: Article 9(3) Directive 90/270/EEC on safety and health at work with display screen equipment.

Keywords: Work with display screen equipment – Protection of eyes and eyesight – Special corrective appliances – Spectacles – Arrangements for the employer to meet the costs

Core statement: Corrective spectacles which serve to correct and prevent visual difficulties in connection with work involving display screen equipment are "special corrective appliances" within the meaning of Article 9(3) of Directive 90/270/EEC. Moreover, these "special corrective appliances" are not limited to vision aids that are used exclusively at work.

The employer's obligation to provide the workers concerned with a special corrective appliance can be fulfilled by providing the corrective appliance to the workers concerned or by reimbursing them for the necessary expenses, but not by paying a general salary supplement.

Notes: In its judgment, the CJEU essentially endorses the opinion of Advocate General *Ćapeta,*[11] according to which "corrective appliances" within the meaning of Article 9(3) of Directive 90/270/EEC are to be understood broadly in the sense that they also refer to corrective glasses that both correct and prevent visual difficulties during display screen work. There need not be a causal connection between display screen work and the occurrence of any visual difficulties. Rather, the specific corrective appliances are aimed at correcting or preventing visual difficulties associated with work involving display screen equipment. This is likely to include, for example, lenses with blue light filters. Moreover, according to the CJEU, these special corrective appliances within the meaning of Article 9(3) Directive 90/270/EEC are not limited to corrective appliances used exclusively at the workplace or in the performance of employment duties.

Finally, the CJEU points out that it is not clear from the wording of the provision how the employer is to fulfil this obligation. Accordingly, the employer's obligation could be fulfilled either by providing special corrective appliances to the workers concerned or by means of an allowance paid by the employer, which would then enable workers to acquire such appliance themselves. However, a general salary supplement granted for difficult working conditions is insufficient, as it does not seem to be intended to cover the expenses incurred by the worker concerned for such an acquisition.

In Germany, the employer must provide display screen workstation glasses in accordance with Section 3(3) of the Act on Occupational Safety and Health (ArbSchG) and Part 4 of the Annex to the Preventive Occupational Health Care Ordinance (ArbMedVV). Currently, it is assumed that a special corrective appliance can only be prescribed if it is not possible to compensate for the visual impairment at the display screen workstation with a normal visual

[10] CJEU of 15 January 2019 – C-258/17 – EB; CJEU of 16 December 2010 – C-266/09 – Stichting Natuur en Milieu and others, para. 32 and CJEU of 26 March 2015 – C-596/13 P – Commission v. Moravia Gas Storage, para. 32.

[11] For details on the opinion, see HSI Report 3/2022, p. 11.

aid.[12] Whether this restriction can be upheld has to be called into question in view of the current CJEU decision.

Judgment of the Court (Second Chamber) of 22 December 2022 – C-279/21 – *Udlændingenævnet*

Law: Article 10(1) and Article 13 of Decision No. 1/80 of the EEC/Turkey Association Council on the development of the Association.

Keywords: Turkish nationals holding a permanent residence permit – Family reunification – New requirement of passed language test – Objective of ensuring integration

Core statement: If a Member State subsequently introduces a rule that requires Turkish workers with permanent residence permits to have passed a language test before they can join their spouses, this violates the so-called standstill clause.

Judgment of the General Court (Ninth Chamber) of 21 December 2022 – T-330/21 – *EWC Academy v Commission*

Law: Article 197(2) lit. c of Regulation (EU) 2018/1046 on the financial rules applicable to the general budget of the Union

Keywords: Grants for measures to promote the involvement of employees in undertakings – Exclusion of the application of a European works council – Proof of eligibility for funding

Core statements: In order to award funding to a European works council, it must provide equivalent, not the same, evidence of financial capacity as a legal entity.

Notes: The EWC Academy, which offers training and consultation, especially on issues of cross-border employee representation, formed a consortium together with two European works councils in order to apply for a grant for promotional measures in the field of employee training. Under EU law, all applicants must be financially stable and capable of operating in order to ensure the sustainability of the measures. Therefore, the Commission required the works councils to provide proof of financial capacity in accordance with Article 197(2) lit. c of Regulation (EU) 2018/1046. The proof had to be provided on the basis of the evidence referred to in Article 196(1) of Regulation (EU) 2018/1046, i.e. in the form of balance sheets and profit and loss accounts, which works councils do not have. The Commission therefore rejected the application for funding, and the EWC Academy contested this decision.

Union law, in Article 197(2) lit. c of Regulation (EU) 2018/1046, imposes stricter requirements on the eligibility of entities without legal personality, such as a European works council, since they are subject to greater uncertainty as regards their financial capacity than, for example, legal persons. Nevertheless, as the CJEU states in this decision, according to the wording of the provision, proof of financial capacity need only be *equivalent to* that of a legal person. Moreover, according to the wording of Article196(1) lit. c, profit and loss accounts and balance sheets are only examples of how to provide proof, and not the only possibility (para. 37). Furthermore, Article 197(2) lit. c is intended specifically to give entities without legal personality the opportunity to receive funding. If this is made dependent on requirements normally associated with the possession of legal personality, this casts doubt on the practical effectiveness of the regulation (para. 38). The Commission's rejection of the application thus violates Union law and is null and void.

[12] *Pieper*, Arbeitsschutzrecht, 7th ed. 2022, Part III, ArbMedVV, Annex, Part 4: Other activities, marginal no. 9.

Opinion

Opinion of Advocate General Emiliou delivered on 24 November 2022 – C-666/21 – *Åklagarmyndigheten*

Law: Article 2(1), Article 3 and Article 4 Regulation (EC) No 561/2006 on the harmonisation of certain social legislation relating to road transport

Keywords: Social rules in road transport – 'Carriage of goods by road' – Vehicle containing both a temporary living space and storage area for the transport of snowmobiles – Tachographs

Core statements:

1. The scope of Regulation (EC) No 561/2006 according to Article 2(1)(a) may also include the carriage of goods for exclusively private purposes, so that the provisions on the use of a tachograph apply.

2. A mixed-use vehicle which is used, on the one hand, for the carriage of goods and, on the other hand, as a temporary living space may be covered by the scope of Regulation (EC) No 561/2006, since it is sufficient that the vehicle is *normally* used for the carriage of goods in accordance with the first indent of Article 4(b).

3. Whether the vehicle is *normally* used for the carriage of goods is determined by its permanent equipment. For this purpose, it must have, among other things, a storage space separate from the living area.

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Social nº 1 de Madrid (Spain) lodged on 20 September 2021 – C-583/21 – *NC*

Law: Article 1(1)(a) Transfer of Undertakings Directive 2001/23/EC

Keywords: Applicability of the Transfer of Undertakings Directive to notarial employees

Notes: Is the Transfer of Undertakings Directive applicable when a notary who is both a civil servant and a private employer of the staff working for him replaces the former proprietor of the notary post in his office and, in so doing, carries on his activities in the same workplace and with the same equipment and takes over the register of deeds and the staff who already worked for the former proprietor of the notary post?

Reference for a preliminary ruling from the BAG lodged on 17 May 2022, received at the Court on 17 November 2022 – C-706/22 – *Konzernbetriebsrat*

Law: Article 12(2) of Regulation (EC) No. 2157/2001 on the Statute for an SE (SE Regulation) in conjunction with Articles 3 to 7 SE Employee Involvement Directive 2001/86/EC

Keywords: SE without employees – No negotiation procedure for employee involvement – New subsidiaries with employees – Retrospective negotiation

Notes: The legal form of the European Company (SE) opens up possibilities for avoiding co-determination.[13] The case at hand is based on a situation in which a holding SE without employees does not carry out a negotiation procedure for the involvement of employees

[13] *Sick*, Erosion als Herausforderung für die Unternehmensmitbestimmung, in: Mitbestimmung der Zukunft, I.M.U.-Mitbestimmungsreport No. 58, p. 13 et seq., on the reduction of co-determination rights in the participation agreement, *cf.* the *IG Metall and ver.di* case (C-677/20), supra p. 4 et seq.

when it is founded. The SE is then used as a holding company for subsidiaries that employ workers, including a German GmbH. This was converted into a KG, whereupon employee participation in the supervisory board came to, which the group works council opposed. The Holding SE later moved its registered office from the UK to Germany. After the lower courts dismissed the works council's applications, the Federal Labour Court (BAG) now refers questions to the European Court of Justice (CJEU) as to whether the participation procedure must be conducted retrospectively.

Reference for a preliminary ruling from the Cour d'appel de Mons (Belgium) lodged on 19 September 2022 – C-650/22 – *FIFA*

Law: Articles 17 and 9 FIFA Regulations on the Status and Transfer of Players, Articles 45 and 101 TFEU.

Keywords: Professional football players – Transfer – Compensation – Release

Notes: According to FIFA regulations, if a contract between a football player and his club is terminated without good cause, the player and the new club wishing to sign the player are jointly and severally liable for the paying compensation to the old club. Furthermore, the association to which the former player belongs can refuse to issue the release certificate if there is a legal dispute between the old club and the player. The Belgian court asks whether these rules violate Articles 45 and 101 of the TFEU.

Reference for a preliminary ruling from the Finanzgericht Köln (Germany) lodged on 20 September 2022, received at the Court on 4 October 2022 – C-627/22 – *Finanzamt Köln-Süd*

Law: Articles 7 and 15 of the Agreement on the Free Movement of Persons between the EC and Switzerland in conjunction with Article 9(2) of Annex I to the Agreement on the Free Movement of Persons between the EC and Switzerland.

Keywords: Application for income tax assessment – Residence in Switzerland – No residence in the EU/EEA area – Unequal treatment

Notes: In order to receive an income tax refund, in particular taking into account expenses (income-related expenses) as well as crediting withheld German wage tax, an application for assessment for income tax can be made. Under German law (Sec. 46(2) No. 8, Sec. 50(2) 7th sentence Einkommenssteuergesetz - EStG (Income Tax Act)), this is possible for employees resident in Germany or in an EU/EEA state. However, this possibility is excluded for employees residing in Switzerland. The referring court therefore asks the CJEU whether this regulation is compatible with the Agreement on the Free Movement of Persons, which prohibits unequal treatment with regard to tax benefits.

→ back to overview

2. Working time

Opinion

Opinion of Advocate General Pitruzella delivered on 13 October 2022 – C-477/21 – *MÁV-START*

Law: Article 3, Article 5 Working Time Directive 2003/88/EC, Article 31(2) European Charter of Fundamental Rights

Key words: Protection of the safety and health of workers – Daily and weekly rest period – Modalities for granting the rest period

Core statements: Even if national law provides for weekly rest periods which are longer and thus more favourable for workers than those provided for in the Working Time Directive, this does not release the employer from the obligation to grant at least the minimum daily rest period provided for in the Directive. The daily rest period is an autonomous right that cannot be included in the concept of weekly rest.

The minimum daily rest period must be granted in a 24-hour period, irrespective of the work scheduled for the following 24 hours. Member States are free to determine when the daily rest period is granted, provided that the principle of the protection of the safety and health of workers is respected.

Notes: The questions referred for a preliminary ruling provide an opportunity to take a closer look at the relationship between the rights to daily and weekly rest as granted to workers in the Working Time Directive. The case essentially concerns the legal question of whether the daily rest period is already covered by the concept of weekly rest or whether, in addition to the weekly rest period of at least 24 hours, the daily rest period of at least eleven hours must also be granted.[14] The referring court raises these questions because, although the Hungarian Labour Code sets out the legal concepts of daily and weekly rest in various provisions, there is no reference to the daily rest period or the duration of the rest period in the provision on weekly rest.

According to the Advocate General, the daily rest period and the weekly rest period serve different objectives and therefore constitute autonomous concepts (para. 49). The aim of the daily rest period is to enable workers to recuperate for a few hours in a 24-hour period, whereas the weekly rest period is intended to enable them to rest within a reference period of seven days (para. 51).[15] Furthermore, Article 3 of the Working Time Directive, in conjunction with Article 31(2) of the ECHR, must be interpreted as meaning that the worker is entitled to a daily rest period in any 24-hour period, even if he or she does not have to work during the following 24 hours. Finally, the Advocate General clarified that, as long as the observance of the minimum daily rest period is guaranteed, the Member States are free to determine the concrete modalities.

→ back to overview

3. Time limits

Judgments / Decisions

Judgment of the Court (Sixth Chamber) of 15 December 2022 – C-40/20 – *Presidenza del Consiglio dei Ministri and Others.*

Law: Clauses 4 and 5 Framework Agreement on fixed-term work (implemented by Directive 99/70/EC)

Keywords: Fixed-term employment of university researchers – Reasons for fixed-term employment – Maximum duration – Comparison with fixed-term employment under public law

[14] On the interpretation of Article 2 of the Working Time Directive 2003/88/EC, specifically the distinction between working time and rest time/breaks, see *Buschmann*, HSI Report 4/2021, p. 5 (in German).

[15] CJEU of 9 November 2017 – C-306/16 – *Maio Marques da Rosa*, para. 42; overview HSI Report 2/2019, p. 20. In depth on Article 5(1) of the Working Time Directive as a regulation on a de facto Sunday *Ulber*, EuZA 2018, 484.

Core statements:

1. The possibility, which Italian universities have under national law, to conclude employment contracts with researchers without a fixed term for three years and extendable for a maximum of two years is not an abusive use of fixed-term employment contracts according to Clause 5 of the Framework Agreement.

2. Member States may provide for rules limiting the total duration of employment contracts of a researcher with different universities and institutes to twelve years.

3. The principle of equal treatment pursuant to Clause 4 of the Framework Agreement does not apply to different groups of employees, such as employees at universities and in public administration or in the private sector.

4. Researchers must not be denied the opportunity to participate in an assessment procedure with regard to a permanent position as an associate professor solely on the basis of their fixed-term contract.

New pending cases

Reference for a preliminary ruling from the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (Poland) lodged on 18 December 2020 – C-715/20 – *KL/X sp. z o.o.*

Law: Article 1 Directive 99/70/EC, Clauses 1 and 4 Framework Agreement on fixed-term work (implemented by Directive 99/70/EC), Article 21 European Charter of Fundamental Rights

Keywords: Obligation to give written reasons for a dismissal only in the case of open-ended employment contracts – Discrimination – Direct effect of Union law

Notes: In contrast to permanent employees, reasons do not have to be given in writing for the dismissal of fixed-term employees under Polish law, whereas this is very much the case for the dismissal of permanent employees. This also leads to limited judicial review of the dismissal. The Polish court now asks the CJEU whether these provisions are compatible with EU law and, secondly, whether the parties can directly invoke the infringement of EU law in a private law dispute.

→ back to overview

4. Data protection

Opinion

Opinion of Advocate General Ćapeta delivered on 6 September 2022 – C-268/21 – *Norra Stockholm Bygg*

Law: Article 6(3), Article 6(4) and Article 23(1)(f) General Data Protection Regulation (EU) 2016/679 (GDPR).

Keywords: Protection of personal data – Attendance times of employees – Purpose limitation – Use of the timesheet created for another purpose as evidence

Key issues: The parties to the main proceedings, two companies, are disputing before a Swedish court the amount of the fee for construction work performed, which depends in part on the scope of the services rendered. For tax reasons, the contractor had commissioned a service provider to record the attendance times of the employees in an electronic personnel register. In the court proceedings, the client requested that the service provider's personnel

register be used to support its view that the amount of the remuneration for the work had been set too high. The contractor, on the other hand, invoked data protection with regard to the employees concerned, in particular the purpose limitation of the recording.

According to the Advocate General, the GDPR is also applicable in the context of civil court proceedings, and the court is now the controller within the meaning of Article 4 No. 7 GDPR. In addition to the disclosure provisions of the national procedural code, the court must also comply with the GDPR. The use of personal data in court proceedings is covered by Article 23(1)(f) of the GDPR. In addition, Article 6(4) of the GDPR requires that the court weigh the interests involved in each case of disclosure in the context of a proportionality test.

The upcoming decision could also have consequences for requests for evidence in proceedings before the German courts. The legal discussion usually centres on the question of whether evidence collected in breach of data protection – for example, in the context of video surveillance – may be used.[16] In the present case, it is a question of introducing employee data collected for another purpose into the labour court proceedings for evidentiary purposes. If one takes the Advocate General's opinion to its logical conclusion, any collection of evidence in which personal data is processed is subject to the GDPR, whereas a decision on evidence is generally not independently contestable in procedural terms; see Section 355(2) Code of Civil Procedure and Section 46(2) Labour Court Act.

Opinion of Advocate General Sánchez-Bordona delivered on 15 December 2022 – C-579/21 – *Pankki S*

Law: Article 15(1) in conjunction with. Article 4 No. 1 GDPR

Keywords: Data contained in a log of processing activities – Right of access – Concept of personal data – Staff working for the controller

Core statement: The right to information to which a data subject is entitled under Article 15(1) of the GDPR does not include information on who has requested his or her personal data from the employer.

Notes: The plaintiff in the main proceedings is both a former employee of the defendant financial institution and a customer there. As he learned in 2014, his personal data had been retrieved there at the end of 2013. He suspected an unlawful data retrieval. After termination of his employment, he claimed information in May 2018 about which employees had access to his data.

According to the Advocate General, the admissibility of data processing as such is assessed according to the law that was relevant prior to the application of the GDPR as of 25 May 2018. Since the entry into force of the GDPR, however, the right to information can be asserted pursuant to Article 15 GDPR.

Article 15 of the GDPR contains the right to obtain information about the personal data that have been processed and the circumstances of the processing operation. The latter are not personal data and are therefore mentioned in Article 15(1) GDPR. What is not mentioned in the provision, however, is that the information on which person at the data processor initiated this processing operation must also be provided. In particular, employees of the information provider are not "third parties" within the meaning of Article 15(1) GDPR, as can be derived from the definition in Article 4(9) GDPR. Therefore, there is no right to information in this regard.

[16] See, for example, BAG of 23 August 2018 – 2 AZR 133/18; on the usability of dashcam recordings to reconstruct the accident BGH of 15 May 2018 – VI ZR 233/17.

The upcoming CJEU ruling has potentially great significance. Employees can demand information from their employer about the data stored about them, which becomes particularly relevant after the termination of their employment. Extending the right to information to cover those who have had access to it would significantly expand this right. In the reverse perspective, all clients would be able to know which employees were involved with their data. Even if the fact which person has accessed a personal data still has a personal reference, the solution described by the Advocate General that the right of access does not extend to the person who accessed the data is convincing. The employees concerned are left with the option of checking whether the data processing was lawful on the basis of the data transmitted pursuant to Article 15 GDPR. In case of doubt, the supervisory authority can be called in.

→ back to overview

5. Equal treatment

Judgments

Judgment of the Court (Second Chamber) of 13 October 2022 – C-344/20 – *S.C.R.L.*

Law: Article 1, Article 2(2)(a) and Article 8(1) Employment Equality Directive 2000/78/EC.

Keywords: Prohibition of discrimination on grounds of religion or belief – Uniform ground for discrimination – Prohibition of any manifestation of religious, philosophical or political belief in the workplace – Wearing a headscarf at the workplace

Core statements:

1. The terms "religion or ... belief" contained in Article 1 of the Employment Equality Directive 2000/78/EC constitute a single ground of discrimination covering both religious and philosophical or spiritual beliefs.

2. A provision in a company's terms of employment prohibiting employees from expressing their religious or philosophical beliefs by word, dress or other means does not constitute direct discrimination "on grounds of religion or belief" if the provision is applied in a general and undifferentiated way. However, the prohibition may indirectly discriminate based on religious affiliation.

3. If religious and philosophical beliefs are regarded as two distinct grounds of discrimination in the national legal system, they cannot be regarded as provisions "more favourable to the protection of the principle of equal treatment than those laid down in this Directive" (Art. 8(1) Employment Equality Directive 2000/78/EC).

Notes: Once again, the CJEU had to deal with a question arising from a case in which an employer prohibited an employee of the Muslim faith from wearing a headscarf at work.[17] In line with its previous case law, the CJEU considered the questions not in the context of freedoms, but in terms of equality and discrimination. It has clarified that the characteristics "religion or belief" in Article 1 of the Employment Equality Directive as well as in Article 21 of the European Charter of Fundamental Rights describe a single criterion.[18] Moreover, national law cannot be regarded as a more favourable regulation as permitted under Article 8(1) of

[17] See already CJEU of 15 July 2021 – C-804/18 and C-341/19 – *WABE and MH Müller Handel*, with comment by *Seeland,* in: HSI Report 3/2021 (in German), p. 4 et seq.; of 14 March 2017 – C157/15 -- *G4S Secure Solutions.*

[18] *Bauer/Krieger/Günther,* AGG/EntgTranspG, 5th ed. 2018, § 1 AGG marginal no. 28; *Nollert-Borasio/Dickerhof-Borello/Wenckebach,* Basiskommentar AGG, 5th ed. 2019, § 1 marginal no. 15.

the Employment Equality Directive if, in derogation therefrom, it treats the two characteristics as individual grounds of discrimination. This statement, which interferes with the legal understanding of the law of the Member State, is justified by the fact that, even according to the approach of the Court of Justice, the Member State must take freedom of religion into account and may form sub-groups of employees.[19] The differing approach of the referring court therefore does not constitute a "more favourable" transposition of the Directive within the meaning of Article 8 of the Employment Equality Directive.

Finally, the present ruling once again illustrates the differentiation with which, according to the CJEU, "headscarf cases" must be assessed:[20]

1. A prohibition which directly refers to the wearing of a headscarf is direct discrimination and as such unlawful.

2. A prohibition of "large-sized" signs of religious or philosophical convictions constitutes direct unequal treatment if, as in the case of the headscarf, this criterion is "inextricably linked to one or more specific religions or beliefs".[21]

3. A prohibition of "any visible sign of political, philosophical or religious beliefs" is not directly based on a criterion that is inseparably linked to one religion or belief. It is to be regarded as indirect unequal treatment if members of a certain religion or belief are disadvantaged in a particular way. However, the employer's desire to display a policy of political, philosophical or religious neutrality in its relations with public- and private-sector customers can in principle justify such a prohibition. This requires a "real need" on the part of the employer (para. 32 et seq.) and a coherent approach.

Judgment of the Court (Sixth Chamber) of 20 October 2022 – C-301/21 – *Curtea de Apel Alba Iulia and Others.*

Law: Article 1 and Article 2(1) and (2) Employment Equality Directive 2000/78/EC

Keywords: New salary regulation for newly appointed judges – Different salaries for judges of the same rank – Age discrimination – Conclusive character of the discrimination criteria

Core statements:

1. A regulation which results in the remuneration of judges who take up their duties after a cut-off date being lower than that of judges who are already in service does not in itself constitute unequal treatment on grounds of age. The Employment Equality Directive is not applicable.

2. The grounds of discrimination listed in Article 1 of the Employment Equality Directive are exhaustive.

Judgment of the Court (Seventh Chamber) of 17 November 2022 – C-304/21 – *Ministero dell'Interno*

Law: Article 4(2), Article 6(1) Employment Equality Directive 2000/78/EC

Keywords: Age discrimination – Maximum age limit for police commissioners – Special physical aptitude – Appropriateness

Core statements: If the tasks actually performed by police commissioners do not require any particular physical aptitude, a maximum age limit of 30 years for their recruitment is

[19] More detailed *Rudnik/Wieg*, NZA 2022, 1515, 1517 et seq.
[20] On this also *Klengel*, in: jurisPR 2/2023, note 4.
[21] CJEU of 15 July 2021 – C-804/18 and C-341/19 – *WABE and MH Müller Handel*, paras. 72 and 73, in more detail *Seeland*, in: HSI Report 3/2021, p. 4 et seq.

contrary to EU law. If, on the other hand, the tasks require such aptitude, the age limit must be appropriate. It is for the referring court to determine this.

Notes: The referral concerns the maximum age as a condition for access to the police service and possible age discrimination. Under the Italian legislation, there is an age limit of 30 years for participation in the selection procedure for police commissioners in Italy. The Court pointed out, first, that, according to its established case-law, the age limit could be justified because police service can be particularly physically demanding.[22] Whether this applies to the office of police commissioner was in dispute in the present proceedings. The Court ruled that it is up to the national court to determine this, whereby it depends on which tasks the persons in question actually usually performs and whether, for example, law enforcement service constitutes an essential part of their daily work. Furthermore, the age limit must be proportionate in any case. Subject to further examination by the referring court, the age limit of 30 years is therefore not justified. Nor is it justified from the point of view of ensuring a reasonable period of service until retirement, given that the retirement age is 61.

German law also sets age limits for entry into police service. For example, the maximum age for entry into preparatory training for the intermediate law enforcement service in the Federal Police is 28 years; cf. Section 5(3), first sentence of the Federal Police Career Paths Ordinance (BPolLV).

Order of the Court (Seventh Chamber) of 17 November 2022 – C-569/21 – *Ministero dell'Interno*

Law: Article 4(1), Article 6(1) Employment Equality Directive 2000/78/EC

Keywords: Age discrimination – Maximum age limit for the recruitment of police psychologists – Grounds for justification

Core statement: The setting of an age limit of 30 years for participation in a selection procedure for the recruitment of psychologists in the police is incompatible with Union law.

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 21 July 2022, received at the Court on 10 October 2022 – C-630/22 – *Kirchliches Krankenhaus*

Law: Article 4 Employment Equality Directive, Article 21 European Charter of Fundamental Rights

Keywords: Leaving the church before starting employment – Unequal treatment on grounds of religion

Notes: Once again, the subject is a dismissal by a church employer due to lack of church membership. The plaintiff in the referred proceedings was employed as a midwife in a hospital of the German Caritas Association. After termination of the employment relationship, she left the Catholic Church. Five years later, she applied again and was hired by the hospital. Her church affiliation was not discussed in the interview, but she marked it as not given in the personnel questionnaire, which she sent to the hospital together with the employment contract, which had already been signed by both parties. As a result, she was dismissed with reference to the Basic Regulations of Church Service (Article 3(4), according to which persons who have left the Catholic Church are not suitable to work for the church.

[22] CJEU of 12 January 2010 – C-229/08, EU:C:2010:3 – *Wolf*, paras. 41 to 44: age limit of 30 permissible as an access restriction for the fire service; differently for the police service CJEU of 13 November 2014 – C416/13, -EU:C:2014:2371 – *Vital Pérez*, paras. 54 and 57.

With this reference for a preliminary ruling, the CJEU has the opportunity to further hone the scope of the church's right to self-determination[23] in the light of Union law. On the one hand, it is questionable whether not having left the church can be a justified occupational requirement (referred questions 1 a and c) and, on the other hand, whether the duties of loyalty also apply to employees who will only be employed in the future or whether their conduct can continue to have an effect (referred question 1 b). Therefore, the Federal Labour Court has referred the questions for a preliminary ruling as to whether and under which further requirements a private organisation whose ethos is based on religious principles

a) may deem unsuitable for employment in its establishment persons who have left a particular religious community prior to the establishment of the employment relationship, or
b) may require of its staff that they have not left a particular religious community prior to the establishment of the employment relationship, or
c) may make it a condition of employment that a member of staff who has left a particular religious community prior to the establishment of the employment relationship rejoin said community, if it does not also require its staff to belong to that religious community.

Reference for a preliminary ruling from the Tribunal Superior de Justicia de las Islas Baleares (Spain) lodged on 7 October 2022 – C-631/22 – *C.N.N.*

Law: Article 5 Employment Equality Directive 2000/78/EC, Articles 21 and 26 European Charter of Fundamental Rights, Articles 2 and 27 UN Convention on the Rights of Persons with Disabilities.

Keywords: Determination of occupational incapacity – Automatic termination after determination – No duty to make reasonable accommodation – Direct discrimination

Notes: Under Spanish law, if an employee is found to be permanently and totally incapacitated with no prospect of recovery, and thus disabled, the employment relationship ends immediately and automatically. The law does not on the other hand require that reasonable accommodation (Art. 5 Employment Equality Directive) be made beforehand to enable continued employment in the company. Dismissal is thus the mandatory legal consequence once the disability has been established, even if a job suitable for the person with the disability is actually available in the company. The referring court wishes to know whether this provision is compatible with Article 5 of the Employment Equality Directive and whether it constitutes direct discrimination in its application.[24]

→ back to overview

6. Temporary agency work

Judgments / Decisions

Judgment of the Court of 15 December 2022 – C-311/21 – *TimePartner Personalmanagement*

Law: Article 5 Temporary Agency Work Directive 2008/104/EC

Keywords: Temporary agency work – Equal pay – Observance of the overall protection of temporary agency workers in the event of derogation from the principle of equal treatment –

[23] *Stein*, HSI-Schriftenreihe Band 47, Das kirchliche Selbstbestimmungrecht im Arbeitsrecht und seine Grenzen.
[24] On the meaning of the term "reasonable accommodation" for the duty to provide an appropriate workplace for the disabled person, cf. CJEU of 10 February 2022 – C-485/20 – *HR Rail*, with comment (in German) by *Sutterer-Kipping*, in: HSI-Report 1/2022.

Collective agreement providing for lower pay for temporary agency workers than for permanent staff – Judicial review

Core statements:

1. If a collective agreement allows unequal treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, this collective agreement must, in order to respect the overall protection of the temporary agency workers concerned within the meaning of Article 5(3) of the Temporary Agency Work Directive, grant advantages capable of compensating for their unequal treatment.

2. The question of whether the overall protection of temporary agency workers is respected shall be assessed by comparing, for a given job, the basic working and employment conditions applicable to workers directly hired by the user undertaking with those applicable to temporary agency workers.

3. The obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to be bound to the temporary employment agency by a permanent employment contract.

4. The national legislature is not obliged to explicitly provide for the conditions and criteria for respecting the overall protection of temporary agency workers pursuant to Article 5(3) of the Temporary Agency Work Directive.

5. Collective agreements which, under this provision, permit unequal treatment with regard to basic working and employment conditions to the detriment of temporary agency workers must be subject to effective judicial review with regard to respect of the overall protection of those workers.

Notes: See comment (in German) by *Donath*, HSI Report 4/2022, p. 5.

→ back to overview

7. Social security

Judgments/Decisions

Judgment of the Court (Seventh Chamber) of 13 October 2022 – C-199/21 – *Finanzamt Österreich*

Law: Articles 67 and 68 Coordination Regulation (EC) No. 883/2004, Article 60(1), third sentence, Implementing Regulation (EC) No. 987/2009.

Keywords: Recovery of family benefits – Pensions from several Member States – Application by the non-entitled parent – Actual fulfilment of the purpose of the benefit

Core statement:

1. If a person is entitled to the payment of a pension in two different Member States, but family benefits are part of this pension in only one of the Member States, it is not necessary to decide whether the right to family benefits from one of the two Member States has priority. The right to payment of the family benefit in the Member State concerned is to continue.

2. A Member State may reserve a family benefit for the parent who lives with the child, even if that parent did not apply for the benefit and the other parent who did apply bears the sole financial burden of the child's maintenance. If the Member State has nevertheless paid the benefit to the other, non-entitled, parent, recovery is not permitted if the funds reached the person bearing the costs of the child's maintenance.

Notes: The plaintiff in the main proceedings is an Austrian pensioner and receives a pension benefit from both Austria and Poland. He has a daughter from a former marriage who lives with her mother in Poland. In connection with his receipt of a pension, he applied to the Austrian authorities for family benefits for his daughter, received those benefits and used them to support his daughter. His former wife, on the other hand, a Polish national, never applied for these family benefits in Austria. Referring to Union law and national law, the Austrian authorities later reclaimed the family benefits paid, arguing that they were not competent for the family benefit due to the pension paid by Poland (Art. 67(2) Coordination Regulation). However, the claimant was not entitled to the payment of a family benefit in Poland because his pension exceeded the relevant limit.

To answer the national court, the Court found, first, that the claimant was entitled to the family benefit in Austria: Although both Member States may in principle be competent for family benefits, whether a claim actually exists is determined by national law, which can thus preclude the application of the priority rules under Article 68 of the Coordination Regulation. In order to apply the priority rules, a case of conflict would have to exist in the first place, i.e. that several claims actually exist, which was not the case here. Furthermore, the CJEU stated that family benefits cannot be reclaimed. If the Austrian authorities decided to take the claimant's application into account because his former wife, who was entitled to it, failed to submit an application (Art. 60(1), third sentence, of the Implementing Regulation), the decisive factor was that he actually used the allowance granted to him to pay child maintenance.

Judgment of the Court (Second Chamber) of 13 October 2022 – C-713/20 – *Raad van bestuur van de Sociale verzekeringbank*

Law: Article 11(3) lit. a and e Coordination Regulation (EC) No. 883/2004

Key words: Temporary agency work – Postings in a Member State other than the State of residence – Social security for migrant workers between several postings

Core statements: If the employment relationship ends between two posting periods, workers are subject to the legislation of the social security system of the Member State of residence.

Notes: The main issue in the case in question was whether a person who resides in a Member State (in this case Poland and Germany respectively) and works as a temporary agency worker in that other Member State (in this case the Netherlands) through a temporary employment agency established in another Member State is subject to the national legislation of the Member State of employment or of his or her Member State of residence during the periods between the assignments.

The applicable legislation is essentially determined by the coordination rules of the Coordination Regulation (EC) No 883/2004. Article 11(3)(a) of the Coordination Regulation establishes the principle that a person who pursues an activity as an employed or self-employed person in the territory of a Member State is subject to its social security provisions (place of activity principle). Decisive for the assessment of whether an employment or self-employed activity is exercised is the place where the employment or self-employed activity is actually carried out. This in turn is determined solely by the actual circumstances and not by the legal agreements. The concrete modalities of the exercise of the work performance (for example, part-time or only occasionally), on the other hand – as already in the *Kits van Heijningen* case[25] – do not play a role, as they do not affect the existence of the employment

[25] CJEU of 3 May 1990 – C-2/89 – *Kits van Heijningen*. In paragraphs 14 and 15 of that judgment, the Court pointed out that Article 13(2)(a) of Regulation 1408/71 "makes no distinction between full-time and part-time employment". The Court

relationship. For the application of the Law, therefore, it is the existence of a continuing employment relationship that matters, even if the principal obligations arising from the employment relationship are suspended.[26] During the assignment period, temporary agency workers are therefore subject to the legislation of their Member State of employment. However, a distinction must be made between cases in which the person was registered with several temporary work agencies during the non-lending period, but did not work for any of them as a temporary agency worker – or, in other words, they have temporarily terminated their employment. If there is no longer a fixed-term or permanent employment relationship during the non-lending period, the person is subject to the legislation of the Member State of residence.

Judgment of the Court (Second Chamber) of 24 November 2022 – C-638/20 – *MCM*

Law: Article 7(2) Free Movement Regulation (EU) No. 492/2011, Article 45 TFEU

Keywords: Aid to finance studies – Studies in another Member State – Residence requirement – Social connection for non-resident students

Core statements: If the grant of an allowance for the child's studies in another Member State is linked to residence in the country of origin or to social integration, and if this condition applies equally to the other nationals of the Member State, this does not preclude the free movement of workers.

Notes: The promotion of student mobility is on the EU agenda and was to be initialised, for example, by the Bologna Process,[27] whose core concern was the creation of a European Higher Education Area. Studying abroad (in Europe) is becoming more and more popular,[28] making the question of exporting financial study grants more significant.

This was also the case in the main proceedings. The plaintiff is a Swedish citizen and is seeking financial assistance from the Swedish state for his studies in Spain. He has lived in Spain since birth, initially with his father, who worked there as a migrant worker, before the father moved back to Sweden to work.

Under Swedish law, study aid abroad is linked to residence in Sweden. Exceptions to this are possible, for example, for migrant workers and their family members or if the student has a social connection to Sweden. On this basis, the claimant's application was rejected.

The question now was whether it is a violation of the European right to freedom of movement (in this case, Art. 7 of the Free Movement Regulation and Art. 45 TFEU) if the child must have a certain connection to the state of origin in order to receive the allowance, since parents could be deterred by the regulation from going to work in another Member State. In this regard, the CJEU first states that Article 7 of the Free Movement Regulation is not applicable in the present case. This provision applies to the receiving Member State, not the State of origin.

The CJEU then examines a violation of the free movement of workers pursuant to Article 45 TFEU. It already denies an impairment of the same. This is because the circumstances affecting the decision to exercise the right of free movement must have a certain degree of

---

therefore held that Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a person falling within the scope of that regulation who is employed part-time in the territory of a Member State is subject to the legislation of that Member State "both on the days on which he pursues that activity and on the days on which he does not".

[26] CJEU of 13 September 2017 – C-569/15 – *Staatssecretaris van Financiën*, para. 21 et seq.

[27] https://education.ec.europa.eu/de/education-levels/higher-education/inclusive-and-connected-higher-education/bologna-process.

[28] See the Report of the German Conference of Ministers of Education and Cultural Affairs and the Federal Ministry of Education and Research on the implementation of the goals of the Bologna Process 2000-2020, p. 7 et seq.

certainty and directness (para. 35).[29] This is not the case here. At the time of the decision, the subsequent granting of the study grant depends on further future decisions of both the parents and the child as well as further uncertain events (e.g. becoming parents, taking up studies, place of study and residence). Such an uncertain situation cannot influence the decision on free movement, so that Swedish law does not violate Article 45 TFEU.

Judgment of the Court of 8 December 2022 – C-731/21 – *Caisse nationale d'assurance pension* (Antonia)

Law: Article 45 TFEU; Article 7(1) and (2) Free Movement Regulation (EU) No. 492/2011

(Key words: Equal treatment – Survivor's pension – Partner in a registered civil partnership – Condition for grant of pension entry in the national register of a civil partnership validly contracted and registered in another Member State)

Core statements: The granting of a survivor's pension may not be made dependent on an entry of the civil partnership in the register of the state granting the benefit if the civil partnership was already previously registered in another Member State.

Notes: The labour market in Luxembourg is characterised by a high number of cross-border workers, and this number is increasing.[30] Among these are the complainant and her deceased partner. In their country of residence, France, they entered into a civil partnership, which was validly registered in the French register. After the death of her partner, the complainant sought a survivor's pension from the Luxembourg authorities. However, this was refused on the grounds that the civil partnership had not been entered in the Luxembourg civil status register. In the case at hand, the competent benefit provider applied a national provision according to which civil partnerships registered abroad can also be entered in the Luxembourg register. The purpose is to ensure that a survivor's pension financed from public funds is only paid to a person who is actually entitled to it. The complainant appealed against the decision.

The CJEU sees the application of the law as indirect discrimination on the basis of Article 45 TFEU and Article 7(1) and (2) of the Implementing Regulation and, moreover, as disproportionate. First, registration in the Luxembourg register is not mandatory. Second, the legitimate purpose can already be achieved, for example, by submitting an official document confirming the registration in France.

Judgment of the Court (Fifth Chamber) of 22 December 2022 – C-404/21 – *INPS and Repubblica italiana*

Law: Article 4 (3) TEU, Article 8 of Annex IIIa of the Conditions of Employment of the ECB

Key words: ECB staff – Transfer of national pension rights to the ECB's pension scheme – Principle of sincere cooperation – Absence of rules permitting such transfer

Core statements:

1. If a Member State has not concluded an agreement with the ECB or if national law does not provide for any regulation or administrative practice on the transfer of pension rights acquired in the Member State to the ECB's pension scheme, such an obligation cannot be derived from Union law (Articles 45 and 48 TFEU, Article 8 of Annex IIIa Conditions of Employment of the ECB, Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Union). However, if the ECB has requested the Member State to conclude such an

[29] CJEU of 13 March 2019 – C437/17 – *Joint Works Council EurothermenResort Bad Schallerbach*, para. 40.
[30] https://ec.europa.eu/eures/printLMIText.jsp?lmiLang=de&regionId=LU0&catId=2643.

agreement, it follows from the principle of sincere cooperation under Article 4(3) TEU that the Member State is obliged to participate actively and in good faith in the negotiations.

2. A national court is not empowered to order the transfer of acquired pension rights to the ECB's pension scheme. However, if the Member State is obliged to participate in the negotiations under Article 4(3) TEU, the national court must take all measures provided for in the applicable national procedural rules to ensure that the Member State complies with this obligation.

New pending cases

Reference for a preliminary ruling from the Court of Appeal (Ireland) lodged on 10 August 2021 – C-488/21 – *Chief Appeals Officer and Others.*

Law: Article 7(2) Free Movement Directive 2004/38/EC

Keywords: Maintenance payment by relatives as a condition of the right of residence

Notes: Union law presupposes that the right of residence of family members of Union citizens is subject to the condition that their subsistence is covered and that they do not have to claim social assistance benefits from the host Member State. An Irish legal provision is under scrutiny according to which the right of residence exists as long as these requirements are met and the social welfare benefits of the state are not unreasonably claimed.

→ back to overview.

8. Part-time employment

Opinion

Opinion of Advocate General Emiliou delivered on 1 December 2022 – C-660/20 – *Lufthansa CityLine*

Law: Clause 4 No. 1 of the Framework Agreement on part-time work (transposed by Directive 97/81/EC).

Keywords: Principle of non-discrimination of part-time workers – Pro rata temporis principle – Increased remuneration for hours worked in a month beyond a fixed threshold – Identical threshold for full-time and part-time pilots

Core statements: A provision in a collective agreement according to which additional remuneration for part-time and full-time employees is uniformly linked to the fact that the same number of working hours is exceeded is compatible with EU law if the same number of hours worked by part-time and full-time employees for the same work are remunerated by the same salary.

Notes: The background is the complaint of a part-time Lufthansa pilot. According to the relevant collective agreement for cockpit personnel, pilots receive additional remuneration if they work a certain number of flight duty hours per month. The threshold for additional flight hours (so-called trigger threshold) is identical for part-time and full-time employees. The collective bargaining provisions do not provide for these trigger thresholds to be reduced for part-time employees in proportion to their part-time percentage. The central question in this case is therefore whether the remuneration of flight duty hours, in terms of hours worked in excess of the trigger thresholds, unlawfully discriminates against part-time pilots compared to full-time pilots because it is a single threshold. The part-time pilot is of the opinion that the use of identical trigger thresholds for full-time and part-time employees violates the

prohibition of discrimination of part-time employees in Section 4(1) of the Law on Part-time Work and Fixed-term Contracts (TzBfG).[31]

In comparable cases, Chambers of the Federal Labour Court (BAG) have performed a comparison of the total remuneration and found no unequal treatment if the same remuneration was paid for the same number of working hours.[32] They followed the CJEU decision in the *Helmig* case.[33] The Tenth[34] and Sixth Chambers[35] of the BAG, in contrast, compared individual remuneration components in isolation and argued that a focus on total remuneration leads to unequal treatment of part-time employees. They based this on the case law of the CJEU in the *Elsner-Lakeberg* case.[36][37]

In his Opinion, Advocate General *Emiliou* shares the view of the defendant that there is no unequal treatment of part-time workers and focuses on overall remuneration (para. 30). He reasons that the Framework Agreement only establishes a minimum level of protection, requiring that the remuneration for the same number of hours worked by part-time and full-time employees be the same – not less or more (para. 85). Otherwise, part-time pilots would be treated better than full-time pilots (para. 84).

However, it must be countered that the starting situation is an unequal one. It is naturally more difficult for a part-time employee to reach the trigger thresholds for full-time employees. The question, therefore, is rather whether this unequal treatment is justified.[38] While respecting the scope for assessment and regulation that the parties to the collective agreement have, what has to be assessed is therefore: What is the purpose of the additional remuneration – the protection of free time? Compensation for the special workload? For this purpose, the collective agreement must as a rule be interpreted, but this can hardly be the task of the CJEU.[39]

→ back to overview

9. Annual leave

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Social No. 1 of Seville lodged on 27 October 2022 – C-673/22 – *INSS*

Law: Article 5 in conjunction with Recital 37 of the Work-Life Balance Directive (EU) 2019/1158

Keywords: Parental leave – Non-transferable right – Single parents – Extension of parental leave for single parents

[31] On the reference for a preliminary ruling by the BAG, see BAG of 11 November 2020 – AZR 185/20 (A), NZA 2021, 57; HSI Report 2/2021, p. 14.
[32] BAG of 30 January 1996 – 3 AZR 275/94, BeckRS 1996, 31017221 (Third Chamber); BAG of 16 June 2004 – 5 AZR 448/03, NJOZ 2004, 3307, 3311; BAG of 5 November 2003 – 5 AZR 8/03, NZA 2005, 222, 224; BAG of 21 April 1999 – 5 AZR 200/98, NZA 1999, 939, 941 (Fifth Chamber); BAG of 23 April 1998 – 6 AZR 558/96, BeckRS 1998, 30369586 (Sixth Chamber); BAG of 26 April 2017 – 10 AZR 589/15, NZA 2017, 1069, 1072 (Tenth Chamber).
[33] CJEU of 15 December 1994 – C-399/92 – *Helmig*, NZA 1995, 218.
[34] BAG of 19 December 2018 – 10 AZR 231/18, NZA 2019, 790, 794.
[35] BAG of 23 March 2017 – 6 AZR 161/16, NZA-RR 2018, 45, 48.
[36] CJEU of 27 May 2004 – C-285/02 – *Elsner-Lakeberg*, NZA 2004, 783, 784.
[37] According to *Bayreuther*, it cannot be inferred from the two decisions that the CJEU now advocates an isolated consideration of the individual remuneration components (*Bayreuther*, NZA 2019, 1684).
[38] On the justification of unequal treatment, see *Herms/Degen*, RdA 2021, 311, 313 et seq.
[39] So also *Bauer*, FD-ArbR 2020, 434077; *Einfeldt*, ArbRB 2021, 4 et seq.

Core statement: In Spanish law, parental leave is a personal and non-transferable right for each parent and serves to ensure care for the child. An extension of parental leave for a single parent is not possible. The CJEU is now called upon to rule on the question of whether the special needs of single parents require a full or partial "transfer".

→ back to overview

III. Proceedings before the ECtHR

Compiled and commented by

Karsten Jessolat, DGB Rechtsschutz GmbH, Centre for Appeal and European Law, Kassel

1. Prohibition of discrimination

Judgments

Judgment (Fourth Section) of 20 December 2022 – Nos. 53282/18 and 31428/20 – *Moraru and Marin v. Romania*

Law: Article 14 ECHR (prohibition of discrimination); Article 1 of Protocol No. 12 to the ECHR (general prohibition of discrimination).

Keywords: Termination of employment due to old-age pension – Different start of pension for women and men – Discrimination on grounds of sex

Core statement: Unequal treatment on grounds of sex can only be considered compatible with the ECHR based on very weighty grounds, so that the discretion available to states with regard to the justification of discriminatory measures is very limited.

Notes: The complainants are civil servants in the State Tax Administration and the Ministry of Economy, respectively. According to national law, the normal retirement age for women is 60 and for men 65. Shortly before reaching this standard retirement age, the complainants, who are women, applied to their respective departments to be able to continue working until they reached the retirement age set for men. The applications were rejected in both cases. The actions brought against this, which were based in particular on the fact that the statutory regulation on the setting of a different retirement age for men and women violates the prohibition of discrimination on grounds of sex, were unsuccessful. The Courts of Appeal held that according to Article 7 of Directive 79/7/EEC, Member States were entitled to exclude the setting of the retirement age for the granting of old-age pensions from the scope of the Directive.

The complainants claim before the Court that domestic law discriminates against them on the basis of sex, as it provides for a different retirement age for women and men, thus violating Article 1 of Protocol No. 12.

With regard to the standard of review, the Court first points out that, notwithstanding the different scope of application of Article 14 ECHR and Article 1 of Protocol No. 12, the meaning of the term "discrimination" is identical for both provisions, so that the same standards developed by the Court for the protection of Article 14 ECHR apply to Article 1 of Protocol No. 12.[1] According to this, unequal treatment is discriminatory if it does not serve an objective and reasonable justification or if there is no reasonable relationship between the means employed and the aim pursued.[2] In this context, the Court considers that the promotion of gender equality is today an important objective in the Member States of the Council of Europe. Therefore, there must be "very weighty reasons" or "particularly serious reasons" to be able to justify unequal treatment on grounds of sex. A reference to traditions,

[1] ECtHR of 22 December 2009 – Nos. 27996/06 and 34836/06 – *Sejdić and Finci v. Bosnia and Herzegovina.*
[2] ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali v. Greece.*

general assumptions or social attitudes prevailing in a particular country do not satisfy these requirements.[3] The margin of appreciation granted to states with regard to unequal treatment on grounds of sex is therefore very narrow.[4]

Measured against these principles, the Court finds that a different retirement age for men and women constitutes unequal treatment on grounds of sex.[5] The same applies to the associated automatic termination of employment for women upon reaching retirement age. Domestic law does not provide any weighty reason to justify this unequal treatment. Rather, the statutory provision confirms a stereotypical view of gender roles and treats women as a homogeneous group, thereby depriving them of their capacity to act and completely disregarding their personal situation or wishes with regard to professional life and career development. The Court emphasises that the national authorities and courts have in particular failed to consider the applicable Union law and the decisions of the CJEU in this regard,[6] as the complainants had expressly pointed out. If the complainants are prevented by law from continuing to work beyond retirement age until they reach the retirement age set for men, they are discriminated against on the grounds of their sex.

The Court therefore unanimously found a violation of Article 1 of Protocol No. 12 to the ECHR and awarded the first complainant compensation in the amount of 7,500 euros. The second complainant did not apply for compensation.

Judgment (Fourth Section) of 8 November 2022 – No. 64480/19 – *Moraru v. Romania*

Law: Article 14 ECHR (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education)

Keywords: Exclusion from studies – Differentiation on the basis of physical characteristics

Core statement: With regard to the objective and reasonable justification of an unequal treatment, states are allowed a wide margin of discretion, especially in matters concerning national security, as the resulting security interests of the state are of central importance. However, a regulation that makes a certain height and weight a prerequisite for being admitted to military service is impermissible if it also applies to non-military personnel and it is not shown that the physical requirements are also necessary for such personnel.

Notes: Due to her height and weight, the complainant was not admitted to the entrance examination for the study of medicine at a military academy. According to a decree of the Ministry of National Defence (MND), admission to military educational institutions required compliance with certain medical criteria, including height and weight. An action brought by the complainant against her non-admission to studies was unsuccessful before the domestic courts. She relied in particular on a decision of the CJEU[7] according to which the imposition of anthropometric restrictions constitutes indirect discrimination. The courts assumed the legality of the relevant provisions and denied discrimination. They assumed that the restrictions serve the purpose of ensuring the fitness of soldiers for participation in military missions.

[3] ECtHR of 11 October 2022 – No. 78630/12 – *Beeler v. Switzerland*; ECtHR of 28 May 1985 – Nos. 9214/80; 9473/81; 9474/81 – *Abdulaziz, Cabales and Balkandali v.United Kingdom*; ECtHR of 16 November 2004 – No. 29865/96 – *Ünal Tekeli v. Turkey*; ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 25 July 2017 – No. 17484/15 – *Carvalho Pinto de Sousa Morais v. Portugal*.

[4] ECtHR of 11 October 2022 – No. 78630/12 – *Beeler v. Switzerland*; ECtHR of 2 December 2014 – No. 61960/08 – *Emel Boyraz v. Turkey.*

[5] ECtHR of 12 April 2006 – Nos. 65731/01 and 65900/01 – *Stec and Others v. United Kingdom*.

[6] CJEU of 26 February 1986 – C-152/84 – *Marshall*; CJEU of 18 November 2010 – C-356/09 – *Kleist*.

[7] CJEU of 18 October 2017 – C-409/16 – *Kalliri*.

The complaint alleges that a restriction on access to state educational institutions on the basis of anthropometric characteristics constitutes impermissible discrimination and therefore a violation of Article 14 ECHR in conjunction with Article 2 of Protocol No. 1 to the Convention.

Unequal treatment based on a personal characteristic on the basis of which persons or groups of persons can be distinguished from one another can constitute discrimination within the meaning of Article 14 ECHR. In this respect, the list contained in the provision is not exhaustive, as the word "in particular" indicates.[8] A difference in treatment is discriminatory if it has no objective and reasonable justification or if there is no reasonable relationship between the means used and the aim pursued.[9] Within their discretionary powers, States may determine the circumstances in which unequal treatment may be justified in otherwise similar situations.[10] As far as issues of national security in general and the armed forces in particular are concerned, States are granted a particularly wide margin of appreciation because these are central to the security of the nation and the vital interests of the State.[11]

In the present case, the national authorities and courts failed to take into account that the criteria established by the MND apply to both military and non-military personnel. Similarly, the MND does not specify the duties of military doctors and the physical requirements of these activities. Therefore, there is a lack of explanation of the need for all military personnel, even if they do not have specifically military duties, to meet the specified anthropometric characteristics. There is no reasonable justification for the connection between the height or weight of an applicant and the job he or she has to do. The Court also considers the fact that the MND deleted the anthropometric requirements on 14 May 2020 as an indication of the discriminatory effect of the relevant provisions.

In the light of these findings, the Court unanimously found a violation of Article 14 ECHR with Article 2 of Protocol No. 1 to the ECHR and awarded the applicant compensation for non-material damage in the amount of 7,500 euros.

Judgment (Grand Chamber) of 11 October 2022 – No 78630/12 – *Beeler v Switzerland*

Law: Article 14 ECHR (prohibition of discrimination) in conjunction with Article 8 ECHR (right to respect for private and family life).

Keywords: Cessation of payment of a survivor's pension to the widowed male parent – Sex discrimination

Core statement: Ensuring progress in gender equality, which is a declared goal of the Council of Europe Member States, means that only very weighty reasons can justify a difference in treatment.

Notes: The proceedings concern the case *B. v. Switzerland*, no. 78630/12,[12] on which the Third Section of the ECtHR ruled on 20 October 2020. The question at issue is whether the denial of a widow's pension to a male survivor constitutes discrimination on grounds of sex if, under national law, that pension is granted exclusively to female survivors.

At the time, the Court unanimously held that there had been a violation of Article 14 ECHR in conjunction with Article 8 ECHR. At the request of the defendant government, the case was referred to the Grand Chamber.

[8] ECtHR of 16 March 2005 – No. 42185/05 – *Carson v. United Kingdom*.
[9] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia.*
[10] ECtHR of 19 October 2018 – No. 20452/14 – *Molla Sali v. Greece.*
[11] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia.*
[12] ECtHR of 20 October 2020 – No. 78630/12 – *B. v. Switzerland*, see HSI Report 4/2020, V. 6.

The Grand Chamber shares the view of the Section that Article 14 ECHR in conjunction with Article 8 ECHR is applicable to the field of social benefits.[13] There is no evidence that the discontinuation of the pension affects the complainant less than a widow in a comparable situation. After 16 years of unemployment, he has the same difficulties on the labour market as a woman at the age of 57.

The Grand Chamber therefore upheld the decision of the Third Section by twelve votes to five, finding a violation of Article 14 ECHR in conjunction with Article 8 ECHR and awarding the complainant 5,000 euros in compensation for non-material damage.

In a favourable opinion, Judge *Seibert-Fohr* elaborates on the Court's reasoning and explains with further arguments the scope of application of Article 8 ECHR to social security issues.

In another favourable opinion, Judge *Zünd* points out the particularities of Swiss law, which differentiates between men and women, especially in the area of old-age provision.

In a joint dissenting opinion, Judges *Kucsko-Stadlmayer*, *Mourou-Vikström* and *Koskelo* and Judges *Kjølbro* and *Roosma take* the view that issues of social benefits are excluded from the scope of Article 14 in conjunction with Article 8 ECHR.

New proceedings (notified to the respective government)

No 29265/22 – *D. J. v Slovenia* – lodged on 8 June 2022 – communicated on 8 November 2022

Law: Article 14 ECHR (prohibition of discrimination), Article 8 ECHR (right to respect for private and family life).

Keywords: Termination of the employment relationship of a pregnant woman – Exclusion of the special protection against dismissal in the employment contract

Notes: In February 2014, the employment of the complainant, who was employed as an authorised signatory, was terminated. She then informed the employer that she was pregnant and objected to the employer's decision, citing the protection afforded to pregnant women under labour law. She subsequently suffered a miscarriage. In her action against her former employer, she demanded reinstatement and continued payment of wages for the period of the unlawful termination. The court of first instance partially upheld her claim. The Court of Appeal overturned the decision. The Supreme Court upheld the employer's appeal and dismissed the action in its entirety. It held that the protection of pregnant women under labour law did not apply to her, as she had concluded an individual employment contract (service contract as director and authorised signatory) with an explicit termination clause in connection with the termination of her activities as authorised signatory. According to the Supreme Court, the complainant had waived the protection under labour law for pregnant women in the event of termination of her employment. The Constitutional Court did not admit the complainant's constitutional complaint for decision.

The complainant alleges discrimination as a pregnant woman on the basis of Article 14 of the Convention, as she was deprived of the relevant protection under labour law.[14]

→ back to overview

[13] ECtHR of 27 March 1998 – No. 20458/92 – *Petrovic v. Austria*; ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary;* ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia.*

[14] ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*; ECtHR of 20 October 2020 – No. 33139/13 – *Napotnik v. Romania*; ECtHR of 4 February 2021 – No. 54711/15 – *Jurčić v. Croatia*.

2. Freedom of expression

Judgments

Judgment (Fourth Section) of 29 November 2022 – No 80450/17 – *Godenau v Germany*

Law: Article 10 ECHR (freedom of expression)

Keywords: Exclusion from access to the teaching profession – Loyalty to the constitution as a prerequisite – Consideration of off-duty conduct

Core statement: The duty of loyalty to the constitution imposed on civil servants and public employees under German law is an expression of a "defensible democracy" and pursues a legitimate aim of restricting teachers' freedom of expression within the meaning of Article 10 ECHR.

Notes: From 1993 to 2006, the complainant was a member of the party *Die Republikaner*, an extreme-right-wing party which was under observation by the Office for the Protection of the Constitution and was declared unconstitutional by the Federal Constitutional Court. Furthermore, she supported various national socialist groups and organisations and publicly expressed her radical right-wing views and rejection of the Federal Republic. From 2006 to 2008, the complainant represented the *Republikaner* in the district council of a Hessian district and ran for both the Bundestag and the Hessian Landtag. From 2004 to 2006, she worked as a salaried teacher at a public school in Hesse. Because of doubts about her loyalty to the constitution, her employment was terminated. In the course of a dismissal protection suit, the employment contract was terminated amicably by way of a court settlement. Subsequently, she was placed on an internal list of "teachers unsuitable for re-employment in the teaching profession" that was maintained by the Hessian authorities in order to inform all decentralised education offices in this federal state about possible applications of teachers who were not to be considered for recruitment due to their lack of loyalty to the constitution. The complaint against inclusion on this list was dismissed by the national courts. A constitutional complaint was not admitted for decision by the Federal Constitutional Court.

The complaint alleges a violation of Article 10 ECHR, as the refusal of the Hessian school authority to remove the complainant's name from the "list of teachers deemed unsuitable for reappointment to the teaching profession" was based on her expressions of opinion and political activities.

The Court points out that, while the refusal to employ a person in the public service cannot constitute a ground for complaint, if a candidate is rejected on the basis of his or her public statements, this constitutes a measure affecting freedom of expression.[15] Therefore, to the extent that the complaint alleges a violation of Article 10 ECHR, it is admissible.

The interference with freedom of expression is prescribed by law. According to German law, civil servants and employees of the public service have a duty of loyalty to the constitution. This is an expression of a "defensible democracy", so that restrictions on teachers' freedom of expression on the basis of the duty of loyalty incumbent upon them pursue a legitimate aim within the meaning of Article 10 ECHR. In enforcing such restrictions, the Court affirms that this duty of loyalty of teachers also applies to conduct outside school.[16] Because of the enormous importance of providing credible instruction and education to children in relation to freedom, democracy, human rights and the rule of law, a very high level of loyalty is

[15] ECtHR of 30 June 2020 – No. 58512/16 – *Cimperšek v. Slovenia.*
[16] ECtHR of 7 July 2020 – No. 57462/19 – *Mahi v. Belgium*.

expected from teachers. Even if there is no evidence that a teacher exploits her position to unduly influence pupils during lessons, there are – unlike in the case of the complainant in the *Vogt* case[17] – considerable doubts about the complainant's loyalty to the constitution due to her political statements and activities outside school. Placement on the internal list of unsuitable teachers was therefore justified.

For these reasons, the interference with the complainant's freedom of expression is proportionate to the legitimate aims pursued and is therefore "necessary in a democratic society". The Court unanimously finds that there has been no violation of Article 10 ECHR.

Judgment (Third Section) of 8 November 2022 – No 74729/17 – *Ayuso Torres v Spain*

Law: Article 10 ECHR (freedom of expression)

Keywords: Initiation of disciplinary proceedings – Publicly expressed criticism of the constitution – Finding of a disciplinary offence – No conviction due to time-bar

Core statement: If the prosecution of a disciplinary offence is discontinued for procedural reasons and there is nevertheless a risk that the person concerned would have been found guilty of the offence, he or she can claim to be a victim of a violation of Article 10 ECHR.

Notes: The complainant is a reserve officer in the Spanish armed forces and a professor of constitutional law at the *Pontifical University of Comillas* in *Madrid*. As a guest on a television programme dealing with the transition process from military dictatorship to democracy in Spain, he expressed criticism of the origins of the Spanish Constitution, which he described as a "pseudo-constitution". He had already made similar statements on the subject in academic publications. For this reason, disciplinary proceedings were initiated against him by the competent military authorities. The president of the Central Military Court decided that the disciplinary proceedings should be discontinued because the accusation was time-barred. However, in the grounds for the decision it was stated that the complainant had exceeded the limits of the right to freedom of expression to which military personnel are entitled. The complainant then requested that this finding be removed from the disciplinary decision, which was rejected by the military court. A judicial review was unsuccessful. In particular, the Constitutional Court dismissed a complaint against this as inadmissible.

The complaint alleges that the military court's finding that the complainant had exceeded his right to freedom of expression amounts to a clear warning and that he could be sanctioned for similar allegations in the future. This constitutes an interference with his right to freedom of expression under Article 10 ECHR.

It should be emphasised that the complainant was not sanctioned for the disputed allegation. Nevertheless, special circumstances that have a chilling effect on freedom of expression may interfere with the exercise of the right to freedom of expression,[18] if it is established in what specific situation such an effect may occur.[19] In the present case, the decision of the military court implies that the complainant would have been sanctioned if the offence had not been time-barred.[20] The Court therefore regards the disciplinary decision as a de facto warning in the event that the complainant makes similar critical remarks about the Spanish Constitution in the future, with the consequence that new disciplinary proceedings could be initiated against him.

Article 10 ECHR applies equally to military personnel as to other holders of state authority. Since an effective military defence requires an adequate level of discipline of the armed

[17] ECtHR of 26 September 1995 – No. 17851/91 – *Vogt v. Germany.*
[18] ECtHR of 15 September 2015 – No. 29680/05 – *Dilipak v. Turkey*.
[19] ECtHR of 12 November 2019 – No. 68995/13 – *Swiss Radio and Television Company v. Switzerland.*
[20] ECtHR of 28 June 2022 – No. 36584/17 – *M. D. v. Spain*.

forces,[21] the right to freedom of expression of military personnel may be restricted if national security and the defence of public order so require.[22] In the present case, the question of whether such interference is "necessary in a democratic society" had to take into account that the complainant made the disputed allegations in his capacity as a university professor and not as a military member. In this respect, his right to freedom of expression in the academic field collides with the permissible restrictions of this right in the military field. However, the domestic courts have not adequately taken into account the fact that the complainant expressed his opinion as a university professor. In the present case, the right to freedom of expression in the context of academic freedom is undoubtedly affected.[23]

In light of these considerations, the Court unanimously found a violation of Article 10 ECHR and ordered the respondent government to pay compensation of 4,000 euros.

→ back to overview

3. Protection of property

New proceedings (notified to the respective government)

No 68907/14 – *Korgun / Ukraine* – lodged on 17 October 2014 – communicated on 2 December 2022

Law: Article 1 Protocol No. 1 to the ECHR (protection of property); Article 6 ECHR (right to a fair trial).

Keywords: Suspension of remuneration during pre-trial detention – Lack of domestic legal basis – Sufficient justification by state courts

Notes: The complainant, a police officer, was arrested for a corruption offence and subsequently convicted. After his conviction, he was released from the police service. For the period from his arrest on 3 February 2010 until his release from prison on 19 September 2011, his pay was suspended. The complainant considers that there was no domestic legal basis for the suspension of his pay during the period at issue.

The complainant alleges a violation of Article 6 ECHR because the domestic courts did not sufficiently state reasons for their decision.[24] He also alleges a violation of Article 1 of Protocol No. 1.[25]

No 59159/21 – *de Luca and Others v Italy* – lodged on 26 November 2021 – communicated on 21 November 2022

Law: Article 1 Protocol No. 1 to the ECHR (protection of property); Article 6 ECHR (right to a fair trial)

Keywords: Amount of salary after transfer – Consideration of periods of prior service – Retroactive authorisation by the legislature

[21] ECtHR of 12 November 2013 – No. 25330/07 – *Jokšas v. Lithuania*; ECtHR of 18 December 2008 – No. 1758/02 – *Kazakov v. Russia*; ECtHR of 25 November 1997 – No. 24348/94 – *Grigoriades v. Greece*.
[22] ECtHR of 24 January 2006 – No. 56566/00 – *Yaşar Kaplan v. Turkey*.
[23] ECtHR of 19 June 2018 – No. 20233/06 – *Kula v. Turkey*.
[24] ECtHR of 5 February 2015 – No. 22251/08 – *Bochan v. Ukraine*; ECtHR of 6 November 2018 – No. 55391/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*.
[25] ECtHR of 27 June 2019 – No. 13290/11 – *Svit Rozvag, TOV and Others v. Ukraine*; ECtHR of 21 April 2020 – No. 36093/13 – *Anželika Šimaitienė v. Lithuania.*

Notes: The complainants were employed by local authorities and were transferred to the Ministry of Education, Universities and Research. Their length of service with local authorities was not fully taken into account in the calculation of their salary. Through an appeal to the national district courts, they requested to be placed in a grade that reflected their full length of service. During the appeal proceedings against the first instance decision dismissing the action, Law No. 266/2005 came into force, confirming in law that the original period of service was not taken into account.

The complaint alleges a violation of the principle of fair trial according to Article 6 ECHR, as the legislature interfered with a judicial proceeding by creating a legal basis.[26]

No 23580/21 – *Risakovas / Lithuania* – lodged on 4 May 2021 – communicated on 9 November 2022

Law: Article 1 Protocol No. 1 to the ECHR (protection of property); Article 6 ECHR (right to a fair trial).

Keywords: Refusal of an old-age pension – Long-standing conviction to a suspended sentence – Proportionality of the measure

Notes: The complainant attempted to commit a criminal offence on 29 March 1993. In April 1993, he applied to join the Lithuanian armed forces as a professional soldier. During the application procedure, he stated that he was suspected of attempting to commit a criminal offence. He was accepted into military service on 21 April 1993 and took his military oath on 4 August 1993. On 12 August 1993, the complainant was given a suspended sentence of two years for the attempted offence. After 25 years of professional military service, he was discharged from active service on 3 December 2018 and retired from military service. The state pension for soldiers he applied for was denied to him on the grounds that the pension may not be granted to persons convicted of an intentional criminal offence.

The administrative court initially upheld the complainant's action and considered the denial of the state pension to be unreasonable in view of the 25 years of unblemished service. The Supreme Administrative Court overturned this decision on appeal by the Ministry of Defence and dismissed the complaint. According to the case law of the Constitutional Court, state pensions could not be granted to persons who had committed intentional criminal offences.

In addition to a violation of Article 6 ECHR, the applicant claims that his right to the protection of property pursuant to Article 1 of Protocol No. 1 was violated by the withdrawal of the state pension and emphasises that the interference was disproportionate.[27]

→ back to overview

4. Protection of privacy

Judgments

Judgment (Third Section) of 13 December 2022 – No. 58997/18 – *Nikëhasani v. Albania*

[26] ECtHR of 7 June 2011 – Nos. 43549/08, 6107/09 and 5087/09 – *Agrati and Others v. Italy*; ECtHR of 30 January 2020 – No. 29483/11 – *Cicero v. Italy*.

[27] ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*; ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*.

Law: Article 8 ECHR (right to respect for private and family life).

Keywords: Dismissal of a public prosecutor – Incorrect information on financial circumstances – Appropriateness of a lifetime ban from the profession

Core statement: Removal from service, as the most serious disciplinary measure, has a negative impact on private life and therefore requires consideration of valid and proven facts that call into question the ethics, integrity and professional suitability of the person concerned.

Notes: The case concerns the dismissal of the complainant from the position of public prosecutor, to which she was appointed in 1993. After a law on the disclosure of assets was adopted in Albania in 2003, she made an annual declaration of her economic circumstances to the supervisory authority. In order to fight corruption within the judiciary, a law on the re-evaluation of judges and prosecutors was adopted in 2014.[28] As a result, a procedure for the re-evaluation of all acting public prosecutors was initiated in 2016. The subsequent review process conducted by an independent commission (IQC) revealed that the complainant had provided false or untrue information about her property and assets in the past. The commission concluded that the complainant had failed to disclose or had provided inaccurate information about the origin of more than half of her assets, which indicated a suspicion of corruption and led to the removal of the complainant from service in 2018. She was also prohibited from practising as a lawyer. Both the IQC's dismissal order and the disbarment were upheld by the State Administrative Appeals Council (SAC), which is the appeal body established under domestic law.

The complaint alleges, on the one hand, that the IQC is not an independent and impartial court within the meaning of Article 6 ECHR. In addition, the complainant alleges a violation of Article 8 ECHR and takes the view that her dismissal from employment and the ban on practising as a lawyer constitute an inadmissible interference in her private life.

As regards the violation of Article 6 ECHR, the Court notes that according to its case law[29] IQC falls within the scope of this provision. However, according to the Court's findings, the complainant has not substantiated or provided a sound reason for her complaint, so that the complaint had to be dismissed as manifestly unfounded in this respect pursuant to Article 35(3a) and (4) ECHR.

In the case of a violation of Article 8 ECHR, it must be examined whether the right to respect for the private life of the complainant was interfered with by the dismissal from the service. With regard to this legal consequence, the Court refers to its judgment of 9 February 2021,[30] which was based on comparable facts. Furthermore, a violation of Article 8 ECHR requires that the interference is in conformity with the law, pursues legitimate aims and is necessary in a democratic society. The contested measure must have a legal basis and be foreseeable in terms of its legal consequences with regard to a violation of the law, so that the persons concerned can adjust their behaviour accordingly.[31] Applying the standards established in the judgment of 9 February 2021,[32] the Court concludes that the contested dismissal order complied with statutory provisions, which also pursued a legitimate objective, namely combating corruption within the judiciary. The intervention was also necessary in a democratic society, as combating corruption in the Albanian judiciary was an urgent social need, especially given the alarming level of corruption. Given the high level of responsibility borne by judicial staff, especially judges and prosecutors, it is not disproportionate to remove

[28] cf. ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.
[29] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.
[30] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.
[31] ECtHR of 12 June 2014 – No. 56030/07 – *Fernández Martínez v. Spain*; ECtHR of 9 April 2019 – No. 11236/09 – *Altay v. Turkey (n. 2)*.
[32] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.

them from office and ban them from re-entering the judiciary for violations of anti-corruption laws.

The Court therefore held by a vote of six to one that there was no violation of Article 8 ECHR.

Judge *Serghides*, in a partially dissenting opinion, takes the view that the complaint is not only admissible under Article 6 ECHR but also well-founded and that there has also been a violation of Article 8 ECHR. He refers to his dissenting opinion on the judgment of 9 February 2021,[33] in which he takes the view that the IQC is not an independent court within the meaning of Article 6 ECHR and that the dismissal was disproportionate in view of the complainant's long period of service.

Judgment (Third Section) of 13 December 2022 – No 40662/19 – *Sevdari v. Albania*

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Dismissal of a public prosecutor – Incorrect information about financial circumstances – Information concerning the financial circumstances of the husband

Core statement: Facts that may call into question a person's ethics, integrity and professional suitability and justify removal from service must relate to the person concerned, so that in individual cases the imputation of breaches of duty by close persons may be disproportionate when it comes to the most serious disciplinary measure.

Notes: The facts in this case are similar to those in *Nikëhasani v. Albania.*[34] The complainant in this case was also removed from service due to the 2016 re-evaluation of judges and prosecutors on the basis of the Law on Disclosure of Assets. She was also banned from practising law. She was accused of providing incomplete or untrue information about her and her husband's assets. In the course of the investigation conducted by the IQC, it was found that the incomplete or untrue information related exclusively to the assets of the complainant's husband. The appeal against the IQC's decision was dismissed by the Board of Appeal, the SAC.

The complainant alleges a violation of Article 8 ECHR, in particular with regard to the disproportionality of the measure. Furthermore, a violation of Article 6 ECHR is alleged due to the lack of independence and impartiality of the administrative board of appeal.

With regard to the violation of Article 6 ECHR, the Court refers to the principles established in the judgment of 9 February 2021[35] on the applicability of this provision to the Albanian Commissions for Combating Corruption in the Judiciary. According to this, these commissions are independent courts within the meaning of Article 6 ECHR. Also with regard to the question of whether the right to respect for private life has been interfered with, the Court refers to its previous case law as cited in the decision of 9 February 2021.[36] However, since removal from one's post is the most severe sanction possible, it must be taken into account that the incomplete or untrue statements exclusively concerned assets of the complainant's husband, to whom she was not yet married at the time of declaring these statements. On the basis of the overall assessment of the particular circumstances of the case, the Court considers that the contested measure, which leads to the removal of the complainant from her post and to a lifetime ban from her profession, is disproportionate.

[33] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.
[34] ECtHR of 13 December 2022 – No. 58997/18 – *Nikëhasani v. Albania.*
[35] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*, see HSI Report 1/2021 III. 5.
[36] ECtHR of 12 June 2014 – No. 56030/07 – *Fernández Martínez v. Spain*; ECtHR of 9 April 2019 – No. 11236/09 – *Altay v. Turkey (n. 2)*.

Therefore, it was unanimously found that there had been a violation of Article 8 ECHR and ordered the defendant government to pay compensation in the amount of 6,000 euros and to compensate for pecuniary damage in the amount of 13,600 euros.

In a partially dissenting opinion, Judge *Serghides* objected that in his opinion, in addition to the violation of Article 8 ECHR, a violation of Article 6 ECHR was also justified, as the competent administrative decision-making bodies under Albanian law are not an independent and impartial court within the meaning of this provision.

Judgment (Fourth Section) of 13 December 2022 – No 26968/16 – *Florindo De Almeida Vasconcelos Gramaxo v Portugal*

Law: Article 8 ECHR (right to respect for private and family life); Article 6 ECHR (right to a fair trial).

Keywords: Dismissal for conduct – Data collection through GPS technology in the company car – Discretion of state authorities and courts

Core statement: States must establish a legal framework for the surveillance of workers in the workplace that ensures the protection of privacy, leaving it to national courts to determine whether the introduction of surveillance measures is accompanied by sufficient safeguards against abuse.

Note: The case concerns the termination of the complainant's employment on the basis of data collected by means of a geolocation system installed in his company vehicle. The complainant had been employed as a pharmaceutical sales representative in a pharmaceutical company since 1994. His duties included visiting doctors and medical facilities for the purpose of giving advice. For this purpose, he was provided with a company car, which he was also allowed to use for private trips. In order to settle the travel expenses, the employer installed a geolocation system based on GPS technology in the vehicle, which recorded not only the business trips but also the private trips. Because of the introduction of this geolocation system, the complainant turned to the National Data Protection Commission (CNPD). His complaint was rejected as unfounded, as the installation of the system at issue complied with national legislation. The complainant did not challenge this decision before the administrative courts. After evaluating the data obtained from the system installed in the complainant's vehicle, the complainant's employer found that the complainant had recorded significantly more kilometres than he had actually driven. He was also accused of manipulating the GPS device. The employer then terminated the employment relationship on 5 September 2014. An action for protection against dismissal brought against this was unsuccessful in all instances. The courts of first instance considered the allegations to be proven. The use of technical devices for remote monitoring was also found to have been permissible, as the GPS system used did not serve to monitor the employee's performance, which is impermissible under Portuguese law. Rather, the data were collected solely for the purpose of calculating travel expenses, so that the use of the technical device was in line with the legal provisions on data protection. According to the courts, the complainant's conduct constituted a breach of the relationship of trust which justified the termination of the employment relationship. The termination was also found proportionate to the complainant's misconduct.

The complainant argues before the Court that the processing of the data obtained and used by the GPS system installed in his company vehicle interferes with his right to respect for private life under Article 8 ECHR, since the measures are not in conformity with national data protection provisions. Furthermore, the complainant claims that the assessment of the dismissal by the domestic courts is based exclusively on illegally collected evidence. Therefore, the principle of fair trial according to Article 6 ECHR has been violated.

With regard to the admissibility of the complaint based on Article 8 ECHR, the Court reiterates its principles established on the concept of "private life", according to which professional activity is part of the private sphere. [37]

According to the case law of the Court of Justice, Article 8 ECHR primarily protects individuals from arbitrary interference by the state. However, in addition to the negative obligation to refrain from such interference, there is also a positive obligation on the state to take measures aimed at protecting the private life of individuals in their relations with each other.[38] If the state fails to take such measures, it is liable for the consequences of unjustified interference with the private lives of individuals.[39] In the present case, the Court considers that the private life of workers is sufficiently protected by national legislation on the protection of personal data. Also, the complainant did not challenge in court the CNPD's decision on the admissibility of the installation of the GPS device in his company car. The national courts therefore only had to carry out a balancing of interests, contrasting the complainant's right to respect for his private life and the employer's right to control the billed travel expenses resulting from the use of the vehicles entrusted to its employees. The Court does not challenge this balancing exercise carried out by the national courts.

Since the installation of the GPS device in the complainant's company vehicle was carried out on the basis of data protection regulations, the facts on which the allegation of dismissal was based were not established in an unlawful manner. Therefore, the complainant's right to a fair trial has not been violated.

The Court therefore finds, by four votes to three, that there has been neither a violation of Article 8 ECHR nor a violation of Article 6 ECHR.

In a joint dissenting opinion, Judges *Motoc* and *Guerra Martins* and Judge *Pastor Vilanova* held that there was a violation of both Article 8 ECHR and Article 6 ECHR. The geolocation system installed in the complainant's company car not only monitored his business trips, but also his private journeys. This circumstance had not been taken into account by the domestic courts in the balancing of interests. The collection of the data was also unlawful, as according to national law only the determination and processing of business trips was permissible, but not private journeys.

(In)admissibility decisions

Decision (Second Section) of 8 November 2022 – No. 40825/15 – *Aleksić v. Serbia*

Law: Article 8 ECHR (right to respect for private and family life); Article 10 ECHR (freedom of expression).

Keywords: Reading of emails by the employer – Defamation action

Core statement: In the case of legal systems that guarantee the fundamental protection of human rights and fundamental freedoms under the ECHR, it is incumbent on the persons concerned to have the extent of this protection reviewed by the domestic courts.

---

[37] ECtHR of 17 October 2019 – Nos. 1874/13 and 8567/13 – *López Ribalda and Others v. Spain*; ECtHR of 12 June 2014 – No. 56030/07 – *Fernández Martínez v. Spain*; ECtHR of 5 October 2010 – No. 420/07 – *Köpke v. Germany*; ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*; ECtHR of 28 November 2017 – No. 70838/13 – *Antović and Mirković v. Montenegro*; ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.

[38] ECtHR of 7 February 2012 – Nos. 40660/08 and 60641/08 – *von Hannover v. Germany (No. 2)*; ECtHR of 12 November 2013 – No. 5786/08 – *Söderman v. Sweden*; ECtHR of 17 October 2019 – Nos. 1874/13 and 8567/13 – *López Ribalda and Others* v. *Spain*.

[39] ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*; ECtHR of 23 September 2010 – No. 1620/03 – *Schüth v. Germany*.

Notes: The complainant's public employer, the Statistical Office of Serbia, had provided the complainant with an e-mail account for business purposes. From this account, the employer had printed and read e-mails that had both private and professional content. The emails, which contained insulting and discrediting remarks about a work colleague, were used as evidence in a defamation case brought by the complainant against him. The domestic courts ordered the complainant to pay damages for an established case of defamation of character. The Constitutional Court found that the emails in question were permissibly used as evidence in civil proceedings. An action against the employer to restrain the disclosure of the emails to the complainant's work colleague was not brought.

The complainant claims that the use of his e-mails provided by the employer interfered with his right to privacy and furthermore interfered with the freedom of expression.

The Court points out that under Article 35 ECHR it can only deal with a matter if the remedies provided under domestic law have been exhausted. Serbian law provides that there is a legal right to injunctive relief against acts which may be intended to violate the protection of private and family life. Against this background, the complainant should have sought an injunction to prevent his employer from disclosing the emails in question to the work colleague.[40]

Therefore, the Court unanimously declared the complaint inadmissible because the complainant had not exhausted domestic remedies.

New proceedings (notified to the respective government)

No 46704/16 – *Guyvan v Ukraine* – lodged on 26 September 2016 – communicated on 2 December 2022

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Analysis of data from a mobile phone used for work purposes – Prior information by the employer

Notes: The complainant alleges a violation of the right to respect for private and family life. His employer analysed data from the mobile phone made available to him in the course of an internal investigation without informing him.

The Court asks whether this measure violated the complainant's right under Article 8 of the ECHR and whether the interference, if any, was provided for by law and necessary.[41]

→ back to overview

5. Procedural law

Judgments

Judgment (Fifth Section) of 15 December 2022 – No 11/18 – *Olivares Zúñiga v Spain*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Termination of employment – Independent challenge for nullity – Lack of access to a tribunal

[40] ECtHR of 19 June 2012 – No. 36937/06 – *Hajnal v. Serbia*; ECtHR of 7 January 2014 – No. 3363/08 – *Lakatoš v. Serbia*; ECtHR of 13 October 2020 – No. 5158/12 – *Jakovljević v. Serbia*.

[41] ECtHR of 3 April 2007 – No. 62617/00 – *Copland v. United Kingdom*; ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*.

Core statement: The right of access to a court is impaired when state measures no longer serve the objectives of legal certainty and the orderly administration of justice and therefore constitute an obstacle that prevents the person seeking justice from having a dispute decided by a court.

Notes: The case concerns the complainant's right to a fair trial because the Constitutional Court had dismissed as inadmissible her appeal against a labour court decision rejecting a claim for the invalidity of a dismissal. The complainant was dismissed in 2013 by her employer, where she was employed as a lawyer, for reasons of conduct. She challenged the dismissal before the Labour Court in Madrid, seeking to have the dismissal declared both null and void and unfair. The Labour Court partially upheld the claim and found that the dismissal was unfair. However, it dismissed the action with regard to the alleged nullity of the dismissal. The Labour Court ordered the employer – which is possible under Spanish law – either to pay severance pay or to continue employing the employee. The company decided to pay severance pay to the complainant. The appeal against this decision, which continued to seek a declaration that the dismissal was invalid, was unsuccessful before the Supreme Court. The Supreme Court held that the complainant's claim could only have been granted if she had pursued the action for a declaration of nullity of the dismissal in separate court proceedings. A complaint before the Constitutional Court was dismissed on the grounds that the complainant had failed to bring an action for a declaration of nullity of the dismissal, so that remedies had not been properly exhausted.

The complainant argues that the filing of an action for a declaration of nullity of the dismissal was superfluous, as she had asserted her constitutional rights at all instances with her action for protection against dismissal. The obligation imposed by the Constitutional Court to additionally file such an action restricts her right of access to a court within the meaning of Article 6 of the ECHR.

The Court first refers to the principles established by its previous case-law, according to which it is indeed incumbent on the States, within the limits of their discretion, to adopt restrictions on admissibility with regard to appeals against judicial decisions.[42] The right of access to a court is therefore not absolute, as it requires regulation by the state by its very nature.[43] However, state restrictions must not have the effect of impairing the essence of the right of access to a court.[44] This is always the case when such provisions no longer serve the objectives of legal certainty and the proper administration of justice, i.e. prevent the person seeking justice from bringing his or her case to court.[45] For the present case, the application of these principles means that the complainant could reasonably assume that she had fully sought legal protection before the domestic courts with her original action. The requirement to bring an additional action for a declaration of invalidity of the dismissal would lead to excessive formalism, preventing the review of the merits of an appeal.[46]

The Court therefore unanimously finds that the Constitutional Court's decision to declare the appeals inadmissible disproportionately restricts the appellant's right of access to a court, so that there is a violation of Article 6 ECHR. The respondent government was ordered to pay compensation in the amount of 9,600 euros.

Judgment (Third Section) of 4 October 2022 – No 37474/20 – *Besnik Cani v Albania*

[42] ECtHR of 15 February 2000 – No. 38659/97 – *García Manibardo v. Spain*; ECtHR of 8 November 2007 – No. 3321/04 – *De la Fuente Ariza v. Spain*.
[43] ECHR of 21 February 1975 – No. 4451/70 – *Golder v. United Kingdom.*
[44] ECtHR of 5 April 2018 – No. 40160/12 – *Zubac v. Croatia*; ECtHR of 20.1.2015 – No. 16563/11 – *Arribas Antón v. Spain*.
[45] ECtHR of 3 December 2009 – No. 8917/05 – *Kart v. Turkey*.
[46] ECtHR of 12 November 2002 – No. 46129/99 – *Zvolský and Zvolská v. Czech Republic*; ECtHR of 8 November 2007 – No. 3321/04 – *De la Fuente Ariza v. Spain*; ECtHR of 13 October 2009 – No. 39500/05 – *Ferré Gisbert v. Spain*.

Law: Article 6 ECHR (right to a fair trial)

Keywords: Access to a court – Requirements for judicial office – Prior dismissal of a judge

Core statement: Due to the outstanding importance of the function of the judiciary and in order to avoid arbitrariness, it must be ensured through a special procedure that only the most qualified applicants are considered for the appointment of judges, in terms of both professional competence and moral integrity.

Notes: With regard to the facts underlying the decision, reference is made to the cases *Nikëhasani v. Albania*[47] and *Sevdari v. Albania*[48] and the principles established therein, as well as the case law of the Court cited in this context. The difference with these proceedings is that during the appeal proceedings before the SAC, disciplinary proceedings were initiated against one of its judges. In these proceedings, it was found that this judge did not fulfil the requirements to hold office on the Board of Appeal because of a previous dismissal from the service.

The complainant alleges a violation of Article 6 ECHR on grounds that the Board of Appeal dealing with his case did not comply with the legal provisions, as one of the members did not meet the requirements for judicial office.

The Court of Justice has already clarified the scope and meaning of the term "court established by law" in its decision of 1 December 2020.[49] In view of the paramount importance of their function, when judges are appointed it must be ensured that, with regard to their professional competence and their moral integrity, only the most qualified candidates may be appointed to judicial offices. The decisive factor is not only the legal ability of the candidate, but also the guarantee of the public's trust in the judiciary. The appointment of judges can only be made on the basis of clear national legal provisions to prohibit arbitrary interference in the appointment process. In order to assess whether the appointment procedure of a judge complies with the rule of law, the Court has developed a so-called three-step test. According to this test, there is a violation of the rule of law if the appointment procedure objectively and in fact recognisably violates domestic law. The violation is to be assessed against the meaning and purpose of the legal regulation, namely the tasks to be performed by the judiciary within the framework of the separation of powers. Finally, the national courts must assess the effects of the infringement on the appointment procedure. In the present case, the Court concludes that one of the judges who participated in the complainant's case did not meet the requirements for appointment to the Disciplinary Tribunal under national law. This is a manifest breach of domestic law which adversely affects the appointment of the judge in question. The domestic courts did not properly consider these issues raised by the complainant.

The Court therefore held, by a vote of six to one, that the decision of the SAC to dismiss the complainant violated Article 6 ECHR, as this decision-making body was not properly constituted and was therefore not a "court established by law". The application for payment of adequate compensation was dismissed.

Judge *Serghides,* in a partly concurring and partly dissenting opinion, concludes that there was no "court established by law" and that the Court should therefore also have ruled on a violation of Article 8 ECHR. Furthermore, it is considered that the applicant should have been awarded a symbolic amount as compensation for non-material damage.

[47] ECtHR of 13 December 2022 – No. 58997/18 – *Nikëhasani v. Albania*.
[48] ECtHR of 4 October 2022 – No. 40662/19 – *Sevdari v. Albania*.
[49] ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*.

Judgment (Fourth Section) of 6 December 2022 – No. 2463/12 – *Mnatsakanyan v. Armenia*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Dismissal of a judge – Lack of possibility to challenge the decision

Core statement: The right of access to a court, even if it is not absolute, may only be subjected to such restrictions that do not affect the essence of this right.

Notes: The complainant was a judge at the *Avan* and *Nor Nork* District Court in *Yerevan*. After an offender was charged, the complainant sentenced him to two months' imprisonment at the request of the prosecution. Before the expiry of the prison term, the complainant, at the request of the accused, ordered that he be released on bail. This decision led to the initiation of disciplinary proceedings against the complainant, in which it was argued that he had not sufficiently substantiated the dismissal order, which had created doubts about his professional qualifications. The Judicial Council in charge of the disciplinary proceedings then recommended to the President of the Republic that the complainant be dismissed from the judiciary on the grounds that he lacked the necessary professional competence, which had led to a gross violation of the rules of judicial ethics. The President of the Republic then dismissed the complainant from the judiciary by decree of 11 July 2011. An action brought against this was dismissed as inadmissible by the administrative courts in all instances. A judicial review of the decisions of the Judicial Council was excluded by law. The action against the decree of the President of the Republic was dismissed on the grounds that it was based on the unappealable decision of the Judicial Council. While the case was pending before the Court, the complainant died. His widow and daughter, as his heirs, extended the proceedings.

The complaint alleged a violation of Article 6 ECHR on grounds he was denied access to a court by the refusal to challenge his early dismissal from judicial office.

The Court has repeatedly recognised that close relatives are entitled to continue proceedings on behalf of an appellant if the appellant dies after filing the appeal.[50]

Referring to its case law,[51] the Court first assumes the admissibility of the appeal. The Judicial Council is competent under national law to take decisions on the dismissal of judges, even if the decision is ultimately implemented by a decree of the President of the Republic.

An essential element constituting the right to a fair trial under Article 6 ECHR is the right to bring a civil claim, which includes service law claims arising from a civil service relationship, before a court. Although the right of access to a court is not absolute, it may only be subject to limitations that do not affect its essence.[52] The decision of the Judicial Council to recommend the complainant's early dismissal from the judiciary is unappealable under domestic law. A lack of legal protection against dismissal orders cannot be justified by the exercise of state sovereignty either. This follows in particular from the fact that there must be weighty reasons for the recall or dismissal of judges, for which the possibility of judicial review is mandatory.[53]

Since in the present case the complainant's right of access to a court was affected in its essence, the Court unanimously found a violation of Article 6 ECHR and awarded the complainant's heirs compensation in the amount of 3,600 euros.

---

[50] ECtHR of 28 September 1999 – No. 28114/95 – *Dalban v. Romania*; ECtHR of 15 June 2010 – No. 34334/04 – *Ashot Harutyunyan v. Armenia*; ECtHR of 8 April 2014 – No. 73359/10 – *Ergezen v. Turkey*.
[51] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*.
[52] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.
[53] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*.

New proceedings (notified to the respective government)

No 44794/19 – *Coutinho dos Santos Amado v Portugal* – lodged on 14 August 2019 – communicated on 19 November 2022

Law: Article 6 ECHR (right to a fair trial)

Keywords: Suspension of a judge – Independence of the court – Requirement of an oral hearing

Notes: The case concerns the suspension of a judge pending the outcome of disciplinary proceedings concerning his suitability determination. The complainant cites the lack of independence of the High Judicial Council responsible for the decision, pointing out that the body is composed of a large number of non-judicial members appointed by political authorities.[54] The complainant further alleges that his case was decided in the domestic courts without a public hearing.[55]

No 17256/22 – *Rusulashvili v Georgia* – lodged on 24 March 2022 – communicated on 15 November 2022

Law: Article 6 ECHR (right to a fair trial)

Keywords: Bias of the court – Employment of the daughter of a party's lawyer as assistant to the presiding judge

Notes: The complainant is an employee who was involved in litigation against his former employer. The daughter of the lawyer who represented the employer worked as a judicial assistant to the presiding judge during the trial. The complainant is of the opinion that the presiding judge was not impartial for this reason, especially since the daughter was directly involved in handling the case.

The complaint therefore claims that the court was not impartial within the meaning of Article 6 ECHR.[56]

No 16418/21 – *Kiliç and Others v Turkey* – lodged on 11 March 2021 – communicated on 15 November 2022

Law: Article 6 ECHR (right to a fair trial).

Keywords: Entitlement to be recruited in the public service – Negative security clearance – No possibility of judicial review

Notes: The case concerns the refusal of the national authorities to recruit the complainants into the civil service, despite the fact that they fulfilled the formal requirements, because of a negative security clearance. The complainants were not informed of the information obtained as a result of the security clearance and had no opportunity to seek judicial review of the authorities' decision. Two of the complainants also claim that their membership in and activities for legitimate associations were grounds for the issuance of a negative security clearance.

---

[54] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland.*

[55] ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*; ECtHR of 1 June 2021 – No. 2388/15 – *Marcolino de Jesus v. Portugal*.

[56] ECtHR of 23 May 2015 – No. 29369/10 – *Morice v. France*; ECtHR of 21 June 2011 – No. 46575/09 – *Bellizzi v. Malta*; ECtHR of 20 December 2007 – No. 41195/02 – *Nikolov v. The former Yugoslav Republic of Macedonia*; ECtHR of 2 June 2016 – No. 45959/09 – *Mitrov v. The former Yugoslav Republic of Macedonia*.

A violation of Article 6 ECHR is alleged due to the lack of access to a court.[57]

No 18350/21 – *Bağci v Turkey* – lodged on 13 March 2021 – communicated on 15 November 2022

Law: Article 6 ECHR (right to a fair trial)

Keywords: Termination of employment – Question of jurisdiction – Failure to observe a time-limit due to conflict of jurisdiction of the courts

Notes: The complainant was employed by the Commission of Turkish Exporters (*Türkiye İhracatçılar Meclisi)*. On 21 May 2009, the employer terminated the employment relationship. The complainant filed a complaint with an administrative court within the statutory period. The employer objected that the civil courts had jurisdiction over the dispute. The administrative court declared itsel competent and ruled in favour of the complainant, holding that the termination was invalid. On appeal by the employer, the Supreme Administrative Court overturned the decision on the grounds that the dispute should have been referred to the civil courts. A subsequent appeal to the civil court was then dismissed on the grounds that the time limit for bringing an action had expired.

The complainant claims that he was denied access to a court due to the dispute over the jurisdiction of the courts and the resulting expiry of the time limit, which thus violates Article 6 ECHR.[58]

No 66965/13 – *Chernova / Ukraine* – lodged on 16 October 2013 – communicated on 14 November 2022

Law: Article 6 ECHR (right to a fair trial)

Key words: Failure to serve a judgment – Appeal after expiry of the time-limit – Access to a court or tribunal

Notes: The complainant had filed a claim for reinstatement and compensation for the non-pecuniary damage she suffered as a result of her allegedly unlawful dismissal. A court of first instance ruled on 31 October 2012 in her absence and declared the dismissal to be lawful. It was not until 13 February 2013 that the complainant received a copy of the decision of 31 October 2012, after the deadline for filing an appeal had expired. The appeal against the decision was dismissed.

The complainant is of the opinion that she was denied access to a court within the meaning of Article 6 ECHR by the service of the first instance decision after the expiry of the time limits for appeal.

No. 20641/20 – *Selimi and Others v. Serbia* – lodged on 22 April 2020 – communicated on 10 November 2022

Law: Article 1 of Protocol No. 1 to the ECHR (protection of property); Article 6 ECHR (right to a fair trial).

Keywords: Suspension of the granting of a pension – Excessive duration of proceedings

Notes: The subject of the complaints are the suspensions of pensions granted to the complainants by the Serbian Pension Fund. The claims were previously fulfilled by the branch of this fund in Kosovo before its placement under international administration in 1999.

[57] ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin v. Turkey*.
[58] ECtHR of 5 April 2018 – No. 40160/12 – *Zubac v. Croatia*; ECtHR of 30 October 2018 – No. 22677/10 – *Kurşun v. Turkey*.

The complainants complain of an excessive length of proceedings associated with the administrative and judicial review.

A central question is after what period of time an excessively long duration of proceedings can still be claimed under Article 6 ECHR.[59]

No 26409/21 – *Iosifidis and Others v Greece* – lodged on 13 May 2021 – communicated on 25 October 2022

Law: Article 6 ECHR (right to a fair trial)

Key words: Action for payment of an allowance – Excessive length of proceedings

Notes: The complainants are five retired doctors who were previously employed in the public service. They brought an action for payment of an allowance on 30 December 2011. The claim was dismissed in a judgment dated 30 July 2018. On 31 January 2019, the complainants brought an action for payment of compensation on account of the excessive length of the proceedings. The court found that the proceedings had taken too long, but rejected the application for compensation. The decision was based on the fact that the complainants were able to draw their full salaries and pensions and their livelihood was therefore secured. For this reason, the finding of an excessively long duration of proceedings had sufficed and constituted sufficient and just satisfaction.

The complaint alleges a violation of Article 6 ECHR due to the denial of compensation by the Administrative Tribunal's decision.

No. 7792/17 – *Popović and Others v. Serbia* – lodged on 18 January 2017 – communicated on 13 October 2022

Law: Article 6 ECHR (right to a fair trial)

Key words: Action for payment of a shift allowance – Conflicting case-law of national courts

Notes: The complainants had brought actions against their employer for payment of an allowance for shift work. The claims were dismissed by the court of first instance. In the court of appeal, these decisions were confirmed. A constitutional complaint against this was rejected. The complainants argue that the case law of the courts of first instance deviates from decisions of other national courts. These courts had upheld the workers' complaints in comparable cases.

The question of whether the right to a fair trial has been violated by the conflicting case law of the domestic courts will be the subject of this case.[60]

→ back to overview

[59] ECtHR of 29 March 2006 – No. 64886/01 – *Cocchiarella v. Italy*.
[60] ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish v. Romania.*

IV. Proceedings before the European Committee of Social Rights (ECSR)

Compiled and commented by Ammar Bustami, trainee lawyer at the Higher Regional Court of Celle

(In)admissibility decisions

Admissibility decision of 7 December 2022 – No 208/2022 – Unione sindacale di base (USB) / Italy[1]

Law: Article 6§4 RESC (right to collective bargaining)

Keywords: Right to strike – Public service – Basic public services – Public infrastructure/utilities – Minimum service – Discretionary powers of public authorities

Decisions on the merits

Decision of 18 May 2022 – No 152/2017 – Unione Sindacale di Base, Settore pubblico impiego (USB) v Italy[2]

Law: Article 1§2 RESC (right to work), Article 10§3 RESC (right to vocational training).

Keywords: Right to work – Fair pay – Promotion opportunities – Right to vocational training – Public service – Workers in the Ministry of Justice

Core statements:

1. In order to determine whether work performed is equal or equivalent within the meaning of the guarantee in Article 1§2 RESC, factors such as the nature of the tasks, the skills and the education and training requirements must be taken into account (para. 61).

2. On the basis of the documents at its disposal, the Committee cannot objectively establish that the support staff allegedly suffering discrimination are systematically entrusted with the same or equivalent work as the more highly paid judicial operators (paras. 65-66).

3. The fact that the only possibility of promotion to the category of judicial operator for employees in the category of support staff is to participate in the external, public and competitive selection procedure, which is equivalent to a new recruitment, does not in itself constitute discriminatory treatment in breach of Article 1§2 RESC. The legitimate objective of Italian law, based on objective and reasonable grounds, to ensure access to permanent employment in the public sector through transparent and objective selection procedures, as well as the associated discretionary power of the Contracting States, justify the admissibility of such a rule (paras. 67-69).

4. The complainant organisation was also unable to substantiate how the government failed to provide adequate vocational training for the retraining of specifically the support staff (paras. 77-78).

5 The likewise alleged violations of Article 4§4, Article 6§4 and Article E RESC were not sufficiently substantiated by the complaint and were therefore not examined (paras. 30-32).

[1] See most recently HSI Report 2/2022, p. 59 (in German).
[2] See most recently HSI Newsletter 1/2018, p. 48 and HSI Newsletter 4/2017, pp. 53-54.

Decision on the merits of 5 July 2022 – No 175/2019 – Syndicat CFDT de la métallurgie de la Meuse / France (see also press release of 30 November 2022)[3]

Law: Article 24 RESC (right to protection from dismissal).

Keywords: Protection against dismissal – Compensation for unfair dismissal – Reinstatement

Core statements:

1. The right of workers dismissed without a valid reason to adequate compensation or other appropriate relief (Art. 24(b) RESC) requires, inter alia, the possibility of reinstatement and compensation high enough to be dissuasive for employers and to compensate for the harm suffered by the victim (para. 83).

2. French law opens up the possibility of such reinstatement under certain conditions, so that the existing regulations do not violate Article 24(b) RESC (para. 87).

3. However, the compensation ceiling under French law, which does not allow for the award of higher compensation on the basis of the workers' personal and individual situation, violates Article 24(b) of the RESC (paras. 89, 92).

Notes: The decision follows on seamlessly from a series of similar proceedings in which the Committee found corresponding violations of Article 24 RESC with regard to both French[4] and Italian[5] law. A special feature of the current proceedings is that in the meantime the French Cour de Cassation has ruled on the compensation caps, finding in this context that Article 24 RESC has no direct effect in French law and that furthermore the Committee's decisions have no binding effect in France (para. 90). The Committee therefore took this last decision as an opportunity to emphasise that it was up to the national courts to take the Committee's comments into account in their own case law and up to the French legislature to provide the courts with the means to draw the appropriate consequences with regard to conformity with the Charter (para. 91).

Newly filed complaints

Complaint of 24 October 2022 – No. 216/2022 – Federação Nacional dos Professores (FENPROF) / Portugal (translation forthcoming here).

Law: Article 3 RESC (right to safe and healthy working conditions) in conjunction with Article E RESC (prohibition of discrimination)

Keywords: Safe and healthy working conditions – Sick mobility scheme – Incapacitating illness – Medical care – Teachers

Notes: The complainant organisation complains that the Portuguese government changed the previous mobility scheme for teachers in case of illness, which previously allowed teachers suffering from an incapacitating illness to be transferred to a school near a place where appropriate medical care was provided.

→ back to overview

[3] See most recently HSI Report 1/2020, p. 51 and HSI Newsletter 1/2019, p. 46 (both in German).
[4] Decisions on the merits No. 160/2018 and No. 171/2018, in HSI Report 3/2022, p. 57 (in German).
[5] Decision on the merits No. 158/2017, in HSI Report 1/2020, p. 52 (in German).

→ back to overview

Contact and Copyright
Hugo Sinzheimer Institute for Labour and Social Law (HSI)
of the Hans-Böckler-Stiftung
Wilhelm-Leuschner-Straße 79
60329 Frankfurt am Main
Phone +49 69 6693-2953
hsi@boeckler.de
www.hugo-sinzheimer-institut.de
You can also find us on Twitter: twitter.com/ArbeitsrechtHSI