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 1/2023
Reporting period: 1 January – 31 March 2023

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I. Editorial

HSI Report 1/2023 reports on the development of case law and legislation in the area of labour and social security law at European and international level in the period from January to March 2023.

The overview on CJEU case law contains two rulings on employee data protection. Following the case *Hauptpersonalrat der Lehrerinnen und Lehrer* (C-34/21), the German legal basis for employee data protection is at issue – here the delay in passing special legislation on employee data protection is exacting a price. Meanwhile the case *X-Fab Dresden* (C-453/21) deals with the important question of the circumstances under which a data protection officer can be dismissed. The case *IEF Services* (C-710/21) deals with the concept of the habitual place of employment in the case of home working in a Member State other than the company's place of work. Opinions deal, *inter alia*, with a procedural error in the notification of collective redundancies and the receipt of social assistance by family members of mobile workers.

The ECtHR dealt with issues from the field of labour and social security law in a number of cases, which are presented in the overview. *The Hoppen and Trade Union of Employees of AB Amber Grid v. Lithuania* judgment (No. 976/20) dealt with the dismissal of a company employee representative. The upshot: States have an obligation to establish a legal system that provides real and effective protection against anti-union discrimination. In *Domenech Aradilla and Rodríguez González v. Spain* (Nos. 32667/19 and 30807/20), the Court stated that although social benefits such as survivors' pensions may be interfered with, such interference must be proportionate; in particular, a transitional period must be established.

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

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

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II. Proceedings before the CJEU

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1. Annual leave

Decisions

Opinion of Advocate General *Ćapeta* delivered on 23 March 2023 – C-271/22 and others – *Keolis Agen SARL*

Law: Art. 31(2) European Charter of Fundamental Rights, Art. 7(1) Working Time Directive 2003/88/EC

Keywords: Direct effect of the Working Time Directive between private individuals – Carry-over period of leave entitlement

Core statement: Art. 31(2) European Charter of Fundamental Rights in conjunction with Art. 7 Working Time Directive guarantees the right to paid annual leave irrespective of whether the employer is a private or a public body. Under current EU law, there is no obligation on Member States (imposed either by the legislative bodies or by the courts) to establish a time limit on the carry-over periods for unused annual leave.

Notes: All of the disputes underlying the request for a preliminary ruling concern workers who are or were employed by *Keolis Agen SARL*, a French company under private law which operates a local public transport service. In the course of their respective employment relationships, all plaintiffs were on sick leave for extended periods of time. After resuming work, or after their employment relationships were terminated, they requested that the employer either grant them the days of annual leave they had been unable to take during their periods of illness or – in the cases of termination – pay them allowances in lieu. The employer refused the request. The referring court considers that French law does not determine the duration of the period for the transfer of paid annual leave. Days of unused annual leave could therefore be accumulated indefinitely. *Keolis Agen* considers that the possibility of accumulating annual leave and taking it later contradicts the purpose of annual leave as a period of rest. Given these circumstances, the referring court asks whether European Union law contains such an obligation to introduce a reasonable limit to the carry-over period.

The present case provides the Court with an opportunity to contribute to a better understanding of the Working Time Directive and to build on its previous case law on the direct effect of the Working Time Directive in horizontal situations, according to which the right to paid annual leave is not only a particularly significant principle of Union social law, but a fully-fledged fundamental social right, which has direct effect vis-à-vis employers structured under private law.[1] National courts are thus obliged to disregard any conflicting provision of

[1] CJEU of 6 November 2018 – C-684/16 – *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 62 et seq., NZA 2018, 1474; of 6 November 2018 – C-569/16 – *Bauer* and C-570/16 – *Willmeroth*, paras. 64 et seq., NZA 2018, 1467; concurring *Buschmann* AuR 2019, 236 et seq.; dissenting *Rambach/Rambach,* ZTR 2018, 374: pure secondary

national law – including in relations between private parties – when deciding a case that falls within the scope of Union law.[2]

The present referral also provides the Court with an opportunity to highlight the difference, not always easy to establish, between conditions for the establishment and conditions for the exercise of an entitlement to paid annual leave.

According to Advocate General *Ćapeta*, the Union legislature did not intend to regulate carry-over periods, the Court's competence being limited to determining whether the time limit is compatible with Union law. The Advocate General's view is supported, firstly, by the wording of the Directive, which simply lacks a provision limiting the carry-over period. Secondly, the Court of Justice has already emphasised, in *LB v. TO*, that it is for the Member States to lay down in their national legislation the conditions for the exercise and implementation of the right to paid annual leave, specifying the concrete circumstances in which workers may exercise that right.[3] Accordingly, the power to introduce or refrain from introducing limited carry-over periods remains in the hands of the Member States. The Advocate General's conclusion that the Court's competence is limited to determining whether the time limit is compatible with EU law is therefore convincing. Put another way: If national legislation does not provide for a limit on the carry-over period for unused paid annual leave, it cannot conflict with the Working Time Directive. Nor is the Advocate General's view called into question by the *KHS* decision, in which a 15-month period was assumed to be permissible. No rule limiting the carry-over period can be inferred from that judgment, which merely explains why it is reasonable for a Member State to decide to introduce a 15-month carry-over period.

New pending cases

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 7 December 2022 – C-749/22 – *I*

Law: 31(2) European Charter of Fundamental Rights, Art. 7 Working Time Directive 2003/88/EC

Keywords: Entitlement to retroactive granting of annual leave – Overlap of granted leave and government-ordered quarantine at home

Notes: The request for a preliminary ruling submitted by the Federal Labour Court (*Bundesarbeitsgericht*, *BAG*)[4] deals with the question of whether granted paid annual leave which falls during a period of quarantine ordered by the authorities must be granted if the employee was not incapacitated for work due to illness during the quarantine.

Under German law, such an entitlement to paid annual leave would be fulfilled by a paid leave of absence, because Sec. 9 Federal Minimum Leave Act (BUrlG) only preserves the days of leave in case of illness. Sec. 59(1) Infection Prevention Act (IfSG), which has been in force with *ex nunc* effect since 17 September 2022 and according to which the period of quarantine may not be counted towards annual leave, was not yet in force in the underlying case.[5]

The BAG now asks the CJEU whether this practice is compatible with European law and, in particular, with Art. 7 Working Time Directive and Art. 31(2) European Charter of

law; *Rudkowski,* NJW 2019, 476, 477, 479; *Sagan,* ZAS 2019, 211, 213; *Wutte*, EuZA 2019, 222, 230 et seq.: "direct derivation from Art. 31(2) European Charter of Fundamental Rights contrary to the rule of law"; critical *Krimphove,* ArbRAktuell 2018, 295, 296 et seq.; *Lüderitz*, BB 2019, 320; comments by *Franzen/Roth,* EuZA 2019, 143, 180 et seq.; *Gooren*, NZA-RR 2019, 12, 13; *Junker*, RIW 2019, 169, 173 et seq., 175; continuing *Arnold/Zeh,* NZA 2019, 1, 2 et seq.

[2] *EWC/Gallner*, Directive 2003/88/EC, Art. 7 marginal No. 51.

[3] CJEU of 22 September 2022 – C-120/21 – *LB*, in-depth HSI Report 3/2022, pp. 3, 4.

[4] BAG, referral decision of 16 August 2022 – 9 AZR 76/22 (A), NZA 2023, 39.

[5] *Söllner* NZA-RR 2023, 53.

Fundamental Rights. The BAG draws a comparison here to the overlap of annual leave and sick leave, in which the CJEU does not assume a forfeiture of annual leave.[6] This is because both illness and an officially ordered quarantine are neither foreseeable nor influenceable for employees. And in both cases, a self-determined organisation of free time is not possible. In view of the employee-friendly case law of the CJEU regarding national rules on leave expiry, one can look forward to the decision of the CJEU.

Request for a preliminary ruling from the Tribunale di Oristano (Italy) lodged on 9 November 2022 – C-689/22 – *Unione di Comuni Alta Marmilla*

Law: Art. 31(2) European Charter of Fundamental Rights and Art. 7(2) Working Time Directive 2003/88/EC

Keywords: Public finance constraints – Public service employees who are not granted cash benefits in lieu of accrued and unused leave upon termination of employment

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2. Collective redundancy

Opinion of Advocate General *Pikamäe* delivered on 30 March 2023 – C-134/22 – *G GmbH*

Law: Art. 2(3)(2) Collective Redundancies Directive 98/59/EC

Keywords: Collective redundancies – Information and consultation of workers' representatives – Employer's duty to provide the authority with a copy of the written notification to the workers' representatives – Purpose and consequences of failure to comply with this duty

Core statement: The obligation to provide the competent authority with a copy of the elements of the notification to the workers' representation referred to in Art. 2(3)(1)(b)(i) to (v) of the Collective Redundancies Directive is intended to enable the authority to assess the consequences of collective redundancies for the workers concerned and, where appropriate, to prepare for the necessary remedial action. Member State law must enable workers' representatives to have compliance with this obligation reviewed, which includes effective and efficient judicial protection.

Notes: A dismissal in the context of a collective redundancy procedure requires, among other things, that the works council be informed of the circumstances mentioned in Sec. 17(2), first sentence, Employment Protection Act (KSchG) (reasons for the planned dismissals, number of dismissed and employed workers, criteria for the selection of the workers to be dismissed as well as for the amount of severance pay). The employer must send a copy of this consultation to the employment agency. Sec. 17(3) KSchG transposes Art. 2(3) of the Collective Redundancies Directive into German law.

On the question of what the consequences are if the employer does not (properly) forward to the agency a copy of the notice given to the works council, the BAG is now considering a change in its employee-friendly case law. If the employer fails to provide the agency with the copy, so far this has led to the invalidity of the notice and thus of the dismissals.[7] However,

[6] Cf. CJEU of 4 June 2020 – C-588/18, ECLI:EU:C:2020:420 paras.33 et seq. = NZA 2020, 929 – *Fetico et al.*; of 30 June 2016 – C-178/15, ECLI:EU:C:2016:502 paras. 25 et seq. = NZA 2016, 877 – *Sobczyszyn*; of 10 September 2009 – C-277/08, ECLI:EU:C:2009:542 para. 22 = NZA 2009, 1133 – *Vicente Pereda*.

[7] BAG of 28 June 2012 – 6 AZR 780/10; BAG of 21 May 1970 – 2 AZR 294/69.

considering the CJEU case law on the concept of dismissal,[8] the point in time at which this consultation must take place was moved forward. Since dismissal is not to be regarded as the termination of the employment relationship, but already the giving of notice, the collective redundancy notice must be given earlier. The BAG now intends to deduce from this that Section 17(3) KSchG is a purely regulatory provision without individual protection for individual employees; an error by the employer should therefore no longer lead to the invalidity of the dismissal.[9] However, Union law would stand in the way of the change in case law if Art. 2(3) of the Collective Redundancies Directive enforces the consequence of invalidity. The referring BAG considers this from the point of view that early joint action by the employer, the authority and the employee representatives could also be in the individual interest of the employees.[10]

The Advocate General discusses the duty to inform in the light of the Directive's scheme and objective: the authority should be able to assess at an early stage whether collective redundancies are imminent and, if so, what the consequences will be. The information sent to the employee representatives can be an important tool in this respect. The information should enable the authority to have ongoing knowledge of the circumstances of collective redundancies and to assess the prospects of success of labour market policy measures.[11] The obligation therefore only provides collective, but not individual, protection, especially since consultation and hearing as such are aimed at collective protection. In the opinion of the Advocate General, the Member States must take effective measures to ensure that the provisions of the Directive are effective. The annulment of the dismissal as a sanction was therefore permissible under EU law, but not mandatory.

This assessment cannot be followed. Following the Opinion's convincing introductory explanations, the exclusion of the individual-protective purpose of the respective provision of the Directive appears contrived and is rather alien to Union law. The purpose of informing the authorities is rightly to ensure that they are comprehensively informed at an early stage about any imminent mass dismissal. A purely collective character could only be considered if the information only served to secure the right of the works council in the context of the collective redundancy procedure. But this is far from the case.[12] The authority's action is aimed at mitigating the consequences of the possible dismissals for the employees – a concern with which labour market policy goals are pursued, but which is also in the (to a certain extent bundled) individual interest of the employees.

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3. Data protection

Decisions

Judgment of the Court (First Chamber) of 30 March 2023 – C-34/21 – *Main Staff Council of Teachers*

Law: Art. 88(1) and (2), Art. 6(1) and (3) General Data Protection Regulation (EU) 2016/679 (GDPR); Sec. 23 Hessian Data Protection and Freedom of Information Act (HDSIG).

[8] CJEU of 27 January 2005 – C-188/03 – *Junk;* CJEU of 21 September 2017 – C429/16, EU:C:2017:711 – *Ciupa and others*, para. 32.

[9] For the preliminary ruling of the BAG of 27 January 2022 – 6 AZR 155/21 (A) see HSI Report 2/2022, p. 23.

[10] According to *Däubler/Deinert/Zwanziger-Callsen*, Kündigungsschutzrecht, 11th ed. 2020, § 17 KSchG marginal No. 57; other view *Ascheid/Preis/Schmidt-Moll*, Kündigungsrecht, 6th ed. 2021, § 17 marginal No. 93; cf. *Linck/Krause/Bayreuther-Bayreuther*, Kündigungsschutzgesetz, 16th ed. 2019, § 17 marginal No. 114, 132 (effectiveness of the notification only upon receipt of the statement by the employment agency).

[11] Opinion, para. 51.

[12] See *Däubler/Deinert/Zwanziger-Callsen*, Kündigungsschutzrecht, 11th ed. 2020, § 17 KSchG marginal No. 57.

Keywords: Employee data protection – Legal basis for data processing – Teaching by videoconference due to the Covid 19 pandemic – Explicit consent of teachers

Core statement: The processing of employee data can only rest on a legal basis of a Member State if this is to be regarded as a "more specific provision" within the meaning of Art. 88(1) GDPR, otherwise it must remain inapplicable unless it meets the requirements of Art. 6(3) GDPR.

Notes: The fact that teachers' personal data is processed during online teaching is just as obvious as the need for protection of the teaching staff in this case: transmission via video conference enables, for example, the storage, evaluation and editing of video recordings in which the teacher can be seen via the transmission of lessons in the form of a livestream.

This case is also an illustrative example of the importance of collective representation to safeguard employment data protection: The main staff council of teachers in the state of Hesse took action against the unilateral order of the employer obliging teachers to give lessons via livestream. However, the Wiesbaden Administrative Court did not refer the matter to the CJEU on the interesting question of whether this is permissible under data protection law, but rather on the upstream question of whether the legal basis under data protection law on which the Hessian Ministry of Education and Cultural Affairs based the order can be upheld at all.

The legal basis for data protection is, in principle, the GDPR, which, however, contains openings for national law. For employee data protection, Art. 88 GDPR represents such an opening. According to Art. 88(1), Member States may adopt provisions on employee data protection, the central requirement being that these be "more specific" (the term "more specific provision" is also used in Art. 6(2) of the GDPR), i.e. provisions that lay down more concrete requirements.

The state of Hesse made use of this opening in Sec. 23 (1) HDSIG, according to which employee data may be processed if this is necessary for taking a decision on the establishment of an employment relationship or, after the establishment of the employment relationship, for its implementation, termination or settlement, as well as for the implementation of internal planning, organisational, social and personnel measures (identical wording: Sec. 26 of the German Federal Data Protection Act, BDSG). Although demands for a practically manageable, because more concrete, regulation in the form of an Employee Data Protection Act[13] have not yet been realised, employee data protection is part of the current coalition agreement at the federal level.[14] In 2019, the BAG as yet had no doubts about the compatibility of the regulations with the opening clause under EU law.[15]

The CJEU has now clarified that legal bases which do not provide "more specific" requirements for data processing in the employment context according to Art. 88(2) GDPR must remain inapplicable.[16] Furthermore, the legal provision must also comply with the requirements of Art. 88(2) of the GDPR. Whether they so comply is to be assessed by the jurisdiction of the Member State. However, according to the criteria developed by the Court of Justice in the context of the interpretation, Sec. 23 HDSIG and Sec. 26 BDSG are not

[13] See the resolution of the Conference of Independent Data Protection Supervisors of the Federation and the Länder of 29 April 2022: "The time for an Employee Data Protection Act is 'Now'!" as well as the draft of an Employee Data Protection Act prepared by Peter Wedde together with the DGB: www.dgb.de/uber-uns/dgb-heute/recht/++co++82a3178c-88c4-11ec-b434-001a4a160123.

[14] Mehr Fortschritt wagen – Koalitionsvertrag 2021 – 2025, 2021, p. 14.

[15] BAG of 7 May 2019, 1 ABR 53/17: "The correct application of Union law is so obvious in this respect that there is no room for reasonable doubt (*acte clair* [...])."

[16] Thus already Advocate General Sánchez-Bordona, Opinion of 22 September 2022 – C-34/21 – *Main Staff Council of Teachers*.

likely to comply with these requirements.[17] However, this does not necessarily mean that the national provisions are inapplicable:[18] The Court of Justice points out that it is still necessary to examine whether Art. 6(3) of the GDPR can be used as an opening clause; this provision does not itself expressly contain the requirement of "more specific provisions".

Should German courts come to the conclusion that Section 26 BDSG does not meet these requirements under EU law as set out by the CJEU, data processing in the employment context would have to be measured directly against the GDPR (in particular Art. 6(1) GDPR) and not against national data protection laws, whereby the test under Art. 6(1) GDPR is also characterised by the principle of necessity. However, a large number of data protection regulations, agreements and notices would have to be adapted to the new legal basis. Certain changes in the multi-level judicial system are also likely to follow: While provisions of data protection laws are only subject to review by the CJEU in terms of whether they comply with the opening clause and other provisions of the GDPR (a higher standard of protection being permissible), the GDPR is to be interpreted conclusively by the CJEU.

With Art. 6(3) of the GDPR, the Court of Justice has pointed out an opening clause that could "save" the German provisions on employment data protection. Since the questions raised in the proceedings would have to be clarified in the last instance by the Federal Administrative Court and the mills of administrative jurisdiction are known to grind rather slowly, a prompt clarification of the legal situation is not to be expected. The proceedings once again show the practical need for a legal regulation of employee data protection that is easy to apply and complies with the requirements of the GDPR.

Judgment of the Court (Sixth Chamber) of 9 February 2023 – C-560/21 – *KISA*

Law: Art. 38(3), second sentence, Regulation (EU) 2016/679 (GDPR)

Keywords: Data protection officer – Concept of "conflict of interests" – Prohibition on dismissing data protection officer for performing his or her tasks – Functional independence

Core Statement: The dismissal of a data protection officer may be made conditional on good cause being shown, even if the dismissal is not related to the performance of his or her duties as data protection officer, provided that this provision does not affect the achievement of the objectives of the GDPR (e.g. by making it no longer possible to dismiss the data protection officer).

Notes: See *X-FAB Dresden*.

Judgment of the Court (Sixth Chamber) of 9 February 2023 – C-453/21 – *X-FAB Dresden*

Law: Art. 38(3), second sentence, 38(6) Regulation (EU) 2016/679 (GDPR)

Keywords: Data protection officer – Concept of "conflict of interests" – Prohibition on dismissing data protection officer for performing his or her tasks – Functional independence

Core statement: The dismissal of a data protection officer may be made dependent on the existence of "good cause", even if the dismissal is not related to the performance of his or her duties as data protection officer, provided that this provision does not impair the achievement of the objectives of the GDPR (e.g. by making it no longer possible to dismiss the data protection officer at all).

[17] See on the doubts of the Court of Justice its judgment of 30 March 2023 – C-34/21 – *Main Staff Council of Teachers*, esp. para. 81, on interpretation paras. 61 et seq.
[18] Different view *Meinecke*, NZA 2023, 487.

A "conflict of interests" within the meaning of the GDPR may be presumed if a data protection officer is assigned by the controller or its processor tasks relating to the determination of the purposes and means of the processing of personal data. In the absence of fixed criteria, the ultimate assessment lies with the national courts.

Notes: The two cases submitted by the BAG to the CJEU, *X-FAB Dresden*[19] and *KISA*,[20] deal with the question of whether a national data protection law provision may impose stricter requirements on the dismissal of a data protection officer than the relevant EU law provision provides.

Pursuant to Sec. 6(4), first sentence, BDSG, the data protection officer may only be dismissed by analogous application of Sec. 626 BGB (i.e. only if there is a "compelling reason"), whereas according to Art. 38(3), second sentence, GDPR, the data protection officer may only "not be dismissed or disadvantaged because of the performance of his or her duties", which would not exclude dismissal due to a conflict of interests with other tasks and duties (Art. 38(6) GDPR).

Just such a conflict of interests (between the office of data protection officer and serving on the works council or other professional activity) was the reason for dismissal in the two underlying cases. The CJEU has responded with reference to its relevant case law[21] that in order to guarantee a high uniform level of data protection in the EU, the independence of the data protection officer is of particular importance. National regulations that protect this independence to a degree that goes beyond the European level are therefore lawful, as long as they do not compromise the objectives of the GDPR.

In a follow-up question, the BAG wanted to know which conditions had to be present to establish a "conflict of interests"[22] which the employer had to rule out according to Art. 38(6) GDPR. In principle, according to the CJEU, the risk of a conflict of interests exists if the data protection officer him- or herself would assume responsibility for the data processing in the company he or she monitors. Whether such a conflict of interests exists in the individual case, however, always has to be decided by the national court after assessing all the circumstances.

New pending cases

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 22 September 2022 – C-65/23 – *K GmbH*

Law: Sec. 26(4) BDSG; Arts. 5, 6(1), 9(1) and (2), 82(1), 88(1) GDPR

Keywords: Primacy of Union law – Scope for assessment granted by national law to the parties to a works agreement when assessing the necessity of data processing – Limited judicial review – Entitlement and amount of non-material damages – Degree of fault

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[19] CJEU of 9 February 2023 – C-453/21 – *X-FAB Dresden*.
[20] CJEU of 9 February 2023 – C-560/21 – *KISA*.
[21] CJEU of 22 June 2022 – C-534/20 – *Leistritz*; with commentary HSI Report 2/2022, pp. 5 et seq.
[22] Possible conflicts of interest of the DPO with other offices have been addressed, and a number of recommendations developed, by the Article 29 Working Party: Guidelines on DPOs, WP 243 rev. 01, p. 19.

4. Equal treatment

Decisions

Judgment of the Court (Second Chamber) of 12 January 2023 – C-356/21 – *TP*

Law: Art. 3(1), lit. a and c, Employment Equality Directive 2000/78/EC

Keywords: Conditions for access to self-employment – Prohibition of discrimination on grounds of sexual orientation – Free choice of a contractual partner

Core statement: A national rule that allows makes it lawful to refuse to enter into a civil service contract if that refusal is motivated by the contractual partner's sexual orientation is incompatible with the Employment Equality Directive.

Notes: The Court held that the phrase "conditions [...] for access to employment [and] self-employment" in Art. 3(1)(a) of the Employment Equality Directive is to be understood broadly according to ordinary usage and covers access to any professional activity that is genuine and characterised by a degree of stability of legal relations.[23] It covers not only employees within the meaning of Art. 45 TFEU, but also freelancers. The borderline should only be drawn at merely supplying goods or providing services to one or more recipients.[24] The aim of the Directive is to remove all discriminatory obstacles to access to livelihoods. A national rule that a contract with a freelancer may be refused on the grounds of sexual orientation would thwart this objective and ultimately deprive the Directive of its practical effectiveness.[25] Furthermore, with regard to the concept of 'dismissal', the Court acknowledges that a self-employed person may also be forced to give up the self-employed activity at the instigation of the contracting party and may consequently find him- or herself in a difficult situation comparable to that of a dismissed worker.[26]

Opinions

Opinion of Advocate General *Szpunar* delivered on 9 March 2023 – C-680/21 – *Royal Antwerp Football Club*

Law: Arts. 45, 165 TFEU

Keywords: Discrimination on the basis of nationality – Compatibility of the "home-grown players rule" with Union law – Compulsory inclusion of "HGPs" in the first-team squad of professional football clubs

Core statement: A youth player rule that requires clubs to draw up a list of 25 players (with a minimum of eight "home-grown" players) in order to participate in certain competitions is contrary to Union law to the extent that such players may come from another club of the national football association concerned.

[23] CJEU of 12 January 2023 – C-356/21 – *TP*, para. 45. For the facts of the case and the opinion of Advocate General *Ćapeta*, see HSI Report 3/2022, pp. 8 et seq.
[24] CJEU of 12 January 2023 – C-356/21 – *TP*, para. 44.
[25] CJEU of 12 January 2023 – C-356/21 – *TP*, para. 77.
[26] In depth on strengthening the rights of self-employed persons *Tödtmann/Erdmann*, DB 2023, 716; in connection with the right of residence already CJEU of 20 December 2017 – C-442/16 – *Florea Gusa*.

New pending cases

Request for a preliminary ruling from the Tribunal du travail de Liège (Belgium) lodged on 2 March 2022 – C-148/22 – *Commune d'Ans*

Law: Art. 2(2), lit. a and b, Employment Equality Directive 2000/78/EC

Keywords: Prohibition to wear symbols of conviction at the workplace – entirely neutral administrative environment - covert discrimination on the basis of gender.

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5. Fixed-term employment

Opinions

Opinion of Advocate General *Pitruzzella* delivered on 30 March 2023 – C-715/20 – *X*

Law: Clauses 1 and 4 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC); Art. 21 European Charter of Fundamental Rights

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

Core statement: A national rule that obliges the employer to give written reasons for a dismissal only in the case of employment contracts of indefinite duration may be in conformity with Union law. This is the case if the national court ensures judicial review of the grounds for termination of fixed-term contracts and at the same time ensures that fixed-term workers have effective legal protection. Private parties cannot directly rely on the framework agreement in a legal dispute.

New pending cases

Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 26 January 2023, received at the Court on the same day – C-41/23 – *Peigli*

Law: Art. 7 Working Time Directive 2003/88/EC; Clauses 4 and 5 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Honorary judges and (deputy) public prosecutors – Exclusion of claims – Employment relationship without the possibility of conversion into a permanent employment relationship in public administration

Request for a preliminary ruling from the Consiglio di Stato (Italy) of 10 June 2022, submitted on 13 June 2022 – C-389/22 – *Croce Rossa Italiana and Others*.

Law: Art. 267 TFEU; Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Unequal treatment of fixed-term and permanent employees – Existence of employment relationships with a public administration which have been extended and renewed several times over decades without interruption – Exception to the obligation to make a referral under Art. 267 TFEU imposed on the court of final instance

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6. General matters

Opinions

Request for a preliminary ruling from the Tribunale ordinario di Padova (Italy) lodged on 13 December 2021 – C-765/21 – *Azienda Ospedale-Università di Padova*

Law: Art. 19(3) lit. b TEU; Arts. 267 and 288 TFEU; Arts. 3, 35, 41 European Charter of Fundamental Rights; Regulation (EU) 2021/953 (digital COVID certificate of the EU)

Keywords: Compulsory vaccination for health care workers – Leave of absence for people who refuse compulsory vaccination – Convalescent status

Notes: In the present case, the CJEU has to deal with the issue of compulsory vaccination. The plaintiff has been employed by the University Hospital of Padua since 2017. By order of 16 September 2021, she was informed by the hospital that she would be granted leave of absence with immediate effect and without remuneration, as she had not complied with the obligation of compulsory vaccination and therefore no further duties could be assigned to her. The leave of absence would remain in force until she had been vaccinated, otherwise until the completion of the national vaccination plan, and thus at the latest 31 December 2021. In her action brought against this order, the plaintiff requested to be reinstated. She argues that there are no grounds for leave of absence, either in the context of an employment relationship or in the context of self-employment, being naturally immune following a Covid infection.

In its seven questions for a preliminary ruling, the referring court asks the CJEU whether the employer's action is proportionate and thus lawful. The main questions concern the use of vaccines only conditionally authorised by the Commission and whether compulsory vaccination can still be prescribed in the case of a recovery. Another question is aimed at the discriminatory character of compulsory vaccination in the case of unequal treatment of vaccinated people and those who have recovered from the disease. For German law, the outcome of the case may become relevant in connection with facility-based compulsory vaccination in the health and care sector.[27]

Request for a preliminary ruling from the Dioikitiko Protodikeio Athinon (Greece) lodged on 16 June 2022 – C-404/22 – *Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou*

Law: Arts. 2(a), 4(2)(b) Consultation Directive 2002/14/EC

Keywords: Information and consultation of employees – Applicability – Undertaking carrying out a commercial activity – Meaning of the terms "employment situation", "employment structure" and "probable employment trend"

Notes: The Consultation Directive sets certain minimum requirements for the information and consultation of employees or their representatives in the company. According to Art. 3(1), the Directive applies to companies with at least 50 employees or to establishments with at least 20 employees in a Member State, as decided by the Member States. According to Art. 4(2) lit. b of the Consultation Directive, information and consultation must take place on the "employment situation", "employment structure" and "probable employment development".

[27] Cf. on the release of an unvaccinated employee without continued payment of remuneration, for example LAG Baden-Württemberg of 3 February 2023 – 7 Sa 67/22; 4 Sa 59/22.

In the present case, the question for a private-law legal entity, which however exercises public powers for the certification of vocational training institutions, is whether it is an undertaking within the meaning of the Directive and whether it affects the employment situation if employees are relieved of their management positions, which are specified in the question referred for a preliminary ruling.

In particular, the question of the concept of an undertaking is also relevant for other EU law contexts, in part because the Consultation Directive is linked to the case law on the Transfer of Undertakings Directive.[28] Therefore, there is much to suggest that the Court of Justice will also take a broad understanding as a basis for the Consultation Directive.[29] An exception to the minimum standards for employee participation under EU law seems justified at most for state institutions that perform tasks that must be performed by the public authority itself.

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7. Insolvency

Decisions

Judgment of the Court (Seventh Chamber) of 16 February 2023 – C-710/21 – *IEF Service*

Law: Art. 9(1) Insolvency Directive 2008/94/EC

Keywords: Protection of employees in the event of insolvency of their employer – Determination of the competent guarantee institution in the case of cross-border work of an employee in home office

Core statement: Workers whose main task and "habitual" place of work is in the employer's Member State of establishment are not employed in two Member States, even if half of the work in the state of establishment is carried out in home office. In determining the habitual place of work, a stable economic presence of the company in the other Member State is decisive.

Notes: The plaintiff was employed as a freelance sales engineer without any other employees by S GmbH with its registered office in Graz (Austria), which also offered its services in Germany. Although the plaintiff's employment contract stipulated Austria as the main focus and habitual place of work, the plaintiff actually worked alternately one week in the office in Graz and one week in his home office in Germany. On 4 June 2019, reorganisation proceedings without self-administration were opened for the assets of S GmbH. The plaintiff applied for insolvency benefits for his claims to remuneration that were in arrears until the opening of the reorganisation proceedings. He filed a corresponding application with both the Austrian guarantee institution (IEF Service) and the German counterpart (Federal Employment Agency). IEF Service refused the benefits. After the action against this was successful in the first instance, the Graz Higher Regional Court dismissed IEF Service's appeal. On appeal, the Supreme Court of Austria stayed the case and referred it to the CJEU for a preliminary ruling.

The Court of Justice now had to deal with the question of which guarantee institution is responsible for the payment of insolvency benefits in the event of the employer's insolvency

[28] *Franzen/Gallner/Oetker-Weber*, Kommentar zum Europäischen Arbeitsrecht, 4th ed. 2022, Art. 2 Directive 2002/14/EC marginal Nos. 4 et seq.; cf. on the Directive on temporary agency work *Hamann*, in Schüren/Hamann, 6th ed. 2022, § 1 marginal No. 277.

[29] See, for example, CJEU of 18 June 1998 – C-35/96 – *Commission v. Italy*, with further references.

within the meaning of the Insolvency Directive, in particular with regard to the home office regulation. Art. 9(1) of the Insolvency Directive regulates the international competence of the guarantee institutions with regard to companies that are active in several Member States. If a company operating in the territory of at least two Member States is insolvent within the meaning of Art. 2(1) of the Insolvency Directive, international jurisdiction is generally based on the "habitual place of work" of the employees concerned.

In defining the "habitual place of work", the Court pointed out that a presence of the employing undertaking in the form of a branch or a fixed establishment in another Member State was not necessary. Nevertheless, it is not sufficient for the assumption of employment in two or more Member States that the employee carries out any activity in a Member State other than the Member State in which the employer has its registered office and this is based on the employer's need and instructions.[30] Rather, a certain permanence of such activities of the enterprise is decisive, which must find expression in the employment of at least one or more workers in the other state.[31] A physical infrastructure is not mandatory. Communication could also take place "at a distance".[32] What is required, however, is a stable economic presence of the employer in the other Member State, which also entails personnel and which enables the development of an economic activity in that Member State. In its discussion, the Court referred to the *Holmqvist* judgment.[33][34]

Cross-border activities in home office also raise new questions in the area of insolvency labour law. With its decision, the Court of Justice has confirmed the previous case law that there is no employment in another Member State if the employee is a haulage driver or if, in the case of permanent integration into the company organisation – as in the present decision – large parts of the activity are not carried out in the State of employment but in the State of residence in home office. The Court's decision is convincing because it not only contributes to preventing employers from being burdened twice with insolvency benefit contributions, but also to avoiding the passing on of such costs to a Member State in which the employing company is not economically present.

Judgment of the Court (Second Chamber) of 16 February 2023 – joined Cases C-524/21 and C-525/21 – *Agenţia Judeţeană de Ocupare a Forţei de Muncă Ilfov*

Law: Arts. 2(1), 3(2), 4(2), 12(a) Insolvency Directive 2008/94/EC

Keywords: Protection of employees in the event of the employer's insolvency – Limitation of the guarantee institutions' payment obligation to remuneration claims from the period of three months before or after the date of commencement of insolvency proceedings – Recovery of amounts paid by the guarantee institution without legal grounds

Core statements:

1. It is compatible with Union law if the relevant point in time for determining the period for which a guarantee institution has to satisfy unfulfilled pay claims of employees is the date on which insolvency proceedings are opened.

2. In addition, the satisfaction by a guarantee institution of employees' unpaid remuneration claims may be limited to a period of three months within a reference period comprising the three months immediately preceding and the three months immediately following the date on which insolvency proceedings are opened in respect of the assets of the employer.

[30] CJEU of 16 February 2023 – C-710/21 – *IEF Service GmbH*, para. 38.
[31] CJEU of 16 February 2023 – C-710/21 – *IEF Service GmbH*, para. 39.
[32] CJEU of 16 February 2023 – C-710/21 – *IEF Service GmbH*, para. 40.
[33] CJEU of 16 October 2008 – C-310/07 – *Holmqvist*.
[34] CJEU of 16 February 2023 – C-710/21 – *IEF Service GmbH*, para. 41.

3. The recovery of remuneration paid to an employee after the expiry of the limitation period does not constitute measures necessary to prevent abuse within the meaning of the Insolvency Directive if there is no act or omission attributable to the employee(s) concerned.

4. The recovery of sums paid by a guarantee institution without legal grounds because of the employee's unfulfilled remuneration claims shall not be permissible if its structure violates the Union law principles of equivalence or effectiveness. Regulations to the contrary shall remain inapplicable.

New pending cases

Reference for a preliminary ruling from the Cour d'appel d'Aix-en-Provence (France) lodged on 24 February 2023, received on 1 March 2023 – C-125/23 – *Unedic*

Law: Arts. 3, 4, 12 Insolvency Directive 2008/94/EC

Keywords: Insolvency of the employer – Granting of compensation by the guarantee institution – Exclusion due to termination of the employment relationship – Awareness of the termination of the employment contract

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8. Professional qualifications

Decisions

Judgment of the Court (Fourth Chamber) of 2 March 2023 – C-270/21 – *A*

Law: Art. 3(1) lit. a, 3(3) Professional Recognition Directive 2005/36/EC

Keywords: Recognition of professional qualifications – Right to exercise the profession of educator – Regulated profession – Diploma issued in the Member State of origin – Professional qualification obtained in a third country

Core statement: A profession is not to be considered a "regulated profession" if qualification requirements are provided for its admission and practice, but the assessment of whether these requirements are met is left to employers' discretion.

A professional qualification acquired in the former Soviet Union and regarded by the legislation of a Member State which has now once again become independent as equivalent to a qualification acquired in that Member State shall be deemed to have been acquired in that Member State and not in a third country.

New pending cases

Request for a preliminary ruling from the Conseil d'État (France) lodged on 12 January 2023 – C-8/23 – *Conseil national de l'ordre des médecins*

Law: Arts. 21, 25(4) Professional Recognition Directive 2005/36/EC

Keywords: Specialist medical training certificate issued in a Member State – Automatic recognition of evidence of formal qualifications – Basic medical training from a third country whose evidence of formal qualifications is not automatically recognised

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9. Part-time employment

New pending cases

Reference for a preliminary ruling from the Giudice di pace di Arcidosso (Italy) lodged on 8 December 2022 – C-748/22 – *Presidenza del Consiglio dei ministri and Others.*

Law: Arts. 17, 31, 34 and 47 European Charter of Fundamental Rights; Art. 7 Working Time Directive 2003/88/EC

Keywords: Automatic waiver of the assertion of claims – Honorary judges as temporary European employee – Part-time employment – Application for participation in permanence proceedings – Granting compensation

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10. Social security

Decisions

Order of the Court (Seventh Chamber) of 13 January 2023 – C-574/20 – *Finanzamt Österreich*

Law: Art. 7 Coordination Regulation (EC) No. 883/2004; Arts. 53(2), 99 Rules of Procedure of the Court of Justice

Keywords: Social security – Family benefits – Indexation according to prices – Manifestly inadmissible question referred for a preliminary ruling

Core statement: The indexation of family benefits violates EU law according to the CJEU ruling of 16 June 2022 – *Commission v. Austria*.[35]

Judgment of the Court (Second Chamber) of 2 March 2023 – joined Cases C-410/21 and C-661/21 – *DRV Intertrans*

Law: Art. 13(1)(b)(i) Coordination Regulation (EC) No. 883/2004; Art. 5 Implementing Regulation (EC) No. 987/2009

Keywords: Social security of migrant workers – Binding effect of the A1 certificate – A1 certificate fraudulently obtained – Applicability of legislation of the Member State of residence – Evidentiary value of a Community road transport license

Core Statements:

1. An A1 certificate issued by the competent institution of a Member State shall be binding on the institutions and courts of the Member State where the work is performed, even if the issuing institution, at the request of the competent institution, has declared that it will provisionally suspend the binding effect of this certificate pending its final decision on this request. However, in the context of criminal proceedings, a court of the Member State where the work is performed may find persons suspected of having fraudulently obtained or used this A1 certificate guilty of fraud and consequently disregard this certificate. This requires that

[35] C-328/20.

the issuing institution has not reviewed and withdrawn the certificate within a reasonable period of time. In addition, the guarantees related to the right to a fair trial must be respected.

2. The grant of a Community road transport licence does not provide irrefutable proof of which Member State the company is established in.

Judgment of the Court (Third Chamber) of 2 March 2023 – C-666/21 – *Åklagarmyndigheten*

Law: Arts. 2(1)(a), 3(h) and 4(m) Regulation (EC) No. 561/2006 on 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 Statement: The term "carriage of goods by road" includes carriage performed by a vehicle whose maximum permissible mass exceeds 7.5 tonnes. This also applies if, as determined by its equipment, the vehicle is intended not only as a temporary private living space, but also for the loading of goods for non-commercial purposes. The question of the maximum permissible mass of the vehicle and under which category it is registered in the national road traffic register is irrelevant.

Opinions

Opinion of Advocate General *Ćapeta* delivered on 16 February 2023 – C-488/21 – *Chief Appeals Officer and Others*

Law: Arts. 21, 45(2) TFEU; Coordination Regulation (EC) No. 883/2004; Art. 2, No. 2, lit. d, and Arts. 7(1), 2 lit. d, 24(1) Citizenship Directive 2004/38/EC

Keywords: Right of residence in the territory of the Member States and to special non-contributory cash benefits – Circle of beneficiaries – Right of residence of the direct ascendant subject to the requirement of continuing dependent status – Unreasonable burden on the social assistance system of the Member State concerned

Core statements:

1. The condition that the direct ascendant of a mobile EU worker be dependent on that worker must be met as long as the right of residence of this relative is derived from the right of free movement exercised by the worker.

2. The application for a special non-contributory cash benefit by the direct ascendant of a mobile Union citizen does not terminate that relative's dependence on the worker and therefore does not affect that relative's derived right of residence.

3. National legislation is incompatible with EU law if it restricts access to a special non-contributory cash benefit for a direct ascendant of a mobile EU worker on the ground that the grant of that benefit would result in the family member concerned becoming an unreasonable burden on the social assistance system of that State.

Notes: Although the Court of Justice has had to clarify on several occasions what rights dependent family members enjoy under EU law and how these rights arise, most of these cases have concerned dependent relatives who are direct descendants or spouses. This

case now provides the Court with an opportunity to further interpret the rights of the ascendant relatives of a mobile EU worker[36] who are dependent on the worker.

In the present case, the mother of a mobile worker moved to Ireland to join her daughter. Both mother and daughter have Romanian nationality. It is established that the individual is lawfully resident in Ireland as the parent of an EU mobile worker on whom she is financially dependent. In 2017, the individual made a claim for invalidity allowance. This is a social assistance benefit paid from the State budget. Invalidity allowance meets the criteria of a special non-contributory cash benefit within the meaning of the Coordination Regulation (EC) No 883/2004. It can therefore only be claimed in the Member State of residence, which means that the person concerned could not claim this benefit in Romania as she is resident in Ireland. However, Irish law precludes the payment of invalidity allowance to a person who is not ordinarily resident in Ireland. A condition of habitual residence is that the person concerned is entitled to reside in Ireland. The Irish regime attaches two main conditions to the maintenance of the relative's right of residence: Firstly, the relative must be dependent on the mobile Union citizen; secondly, that relative must not be an unreasonable burden on the state welfare system. Thus, if the relative does not have a right of residence in Ireland, he or she is not entitled to an invalidity benefit. And therein now lies the crux: as soon as a family member is granted a social assistance benefit, the right of residence ceases, which in turn precludes the possibility of receiving a social assistance benefit. Without this social assistance benefit, however, the relative again becomes dependent on the mobile Union citizen, which means that he or she is entitled to a derived right of residence and fulfils a condition for applying for the social assistance benefit.

According to the Advocate General, the derived right of residence is not an independent right of relatives in the direct ascending line, which is why it seems logical that the dependence on that Union citizen must continue after a close relative moves to the host Member State.[37] However, the Advocate General points out that the Union Citizenship Directive does not specify what is meant by dependence. Is a person only dependent within the meaning of the Citizenship Directive if he or she is dependent on the financial support of another person? Or does dependency also include other needs, such as the need for physical or emotional support? The Advocate General is in favour of the latter.

In her view, material or financial dependence is “the least important reason for allowing a mobile EU worker to bring his or her parents to the host State in which he or she lives and works”. If it were only a matter of financial support, this could also be granted to parents remaining in their countries of origin. It might even be cheaper to provide this support in the parents' country of origin, where the cost of living might be lower.[38]

Furthermore, it is clear from the preparatory documents for the EU Citizenship Directive that the reason for recognising the derivative rights of family members was to enable the effective enjoyment of the right to respect for family life. This fundamental right, recognised in the EU CFR, “encompasses the existence of emotional links between family members”.[39] Thirdly, such a broad interpretation of the concept of dependency is in line with the objective of the EU Citizenship Directive, which is to contribute to the right to free movement of mobile EU workers.[40] On the question of whether the payment of invalidity allowances to the relative of a worker who is a Union citizen terminates that relative's dependence on the worker and thus invalidates his or her derivative right of residence, the Advocate General recommends that the status of a dependent family member of a worker be assessed independently of the

[36] Note: In the following, the term "relatives" is used for "direct ascendants".
[37] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 47.
[38] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 54.
[39] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 60.
[40] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 61.

granting of an allowance.[41] If there is an entitlement to invalidity allowance, this confirms dependency rather than disproving it. This argument is plausible.

Finally, the Advocate General concludes that the criterion of inappropriate recourse to Member State social assistance benefits does not entitle a Member State to refuse access to special non-contributory cash benefits to the direct ascendants of a mobile EU worker who are dependent on that worker. According to the Advocate General, the right of the person concerned in the case to invalidity allowance already derives from the fact that her daughter, as a worker who has exercised her right to freedom of movement, is entitled to equal treatment. Accordingly, the person concerned could invoke Art. 45(2) TFEU, concretised by Art. 7(2) Free Movement Regulation,[42] because of her dependence on her daughter.[43] In addition to the derived right, which is based on her daughter's direct right to equal treatment, the person concerned is also entitled to her own direct right to equal treatment pursuant to Art. 24(1) of the EU Citizenship Directive. As soon as she has a derived right of residence, she acquires her own direct right to equal treatment with Irish citizens.[44]

New pending cases

Request for a preliminary ruling from the Bundesverwaltungsgericht (Austria) lodged on 23 February 2023, received at the Court on 27 February 2023 – C 116/23 – *Sozialministeriumservice*

Law: Arts. 3, 21 Coordination Regulation (EC) No. 883/2004

Keywords: Prerequisites for care leave allowance – Sickness benefit – Concept of "cash benefit" – Benefit for the carer or the person in need of care – Discrimination – Cross-border commuter status – Conversion of an "application for care leave allowance" into an "application for family hospice leave".

Request for a preliminary ruling from the Cour de cassation du Grand-Duché de Luxembourg (Luxembourg) lodged on 19 January 2023 – C-27/23 – *Hocinx*

Law: Art. 45 TFEU; Art. 7(2) Free Movement Regulation (EU) No. 492/2011; Arts. 60, 67 Coordination Regulation (EC) No. 883/2004

Keywords: Cross-border commuter – Child benefit – Court-ordered foster care

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11. Transfer of business

Decisions

Judgment of the Court (Seventh Chamber) of 16 February 2023 – C-675/21 – *Strong Charon*

Law: Art. 1(1) Transfer of Undertakings Directive 2001/23

[41] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer* and others, paras. 74 et seq.
[42] Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union.
[43] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 107.
[44] CJEU of 16 February 2023 – C-488/21 – *Chief Appeal Officer and others*, para. 113; CJEU of 11 November 2014 – C-333/13 – *Dano*, para. 69.

Keywords: Scope of application of the Transfer of Undertakings Directive 2001/23/EC – Succession to a contract as transfer of an undertaking

Core statements:

1. The absence of a contractual link between the transferor and the transferee of an undertaking or business or part of an undertaking or business is irrelevant for the purpose of determining whether there is a transfer within the meaning of the Transfer of Undertakings Directive.

2. Succession in the field of services does not fall within the scope of the Transfer of Undertakings Directive if the transferee takes on only a very limited number of employees who, moreover, do not have specific skills and knowledge and, secondly, the new service provider does not take over any tangible or intangible assets that are necessary for the continuity of these services.

Notes: The fact that transfer of undertakings and succession of contracts are not mutually exclusive, and that situations involving a change of provider can represent transfers of undertakings,[45] is still not widely known in practice. In the present case, the referring Portuguese court had to deal with the change of provider of a private security service for industrial plants. Almost in disbelief, the court seemed to ask whether the succession of the contract could be considered a transfer of an undertaking despite the absence of a contractual link between the transferor and the transferee. This is precisely what the Court has now – unsurprisingly – reaffirmed.

However, it referred to its line of jurisprudence according to which the transfer of large parts of the workforce[46] as well as tangible and intangible assets are indications that can argue in favour of affirming the existence of a transfer of an undertaking that preserves the identity of the undertaking. Looking at it the other way round, this means that the absence of these criteria should argue against the transfer of an undertaking, which, of course, leaves employers with a degree of freedom not provided for by the Directive.[47] In particular, the taking on of important members of the workforce, which accordingly indicates the existence of a transfer of an undertaking, is often in the hands of the transferor and the transferee, who can thus avoid or bring about a transfer by skillful handling of the transaction. The assessment of the circumstances of the concrete case – as the Court of Justice emphasises in the present case – must ultimately be carried out by the national court on the basis of the criteria laid down by the CJEU.[48]

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[45] For example, CJEU of 11 March 1997 – C-13/95 – *Süzen*, para. 11; CJEU of 27 February 2020 – C-298/18 – *Grafe and Pohle*, cf. on this HSI Report 1/2020, pp. 18 et seq.

[46] CJEU of 11 July 2018 – C-60/17, EU: C:2018:559 – *Somoza Hermo and Ilunión Seguridad*, paras. 35 and 37 and the case law cited therein.

[47] On questionable developments in the case law of the BAG shifting away from the overall assessment towards the cumulative existence of all indications of the transfer of an undertaking *Greiner/Pionteck*, RdA 2020, 84, 86 et seq.

[48] CJEU of 16 February 2023 – C-675/21 – *Strong Charon*, paras. 55, 59.

12. Working time

Decisions

Judgment of the Court (Second Chamber) 2 March 2023 – C-477/21 – *MÁV-START*

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

Keywords: Daily and weekly rest – National regulation providing for a minimum weekly rest period of 42 hours – Obligation to grant daily rest – Modalities for granting

Core Statement: The daily rest period provided for in Art. 3 of the Working Time Directive is not part of the weekly rest period according to Art. 5 of the Working Time Directive, but is in addition to it. If a national regulation provides for a weekly rest period of more than 35 consecutive hours, the worker must be granted the daily rest period guaranteed by Art. 3 of the Working Time Directive in addition to this time. Workers who are granted a weekly rest period are also entitled to a daily rest period preceding this weekly rest period.

Notes: See Note (in German) by *Gruber-Risak / Sutterer-Kipping*, HSI Report 1/2023, p. 5.

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III. Proceedings before the ECtHR

Compiled and commented by Karsten Jessolat, DGB Rechtsschutz GmbH, Gewerkschaftliches Centrum für Revision und Europäisches Recht, Kassel

1. Ban on discrimination

(In)admissibility decisions

Decision (Section 5) of 9 March 2022 – No. 32522/19 – *Nechyporenko and Others v. Ukraine*

Law: Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 1 (protection of property)

Keywords: Compensation for damage to health caused by police service – No claim in case of early retirement – Illness as reason for retirement

Core statement: With regard to the prohibition of discrimination under Art. 14 ECHR, states have a certain margin of discretion in assessing whether and to what extent differences in otherwise similar factual circumstances justify unequal legal treatment.

Notes: The three complainants are former police officers who retired from the police service in 2017 and 2018. Previously, all three had been diagnosed with health impairments as a result of their service. As compensation for the damage to their health, they applied for a lump-sum allowance provided for by law, which can be claimed if police officers are diagnosed within six months of leaving the police service with a disease related to this service and it is the reason for their departure from the police service. The applications were rejected on the grounds that the complainants did not retire for health reasons but voluntarily. Appeals against the refusal of compensation were unsuccessful before the national courts.

The complaints object to the decisions of the national courts on the grounds that the difference in treatment compared to officers who are dismissed due to the health consequences of police service violates Art. 14 in conjunction with Art. 1 of Protocol No. 1.

The Court reiterates that while Art. 1 Protocol No. 1 does not create a right to social benefits of any kind, when the State establishes a benefit system, it must implement it in a manner that is compatible with Art. 14.[49] According to Art. 14 ECHR, unequal treatment is discriminatory if it has no objective or reasonable justification and does not pursue a legitimate aim or if the means employed are not proportionate to the aim pursued. With regard to the question of whether similar circumstances justify different treatment, States have a certain margin of appreciation.[50] If – as in the present case – a national regulation grants the payment of a lump sum without exception to those officers who leave the service for health reasons based on the police service, this does not constitute discrimination.

The Court therefore declared complaints inadmissible on the grounds of manifest lack of merit under Art. 35(3)(a) ECHR.

[49] ECtHR of 12 April 2006 – Nos. 65731/01 and 65900/01 – *Stec and Others v. United Kingdom*.
[50] ECtHR of 11 September 2007 – No. 59894/00 – *Bulgakov v. Ukraine*.

New pending cases (notified to the respective government)

No 4455/22 – *Sakalauskas v Lithuania* (2nd Section) – lodged on 24 December 2021 – communicated on 16 March 2023

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

Keywords: Temporary continuation of employment after reaching an age limit – Age discrimination

Notes: The complainant, born in 1947, was employed as a senior scientific researcher at the Institute of Mathematics and Computer Science of *Vilnius* University starting in 1974. In 2012, when the complainant turned 65 and thus reached the standard retirement age and was entitled to receive a retirement pension, it was possible, according to the statutes of *Vilnius* University, to continue to be employed beyond this age under a fixed-term contract of up to three years, which could be extended once. On this basis, the complainant's employment was extended until August 2018. After the expiry of the fixed-term contract, the complainant brought an action for the renewal of the employment relationship, arguing in particular that the contract had been terminated solely on the grounds of his age, although he had the professional qualifications for continued employment. The action was unsuccessful before the national courts.

In his complaint, the complainant claims to have been discriminated against because of his age within the meaning of Art. 14 ECHR. He also claims that the termination of his employment relationship interfered with his right to respect for his private life under Art. 8 ECHR.

The Court has put questions to the parties on the assessment of the legal situation, referring to its case law on Art. 8 ECHR[51] and Art. 14 ECHR.[52]

No 49826/16 – *Şimşek v Turkey* (2nd Section) – lodged on 3 August 2016 – communicated on 9 March 2023

Law: Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 1 (protection of property)

Keywords: Reduction of a survivor's pension – Age difference between the spouses – Prevention of marriages of convenience as a ground for justification

Notes: According to Turkish national law, the survivor's pension of a spouse is to be reduced by 50% if the age difference between the spouses is at least 30 years. The reduction does not apply if the marriage has lasted more than ten years or if the spouses have a child together. The background of this provision was to exclude the unjustified receipt of a survivor's pension as a result of a sham marriage. According to this legal provision, the complainant received a survivor's pension reduced by half after the death of her spouse.

The complainant considers this to be a violation of Art. 14 ECHR, especially since the relationship with her deceased husband could not be described as a marriage of convenience. Moreover, the reduction of the survivor's pension interfered with the protection of property under Art. 1 of Protocol No. 1.

[51] ECtHR of 22 June 2021 – No. 76730/12 – *Balliktas Bingollu v. Turkey*.

[52] ECtHR of 27 July 2004 – Nos. 55480/00 and 59330/00 – *Sidabras and Džiautas v. Lithuania*; ECtHR of 26 October 2021 – No. 32934/19 – *Šaltinytė v. Lithuania*.

The Court has requested statements from the parties on the question of admissibility of discrimination as well as its objective justification, referring to its previously developed principles.[53]

No. 20034/18 – *Gikas v. Greece* (3rd Section) – lodged on 23 April 2018 – communicated on 9 January 2023

Law: Art. 6 ECHR (right to a fair trial); Art. 14 ECHR (prohibition of discrimination)

Keywords: Job application – Rejection on the basis of residence – Preservation of the population structure as a ground for justification

Notes: The complainant participated in a selection procedure for the recruitment of a worker in the municipality of Pogoni in the prefecture of Ioannina. Although he was the most suitable candidate based on the selection criteria, another candidate was selected for the position because she was a permanent resident of the municipality of Pogoni. An appeal against the selection decision was unsuccessful in the final instance. The Supreme Administrative Court held that the legal provision that was the basis for the selection decision pursued the legitimate objective of maintaining a stable population structure in municipalities close to the border.

In particular, the complainant alleges a violation of the prohibition of discrimination within the meaning of Art. 14 ECHR. The Court considers relevant the legal questions under which conditions the difference in treatment is based on an identifiable, objective or personal characteristic and when a legitimate aim is pursued by a difference in treatment. The parties are invited to comment on this, with reference to the previous case law.[54][55]

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2. Freedom of association

Decisions

Judgment (2nd Section) of 17 January 2023 – No. 976/20 – *Hoppen and Trade Union of Employees of AB Amber Grid / Lithuania*

Law: Art. 11 ECHR (freedom of assembly and association); Art. 14 ECHR (prohibition of discrimination)

Keywords: Dismissal for trade union activity – Causality of the activity – Protection by adequate legal framework

Core statement: States are obliged under Arts. 11 and 14 ECHR to establish a legal system which ensures real and effective protection against anti-union discrimination, whereby Art. 11 ECHR does not establish a special status for trade unions or their members and leaves each state free to choose the means by which trade union freedom is to be ensured.

Notes: The first complainant is a former employee of AB Amber Grid, a Lithuanian gas distribution company. The second complainant is the trade union established by the

[53] ECtHR of 8 December 2009 – No. 49151/07 – *Muñoz Díaz v. Spain*; ECtHR of 14 June 2016 – No. 35214/09 – *Aldeguer Tomás v. Spain*; ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*; ECtHR of 5 July 2022 – No. 70133/16 – *Dimici v. Turkey*.

[54] ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*.

[55] ECtHR of 20 October 2020 – No. 33139/13 – *Napotnik v. Romania*; ECtHR of 4 February 2021 – No. 54711/15 – *Jurčić v. Croatia*.

employees of this company. The complaint concerns the termination of the first complainant's employment and whether it is related to the complainant's trade union activities.

The first complainant was employed by AB Amber Grid or its legal predecessors since 1998. The second complainant was founded by the workers in 2017, after it was legally regulated in 2016 that collective bargaining may only be conducted by trade unions. The first complainant participated in the collective bargaining conducted in 2017 as a delegate of the second complainant. During this time, the employer offered the first complainant the opportunity to terminate the employment relationship by mutual agreement in exchange for severance pay, which the first complainant refused. In October 2017, the first complainant was elected deputy chairperson of the second complainant.

In November 2017, the employer applied to the State Labour Inspectorate (SLI) for approval to terminate the employment of the first complainant, which is a prerequisite under national law for the termination of employees who have been elected as workers' representatives. The SLI justified the decision to terminate the employment of the first complainant on the grounds that the first complainant was not a team player, did not follow instructions from superiors and violated contractual obligations. The SLI granted the employer's request and justified the decision by stating that its role was limited to assessing whether the dismissal was related to the activities and membership of the union. As there was no evidence to support this, the dismissal had to be approved. Appeals against this decision were dismissed.

AB Amber Grid then terminated the employment relationship with effect from 26 June 2019. The first complainant, supported by the second complainant, unsuccessfully challenged his dismissal in the domestic courts. In particular, the courts found that the dismissal was unrelated to trade union activities. Furthermore, the labour courts found that the dismissal was therefore lawful because the company had provided relevant and sufficient reasons for it.

The complainants submit that the dismissal of the first complainant constituted unequal treatment within the meaning of Art. 14 ECHR on the basis of his trade union activities and violated the second complainant's right to freedom of association within the meaning of Art. 11 ECHR.

The Court first emphasises that while Art. 11 ECHR gives trade union members a right to protect their interests, it does not guarantee them special treatment by the state. Trade unions must be given the opportunity under domestic law to advocate for their members under the conditions of Art. 11 ECHR.[56] It is the responsibility of the state to ensure that workers are not prevented from having their interests represented by trade unions vis-à-vis employers.[57] State authorities must ensure that trade union representatives are not prevented from defending the interests of their members through disproportionate sanctions.[58] States must establish a legal framework to ensure real and effective protection against anti-union discrimination.[59] States have wide discretion as to how to ensure trade union freedom and the protection of the professional interests of their members.[60]

Applying these principles, the Court concludes that Lithuanian law provides an adequate legal framework for the protection of trade unions and their members. The mere fact that trade union members and officers can be dismissed on the same grounds as all workers does not violate the protection afforded to trade unions under Art. 11. The protection afforded

[56] ECtHR of 9 July 2013 – No. 2330/09 – *Sindicatul "Păstorul Cel Bun" v. Romania*.
[57] ECtHR of 2 July 2002 – No. 30668/96 – *Wilson, National Union of Journalists and Others v. United Kingdom*.
[58] ECtHR of 25 September 2012 – No. 11828/08 – *Trade Union of Police in the Slovak Republic and Others v. Slovakia*.
[59] ECtHR of 30 July 2009 – No. 67336/01 – *Danilenkov and others v. Russia*.
[60] ECtHR of 9 July 2013 – No. 2330/09 – *Sindicatul "Păstorul Cel Bun" v. Romania*.

to trade union representatives through the procedure before the SLI is sufficient and within the discretionary powers of the States. There is no need to require the consent of trade unions to the dismissal of their members and officers. Since it was established both in the proceedings before the SLI and before the labour courts that the dismissal was not imposed because of the first complainant's trade union activities, a violation of Art. 14 ECHR in conjunction with Art. 11 ECHR could not be established.

(In)admissbility decisions

Decision (2nd Section) of 28 February 2023 – No 52051/17 – *Ateş and Others v. Turkey*

Law: Art. 11 ECHR (freedom of assembly and association)

Keywords: Organisation of a strike – Termination of the employment relationship

Core statement: The right to take strike action is protected by Art. 11 ECHR only if it is organised by trade unions.

Notes: The complainants were employed in a factory and were members of the metalworkers' union Türk Metal iş Sendikası. Dissatisfied with a collective agreement concluded by the union, they resigned from their union membership and, together with other workers, organised several days of strike and occupation to improve their working conditions. The action was ended by police intervention without violence. The complainants' employment contracts were terminated. The complaints against the dismissal were unsuccessful before the national courts.

The complaint alleges a violation of the right to freedom of association and assembly under Art. 11 ECHR, as the termination of the employment relationship was, according to the complainants, to be considered as a consequence of the organisation of the strike action.

The Court assumes that, according to the facts established by the national courts, the dismissals took place because of the strike. It emphasises that according to its case law[61] strike action is protected by Art. 11 ECHR only insofar as it is initiated by trade union organisations. Industrial action that is not organised by a trade union or its members does not fall within the scope of Art. 11 ECHR. This is also in line with the practice of the European Committee on Social Rights, according to which the right to strike is reserved for trade unions, which also follows from Art. 6§4 of the European Social Charter.

Therefore, the Court declared the complaint inadmissible under Art. 35(3)(a) ECHR due to its manifest lack of merit.

Decision (2nd Section) of 28 February 2023 – No. 46183/12 – *Ekelik and Others v. Turkey*

Law: Art. 11 ECHR (freedom of assembly and association)

Keywords: Organisation of a strike – Termination of the employment relationship

Core statement: The right to take strike action is protected by Art. 11 ECHR only if it is organised by trade unions.

Notes: The complaint concerns facts comparable to those in *Ateş and Others v. Turkey* (see above).

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[61] ECtHR of 14 December 2021 – No. 66828/16 – *Barış and Others v. Turkey*.

3. Procedural law

Decisions

Judgment (4th Section) of 17 January 2023 – No. 30745/18 – *Cotora / Romania*

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

Keywords: Disciplinary measure against a judge – Composition of a disciplinary chamber – Requirements for a court within the meaning of Art. 6 ECHR

Core statement: The term "court" does not necessarily mean a court of the classical type integrated into the ordinary judicial structures of the country, so that an authority can also fulfil this function if it has to decide on the basis of legal norms with full jurisdiction and according to an orderly procedure on all issues that fall within its jurisdiction.

Notes: The complaint concerns a disciplinary measure imposed on the complainant, a judge and president of a court of appeal.

In 2013, the Romanian Ministry of Justice conducted a selection procedure to fill new vice-president positions at various courts of appeal, including the court of which the complainant was president. By means of a report from the National Anti-Corruption Directorate (DNA), the Judicial Inspectorate (CSM) in charge at the National Commission for the Judicial and Legal Service was informed that the complainant had tried to influence various members of the selection committee in order to improve the prospects of two male applicants over two female applicants. The CSM conducted a disciplinary enquiry and asked the Commission's Disciplinary Board to initiate disciplinary proceedings against the complainant for influencing the professional activities of fellow judges. The Disciplinary Board of the CSM found a disciplinary offence and imposed on the complainant a 20% reduction in salary for three months as a disciplinary measure. The Court of Cassation rejected the appeal and upheld the decision of the CSM.

In her complaint, the complainant claims that the proceedings before the CSM were not judicial proceedings within the meaning of Art. 6 ECHR. In addition, the evidence offered by the complainant was not taken into account in the proceedings. Her right to a fair trial was thus violated.

The Court first notes that the present case is different from the *Kövesi*[62] and *Baka*[63] cases, which challenged the dismissal of judges and prosecutors by a non-independent state body. The CSM, which had to decide on the disciplinary charges against judges in the present case, has been established on the basis of statutory provisions. It has the unrestricted power to investigate facts with all means that are also available to courts and to take disciplinary decisions. For the term "court" in the sense of Art. 6 ECHR, it is not important that a decision-making body is integrated into the ordinary legal structures of a country.[64] Accordingly, an authority can also be considered a "court" if it has to decide on the basis of legal norms according to an orderly procedure on all questions that fall within its competence.[65] Accordingly, the CSM is to be considered a court within the meaning of Art. 6 ECHR. In view of the principles developed by the Court,[66] the members of the Disciplinary Board were to be

[62] ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*; see HSI Report 2/2020, V.3.
[63] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; see HSI Newsletter 2/2016, V.3.
[64] ECtHR of 28 June 1984 – Nos. 7819/77 and 7878/77 – *Campbell and Fell v. United Kingdom*.
[65] ECtHR of 15 January 2009 – No. 10468/04 – *Argyrou and Others v. Greece*; ECtHR of 31 October 2017 – No. 147/07 – *Kamenos v. Cyprus*.
[66] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.

judged as "independent" and "impartial". They were elected by a general assembly of judges and belonged to the judiciary. No indications of bias could be found. In the proceedings before the CSM, the complainant could be represented by a freely chosen defence lawyer. She was able to present her point of view in writing and offer all necessary evidence. The decision was made after consideration of all arguments and requests for evidence. Nor could it be established that the disciplinary measure was arbitrary or manifestly unreasonable. Since the review of the decision by the court of cassation was also to be considered sufficient, the Court did not find a violation of Art. 6 ECHR.

Judgment (2nd Section) of 21 February 2023 – No 43237/13 – *Catană v Republic of Moldova*

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

Keywords: Disciplinary proceedings against a judge – Composition of a disciplinary chamber – Requirements for a court within the meaning of Art. 6 ECHR

Core statement: The term “court” in the sense of Art. 6 ECHR implies that it is composed of judges or persons qualified to hold judicial office, which is crucial for maintaining public confidence in the judiciary and serves as a guarantee of judges' independence.

Notes: In her complaint, the complainant, who was an investigating judge at the relevant time, challenges two disciplinary decisions of the Supreme Judicial Council (CSM). In one proceeding, she was found to have applied an amnesty provision without legal basis to a person convicted of aggravated rape. In another proceeding, the complainant was found to have exceeded her powers as a judge because she set aside orders of the public prosecutor's office to initiate criminal proceedings, even though such orders are not subject to review by a court. The disciplinary committee of the CSM imposed a "strict reprimand" as a disciplinary measure on the complainant for these official offences. Appeals against this were unsuccessful. In particular, the Supreme Court pointed out that decisions of the CSM can only be reviewed as to whether the procedure that led to the disciplinary decision was lawful. The Supreme Court refused to review the substance of the issues raised by the complainant.

The complainant argues that the national authorities did not ensure an independent and impartial examination of her case. The CSM is not an independent and impartial court within the meaning of Art. 6 ECHR. The majority of the twelve members of the CSM had been elected to this body by parliament as political officials. In addition, the prosecutor general who initiated the disciplinary proceedings was a member of the CSM.

According to the case law of the Court of Justice,[67] Art. 6 ECHR applies to disputes concerning judges and in particular to disciplinary proceedings against them. With regard to national bodies that have to decide on disciplinary proceedings, these fulfil the requirements of Art. 6 ECHR if either this body itself is to be considered a "court" within the meaning of this provision or if its decision is open to review by ordinary courts.[68] The Court has repeatedly expressed concern about the independence of a court when the majority of such a body is composed of non-judicial members.[69] The term "court" implies that it is composed of persons qualified to hold judicial office, whether or not they are professionally active in that capacity. It

[67] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

[68] ECtHR of 10 February 1983 – No. 7299/75 – *Albert and Le Compte v. Belgium*; ECtHR of 20 October 2015 – No. 40378/10 – *Fazia Ali v. United Kingdom*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

[69] ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

is crucial that they are selected because of their professional qualifications, as this is crucial for maintaining public confidence in the judiciary.[70] This is all the more true if – as in the present case – the vast majority of the members of the CSM are elected by simple majority by parliament on the proposal of at least 20 MPs. A politically motivated selection procedure does not guarantee fairness and transparency and cannot guarantee the independence of the members of a collegial judicial body elected in this way. On the contrary, this circumstance indicates a clear political influence and prevents the persons concerned from being appointed solely on the basis of their professional qualifications. Similarly, the Court finds it problematic that the prosecutor general, who initiated and conducted the investigations in both disciplinary proceedings, participated in the disciplinary decision. These aspects are sufficient to establish that the requirements of independence and impartiality were not met by the CSM.

The Court therefore found a violation of Art. 6 ECHR and awarded the complainant compensation in the amount of €3,600.00.

(In)admissibility decisions

Decision (4th Section) of 7 March 2022 – No. 31390/18 – *Petrescu and Others v. Romania*

Law: Art. 6 ECHR (right to a fair trial); Art. 1 Protocol No. 1

Keywords: Additional remuneration for hazardous work – Recognition of special work – Contradictory case law of domestic courts

Core statement: The possibility of conflicting judicial decisions is an inherent feature of any judicial system and only violates the right to a fair trial when there are "profound and long-standing differences" in the jurisprudence of domestic courts and there are no possibilities under national law to remedy the contradictions.

Notes: The complaints concern the conflicting jurisprudence of the national appellate courts on the question of whether the complainants are engaged in hazardous activities.

The complainants are employees – doctors, biologists, chemists, medical assistants or nurses – in the fields of forensic medicine and pathological anatomy. They claim that their type of work involves hazardous activities and should therefore be recognised as "work under special conditions". Such recognition results in benefits in terms of salary, working hours, annual leave, pension rights and seniority. Recognition as "working under special conditions" is granted by the regional Ministry of Labour, which decides on this status on a case-by-case basis. In the case of the complainants, the applications were rejected. Appeals against this decision were unsuccessful due to the decisions of the courts of appeal in 2018. In similar cases, several other courts of appeal have upheld the workers' claims. On 14 October 2019, the Supreme Court of Cassation and Justice ruled that working conditions in forensic medical services are to be considered "work under special conditions" by default. Under domestic law, a decision of the High Court of Cassation and Justice (HCCJ) is not binding on domestic instance courts until it is published in the Official Gazette, which was the case on 12 December 2019. This binding effect has no consequences for previously issued judicial decisions.

The complainants allege a violation of Art. 6 ECHR in conjunction with Art. 1 Protocol No. 1 due to the inconsistency of decisions of domestic courts.

[70] ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*.

According to the case law of the Court of Justice, the possibility of conflicting decisions by different domestic courts is an inherent feature of any judicial system. This cannot in itself be considered contrary to the Convention.[71] Only if domestic courts deviate from a long-established case law of the national constitutional court or the Court of Justice can a violation of Art. 6 ECHR be established. In doing so, it must be taken into account whether domestic law provides a mechanism for overcoming these contradictions and whether this mechanism has been applied.[72] In the present case, it was not necessary to examine whether the contradictory case law of the domestic courts precluded the decision of the HCCJ. In any case, the decision of 14 October 2019 is not a long-standing and profound case law. The complainants were also unable to develop a "legitimate expectation" with regard to the acquisition of an asset protected by Art. 1 of Protocol No. 1[73] at the time of the adoption of the contested decisions, i.e. before the decision of the HCCJ.

The Court therefore declared the complaints inadmissible on the grounds of manifest lack of merit with regard to both Art. 6 ECHR and Art. 1 Protocol No. 1.

New pending cases (notified to the respective government)

No. 31705/16 – *Gajewskyy v. Ukraine* (5th Section) – lodged on 25 May 2016 – communicated on 17 March 2023

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

Keywords: Official activity as cause of damage to health – Revocation of recognition – Retroactive effect of a legal basis

Notes: The complainant is an employee of the State Border Guard. In June 2005, a medical commission of the Border Guard found that the complainant was suffering from health problems resulting from the performance of his duties. As a result, he was granted a number of social benefits and allowances. In December 2008, the commission annulled its decision and found that the complainant's service was not the cause of his physical impairments. This decision was overturned in the final instance after the complainant challenged it in court. It is not apparent whether there was a legal basis for the medical commission's power to overturn its own decisions. In June 2009, a government decree adopted a regulation according to which medical commissions are entitled to revise their own decisions. As a result, in May 2015, the commission overturned its original 2005 decision and found that the complainant's illnesses were not due to service in the Border Guard. An appeal against this decision was unsuccessful at all instances.

The complainant complains that the medical commission's decision of 2015 was arbitrary, in particular because its revocation of the recognition of the service activity as a cause of illness was based on a decree that was not yet in force at the time of the initial decision. Moreover, the original recognition of the consequences of the official activity as the cause of the health-related activity had already taken place ten years ago.

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[71] ECtHR of 20 October 2011 – No. 13279/05 – *Nejdet Şahin and Perihan Şahin v. Turkey*.
[72] ECtHR of 29 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish and Others v. Romania*.
[73] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*; ECtHR of 7 July 2011 – No. 37452/02 – *Stummer v. Austria*; ECtHR of 11 January 2007 – No. 73049/01 – *Anheuser-Busch Inc. v. Portugal*.

4. Protection of privacy

Decisions

Judgment (5th Section) of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*

Law: Art. 8 ECHR (protection of private and family life); Art. 6 ECHR (right to a fair trial).

Keywords: Dismissal of constitutional judges – Participation in judgments in favour of the former government – Requirements for a court of law

Core statement: A bona fide error of law is to be distinguished from a bad faith miscarriage of justice, so that a judge's involvement in politically controversial judicial decisions cannot, in itself and without the existence of corresponding factual elements, give rise to disciplinary accountability.

Notes: The complaint concerns the dismissal of two judges of the Constitutional Court of Ukraine.

In February 2014, mass protests in Ukraine culminated in the overthrow of then-President Yanukovych. A series of changes in the country's political system followed, including the formation of a new interim government, the restoration of the previous constitution and short-term presidential elections. In this context, the complainants were removed from office as constitutional judges on the basis of a parliamentary resolution on grounds of "perjury". In 2010, they had participated in a ruling by the Constitutional Court, on the basis of which President Yanukovych's powers were significantly expanded. The complainants unsuccessfully challenged their dismissal in the domestic courts. In particular, the Supreme Court found that the Constitutional Court had amended the constitution with the 2010 ruling and, as this was exclusively within the power of parliament, violated the fundamental principles of democracy, separation of powers and legitimacy of state authority.

The complainants alleged that the dismissal from the judiciary constituted an unjustified interference with their right to respect for private life under Art. 8 ECHR. Furthermore, they claimed that the effectiveness of their dismissal had not been reviewed by an independent and impartial court within the meaning of Art. 6 ECHR and that the decision had not been accompanied by a proper statement of reasons.

The Court reasoned, first, that the dismissal of the complainants from their judicial office constitutes an interference with their right to respect for private life because of the negative economic consequences and the associated damage to their reputation.[74] Such an interference must be provided for by law under Art. 8 ECHR, whereby this requirement refers to the obligation under national law to comply with both the substantive and procedural provisions of the ECHR.[75] If the interference is not in accordance with national law in the first place, it is no longer relevant whether it pursues a legitimate aim or is necessary in a democratic society.[76] Already in the case *Oleksandr Volkov v. Ukraine*,[77] the Court found that the domestic law of Ukraine does not meet the requirements of foreseeability and protection against arbitrariness with regard to the legality of sanctions against judges. Even if – unlike in

[74] ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*.
[75] ECtHR of 5 June 2014 – No. 12317/06 – *Akopjan v. Ukraine*.
[76] ECtHR of 19 June 2007 – No. 12066/02 – *Ciorap v. Republic of Moldova*; ECtHR of 22 October 2015 – No. 42883/11 – *Khalikova v. Azerbaijan*; ECtHR of 5 November 2015 – No. 36814/06 – *Chukayev v. Russia*; ECtHR of 21 March 2017 – No. 34458/03 – *Porowski v. Poland*.
[77] ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*.

the *Oleksandr Volkov* case – the present case does not concern the functional immunity of constitutional judges, but rather the responsibility of a judge for the content of his decisions, the maintenance of the rule of law and democracy requires that particularly high standards be applied to the sanctioning of constitutional judges. Although the historical context at the time of the dismissal of the complainants has to be taken into account – massive protests leading to a change in state power – this does not justify disregarding the fundamental requirements of the ECHR on the legality and foreseeability of legislation.

As regards the claim of a violation of Art. 6 ECHR, the Court does not consider the decisions of the domestic courts to be sufficiently reasoned. The latter only assessed whether the complainants' actions before the national courts were subject to independent and impartial review. The question of whether their dismissal was compatible with the constitutional guarantees of judicial independence and whether judges can be held accountable for the content of their decisions that were the reason for the dismissals was not answered.

The Court therefore found a violation of both Art. 8 ECHR and Art. 6 ECHR and considered this finding sufficient to compensate for the non-material damage.

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5. Protection of property

New pending cases (notified to the respective government)

No. 8753/16 – *Babkinis v. Ukraine* (Section 5) – lodged on 3 February 2016 – communicated on 17 February 2023

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

Keywords: Default of acceptance – Flight from war as temporary inability to carry out duties

Notes: The complainant was employed by the Luhansk Region Environmental Inspectorate in Luhansk. Due to the fighting there, she left the region in July 2014 out of concern for her and her children's safety. In November 2014, the Environmental Inspectorate was transferred to the city of Siwerodonetsk in the Luhansk region and resumed its work there. As the complainant was not willing to return to Siwerodonetsk, she terminated the employment agreement. For the period from July to November 2014, during which she had not worked, she demanded payment of remuneration on the grounds of default of acceptance. Corresponding actions before the domestic courts were unsuccessful. The courts referred to a ministerial provision according to which remuneration is only payable to employees in public institutions that have been relocated to government-controlled areas due to the military conflict if the employees actually perform their work there.

The complainant considers her right to a fair trial under Art. 6 ECHR to have been violated, as she does not consider the judicial decisions to be properly reasoned. In addition, her right to protection of property has been violated. On this issue, the Court refers to its case law.[78]

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[78] 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*.

6. Social security

Decisions

Judgment (5th Section) of 19 January 2023 – Nos. 32667/19 and 30807/20 – *Domenech Aradilla and Rodríguez González v. Spain*

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Denial of a survivor's pension – Retroactive effect of an amendment to the law – Absence of a transitional period – Balancing of conflicting interests

Core statement: A permissible interference with the right to protection of property is disproportionate if it is based on a retroactive state measure ordered with immediate effect without consideration of a transitional period.

Notes: The first complainant lived in a common-law marriage with her partner since 2007 and shared a household with him. The partner died in an accident at work in November 2013.

The second complainant conducted a marriage-like relationship with her partner with joint household management since 2008. Her partner died in January 2014.

The civil partnerships of both complainants were not formally registered in the civil partnership register at the time of the death of the respective partners. Under Spanish law, the registration of a civil partnership in the State Register of Civil Partnerships is equivalent to a church marriage in terms of family and social law consequences.

After the death of their respective partners, the complainants applied to the state social security for a survivor's pension. This was denied on the grounds that the legal requirement for this, that the civil partnership be notarised at least two years before the death of one of the partners, was not met. This requirement was introduced on the basis of a ruling by the Constitutional Court of 11 April 2014, i.e. after the death of the complainants' civil partners. The legislature thereby intended to standardise the legal system, as there was already a duty to register civil partnerships in various provinces of Spain. The registration duty was intended to prevent potential abuse and to ensure that survivors' pensions were only granted to the survivors of a permanent civil partnership.

The actions brought against the decision of the state social security authorities were unsuccessful before the national courts. The latter based their decisions on the fact that the Constitutional Court's ruling was also applicable to cases in which an administrative decision had not yet become final.

The complainants assert that their right to protection of property under Art. 1 of Protocol No. 1 has been interfered with. The requirement to legalise a civil partnership at least two years before the death of one partner in order to acquire a right to a survivor's pension had been created by a statutory provision which only came into force after the death of their civil partners.

The Court based its decision on the guiding principles developed in relation to Art. 1 of Protocol No. 1, according to which this provision, though not creating a right to acquire property, protects a legitimate expectation to acquire an asset under certain circumstances.[79]

[79] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*; ECtHR of 7 July 2011 – No. 37452/02 – *Stummer v. Austria*; ECtHR of 11 October 2022 – No. 78630/12 – *Beeler v. Switzerland*; ECtHR of 11 January 2007 – No. 73049/01 – *Anheuser-Busch Inc. v. Portugal*.

A legitimate expectation must be based on a legal provision or act such as a court decision. This cannot be assumed if the interpretation and application of domestic law is disputed and a claim has been rejected as a result of a decision of a national court.[80] These principles are also applicable to social and welfare benefits.[81] Art. 1 Protocol No. 1 does not create a right to social benefits or pensions. States are free to establish a social security system.[82] However, where social benefits are granted by virtue of legislation, a property right within the meaning of Art. 1 Protocol No. 1 shall be created for the persons who fulfil the conditions specified therein.[83] If statutory provisions are amended to the effect that beneficiaries no longer fulfil the conditions for a pension, the interference with the right to protection of property must be examined under national law, taking into account the circumstances of the individual case. [84]

Taking these principles into account, the Court found, first, that the denial of the survivor's pension constitutes an interference with the protection of the complainants' property within the meaning of Art. 1 of Protocol No. 1. The change of law on the basis of the Constitutional Court's case law indeed has a legal basis and pursues the legitimate aim of eliminating unequal treatment based solely on the complainants' place of residence. However, the measure was disproportionate, as the complainants' life partners had already died at the time of the introduction of the new eligibility requirement and they could not fulfil the new requirement. A transitional period was called for here to allow a reasonable solution for groups of persons for whom the legal consequences of the change in the law were not foreseeable. The government was not able to show why the public interest could not have been achieved without imposing such a serious consequence on the complainants. The legitimate aim of the measure cannot justify the retroactive effect of the legal provision.

The Court therefore found a violation of Art. 1 of Protocol No. 1 and awarded the complainants compensation for non-material damage in the amount of €8,000.00 each.

Judges *Elósegui* and *Šimáčková* drafted a joint concurring special opinion in which they express the view that, in addition to the violation of Art. 1 Protocol No. 1, there is also a violation of the prohibition of discrimination under Art. 14 ECHR, since in Spain the majority of women receive a survivor's pension and the measure therefore also constitutes indirect discrimination against women.

Judgment (5th Section) of 26 January 2023 – No 22386/19 – *Valverde Digon v Spain*

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Denial of a survivor's pension – Retroactive effect of an amendment to the law – Absence of a transitional period – Balancing of conflicting interests

Notes: The decision concerns a case comparable to *Domenech Aradilla and Rodríguez González v. Spain* (see above). In contrast to that case, the civil partnership was entered in the civil partnership register before the death of the complainant's husband.

On the basis of the above considerations, the Court here as well finds a violation of Art. 1 of Protocol No. 1. With regard to the proportionality of the interference, the following must be

[80] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*; ECtHR of 3 June 2014 – No. 57116/10 – *Kolesnyk v. Ukraine*.
[81] ECtHR of 12 April 2006 – Nos. 65731/01 and 65900/01 – *Stec and Others v. United Kingdom*.
[82] ECtHR of 26 June 2014 – Nos. 68385/10 and 71378/10 – *Sukhanov and Ilchenko v. Ukraine*; ECtHR of 3 June 2014 – No. 57116/10 – *Kolesnyk v. Ukraine*; ECtHR of 3 June 2014 – No. 4519/11 – *Fakas v. Ukraine*; ECtHR of 8 October 2019 – No. 53068/08 – *Fedulov v. Russia*.
[83] ECtHR of 12 April 2006 – Nos. 65731/01 and 65900/01 – *Stec and Others v. United Kingdom*.
[84] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*.

noted: Even though the amended statutory eligibility requirement was already in force at the time of the death of the complainant's husband, account must be taken, firstly, of the contribution-dependent nature of the survivor's pension, which, moreover, is calculated on the basis of the deceased's income. In addition, the law was only passed three months before the husband's death, so that a transitional period would also have been necessary in this case to ensure the predictability of the change in the law for the persons concerned.

In the absence of a corresponding application, no compensation was awarded.

Here, too, Judges *Elósegui* and *Šimáčková*, in a joint concurring special opinion, are of the opinion that, in addition to the violation of Art. 1 Protocol No. 1, there has been a violation of Art. 14 ECHR.

Judges *Ravarani*, *Ranzoni* and *Guyomar*, in a joint dissenting special opinion, do not see a violation of Art. 1 Protocol No. 1, as the present case is not comparable to the decision in *Belane Nagy v. Hungary,*[85] which would allow a claim to social security benefits to be derived from Art. 1 Protocol No. 1, which, however, has so far been expressly rejected by the Court.[86]

(In)admissibility decisions

Decision (1st Section) of 31 January 2023 – No 69424/16 – *Denysiuk v Poland*

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Reduction of an old-age pension – Setting-off of an early retirement pension

Core statement: As the concept of "public interest" is necessarily broad, economic and social issues must be taken into account when enacting regulations on social benefits, and states must be given a wide margin of discretion in implementing principles of distribution.

Notes: The complaint concerns the reduction of the complainant's old-age pension due to the previous receipt of an early old-age pension.

The complainant received an early retirement pension from October 2009 to May 2015. Subsequently, he was granted the regular old-age pension. However, the value of this pension was negatively affected by the previous receipt of the early retirement pension, as the amounts paid under the early retirement scheme were deducted from the fund saved for the calculation of the regular retirement pension. This resulted in an 11% reduction in the old-age pension. The amendment to the domestic law allowing such a deduction entered into force in 2013, i.e. at a time when the complainant was already receiving early retirement pension.

The complainant alleges a violation of Art. 1 of Protocol No. 1, since the entry into force of a law at a time when he was already receiving early retirement benefits reduced his regular retirement pension.

According to the case law of the Court of Justice, the payment of contributions to a pension fund may, under certain circumstances, create a property right which may be diminished by the manner in which it is distributed.[87] Even assuming that Art. 1 Protocol No. 1 guarantees benefits based on the payment of contributions to a social security scheme, it does not follow that a pension entitlement of a certain amount is created.[88] For a violation of Art. 1 of Protocol No. 1, it is exclusively a matter of whether the right to receive benefits has been

[85] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*.
[86] ECtHR of 10 April 2012 – No. 26252/08 – *Richardson v. United Kingdom*.
[87] ECtHR of 27 April 1999 – No. 40832/98 – *Bellet, Huertas and Vialatte v. France*; ECtHR of 1 June 1999 – No. 39860/98 – *Skorkiewicz v. Poland*.
[88] ECtHR of 12 October 2004 – No. 60669/00 – *Kjartan Ásmundsson v. Iceland*.

violated in a way that has led to an impairment of the essence of the pension entitlement.[89] Whether such an impairment exists is to be assessed by the national authorities on the basis of their direct knowledge of the social circumstances and is beyond the Court's decision.[90] Taking these circumstances into account, it cannot be established in the present case that an appropriate balance has not been struck between the interests of the general public and the need to protect the complainant's property. In any event, the reduction of the complainant's pension entitlement is not excessive and does not affect his right to property in its essence.

The Court therefore considers the complaint to be manifestly il-founded and has declared it inadmissible under Art. 35 (3)(a) ECHR.

New pending cases (notified to the respective government)

No. 59726/21 – *Jelušić / Croatia* (1st Section) – lodged on 1 December 2021 – communicated on 3 March 2023

Law: Art. 6 ECHR (right to a fair trial); Art. 1 Protocol No. 1 (protection of property); Art. 14 ECHR (prohibition of discrimination)

Keywords: Receiving an old-age pension – Setting-off of benefits for the care of a severely disabled child

Notes: The complainant retired early in 1998 to care for her severely disabled son. Since then, she received an early retirement pension. In 2014, she was recognised by a state agency as a full-time career for her son and received remuneration for this activity. Thereupon, the competent authority stopped paying the old-age pension to the complainant. An action brought against this before the national courts was unsuccessful.

The applicant objects to the national decisions on the grounds that the administrative procedure violated Art. 6 of the ECHR. In addition, her right to the protection of property under Art. 1 of Protocol No. 1 was violated. Moreover, the measure discriminated against her within the meaning of Art. 14 ECHR.

The Court draws the attention of the parties to its case law on the question of interference with the right to property[91] and discrimination on the grounds of the severe disability of a child[92] and awaits their comments.

No. 62341/16 – *Marushchak v. Ukraine* (5th Section) – lodged on 22 October 2016 – communicated on 2 March 2023

Law: Art. 1 Protocol No. 1 (protection of property); Art. 14 ECHR (prohibition of discrimination)

Keywords: Receipt of an old-age pension – Simultaneous earned income – Suspension of the old-age pension

Notes: The complainant receives a retirement pension and also works as an editor for a local daily newspaper. A law that came into force on 1 April 2015 stopped the payment of pensions to working retired civil servants and reduced the pensions of working pensioners by 15%. The payment of the old-age pension to the complainant was completely stopped due to this regulation. The complaint against this was rejected. Although the complainant argued

[89] ECtHR of 15 June 1999 – No. 34610/97 – *Domalewski v. Poland*.
[90] ECtHR of 13 December 2016 – No. 53080/13 – *Belane Nagy v. Hungary*.
[91] ECtHR of 28 July 1999 – No. 22774/93 – *Immobiliare Saffi v. Italy*.
[92] ECtHR of 22 March 2016 – No. 23682/16 – *Guberina v. Croatia*.

that the provision did not apply to her because she was not a civil servant, the Court of Appeal considered her position to be equivalent to that of civil servants. The payment of retirement benefits to the complainant was resumed as of 1 May 2016.

The complainant alleges unjustified unequal treatment compared to employed pensioners whose pensions were reduced by only 15%. In addition, the complete cessation of the payment of the pension constitutes an interference with the right to property protected by Art. 1 of Protocol No. 1.

With regard to the legal question to be dealt with here, namely, whether the payment of old-age pensions falls within the protection of Art. 1 of Protocol No. 1, the Court refers to its case law.[93]

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[93] ECtHR of 19 June 2012 – No. 17767/08 – *Khoniakina v. Georgia*.