REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

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Contents

I. Editorial **2**

II. Proceedings before the CJEU **3**
1. Annual leave 3
2. Collective redundancy 6
3. Data protection 6
4. Equal treatment 8
5. Fixed-term employment 13
6. General matters 13
7. Social security 14
8. Temporary agency work 18
9. Transfer of business 19
10. Working Time 20

III. Proceedings before the ECtHR **22**
1. Ban on discrimination 22
2. Freedom of association 23
3. Procedural law 24
4. Protection of privacy 30
5. Protection of property 32
6. Social security 34

I. Editorial

HSI Report 2/2023 chronicles 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 April to June 2023.

In the *ALB FILS Kliniken* case (C-427/21), the **CJEU** ruled that the EU Directive on Temporary Agency Work 2008/104/EC does not apply to the provision of personnel in the public sector. Of interest beyond the legal question decided are the consequences it has for the other exceptions in certain types of cases to the application of protective rights for temporary agency workers. Not all of the exceptions contained in the German Act on Temporary Agency Work (AÜG) will likely prove to be in conformity with EU law in the light of this decision.

In this quarter's overview of CJEU case law, annual leave law is another area that can be highlighted. Compensation for leave is to be paid by the employer not only upon termination of the employment relationship, but also if, in the block model of partial retirement, the leave cannot be taken at the beginning of the release phase, as was decided in the *Bayerische Motoren Werke* case (C-192/22). Various cases also addressed equality issues, for example in a case of alleged age discrimination (C-52/22 – *Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau*) or of different protection rules for night work in the public and private sectors (C-529/21 and others – *Glavna direktsia "Pozharna bezopasnost i zashtita na naselenieto"*). Another ruling concerns the question of whether a claim to compensation benefits based on a government-ordered quarantine (e.g. in the case of a COVID-19 infection) also applies to migrant workers whose state of residence decreed their isolation (C-411/22 – *Thermalhotel Fontana*).

In the overview of cases before the ECtHR in this reporting period, several on freedom of association stand out. For example, the moderation requirement under civil service law does not apply to trade union activities (No. 63029/19 – *Pehlivan v. Turkey*). In addition, the Court clarifies that even minor sanctions for trade union activities can violate the right to freedom of association and assembly (No. 62239/12 – *Kaymak and others v. Turkey).* A further focus is on the presumption of innocence, the scope of which is not limited to criminal proceedings (No. 11643/18 – *Ispiryan v. Lithuania*). The Court will soon have the opportunity to rule on whether the legal concept of dismissal on suspicion complies with this legal principle (No. 30906/19 – *Kandemir v. Turkey*).

We wish you a stimulating read and look forward to receiving your feedback at hsi@boeckler.de.

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

→ back to overview

II. Proceedings before the CJEU

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1. Annual leave

Decision

Judgment of the Court (Sixth Chamber) of 27 April 2023 – C-192/22 – *Bayerische Motoren Werke*

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

Keywords: Partial retirement scheme – Annual leave acquired during the work phase but not yet taken – Expiry of the leave entitlement during the release phase – Employer's obligations to cooperate

Core statement: A leave entitlement acquired by an employee under a partial retirement scheme may not expire at the end of the leave year or at a later point in time if the employee was prevented from taking this leave due to illness before the release phase. This also applies in the case of a short absence due to illness.

Note: The plaintiff in the case presented by the Federal Labour Court (BAG) had agreed on a partial retirement employment relationship with his employer. The final phase of this model consisted of a long period of leave ("release phase") directly before the regular end of the employment relationship. The plaintiff took all of his remaining annual leave before the start of the agreed release phase. During this leave, the plaintiff fell ill. With his lawsuit he demands compensation for these (2-2/3) days of leave not taken due to illness. The employee refused to pay compensation, pointing out that the holiday entitlement had lapsed (during the release phase).

According to German law, leave not taken before the release phase (due to illness) expires at the latest at the end of the carry-over period according to Section 7(3) of the Federal Leave Act (BUrlG), even if it is impossible for the employee to take all the leave days due to being released from work duty. The BAG would like the CJEU to clarify whether this legal situation is compatible with European law. The CJEU starts by emphasising the particular relevance of the right to paid annual leave,[1] and then points out that Article 7(2) of the Working Time Directive does not have any further prerequisites for the accrual of the right to financial compensation for leave other than that the employment relationship must have ended and the employee must not yet have taken all the leave to which he or she was entitled up until the termination of the employment relationship. These principles, which form the fundamental right to paid annual leave under Article 31(2) European Charter of Fundamental Rights, may only be restricted under strict conditions (Article 52(1) European Charter of Fundamental Rights) and with respect for the substance of the right.

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[1] CJEU of 25 June 2020 – C-762/18 and C-37/19 – *Varhoven kasatsionen sad na Republika Bulgaria*, para 54 and the case law cited therein.

These conditions were found, for example, in the *KHS* case,[2] in which the forfeiture of the claim for compensation was considered to be legal, as otherwise the employer would have risked facing a severe disruption of its work organisation by the employee’s accumulating long absence periods.

However, the present situation had nothing in common with such a special case. The CJEU justified this on the one hand with the particular brevity of the absence due to illness. In addition, the impossibility of taking the leave resulted from the partial retirement model agreed upon by both parties. Furthermore, the employee's illness during his leave was not a completely unforeseeable event. The employer could have effectively reduced the risk of having to pay compensation by requesting that the employee take his leave in time. Finally, the Court points out that the taking and payment of annual leave are two parts of a single right. If, in a situation such as the present, compensation for leave not taken due to illness were to be completely excluded, this would deprive the European rules on leave law of their substance.

The ruling shows once again that the CJEU is particularly serious about the European fundamental right to paid annual leave. In its view, forfeiture rules should only apply where maintaining them would lead to unacceptable results for employers; otherwise, it asserts, the entitlement must be upheld.

Opinions

<u>Opinion of Advocate General Capeta delivered on 8 June 2023 – C-218/22 – *Comune di Copertino*</u>

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

Keywords: Public service – Entitlement to compensation for leave not taken before termination of employment – Incentives for employees to actually take their annual leave

Core statement: Member States may provide that unused leave does not have to be compensated at the end of the employment relationship where

- such prohibition of compensation excludes the holiday entitlement which took place in the calendar year of the termination of the employment relationship;
- the employee has been able to take the compensated leave in the previous years including the minimum carry-over period;
- the employer has required the employee to take paid annual leave;
- the employer has indicated that the accrual of annual leave for the purpose of obtaining financial remuneration is not possible.

The employer has the burden of proof to provide comprehensive information. Otherwise, compensation must be paid to the workers concerned.

Note: In the present case, the plaintiff terminated his employment in order to take early retirement. He demanded compensation from his employer for the annual leave not yet taken, which the employer refused, citing Italian law. According to Italian law, the referring court explained, compensation for untaken leave is only possible if the leave could not be taken for reasons beyond the employee's control (e.g. illness). If, on the other hand, the termination of work was foreseeable by the employee (as in the case of a dismissal), the employee may be denied compensation (para. 14). The CJEU is now to decide whether this national regulation is compatible with EU law.

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[2] CJEU of 22 November 2011 – C-214/10 – <u>*KHS*</u>.

In her Opinion, the Advocate General refers to the high value of leave and to the fact that it can only have its health-promoting effect if it is taken promptly. This is the reason why compensation has a subsidiary character (para. 40). Since the Union legislature had failed to define precisely how incentives could be created for employees to actually take the leave, it was the responsibility of the Member States to fill this gap. Limits on the carry-over period should not be regarded as the only possibility (para. 54).

The Advocate General concludes that the regulation is compatible with EU law under certain conditions (see core statement). In particular, the prohibition of compensation should not refer to the reference year in which the termination of the employment relationship falls.

This case has thematic proximity to the *Bayerische Motoren Werke* case also dealt with in this report.[3] Both cases deal with questions of the settlement of holiday entitlements in connection with retirement from employment. Both the CJEU's judgment and the opinion highlight the high threshold for the forfeiture of holiday entitlements once they have been acquired. It will probably continue to be challenging for Member States to enact national regulations that nevertheless lead to the forfeiture of these entitlements.

Opinion of Advocate General Pikamäe delivered on 4 May 2023 – C-206/22 – *Sparkasse Südpfalz*

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

Keywords: Entitlement to paid annual leave – Quarantine coinciding with paid annual leave – Postponement of paid annual leave

Core statement: Approved annual leave that coincides with an officially ordered quarantine does not have to be postponed.

Note: Must approved annual leave that cannot be taken due to an officially ordered quarantine be postponed in the employee’s favour? With this question – a hot topic in the debate on German law[4] – the Labour Court (ArbG) of Ludwigshafen am Rhein addressed the CJEU. In the referred case, the plaintiff's two weeks of leave, which had already been approved by his employer, fell entirely within a domestic quarantine ordered by the authorities. The plaintiff demanded that his employer postpone the annual leave he had taken, which the employer refused.

The referring court notes that German law only provides for the postponement of leave in the case of incapacity for work certified by a doctor (Sec. 9 Federal Leave Act (BurlG)), which was not the case with the plaintiff. Whether this national provision is compatible with Article 7(1) of the Working Time Directive and Article 31(2) of the EU Directive is now to be decided by the CJEU.

In his Opinion, the Advocate General takes the view that the restrictive interpretation of Section 9 of the BUrlG advocated by the referring court is compatible with European law and that employers are therefore not required to grant leave again in a different period. In order to assume that leave has been granted, employers must have released employees from all contractual obligations, so that employees have the opportunity to rest and freely determine their free time. However, this right should not be confused with the right to the actual result of such leave (time of actual relaxation, recreation and leisure activities) (para. 54). This is because the quarantine only restricts the possibility to organise the free time provided by employers as they see fit; however, the employers had fulfilled their obligation and had not restricted the right to actually receive the leave (para. 56). Moreover, on the one hand, the idea

[3] CJEU of 27 April 2023 – C-192/22 – Bayerische Motoren Werke.
[4] *Hein/Tophof*, NZA 2021, 601; *Isenhardt*, ArbRAktuell 2022, 281.

of recreation is highly subjective, so that an objective statement about the concrete restriction of free time due to the quarantine is hardly possible (para. 57). On the other hand, it is not possible to objectively assess whether employees are really unable to work as a result of the quarantine. This depends, for example, on whether employers can provide the technical means for quarantined employees who are willing to work to perform their work effectively (para. 46).

→ back to overview

2. Collective redundancy

New pending case

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia) (Spain) lodged on 20 January 2023 – 24 March 2023 – C-196/23 – *Fogasa*

Law: Arts. 1 and 2 Collective Redundancies Directive 98/59/EC; Arts. 27 and 30 European Charter of Fundamental Rights

Keywords: Collective redundancies – Dismissal due to retirement of the employer – No consultation of the employee representation – Horizontal effect of Union law

Core statement: Spanish law only requires a consultation process with workers' representatives in the case of collective redundancies for economic, organisational and production-related reasons, in order to avoid or mitigate the consequences of the termination. However, if the employer's retirement has led to the collective dismissal, consultation is not mandatory.

The referring Spanish court therefore asks whether this restriction is compatible with Articles 1 and 2 of the Collective Redundancies Directive. Alternatively, as a second question, it asks the CJEU whether the Collective Redundancies Directive, as a regulation that fleshes out the fundamental rights under Articles 27 and 30 of the EU Charter of Fundamental Rights, has direct horizontal effect in private legal relationships.

3. Data protection

Opinions

Opinion of Advocate General Sánchez-Bordona delivered on 25 May 2023 – C-667/21 – *Krankenversicherung Nordrhein*

Law: Arts. 5, 6, 9(2), 9(3), 82(1), 82(3) GDPR

Keywords: Health data – Compensation for damages – Assessment of employees' ability to work – Processing of employee data by the medical service of the health insurance provider

Core statements:

1. The medical service of a health insurance provider is allowed to process health data of its employees, which is a prerequisite for the assessment of these employees' ability to work.

2. This processing may constitute an exception to the prohibition of processing personal health data if it is necessary for the assessment of the employee's ability to work. However, the principles and conditions set out in Articles 5 and 6 of the GDPR must be complied with.

3. Both liability and the assessment of the amount of the non-material damage to be compensated under Article 82(1) GDPR are independent of the degree of fault of the controller or processor.

4. If the circumstances giving rise to the obligation to compensate the data subject are attributable to the data subject, this may lead to an exemption of the controller or processor from liability pursuant to Article 82(3) GDPR.

Note: The proceedings brought by the BAG concern questions of interpretation regarding the GDPR. On the one hand, they concern the processing of employee health data and, on the other hand, compensation for damages due to an (alleged) breach of the GDPR.

The plaintiff is an employee of the Medical Service of the North Rhine Health Insurance Fund. The medical service of an insurance provider (at the time of proceedings MDK; in the meantime just MD) prepares, among other things, expert opinions on the incapacity to work of persons insured by public health insurance providers (GKVs). Since the plaintiff had been unfit for work for an extended period of time and was receiving sickness benefits from his GKV, the GKV commissioned the MDK to issue an expert opinion on the plaintiff's state of health. In the event of an assessment of its own employees (internally referred to as a "special case"), the MDK provided for a number of ad hoc technical and organisational measures in order to guarantee the particularly high data protection requirements.

The plaintiff learned about the preparation of the expert opinion, gained access to it and consequently brought an action for damages against his employer due to possible data protection violations.

With its five questions for a preliminary ruling, the BAG asks the CJEU whether the preparation of the expert opinion at issue is compatible with the GDPR and whether fault on the part of the controller is required for a claim for damages under Article 82(1) of the GDPR.

The Advocate General's opinion contains findings on three questions of law:

According to the Advocate General, the GDPR (Art. 9(2)(h)) does not contain a fundamental prohibition in the event that an MDK processes health data of its employees for an expert opinion (para. 31). No such prohibition results from the wording, history, purpose or structure of the provision.

In answering the second and third questions referred for a preliminary ruling, the Advocate General takes the view that no further measures under Articles 5 and 6 of the GDPR are required in order to justify the processing under data protection law, but notes that, ultimately, it is for the referring court to decide.

The fifth question referred by the BAG[5] relates to Article 82(1) of the GDPR, which provides for a claim for damages whenever the provisions of the GDPR are infringed. The referring court would like (according to the interpretation by the Advocate General) to see the question discussed – which is a controversial one in Germany[6] – of what role the degree of fault of the controller or processor plays in determining liability or in assessing the amount of the non-material damage to be compensated. After the Advocate General's introductory statement that it is not clear which concrete model of civil liability the GDPR is based on (para. 72), he nevertheless agrees with the BAG's suggestion that no proof of fault on the part of the controller is required for a liability claim. In addition to the wording argument (Article 82 of the

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[5] The fourth question referred is not dealt with by the Advocate General at the request of the Court.

[6] *Däubler/Wedde/Weichert/Sommer*, EU-GDPR und BDSG, 2nd ed. 2020, GDPR, Art. 82 marginal No. 25 et seq.

GDPR mentions neither intent nor liability), it is above all the systematic interpretation that leads the Advocate General to this conclusion. Article 82(3) of the GDPR stipulates that a "controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage." Conversely, this means that Article 82(1) GDPR does not require fault (not even ordinary negligence).

The Advocate General then refers to the high level of protection afforded by the GDPR, which, however, cannot go so far as to oblige the controller to be liable for damage resulting from the data subject's action (para. 112).

The scope of the opinion and also the depth of the dogmatic derivation of its findings suggest that the reference for a preliminary ruling submitted by the BAG brings new, as yet unaddressed legal questions to the table of the CJEU. At the same time, the Advocate General at times makes it very clear that in his opinion he has chosen only one of objectively several possible ways of interpretation and that others would also be quite justifiable from a dogmatic point of view. The CJEU is thus given the opportunity to fundamentally develop the doctrine of the GDPR.

→ back to overview

4. Equal treatment

Decisions

Judgment of the Court (Sixth Chamber) of 15 June 2023 – C-132/22 – *Ministero dell'Istruzione, dell'Università e della Ricerca*

Law: Art. 3(1) Free Movement Regulation (EU) No. 492/2011; Art. 45 TFEU

Keywords: Free movement of workers – Indirect discrimination – Condition of admission to higher education linked to previous professional experience acquired in the institutions of the Member State concerned

Core statement: It is contrary to EU law if only applicants who have acquired a certain amount of professional experience at national public higher education institutions for art, music and dance are eligible for admission to a competitive procedure, and thus professional experience acquired in other Member States is not taken into account.

Note: The Court deals with a rule according to which only applicants with a certain professional experience at Italian public higher education institutions for art, music and dance have access to an application procedure. Following its previous case law,[7] the Court holds that such a rule constitutes indirect discrimination and as such violates the freedom of movement of workers who have acquired such professional experience in other Member States; their professional experience must be duly taken into account.

[7] Cf. for example CJEU of 28 April 2022 – C-86/21 – Gerencia Regional de Salud de Castilla y León as well as *Terhechte*, in: Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 1 marginal No. 71 with further references.

<u>Judgment of the Court (Sixth Chamber) of 4 May 2023 – joined Cases C-529/21 to C-536/21 and C-732/21 to C-738/21 – *Glavna direktsia* "*Pozharna bezopasnost i zashtita na naselenieto'*</u>

Law: Arts. 1(3), 12 Working Time Directive 2003/88/EC; Art. 2(2) OSH Framework Directive 89/391/EEC; Arts. 20 and 21 European Charter of Fundamental Rights

Keywords: Firefighters as night workers – Safety and health protection of night workers – Different duration of night duty for public and private employees

Core statements:

1. The Working Time Directive is also applicable to night workers in the public sector, such as firefighters, provided that they carry out their work under normal circumstances.

2. Legislation that sets the fixed normal duration of night work at seven hours for workers in the private sector does not necessarily apply to workers in the public sector if this difference in treatment is based on an objective and reasonable criterion. This presupposes that the categories of workers concerned are in a comparable situation.

Note: Bulgarian law provides for a different regular daily duration of night work for employees in the private sector (7 hours) than in the public sector (8 hours) (e.g. for firefighters or police officers). The plaintiffs in the main proceedings, all firefighters, consider this situation to be discriminatory and have brought actions against it. They request that the more favourable standard be applied to public sector employees as well.

The first question seeks to clarify whether firefighters, who are considered night workers,[8] fall within the scope of the Working Time Directive pursuant to Article 1(3) in conjunction with Article 2 of the OSH Framework Directive (para. 34). This would not be the case if peculiarities of certain specific activities in the public sector, e.g. of the police, necessarily precluded this.

To answer this question, the CJEU refers to its established case law: This exception according to Article 2(2) OSH Framework Directive only applies in situations of particular severity in which it is not possible to plan working time, in order to ensure the protection of public safety, health and order.[9] The mere formal affiliation of workers to one of the areas of activity described in Article 2(2) OSH Framework Directive (e.g. police, fire brigade) is not sufficient (para. 36 et seq.).[10] The decisive factor is the tasks that have to be carried out under exceptional circumstances. The impossibility of planning tasks is not such an exceptional, justifying circumstance. Indeed, it follows from the nature of the work of, for example, the fire brigade and does not preclude the prior organisation of tasks and working hours.[11]

With this ruling, the CJEU therefore also applies its case law on the scope of application of the directives to night workers in the fire service and here as well consistently distinguishes on the basis of the tasks to be performed – not whether they are performed during the day or

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[8] Already recognised for the daytime activities of firefighters in CJEU 3 May 2012 – C-337/10 – *<u>Neidel</u>* and for Directive 93/104/EC in CJEU 14 July 2005 – C-52/04 – *<u>Personalrat der Feuerwehr Hamburg.</u>*

[9] CJEU of 5 October 2004 – C-397/01 – *<u>Pfeiffer et al.</u>*, para. 55; of 3 May 2012 – C337/10 – *<u>Neidel,</u>* para. 21 with further references.

[10] CJEU of 15 July 2021 – C-742/19 – *<u>Ministrstvo za obrambo</u>*, para. 56.

[11] CJEU of 5 October 2004 – C-397/01 – *<u>Pfeiffer and others</u>*, para. 57; of 21 February 2018 – C-518/15 – *<u>Matzak</u>*, para. 7, with comments by *Buschmann*, in <u>HSI Newsletter 1/2018</u>, p. 4 et seq.

at night. This ruling once again explicitly clarifies the scope of protection,[12] which is to be welcomed, especially since night work is associated with risks to workers' mental and physical health.

By its second question, the referring court asks whether it is compatible with Union law for a Member State to treat certain public sector workers differently from private sector workers when regulating the duration of night work (a protective measure under Article 12(a) of the Working Time Directive). This question is not new to the CJEU, as it was already referred to it shortly before in the case *Glavna direktsia "Pozharna bezopasnost i zashtita na naselenieto"*[13] concerning the Bulgarian regulation at issue. Now, as before, the CJEU finds that the Bulgarian court's explanations, e.g. on the objectives of the regulations, are insufficient. Thus the Court did not have full knowledge of the Bulgarian provisions and could not clearly examine their compatibility with Union law.[14] However, the CJEU provides guidance with reference to its previous case law: it again sets out which obligations the Member States have in transposing the Directive (para. 47 et seq.)[15] and when different treatment is justified (paras. 52, 56 et seq.).[16] Similarly as before, the CJEU emphasises the discretion that the Member States have in determining the measures (para. 49).[17]

Judgment of the Court (Seventh Chamber) of 20 April 2023 – C-52/22 – *Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)*

Law: Art. 2(1), Art. 2(2) lit. a and b, Art. 6(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Pension scheme – Different adjustment of the pension of civil servants – Age discrimination – Regulation for the harmonisation of pension systems

Core statement: A national regulation that provides for a different adjustment of the pension depending on the time of the accrual of the pension entitlement and is intended to compensate for disadvantages that certain civil servants have to bear due to reforms of the pension system, and thus in principle serves to harmonise the pension systems, is not in violation of the prohibition of age discrimination.

Judgment of the Court (Seventh Chamber) of 27 April 2023 – C-681/21 – *Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)*

Law: Art. 2(1), Art. 2(2) lit. a, Art. 6(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Retirement pay of civil servants or pension – Age discrimination – Retroactive adjustment – Equal treatment of previously favoured group and previously disadvantaged group

Core statement: Only an urgent ground in the general interest can justify a national rule that retroactively puts a group of civil servants previously favoured by national legislation on

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[12] In *Glavna direktsia"Pozharna bezopasnost i zashtita na naselenieto"* (CJEU of 24 February 2022 – C-262/20, for more details see HSI Report 1/2022, p. 19 et seq.), the issue was whether the Working Time Directive obliges a Member State to stipulate that the duration of night work of public sector employees such as firefighters must be shorter than the duration of day work.

[13] CJEU of 24 February 2022 – C-262/20 – *Glavna* direktsia *"Pozharna bezopasnost i zashtita na naselenieto".*

[14] See also Opinion of Advocate General Pitruzella of 2 September 2021 – C-262/20 – *Glavna direktsia "Pozharna bezopasnost i zashtita na naselenieto"*, para. 57 et seq.

[15] CJEU of 24 February 2022 – C-262/20 – *Glavna* direktsia *"Pozharna bezopasnost i zashtita na naselenieto".*

[16] CJEU of 17 October 2013 – C-101/12 – *Schaible*; of 22 May 2014 – C-356/12 – *Glatzel.*

[17] CJEU of 24 January 2012 – C-282/10 – *Dominguez*; of 24 February 2022 – C-262/20 – *Glavna* direktsia *"Pozharna bezopasnost i zashtita na naselenieto".*

pensions on equal footing with a group of civil servants previously disadvantaged by that legislation.

Judgment of the Court (Second Chamber) of 20 April 2023 – C-650/21 – *Landespolizeidirektion Niederösterreich and Finanzamt Österreich*

Law: Arts. 1, 2, 6 Equal Treatment Framework Directive 2000/78/EC; Arts. 20 and 21 European Charter of Fundamental Rights

Keywords: Civil servant pay – Age discrimination – Classification in a new pay system with reference to the former, discriminatory system – Full consideration of periods of apprenticeship only for civil servants hired after a cut-off date.

Core statements:

1. A transition mechanism to a non-discriminatory pay system for civil servants that now takes into account periods of prior service before the age of 18, but at the same time makes it more difficult to take into account certain periods after the age of 18, constitutes age discrimination.

2. If a new statutory regulation of remuneration leads to the application of the new provisions in pending proceedings and the remuneration is therefore recalculated, but this does not completely eliminate age discrimination, this is an infringement of Union law if, on the other hand, the previously existing discriminatory provisions were not applied in proceedings that have already been concluded, as they were deemed to be contrary to Union law by the CJEU.

3. It is in conformity with Union law if periods of apprenticeship are taken into account in their entirety in the calculation of the salary only if the civil servant was recruited by the state after a reference date, whereas only one-half of such periods are taken into account and are subject to a flat-rate deduction if the civil servant was recruited before that date.

Opinions

Opinion of Advocate General Collins delivered on 4 May 2023 – C-667/21 – *Krankenversicherung Nordrhein*

Law: Arts. 2(2), 2(5) and 4(1) Equal Treatment Framework Directive 2000/78/EC

Keywords: Prohibition of discrimination on grounds of religion or belief – Public institution – Prohibition of wearing visible signs of political, ideological or religious convictions at the workplace – Wearing of a headscarf at the workplace – Principle of the neutrality of the state.

Core statement: The provision in the service regulations of a public body which, with the aim of creating a completely neutral administrative environment, prohibits staff from wearing any visible sign of political, philosophical or religious beliefs in the workplace does not constitute direct discrimination, provided that the provision is applied in a general and undifferentiated way.

Indirect unequal treatment of the wearer of the headscarf on the basis of her religious affiliation, which arises from the prohibition, may be justified by the will of this institution to create a completely neutral administrative environment, provided that this will corresponds to a genuine need of the institution, which it must prove. Furthermore, the unequal treatment must be suitable to ensure the proper implementation of this will; the prohibition must be limited to what is strictly necessary.

Note: The CJEU considers the prohibition of wearing religious signs in the workplace from a discrimination-law perspective. The Court has developed principles in this regard, most recently summarised in the decisions *WABE and MH Müller Handel*[18] and *S.C.R.L.*[19] According to these, a general ban on the wearing of religious symbols may be introduced in the private sector if it is applied in a general and undifferentiated way, if there is a special reason for this, which must be proven by the employer, and if this ban is limited to what is absolutely necessary. The Advocate General upholds these principles and considers that they also apply to public service. In particular, it is legitimate for public employers, in special circumstances, to pursue a policy of an "entirely neutral administrative environment".

New pending cases

Reference for a preliminary ruling from the Arbeitsgericht Mainz (Germany) lodged on 24 April 2023 – C-284/23 – *Haus Jacobus*

Law: Art. 10(1) Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Keywords: Special protection of pregnant women against dismissal – Notification of pregnancy to the employer – Action for protection against dismissal – Exceeding the three-week period for bringing an action pursuant to Section 4 KSchG

Note: In the initial proceedings pending before the Mainz Labour Court (ArbG Mainz)[20] an employee had been dismissed by letter dated 6 October 2022. After the plaintiff was found to be seven weeks pregnant on 9 November 2022, she informed the former employer of the pregnancy on 10 November 2022. She filed an action for unfair dismissal with the Labour Court on 13 December 2022.

Pregnant women enjoy special protection against dismissal under Section 17(1), No. 1 of the Maternity Protection Act (MuSchG), which has effect even when the employer is subsequently informed of the pregnancy. However, according to Section 4 of the Employment Protection Act (KSchG), a complaint must be filed within three weeks of the notice of termination being given. This makes it impossible to invoke protection against dismissal if the pregnant woman only learns of her pregnancy after the deadline for filing a complaint has expired. Section 4, fourth sentence KSchG is not intended to apply.[21] Pursuant to Section 5, No. 1, second sentence KSchG, the action is admitted after the fact if a woman learns of her pregnancy for a reason for which she is not responsible only after the expiry of the three-week period. In this case, however, she has to file an action within two weeks "after the obstacle has been removed", Section 5 No. 3 KSchG. In the present case, the plaintiff did inform the employer about the pregnancy within this period, but did not file the complaint until afterwards. Accordingly, the action would be precluded by the legal fiction of Section 4, first sentence of the KSchG. The ArbG Mainz, in agreement with the literature,[22] rightly considers this legal situation to be incompatible with Article 10 of Directive 92/85/EEC in the light of the principle of effectiveness under EU law[23] and has submitted the question to the CJEU for a decision.

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[18] CJEU of 15 July 2021 – Joined Cases C-804/18, C-34/19 – *WABE and MH Müller Handel* and the instructive comment by Seeland, HSI Report 3/2021, p. 4 et seq.

[19] CJEU of 13 October 2022 – C-344/10 – *S.C.R.L.*, see also the comments by *Klengel/Seeland/Sutterer-Kipping,* in HSI Report 4/2022, p. 32 et seq.

[20] Cf. ArbG Mainz, referral decision dated 24 April 2023 – 4 Ca 1424/22.

[21] BAG of 19 February 2009 – 2 AZR 286/07, NZA 2009, 980.

[22] *ErfK/Schlachter*, § 17 MuSchG, marginal No. 19; *Nebe,* EuZA 2010, 383, 394 et seq.

[23] On the problem also *Winge/Wohlleben/Nebe/Hoffer*, in: Bundesministerium für Familie Senioren, Frauen und Jugend (ed.), Evaluation Mutterschutzgesetz, Berlin 2023.

→ back to overview

5. Fixed-term employment

New pending cases

Reference for a preliminary ruling from the Giudice di pace di Bologna (Italy) lodged on 14 March 2023 – C-163/23 – *Palognali*

Law: Art. 7 Working Time Directive; Clauses 2 and 4 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC); Arts. 31(2) and 47 European Charter of Fundamental Rights

Keywords: Status of Italian honorary judges and justices of the peace – Case-law of the supreme court – Fixed-term employment – Equal treatment to permanently employed professional judges – Leave entitlement – Conditions of employment of a certain classification as a professional judge as a reference point for damages – Removal from office of judges who intend to derogate from national legal practice for the purpose of implementing European Union law

Reference for a preliminary ruling from the Tribunale ordinario di Ravenna (Italy) lodged on 22 April 2022 – C-270/22 – *Ministero dell'Istruzione and INPS*

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

Keywords: Teachers – Taking into account of periods of prior service with a lower number of hours than that applicable in the case of employment for an indefinite period ("residual assignments") – Equal treatment of periods of prior service completed in the context of fixed-term employment relationships –"'Restoration of career" – Interpretation of a previous judgment of the Court of Justice[24]

• back to overview

6. General matters

New pending case

Reference for a preliminary ruling from the Consiglio di Stato (Council of State, Italy) lodged on 11 April 2023, received at the Court on 18 April 2023 – C-242/23 – *Tecno*37*

Law: Art. 59(3) Professional Competence Directive 2005/36/EC; Art. 25(1) Services Directive 2006/123/EC; Art. 49 TFEU (freedom of establishment)

Keywords: General exclusion of the simultaneous exercise of the activity as an estate agent and as a property manager – Compatibility with Union law

[24] Here: CJEU of 20 September 2018 – C-466/17 – *Motter*.

→ back to overview

7. Social security

Decision

<u>Judgment of the Court (Seventh Chamber) of 15 June 2023 – C-411/22 – *Thermalhotel Fontana*</u>

Law: Art. 3(1)(a) Coordination Regulation (EC) No. 883/2004; Art. 7(2) Free Movement Regulation (EC) No. 492/2011; Art. 45 TFEU

Keywords: Isolation/quarantine ordered by the authorities due to COVID-19 infection – State compensation benefit in the case of official isolation order – Sickness benefit – Order of segregation by the state of residence – Exclusion of benefits and competence of the authorities in the case of cross-border commuters – Free movement of persons

Core statements:

1. A state compensation benefit granted to employees as compensation for loss of earnings due to isolation is not a "sickness benefit" according to Article 3(1)(a) of the Coordination Regulation and therefore does not fall within the scope of this Regulation.

2 This allowance may not only be granted to workers who have been ordered to isolate by the authorities of the country of acquisition. It must also cover isolation ordered by other Member State authorities.

Note: The plaintiffs in the main proceedings are employed in Austria, but live in Hungary and Slovenia ("cross-border commuters"). After they tested positive for COVID-19 in the course of their employment, the health authorities of their countries of residence ordered them to be quarantined. Their Austrian employer continued to pay their wages. Austrian law provides for compensation for the loss of earnings resulting from quarantine as a state payment in lieu of remuneration. If the employer pays wages, the claim for remuneration against the federal government is transferred to it. According to this legal basis, the employer applied to the competent authority for payment of the remuneration. The application was rejected because the isolation order was not issued by the Austrian authorities. The employer filed a complaint against this.

The question was whether the compensation was a sickness benefit under Article 3(1)(a) of the Coordination Regulation. In the view of the referring court, the Austrian authorities would then have to treat the quarantine orders pursuant to Article 5(b) of the Coordination Regulation as if they had been issued by an Austrian authority. According to the established case-law of the European Court of Justice, one decisive factor for the assessment is the purpose of the granting of benefits. Sickness benefits serve the purpose of recovery (para. 23 et seq.).[25] The remuneration in question, on the other hand, was an incentive to comply with the quarantine and thus to avoid infections. Moreover, an actual illness is not a prerequisite for payment. It is therefore not a sickness benefit under Article 3(1)(a) of the Coordination Regulation (para. 29).

However, the rule could constitute a violation of the principle of freedom of movement pursuant to Article 45 TFEU and Article 7 TFEU. Since the requirement of remuneration is indirectly linked to the country of residence, the CJEU considers this to be indirect discrimination against cross-border workers (para. 39). Even if the rule serves the legitimate

[25] CJEU of 16 September 2015 – C-433/13 -; of 15 July 2021 – C-535/19 – *<u>A (Public Health Care)</u>*.

purpose of protecting health, it is unsuitable for achieving this goal. This is because the remuneration is also an incentive for migrant workers to comply with the quarantine. Possible double payments in the country of residence and the country of employment are also not a justifying argument, because it is possible for the Austrian authorities to take these into account (para. 44 et seq.).

German law also provides for compensation in case of quarantine-related loss of earnings according to Section 56 of the Infection Prevention Act (IfSG). This benefit has similar conditions and character to the Austrian one: The order must come from the German authorities. It aims to provide financial compensation and economic security for the person who has been isolated to protect public health.[26] Thus, it is likewise not considered a sickness benefit according to Article 3(1)(a) of the Coordination Regulation.[27] In practice, different opinions have been expressed so far on how to deal with quarantine orders issued by the authorities of other Member States, especially in the wake of the COVID-19 pandemic.[28] According to this ruling, when applying Section 56 IfSG, the competent national authorities are obliged to also take into account orders issued by the competent authorities of other Member States, a solution which cushions both migrant workers from negative effects and employers from wage risk.

Opinions

Opinion of Advocate General de la Tour delivered on 22 June 23 – C-422/22 – *Zakład Ubezpieczeń Społecznych Oddział w Toruniu*

Law: Arts. 6, 16, 2 and 20 Implementing Regulation (EC) No. 987/2009; Art. 76 Coordinating Regulation (EC) No. 883/2004

Keywords: Posting of workers – A1 certificate – Withdrawal on the initiative of the issuing institution – No obligation for a prior dialogue and conciliation procedure between social security institutions – Mutual information and cooperation obligations – Obligation of immediate notification of withdrawal

Core statements:

1. If an institution has established on its own verification that it has wrongly issued an A1 certificate, it may withdraw this certificate without first initiating a dialogue and conciliation procedure with the competent institution of the Member States concerned in order to determine the applicable legislation.

2. However, that institution shall be obliged to inform the competent institution of the Member States concerned of the withdrawal decision as soon as possible.

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[26] *Noack*, NZA 2021, 251, 252.

[27] So also *Giegerich*, ZEuS 2/2021, 240, 261; *Task Force Grenzgänger 3.0 der Großregion* (2022), Entschädigung von Grenzgängern in der Großregion bei Quarantäneanordnung und Kinderbetreuung in Corona-Zeiten, p. 16 et seq.

[28] Acknowledging the claim: *Task Force Grenzgänger 3.0 der Großregion* (2022), Entschädigung von Grenzgängern in der Großregion bei Quarantäneanordnung und Kinderbetreuung in Corona-Zeiten, p. 21 ff; rejecting the claim VG Würzburg of 26 September 2022 – W 8 K 22.815, para. 30 ff, 44; *Giegerich*, ZEuS 2/2021, 240; rejecting practical advice is given by the Ministry of Social Affairs of Baden-Württemberg, Information on compensation for segregation and childcare – questions and answers; Ministry of Labour, Health and Social Affairs of North Rhine-Westphalia, Compensation for loss of earnings under the Federal Infection Control Act.

<u>Opinion of Advocate General Rantos delivered on 27 April 2023 – C-45/22 – *Service fédéral des Pensions*</u>

Law: Art. 55(1)(a) Coordination Regulation (EC) No. 883/2004

Keywords: Method of calculating survivors' pensions – Concurrence of pensions from different Member States – National double benefit provisions – Concept of amounts taken into account

Core statement: A national rule on the calculation of the survivor's pension which stipulates that only the part of the income exceeding an accumulation cap of pensions, and not the income as such, is divided by the number of survivor's pensions is compatible with Union law.

New pending cases

<u>Reference for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen (Germany) lodged on 4 May 2021 – C-283/21 – *Deutsche Rentenversicherung Bund*</u>

Law: Art. 44(2) Implementing Regulation No. 987/2009; Art. 21 TFEU

Keywords: Old-age pension – Child-raising period completed in another Member State – Pension entitlement if resident in another Member State – Only credited period, no contribution period before child-raising period

Note: The present case concerns the crediting by the German Pension Insurance Agency of child-raising periods spent in foreign EU countries. The claimant is a German national who lived in the Netherlands for a long time without working. She did not previously hold employment subject to compulsory pension insurance in Germany because she was undergoing training. Training periods, while relevant under pension law, are non-contributory credited periods (Sec. 58(1) No. 4 of Book VI of the Social Code (SGB VI)).

When calculating the amount of the old-age pension, the Agency refused to take into account her child-raising period, as neither the plaintiff nor her husband had been gainfully employed in the Netherlands (Sec. 56(1) and 56(3) SGB VI). The claimant appealed against this decision. According to Article 44(2) of the Implementing Regulation, she was entitled to have this period credited. The referring Regional Social Court, LSG North Rhine-Westphalia,[29] wanted to know whether the requirements of the norm were met.

On the one hand, the basic old-age pension to which the claimant is entitled under Dutch law will not take into account child-raising periods (Article 44(2) of the Implementing Regulation). The basic state old-age pension in the Netherlands is linked solely to whether a person has lived or worked in the Netherlands. For the first question of LSG North Rhine-Westphalia, it is therefore questionable whether the period of bringing up children in the Netherlands as a pure period of residence establishes an entitlement.

Secondly, according to Article 44(2) of the Implementing Regulation, at the time when the child-raising periods would have to be taken into account under German law, the claimant would have had to have been employed or self-employed in Germany, making German pension law applicable at that time. However, in its previous case law on the consideration of foreign child-raising periods, the CJEU has adopted a broad interpretation. It found an adequate connection between the periods of insurance and child-raising periods to be sufficient.[30] Moreover, Article 44(2) is not exhaustive.[31] Following this case law, the LSG finds

[29] The detailed referral decision of the LSG dated 23 April 2021 – L 18 R 1114/16 is available here: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=243903&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=3647858.

[30] CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 7 February 2002 – C-28/00 – *Kauer*.

[31] CJEU of 19 July 2012 – C-522/10 – *Reichel-Albert*; of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*.

it clear that the previous non-contributory credited training period should also be recognised. Consequently, the LSG asks, in its second question, whether the period of training can also establish a sufficient connection to the German social security system. Otherwise, the plaintiff would be placed in a worse position solely because of her choice of residence, which would be incompatible with freedom of movement (Art. 21 TFEU).

This is not the first time Section 56 SGB VI has been the subject of a request for preliminary ruling.[32] In both previous cases, the CJEU found that the provision violates the right to freedom of movement pursuant to Article 21 TFEU. According to Section 56(1) and 56(3) SGB VI, equal treatment with education and training within Germany is only possible if employment outside the country results in compulsory contribution periods in the German pension insurance system, e.g. in the case of a posting. In addition, this employment subject to compulsory contributions has to have been carried out immediately before or during the child-raising phase. German courts[33] and legal practitioners interpret the provision restrictively (despite the decisions of the CJEU).[34] In the case now pending, the elements required under Section 56(3) SGB VI – the compulsory contribution periods, the employment abroad or even the concept of immediacy – could be in dispute. The outcome of the case is therefore eagerly awaited.

Reference for a preliminary ruling from the Szegedi Törvényszék (Hungary) lodged on 14 March 2023, received on 16 March 2023 – C-164/23 – *VOLÁNBUSZ*

Law: Art. 9(3) Regulation (EC) No. 561/2006 on certain social legislation relating to road transport

Keywords: Classification as working time of periods spent by professional bus drivers travelling from their homes to external depots and returning to their homes from those depots

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 25 May 2023 – C-323/23 – *Pensionsversicherungsanstalt*

Law: Art. 7 Free Movement Directive 2004/38/EC

Keywords: Economically inactive Union citizen – Entitlement to social assistance – Duration of residence of more than three months but less than five years – Right of residence as spouse of a migrant worker

→ back to overview

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[32] CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 19 July 2012 – C-522/10 – *Reichel-Albert*.

[33] LSG Hessen of 14 July 2015 – L 2 R 236/14 and subsequently German Federal Social Court (BSG) of 29 September 2017 – B 13 R 365/15 B; BSG of 11 May 2011 – B 5 R 22/10 R; BSG of 29 September 2016 – B 13 E 24/16 BH subsequently German Federal Constitutional Court (BverfG) of 6 March 2017 – 1 BvR 2740/16; BSG of 25 January 1994 – 4 RA 3/93.

[34] *Dankelmann*, in Kreikebohm/Roßbach, SGB VI, § 56 marginal No. 21 et seq.

8. Temporary agency work

Decision

<u>Judgment of the Court (Sixth Chamber) of 22 June 2023 – C-427/21 – *ALB FILS Kliniken GmbH*</u>

Law: Arts. 1(1) and 3(1) Temporary Agency Work Directive 2008/104/EC

Keywords: Staff secondment in the public service – Transfer of undertaking – Objection by the employee to the transfer of the employment relationship – Applicability of the Temporary Agency Work Directive

Core statement: The Temporary Agency Work Directive does not apply if the tasks of a worker are definitively transferred to a new company, this worker has objected to the transfer of the employment relationship to the other company and is now obliged towards the previous employer to perform her/his contractually owed work permanently with the new employer.

Note: Section 1(3) No. 2b of the Act on Temporary Agency Work (AÜG) provides for an exception to the scope of application of the AÜG for the so-called provision of personnel. This covers the scenario in which a public service employer outsources tasks to a third party and transfers staff employed by it to the third party by way of Section 4(3) of the Collective Wage Agreement for the Public Sector (TVöD). In the present case, the transfer was preceded by a transfer of business, in the course of which the employee objected to the transfer of the employment relationship pursuant to Section 613a(6) of the Civil Code (BGB). She was then instructed to nevertheless work for the acquirer within the framework of the provision.

The question of whether the sectoral exemption for the provision of personnel is compatible with EU law and in particular with the Temporary Agency Work Directive is controversial.[35] The Directive does not contain an exception for the public sector. Nevertheless, the Court of Justice sees no infringement. It argues that the Temporary Agency Work Directive refers to temporary assignments. Temporary assignments of a permanent nature are therefore not covered by the scope of the Directive. Contrary to what the statements in the *KG* case suggest,[36] according to which the Member States must also prevent permanent hiring out, an abuse of temporary agency work to the detriment of the employees can be ruled out in the present scenario – as stipulated in the referral decision of the BAG.[37]

Even if the legal doctrine approach of the CJEU is to be followed, the result is not convincing: the Temporary Agency Work Directive is indeed aimed at regulating "temporary" hiring out[38] – but this is against the background that permanent hiring out is regarded by the authors of the directive as a situation to be avoided and is therefore regularly inadmissible pursuant to Article 5(5) Temporary Agency Work Directive.[39] The assumption to be made according to the BAG's referral decision that the provision of personnel works in favour of the employees concerned because it secures their jobs can in turn only be sustained if the employer's decision to outsource tasks, which is the source of the breach of contract, remains completely unquestioned.

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[35] In contrast, for example *Forst,* in Schlachter/Heinig, 2nd ed. 2021, § 16 marginal No. 88; *Hamann*, in Schüren/Hamann, 6th ed. 2022, § 1 marginal No. 87; *Klengel,* AuR 2023, 20, 21; *ErfK/Roloff,* 23rd ed. 2023, § 1 AÜG marginal No. 79; *Ulber*, in Ulber/Ulber, AÜG, 6th ed. 2023, § 1 marginal No. 607.

[36] CJEU of 14 October 2020 – C-681/18, ECLI:EU:C:2020:823 = NZA 2020, 1463 – KG.

[37] BAG of 16 June 2021 – 6 AZR 390/20 (A) marginal No. 43 et seq. (juris).

[38] For example *Forst,* in Schlachter/Heinig, 2nd ed. 2021, § 16 marginal No. 88.

[39] *Klengel*, AuR 2021, 180 with further references; id., in Buhl/Frieling et al. (eds.), Der erwachte Gesetzgeber 2017, p. 101.

What consequences the ruling has for the existence of the other exceptions to the AÜG (in particular intra-group provision of personnel and provision following an objection to the transfer of the employment relationship in the course of a transfer of an undertaking) must be discussed in depth elsewhere.[40] In any case, the CJEU's reasoning is essentially based on the assumed permanent character of the provision of personnel. The other exceptions to the scope of application of the AÜG either concern further cases of temporary provision or at least do not primarily serve job security.

→ back to overview

9. Transfer of business

Opinions

Opinion of Advocate General Pitruzzella delivered on 25 May 2023 – Joined Cases C-583/21 to C-586/21 – *NC*

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

Keywords: Term "transfer of business" – Transfer of a notary's office

Core statement: If a notary occupies the position of notary, performs the same activity at the same workplace as the predecessor and with the same material facilities, and takes over both the records and the staff, the provisions of the Transfer of Undertakings Directive are applicable. It is up to the national court to assess whether these conditions are met.

Note: Can the transfer of a retired notary's office to a successor constitute a transfer of business with the consequence that the employment contracts of the office's employees are transferred to the successor by operation of law? The outcome of the present Spanish preliminary ruling could also have an impact on German law, where the transfer of a notary's office had been found not to be a transfer of an undertaking in an earlier Supreme Court decision.[41] The starting point for the assessment is the Directive on the Transfer of Undertakings: if it stipulates the classification as a transfer of an undertaking, national law cannot deviate from it.

For the Advocate General, the question arises in particular from the point of view of whether the fact that the notary acts in an official capacity in the exercise of his profession precludes the application of the Transfer of Undertakings Directive. According to Article 1(1b) of the Transfer of Undertakings Directive, the decisive criterion is whether an economic activity is carried out. For the Advocate General, the official element of the notarial profession does not prevent it from being classified as a transfer of an undertaking within the meaning of the Directive. As grounds, he refers to the qualification of the notary's office as already undertaken by the CJEU in connection with the freedom of establishment: notaries perform their duties in the public interest, but not in the exercise of sovereign powers. However, this is what is important for the assessment of whether it is an economic activity. This assessment is transferable to the Transfer of Undertakings Directive.[42] Taking all the circumstances into account, he concludes, a notary's office under Spanish law is therefore an economic activity within the meaning of the Directive.

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[40] See for example the comment by *Hamann*, HSI Report 2/2023, p. 5 et seq. (available at www.hugo-sinzheimer-institut.de).
[41] BAG of 26 August 1999 – 8 AZR 827/98.
[42] Opinion of Advocate General Pitruzzella of 25 May 2023 – Joined Cases C-583/21 to C-586/21 – *NC*, para. 25 et seq.; on the transferability of the assessment under competition law and restrictive with regard to the concept of public service used there, however, *Winter,* in Franzen/Gallner/Oetker, Art. 1 RL 2001/23/EC para. 39 et seq.

In assessing the other conditions, the Advocate General points out that a transfer always occurs when the natural or legal person responsible for the management of the undertaking changes. It is also decisive for the transfer of an undertaking that the economic unit retains its economic identity in the course of the transfer. In order to assess this, all circumstances of the individual case must be taken into account. In the concretisation of these requirements for the case of the notary's office, a divergence from the previous case law of the BAG could arise. In a decision from 1999, which is still prominently cited today, the BAG focuses on the fact that the office of notary does not change from the "predecessor" to the "successor", but relates to the respective office holder ("discontinuity").[43] The highly personal notarial authority is the substrate of the notary's office. Since this is not "transferred", but rather reassigned, a transfer of business is ruled out. The Advocate General, on the other hand, takes a primarily economic perspective, for example, by emphasising the takeover of the client base as a criterion, but does not even make separate mention of the notary's licence when examining the preservation of identity.

→ back to overview

10. Working Time

Decision

Judgment of the Court (Second Chamber) of 11 May 2023 – C-155/22 – *Bezirkshauptmannschaft Lilienfeld*

Law: Arts. 6 and 22 Regulation (EC) No. 1071/2009 on the admission to the occupation of road transport operator

Keywords: Road transport – Recording of working time by means of a tachograph – National regulation allowing the transfer of criminal liability for serious infringements regarding driving times and rest periods – Assessment of the good repute of a road transport undertaking

Core statement: Where national law allows criminal responsibility for compliance with the rules of Union law on driving times and rest periods for drivers to be delegated to an agent, the offences attributed to that agent must be taken into account when assessing whether the undertaking satisfies the requirement of good repute.

Note: Long before the ruling of the CJEU in *CCOO*,[44] in which the Court established the general obligation to record working time,[45] the working time of professional drivers had to be recorded on the basis of Regulation No. 1071/2009. The present decision draws attention to the consequences of the failure to record working time for the assessment of the good repute of a road transport undertaking. Pursuant to Article 3(1)(b) of Regulation 1071/2009, good repute is a prerequisite for an undertaking to be able to operate as a road transport undertaking – for example, as a road haulage operator or bus operator.

[43] BAG of 26 August 1999 – 8 AZR 827/98, affirmatively referred to, for example, by *Müller-Glöge*, in MüKo-BGB, 9th ed. 2023, § 613a marginal No. 24; *ErfK-Preis,* 23rd ed. 2023, § 613a marginal No. 14; rightly critical, however, *Aschmoneit,* FA 2019, 66 et seq.

[44] CJEU of 14 May 2019 – C-55/18 – *CCOO* m. Annotation *Lörcher*, HSI Newsletter 2/2019, Annotation under II., p. 4 et seq.

[45] See on German law BAG of 13 September 2022 – 1 ABR 22/21 as well as already *Ulber*, Vorgaben des EuGH zur Arbeitszeiterfassung, HSI-Schriftenreihe Band 32, 2020, p. 62 et seq.

Road transport undertakings are obliged under Article 4(1) Regulation No. 1071/2009 to designate a "transport manager" who is responsible for compliance with the regulation. This is the person in the undertaking who actually and permanently manages the transport activities of the undertaking. The transport manager therefore also bears responsibility under working time law, for example in the sense of the Driving Time Regulation No. 561/2006. Member States may provide that responsibility be delegated to other "relevant persons". The Court of Justice has now ruled that in assessing the reliability of an undertaking within the meaning of Article 6(1)(b)(i) of Regulation (EC) No. 1071/2009, not only criminal convictions committed by transport managers themselves must be taken into account, but also convictions of such relevant persons.

The decision also points out that failure to record working time can have consequences under trade law, beyond the scope of road transport companies. Thus, according to Section 22(3) No. 1 Occupational Safety and Health Act (ArbSchG), the occupational health and safety authorities can order that working time be recorded.[46] A violation of such an order is subject to a fine (Sec. 25(1) No. 2(a) ArbSchG), and in the case of persistent repetition also carries a penalty (Sec. 26 No. 1 ArbSchG).[47] Pursuant to Section 149(2) of the Industrial Code (GewO), these violations must be entered in the central trade register and may be used in the assessment of reliability under trade law pursuant to Sec. 35(1) GewO and the relevant special laws.

→ back to overview

[46] Wrongly doubting *Bayreuther*, NZA 2023, 193, 198 et seq.

[47] *Neuhöfer/Schlüter*, BeckOK Arbeitsschutzrecht, 14th edition, § 25 ArbSchG marginal No. 32.1; *Kleinebrink/Schomburg,* DB 2023, 77; *Donath*, Gute Arbeit 5/2023, p. 26 et seq.; dissenting *Bayreuther,* NZA 2023, 193, 198 et seq., who cites concerns based on the constitutionally founded requirement of certainty, which, however, do not apply due to the obligation concretised by the notice.

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

Decision

<u>Judgment (5th Section) of 22 June 2023 – Nos. 23851/20 and 24360/20 – *X and Others v. Ireland*</u>

Law: Art. 14 ECHR (prohibition of discrimination) in conjunction with Art. 1 Protocol No. 1 (protection of property) and Art. 8 ECHR (right to respect for private and family life).

Keywords: Entitlement to child benefit – Habitual residence as a condition for entitlement – Purpose of child benefit

Core statement: The conditions for receiving social benefits that fall within the scope of Article 1 of Protocol No. 1 must be compatible with Article 14 ECHR, which presupposes that the criterion of comparability with non-disadvantaged persons must be met.

Note: The question in dispute is whether the granting of child benefit may be made dependent on the residence status of the beneficiaries. The complainants are mothers of dependent children and their respective daughter and son. They came to Ireland in 2008 and 2013 and applied for permanent residence under an asylum procedure, which was granted in January 2016 and October 2015, respectively. While still in the asylum process, they applied to the relevant authorities for payment of child benefit for their children in accordance with national legislation. This application was rejected for the period during which the complainants' residence status had not yet been decided, on the grounds that under the legislation, child benefit can only be claimed if the person entitled to it is ordinarily resident in Ireland at the time of the application for child benefit. As the complainants were not yet ordinarily resident in Ireland during the period of the asylum procedure, they were not entitled to claim for that period. An appeal against this decision was unsuccessful at first instance. The Court of Appeal found that the provision had a discriminatory effect and set aside the judgment. The Supreme Court, on the other hand, found neither indirect nor direct unlawful discrimination and dismissed the claims in their entirety.

On the one hand, the applicants allege a violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 and in conjunction with Article 8 of the ECHR, since they were denied a social benefit to which they were entitled solely on the basis of their residence status. In addition, the granting of child benefits was also to be assessed under the aspect of "family life".

The Court first points out that, insofar as the respective children appear as complainants, they are not adversely affected due to the lack of entitlement and therefore cannot be discriminated against within the meaning of Article 14 ECHR. According to the national legal provisions, only the parents or one parent, and not the child, are entitled to the requested benefit. Thus, only the complaining mothers can claim discrimination, so that the children's complaint was inadmissible.

Insofar as the complaint is based on the fact that according to the case law of the CJEU[48] there is a right of residence derived from the primary law of the Union as of the day of birth, the Court emphasises that it is not competent to examine violations of Union law.[49] Therefore, the Supreme Court's finding that the appellants were not in a similar situation to comparable persons who had a right of residence was not open to challenge.

In assessing the comparability of the appellants with persons enjoying a right of residence in Ireland, the circumstances must be assessed in the light of the subject-matter and purpose of the measure making the distinction in question and the context in which that measure was adopted.[50] The Court has emphasised the essentially national character of social security schemes.[51] It also follows from Article 12(4)(a) ESC that states may require not only residence but also a prescribed period of residence in their territory before granting non-contributory social security benefits to eligible persons. The context of the present case does not indicate otherwise. The complaint must be seen in the context of immigration policy. The Court has repeatedly held that a state is entitled under established international law and subject to its treaty obligations to control the entry of aliens into its territory and their stay there. Therefore, it is not objectionable to make eligibility for certain social benefits conditional on a right of residence. The complainants were therefore not in a comparable situation to persons residing lawfully in the country. A violation of Article 14 ECHR was therefore not established.

→ back to overview

2. Freedom of association

Decision

Judgment (2nd Section) of 20 June 2023 – No. 62239/12 – *Kaymak and Others v. Turkey*

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

Keywords: Information status of a trade union – Disciplinary measure against trade union members – "Non-punitive warning"

Core statement: However minor a sanction on trade union activities may be, it is in any case likely to deter trade union members from freely exercising their activities and therefore violates the right to freedom of association and assembly.

Note: The case concerns disciplinary measures imposed on the complainants for engaging in trade union activities. The complainants were employed at Hacettepe University at the time in question. They are members of the Eğitim-Sen, the Education and Science Workers' Union. On 2 November 2010, they set up an information stand in front of the university library from which they distributed leaflets highlighting social grievances and recruited union members. They had applied in writing to the university administration for permission to set up the information stand. Before a decision was made on the application, the information stand was set up. Eventually, permission to carry out the planned activities was denied. The complainants were given a "non-punitive warning" as a disciplinary measure for setting up an

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[48] CJEU of 8 March 2011 – C-34/09 – Zambrano.
[49] ECtHR of 3 October 2014 – 12738/10 – Jeunesse v. Netherlands.
[50] ECtHR of 5 September 2017 – No. 78117/13 – Fábián v. Hungary.
[51] ECtHR of 16 March 2010 – No. 42184/05 – Carson v. United Kingdom.

information stand and distributing leaflets. A complaint against this was unsuccessful before the administrative courts. Appeals against this were dismissed.

In their complaint, the complainants allege that the disciplinary measure, which also affects their professional future, prevents them from exercising their right to trade union activity, in violation of Article 11 ECHR.

According to Article 11(1) ECHR, trade union freedom is a specific form of freedom of association.[52] The phrase "for the protection of its interests" expresses that members of a trade union are entitled to defend their professional interests through collective action.[53] Measured by these standards, the Court considers that the disciplinary measure of "non-punitive warning" is an interference with the complainants' freedom of association. The measure was imposed for the unauthorised setting up of the information stand on behalf of the Eğitim-Sen trade union. It is irrelevant whether it would have been necessary to obtain a specific authorisation for the trade union activities. Such a requirement would arguably not be justified under Article 11 ECHR.[54] In so far as the government has argued that the interference was necessary to protect security and order, the Court cannot see that such objectives were pursued. There is no evidence that the complainants' activities disturbed the work of the university staff or obstructed teaching. Finally, the Court notes that even though the sanction at issue was minor, it was, despite its imprecise classification as "non-punitive", capable of deterring both the complainants and other trade union members from carrying out their activities.[55] The disciplinary measure imposed could at least have a negative impact on the complainants' further professional development. As the government failed to demonstrate that the "non-punitive warning" met a pressing social need, the interference with the complainants' freedom of association was neither proportionate nor necessary in a democratic society. The Court therefore found a violation of Article 11 ECHR and awarded one of the complainants €1,500 in compensation for non-material damage. The other complainants had not applied for adequate compensation.

→ back to overview

3. Procedural law

Decisions

Judgment (2nd Section) of 27 June 2023 – No. 11643/18 – *Ispiryan v. Lithuania*

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

Keywords: Removal from service as school director – Suspicion of a criminal offence – Presumption of innocence

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[52] ECtHR of 27 October 1975 – No. 4464/70 – *National Union of Belgian Police v.Belgium*; ECtHR of 6 February 1976 – No. 5614/72 – *Swedish Train Drivers' Union v. Sweden*; ECtHR of 6 February 1976 – No. 5589/72 – *Schmidt and Dahlström v. Sweden*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey.*

[53] ECtHR of 2 July 2002 – Nos 30668/96, 30671/96 and 30678/96 – *Wilson, National Union of Journalists and Others v. United Kingdom*; ECtHR of 30 July 2009 – No. 67336/01 – *Danilenkov and Others v. Russia*; ECtHR of 26 May 2015 – No. 7152/08 – *Doğan Altun – Turkey.*

[54] ECtHR of 26 May 2015 – No. 7152/08 – *Doğan Altun – Turkey*.

[55] ECtHR of 27 May 2007 – No. 6615/03 – *Karaçay v. Turkey*; ECtHR of 15 September 2009 – No. 30946/04 – *Kaya et Seyhan v. Turkey*; ECtHR of 27 September 2011 – No. 1305/05 – *Şişman et al. a. v. Turkey*; ECtHR of 26 May 2015 – No. 7152/08 – *Doğan Altun – Turkey*; ECtHR of 11 May 2021 – No. 44561/11 – *RID Novaya Gazeta and ZAO Novaya Gazeta v. Russia*.

Core statement: The principle of presumption of innocence is not a procedural guarantee limited to criminal cases; it also applies in civil, disciplinary or other proceedings conducted simultaneously with criminal proceedings.

Note: The subject of the proceedings is a dismissal from the service in connection with pending criminal proceedings. The complainant is a teacher and had been serving as the director of a state high school run by the municipality of Šiauliai since 2014. In March 2017, she was confronted with allegations of having taken bribes from a cleaning company in return for favouring it in the procurement procedure. She denied these allegations. During the criminal proceedings initiated against the complainant on 24 October 2018, she was suspended from duty. The criminal proceedings were still pending at first instance during the proceedings before the Court. After the administration of the municipality of Šiauliai, for its part, had opened an investigation into the allegations of bribery, the competent municipal council decided to remove the complainant from the post of director due to a loss of confidence. The removal from office took effect on 5 October 2018, with one month's salary paid as severance pay to the complainant. An action brought against the removal from office was unsuccessful at all instances.

The complainant alleges a violation of Article 6(2) ECHR, on grounds that her dismissal from the service during the criminal proceedings pending against her violated the presumption of innocence guaranteed by this provision. The decision of the municipal council was based on the assumption that she was actually guilty of the offences with which she was charged. This was shown, in particular, by the characteristic form of the language in which the discussions on the dismissal of the complainant had been conducted in the municipal bodies. In any case, there had been nothing to indicate that the complainant's case was merely one of suspicion.

The Court reiterates that the presumption of innocence enshrined in Article 6(2) ECHR is one of the elements of a fair trial required by Article 6(1) ECHR.[56] According to this, the court is prohibited from prematurely expressing the opinion that the person "charged with a criminal offence" is guilty before guilt has been proven according to legal regulations.[57] This principle also extends to other state officials if they make statements about pending criminal proceedings in a manner that is likely to lead the public to believe the suspect is guilty, thereby prejudicing an assessment of the facts by the judiciary.[58] Such statements must be assessed in the context of the particular circumstances of the individual case.[59] Moreover, the Court reaffirms that the principle of the presumption of innocence is not limited to a procedural guarantee in criminal cases. Article 6(2) ECHR may also be violated in civil, disciplinary or other proceedings conducted simultaneously with criminal proceedings. [60]

In the present case, the Court assumes that the authorities and courts that examined the legality of the complainant's dismissal made findings of fact regarding the allegations made against the complainant. The reason for the removal from office was solely the loss of confidence that had arisen due to the criminal proceedings. Therefore, it cannot be seen that the principle of the presumption of innocence was violated in the proceedings on the dismissal of the complainant. Insofar as the complainant had objected that the way in which the facts of the case were discussed in the bodies of the municipality indicated a prejudgement, it cannot be established that the authorities assumed that the complainant

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[56] ECtHR of 27 February 1980 – No. 6903/75 – *Deweer v. Belgium*; ECtHR of 10 February 1995 – No. 15175/89 – *Allenet de Ribemont v. France*; ECtHR of 29 April 2014 – No. 0043/05 – *Natsvlishvili and Togonidze v. Georgia.*

[57] ECtHR of 25 March 1983 – No. 8660/79 – *Minelli v. Switzerland*; ECtHR of 8 April 2010 – No. 40523/08 – *Peša v. Croatia*.

[58] ECtHR of 10 February 1995 – No. 15175/89 – *Allenet de Ribemont v. France*; ECtHR of 10 October 2000 – No. 42095/98 – *Daktaras v. Lithuania*; ECtHR of 26 March 2002 – No. 48297/99 – *Butkevičius v. Lithuania*.

[59] ECtHR of 10 October 2000 – No. 42095/98 – *Daktaras v. Lithuania*; ECtHR of 28 April 2005 – No. 72758/01 – *A. L. v. Germany*; ECtHR of 24 January 2017 – No. 57435/09 – *Paulikas v. Lithuania*.

[60] ECtHR of 27 November 2018 – Nos. 53561/09 and 13952/11 – *Urat v. Turkey*.

was guilty. On the contrary, it has been repeatedly pointed out in the meetings of the municipal council that the proof of a criminal offence can only be established by the courts.

The Court therefore found that there was no violation of Article 6(2) ECHR.

The decision provides a further contribution to the discussion on whether the presumption of innocence enshrined in Article 6(2) ECHR precludes the admissibility of a dismissal on suspicion under German labour law. According to the case law of the Federal Labour Court,[61] this principle only applies to criminal courts. Only the judge who has to decide on the merits of the charge is bound by the presumption of innocence. On the other hand, legal consequences – such as the termination of an employment relationship – which do not have a punitive character can be linked to a residual suspicion in judicial decisions.[62] It is deduced from this that, notwithstanding Article 6(2) ECHR, the termination of an employment relationship on suspicion of a breach of duty is effective if it is based on the court's own assessment on the basis of the lower standard of proof under civil law and the labour court abstains from a criminal law assessment. This applies all the more to a "mere" dismissal on suspicion.[63] This view is shared by the prevailing opinion in academic discourse.[64] Only a few authors express the view that the dismissal on suspicion must be assigned to the material scope of application of the presumption of innocence in view of the seriousness of its consequences and because it is covered by the complementary function of the presumption of innocence to protect the fundamental rights of the employee concerned.[65] The current decision of the Court of Justice, according to which the presumption of innocence is not to be limited to criminal proceedings, but is also to be taken into account in other, in particular civil law disputes, therefore has an impact on the question of the admissibility of dismissals on suspicion.

Judgment (2nd Section) of 20 June 2023 – No. 24492/21 – *Alkan v. Turkey*

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

Keywords: Rejection of a candidate for a judicial office – Appointment procedure without judicial review – Right of access to a public office

Core statement: The right to equal access to public service is a constitutionally protected right, and thus applicants have a judicially reviewable right to know whether the decision to appoint or reject was made arbitrarily.

Note: The complainant is a graduate of a Turkish law school. In June 2018, he took the compulsory exam to become an administrative judge, which he passed with 88 out of 100 points. In September 2018, it was announced that he had failed the exam after an oral hearing, although reasons for this decision were not given. He appealed this to the Ministry of Justice, which upheld the decision that he had passed the exam. The Council of Judges and Prosecutors (HSK), to which the applicant's personal file was forwarded, refused to appoint the applicant as a judge on the grounds that he did not meet the requirements for appointment. No further justification was given. An application for review filed by the complainant with the HSK was rejected. An appeal against this decision was rejected without reasons being giving. The Constitutional Court, which was then called upon, declared itself to be without jurisdiction with regard to the review of decisions of the HSK.

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[61] BAG 14 September 1994 – 2 AZR 164/94.

[62] BVerfG 29 May 1990 – 2 BvR 254/88.

[63] BAG 31 January 2019 – 2 AZR 426/18.

[64] *ErfK/Niemann* BGB § 626 marginal No. 176; *Belling*, Festschrift für Otto Rudolf Kissel zum 65. Geburtstag, 1994, p. 11 et seq.

[65] *Deinert*, Arbeit und Recht 2005, p. 285 et seq.

The complainant argues that he did not have access to a court to challenge the HSK's decision to reject his application to become a judge. This is a violation of the right of access to a court under Article 6 ECHR.

The applicability of Article 6 ECHR to civil claims requires that there be a dispute about a "right" that is protected under domestic law. The actual existence of a right, which must be a "civil" right, is not sufficient; there must also be a serious dispute about its scope and the manner in which it is exercised.[66] Since the right to equal access to the civil service is a constitutionally protected right, rejected applicants must have access to independent courts to have the decision reviewed. As the applicant had passed the written and oral examinations as requirements for access to the judiciary, he also had a right of access to a court under Turkish law.[67] With regard to members of the civil service and also judges,[68] disputes are to be considered "civil" unless the state has expressly excluded access to court for this category of employees and the exclusion is justified by objective reasons, which must be in the state's interest.[69] As the Court has already ruled,[70] the HSK is not a "court" within the meaning of Article 6 ECHR. It follows that the applicant was excluded from access to a court. There were also no objective reasons in the interest of the state justifying this exclusion. The Court points out that there is a clear link between the integrity of the appointment process of judges and the requirement of judicial independence.[71] Judges are selected according to objective criteria in order to ensure public confidence in the judiciary and to complement the guarantee of personal independence.[72] It was therefore essential that the complainant, who fulfilled the requirements for appointment to the judiciary, be able to have the negative decision reviewed by a court within the meaning of Article 6 ECHR. The Court found that the complainant's right of access to a court had been violated and therefore found a violation of Article 6 ECHR.

Judgment (5th Section) of 8 June 2023 – No. 18326/19 – *Alonso Saura v. Spain*

Law: Art. 6 ECHR (right to a fair trial) – Art. 14 ECHR (prohibition of discrimination) – Art. 1 Protocol No. 12 (general prohibition of discrimination)

Keywords: Rejection of a candidate – Adequate statement of reasons for the rejection decision – Discretion of public authorities – Jurisdiction of the Court of Justice to examine the case

Core statement: A state decision is only arbitrary and violates the right to a fair trial if it is not reasoned or the reasoning is based on a manifest error of fact or law which would amount to a denial of justice.

Note: The subject of the dispute is the complainant's allegation that the decision to fill the position of President of the Supreme Court was not adequately reasoned by the national authorities and that she was rejected because of her gender. The complainant is a judge and applied for the post of President of the Supreme Court of Murcia together with two other candidates, both male, one of whom withdrew his application during the procedure. At the end of the selection process, the remaining male candidate was appointed President of the

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[66] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

[67] ECtHR of 26 July 2011 – No. 58222/09 – *Juričić v. Croatia*; ECtHR of 7 April 2022 – No. 18952/18 – *Gloveli v. Georgia*.

[68] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.

[69] 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*.

[70] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

[71] ECtHR of 18 October 2018 – No. 80018/12 – *Thiam v. France*.

[72] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*.

Supreme Court by the Standing Committee of the General Council for the Judiciary (Council). The selection decision is made by the Council in the exercise of its discretion, as is the right of state authorities or courts. The appellant challenged the decision in court. The Supreme Court upheld her appeal and annulled the Council's decision. The reasons given included that the complainant had sufficiently demonstrated that she was the preferred candidate over the two male candidates on the basis of objective selection criteria. It was not sufficiently clear from the statement of reasons for the Council's decision what justified the appointment of the male candidate despite the less favourable objective selection criteria. Therefore, the statement of reasons for the Council's decision was insufficient. The Council therefore annulled its original appointment decision and reappointed the selected candidate as President of the Tribunal. This decision provided detailed reasons as to why certain selection criteria had been better assessed in the case of the selected candidate than in the case of the complainant. The complainant also appealed against the Council's new selection decision. The appeal was dismissed by the Supreme Court, which considered the reasons for the renewed decision to be sufficient. A constitutional complaint was dismissed as inadmissible.

The complainant alleges discrimination on the basis of her sex in relation to the right of access to public office. She claimed that the state authorities and courts failed to take into account discrimination under the pretext of exercising their discretion. Moreover, she argued that the reasoning of the Council's second decision did not comply with the requirements established by the Supreme Court in annulling the first selection decision. Therefore, the applicant submits that her right to a fair hearing was infringed.

With reference to its case law[73] and without further justification, the Court assumes with remarkable brevity that the legal classification of the facts is a matter for the Court and comes to the conclusion that the complaint is to be assessed exclusively under the aspect of Article 6 ECHR. There is no further examination of whether the selection decision discriminated against the complainant because of her sex within the meaning of Article 14 ECHR or Article 1 Protocol No. 12.

As regards a violation of Article 6 ECHR, the Court points out that judgments of state courts must be sufficiently reasoned as a consequence of the proper administration of justice. The extent of this obligation to state reasons may vary depending on the nature of the decision and must be determined in light of the circumstances of the individual case.[74] It is true that the courts do not have to deal in detail with every argument put forward by the parties to a case. However, the parties may expect to receive a specific and clear response to those arguments that are relevant to the decision.[75] It is not the role of the Court to review judgments of state courts for possible errors of law or fact. The only time this does not apply is when rights and freedoms protected by the ECHR are violated.[76] The Court cannot assume the function of a "fourth" instance and can therefore only review judgments of domestic courts as to whether they are arbitrary or manifestly unreasonable.[77] A decision of a state court is only arbitrary if it is not reasoned or if the reasoning is based on a manifest error of fact or law and would amount to a denial of justice.[78] Measured against these standards, the Court assumes that the Supreme Court's decision on the Council's second decision was sufficiently reasoned and could not be classified as arbitrary. In particular,

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[73] ECtHR of 20 March 2018 – Nos. 37685/10 and 22768/12 – *Jakeljić and Others v. Croatia.*

[74] ECtHR of 21 January 1999 – No. 30544/98 – *García Ruiz v. Spain*.

[75] ECtHR of 9 December 1994 – No. 18390/91 – *Ruiz Torija v. Spain*; ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal.*

[76] ECtHR of 21 January 1999 – No. 30544/98 – *García Ruiz v. Spain*.

[77] ECtHR of 21 March 2000 – No. 34553/97 – *Dulauran v. France*; ECtHR of 15 November 2007 – No. 72118/01 – *Khamidov v. Russia*; ECtHR of 9 April 2013 – No. 1401/08 – *Anđelković v. Serbia*; ECtHR of 5 February 2015 – No. 22251/08 – *Bochan v. Ukraine.*

[78] ECtHR of 11 July 2017 – No. 19867/12 – *Moreira Ferreira v. Portugal.*

reference is made to the wide margin of discretion that the Council had in appointing the President of the Court. The complainant also had sufficient opportunity to present her arguments. Overall, the Court concludes that the Supreme Court's assessment was not so arbitrary or manifestly unreasonable as to affect the fairness of the proceedings. The Court therefore found, by six votes to one, that there had been no violation of Article 6 ECHR.

Judge Mourou-Vikström and Judge Ravarani delivered a concurring special opinion on the Court's decision. They agree that the Court does not have to review discretionary decisions of national courts and authorities. However, they also see the problem that objective criteria can be overridden by subjective criteria in selection decisions for public office. They therefore propose to assign certain coefficients of weighting to objective and subjective criteria in order to prevent the selection decision from being influenced too much by a subjective assessment.

Justice Jimena Quesada, in a dissenting opinion to the Court's decision, considers the Supreme Court's judgment on the Council's second selection decision to be insufficiently reasoned and to be in violation of Article 6 ECHR. In particular, however, she takes the view that the Court should have found a violation of Article 14 and Article 1 Protocol No. 12. This follows in particular from the fact that Spanish legislation also requires a balanced representation of women and men in the appointment of public offices in order to ensure effective equality. The legally required implementation of measures to promote women in public service should have been taken into account in the discretionary decision of the national authorities and courts.

New pending cases (notified to the respective government)

No. 30906/19 – *Kandemir v. Turkey* (2nd Section) – lodged on 30 May 2019 – communicated on 20 June 2023

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

Keywords: Termination of employment – Suspicion of participation in anti-government activities – Conditions for termination under domestic law

Core statement: The complainant was employed at the Scientific and Technical Research Institute of Turkey (TÜBİTAK) as an accountant. The TÜBİTAK is a legal entity under public law supporting the government in the field of science and technology. On 31 August 2016, the complainant's employment was terminated without payment of severance pay. The reason given was that he was suspected of having supported the attempted coup on 15 July 2016. An action brought against this, which was directed towards the cancellation of the dismissal and, in the alternative, the payment of compensation for dismissal, was unsuccessful before the domestic courts. A constitutional complaint was rejected as obviously unfounded. According to Turkish labour law, there are two types of dismissals that entitle the employer to terminate an employment relationship with the employee. On the one hand, an employment relationship can be terminated for operational, personal or behavioural reasons. In addition, there is the possibility of termination without notice for good cause. In any case, the employer must clearly state the reason for the termination. If an action is brought for protection against dismissal, the employer must explain the reasons for the dismissal in detail and prove them.

The complaint alleges that, according to national law, the dismissal was not sufficiently substantiated by the employer. The employment relationship was only terminated on the basis of suspicion, without any concrete allegation being established which could have constituted grounds for dismissal. Therefore, the complainant's dismissal had not been heard by the domestic courts in a fair hearing, which constituted a violation of Article 6 ECHR.

In view of its previous case law[79] on Article 6 ECHR, the Court wants to examine whether dismissal on the basis of mere suspicion of a breach of duty can be permissible if domestic law requires the presentation of a concrete demonstrable reason to justify the termination of an employment relationship.

- back to overview

4. Protection of privacy

Decision

Judgment (3rd Section) of 4 April 2023 – No. 29943/18 – *Gashi and Gina v. Albania*

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

Keywords: Criminal proceedings against public prosecutors – Suspension after discontinuation of criminal proceedings – Damage to reputation as a consequence of suspension

Core statement: A suspension of a civil servant ordered because of pending criminal proceedings constitutes a violation of Article 8 ECHR under certain conditions, as it is likely to damage the professional reputation and deprives the person concerned of the opportunity to pursue his or her professional and personal development goals.

Note: The case concerns a suspension from service due to allegations of criminal misconduct. The complainants are a married couple and work as prosecutors in different law enforcement agencies. Under a law that entered into force in 2003, judicial staff are required to make annual asset declarations to a National Assets and Conflicts of Interest Audit Inspectorate (HIDAACI). In 2016, Albania underwent a major reform of the judicial system, in particular to fight corruption. Among other things, all acting prosecutors were audited by an independent commission (IQC). They had to make comprehensive declarations about the origin of their assets and those of their spouses and other family members. The IQC concluded that the complainant and the complainant had made incorrect declarations with regard to their assets and were suspected of trying to conceal the origin of those assets. As a result, a criminal investigation was initiated in March 2018, on the basis of which the couple was suspended from performing their duties as public prosecutors on 11 May 2018 with continued payment of their salaries. By judgment of 8 November 2018, the Administrative Court annulled the suspension order. According to domestic law, a suspension of judicial officers could only be ordered in the case of an accusation of a "serious criminal offence". Such an offence had not been committed in the case of the complainants. The criminal proceedings instituted against the complainants were definitively discontinued in April 2019. Thereupon, they demanded that their employer lift the suspension, which had already been lifted on the basis of the Administrative Court's decision of 8 November 2018. The complainant (Gina) resumed his duties as of January 2020. The complainant (Gashi) was dismissed from service as of 29 May 2019 in the context of disciplinary proceedings initiated against her.

The complainants claim to have suffered a violation of their right to respect for private life due to the suspension from service, which continued even after the criminal proceedings against them had been discontinued, contrary to the court's order to annul them. They claimed their

[79] ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin v. Turkey*.

professional reputation in public was damaged by the suspension and that furthermore they were hindered in their professional and personal development by the measure.

The Court first reiterates the principles developed in its case law[80] according to which labour disputes do not per se fall within the scope of "private life" as defined in Article 8 ECHR. However, some typical aspects of working life, such as disputes over dismissals, demotions, access to a profession or similar measures, may have consequences for private life and therefore concern the protection of Article 8 ECHR. As far as the burden of proof is concerned, it is up to the complainant to show and prove that the consequences of the contested measure are so serious that they substantially affect his or her private life.[81] In the proceedings before the ECtHR, the complainant Gashi primarily argued with regard to the damage to her reputation, i.e. the negative effects of the measure in question, that this was due to the criminal proceedings initiated against her. In contrast, it was not argued that her public reputation had been affected by the suspension. Therefore, she had not sufficiently shown that the negative consequences of the suspension were so serious that a violation of Article 8 ECHR had to be assumed.[82] In this respect, her complaint pursuant to Article 35(3) lit. a and 35(4) ECHR must be rejected. As regards the complainant Gina, the government has not explained why the lifting of the suspension ordered by the judgment of 8 November 2018 was not implemented and he was prevented from performing his official duties for more than 20 months. This situation continued even after the dismissal of the criminal proceedings against him, which was ordered in April 2019. He continued to be deprived of the possibility to take up his job and to move freely in his professional environment, as well as to pursue his professional and personal development goals.[83] This interference with the right to respect for private life was also not provided for by law, which would have presupposed that the contested measure met the requirements of the rule of law.[84] This applies to judicial staff, just the same as to other citizens, who enjoy protection against arbitrariness by the executive power.[85] The suspension would only have been lawful under domestic law if the offence with which the complainant Gina was charged had been a "serious criminal offence". However, this was not the case according to the Administrative Court's ruling of 11 May 2018. Therefore, the continued suspension of the complainant lacks any justification.The Court therefore unanimously found a violation of Article 8 ECHR with regard to the complainant Gina and ordered the government to pay compensation of €4,500. The applicant's complaint was dismissed as inadmissible.

→ back to overview

[80] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine.*

[81] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine.*

[82] ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*; ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova v. Bulgaria*; ECtHR of 27 November 2018 – No. 45434/12 – *J. B. and Others v. Hungary.*

[83] ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*; ECtHR of 22 July 2021 – No. 11423/19 – *Gumenyuk and Others v. Ukraine*.

[84] ECtHR of 22 December 2020 – No. 14305/17 – *Selahattin Demirtaş v. Turkey*.

[85] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*; ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*.

5. Protection of property

Decision

Judgment (5th Section) of 22 June 2023 – No. 61721/19 – *Kubát and Others v. Czech Republic*

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

Keywords: Unlawful reduction of remuneration – Entitlement to retroactive reimbursement – Public interest in the case of state austerity measures

Core statement: A public interest justifying the deprivation of property must take second place to the individual interest of the person concerned if the interference with the property leads to an excessive burden.

Note: The dispute raises the question of whether a right to retroactive reimbursement of remuneration was given on the basis of a court decision which found that a reduction in remuneration was unlawful. The complainants are serving judges. In the course of the global financial crisis in the period from 2011 to 2014, judges' salaries were reduced by 5% on the basis of a statutory regulation. The law was declared unconstitutional by the Czech Constitutional Court, although it was explicitly stated that the unconstitutionality could only have an ex nunc effect. As a result, judges could only claim the difference to the salaries actually paid for the period from 2013 to 2014. One judge, who is not one of the complainants, was awarded the differential remuneration for the entire period of the reduction based on a decision of the Supreme Court. The complainants brought an action for payment of the differences in remuneration arising from the statutory reduction for the period from 2011 to 2014. Their claims were rejected with reference to the decision of the Constitutional Court insofar as they concerned claims arising before 2013. Constitutional complaints filed against this were unsuccessful.

The complainants submit that the reduction of their remuneration on the basis of a statutory provision declared unconstitutional interferes with the protection of their property without this being justified under the conditions of Article 1 of Protocol No. 1. Furthermore, they allege a violation of Article 6 ECHR, as the decision of the Constitutional Court was not sufficiently reasoned. Finally, they claim a violation of Article 14 ECHR, as they were discriminated against compared to other civil servants whose salaries were not reduced during the period in question.

With regard to the admissibility of the complaint under Article 1 of Protocol No. 1, the Court reiterates that under this provision there is no entitlement to a state salary of a certain amount.[86] It is at the discretion of the state to determine the amount of remuneration paid to employees from the state budget. It may introduce, suspend or terminate certain benefits on the basis of statutory provisions. Insofar as the state decides on austerity measures and reduces the salaries of public employees for a limited period of time on the basis of a statutory provision, this does not constitute an interference with the property of the persons concerned within the meaning of Article 1 of Protocol No. 1.[87] Since the present case did not concern the right of the state to reduce the salaries of judges, but only the question of whether, on the basis of the decision of the Constitutional Court, there is a claim for

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[86] ECtHR of 19 April 2007 – No. 63235/00 – Vilho Eskelinen v. Finland.
[87] ECtHR of 6 December 2011 – No. 44232/11 – Mihăieş and Senteş.

retroactive reimbursement of the unlawfully unpaid differences in remuneration, the scope of application of Article 1 of Protocol No. 1 is available.

Concerning the ex nunc effect of the Constitutional Court's decision on the unlawfulness of the reduction in remuneration, it was permissible. In principle, a constitutional court is entitled to set a deadline for the legislature to create a legal situation in conformity with the constitution, within which unconstitutional provisions remain temporarily applicable.[88] Especially in such a sensitive area as the economic policy of a country, such measures may be justified in times of severe economic crises, taking into account a public interest.[89] With regard to the question of whether the interference was proportionate, the interests of the complainants must be weighed against the public interest. The fixing of the level of remuneration of judges serves to ensure that they exercise their judicial functions independently and impartially.[90] In this respect, the Court cannot find that with a 5% reduction in salary, the livelihood of the judges concerned appeared to be at risk[91] and they were no longer able to perform their duties. Likewise, it must be taken into account that the Constitutional Court had declared the legislation unconstitutional, as the reduction of judges' salaries was not based on a sound economic analysis. In any case, the Court concludes that the interference with the complainants' pecuniary interests was proportionate and that there was therefore no violation of Article 1 of Protocol No. 1. Insofar as the complaints are based on a violation of Article 6 ECHR and Article 14 ECHR, the Court dismissed them for manifest lack of merit.

New pending cases (notified to the respective government)

No. 22824/21 – *Akhundov v. Azerbaijan* (1st Section) – lodged on 26 April 2021 – communicated on 15 May 2023

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

Keywords: Suspension of an old-age pension – Political asylum

Note: The complainant was a police officer who, after 26 years of service, was granted a retirement pension as of May 2016. The payment of the pension was stopped in October 2017 on the grounds that the complainant had been granted political asylum in Germany. An action brought against the decision of the State Social Security Fund was dismissed with final effect.

The complainant alleges a violation of Article 1 of Protocol No. 1.

The question to be answered by the Court is whether there has been an interference with the complainant's protected property and whether this was in the public interest, taking into account an excessive individual burden.[92]

→ back to overview

[88] ECtHR of 30 November 2010 – No. 23614/08 – Henryk Urban and Ryszard Urban v. Poland; ECtHR of 16 March 2000 – No. 33916/96 – Walden v. Liechtenstein.
[89] ECtHR of 12 February 2019 – No. 57275/17 – Frantzeskaki v. Greece.
[90] ECtHR of 26 April 2006 – Nos. 3955/04, 5622/04, 8538/04 and 11418/04 – Zubko and others v. Ukraine.
[91] ECtHR of 15 October 2013 – No. 66365/09 – Savickas and Others v. Lithuania.
[92] ECtHR of 3 March 2011 – No. 57028/00 – Klein v. Austria.

6. Social security

New pending cases (notified to the respective government)

No. 22415/22 – *Toader v. Romania* (4th Section) – lodged on 3 May 2022 – communicated on 14 June 2023

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

Keywords: Severe disability – Erroneous assessment of the state of health – Entitlement to a personal assistant

Note: The 89-year-old complainant suffers from mono-paresis after breaking her leg. She is bedridden and dependent on assistance with eating, personal hygiene and almost all activities of daily living. A social assessment report recommended that she be provided with personal assistance. A Commission for the Assessment of Adults with Disabilities (Neamț Commission) determined in October 2020 that the complainant's health situation did not amount to a severe disability. An appeal against this decision was successful and resulted in the Neamț Commission being ordered to certify the complainant as having a disability and requiring personal assistance. On appeal by the Neamț Commission, the decision was overturned on the grounds that the complainant's illness did not qualify as a disability under domestic law.

The complainant is of the opinion that the national courts made an erroneous assessment of her state of health and thus violated Article 8 ECHR. In addition, discrimination on the grounds of age and state of health within the meaning of Article 14 ECHR is alleged.

The question here is whether the way in which the domestic courts examined the complainant's state of health with regard to the existence of a severe disability violated Article 8 ECHR.

No. 29634/22 – *I.M.P. v. Romania* (4th Section) – lodged on 6 June 2022 – communicated on 11 May 2023

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

Keywords: Severe disability – Incorrect assessment of the state of health – Entitlement to personal assistance

Note: The complainant is 79 years old and suffers from Alzheimer's disease. According to medical assessment, she suffers from severe cognitive dysfunction with the consequence that she is dependent on personal assistance for the activities of daily living. The Maramureș Commission for the Evaluation of Adults with Disabilities certified the existence of a severe disability for the complainant in December 2020. As a result, she also applied for a declaration that she requires personal assistance. The application was rejected on the grounds that although she was disoriented, she was not entitled to personal assistance as she could still eat and walk independently. Appeals against this decision before the national courts were unsuccessful.

The complaint alleges both a violation of Article 8 ECHR and Article 14 ECHR, claiming that her disability and her state of health were not sufficiently examined. Furthermore, she was discriminated against because of her age and her state of health.

The question here is whether the way in which the domestic courts examined the complainant's state of health with regard to the existence of a severe disability violated Article 8 ECHR.

No. 45135/21 – *Zupičić-Pešut v. Croatia* (2nd Section) – lodged on 2 September 2021 – communicated on 5 May 2023

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

Keywords: Accident at work – Entitlement to health insurance benefits

Note: The complainant suffered severe damage to her eyesight, which she claimed was due to gas poisoning at her workplace. In proceedings concerning the granting of pension rights, the national authorities established by final judgment that the accident had been an occupational accident. In another case, where benefits were claimed from the health insurance fund, they were refused on the grounds that the injury was not due to an occupational accident.

The complainant claims, with reference to Article 6 ECHR, that the domestic authorities that had to decide on the benefits of the health insurance fund re-examined a fact that had been legally established in another administrative procedure and decided differently on it.

The Court of Justice will have to examine the question of whether the approach of the state authorities of evaluating a situation differently in legal terms violated the principle of legal certainty.[93]

No. 38384/19 – *Hedeș v. Romania* (4th Section) – lodged on 4 July 2019 – communicated on 5 May 2023

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

Keywords: Repayment of an old-age pension – Misapplication of the law – Reassessment of the pension

Core statement: The complaint concerns the review of an old-age pension and a resulting recovery. The complainant had been receiving an old-age pension since 2009. In 2017, she was informed by the local pension authority that a processing error had occurred in the calculation of the pension amount, which was based on an incorrect application of the law. The correct calculation resulted in a reduction of the pension. The previous overpayment was to be reimbursed with respect to a period of three years, equivalent to approximately €2,000. The plaintiff filed an action against this, which was rejected in the final instance on the grounds that a calculation error by the pension authority could not be established.

The complainant is of the opinion that the order to reimburse based on the recalculation of pension entitlements after eight years violates her right to protection of property.

It is questionable whether such an interference was justified within the meaning of Article 1 of Protocol No. 1, taking into account the case law of the Court of Justice.[94]

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[93] ECtHR of 12 January 2006 – Nos. 47797/99 and 68698/01 – *Kehaya v. Bulgaria*; ECtHR of 31 May 2012 – No. 50208/06 – *Esertas v. Lithuania*; ECtHR of 16 January 2014 – No. 42009/10 – *Brletić v. Croatia*.

[94] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*; ECtHR of 26 April 2018 – No. 48921/13 – Čakarevic v. Croatia.

<u>44434/15, 50631/15 – Melnyk v. Ukraine – lodged on 26 August 2015 and 28 September 2015, respectively; communicated on 24 April 2023</u>

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

Keywords: Reduction or discontinuation of the old-age pension – Gainful employment in addition to receiving the old-age pension

Core statement: The complainant Melnyk receives a state pension and also worked as a private entrepreneur. In March 2015, legislation was passed that reduced the retirement pension of employed pensioners by 15 % until 31 December 2015. As a result, the complainant's pension was reduced accordingly. The action brought against this was unsuccessful before the domestic courts.

Melnyk asserts that his right to protection of property was violated by the reduction of the pension.

The complainant Skrybka also receives an old-age pension and worked as a civil servant. The law adopted in March 2015 provided that payments of old-age pensions to civil servants would be completely suspended until 31 December 2016.

In addition to a violation of Article 1 of Protocol No. 1, Skrybka also alleges a violation of Article 14 of the ECHR, as he was disadvantaged by the complete cessation of pension payments in comparison to employed pensioners who were not civil servants and whose old-age pension was reduced by only 15%.

→ back to overview

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