REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
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Contents

I. Editorial

HSI Report 3/2024 chronicles 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 July to September 2024.

The **CJEU overview** again contains some highly relevant judgments. In the case *KfH* (C-184/22), the Court confirms its case law on discrimination against part-time employees with regard to overtime pay and comments on discrimination on grounds of sex. In *CU* (C-112/22 and C-223/22) as well, the CJEU continues to follow its previous case law: Residency conditions for access to social welfare benefits for third-country nationals with long-term residence status may conflict with the objective of integration. Furthermore, important preliminary ruling questions were submitted in connection with the paradigm shift in collective redundancy law at the German Federal Labour Court (BAG) (C-402/24 – *Sewel* and C-134/24 – *Tomann*).

The **ECtHR overview** includes several judgments, for example on the protection of whistleblowers in case No. 15028/16 – *Hrachya Harutyunyan v. Armenia*. In addition, a large number of new proceedings are pending, for example concerning the unilateral obligation of teachers to work during a strike (No. 45299/22 – *Teachers' Trade Union and Teachers' Democratic Trade Union v. Hungary*). As restrictions on the right to strike in certain service professions are also being ordered by courts and discussed politically in Germany, the decision is eagerly awaited.

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

The editors
Prof Dr Martin Gruber-Risak, Prof Dr Daniel Hlava and Dr Ernesto Klengel

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II. Proceedings before the CJEU

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Translated from the German by Allison Felmy

1. Annual leave

Decision

Order of the Court (Sixth Chamber) of 24 July 2024 – C-689/22 – *Unione di Comuni Alta Marmilla*

Law: Art. 7(2) Working Time Directive; Art. 31(2) EU Charter of Fundamental Rights

Keywords: Compensation for untaken leave upon termination of employment – Exclusion of compensation for reasons of economy and efficiency

Core statement: Article 7(2) Working Time Directive and Article 31(2) EUCFR preclude a national regulation that refuses to compensate managers of public authorities for unpaid leave upon retirement because the public sector intends to save costs in this way.[1]

New pending case

Reference for a preliminary ruling from the Curtea de Apel București (Romania) of 8 April 2024, received on 17 April 2024 – C-272/24 – *Tribunalul Galați*

Law: Art. 19(1) TEU; Arts. 3, 5, 6 and 7 Working Time Directive 2003/88/EC

Keywords: Judges' overtime – Staff shortage in court – Compensatory time off instead of overtime pay – Actual impossibility to take annual leave – Judicial independence

Note: A Romanian judge works overtime due to a shortage of court staff and is therefore unable to take his paid annual leave. He sues for compensation for the overtime. However, the legislation on the remuneration of judicial staff does not provide for the possibility of compensatory payments for overtime worked, only time off in lieu. The referring court points out that the remuneration and financial stability of judges constitute a guarantee of their independence and therefore asks whether Article 19(1)(2) TEU and provisions of the Working Time Directive preclude the prohibition of compensatory payments, in particular because the right to paid annual leave is affected.

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[1] See already CJEU of 18 January 2024 – C-218/22 – *Comune di Copertino* as reported in HSI Report 2/2023, p. 4 et seq. and HSI Report 1/2024, p. 3 et seq., for a case of voluntary termination.

2. Collective redundancy

Decision

Judgment of the Court (Second Chamber) of 11 July 2024 – C-196/23 – *Plamaro*

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

Keywords: Obligation to inform and consult workers' representatives – Termination of employment contracts due to employer retirement

Core statement: The provisions of the Collective Redundancies Directive are also applicable if the employment relationship ends when the employer retires. However, a Member State regulation that does not define such situations as collective redundancies does not have to be disapplied for reasons of EU law.

Note: According to the Spanish Workers' Statute, it is not considered a collective redundancy if employers retire and employment is terminated as a result. The dismissals made in this context are therefore not to be regarded as redundancies within the meaning of the Collective Redundancies Directive. According to the CJEU, this exception is not covered by the Collective Redundancies Directive. Unlike cases in which the employer dies and employment contracts are terminated as a result under national law,[2] in the case of retirement, such measures as prior consultation are possible.

However, the Court postulates that the conflicting Member State provisions are applicable even though they violate EU law. According to the CJEU's interpretation, in a "horizontal" relationship between private parties, a violation of EU law in the 'horizontal' relationship between private individuals merely results in an obligation for the member state to implement the law, but not to the inapplicability of the conflicting Member State law. The inapplicability can be considered if the violation also constitutes a violation of the EU Charter of Fundamental Rights. The present case falls within the scope of application of Article 27 of the Charter of Fundamental Rights, the workers' right to information and consultation within the undertaking, in view of the consultation rights in the event of collective redundancies. However, this fundamental right is not self-executing, but requires concretisation by the Member States. Article 27 of the Charter of Fundamental Rights can therefore not be invoked to find a conflicting Member State law inapplicable.

While this has already been decided with regard to Article 27 of the Charter,[3] the Court of Justice is breaking new ground with regard to the right to protection against unjustified dismissal under Article 30 of the Charter: it likewise cannot be invoked to justify the inapplicability of a Member State law that is contrary to EU law. The succinct reasoning of the Court of Justice: Since Article 30 of the Charter of Fundamental Rights also needs to be given concrete expression by national law, the argumentation regarding Article 27 of the Charter of Fundamental Rights applies mutatis mutandis to this fundamental right. This view is not convincing, as Article 30 of the Charter of Fundamental Rights is an equivalent, subjective right according to the wording of the provision.[4] A provision contrary to the directive is not a suitable legal basis to justify an encroachment on this right.

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[2] CJEU of 10 December 2009 – C-323/08 – *Rodríguez Mayor*.

[3] CJEU of 15 January 2014 – C-176/12 – *Association de médiation sociale*, para. 48.

[4] This is also the view of *Kocher/Schmitz*, in: Pechstein/Nowak/Häde, Frankfurter Kommentar, 2nd ed. 2023, Art. 30 GRC marginal No. 12; among those agreeing with the CJEU, on the other hand, are *Hüpers/Reese*, in: Meyer/Hölscheidt, Charta der Grundrechte der EU, 5th ed. 2019, Art. 30 GRC, marginal No. 14.

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) of 1 February 2024, lodged on 20 February 2024 – C-134/24 – *Tomann*

Law: Art. 4(1) Collective Redundancies Directive 98/59/EC

Keywords: Missing or faulty collective redundancy notification – Invalidity of the dismissal

Note: The Second Chamber of the German Federal Labour Court (BAG) has referred several questions on collective redundancy law to the CJEU for a preliminary ruling.[5] The questions are related to the paradigm shift in German collective redundancy law that is being driven by case law.[6] At issue is the standstill period provided under Section 18 of the Employment Protection Act (KSchG) and Article 4 of the Collective Redundancies Directive, according to which collective redundancies become effective at the earliest 30 days after receipt of the corresponding notification by the competent authority (in this case: the Employment Agency):

1. Can a dismissal in the context of a collective redundancy only terminate the employment relationship once the standstill period has expired?
2. Does the expiry of the standstill period not only require some form of collective redundancy notification, but must it also satisfy the conditions of Article 3(1)(4) of the Collective Redundancies Directive in every respect?
3. Can employers remedy errors in the collective redundancy notification so that employment relationships can be terminated after the expiry of the standstill period by the previously declared dismissals?
4. Can the competent authority determine with binding effect for employees when the standstill period expires in a specific case, or must it be possible to bring an action before a court to review the correctness of the authority's determination?

This request for a preliminary ruling was made – unusually in procedural terms – in the context of divergence proceedings. The Sixth Chamber of the BAG intends to deviate from the previous case law of the Second Chamber, according to which dismissals without an effective collective redundancy notification are invalid on the basis of Section 134 BGB.[7] The Sixth Chamber considers that the consequences of errors lie solely in the area of public labour promotion law. It therefore referred a divergence request pursuant to Section 45(2) and (3) of the Labour Court Act (ArbGG) to the Second Chamber asking whether the latter intends to adhere to its previous case law.[8] As part of its consideration of this query, the Second Chamber has now referred the matter to the CJEU. While the first three questions referred concern the effect of the collective redundancy notification, the fourth question concerns legal protection against the determination of the standstill period by the Employment Agency.

In December 2023, the Sixth Chamber of the BAG had already referred questions to the CJEU in the same original proceedings regarding the consequences of a faulty notification of collective redundancies in order to secure the "new" understanding of the Sixth Chamber under EU law.[9] The Second Chamber itself has doubts about invalidity as a necessary consequence of faulty notification, which it had previously advocated, but it comes to somewhat different conclusions than the Sixth Chamber. In its findings of the present decision, it places this in the context of its ("new") understanding of the legal situation: With regard to invalidity as a consequence of errors, a distinction must be made as to whether employers submitted no

[5] BAG, preliminary ruling of 1 February 2024 – 2 AS 22/23 (A); on this, see, for example, *Eisele*, BB 2024, 757; *Fuhlrott/Fischer*, NZA 2024, 246; *Schmitt*, ZESAR 2024, 229 et seq.

[6] For a more detailed discussion, see, for example, *Laura Schmitt*, ZESAR 2024, 228.

[7] *Schmitt*, ZESAR 2024, 229 et seq.

[8] BAG of 14 December 2023 – 6 AZR 157/22 (B).

[9] BAG of 14 December 2023 – 6 AZR 157/22 (A).

collective redundancy notification at all or a faulty one. If no notification was given, this can be made up for. In this case, the dismissal can become effective after the standstill period following the notification in accordance with Section 18(1) and (2) KSchG. If the notification was faulty, it is the responsibility of the competent employment agency to nevertheless determine the expiry of the standstill period incontestably and with binding effect for the labour courts. The questions referred relate to whether this understanding, which is reminiscent of the concept previously advocated by case law,[10] is covered by the minimum requirements of the Collective Redundancies Directive.

Whether this is the case is doubtful. This is because an effective legal remedy against state decisions must always be available within the scope of application of EU law in accordance with Article 47 of the Charter of Fundamental Rights. The standards of EU law for a rule that is purely in the public interest and that would prevent citizens from invoking its violation, are stricter than under German law. In contrast to the German doctrine, under EU law it is sufficient for the existence of an subjective right that the enforcement of an individual interest is adversely affected due to the violation of the law.[11] Against this background, it is hardly appropriate to regard the validity of the termination of employment, which forms the basis of the employee's livelihood, as a mere "by-product" in the sense of EU law.

Nor is it quite accurate to assume that the labour market policy nature of the collective redundancy notification's objective prevents it from requiring errors in the notification procedure to necessarily cause dismissals to be invalid. It goes without saying that it is also in the interests of the specific group of dismissed employees and their chances of placement that the Employment Agency take action prior to a collective redundancy.[12] A proper collective redundancy notification is intended to ensure precisely this. The main argument in favour of the consequence hitherto agreed on in the case law of notification errors was – with reference to the decision of the CJEU in the *Junk* case[13] – the consideration that otherwise there would be no effective sanction for violations.[14] Non-compliance with the obligation under EU law to submit a proper collective redundancy notification must be effectively sanctioned. This would not be sufficiently the case with the new concept developed by the BAG.

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) of 23 May 2024, lodged on 10 June 2024 – C-402/24 – *Sewel*

Law: Arts. 3 and 4 Collective Redundancies Directive 98/59/EC

Keywords: Ongoing consultation procedure of the workers' representatives – Faulty notification – Disproportionality of the invalidity of the dismissals – Interference with entrepreneurial freedom

Note: The Sixth Chamber of the Federal Labour Court has also submitted questions to the CJEU on the interpretation of the Collective Redundancies Directive that are very similar to the questions referred by the Second Chamber and also relate to the further development of the paradigms in this area.[15] The questions concern the contestability of the Employment Agency's decision to accept an objectively erroneous collective redundancy notification as proper and the possibility of subsequently "curing" errors in collective redundancies.

[10] Schmitt, ZESAR 2024, 233 et seq.
[11] *Blanke*, in: Calliess/Ruffert, TEU/TFEU, 6th ed 2022, Art. 47 EU-GRC marginal No. 7.
[12] On this point, but with a different view, see *Schmitt*, ZESAR 2024, 233 et seq. with further references.
[13] CJEU of 27 January 2005 – C-188/03 – *Junk*.
[14] *Schmitt*, ZESAR 2024, 228.
[15] See the above note on C-134/24 – *Tomann*, p. 5.

Reference for a preliminary ruling by the Cour de cassation (France) of 12 June 2024, lodged on 13 June 2024 – *C-419/24 – Hôtel Plaza*

Law: Art. 1(1)(a) Collective Redundancies Directive

Keywords: Calculation of company size – Inclusion of temporary agency workers – Regular employment in the hirer company

Note: A hotel operator cuts 29 of its 39 jobs as the hotel has to close for an extended period due to renovation work. An affected employee takes legal action against her dismissal, arguing in particular that the employer failed to carry out mandatory procedures in the course of a collective redundancy.

According to French law, the provisions on collective redundancies only apply if the number of employees exceeds 50. However, temporary workers are also employed in the hotel to carry out maintenance and cleaning tasks. These are normally employed there and, according to the plaintiff, should be taken into account when calculating the threshold value. Although very relevant in practice, the legal question of including temporary workers in the calculation of the size of the company has not yet been decided by the CJEU[16] and is answered in various ways in the literature.[17]

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3. Data protection

Decisions

Judgment of the Court (Ninth Chamber) of 11 July 2024 – C-461/22 – *MK*

Law: Arts. 4(7), 15 GDPR (EU) 2016/679

Keywords: Scope of application of the GDPR – Term "controller" – Former guardian who performed their duties professionally

Core statement: A former guardian within the meaning of Section 1896 of the German Civil Code (BGB) who performed his duties professionally is a data controller pursuant to Article 4 No. 7 GDPR. The exception laid down in Article 2(2) lit. c GDPR cannot be invoked by professional guardians because it only applies to exclusively personal or family activities. Accordingly, they must fulfil all obligations under the GDPR, in particular the right to information in accordance with Article 15. The person under guardianship must therefore be granted access to the data collected about them.

Judgment of the Court (First Chamber) of 26 September 2024 – C-768/21 – *Land Hessen*

Law Art. 57(1)(a) and (f), Art. 58(2) and Art. 77(1) GDPR (EU) 2016/679

Keywords: Data protection breach by employee – Corrective measures taken by the controller – Obligation of the supervisory authority to adopt further measures – Discretion – Fine

[16] A related submission by the BAG (dated 16 November 2017 – 2 AZR 90/17 (A)) has become moot due to the withdrawal of the appeal.

[17] Affirming the possibility: ErfK/*Kiel,* 24th ed. 2024, KSchG Section 17 marginal Nos. 8, 11; *Fuhlrott/Fabritius*, NZA 2014, 122, 126; rejecting it: EuArbRK/*Spelge*, 5th ed. 2024, Directive 98/59/EC Art. 1 marginal No. 30*; APS/Moll*, 7th ed. 2024, KSchG Section 17 marginal No. 29.

Core statement: The supervisory authority is not obliged to take remedial action for every data protection breach and, in particular, to impose a fine if such intervention is not appropriate, necessary or proportionate to remedy the identified inadequacy and ensure full compliance with the GDPR.

Note: An employee of a savings bank branch accessed a customer's personal data on several occasions without authorisation. As a result, the savings bank imposed disciplinary measures on her and demanded written confirmation that she had not processed the data further and would refrain from doing so in future. In the opinion of the data protection officer, this did not pose a high risk for the customer, which is why the customer was not informed of the breach. The customer, who nevertheless learned of the breach, lodged a complaint with the state data protection officer and requested further remedial measures, which the latter refused to take. The customer then filed a lawsuit and requested that the state data protection officer be obliged to intervene and impose a fine on the employer. Is the supervisory authority always obliged to take remedial action in the event of a breach?

For the Court of Justice, the far-reaching investigative powers of the supervisory authority and its discretion in deciding on corrective measures, which it has under Article 58(1) and (2) GDPR, are decisive. The EU legislature has provided for a system of sanctions that should enable the supervisory authorities to take appropriate and justified measures in individual cases.[18] In the opinion of the CJEU, the supervisory authority is not obliged to take a specific corrective measure or any corrective measure at all in the event of a data protection breach. However, a waiver of the measure can only be considered in exceptional cases. In particular, it is possible if the controller has already immediately complied with their obligation under Article 24 GDPR, implemented suitable and necessary measures and thus remedied the breach. In the opinion of the State Data Protection Commissioner, the savings bank as the controller had fulfilled this obligation through disciplinary measures and the written confirmation. However, the authority's discretion regarding whether to take remedial measures is limited by the requirement to ensure a consistent and high level of protection for personal data (Recitals 7 and 10 GDPR).

Finally, the CJEU clarifies that these principles also apply to a fine: In the case of a minor offence or disproportionate burden, such a sanction can be waived. As a result, affected persons are not entitled to a subjective right that the supervisory authority impose a fine.

New pending cases

Reference for a preliminary ruling from the Landesarbeitsgericht Niedersachsen (Germany) of 8 May 2024, lodged on 10 July 2024 – C-484/24 – *NTH Haustechnik*

Law: Art. 5(1)(c) and Art. 17(3)(e) GDPR

Keywords: Misappropriation and unauthorised resale of business assets by former employees – Use of the "eBay" platform – Employer access to employees' private accounts – Lawfulness of data collection – Use of data in court proceedings

Note: The Higher Labour Court of Lower Saxony has referred a number of fundamental questions to the CJEU to shed light on the gathering of evidence in court from the perspective of the GDPR.[19] In the legal dispute, the employer had gained knowledge of criminal conduct to its detriment through unauthorised access to the defendant's private eBay account. Assuming that data protection law also applies to the collection of evidence in court, the court first asks whether the civil procedural provisions on the collection of evidence are sufficiently specific and can therefore constitute a legal basis for data processing, even if the original data

[18] CJEU of 5 December 2023 – C-683/21 – *Nacionalinis visuomenės sveikatos centras*, para. 75.
[19] LAG Nds. of 8 May 2024 – 8 Sa 688/23; see *Däubler*, jurisPR-ArbR 37/2024 note 1.

collection was unlawful. It also asks whether the obligation to weigh the legitimate interests concerned against each other follows from EU law as a prerequisite for the utilisation of evidence, in particular if the data collection was carried out in violation of personal rights.

Reference for a preliminary ruling from the Högsta förvaltningsdomstolen (Sweden) of 13 June 2024, lodged on 17 June 2024 – C-422/24 – *Storstockholms Lokaltrafik*

Law: Arts. 13 and 14 GDPR (EU) 2016/679

Keywords: Ticket inspectors – Use of body cameras – Duty to inform affected passengers

Note: The ticket inspectors wear so-called "body cams" that film their field of vision if they impose fines on "fare dodgers". This is intended to act as a deterrent to threats and violence against them and also to ensure the identification of customers. The referring court asks whether affected customers must be informed because personal data is collected about them.

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Austria) lodged on 28 June 2024 – C-474/24 – *NADA Austria and Others*

Law: Arts. 5(1)(a) and (c), 6(3), 9 and 10 GDPR (EU) 2016/679

Keywords: Professional athletes – Publication of information on doping offences – "Health datum"

Note: Section 8 of the Austrian Federal Anti-Doping Act (ADBG) provides for the setting up of an Independent Arbitration Commission (USK). According to Section 23(14) ADBG, the general public is generally informed about its decisions, including the names of the athletes concerned, the duration of the ban and the reasons for it, but without details that would allow deductions about health data. The referring court asks whether the information about a doping offence already constitutes a health datum pursuant to Article 9 GDPR and whether Article 6(3)(2) GDPR precludes its publication. It would also like to know whether the GDPR, in particular Article 5(1)(a) and (c), always requires a balancing of interests before publication. Finally, it asks whether the decision of the USK constitutes a criminal conviction within the meaning of Article 10 GDPR and whether the USK is an authority within the meaning of this regulation.

Reference for a preliminary ruling from the Sofiyski rayonen sad (Bulgaria) of 2 August 2024, received on 8 August 2024 – C-5410/24 – *Naltov*

Law: Arts. 6(1)(a) and 47 GDPR (EU) 2016/679

Keywords: Access to case files without being a participant in the proceedings – Relationship to data protection

Note: According to Romanian law, persons not involved in a trial can request access to trial files under certain circumstances. Lawyers have this right by virtue of their professional status, while other persons must demonstrate a legitimate interest. The referring court asks whether these national provisions infringe Article 6(1)(a) and Article 47 GDPR and Articles 7 and 8 of the EU Charter of Fundamental Rights. The court also wishes to know whether it may refuse orders from another court to disclose the files or whether it is protected against sanctions in the event of disclosure.

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4. Equal treatment

New pending cases

Reference for a preliminary ruling from the Tribunal du travail du Brabant wallon (Belgium) lodged on 8 April 2024 – C-374/24 – *Union Nationale des Mutualités Libres*

Law: Art. 8 Equal Treatment Directive for Self-Employed Persons 2010/41/EU; Art. 5 Equal Treatment Directive 2006/54/EC; Arts. 21, 33 and 34 EU Charter of Fundamental Rights

Keywords: Maternity benefit for part-time self-employed women

Note: Belgium has social security systems for employees and the self-employed. At the time of the birth of her child, the claimant was both employed part-time and self-employed on a part-time basis and paid contributions to both insurance schemes. Nevertheless, she only received benefits from the insurance scheme for employees. The referring court asks whether this constitutes a breach of Article 8 of the Equal Treatment Directive for Self-Employed Persons, which requires Member States to take measures to ensure that self-employed persons can also receive maternity benefits. It could also constitute a breach of Article 5 of the Equal Treatment Directive, which prohibits gender-based discrimination in occupational social security schemes. Finally, the court considers it possible that there has been a violation of the prohibition of gender-specific discrimination pursuant to Article 21 in conjunction with Articles 33 and 34 of the Charter of Fundamental Rights.

Reference for a preliminary ruling from the French Cour de cassation (Court of Cassation) lodged on 3 May 2024, registered on 14 May 2024 – C-350/24 – *Crédit agricole Corporate & Investment Bank*

Law: Art. 19 Equal Treatment Directive 2006/54/EC; Art. 288 TFEU; Agreement on the withdrawal of the United Kingdom from the EU, approved by Decision (EU) 2020/135

Keywords: Brexit agreement – Interpretation of UK law in conformity with EU law for situations that occurred before Brexit

Note: In the referral proceedings, a French employee is suing her French employer for harassment and gender discrimination. The work was carried out in Great Britain and the employment relationship was subject to British law. The lawsuit was filed in 2013. Though the United Kingdom has since left the EU, under Article 126 of the Withdrawal Agreement, EU law was applicable within its territory until 31 December 2020. It is questionable whether old cases are still subject to EU law after this date. If this is the case, the dogmatically interesting question arises as to whether the French court may or must interpret English law in accordance with the Directive or whether it may or must disapply it in the event of a breach of a directive that gives concrete expression to fundamental rights.

Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 29 July 2024 – C-522/24 – *Ministero della difesa*

Law: Art. 2(2)(b) Equal Treatment Framework Directive 2000/78/EC; Art. 20 EU Charter of Fundamental Rights

Keywords: Obligation to be vaccinated against Covid-19 (only) for military personnel – Suspension from work without pay in the event of non-compliance

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5. Fixed-term employment

Decisions

Judgment of the Court (First Chamber) of 12 September 2024 – C-548/22 – *Presidenza del Consiglio dei ministri and others*

Law: Clauses 4 and 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Honorary judges and public prosecutors – Concept of employee – State liability

Core statement: The request for a preliminary ruling submitted by the Giudice di pace (Magistrate) of Fondi, Italy is inadmissible. It fails to give the information necessary to determine whether the applicant, an honorary public prosecutor, is a fixed-term employee.

Judgment of the Court (Sixth Chamber) of 19 September 2024 – C-439/23 – *Consiglio nazionale delle Ricerche*

Law: Clause 4, Nos. 1 and 4 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Determination of length of service – Consideration of periods of employment prior to the entry into force of Directive 1999/70/EC

Core statement: The length of service accrued by employees on the basis of fixed-term employment contracts concluded in whole or in part before the expiry of the transposition deadline of the Fixed-Term Work Directive must be taken into account when determining remuneration.

New pending case

Reference for a preliminary ruling from the Tribunal Supremo (Spain) of 30 May 2024, lodged on 12 June 2024 – C-418/24 – *Obadal*

Law: Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Abuse of fixed-term contracts by public servants – Concept of a non-permanent employment relationship of indefinite duration – Compensation for non-conversion into a permanent employment relationship

Note: Under Spanish law, an invalid fixed-term employment relationship with a public employer cannot simply be converted into a permanent employment relationship, as this conflicts with the constitutional principle of equal access to permanent employment in the public sector. An invalid fixed-term contract exists, among other things, if a permanent position is not filled on a permanent basis for more than three years. In order to counter the abusive use of fixed-term contracts, case law has developed the concept of the non-permanent employment relationship

of indefinite duration. Workers with this status are entitled to the same rights as permanent employees for the duration of their employment. If they are not offered a permanent position, they receive compensation. The referral procedure is intended to clarify whether this case law is in line with Section 5 of the Framework Agreement. The referral follows a lengthy dispute that has already been referred to the CJEU.[20]

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6. General matters

Decisions

Judgment of the Court (Seventh Chamber) of 4 July 2024 – C-375/23 – *Meislev*

Law: Art. 13 Decision No 1/80 of the EEC–Turkey Association Council

Keywords: Prohibition of new restrictions on access to the labour market – Introduction of more restrictive conditions for the granting of a permanent residence permit

Core statement: If a Member State – in this specific case Denmark – introduces stricter requirements for the granting of a permanent residence permit than those that applied when Decision No. 1/80 came into force, this does not constitute a "new restriction" and thus does not constitute a breach of the so-called standstill clause in Article 13 of Decision No. 1/80, provided that this does not impair freedom of movement.

Judgment of the Court (Ninth Chamber) of 29 July 2024 – C-768/22 – *Commission v. Portugal*

Law: Arts. 49 and 56 TFEU

Keywords: Recognition of professional qualifications – Evidence of formal qualifications for architects – Restriction of access to a profession or its practice

Core statement: Portugal has violated the freedom of establishment and the freedom to provide services by restricting access to the profession of architect for civil engineers who have obtained a Portuguese university degree but have established themselves in another Member State. The question of whether a further provision ruling out the recognition of foreign engineering qualifications violates EU law did not have to be decided for procedural reasons.

Judgment of the Court (Fourth Chamber) of 29 July 2024 – C-773/22 – *Commission v. Slovakia*

Law: Art. 7(4); Art. 14(1); Art. 50 Professional Recognition Directive 2005/36/EC as amended by Directive 2013/55/EU

Keywords: Recognition of professional qualifications – Aptitude test – Ordering of compensation measures – Training certificates of specialised dentists and midwives – Request for documents in other Member States – Recognition of foreign traineeships

Core statement: A pre-employment aptitude test must be limited to cases where the activity in question has an impact on public health and safety and where there is a substantial

[20] See CJEU of 22 February 2024 – C-59/22, inter alia – *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid* and request for a preliminary ruling of 11 July 2023 – C-434/23 – *Consorcio Gallego de Servicios de Igualdad y Bienestar*; see also HSI Report 1/2024, p. 9.

difference between the qualifications of the service provider and the training required in the host Member State. Compensatory measures must be limited to ensuring training in subjects for which the applicant cannot provide evidence.

Judgment of the Court (First Chamber) of 26 September 2024 – C-387/22 – *Nord Vest Pro Sani Pro*

Law: Art. 56 TFEU

Keywords: Freedom to provide services – Tax allowance for workers in the construction sector – Inapplicability for posted workers – State aid

Core statement: A temporary exemption from taxes and social security contributions for employees in the construction industry, which aims to support the domestic construction industry and has not been extended to workers posted from Romania to other Member States, restricts the freedom to provide services. The differentiation can be justified if the regulation actually leads to higher net wages for domestic construction workers and thus reduces the wage gap in the EU. In principle, the aim of strengthening the domestic economy by preventing the emigration of skilled labour is not a justification, unless the functioning or continued existence of this sector is at risk.

Judgment of the Court (First Chamber) of 26 September 2024 – C-368/23 – *Fautromb*

Law: Art. 267 TFEU

Keywords: Concept of the court – Right of submission

Core statement: The Haut Conseil du commissariat aux comptes, or H3C Committee, which monitors the activities of statutory auditors in France and identifies and sanctions violations of the ban on carrying out other commercial activities, does not exercise judicial powers, but rather official powers. It is therefore not a court authorised to make referrals pursuant to Article 267 TFEU.

Judgment of the Court (First Chamber) of 26 September 2024 – C-792/22 – *Energotehnica*

Law: Art. 1(1) and (2) and Art. 5(1) Occupational Safety and Health Framework Directive 89/391/EEC; Art. 47 EU Charter of Fundamental Rights

Keywords: Measures to improve health and safety at work – Principle of effectiveness of EU law – Death of workers – Administrative court finding of an accident at work – Effect of the final administrative court judgment before the criminal court

Core statement: The provision of a Member State according to which the final judgment of an administrative court on the classification of an event as an "accident at work" has legal effect before the criminal court is inadmissible under EU law if this provision does not allow the victim’s successors to be heard in any of the proceedings.

Note: In the context of criminal proceedings, the employer invoked an administrative court judgment to show that a certain event was not an accident at work. According to the applicable Romanian law as interpreted by the Constitutional Court, the administrative court judgment was to be used as a basis in the criminal proceedings. However, this legal situation would be contrary to Union law if the victim’s successors were not given the opportunity to be heard in the proceedings in which the existence of an accident at work was decided. This is because Member States must take into account the fundamental right to effective legal protection under Article 47 of the EU Charter of Fundamental Rights when determining the legal remedies for

the protection of the legal positions regulated in the Labour Protection Directive. The successors are entitled to this after the death of the worker.

Opinion

Opinion of Advocate General Sánchez-Bordona delivered on 4 July 2024 – C-295/23 – *Halmer Rechtsanwaltsgesellschaft*

Law: Art. 15 Services Directive 2006/123/EC

Keywords: Shareholding of a commercial company in a law firm – Prohibition of outside capital – Revocation of the firm's authorisation to practise law

Core statement: The prohibition of outside capital pursuant to sections 59i and 59j BRAO pursues legitimate objectives, namely the independence of lawyers' activities and the protection of consumers of legal services. However, the regulation is inconsistent and disproportionate. The restriction of the possibility of shareholding to lawyers, the requirement of professional "activity" in the company and the possibility of a significant minority shareholding are not consistent.

New pending cases

Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 3 May 2024 – C-340/24 – *Carbotermo and Consorzio Alisei*

Law: Art. 13 Professional Recognition Directive 2005/36/EC

Keywords: Recognition of a qualification that does not entitle the holder to pursue the desired profession in the issuing Member State

Note: The claimant obtained a professional qualification from a Spanish university, but this does not authorise him to work as a learning support teacher for special needs, which he would like to do in Italy (insegnante di sostegno). Recognition of this qualification was therefore refused. Under Italian law, however, the conditions for recognition may be met even if the qualification is not recognised in the issuing state. The referring court asks whether the Professional Recognition Directive precludes such "excessive" transposition. If this is not the case, the referring court would like to know whether the Directive obliges the receiving state to examine all documents relating to the training and, if necessary, to order compensatory measures.

Reference for a preliminary ruling from the Landesverwaltungsgericht Kärnten (Austria) lodged on 16 May 2024 – C-356/24 – *Kärntner Landesregierung*

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

Keywords: Recognition of previous periods of service completed in other Member States – Civil servants

References for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) of 6 June 2024, lodged on 17 June 2024 – C-424/24 and C-425/24 – *FIGC and CONI*

Law: Arts. 6 and 19 TEU; Arts. 45, 49, 56, 101 and 102 TFEU; Arts. 47-49, EU Charter of Fundamental Rights; Arts. 6 and 7 ECHR

Keywords: Managers of an international sports club – Disciplinary proceedings – Ban on undertaking professional activities for 24 months – Judicial protection options before the administrative court

Reference for a preliminary ruling from Court of Appeal (Ireland) made on 28 June 2024, received on 9 July 2024 – C-477/24 – *Deldwyn*

Law: Art. 7(3) Free Movement Directive 2004/38/EC; Art. 41 EU Charter of Fundamental Rights

Keywords: Right of residence derived from the spouse – Maintenance of residence permit after divorce – Calculation of periods of employment

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7. Part-time employment

Decision

Judgment of the Court (First Chamber) of 29 July 2024 – C-184/22 – *KfH Kuratorium für Dialyse und Nierentransplantation*

Law: Art. 157 TFEU; Arts. 2(1)(b) and 4(1) Equal Treatment Directive 2006/54/EC; Clause 4 Framework Agreement on Part-Time Work (implemented by Directive 97/81/EC)

Keywords: Prohibition of discrimination against part-time employees – Identical working time limit for overtime pay for full-time and part-time employees – Indirect discrimination against women – Statistical distribution of women and men as a means of proving discrimination

Core statements:

1. The prohibition of discrimination under Clause 4 of the Framework Agreement on Part-Time Work precludes the collective agreement provision stipulating that full-time and part-time employees must exceed the same working time threshold in order to receive an overtime supplement. The objectives of using the supplement to discourage employers from ordering overtime and to prevent worse treatment of part-time employees cannot justify the unequal treatment.

2. The equal pay principle enshrined in Article 157 TFEU and Articles 2(1)(b) and 4(1) Equal Treatment Directive also precludes the collective agreement provision. It is sufficient for indirect discrimination on grounds of sex that there are significantly more women than men in the group of part-time employees. It is irrelevant that the group of full-time employees also consists of more women than men.

Note: In the proceedings before the court, two part-time carers (80% and 40% of full-time working hours, respectively) are claiming additional pay for overtime worked. The relevant collective agreement provides for a supplement of 30%, but this is only granted for hours

worked in excess of the monthly working hours of a full-time employee. The plaintiffs argue that this puts them at a disadvantage because this limit is more difficult for them to reach than for full-time employees.

The first part of the decision follows the judgment in the *Lufthansa CityLine* case[21]: Part-time employees are treated less favourably if, like full-time employees, they only receive overtime pay when they exceed the monthly working hours of a full-time employee. However, the justifications for the collective agreement provision differed in part from those in the *Lufthansa CityLine* case. The regulation was intended, first, to prevent employers from ordering overtime and, second, to prevent full-time employees from being placed in a less favourable position. The CJEU did not recognise either of these objectives as suitable justification. This is because the rule creates an incentive to order overtime for part-time employees rather than full-time employees and thus has the opposite effect. The application of the equal treatment also does not place full-time employees in a worse position because, when applying the pro rata temporis principle in relation to overtime, they are treated in the same way as part-time employees who receive the overtime supplement if their part-time hours are exceeded.

The second part of the judgment's findings deals with the question of possible indirect discrimination through the collective agreement provision. This did not have to be decided in the *Lufthansa CityLine* proceedings. In the *KfH* proceedings, two female members of the nursing staff brought an action. Of the part-time employees working for the defendant, 85% were female, compared to 68% of the full-time employees. Women were therefore in the majority in both groups. The BAG therefore asked the CJEU whether indirect discrimination presupposes that there are more members of the opposite sex in the better-placed group. The Court answered this in the negative, stating that the wording of Article 2(1)(b) of the Equal Treatment Directive only refers to the group that is disadvantaged (para. 65). Indirect discrimination likewise cannot be justified by the stated objectives.

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8. Social security

Decisions

Judgment of the Court (Grand Chamber) of 29 July 2024 – C-112/22 C-223/22 – *CU*

Law: Art. 11(1)(d) Long-Term Residence Directive 2003/109/EC in the light of Art. 34 EU Charter of Fundamental Rights

Keywords: Access to social assistance for third-country nationals with long-term residence status – Requirement of ten years of residence – Equal treatment with nationals of the Member State – Indirect discrimination

Core statement: A Member State may not make access to a social security, social assistance or social protection measure for third-country nationals who are long-term residents subject to the condition that they have resided in that Member State for at least ten years, the last two years of which being consecutive.

The Member State is also prohibited from penalising a false declaration concerning such an unlawful residence condition.

[21] CJEU of 19 October 2023 – C-660/20; on this see *Kocher*, HSI-Report 4/2023, p. 5.

Note: In Italy, certain households are granted a "citizens' basic income". Not only Italian nationals and EU citizens are entitled to this social assistance benefit, but also third-country nationals who are long-term residents. A further condition is relevant to the decision in the original case: in order to receive the basic income, it is necessary to have been resident in Italy for ten years at the time of application, the last two of which must be consecutive. In the context of criminal proceedings against two third-country nationals who are long-term residents, the referring court had doubts as to the compatibility of this provision with the principle of equal treatment pursuant to Article 11(1)(d) of the Long-Term Residence Directive in the light of Article 34 of the EU Charter of Fundamental Rights, according to which long-term residents are to be treated as nationals with regard to social assistance benefits. The two had falsely stated that they fulfilled the requirements when applying for the basic income.

The Long-Term Residence Directive is intended to promote the integration of third-country nationals who are long-term legal residents in a Member State. To this end, the Long-Term Residence Directive sets out clear requirements, including with regard to the legal status of a third-country national who is a long-term resident and the conditions for obtaining this status. In particular, it requires an uninterrupted and lawful stay of five years prior to the application in the Member State concerned (Art. 4(1)). In order to realise the integration objective, the rights of long-term residents must be aligned with those of EU citizens and their equal treatment must be guaranteed.

The ten-year residence requirement under Italian law mainly affects third-country nationals and is therefore to be categorised as indirect discrimination, which could violate this principle of equal treatment. The CJEU considers the fact that the residence regulation also applies to Italian nationals and could also affect their interests if they previously lived abroad, for example, to be irrelevant when categorising it as indirect discrimination. In other words: it need not favour all citizens or disadvantage only third-country nationals who are long-term residents. In this respect, the CJEU is building on its case law.[22]

According to the Italian government, this discrimination is justified by the objective of the ten-year residence requirement: as the basic income is primarily intended to promote social integration into the labour market, it should therefore only benefit third-country nationals who are permanent residents and well integrated in Italy. According to the CJEU, however, the different degree of connection to a Member State cannot justify the discrimination. The EU legislature considers an uninterrupted legal residence period of five years to be sufficient to establish roots in a Member State (Art. 4(1) and Recital 6 Long-Term Residence Directive). Therefore, a Member State cannot unilaterally extend the requisite period of residence.

Finally, the Court finds that the Member State concerned is also prohibited from penalising a false declaration concerning a residence condition that is contrary to EU law.

Judgment of the Court (Seventh Chamber) of 26 September 2024 – C-329/23 – *Social Security Institution*

Law: Art. 14a Regulation (EEC) No. 1408/71 on the coordination of social security systems; Art. 13(2) Coordination Regulation (EC) 883/2004; Art. 14(8) Implementation Regulation (EC) No. 987/2009

Keywords: Self-employed persons – Simultaneous gainful activity in a Member State, EFTA State and Switzerland – Applicable legislation – Concept of "relevant situation"

Core statement: If self-employed persons work simultaneously in an EU Member State, an EFTA state and Switzerland, the applicable social security provisions must be determined

[22] CJEU of 16 January 2003 – C-388/01 – *Commission v. Italy*, para. 14; of 20 June 2013 – C-20/12 – *Giersch*, para. 45.

separately within the framework of the EFTA Agreement and the Agreement on the Free Movement of Persons with Switzerland.

Note: The EU has concluded agreements with both the EFTA states (EEA Agreement) and Switzerland (AFMP Agreement), according to which the Coordination Regulation and Implementing Regulation also apply in the relationship between EU states and EFTA states or Switzerland. Accordingly, the two regulations are applicable if self-employed EU citizens initially work in both an EU Member State (here: Austria) and an EEA contracting state (here: Liechtenstein) and later take up further self-employed activity in Switzerland.

According to the CJEU, the legal provisions applicable to social security must be determined separately: on the one hand in the context of the EEA Agreement for the relationship between Austria and Liechtenstein, and on the other hand in the context of the AFMP for the relationship between Austria and Switzerland.

Opinion

Opinion of the Advocate General Szpunar delivered on 4 July 2024 – C-277/23 – *Ministarstvo financija*

Law: Art. 21 TFEU in conjunction with Art. 165(2), second indent TFEU

Keywords: Freedom of movement for educational purposes – Basic tax-free allowance for a dependent child – Participation of the child in the Erasmus+ programme – Mobility allowance exceeding the maximum amount – Tax disadvantages

Core statement: The Erasmus+ programme is intended to promote the mobility of young EU citizens for academic and vocational training purposes in the EU. If the mobility allowance granted as part of this programme is taken into account when determining the basic income tax allowance to which a dependent parent is entitled, with the result that the entitlement to an increase in this allowance is lost, this violates the principle of freedom of movement.

New pending case

Reference for a preliminary ruling from the Visoki trgovački sud Republike Hrvatske (Croatia) of 3 May 2024, lodged on 16 May 2024 – C-357/24 – *Freistaat Bayern*

Law: Art. 85(1) Coordination Regulation (EC) No. 883/2004

Keywords: Continued payment of remuneration in the event of illness – Transfer of the claim against a tortfeasor – Internationally applicable law

Note: An employee of the Free State (“Freistaat”) of Bavaria is unable to work as a result of a road traffic accident in Croatia. He receives sick pay from his employer on the one hand and compensation from the liable party's liability insurance on the other. As the employer, the Free State of Bavaria asserts the transfer of its employee's claim for damages against the injuring party or the liability insurance pursuant to Section 6(1) of the Continued Remuneration Act (EntgFG) with regard to the compensation paid.

However, such a claim is foreign to Croatian law, which is why the referring Croatian court asks the CJEU whether the Free State of Bavaria, as the employer, is entitled to such a claim on the basis of Article 85(1) of the Coordination Regulation. In particular, it is questionable whether the employer – and therefore not a social security institution – is considered an "institution obliged to provide benefits" within the meaning of Article 1(q) and whether the continued payment of remuneration is a "sickness benefit" pursuant to Article 3(1)(a) of the Coordination Regulation.

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9. Whistleblowing

Decision

Judgment of the General Court (Fourth Chamber, Extended Composition) of 11 September 2024 – T-793/22 – *TU v. Parliament*

Law: Arts. 22a to 22c EU Staff Regulations; Art. 21 Whistleblower Directive 2019/1937

Keywords: Accredited parliamentary assistants – Whistleblowers – Non-renewal of a fixed-term contract – Protective measures – Confidentiality – Non-material damage

Core statement: Although the Whistleblower Directive is addressed to the Member States, it may also be indirectly applicable to EU institutions.

Note: An assistant in the European Parliament reported cases of bullying and financial irregularities committed by his MEP. The Parliament released the assistant from his duties, but did not explicitly recognise him as a whistleblower and did not renew his contract. According to the European Court of Justice, a formal determination of whistleblower status is not required. However, the Parliament must prove that it has taken the necessary protective measures. For this purpose, the Court also refers to the Whistleblower Directive, although this only directly obliges the Member States.

The Parliament was unable to provide evidence of sufficient protective measures. It did not have to extend the assistant's contract because there was no request to do so from a member of parliament, and MEPs may not have assistants "imposed" on them. However, it should have informed and counselled the assistant and supported him in his search for other employment within the Parliament. The Court also found the Parliament to have breached confidentiality obligations. The plaintiff was awarded €10,000 for the non-material damage he suffered.

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10. Working time

Decisions

Order of the Court (Sixth Chamber) of 29 July 2024 – C-435/23 – *Glavna direktsia "Granichna politsia" kam Ministerstvo na vatreshnite raboti*

Law: Art. 12(a) Working Time Directive 2003/88/EC; Arts. 20, 31 EU Charter of Fundamental Rights

Keywords: Safety and health of night workers – Equal treatment of workers in the public and private sectors

Core statement: Unequal treatment of night workers in the public and private sectors is unlawful unless it is justified by serving a legitimate aim and it is proportionate to that aim. Incompatible national law must be disapplied.[23]

Judgment of the Court (Third Chamber) of 26 September 2024 – C-164/23 – *Volànbusz*

[23] See also CJEU of 24 February 2022 – C-262/20 – *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*; see also HSI Report 1/2022, pp. 20 et seq.

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

Key words: Road transport – Working time of drivers – Concept of “employer’s operational centre where the driver is normally based”

Core statement: Car parks where there are neither sanitary facilities nor social rooms can be classified as "the employer's operational centre where the driver is normally based" within the meaning of Article 9(3) Harmonisation Regulation, so that the travel times from the place of residence to these car parks are not to be regarded as "other work" within the meaning of Article 4(e) of the Harmonisation Regulation, i.e. working time within the meaning of Article 3(a) of the Mobile Workers Directive 2002/15/EC.

New pending cases

Request for a preliminary ruling from the Općinski sud u Puli-Pola (Croatia) dated 3 May 2024, received on 24 May 2024 – C-373/24 – *Ramavić*

Law: Art. 2 Occupational Safety and Health Framework Directive 89/391/EEC; Art. 1(3), Art. 2 Nos. 1 and 2 Working Time Directive 2003/88/EC

Keywords: Definition of “worker” – Exception for public prosecutors – Delimitation of working time and rest periods for on-call duty

Note: The applicant works as a public prosecutor at the Municipal Public Prosecutor's Office in Pula. She works Monday to Friday from 8 am to 4 pm. In addition, she is on call as a public prosecutor, which can be outside regular working hours and on weekends and public holidays and lasts 24 hours, sometimes for several consecutive days. During these shifts, the applicant carries out acts that cannot be postponed in (criminal) investigation proceedings, which also occur on a regular basis. According to a service instruction, this service is performed "on constant standby at home", whereby the plaintiff must be permanently available and be able to come to the office building or other locations immediately at any time. Nevertheless, the working hours are not recorded by the public prosecutor's office as the employer and are not taken into account in the maximum working hours and minimum rest periods.

The referring court asks, firstly, whether the applicant is a worker within the meaning of EU law. The autonomous definition of worker under EU law can be broader than the national definition, e.g. the German definition, and also includes employment relationships under public law, for example of civil servants, soldiers or judges.[24] However, Article 2(2) of the Labour Protection Framework Directive allows for exceptions to this, insofar as the particularities of certain specific activities in the public sector necessarily preclude this. Article 1(3) of the Working Time Directive refers to this standard. However, these services are not excluded from the scope of the Directive as a whole, but only unplannable activities in an emergency.[25] Applying this case law, the plaintiff should be regarded as a worker and the on-call duty should not be excluded from the scope of the Working Time Directive. This is because the mere uncertainty as to whether and to what extent unpostponable investigative activities will occur does not prevent duty planning.

Assuming this is the case, the question arises as to whether the on-call duty of a public prosecutor is to be assessed as working time or rest period. According to previous CJEU case

[24] CJEU of 12 February 1974 – Case 152/73 – *Sotgiu*, para. 5; of 3 July 1986 – Case 66/85 – *Lawrie-Blum*, para. 20; EuArbRK/*Steinmeyer,* 5th ed. 2024, TFEU Art. 45 marginal No. 11; *Preis/Sagan* EurArbR/*Sagan*, 2nd ed. 2019, marginal No. 1.111.

[25] CJEU of 5 October 2004 – C-397/01 – *Pfeiffer*, paras. 54 et seq.; of 14 July 2005 – C-52/04 – *Personalrat der Feuerwehr Hamburg*, paras. 52 et seq.; EuArbRK/*Gallner*, 5th ed. 2024, Directive 2003/88/EC Art. 1 marginal No. 45 et seq.; Preis/Sagan *EurArbR/Ulber*, 2nd ed. 2019, marginal No. 7.53 et seq.

law, the degree of restriction of the ability to devote time to personal and social interests is decisive for on-call time at home.[26] An overall assessment is required in which, among other things, the response time, the duration and modalities of any assignments and the frequency of calls must be taken into account.[27] It remains to be seen whether the CJEU will take the opportunity here to provide further clarification. The question had arisen in 2021 whether the CJEU intended to impose stricter criteria for the test.[28] However, if the on-call duty is performed at the workplace, it should undoubtedly be considered working time within the meaning of the Working Time Directive.[29]

Reference for a preliminary ruling from the Curtea de Apel Iași (Romania) lodged on 14 May 2024, communicated on 11 June 2024 – C-420/24 – *Sindicatul Drumarilor "Elie Radu"*

Law: Art. 2 No. 1 and Art. 6(1)(b) Working Time Directive 2003/88/EC; Art. 31(2) EU Charter of Fundamental Rights

Keywords: Definition of working time – Travelling time without performing work – Compliance with the maximum weekly working time

Note: The complainant in the main proceedings is an employee whose work entails travelling to various construction sites and inspecting them. He is usually driven by a chauffeur and does not drive the car himself. The defendant management company refuses to recognise the travel time as working time. Due to the long distances and road conditions, this involves considerable periods of time, 31.5 hours in June 2021 alone.

The proceedings could bring clarity to controversial legal issues. The German concept of working time in the sense of occupational safety and health law has been significantly changed in recent decades by the case law of the European Court of Justice. For example, the Court has recognised that periods of stand-by and, under certain circumstances, on-call duty are working time within the meaning of the Working Time Directive – contrary to the traditional German understanding.[30] The CJEU's assessment is based on whether employees' leisure time is objectively significantly impaired because they have to be available for work and are therefore unable to devote themselves to their personal and social interests.[31] The intensity of the work, on the other hand, is not relevant.[32]

These decisions raise the question of whether the prevailing opinion on travelling time can be upheld. According to the case law of the Federal Labour Court and the prevailing opinion in the literature, it should only be considered working time in the sense of occupational health and safety law if employees drive a car themselves or perform their work during the journey, e.g. read files on the train, because only then can there be a health risk (so-called stress

[26] CJEU of 9 March 2021 – C-344/19 – *Radiotelevizija Slovenija*, paras. 36 et seq.; of 9 March 2021 – C-580/19 – *Stadt Offenbach am Main*, paras. 44, 47, see note by *Buschmann*, HSI-Report 4/2021, p. 5 et seq.

[27] CJEU of 9 March 2021 – C-344/19 – *Radiotelevizija Slovenija*, paras. 46, 55; *Bayreuther*, RdA 2022, 290, 295; *Kocher*, RdA 2022, 50, 54.

[28] *Kocher*, RdA 2022, 50, 52.

[29] For on-call duty with a requirement to remain at the workplace, which is not also the employee's home, this is in line with established case law; see CJEU of 9 September 2003 – C-151/02 – *Jaeger*, paras. 71, 75 and 103; of 5 October 2004 – C-397/01 – *Pfeiffer*, para. 93; EuArbRK/*Gallner*, 5th ed 2024, Directive 2003/88/EC Art. 2 marginal No. 7; *Kocher*, RdA 2022, 50, 54.

[30] CJEU of 3 October 2000 – C-303/98 – *SIMAP*, para. 52; of 9 September 2003 – C-151/02 – *Jaeger*, para. 65; of 21 February 2018 – C-518/15 – *Matzak*, para. 66; BAG of 18 February 2003 – 1 ABR 2/02, NZA 2003, 742 head-note 3.

[31] CJEU of 3 March 2021 – C-344/19 – *Radiotelevizija Slovenija*, paras. 36 et seq.; of 9 March 2021 – C-580/19 – *Stadt Offenbach am Main*, paras. 44, 47; see note by *Buschmann*, HSI-Report 4/2021, p. 5 et seq.

[32] CJEU of 21 February 2018 – C-518/15 – *Matzak*, para. 56*; EuArbRK/Gallner*, Directive 2003/88/EC Art. 2 marginal No. 7.

theory).[33] Some authors have long questioned whether this is compatible with the case law of the CJEU because employees are restricted in their private lives even when not travelling for work.[34] There are also divergent decisions from other jurisdictions.[35] So far, the CJEU has only ruled on this for employees without a fixed place of work who also drive the vehicle themselves.[36] The answer to the first question referred, whether travelling time constitutes working time in accordance with Article 2 No. 1 of the Working Time Directive, can therefore be eagerly awaited. In our opinion, the CJEU should recognise these times as working time, as the journeys are necessary for the inspections and are therefore part of the work performed. If the opposite view is taken, passengers in cars are in any case considerably restricted in terms of location and content in terms of which activities they pursue, so that it is difficult to consider this as a rest period within the meaning of Article 2 No. 2 of the Working Time Directive.

Secondly, the referring court asks whether, under EU law, travelling time must be taken into account when assessing whether the average weekly working time has been reached. In Romania, a statutory working week of 40 hours applies, and travelling time does not count. If the travelling time is working time, it should in any case be taken into account in the maximum weekly working time of 48 hours pursuant to Article 6(b) of the Working Time Directive.

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[33] BAG of 11 July 2006 – 9 AZR 519/05, NZA 2007, 155 paras. 44, 46; *Anzinger/Koberski*, ArbZG § 2, marginal No. 22; *Schliemann*, ArbZG § 2, marginal No. 55 et seq.

[34] *Bartl/Harker*, NZA 2020, 1669, 1674; *Buschmann/Ulber/Buschmann*, ArbZG § 2, marginal Nos. 45 et seq.; *Preis/Schwarz*, Dienstreisen als Rechtsproblem, HSI-Schriftenreihe Vol. 31, p. 41 et seq.

[35] EFTA Court of 15 July 2021 – E-11/20 – *Eyjólfur Orri Sverrisson*; VG Hannover of 3 May 2023 – 3 A 146/22.

[36] CJEU of 10 September 2015 – C-266/14 – *Federación de Servicios Privados del sindicato Comisiones obreras*, para.. 50, see HSI Newsletter 3/2015, p. 22 et seq.

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

New proceedings (notified to the respective government)

No. 29497/22 – *Broz v. Croatia (Second Section) – lodged on 7 June 2022 – communicated on 27 August 2024*

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

Keywords: Retirement – Incapacity of a police officer – Possibility of alternative employment

Note: The complainant, a police officer, had been receiving a disability pension since May 2016 as he was no longer able to work as a police officer for health reasons due to an injury. However, the pension decision stated that he was still able to carry out any other sedentary work for which he was qualified on a full-time basis. Under national law, the employment relationship was terminated at the time the invalidity pension was granted. The complainant challenged the administrative decision to retire him before the administrative courts on the grounds that the measure discriminated against him because of his state of health. According to the civil service regulations and the Equal Treatment Framework Directive 2000/78/EC, he should have been transferred to a post corresponding to his physical abilities. The complaint was unsuccessful in all instances. A constitutional complaint was declared inadmissible as manifestly unfounded.

The complainant claims that he was discriminated against within the meaning of Article 14 ECHR as a result of his retirement, which was based on his physical limitations. Employment in another post would have been possible. He is also of the opinion that the decisions of the national courts were arbitrary and not justified.

With regard to the question of discrimination, it will depend on whether the complainant belongs to a discriminated group of persons and whether there were substantial grounds for the interference with the protected right.[37]

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2. Freedom of expression

New proceedings (notified to the respective government)

No. 45299/22 – *Teachers' Trade Union and Teachers' Democratic Trade Union v. Hungary (First Section) – lodged on 9 September 2022 – communicated on 9 September 2024*

[37] ECtHR of 20 May 2010 – No. 38832/06 – *Alajos Kiss v. Hungary*; ECtHR of 29 January 2013 – No. 11146/11 – *Horváth and Kiss v. Hungary*.

Law: Art. 6 ECHR (right to a fair trial); Art. 11 ECHR (freedom of assembly and association)

Keywords: Restriction of the right to strike by state decree – Lack of judicial review

Note: The complainants are trade unions representing the interests of teachers and other employees in the education sector. They decided to organise a strike to enforce their demands for improved working conditions for employees and an increase in salaries. According to Hungarian law, a strike in the area of systemically important services can only be organised if the collective bargaining partners have previously reached an agreement on the nature and scope of the essential services to be provided during the strike or if this agreement has been replaced by a court decision. Even before such an agreement was reached or superseded by court judgment, the government issued a decree unilaterally determining the scope of essential services in educational institutions during a strike. An application by the complainants for a judicial determination of the minimum services during the planned strike was rejected on the grounds that these had now been determined by the decree.

The complainants argue that they were denied access to a court within the meaning of Article 6 ECHR due to the state decree. Furthermore, they are of the opinion that the decree was unforeseeable and that it is tantamount to a ban on strikes, which would constitute an interference with the right to strike under Article 11 ECHR.[38]

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3. Protection of privacy

Decision

Judgment (First Section) dated 29 August 2024 – No. 24622/22 – *Pasquinelli and Others v. San Marino*

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

Keywords: Labour law measures due to refusal to be vaccinated – Covid-19 pandemic as an exceptional context – Justification of exceptional measures

Core statement: State measures to combat the pandemic that affect employment relationships can justify an interference with Article 8 ECHR if they serve to protect the rights and freedoms of others and are proportionate to the legitimate objectives pursued by the state.

Note: The complaint concerns the refusal of a non-mandatory Covid-19 vaccination by healthcare workers and the subsequent imposition of employment-related temporary measures (transfer, community service for remuneration or suspension in case of refusal).

See note by *Stöhr* in HSI-Report 3/2024, p. 10 et seq.

New proceedings (notified to the respective government)

No. 35473/23 – *Thorenfeldt v. Norway (Second Section) – lodged on 18 September 2023 – communicated on 5 September 2024*

Law: Art. 8 ECHR (right to respect for private and family life); Art. 13 ECHR (right to an effective remedy)

[38] ECtHR of 8 April 2014 – No. 31045/10 – *National Union of Railwaymen, Seafarers and Transport Workers v. United Kingdom*.

Keywords: Content of social security case files – Confidential treatment by employees – Claim for damages for breach of the GDPR

Note: The complainant is employed by the Norwegian Labour and Welfare Administration (NAV). After an accident, she herself received compensation benefits from the NAV. Because she suspected that NAV employees had unauthorised access to her case file, she demanded that the employer inform her which persons had access to the documents and why. The data protection authority, upon being informed by the complainant about the case, found that NAV had not taken adequate security precautions to protect the personal data of the benefit recipients. NAV explained this by saying that precautions to protect the data could not yet be taken for technical reasons. The data protection authority found a breach of the GDPR and instructed NAV to resolve this problem promptly. The complainant brought an action for a declaration of infringement of the GDPR and payment of damages for violation of her right to privacy. The national courts found a breach of the GDPR, but dismissed the action with regard to the claimed damages, as it had not been proven that unauthorised access to the complainant's data had actually taken place.

The complainant alleged a violation of Article 8 ECHR, as the inadequate protection of the confidentiality of her documents at the NAV had interfered with her private life. She also claimed that she had no effective domestic legal remedy within the meaning of Article 13 ECHR due to the violation of her rights.

The question here is whether the state has violated a positive obligation to protect the confidentiality of the data collected by NAV about the complainant.[39] The fact that NAV is subordinate to the Norwegian Ministry of Labour and Social Affairs and is therefore subject to state supervision is likely to be relevant in this context.

Nos. 473/24 and 485/24 – *Rodríguez Quintero and Martinez Martin v. Spain (Fifth section) – lodged on 22/28 December 2023 – communicated on 3 July 2024*

Law: Art. 6 ECHR (Right to a fair trial); Art. 8 ECHR (Right to respect for private and family life); Art. 10 ECHR (Freedom of expression)

Keywords: Termination of employment – Disclosure of confidential information – Confidentiality agreement

Note: The complainants were employed by a security service as security guards for the transport of explosives. Due to the sensitive nature of the work performed, they were required to sign a confidentiality agreement in which they undertook to maintain confidentiality with respect to third parties about all company information that became known to them during their work. The complainants exchanged information with other employees of the company via social media regarding their working and rest times as well as the company's blasting times. The employer found out about this exchange of information through labour court proceedings brought against the company by other employees. This led to the termination of the complainants' employment contracts due to the breach of the confidentiality agreement. The actions for unfair dismissal brought against this were unsuccessful before the national courts. In particular, the national courts found that there was no interference with the right to freedom of expression.

The complainants allege violations of both Article 6 ECHR and Article 8 ECHR as well as Article 10 ECHR. Insofar as the employer obtained the findings to justify the dismissal from other labour court proceedings, this constitutes a violation of the right to a fair trial.[40] The

[39] ECtHR of 17 July 2008 – No. 20511/03 – *I v. Finland*.
[40] ECtHR of 17 October 2019 – Nos. 1874/13 and 8567/13 – *López Ribalda and Others v. Spain*.

employer's monitoring of social media violates the right to respect for private life[41] and constitutes an interference with freedom of expression.

No. 38303/23 – *B. A. et al. v. Hungary (First Section) – lodged on 12 October 2023 – communicated on 10 July 2024*

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

Keywords: "Integrity testing" as a prerequisite for recruitment – Secret surveillance of privacy – Principle of proportionality

Note: In Hungary, so-called integrity testing was introduced in 2011 as a prerequisite for employment in the police service. The original aim of this instrument was to combat corruption and monitor compliance with labour law obligations arising from laws, collective agreements and employment contracts. The integrity check can be carried out by the National Protection Service (NPS) and allows, among other things, the secret gathering of information about the person concerned by secretly observing the person, their home and their sphere of activity. Electronic communication channels may also be monitored. If unlawful behaviour is detected, disciplinary or administrative offence proceedings can be initiated. In 2020, the integrity check was also extended to employees in other areas of the public sector.

The complainants are employed in various public institutions administered by the Ministry of the Interior. They applied to the Constitutional Court for a declaration that the relevant statutory provisions are unconstitutional. The application was rejected on the grounds that the statutory provisions pursue the objective of ensuring the proper functioning of the public service. The Court also found the covert investigation to be proportionate, especially as the state had wide discretionary powers in this respect. It took into account the fact that employees can decide for themselves whether they wish to work for a public employer.

The complainants consider the possibility of secret surveillance as part of integrity testing to be a disproportionate interference with their right to respect for private and family life in accordance with Article 8 ECHR. Furthermore, they deem integrity testing to be an unsuitable means of detecting breaches of professional duties.

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4. Protection of property

New proceedings (notified to the respective government)

No. 13816/22 – *Florian v. Romania (Fourth section) – lodged on 23 February 2022 – communicated on 9 July 2024*

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

Keywords: Granting of salary increments – Assignment of higher-paid tasks – Delegation of duties vs. assignment of tasks

Note: The complainant is an employee of a correctional institution. In the period from May to October 2017 and from April 2018 to September 2020, he was assigned managerial tasks by the respective head of department. In each case, he was assigned these tasks by means of "daily decisions" made by the director of the prison. The complainant claimed payment of salary increments for this activity. After the Regional Court had upheld the complainant's claim,

[41] ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*.

the Court of Appeal overturned the decision on the grounds that there had been no transfer of managerial duties. Domestic law distinguishes between the permanent delegation of duties and the assignment of tasks based on a daily decision by the superior. The delegation of duties is the responsibility of the General Director, whereas the daily assignment of tasks is the responsibility of the director of the prison. Therefore, the complainant's case did not involve a delegation of duties with financial entitlement. The public employer is bound by these statutory provisions when determining the remuneration, so that an analogous application of the regulations on the granting of salary increments for delegated duties is also out of the question.

The complaint alleges a violation of Article 1 Protocol No. 1, whereby it must be decided whether the assignment of tasks on the basis of daily individual decisions over a period of more than three years justifies a legitimate expectation of the salary increments that would be due in the case of delegated duties.[42]

No. 3852/23 – *Cascetta v. Italy (First section) – lodged on 11 January 2023 – communicated on 2 July 2024*

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

Keywords: Secondary employment without authorisation – Compensation for employers – Sufficient certainty of a statutory provision

Note: The complainant is a university professor. In the years 2012 to 2015, he carried out paid consultancy work as part of a secondary occupation. According to the legal provisions, such activities can be carried out without the prior authorisation of the employer, provided they are compatible with the institutional commitments of university professors. In 2019, the public prosecutor's office of the Court of Audit initiated proceedings against the plaintiff and demanded €841,408.41 from him as compensation for the damage caused to the public administration by the plaintiff's secondary employment. The Court of Audit partially upheld the claim and ordered the complainant to pay €369,609.10.

The complainant is of the opinion that the statutory regulation on the exercise of a secondary activity is not sufficiently clear in defining which duties require prior authorisation. Therefore, the claim for damages based on the decision of the national courts violates his right to the protection of property.[43]

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5. Procedural law

(In)admissibility

Decision (Fifth section) of 9 July 2024 – No. 47070/20 – *Levrault v. Monaco*

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

Keywords: Secondment of a foreign judge – Refusal to extend the secondment – Scope of application of Art. 6 ECHR

[42] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*.

[43] ECtHR of 30 May 2000 – No. 24638/94 – *Carbonara and Ventura v. Italy*; ECtHR of 7 June 2012 – No. 38433/09 – *Centro Europa 7 S.r.l. and Di Stefano v. Italy*; ECtHR of 25 March 2014 – 71243/01 – *Vistiņš and Perepjolkins v. Latvia*; ECtHR of 11 December 2018 – 36480/07 – *Lekić v. Slovenia*; ECtHR of 19 May 2022 – Nos. 16140/15 and 13322/16 – *Bežanić and Baškarad v. Croatia*.

Core statement: The secondment of judges on the basis of an international agreement differs from domestic orders concerning the career of judges in their own country due to the diplomatic dimension of such a supranational measure and its limited duration.

Note: The complainant is a judge in France and was seconded to the Principality of Monaco for a period of three years up to and including August 2019 to perform the duties of an examining magistrate there. A request by him to extend this secondment was rejected by both the Monegasque and French authorities without justification.

The complaint asserts that the refusal to extend the secondment constitutes an interference with the independence of the judiciary. Furthermore, it claims the refusal decision was not sufficiently justified within the meaning of Article 6 ECHR.

The Court refers to its established case law, according to which Article 6 of the ECHR is applicable to disputes involving employees of the judiciary, including judges, with regard to its civil law component. This applies in particular to disputes concerning disciplinary measures, the premature termination of a judge's term of office or a transfer to another post.[44] In the present case, the secondment of the complainant was based on a bilateral agreement between two sovereign states on matters of diplomatic relations in general and cooperation between the two states in the field of justice in particular. This diplomatic dimension of the secondment on the basis of an intergovernmental agreement and the limited duration of the measure distinguish it from those that relate to the careers of judges under national law.[45]

Consequently, the Court concludes that the refusal to extend the complainant's secondment does not concern the civil law component of Article 6 ECHR, so that this provision does not apply to the facts of the case. It therefore declares the complaint inadmissible in accordance with Article 35(3) lit. a.

New proceedings (notified to the respective government)

No. 43983/19 – *Vlachopoulou and Others v. Greece (Third Section) – lodged on 13 August 2019 – communicated on 10 September 2024*

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

Keywords: Interpretation of collective agreements on the basis of the Fixed-term Work Directive – Application for referral to the CJEU – Failure to state reasons for refusal

Note: The appellants brought a dispute before the national labour courts concerning the interpretation of collective agreements concluded on the basis of Directive 1999/17/EC on the ETUC-UNICE-CEEP Framework Agreement on fixed-term work.[46] They applied to the court of last instance to request a preliminary ruling from the CJEU on the correct interpretation of the Directive. In its decision, the court of appeal upheld the Greek government's appeal against this decision without giving reasons for rejecting the request for a preliminary ruling.

[44] ECtHR of 8 February 2011 – No. 52531/07 – *Zalli v. Albania*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*; ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Türkiye*; ECtHR of 29 June 2021 – Nos. 26691/18 and 27367/18 – *Broda and Bojara v. Poland*; ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova v. Bulgaria*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland;* ECtHR of 26 March 2024 – No. 54699/14 – *Kartal v. Türkiye*; ECtHR of 9 April 2024 – No. 73532/16 – *Sözen v. Türkiye*.

[45] Conversely: ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v Türkiye*; ECtHR of 22 July 2021 – No. 11423/19 – *Gumenyuk and others v Ukraine*.

[46] Directive 1999/17/EC on the ETUC-UNICE-CEEP Framework Agreement.

In particular, the Court of Justice will have to rule on the question of whether the rejection of a request for a preliminary ruling by national courts must be reasoned.[47]

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6. Social security

New proceedings (notified to the respective government)

No. 6354/23 – *Barba v. Croatia (Second section) – lodged on 28 January 2023 – communicated on 27 August 2024*

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

Keywords: Status of a war invalid – Retroactive granting of a disability benefit – Default interest

Note: On the basis of a decision dated 23 January 1997, the complainant is recognised as a war invalid with a degree of disability of 50%. Since 1 June 1996, he has been receiving a disability benefit, the amount of which is calculated according to the degree of disability. The complainant's appeal against the original benefit decision led to its amendment in May 2005 and the determination of a degree of disability of 80% as well as the retroactive increase of the disability benefit as of 1 January 1996. The difference between the originally determined benefit and the subsequently increased benefit was paid to the complainant without the statutory default interest that had accrued in the meantime. The complainant brought an action against the pension insurance institution for payment of the default interest. The action was dismissed on the grounds that no default had occurred as the original pension assessment was only found to be incorrect in May 2005 and the debt was settled immediately afterwards. The complainant considers the courts' refusal to grant him default interest to be in breach of his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the ECHR.

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9. Whistleblowing

Decision

Judgment (Fourth Section) of 27 August 2024 – No. 15028/16 – *Hrachya Harutyunyan v. Armenia*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Damages for whistleblowing – Damage to the reputation of a former colleague – Significance for the general public – Proportionality of the interference

[47] ECtHR of 13 February 2020 – No. 25137/16 – *Sanofi Pasteur v. France*; ECtHR of 20 September 2011 – Nos. 3989/07 and 38353/07 – *Ullens de Schooten and Rezabek v. Belgium*; ECtHR of 14 March 2023 – No. 57378/18 – *Georgiou v. Greece*.

Core statement: The protection of whistleblowers guaranteed by Article 10 ECHR continues to exist beyond the end of the employment relationship if the information disclosed, to which whistleblowers had privileged access due to their employment relationship, is of public interest.

Note: The complainant was employed by an energy supply company organised under private law as head of the security and administration department from 2008 until his employment was terminated in 2011. In March 2012, he passed on information to the head of the anti-corruption department about alleged corrupt behaviour and abuse of office by an employee of the company's security directorate. After this employee learned of the complainant's disclosure of the information, he brought an action against the complainant before a civil court for payment of damages for insult and defamation. The complainant was ordered by the competent regional court to pay compensation of approximately €3,500. Appeals against this were unsuccessful. By way of enforcement of the judgment, the complainant's home and car were seized.

The complainant considers his right to freedom of expression under Article 10 ECHR to have been violated by the judgment. He claims to have obtained the relevant information on the basis of the employment relationship and passed it on to the company. He asserts that the Court's case law on the protection of whistleblowers[48] should be applied to his case.

The cases decided by the Court to date have concerned situations in which internal information about employers was passed on to the general public.[49] The protection of whistleblowers arising from Article 10 ECHR is based on the need to take into account the particularities of the existence of an employment relationship, which is characterised by the employees' duty of loyalty, restraint and discretion towards their employers. On the other hand, the economic interest of private or public employers must also be taken into account when deciding whether employees can invoke whistleblower protection. Ultimately, this also contributes to the preservation of jobs.[50] These principles must also be applied in cases in which whistleblowers inform employers internally about harm caused by the behaviour of other employees.

The protection of whistleblowers is not limited by the termination of the employment relationship. Both the recommendation of the Committee of Ministers[51] and Article 4(2) of the Whistleblowing Directive 2019/1937/EU[52] extend the protection of whistleblowers' freedom of expression to former employees. The right to freedom of expression does not automatically cease to apply when the employment relationship ends. This applies in particular in cases where the information to which whistleblowers have privileged access due to their employment relationship is of public interest. It is true that the disclosure of information after the end of the employment relationship can no longer have any direct consequences for the employee. However, the order to pay damages to the complainant was a consequence of the disclosure protected by Article 10 ECHR.

In this case, the Court concludes that the domestic courts, in deciding on the allegations of defamation against the complainant, did not take into account the protection of the freedom of expression of whistleblowers. The reported information about possible corruption and abuse of office initially only concerned the internal relationship between employee and employer. Nevertheless, there was a public interest in clarifying the facts of the case, as the complainant's employer is the country's most important energy supply company, and is subject to state control. The domestic courts did not sufficiently address this issue. In view of the severity of

[48] ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Moldova*; ECtHR of 1 February 2023 – No. 21884/18 – *Halet v. Luxembourg*.

[49] ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Moldova*; ECtHR of 19 February 2008 – No. 4063/04 – *Martschenko v. Ukraine*; ECtHR of 21 July 2011 – No. 28274/08 – *Heinisch v. Germany*; ECtHR of 8 January 2011 – No. 40238/02 – *Bucur and Toma v. Romania*; ECtHR of 21 October 2014 – No. 73571/10 – *Matúz v. Hungary*; ECtHR of 16 February 2021 – No. 23922/19 – *Gawlik v. Liechtenstein*.

[50] ECtHR of 14 February 2023 – No. 21884/18 – *Halet v. Luxembourg*.

[51] Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014.

[52] Directive 2019/1937/EU.

the sanction imposed on the complainant, the Court considers that the interference with the protected right was disproportionate.

The Court therefore recognised a violation of Article 10 ECHR and awarded the complainant compensation in the amount of €4,500.

New proceedings (notified to the respective government)

No. 52722/20 – *Goga v. Romania (Fourth Section) – lodged on 12 November 2020 – communicated on 16 September 2024*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Compensation for damages due to whistleblowing – Defamatory allegations on Facebook – Balancing of interests

Note: The complainant had published comments on Facebook about his employer's deputy general manager that the latter considered to be defamatory. His action led to a final judgment against the complainant for payment of compensation.

The complainant is of the opinion that the domestic courts have not performed a balancing of interests and have not taken into account the fact that he acted as a whistleblower, which means his actions are protected by Article 10 ECHR.

The legal dispute concerns in particular the question of whether the complainant's statements published on Facebook can be classified as whistleblowing within the meaning of the case law of the ECtHR.[53]

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[53] ECtHR of 14 February 2023 – No. 21884/18 – *Halet v. Luxembourg*; ECtHR of 9 December 2021 No. 52969/13 – *Wojczuk v. Poland*.