REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

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

Edition 4/2024
Reporting period: 1 October - 31 December 2024

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I. Editorial

HSI Report 4/2024 chronicles the development of case law and legislation in the area of labour and social security law at the European and international level during the period from October to December 2024.

The **CJEU overview** contains a number of relevant cases. In *MK* (C-65/23), the CJEU takes a position on the fundamental question of which requirements must be complied with in a company agreement on data protection. Also, discriminatory provisions in collective agreements, specifically collective agreements between different trade unions, are once again in the focus of the Court (C-314/23 – *Air Nostrum*). A new case brought by the Commission against the Federal Republic of Germany is pending, as the Bavarian family allowance provides for lower benefits for children of EU citizens living in another Member State under certain circumstances (C-642/24 – *Commission v. Germany*).
A number of **proceedings before the ECtHR** concern the protection of whistleblowers. In *Aghajanyan v. Armenia* (No. 41675/12), the ECtHR clarifies that the duties of loyalty and confidentiality take second place to the public interest in the disclosure of information, particularly when this relates to environmental protection. The question of the legality of selective strike action is the subject of the case *Hellgren v. Finland* (No. 52977/19) and the case *Central Unitaria De Traballadores/as v. Spain* (No. 49363/20) concerns the ban on a union-organised demonstration during the COVID-19 pandemic.

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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1. Data protection

Decision

Judgment of the Court (Eighth Chamber) of 19 December 2024 – C-65/23 – *MK*

Law: Art. 88(1) and (2) GDPR (EU) 2016/679

Keywords: Employee data protection – Works agreements – Application of the requirements of the GDPR to works agreements – Margin of discretion of the parties to a collective agreement – Scope of judicial review

Core statement: A Member State regulation pursuant to Article 88(1) GDPR, which permits company agreements on data protection, must ensure that the provisions of Article 5, Article 6(1) and Article 9(1) and (2) GDPR are complied with in such an agreement. The judicial review of a collective agreement also applies in full to the necessity of the data processing within the meaning of the GDPR.

Note: Works agreements play a special role in the context of employee data protection especially in Germany and Austria. They break down the very general requirements of the GDPR and the German Federal Data Protection Act (BDSG), which are not limited to the employment context, to the specific operational use of IT systems in particular. The basis for this is provided by Article 88(1) GDPR, which expressly permits more specific provisions for data protection in the employment context "by law or by collective agreement". Pursuant to Section 26(4) BDSG, data processing for the purposes of the employment relationship is also permitted on the basis of collective agreements. This provision refers to Article 88(2) GDPR, which in turn specifies general principles for data processing in the workplace.

The starting point of the referral made by the Eighth Chamber of the Federal Labour Court (BAG) to the CJEU[1] is the complaint of an employee who objects to the processing of his data on the basis of a works agreement. The employer introduced the “Workday” software as a personnel information system throughout the group. Until the conclusion of a negotiated works agreement, the works council and employer had concluded a so-called "works agreement confirming acquiescence", which restricted data processing to a minimum and excluded, for example, personnel administration via “Workday”. This meant that only data such as name, start date, place of work, employer within the group and business contact details could be processed. The plaintiff claimed that the employer had actually exceeded the limits of the works agreement. For the questions referred by the BAG, however, it is of interest that he also objects to the works agreement confirming acquiescence itself. The BAG referred very practical questions to the CJEU regarding the legal requirements and standards of scrutiny to be applied to such a works agreement. To what extent are collective agreements to be measured against the requirements of the GDPR?

[1] Federal Labour Court of 20 April 2023 – 8 AZR 209/21.

Firstly, the CJEU emphasises that Article 88(1) GDPR constitutes an “opening clause” that gives the Member States the power to adopt provisions with their own regulatory content on employee data protection.[2] It notes that States’ discretion is limited by the principles of Article 88(2) GDPR and adds that the regulations of the Member States must not jeopardise the objectives of the GDPR, in particular the high level of protection applied to the processing of employee data. The provisions of the Member States must therefore comply with the requirements of the GDPR, which also includes Article 5, Article 6(1) and Article 9(1) and (2) GDPR, which are mentioned specifically by the BAG.

In the present case, the CJEU does not explicitly mention that regulations that go beyond the minimum requirements for employee data protection in the interests of employees are permissible in any case.[3]

In the second part of the grounds for the decision, it states that the assessment of necessity under data protection law is subject to judicial review "without any restriction", even if the data processing is regulated by more specific provisions in collective agreements. The margin of discretion enjoyed by parties to a collective agreement does not mean that the "requirement of necessity is applied less strictly or even waived" (para. 56). Conflicting provisions must be left unapplied (para. 53, 59).

The statements in this part of the grounds for the decision read quite broadly – the Court seems to confirm that it is not in a position to adequately capture the collective dimension of labour law in its case law. For example, it makes no reference whatsoever to collective autonomy based on fundamental rights (Arts. 12, 28 EU CFR and Art. 27 EU CFR). In view of the wording of Article 88(1) GDPR, the question arises as to what significance the opening for more specific provisions in collective agreements should have if these are fully subject to the requirements of the GDPR and full judicial review.

However, the CJEU itself refers to a "margin of discretion that Article 88 leaves to the parties to a collective agreement" (para. 55). The solution is inherent in the particularities of rule-making in the multi-level system of labour law. The CJEU is called upon to formulate the abstract overriding principles for the interpretation of EU law – and thus also the application of the GDPR in the employment context. The downstream regulatory levels must correspond to these overriding principles. However, the assessment of a specific works agreement on a specific IT system on the basis of these general principles and, in particular, the balancing processes to be carried out in the context of necessity are the responsibility of the national courts. The collective scope for regulation, including its fundamental rights dimension, must also be taken into account in the assessment.

Opinion

Opinion of Advocate General Pikamäe of 4 October 2024 – Joined Cases C-313/23, C-316/23 and C-332/23 – *Inspectorate kam Visshia sadeben savet*

Law: Art. 19(1)(2) TEU in conjunction with Art. 47 EU Charter of Fundamental Rights; Arts. 4(7) and 79(1) GDPR (EU) 2016/679

Keywords: Employee data protection – Judicial inspectorates with the power to propose disciplinary proceedings against judges and public prosecutors – Access to account balances – Remaining in office even after the end of the statutory term of office – Concept of "controller"

[2] CJEU of 30 March 2023 – C-34/21 – *Hauptpersonalrat der Lehrerinnen und Lehrer beim Hessischen Kultusministerium*, para. 51.
[3] But thus CJEU of 9 February 2023 – C-453/21 – *X-FAB Dresden,* marg. No. 31; CJEU of 22 June 2022 – C-534/20 – *Leistritz*, see also HSI-Report 2, p. 5.

Core statement: Members of judicial inspectorates must not be allowed to extend their term of office indefinitely after the end of their official term of office if there are indications that pressure is being exerted on the work of judges and public prosecutors.

A court that merely decides on the request for access to the account balances of the judges and public prosecutors concerned cannot be classified as the controller of this personal data within the meaning of the GDPR.

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2. Equal treatment

Decisions

Judgment of the Court (Fourth Chamber) of 4 October 2024 – C-314/23 – *Air Nostrum*

Law: Art. 14(1)(c), Art. 2(1)(e) and Art. 4(1)(c) Equal Treatment Directive 2006/54/EC; Art. 157 TFEU

Keywords: Collective agreements of different trade unions – Provision on daily allowances for different occupational groups – Indirect discrimination on grounds of sex – Collective bargaining autonomy

Core statement: Article 2(1)(e) and Article 4(1)(c) of the Equal Treatment Directive are to be interpreted as meaning that, on the one hand, daily allowances which compensate certain employees for expenses incurred as a result of their business trips as a lump sum constitute part of their remuneration and, on the other hand, a difference in the amount of such daily allowances is not prohibited under this Directive if these two groups do not perform the same work or work recognised as equivalent.

Note: In this case, it had to be clarified whether indirect discrimination on grounds of sex exists if a trade union for pilots in a company has negotiated better conditions in its collective agreement than the trade union for flight attendants represented in the same company, if the group of pilots favoured by the collective agreement is largely made up of men, while the group of flight attendants is largely made up of women.

The CJEU skirts the fundamental question of whether the autonomy of the social partners alone can be a sufficient reason for the objective justification of unequal treatment or whether the differences in the amount of daily allowances between two groups of employees must rather be justified by objective factors. Firstly, it states that the daily allowance is a component of remuneration within the meaning of Article 2 of the Equal Treatment Directive. However, with reference to "equal work or work recognised as being of equal value" in Article 4 of the Equal Treatment Directive, it denies the existence of indirect discrimination on grounds of sex (para. 40), stating that cabin crew and pilots obviously do not perform the same work. Furthermore, it argues, in view of the training required for the profession of pilot and the responsibilities associated with this profession, it cannot be assumed that the work of pilots is equivalent to the work of cabin crew within the meaning of Article 4 of the Equal Treatment Directive. Consequently, the Court did not go on to discuss the question what impact it has that the daily allowances are provided for in different collective agreements concluded between different parties.

Judgment of the Court (Second Chamber) of 17 October 2024 – C-349/23 – *Zetschek*

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

Keywords: Equal treatment in employment and occupation – Prohibition of age discrimination – Fixed maximum retirement age for federal judges – Postponement of retirement – Unequal treatment

Core statement: A national regulation according to which federal judges are not allowed to postpone their retirement, while federal civil servants and state judges are allowed to do so, does not constitute unequal treatment based directly on age.

Judgment of the Court (Seventh Chamber) of 17 October 2024 – C-408/23 – *Anwaltsnotarin*

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

Keywords: Prohibition of discrimination on grounds of age – Maximum age limit of 60 years for first-time appointment as a lawyer-notary – Vacancies due to the absence of younger applicants – Justification grounds – Appropriateness and necessity

Core statement: A maximum age limit of 60 years may be set for the first appointment as a lawyer commissioned as a notary, provided that this regulation pursues a legitimate objective of employment and labour market policy and that the regulation is also appropriate and necessary in view of its legislative context.

Judgment of the Court (Seventh Chamber) of 24 October 2024 – C-441/23 – *Omnitel Comunicaciones and Others*

Law: Arts. 3(1), 5(1) Temporary Agency Work Directive 2008/104/EC; Art. 15 Equal Treatment Directive 2006/54/EC

Keywords: Definition of temporary employment agency – Temporary work – Remuneration

Core statements:

1. The Temporary Agency Work Directive is applicable even if the temporary employment agency is not recognised as a temporary employment agency under national law because it does not have a corresponding official permit.

2. Temporary agency work within the meaning of Article 3(1)(b) to (d) of the Temporary Agency Work Directive is given if employees are subject to the supervision and management of the hirer and the hirer specifies the services to be provided and the manner in which they are to be provided, requires them to comply with its instructions and internal rules and exercises control and supervision over the manner in which they perform their tasks.

3. Pursuant to Article 5(1) of the Temporary Agency Work Directive, temporary workers must receive a salary for the duration of their assignment that is at least equal to the salary they would have received if they had been hired directly by this company.

Note: In this case, the CJEU states that the scope of application of the Temporary Agency Work Directive does not depend on whether national law provides for a special state authorisation for the hiring out of workers – such as the hiring-out permit pursuant to Section 1(1) of the Act on Temporary Agency Work (AÜG). In the event of such a restriction, companies having no such permit that provide other companies with workers who have concluded an employment contract with them could escape the application of the Temporary Agency Work Directive and workers would therefore not benefit from the protection intended by this directive, even though the employment relationship between them and the company providing them

would not differ in essence from that which would exist between them and a company that had the prior official authorisation required under national law. Such a restriction would impair the practical effectiveness of the Temporary Agency Work Directive. Its scope would be at the discretion of the Member States.

Furthermore, the CJEU states that the status of "temporary-work agency" does not depend on the number or percentage of employees provided to a company (para. 34). Accordingly, mixed-status companies are also covered by the Temporary Agency Work Directive.[4]

Although Article 3(1)(a) of the Temporary Agency Work Directive expressly refers to the status of worker under the law of the Member State, the CJEU uses the concept of worker under EU law as a basis (para. 55). The CJEU uses the concept of temporary work agency to differentiate between the provision of services by one company and another company (para. 52). As in the *Betriebsrat der Ruhrlandklinik* case,[5] the CJEU recalls that, according to established case law, the term "worker" cannot be interpreted differently depending on national law, but has its own meaning under EU law.

The recourse to the concept of worker in conformity with EU law is strongly criticised in the literature as an overstepping of the CJEU's jurisdiction with reference to Article 19(1), second sentence, TEU.[6] However, by adopting a more harmonised understanding, the decision can also be read in such a way that the CJEU is primarily concerned with ensuring that no specific groups of persons or employment relationships that are in a comparable legal situation are excluded from the application of EU law.[7] By referring to the *Kiiski* case,[8] the CJEU makes it clear that it is primarily concerned with the general principle of equal treatment under Article 20 of the EU Charter of Fundamental Rights.[9] Finally, the decisive factor for the further delimitation of temporary agency work from services is that employees work in the user company "under its supervision and management". According to the CJEU, this requires a relationship of subordination with the user company. The supervisory and managerial authority includes compliance with internal rules and working methods, as well as monitoring and supervising the way in which the employee fulfils their tasks. However, merely reviewing the work and issuing general instructions is not sufficient (para. 60). The authority to supervise and manage therefore only becomes relevant for the status of a temporary worker when it is exercised by the user company in the form of a right to issue instructions.[10]

New pending case

Request for a preliminary ruling from the Arbeits- und Sozialgericht Wien (Austria) dated 12 September 2024, lodged on 4 November 2024 – C-757/24 – *Gemeinde Wien*

Law: Arts. 1, 2 and 6 Equal Treatment Framework Directive 2000/78/EC in conjunction with. Art. 21 EU Charter of Fundamental Rights

Keywords: Age discrimination – Length of service – Periods of service completed before the age of 18 – Budgetary considerations

[4] This is also the prevailing opinion in the literature: *BeckOK-Kock* ArbR, Section 1 AÜG, 73rd ed. 1 September 2024; *ErfK-Roloff*, Section 1 AÜG, marg. No. 34; *Schüren/Hamann-Hamann*, Section 1 AÜG marg. No. 78, 6th ed. 2023.
[5] CJEU of 17 November 2016 – C-216/15 – *Betriebsrat der Ruhrlandklinik*, see also HSI-Newsletter 04/2016, p. 4 et seq.
[6] *Sagan*, NZA Supplement 3/2023, 51, 52.
[7] As *Kocher* for the *Betriebsrat der Ruhrlandklinik* case at NJW-RR 2024, 449, 451.
[8] CJEU of 20 September 2007 – C-116/06 – *Kiiski*, with acceptane *Göhle-Sander,* jurisPR-ArbR 17/2008, note 1.
[9] As *Kocher* for the *Ruhrlandklinik* case, NZA-RR 2024, 449, 451.
[10] CJEU of 24 October 2024 – C-441/23 – *Omnitel Comunicaciones SL*, with a note by *Hamann*, juris-PR-ArbR 49/2024, note 1.

Note: Is a national provision contrary to EU law which, in order to eliminate existing age discrimination,[11] only partially takes into account periods of prior service before the age of 18?

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3. Fixed-term employment

Decision

Judgment of the Court (Seventh Chamber) of 17 October 2024 – C-322/23 – *Lufoni*

Law: Clause 4 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: Fixed-term employment in the public sector – Partial crediting of periods of service completed under fixed-term employment contracts when determining length of service

Core statement: If only two-thirds of a worker's period of service is taken into account for the recognition of their length of service when they are made a civil servant, this constitutes discrimination against fixed-term employees.

New pending cases

Request for a preliminary ruling from the Tribunale ordinario di Ravenna (Italy), lodged on 8 October 2024 – C-654/24 – *Bariello*

Law: Section 4 No. 1 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: Assertion of claims from the employment relationship by fixed-term employees who have left the service – Teachers' card

Note: In this preliminary ruling procedure, the CJEU is being asked whether fixed-term employees are unjustifiably disadvantaged by the restrictions that arise for them after leaving the teaching profession when asserting claims under the newly introduced "teachers' card".

Request for a preliminary ruling from the Tribunale di Milano (Italy) dated 7 October 2024, lodged on 11 October 2024 – C-668/24 – *Fondazione Teatro alla Scala di Milano*

Law: Sections 4 and 5 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: Sanction for a violation of the prohibition of abusive use of successive fixed-term employment relationships – Special regulation for the field of activity of operatic and orchestral foundations

Note: The referring court states that, according to the understanding of the *Suprema Corte di Cassazione* (Court of Cassation, Italy), the general rules according to which the abusive recourse to successive fixed-term employment contracts results in the automatic conversion

[11] The relevant legal regulation here was issued in response to the decision of the CJEU of 8 May 2019 – C-396/17 – *Leitner*.

of the fixed-term contract into a permanent one are not fully applicable to the field of activity of the foundations for opera and orchestra. Does this legal situation fulfil the requirements of EU law?

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4. General matters

Decisions

Judgment of the Court of Justice (Grand Chamber) of 4 October 2014 – Joined Cases C-541/20 to C-555/20 – *Lithuania and Others v. Parliament and Council*

Law: Mobility Package: Arts. 1, 2 Regulation (EU) 2020/1054, Art. 1 Directive 2020/1057

Keywords: Maximum daily and weekly driving times for drivers – Breaks – Right to spend rest periods at home or at the place of work – Prohibition on spending rest periods in the vehicle – Time limit for the installation of smart tachographs – Return of the vehicle to the operational centre in the Member State of establishment – Cabotage – Drivers as posted workers – Freedom to provide services in the transport sector – Impact assessment when adopting EU acts

Core statement: The EU legislature has a wide margin of discretion in the area of social policy. However, it is obliged to base its judgments on an objective factual basis before adopting the legal act and must be in a position to prove this in retrospect.

The obligation under the Mobility Package that vehicles used for international transport must return to an operational centre in the country of establishment of the transport company within eight weeks is not based on a sufficiently sound assessment by the European legislature and is therefore declared null and void. Otherwise, the Mobility Package is in line with higher-ranking Union law.

Note: Seven EU Member States (Bulgaria, Lithuania, Malta, Poland, Romania, Hungary and Cyprus) have brought actions for annulment before the Court of Justice against provisions of the Mobility Package[12] from 2020. The aim of the legislation is, among other things, to contribute to good working conditions for drivers and fair business conditions for transport companies (Recital 1). EU social legislation in road transport is to be reorganised in a clear, effective and easily implementable manner throughout the Union. The Mobility Package contains regulations on driving times and rest periods for drivers, on their return to their place of work or residence, on their accommodation and on remuneration systems. These Member States object in particular to the following individual provisions of the Mobility Package:

1. The ban on drivers spending their weekly rest period in the vehicle (Art. 1 No. 6 lit. c Regulation (EU) 2020/1054; Art. 8(8) Regulation 561/2006 as amended);
2. The obligation to enable drivers to return to the company's premises or their place of residence every four weeks (Art. 1 No. 6 lit. d Regulation (EU) 2020/1054; Art. 8(8a) Regulation 561/2006 as amended);

[12] Mobility Package I comprises the relevant Regulation (EU) 2020/1054 amending Regulation (EC) 561/2006 on driving times, minimum breaks and rest periods and Regulation (EU) 165/2014 on positioning by means of tachographs as well as Regulation (EU) 2020/1055, Regulation (EU) 2020/1056 and Directive (EU) 2020/1057 on special rules concerning the posting of drivers in road transport, see OJ EU of 31 July 2020, L249.

3. Bringing forward the date of the obligation to install second-generation smart tachographs (Art. 2 No. 2 Regulation (EU) 2020/1054; Art. 3(4) No. 4, Art. 3(4a) Regulation 165/14);
4. The obligation that vehicles used in international transport return to one of the operating sites in the Member State of establishment within eight weeks (Art. 1 No. 3 Regulation (EU) 2020/1055; Art. 5(1) lit. b Regulation 1071/2009 as amended);
5. The waiting time of four days between different cabotage transport operations (transport operations between states, none of which is the Member State of establishment of the transport company) with the same vehicle in the same Member State (Art. 2 No. 4 Regulation (EU) 2020/1055; Art. 8(2a) Regulation 1072/2009 as amended);
6. The classification of drivers as "posted workers" if they carry out cabotage transport operations or certain combined transport operations, so that they benefit from the working and employment conditions applicable in the host Member State (Art. 1 Directive 2020/1057).

The Grand Chamber of the CJEU has dismissed all but one of the actions for annulment brought together for a joint decision: The new obligation introduced by the Mobility Package that vehicles used for cross-border transport must return to an operational centre in the Member State of establishment within eight weeks. This provision was only included in the legislative process at the instigation of the Council.

In a record-breaking extent of 1,496 paragraphs, the CJEU's reasoning contains some remarkable statements for the further development of the social protection of drivers, but also of EU law in general. According to the Court, the Mobility Package rebalances the relevant interests and increases the social protection of drivers (see paras. 266 et seq., 281 et seq.). It will therefore not be possible to simply fall back on traditional case law for the interpretation of the reformed body of standards.

When examining the proportionality (Art. 5(4) TEU) of the challenged provisions, the Grand Chamber emphasised some general obligations for the EU legislature. It had a wide margin of discretion to assess the political, economic or social consequences of the legal acts. Proportionality is not about identifying the best possible legislative measure, but rather about excluding manifestly inappropriate measures (para. 242). However, the Union legislature must base its assessments on an objective factual basis, for which it bears the burden of proof. It is noteworthy that an *ex ante* perspective must be applied for this: It is not sufficient to present findings in court proceedings that were not included in the legislative process. The (possible) lack of consideration of objective facts in the legislative process can in itself justify the disproportionality of a provision (paras. 736 et seq.).

Furthermore, there is a legislative obligation to minimise burdens on economic operators (paras. 243 et seq.). However, the fact that the competitiveness of the EU must be taken into account does not follow from Article 151(2) TFEU in the present case, as this is only relevant for provisions of social policy, but not for provisions of transport policy (paras. 635 et seq.).

Transport companies from supposedly "peripheral" Member States are not discriminated against by the provisions of the Mobility Package because their chosen business model consists of operating in distant Member States (paras. 278, 318, 876) – and they are free to establish themselves in these Member States (paras. 369, 1449). The provisions on the waiting period between cabotage operations safeguard the temporary nature of the activity in the host Member State (paras. 803 et seq.). With regard to the posting rules, the Mobility Package now takes into account the link between the transport service and the host Member State (paras. 1166 et seq.).

Judgment of the Court (Second Chamber) of 4 October 2014 – C-650/22 – *FIFA*

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

Keywords: Professional football players – FIFA regulations on status and transfer – Joint and several liability of the players and the new club – Prohibition on issuing the certificate required for the transfer of players to this other club

Core statements:

1. A blanket regulation that provides that players and the new club are jointly and severally liable for the payment of compensation to the former club for termination of contract without just cause is incompatible with the free movement of workers enshrined in Article 45 TFEU.

2. The sporting sanction laid down in the rules of not being allowed to make any transfers for the new club for two transfer periods unless it can prove that it did not cause the players to breach this contract is also incompatible with Article 45 TFEU.

3. Also incompatible with Article 45 TFEU is the rule according to which the former club is in principle and automatically prohibited from issuing an international transfer certificate, which is necessary for the registration of the player with the new club, if there is a legal dispute between the former club and the player.

4. With regard to competition law, the CJEU finds that these regulations are incompatible with Article 101(1) TFEU.

Note: This case concerns the complaint of former French professional footballer *Lassane Diarra*. In 2013, *Diarra* signed a fixed-term employment contract with the Russian club *FC Lokomotiv Moscow*, which the club cancelled after just one year. Diarra subsequently attempted to move to Belgian club *Charleroi*, but this failed. The new Belgian club feared massive sanctions, as FIFA rules stipulate that the new club is jointly liable for the former club's compensation if the player cancels the contract. In addition, the new club was threatened with a transfer ban unless it could prove that it had not caused the player to breach his contract. *Diarra* then sued FIFA on the grounds that these regulations had made a transfer to *Charleroi* impossible. The Court of Appeal ultimately called on the CJEU to determine whether these regulations were compatible with Article 45 TFEU and the non-competition clause of Article 101 TFEU.

The CJEU's answer is no in both cases. In its reasoning, it agrees with the opinion of Advocate General *Szpunar*[13] and correctly argues that the provision in Article 17(2) of the FIFA regulations regarding status and transfer, according to which a new club is automatically jointly liable for the compensation imposed on the player in breach of contract, is to be regarded as disproportionate because it is not based on the individual case (para. 88). The joint liability applies regardless of whether the new club induced the player to breach the contract with the former club. The blanket rule according to which new clubs are not allowed to make transfers for two transfer periods unless they can prove that they did not induce the players to breach this contract is also disproportionate to the offence. A sporting sanction that cannot be adapted to specific criteria or circumstances in individual cases is obviously disproportionate to the inducement to breach the contract with which the club is charged. The rule according to which the former club is generally and automatically prohibited from issuing a transfer certificate if there is a contractual dispute between the former club and the player is also disproportionate. This rule could result in players not being allowed to work and the new club not being able to use them simply because there is a dispute over the early termination of the contract. This violates the principle of proportionality, in particular because the rule does not take into account the circumstances of the individual case, such as the actual background to the termination of

[13] Opinion of Advocate General Szpunar of 30 April 2024, C-650/22 – *FIFA*, see HSI-Report 02/2024, p. 12.

the contract, the behaviour of the players and the old club and the possible lack of involvement of the new club. With regard to competition law, the CJEU also found that the contested rules could restrict or even prevent cross-border competition between professional football clubs in the EU.[14]

Judgment of the Court (First Chamber) of 4 October 2024 – C-242/23 – *Tecno*37*

Law: Art. 25(1) Services Directive 2006/123/EC; Art. 59(3) Professional Recognition Directive 2005/36/EC

Keywords: Prohibition on simultaneously acting as property broker and property manager

Core statements:

1. The closure of infringement proceedings against a Member State by the European Commission pursuant to Article 258 TFEU does not result in the national legislation that was the subject-matter of these proceedings becoming compatible with Union law.

2. A regulation that provides as a general rule that it is incompatible to pursue both the activity of property brokerage and the activity of property management is incompatible with the free movement of services.

Judgment of the Court (Sixth Chamber) of 14 November 2024 – C-643/23 – *Agenciart – Management Artístico*

Law: Art. 2(3) Late Payment Directive 2011/7/EU

Keywords: Term "undertaking" – Exercise of an independent professional activity – Actor

Core statement: A natural person who works on a regular basis in the acting profession in a self-employed capacity for remuneration, but without having their own premises, staff or equipment related to their professional activity, is an "undertaking" within the meaning of the provision.

Judgment of the Court (Seventh Chamber) of 21 November 2024 – C-546/23 P – *UG v. Commission*

Law: Art. 47(c)(i) of the Conditions of Employment of Other Servants of the European Union; Art. 42a Staff Regulations; Clause 5(4) Framework Agreement on Parental Leave

Keywords: Contract staff – Termination of contract for an indefinite period – Duty to state reasons – Termination due to taking parental leave

Core statement: The prohibition of discrimination under Clause 5(4) of the Framework Agreement on Parental Leave also applies to civil servants and EU staff. Civil servants or other EU employees may not be dismissed on the grounds of inadequate professional performance with reference to the dates of the requested parental leave. However, dismissal is possible for the other reasons stated, provided that these grounds justify the dismissal.

Members of a staff committee of an EU institution do not require authorisation from their line manager to attend a proper meeting of the committee during working hours. However, dismissal may be based on the fact that the line manager was not informed in good time about the attendance of these meetings.

[14] On the consequences of the Diarra judgment for the sanctioning of footballers in breach of contract under association law, see *Fischinger/Rybak*, SpuRt 2024, 434.

Judgment of the Court (Grand Chamber) of 19 December 2024 – C-295/23 – *Halmer*

Law: Arts. 49, 63(1) TFEU; Art. 15(3) Services Directive 2006/123/EC

Keywords: Participation of financial investors in the capital of law firms – Revocation of the authorisation of this company to practise as a lawyer – Freedom of establishment and free movement of capital

Core statement: Under national law, the transfer of shares in a law firm to financial investors may result in the revocation of the firm's authorisation to practise law. The restriction of the freedom of establishment and the free movement of capital is justified by overriding reasons in the public interest.

Opinions

Opinion of Advocate General Szpunar, delivered on 24 October 2024 – C-575/23 – *ONB and Others*

Law: Arts. 2, 3(2) Copyright Directive 2001/29/EC; Arts. 7 to 9 Rental and Lending Directive 2006/115/EC; Arts. 18 to 23 of the Copyright Directive 2019/790/EU

Keywords: Intellectual property – Copyright and neighbouring rights – Neighbouring rights of orchestral musicians – Principle of appropriate and proportionate remuneration – Assignment of neighbouring rights to employers by regulation

Core statement: A legal act on the transfer of "intellectual property rights related to copyright" of orchestral musicians to employers with regard to services provided in the context of the employment relationship is contrary to EU law if the adoption and content of the act was not subject to the prior consent of this group of persons or their duly authorised representatives.

New pending case

Request for a preliminary ruling from the Austrian Supreme Court dated 16 October 2023, received on 29 December 2023 – C-807/23 – *Jones Day*

Law: Art. 45 TFEU

Keywords: Trainee lawyers – Recognition of activity abroad

Note: The subject of these preliminary ruling proceedings is the Austrian regulations for trainee lawyers to obtain a licence to practise as a lawyer: Is it compatible with the freedom of movement for workers enshrined in Article 45 TFEU that "periods of employment" must necessarily take place in Austria, that is, that legal work at a law firm abroad cannot be taken into account?

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5. Insolvency

Decision

Judgment of the Court (Second Chamber) of 7 November 2024 – Joined Cases C-289/23 and C-305/23 – *Corván and Others*

Law: Art. 23(2) and (4) Restructuring Directive (EU) 2019/1023

Keywords: Restructuring, insolvency and discharge of debt procedures – Discharge of debt for tax and social security claims – Upper limit for discharge of debt

Core statements:

1. The list of circumstances set out in Article 23(2) Restructuring Directive is not exhaustive and the Member States are authorised to restrict access to discharge of debt to a greater extent or to regulate it differently, provided that the circumstances are precisely defined and the exceptions are sufficiently justified.

2. Non-preferential public claims may have to be settled in the insolvency proceedings in order to be able to undergo discharge of debt. Access to discharge of debt may also be excluded if the debtor has behaved negligently or carelessly without, however, having acted dishonestly or in bad faith. Access to discharge of debt may be excluded if the debtor has been sanctioned by a final administrative decision for a very serious offence in tax matters or an offence against social security or social order in the ten years preceding the application for discharge of debt, or if a final decision on the extension of liability has been issued against the debtor, unless the debtor has paid such tax debts and debts to the company in full at the time of filing this application.

3. The list of certain categories of debt contained in Article 23(4) of the Restructuring Directive is not exhaustive and Member States may exclude categories of debt other than those listed in this provision from discharge of debt, provided that this is duly justified.

4. Discharge of debt may be excluded for claims under public law on the grounds that their fulfilment is of particular importance for a just society based on solidarity and the rule of law.

5. A general rule excluding public law claims from discharge of debt is not inadmissible merely because it grants public creditors preferential treatment over other creditors.

6. Discharge of debt may be restricted for a particular category of debt by introducing a ceiling above which discharge of debt is excluded, provided that this restriction is sufficiently justified under national law.

7. If a national legislature decides to make use of the power under Article 1(4) of the Restructuring Directive to include insolvent natural persons who are not entrepreneurs in the rules on discharge of debt for insolvent entrepreneurs, these rules must be compatible with the provisions of Title III of the Directive.

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6. Social security

Decisions

Judgment of the Court (Fifth Chamber) of 7 November 2024 – C-126/23 – *Burdene*

Law: Art. 12(2) Victims Compensation Directive 2004/80/EC; Arts. 20, 21, 33(1), 47 EU Charter of Fundamental Rights

Keywords: National schemes for the compensation of victims of violent intentional offences – Compensation of close family members of the deceased – Concept of "victim" – Exclusion of pension to other family members when there are children or a surviving spouse – "Fair and appropriate" compensation

Core statement: Italian law stipulates that the parents of a person killed by a deliberate act of violence only receive compensation if this person has neither a spouse nor children. Siblings only receive compensation if the victim no longer has parents. This automatic exclusion of certain members of the victim's family from a compensation payment does not guarantee "fair and appropriate" compensation for victims within the meaning of the provision. This is because the term "victim" also includes close family members as indirect victims of the wilfully committed acts of violence.

Judgment of the Court (Fifth Chamber) of 19 December 2024 – C-664/23 – *Caisse d'allocations familiales des Hauts-de-Seine*

Law: Art. 12(1)(e) Combined Permit Directive 2011/98/EU

Keywords: Entitlement to family benefits – Rights of third-country workers with a combined permit – Equal treatment – Exclusion of minor children whose legal entry is not proven

Core statement: A Member State may not make a family allowance for foreign workers who are in possession of a single permit for residence and work conditional on proof that the children born in a third country have entered its territory legally. This is because these third-country nationals are to be treated in the same way as nationals of the Member State.

New pending cases

Action brought by the Commission on October 1, 2024 – C-642/24 – *Commission v. Germany*

Law: Arts. 4, 7 and 67 Coordination Regulation (EC) 883/2004; Art. 45 TFEU; Art. 7(2) Free Movement Regulation (EU) No. 492/2011

Keywords: Family allowance – Adjustment of family benefits depending on the country of residence of the children – Discrimination against migrant workers

Core statement: The Free State of Bavaria grants parents residing in Bavaria a family allowance of € 250 per month for each child aged one and two years. From the third child onwards, it is € 300 per month. The family allowance is granted regardless of income, employment and type of childcare and should not be confused with the federal parental allowance, which compensates for a lack of income during parental leave. EU nationals whose

children live in a Member State where the cost of living is lower than in Bavaria receive lower benefits. The European Commission accuses Germany of violating Articles 7 and 67 of the Coordination Regulation, according to which benefits shall not be reduced on the basis of place of residence. The family allowance, as granted by the Free State of Bavaria, is a family benefit within the meaning of the Coordination Regulation. The Commission claims that said provisions prohibit making the grant or the amount of family benefits conditional on the place of residence of the beneficiary's children.

Secondly, the Commission claims that the Federal Republic of Germany has infringed the principle of equal treatment, as laid down in Article 4 of the Coordination Regulation and Article 7(2) of the Freedom of Movement Regulation. By reducing the family allowance for children residing in the 15 Member States listed exhaustively, the Free State of Bavaria treats persons differently depending on where their children reside and, in particular, less favourably if these children reside in one of the 15 Member States on the list. As a result, this leads to indirect discrimination to the detriment of migrant workers from those Member States for which no legitimate objective is recognisable.

In a comparable Austrian case,[15] the CJEU has already ruled that reduction of family benefits on the basis of purchasing power at the place of residence is not compatible with EU law. The justification put forward by Austria, according to which the adjustment of the amount of benefits for non-resident children was intended to ensure that the support and the resulting relief corresponded in value to the benefits granted to children resident in Austria, did not convince the Court at the time.[16] Similar to Bavaria, the benefits in Austria were not determined according to the actual costs for the maintenance of the children, but were granted as a lump sum. The amount of the Bavarian family allowance is also based on the age and the number of children, without taking actual needs into account. Accordingly, the Commission's action against Germany is likely to be successful.

Request for a preliminary ruling from the Najvyšší správny súd Slovenskej republiky (Slovakia) dated 15 August 2024, received on 21 October 2024 – C-717/24 – *Sociálna poisťovňa*

Law: Art. 51(1) Coordination Regulation (EC) No. 883/2004

Keywords: Old-age pension – Retirement age – Miners – Recognition of periods of service completed in another Member State

Note: This legal dispute concerns the question of whether the conditions for a reduced retirement age should also be recognised if the relevant periods of employment were completed in another Member State and the conditions for early retirement are only met under the law of that Member State.

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[15] CJEU of 16 June 2022 – C-328/20 – *Commission/Austria*, see also HSI-Report 2/2022, p. 19.
[16] CJEU of 16 June 2022 – C-328/20 – *Commission/Austria*, see also HSI-Report 2/2022, p. 19.

7. Transfer of business

Decision

Order of the Court (Ninth Chamber) of 22 October 2024 – C-603/23 – *KI*

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

Keywords: Transfer of undertaking – Scope of application of the Transfer of Undertakings Directive and term "transfer of undertaking" – Appointment of a new notary after the previous notary has left due to reaching the age limit – Transfer of the notary's office

Core statement: A notary's office can be the subject of a "transfer" within the meaning of the Transfer of Undertakings Directive as a "business" if, on the one hand, the notaries offer services for remuneration on a given market and assume the financial risks associated with their activities, so that they carry out an economic activity within the meaning of the Transfer of Undertakings Directive. On the other hand, the notary's office must represent a sufficiently structured and independent group of persons and objects for the pursuit of an economic activity.

The term "transfer of business" covers a situation in which the permanent cessation of the activities of notaries due to reaching the age limit for this activity is followed by the appointment of other notaries if the latter take over the activities at the same location and with the same work equipment as the former and provided that the identity of the notary's office concerned is preserved.[17]

Opinion

Opinion of Advocate General *Rantos* of 24 October 2024 – C-431/23 – *Wibra België*

Law: Art. 5(1) Transfer of Undertakings Directive 2001/23/EC

Keywords: Transfer of companies – Safeguarding employees' claims – Insolvency proceedings

Core statement: If a company is transferred before insolvency proceedings are opened and the competent court has previously refused authorisation as part of proceedings aimed at the continuation of the company, there are no "bankruptcy proceedings directed against the transferor". The provisions of the Transfer of Undertakings Directive apply.

Note: The Advocate General reviews similar proceedings[18] and arrives at the conclusion that the present case likewise does not fall under the exception to the scope of application of the Transfer of Undertakings Directive pursuant to Article 5(1). According to this provision, the Transfer of Undertakings Directive does not apply to a transfer when "the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor". In this case, judicial reorganisation proceedings for the continuation of business activities had failed. The business court then declared the company insolvent. On the following day, the transfer of the company (as originally applied for and rejected in the reorganisation proceedings) was carried out and the resumption of business activities was announced. Based on these circumstances, the

[17] For the implications for Austrian law, see the comment by *Stöger*, Notariatszeitung 2024/33.
[18] CJEU of 16 May 2019 – C-509/17 – *Plessers*; see also HSI-Newsletter 02/19, p. 27 and CJEU of 28 April 2022 – C-237/20 – *Federatie Nederlandse Vakbeweging*; see also HSI-Report 02/22, p. 22.

Advocate General considers it proven that the continuation of the company was the objective of the transfer from the outset.

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8. Working time

Decision

Judgment of the Court (Seventh Chamber) of 19 December 2024 – C-531/23 – *Loredas*

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

Keywords: Equal treatment in employment and occupation – Working time recording – Special regulations for domestic workers

Core statement: A national regulation that does not oblige employers to introduce a system for recording the working hours of domestic workers is incompatible with Union law. It may also constitute indirect discrimination on grounds of sex if the vast majority of domestic workers are women.

Note: see note in the German version of this Report by *Kocher and Obrecht*, p. 4 et seqq.

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III. Proceedings before the ECtHR

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

1. Ban on discrimination

Decisions

Judgment (Third Section) of 26 November 2024 – No. 2669/19 – *Ferrero Quintana v. Spain*

Law: Art. 1 Protocol No. 12 (general prohibition of discrimination)

Keywords: Access to the civil service – Successful selection procedure – Exceeding the age limit – Rejected application

Core statement: Unequal treatment on grounds of age does not constitute unjustified discrimination if age is a relevant factor in assessing a person's physical aptitude and certain physical abilities are a prerequisite for performing the job.

Note: In 2014, the complainant applied to take part in an open competition to fill several posts in the police service of the Autonomous Community of the Basque Country (*Ertzaintza*). According to national law, the maximum age for recruitment to the police force is 35 years. Although the complainant, born in 1978, had exceeded this age limit at the time of application, he was authorised to take part in the selection procedure. He successfully passed the various aptitude tests to determine the necessary professional qualifications and, in particular, physical aptitude, but was not recruited due to his age. The action brought against the rejection decision was unsuccessful before the national courts in all instances. A constitutional complaint was dismissed as inadmissible.

Following a change in the law in 2019, the maximum age limit for joining the police service was raised to 38. As a result, the complainant was appointed as a police officer in September 2019.

Before the Court, the applicant claims that the physical and medical aptitude tests confirmed that he was physically fit to fulfil the post in question. Since he was refused recruitment to the police service because he was over the maximum age limit, he was discriminated against on the grounds of his age, in breach of Article 1 of Protocol No. 12.

Even if the complainant was recruited to the police service after the change in the maximum age limit in September 2019, he suffered a significant disadvantage within the meaning of Article 35(3)(b) ECHR as a result of the previous rejection decision. In the initially refused post, he would have received a higher salary than he was paid for the work he carried out until the subsequent shift to that post. The Court therefore considers the complaint as admissible.

According to the case law of the Court of Justice, the term "discrimination" is to be assessed consistently despite the different areas of application of Article 14 ECHR and Article 1 Protocol No. 12, so that the case law on the two provisions is applicable to both.[19] The prohibition of discrimination provides protection against the unequal treatment of persons who are in a

[19] ECtHR of 20 October 2020 – No. 33139/13 – *Napotnik v. Romania*; ECtHR of 22 December 2009 – Nos. 27996/06 and 34836/06 – *Sejdić and Finci v. Bosnia-Herzegovina*.

comparable situation.[20] The comparison group does not have to be identical. The relevant factors for comparability must be assessed in each individual case in the light of the purpose of the measure which results in the differentiation in question.[21] The Court points out that Article 14 ECHR does not prohibit all differences in treatment, but that discrimination only exists if the difference in treatment has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if the means used to achieve this aim are disproportionate.[22] Based on their direct knowledge of social and economic conditions, public authorities are best placed to judge which measures are necessary and appropriate to set limits on the prohibition of discrimination in certain circumstances.[23] In particular, they are granted a wide margin of discretion when it comes to ensuring national security.[24]

Applying these principles, the Court concludes that the applicant was discriminated against because of his age and thus because of an "other status" within the meaning of Article 1 Protocol No. 12 when he was denied access to the police force despite having successfully completed the selection procedure. However, the purpose of limiting access to the police force by means of a maximum age limit is to ensure the proper functioning of the police. States have a margin of discretion with regard to access to employment in the public service and in the police service in particular, as well as in determining the working conditions for the respective activity. It is therefore permissible to assess the requirement of a certain physical constitution for the performance of the job dynamically, taking into account the years of service still to be expected at the time of recruitment. Even if the complainant was in top physical condition at the time of the aptitude test, the state must ensure that the physical abilities are maintained for a maximum number of years in view of the duties of a police officer. This objective can be achieved by setting a maximum age limit. The unequal treatment was therefore justified because it served the operational capability and thus the proper functioning of the police service.

The Court therefore unanimously ruled that there was no violation of Article 1 of Protocol No. 12 to the ECHR.

The decision is in line with the case law of the CJEU. In a preliminary ruling procedure, the CJEU came to the conclusion that the endeavour to ensure the operational capacity and proper functioning of the police services constitutes a legitimate objective within the meaning of Article 4(1) of the Equal Treatment Framework Directive 2000/78/EC.[25] Therefore, a provision that stipulates that applicants for a position as a police officer who are to perform all the duties required of them in that capacity must be no older than 35 years of age does not conflict with the Directive.

Judgment (Fifth Section) of 7 November 2024 – No. 20592/21 – *Bakradze v. Georgia*

Law: Art. 14 ECHR (prohibition of discrimination) in conjunction with Art. 10 ECHR (freedom of expression) and Art. 11 ECHR (freedom of assembly and association)

Keywords: Application for a judicial position – Membership of an NGO – Criticism of the judicial system – Rejection in the selection process

[20] ECtHR of 5 September 2017 – No. 78117/13 – *Fábián v. Hungary*; ECtHR of 19 February 2013 – No. 19010/07 – *X and Others v. Austria*.
[21] ECtHR of 25 July 2017 – No. 17484/15 – *Carvalho Pinto de Sousa Morais v. Portugal*; ECtHR of 13 July 2010 – No. 7205/07 – *Clift v. United Kingdom*.
[22] ECtHR of 29 August 2023 – No. 43651/22 – *Kovačević v. Bosnia and Herzegovina*; ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali v. Greece*.
[23] ECtHR of 8 December 2009 – No. 49151/07 – *Muñoz Díaz v. Spain*.
[24] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*.
[25] CJEU of 15 June 2016 – C-258/15 – *Salaberria Sorondo*.

Core statement: The prima facie evidence of alleged discrimination, which leads to a reversal of the burden of presentation and proof, is provided if facts are conclusively presented which give rise to the presumption of different treatment and the resulting unjustified unequal treatment.

Note: The complainant was appointed as a judge at the Court of Appeal in Tbilisi for a term of ten years. She was a founding member and the president of an NGO called the "Unity of Judges of Georgia", consisting of current and former judges, which aims to promote the independence and transparency of the judiciary. In the past, the organisation has publicly criticised Georgia's judicial system and in particular the role of the High Council of Justice (HCJ), which is responsible for appointing judges, among other things. The HCJ no longer took members of the Unity of Judges into account when filling judges' positions. Due to the limited term of office, the complainant's position as a judge expired in September 2015. In October 2015 and May 2016, she applied for reappointment to the court of appeal. She took part in two selection procedures. During the interviews, she was also asked about her professional qualifications, but the majority of the discussion centred on questions about her role and function in Unity of Judges. Her applications were rejected in December 2015 and July 2016 without further explanation.

The complainant brought an action against the decisions and contested the results of the selection procedures. In particular, she argued that the decisions were based on her membership in Unity of Judges and her critical attitude towards the judicial system and that she had been discriminated against as a result. The action was dismissed at all instances on the grounds that the complainant was unable to prove the existence of discrimination.

She bases her complaint to the ECtHR on this legal opinion brought before the domestic courts and alleges a violation of Article 14 ECHR in conjunction with Articles 10 and 11 ECHR.

According to the case law of the Court of Justice, the judiciary plays a special role in society. It is regarded as the guarantor of justice and, as a pillar of the rule of law, must enjoy the trust of the public in order to fulfil its tasks reliably.[26] It is true that judges must exercise discretion and restraint when speaking in public on social issues. However, they enjoy the protection of Article 10 ECHR and are not excluded from participating in public debates.[27]

As far as the burden of proof with regard to an alleged violation of Article 14 ECHR is concerned, the state must demonstrate that discrimination is justified if it has been alleged.[28] In this context, the existence of prima facie evidence is sufficient if the person concerned presents convincing evidence indicating discrimination. It is then up to the government to demonstrate that the unequal treatment is not based on discriminatory circumstances.[29] The reversal of the burden of proof in cases of discrimination is also in line with the opinion of the European Committee of Social Rights of the Council of Europe.[30]

Applying these principles to the present case, the Court considers that the complainant was entitled to an affiliation with Unity of Judges and to express her criticism of the judicial system. It confirms that she has also set out circumstances indicating discriminatory treatment, having submitted that she was extensively questioned about her activities in Unity of Judges during the selection procedure, which suggests a bias on the part of the members of the HCJ. In

[26] ECtHR of 6 July 2023 – Nos. 21181/19 and 51751/20 – *Tuleya v. Poland*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*; ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 17 February 2004 – No. 44158/98 – *Gorzelik and Others v. Poland*.

[27] ECtHR of 23 April 2015 – No. 29369/10 – *Morice v. France*; ECtHR 20 November 2012 – No. 58688/11 – *Harabin v. Slovakia*; ECtHR of 13 November 2008 – Nos. 64119/00 and 76292/01 – *Kayasu v. Turkey*; ECtHR 28 October 1999 – No. 28396/95 – *Wille v. Liechtenstein*;

[28] ECtHR 19 December 2018 – No. 20452/14 – *Molla Sali v. Greece*; ECtHR 13 November 2007 – No. 57325/00 – *D.H. and Others v. Czech Republic*.

[29] ECtHR of 6 July 2005 – Nos. 43577/98 and 43579/98 – *Nachova and Others v. Bulgaria*.

[30] Case law of the European Committee of Social Rights, December 2018, cited in para. 51 of the judgment.

addition, the undisputed submission that Unity of Judges members are not appointed to the judiciary indicates discrimination. The prima facie evidence thus provided leads to a reversal of the burden of proof, so that the government would have had to substantiate that the unequal treatment was justified by objective reasons. Such a submission is lacking in the present case.

The Court therefore unanimously recognised a violation of Article 14 ECHR in conjunction with Articles 10 and 11 ECHR and awarded the complainant compensation in the amount of € 4,500.

New proceedings (notified to the respective government)

No. 38715/22 – *Marian v. Romania* (Fourth Section) – lodged on 2 August 2022 – communicated on 13 November 2024

Law: Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 12 (general prohibition of discrimination) in conjunction with Art. 8 ECHR (right to respect for private and family life) and Art. 1 Protocol No. 1 (protection of property)

Keywords: Termination of employment – Reaching the standard retirement age – Different treatment of men and women

Note: The complainant was employed by the National Museum George Enescu. The employment relationship was terminated by the employer in February 2020 due to her reaching retirement age. Under national law, the standard retirement age for receiving an old-age pension begins at the age of 60 for women and 65 for men. The complainant asserted in court that the employment relationship should continue until she reached the retirement age set for men. The claim was dismissed in all instances on the grounds that the employer had not agreed to the continuation of the employment relationship, as was required by law.

In particular, the complainant argues that the national legislation, which provides for a different retirement age for men and women, constitutes discrimination on grounds of sex.

The Court of Justice has already ruled on the relevant provision in its judgment of 20 December 2022[31] that a provision that prohibits women from continuing to work until they reach the age limit set for men violates Article 1 of Protocol No. 12.

No. 49283/22 – *Marinescu v. Romania* (Fourth Section) lodged on 11 October 2022 – communicated on 13 November 2024

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

Keywords: Maternity benefit – Voluntary social insurance – Unequal treatment compared to employees subject to social insurance contributions

Note: The complainant is self-employed and is voluntarily insured through the national social insurance scheme (CAS). As she was unable to work during her pregnancy, she received maternity benefits from the CAS in the period from May 2020 to July 2020. The CAS demanded these benefits back from the complainant, as an internal audit determined that, under national law, only employees subject to social insurance contributions can claim these benefits. An action brought against the restitution claim was dismissed and the complainant was ordered to pay approximately €17,500.

[31] ECtHR of 20 December 2022 – Nos. 53282/18 and 31428/20 – *Moraru and Marin v. Romania* (see HSI Report 4/2022, p. 24).

The complainant is of the opinion that the denial of maternity pay puts her at a disadvantage compared to women in employment subject to social security contributions, without there being any objective reason for this.[32] This means that the national legal provisions violate Article 14 ECHR.

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2. Freedom of association

Decisions

Judgment (Fifth Section) of 17 October 2024 – No. 49363/20 – *Central Unitaria De Traballadores/as v. Spain*

Law: Art. 11 ECHR (freedom of assembly and association) in conjunction with Art. 10 ECHR (freedom of expression)

Keywords: Ban on a trade union-organised demonstration on the occasion of 1 May – COVID-19 pandemic – Balancing competing legal interests – Discretion of the state

Core statement: A ban on demonstrations ordered by a government decree is an interference prescribed by law within the meaning of Article 11(2) ECHR and must be reviewed by the domestic courts in terms of legality, legitimate aim and proportionality.

Note: On 20 April 2020, the complainant trade union notified the competent authorities of a demonstration to be held in Vigo, a city with 200,000 inhabitants, on 1 May, International Labour Day. Based on Royal Decree No. 463/2020, the Spanish government declared a national state of emergency for the whole of Spain on 14 March 2020 due to the COVID-19 pandemic. This included the restriction of freedom of movement and the suspension of all non-essential activities in order to reduce the mobility of the population. The measures remained in force until 21/06/2020. The competent authorities informed the complainant that, in view of the emergency situation, permission to hold the demonstration on 1 May 2020 could not be granted. The complainant lodged an appeal against the official decision by way of interim legal protection. The Supreme Court rejected the complainant's application on 28 April 2020 on the grounds that the demonstration would lead to a disproportionate impairment of other rights protected by the constitution in view of the health emergency. A constitutional complaint lodged against this was rejected as inadmissible on 30 April 2020.

The complainant considers the ban on the demonstration to be an interference with its right to freedom of assembly under Article 11 ECHR. It also claims that it interferes with the freedom of expression, as the demonstration was intended to contribute to the debate on the restriction of labour rights through measures to deal with the COVID-19 crisis.

The Court firstly states that the rights guaranteed by Article 11 ECHR are closely linked to freedom of expression.[33] Therefore, the complaint under Article 11 ECHR must be examined in the light of Article 10 ECHR.[34] The ban on holding a demonstration on 1 May to mark International Labour Day constitutes an interference with the complainant's right to freedom of assembly. The government also assumes this to be the case. In connection with the restriction

[32] ECtHR of 4 February 2021 – No. 54711/15 – *Jurčić v. Croatia* (see HSI Report 1/2021, p. 24).
[33] ECtHR of 15 November 2018 – No. 29580/12 – *Navalnyy v. Russia*.
[34] ECtHR of 7 February 2017 – No. 57818/09 – *Lashmankin and Others v. Russia*.

of freedom of assembly, the Court requires that national law contains adequate and effective legal safeguards against the arbitrary and discriminatory exercise of the wide discretion granted to the executive.[35] Applying these principles, the Court considers Royal Decree No. 463/2020 applied by the authorities to be a legal provision within the meaning of Article 11(2) ECHR that may restrict the freedom of assembly. This decree was based on Article 21(2) of the Spanish Constitution and Section 10 of the Assembly Act. According to this, public assemblies can be prohibited if there are good reasons to believe that there is a breach of public order that could endanger people or property.

With regard to the question of whether the interference is necessary in a democratic society, the national authorities and courts are granted a margin of appreciation that is subject to review by the Court with regard to compatibility with the ECHR.[36] With regard to the restriction of freedom of assembly to protect the health of the population, the Court has ruled that states have a wide margin of appreciation and that particular weight must be given to state decision-makers when assessing social requirements.[37]

There was consensus between the Member States of the Council of Europe on the need to take measures to protect public health during the COVID-19 pandemic, which consisted, inter alia, of prohibiting public gatherings. The Court is therefore of the opinion that the ban on the demonstration on 1 May 2020 served to protect public health and thus served an urgent social need, particularly in light of the scientific knowledge available at that time about the potential for the pandemic to spread. When weighing up the right to freedom of assembly against the right to life and physical integrity, the domestic authorities and courts did not exceed their discretionary powers when they came to the conclusion that the protection of public health took precedence over the complainant's right of assembly. [38]

The Court therefore ruled by six votes to one that there was no violation of Article 11 ECHR.

Judgment (Second Section) of 17 December 2024 – No. 52977/19 – *Hellgren v. Finland*

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

Keywords: Participation in a "selective strike" – Withholding of remuneration – Discretionary power of state courts

Core statement: When examining whether the restriction of the right to strike is compatible with Article 11 ECHR, it is important, taking into account the totality of the measures taken by the state, that trade union freedom be safeguarded in general, whereby the state authorities and courts have a margin of appreciation.

Note: The complainant is employed by the Finnish Post Office, a company under private law. Her main activity is mail distribution. She is also responsible for training new employees. The collective agreement governing the working conditions of the employees expired at the end of October 2015. The trade union responsible for the postal and logistics companies planned to accelerate negotiations on a new collective agreement by taking industrial action. As the employer intended to hire more temporary workers in the run-up to the announced strike, the strike action decided by the union consisted of no longer working overtime from 1 November

[35] ECtHR of 7 February 2017 – No. 57818/09 – *Lashmankin and Others v. Russia*.
[36] ECtHR of 24 January 2017 – No. 25358/12 – *Paradiso and Campanelli v. Italy*; ECtHR of 5 March 2009 – No. 31684/05 – *Barraco v. France*.
[37] ECtHR of 27 November 2023 – No. 21881/20 – *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*; ECtHR of 8 April 2021 – No. 47621/13 – *Vavřička and Others v. Czech Republic*; ECtHR of 13 November 2012 – Nos. 47039/11 and 358/12 – *Hristozov and Others v. Bulgaria*; ECtHR of 21 June 2006 – No. 11810/03 – *Maurice v. France*;
[38] ECtHR of 27 November 2023 – No. 21881/20 – *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*; ECtHR of 15 October 2015 – No. 37553/05 – *Kudrevičius and Others v. Lithuania*.

2015 and no longer training externally hired temporary workers. On 10 and 11 November 2015, according to the shift roster the complainant was scheduled to work in ordinary mail delivery. In spite of this, she was asked to train temporary workers who had been hired through an external recruitment agency. Referring to the union's decision to strike, she refused to carry out this work, but at the same time offered to work in mail distribution according to the shift schedule. The employer declined this offer and sent the complainant home. Payment of remuneration for the lost working hours was refused. The claim for payment of the withheld wages was upheld by both the District Court and the Court of Appeal. The Supreme Court overturned the lower court decisions and dismissed the claim in its entirety. It reasoned that the employer was not obliged to accept only the work offered by the complainant in mail distribution. Rather, she should have complied with the employer's instructions.

The complainant alleges a violation of the right to strike protected by Article 11 ECHR. The interference was not prescribed by law and did not pursue a legitimate aim, nor was it necessary in a democratic society. She also complains under Article 14 ECHR that she was discriminated against because of her membership in a trade union.

With regard to the general principles concerning the issue of trade union freedom, the Court refers to its previous case law.[39] According to this, strikes called by trade unions are protected by Article 11 ECHR, as the right to strike is an essential instrument for trade unions to protect and enforce the interests of their members. However, the right to strike is not absolute and may be subject to certain conditions and restrictions. This may be the case in particular in sectors that provide systemically important services for society. Whether the restriction of the right to strike and thus of trade union freedom is compatible with Article 11 ECHR must be assessed on the basis of the measures taken by the state as a whole. All circumstances of the individual case must be taken into account.

According to the Court's findings, the complainant's case does not concern the trade union's right to take collective action. Rather, it concerns the question of whether Article 11 ECHR permits the implementation of "selective strike action" and whether its consequences can restrict the employer's right to manage the work performed. A selective strike does not exclude the application of Article 11 ECHR.[40] However, the Supreme Court of Finland has not ruled on the legality of trade union strike action. In its decision, it expressly points out that employees enjoy protection against sanctions for participating in strike action. However, a selective strike that only affects certain activities to be carried out by employees cannot justify the employer's obligation to assign the striking employee to activities that are not affected by the strike. The Court states that this reasoning does not call into question the trade unions' right to strike and that their members are therefore not at risk of being disadvantaged or exposed to sanctions by the employer without protection. The Supreme Court's decision is therefore within the scope of the discretionary powers that state authorities and courts have with regard to restricting the right to strike. The Court emphasises once again that it is not its task to take the place of the national courts and replace their discretion with its own decision.

Insofar as the complainant alleges a violation of Article 14 ECHR, the Court finds that the domestic courts correctly ruled that there was no discrimination against the complainant. Therefore, there is no apparent indication of a violation of Article 14 ECHR, so that the complaint had to be dismissed as manifestly unfounded in this respect.

The Court unanimously ruled that there was no violation of Article 11 ECHR.

[39] ECtHR of 14 December 2023 – No. 59433/18 – *Humpert and Others v. Germany*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*.

[40] ECtHR of 7 December 2021 – No. 29582/09 – *Yakut Republican Trade-Union Federation v. Russia*.

(In)admissibility decision

Decision (Second Section) of 19 November 2024 – No. 55789/19 et al. – *Almaz and Others v. Türkiye*

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

Keywords: Disciplinary measure for strike participation – Political strike – Scope of application of Art. 11 ECHR

Core statement: Strike action only falls under the protection of Art. 11 ECHR if it is organised by trade unions and is also related to the professional interests of trade union members.

Note: The complainants are municipal civil servants in the municipality of Mamak, a district of Ankara. They are members of *Tüm Belediye ve Yerel Yönetim Hizmetleri Emekçileri Sendikası, TÜM BEL-SEN*, which is affiliated with *the Kamu Emekçileri Sendikaları Konfederasyonu* (KESK), the trade union confederation of public sector employees. In June 2013, the union decided to organise a mobilisation day to protest against the repressive and violent practices of the security forces during a demonstration in Istanbul's Taksim Gezi Park, where numerous people were injured. The trade union members were called to stop work that day. The complainants took part in these strike actions. Disciplinary measures were subsequently imposed on them for participating in the strike. Appeals against this were unsuccessful before the national courts.

The complainants allege a violation of Article 11 ECHR, taking the view that the imposition of the disciplinary measure constitutes an unlawful interference with the exercise of their trade union rights, in particular the right to participate in union-organised strike action.

The Court first refers to the principles established in its case law on freedom of association and, in particular, the right to strike. Accordingly, the right to collective bargaining and the right to strike are protected as elements of freedom of association under Article 11 ECHR.[41] Domestic law must therefore enable trade unions to stand up for the defence of their members' interests in a way that does not contradict Article 11 ECHR.[42] When examining whether the restriction of freedom of association is compatible with Article 11 ECHR, all circumstances of the individual case and the totality of the measures taken by the state to guarantee freedom of association must be taken into account, even if the restrictions in question affect an essential element of freedom of association.[43] A ban on the right to strike, which is a means for trade unions to make their voice heard and is therefore an important instrument for protecting the professional interests of trade union members, must therefore be regarded as a restriction on the power of trade unions.[44] It would therefore be a restriction on the freedom of association of both trade unions and their members if the right to strike were prohibited.[45]

The Court further notes that the sanction imposed on the complainants related to the trade union's call to participate in the work stoppage, so that the question of the applicability of Article 11 ECHR arises in the present case. The complaints that have been submitted to the Court in the past in connection with the exercise of the right to strike have all concerned strike action aimed at improving the working conditions of employees. In the case at issue here, however, the trade union's call to its members to take part in the day of action and to stop work was not related to the assertion of their professional interests. Rather, the call served a political purpose. The Court concludes here that industrial action only falls under the protection of Article 11 ECHR if, first, it is organised by trade unions and, second, serves the sole purpose

[41] ECtHR of 14 December 2023 – No. 59433/18 – *Humpert and Others v. Germany*.
[42] ECtHR of 9 July 2013 – No. 2330/09 – *Păstorul cel Bun v. Romania*.
[43] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*.
[44] ECtHR of 20 November 2018 – No. 44873/09 – *Ognevenko v. Russia*; ECtHR of 27 November 2014 – No. 36701/09 – *Hrvatski liječnički sindikat v. Croatia*.
[45] ECtHR of 2 October 2014 – No. 48408/12 – *Veniamin Tymoshenko and Others v. Ukraine*.

of asserting the professional interests of trade union members.[46] The case law of the international courts also indicates this.[47] As the latter condition was not met, the complainants could not invoke a right protected by Article 11 ECHR.

The complaint was therefore rejected as inadmissible pursuant to Article 35(3) and (4) ECHR.

New proceedings (notified to the respective government)

No. 33159/23 – *Teachers' Trade Union and Others v. Hungary* (Second Section) – lodged on 30 August 2013 – communicated on 14 November 2024

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

Keywords: Strike in companies providing essential services – Minimum services in emergency situations – Determination by legal regulation

Note: The complainants are two trade unions representing the interests of teachers and other employees in the education sector, and a teacher. The unions decided to organise a strike in early 2022 to enforce their demand for improved working conditions and increased pay for employees in the public education sector. Under national law, industrial action may only be taken in essential workplaces if the unions have reached an agreement with the employers on the minimum services to be maintained during the strike or if such an agreement has been replaced by a court decision. In February 2022, a law was passed defining the scope of the minimum services to be provided during a strike in public educational institutions. This removed the possibility for the parties to the collective agreement to reach an agreement on the minimum services to be provided during a strike. The complainants lodged a constitutional complaint against the law, albeit unsuccessfully, as they felt that the law impaired their right to strike.

The complainants are of the opinion that the law, which restricts the negotiating possibilities of the parties to the collective agreement, interferes with the right to strike protected by Article 11 ECHR.[48]

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3. Procedural law

No. 54853/22 – *Ulumberashvili v. Georgia* (Fifth Section) – lodged on 5 November 2022 – communicated on 2 October 2024

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

Keywords: Labour dispute – Excessive duration of proceedings

[46] ECtHR of 14 December 2023 – No. 59433/18 – *Humpert and Others v. Germany*; ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*.
[47] ECtHR of 14 December 2023 – No. 59433/18 – *Humpert and Others v. Germany* paras. 52-68 with reference to ICJ, ESCR, CJEU, Inter-American Court of Human Rights.
[48] ECtHR of 8 April 2014 – No. 31045/10 – *National Union of Rail, Maritime and Transport Workers v. United Kingdom*.

Note: The complaint concerns the duration of a labour dispute. A complaint filed with the Labour Court on 6 March 2019 had not yet been decided in the first instance at the time the complaint was filed with the Court of Justice on 5 November 2022.

The excessive length of the proceedings before the domestic courts is criticised on the basis of Article 6 ECHR.

No. 35016/20 – *Di Girolamo and Others v. Italy* (First Section) – lodged on 30 July 2020 – communicated on 7 November 2024

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

Keywords: Existence of an employment relationship – Application of EU directives – Obligation to submit to the CJEU

Note: The complainants, who are honorary judges under Italian law, applied to the administrative courts to have the existence of a civil servant relationship recognised. In support of their claim, they invoked, inter alia, Directive 1999/70/EC on fixed-term work, Directive 97/81/EC on part-time work and the Equal Treatment Framework Directive 2000/78/EC on equal treatment in employment and occupation. In the court proceedings, they requested that the legal dispute be suspended and that the Court of Justice of the European Union be heard by way of a preliminary ruling. This application was rejected by national courts and the action was dismissed with reference to the fact that European labour law does not apply to lay judges.

In its judgment of 16 July 2020,[49] the CJEU ruled on this legal issue that honorary justices of the peace in Italy can be employees within the meaning of Article 7(1) of the Working Time Directive 2003/88/EC and Article 31(2) EU Charter of Fundamental Rights.

The complaint alleges that the decision to reject the request for a preliminary ruling was not sufficiently reasoned and that they were therefore denied the right to a fair trial under Article 6 ECHR.

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4. Protection of privacy

Decision under Protocol No. 16

Decision (Panel of the Grand Chamber) of 20 December 2024 – No. P16-2024-002 – *Request for an advisory opinion from the High Court of Cassation and Justice of Romania*

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

Keywords: Dismissal from judicial service – Clarity of standards – Foreseeability of a measure

Core statement: A norm can only be considered a "law" within the meaning of Articles 8 to 11 ECHR if it is formulated with sufficient precision to enable citizens to reasonably foresee the consequences of a particular act and to adjust their behaviour accordingly.

[49] ECtHR of 16 July 2020 – C-658/18 – *UX v. Governo della Repubblica italiana*, (see HSI Report 3/2020).

Note: The High Court of Romania had submitted a request for an advisory opinion to the Court pursuant to Article 1 Protocol No. 16. This allows the supreme courts of the Member States of the Council of Europe to ask the Court for advisory opinions on fundamental questions concerning the interpretation or application of provisions of the ECHR.

A legal dispute is pending before the Romanian High Court concerning the dismissal of a judge from her position for health reasons. Under Romanian law, judges can be dismissed from office if they are no longer able to perform their duties properly for health reasons. Fitness for duty is determined by a medical assessment. If the person concerned refuses to be examined without giving reasons, this will result in suspension for one year. If, even during the provisional dismissal of the person concerned, their fitness for duty cannot be established by a doctor due to their refusal, permanent dismissal from office must be ordered.

The plaintiff in the proceedings pending before the High Court did not comply with such an examination order and was provisionally suspended from service for one year. As she continued to refuse to have her state of health assessed, the disciplinary committee ordered her permanent dismissal from her position as a judge. Appeals against this were unsuccessful in the lower courts.

The Romanian High Court asked the Court of Justice to answer the questions of whether Article 8 ECHR is applicable to the case of the dismissal of a judge on health grounds and, if the answer is in the affirmative, whether the applicable national legal provisions are sufficiently clearly formulated to justify an interference with Article 8 ECHR.

With regard to the first question, the Court refers to its extensive case law, according to which the term "private life" is to be interpreted broadly and may also include professional activity.[50] The assessment of whether a measure at the workplace interferes with private life depends on how serious the consequences of the measure are for the person concerned, taking into account whether the measure is the consequence of an act for which that person is responsible.[51]

With regard to the clarity of norms, it should be noted that state regulations only fulfil the requirement of being "prescribed by law" or "in accordance with the law" within the meaning of Articles 8 to 11 ECHR if they are sufficiently clearly formulated and the legal consequences are foreseeable for citizens.[52] However, laws cannot cover all situations with absolute precision and it is up to the courts to interpret the provisions and apply them to the respective facts. It must also be taken into account that the creation of legislation cannot foresee all eventualities to be regulated and the resulting legal consequences.[53]

In view of the reasons given by the Romanian High Court for the application, the Court considers that it has sufficient knowledge of the application of the ECHR to domestic law, so that there is no need for the Court to examine the questions.

Germany has not yet ratified Protocol No. 16, which means that such proceedings could not be initiated by German courts. Nevertheless, the decision could also be of significance for

[50] ECtHR of 5 September 2017 – No. 61496/07 – *Bărbulescu v. Romania*; ECtHR of 12 July 2014 – No. 56030/07 – *Fernández Martínez v. Spain*; ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*; ECtHR 16 December 1992 – No. 13710/88 – *Niemietz v. Germany*.

[51] ECtHR of 16 April 2024 – No. – 4028/23 – *Amar v. France*; ECtHR of 6 July 2023 – No. 54588/13 – *Guliyev v. Azerbaijan*; ECtHR of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*; ECtHR of 14 December 2021 – No. 53176/17 – *Gražulevičiūtė v. Lithuania*; ECtHR of 22 July 2021 – No. 76730/12 – *Ballıktaş Bingöllü v. Turkey*; ECtHR of 25September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 22 November 2016 – No. 22254/14 – *Erményi v. Hungary*.

[52] ECtHr 15 October 2015 – No. 37553/05 – *Kudrevičius and Others v. Lithuania*; ECtHR of 4 December 2008 – Nos. 30562/04 and 30566/04 – *S. and Marper v. United Kingdom*; ECtHR of 4 May 2000 – No. 28341/95 – *Rotaru v. Romania*.

[53] ECtHR of 19 November 2020 – No. 24173/18 – *Klaus Müller v. Germany*; ECtHR of 15 November 2018 – No. 29580/12 – *Navalnyy v. Russia*; ECtHR of 15 October 2015 – No. 37553/05 – *Kudrevičius and Others v. Lithuania*; ECtHR 6 December 2012 – No. 12323/11 – *Michaud v. France*.

German termination-of-employment law with regard to the specificity of circumstances not regulated by law (e.g. termination on suspicion).

New proceedings (notified to the respective government)

No. 18166/23 – *Kugo v. Albania* (Third Section) – lodged on 27 April 2023 – communicated on 23 October 2024

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

Keywords: Dismissal from the judiciary – Obstruction of justice – Serious misconduct

Note: The appellant is a district court judge. In 2019, as a single judge, he ordered the early conditional release of a prisoner serving a life sentence. The decision was later overturned following a judicial review by the appellate court. In 2020, the complainant was removed from his position as a judge by a decision of the High Judicial Council (HJC). As an experienced judge, the complainant had violated statutory provisions and the established case law known to him and had therefore erred in law by releasing a dangerous prisoner prematurely. As a result, he had committed a serious breach of official duty that justified his removal from office. An appeal against the dismissal order was unsuccessful in all instances before the domestic courts.

The complainant alleges a violation of Article 8 ECHR.

The Court will examine the question of whether the appellant's misapplication of the law constituted a serious breach of his official duties, thereby justifying the dismissal of a tenured judge.[54]

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5. Protection of property

New proceedings (notified to the respective government)

No. 38382/19 – *Rusu v. Romania* (Fourth Section) – lodged on 4 July 2019 – communicated on 12 November 2024

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

Keywords: Old-age pension – Recovery – Calculation of pension benefits – Incorrect application of the law

Note: The complainant received a monthly old-age pension starting in 2012. In 2017, he was informed by the pension insurance institution that the old-age pension had been calculated incorrectly. The periods in which the complainant worked as an accountant in a state-owned collective agricultural enterprise (CAP) could not be taken into account when calculating the amount of the old-age pension, as this was not an agricultural activity. The action brought against the repayment decision was ultimately unsuccessful and the complainant was ordered to repay approximately € 3,000.

[54] ECtHR of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*; ECtHR of 6 October 2022 – No. 25599/20 – *Juszczyszyn v. Poland*.

The Court of Justice will have to assess, in the light of its case law,[55] whether the revaluation of the pension and the recovery of paid retirement benefits unlawfully interfered with the property of the complainant.

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6. Whistleblowing

Decisions

Judgment (Third Section) of 15 October 2024 – Nos. 73585/14 and 51427/18 – *Gadzhiyev and Gostev v. Russia*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Dismissal from employment – Breach of confidentiality – Damage to the reputation of a public employer

Core statement: Even if public service employees are subject to a special duty of confidentiality, this group of persons enjoys the protection of Article 10 ECHR, so that any statutory interference with their freedom of expression must pursue a legitimate aim and be necessary in a democratic society.

Note: See note in the German version of this Report by *Vinzenz and Buschmann*, p. 13 et seqq.

Judgment (Fourth Section) of 8 October 2024 – No. 41675/12 – *Aghajanyan v. Armenia*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Termination of employment – Agreement on duty of confidentiality – Disclosure of business secrets – Public interest

Core statement: Employees' duty of loyalty and confidentiality towards their employer can be overridden by the public's interest in specific information, particularly on environmental issues.

Note: The complainant was employed as a senior researcher in a chemical products manufacturing company in Nairit since 2003. The parties to the employment contract had contractually agreed a confidentiality obligation that related to trade secrets and in particular the salaries paid to the employees. Between 2006 and 2010, the complainant repeatedly complained to his employer that chemical waste was not being stored properly on the factory premises, which could pose a risk to the environment. After the shortcomings were not remedied by the employer, the complainant gave an interview to a local newspaper, which then reported on these shortcomings. In the interview, the complainant also expressed his displeasure at the significant discrepancy between the salaries paid to experienced scientists and those paid to the company's directors, which he specifically quantified. The complainant's employer then dismissed the complainant without notice for betrayal of secrets and breach of the contractual obligation to maintain confidentiality.

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

An action for unfair dismissal brought against this was unsuccessful before the domestic courts in all instances.

The complainant claims that the termination of his employment contract due to the published newspaper interview constitutes an unlawful interference with his right to freedom of expression guaranteed by Article 10 ECHR. In particular, it should be taken into account that, as a "whistleblower", he only turned to the public after he had drawn the employer's management's attention to the deficiencies.

The Court refers to the general principles developed in its case law on freedom of expression.[56] According to this, the protection of Article 10 ECHR also extends to the workplace, where it is irrelevant whether the employer is public or private.[57] In the latter case, the state has a positive obligation to protect the right to freedom of expression against interference by private individuals.[58] The national courts are therefore obliged to examine whether the employees' right to freedom of expression is sufficiently protected in the event of the dismissal of "whistleblowers".

Applying these principles, the Court finds that the national courts failed to assess the dispute in the light of the case law on Article 10 ECHR. The duty of loyalty and confidentiality of employees towards their employers requires that the dissemination of accurate information must be done with moderation and decency. However, this obligation can be overridden, even if a duty of confidentiality has been agreed in the employment contract, if there is a public interest in the disclosure of specific information.[59] This is particularly the case when it comes to environmental protection issues that may affect human health and safety in the workplace. The national courts have not undertaken a balancing of interests in this regard and have therefore not interpreted national law in the light of Article 10 ECHR. As a result, they failed to strike an appropriate balance between the conflicting interests and to provide the decisions with relevant and sufficient reasons.

The Court therefore unanimously 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. 37441/23 – *Geshev v. Bulgaria* (Third Section) – lodged on 11 October 2023 – communicated on 2 October 2024

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

Keywords: Removal from office – Public criticism of the judicial system – Damage to the reputation of employers

Note: The complainant was appointed Chief Public Prosecutor in 2019 for a term of seven years. In 2023, he was dismissed prematurely from his position by a decree of the President of the Republic based on a decision of the Supreme Judicial Council (CSM). The president's decision, which could not be reviewed by a court decision, was justified on the grounds that

[56] ECtHR of 12 September 2011 – Nos. 28955/06 et al. – *Palomo Sánchez and Others v. Spain*.
[57] ECtHR of 21 July 2011 – No. 28274/08 – *Heinisch v. Germany*; ECtHR of 29 February 2000 – No. 39293/98 – *Fuentes Bobo v. Spain*.
[58] ECtHR of 14 February 2023 – No. 21884/18 – *Halet v. Luxembourg*; ECtHR of 5 November 2019 – No. 11608/15 – *Herbai v. Hungary*; ECtHR of 12 September 2011 – Nos. 28955/06 et al. – *Palomo Sánchez and Others v. Spain*.
[59] ECtHR of 8 October 2020 – No. 41752/09 – *Goryaynova v. Ukraine*.

the complainant had made public statements critical of the judicial system and thus damaged the reputation of the judiciary.

The complainant claims that his dismissal is due to his publicly critical statements and therefore constitutes an interference with his right to freedom of expression. He also argues that he was denied access to an independent court due to the impossibility of challenging the president's decision in a court of law.

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