Bird & Bird

EU Employment Law Report

5th report - Q4 2019

Keeping you up-to-date on the most significant developments of employment law at EU level

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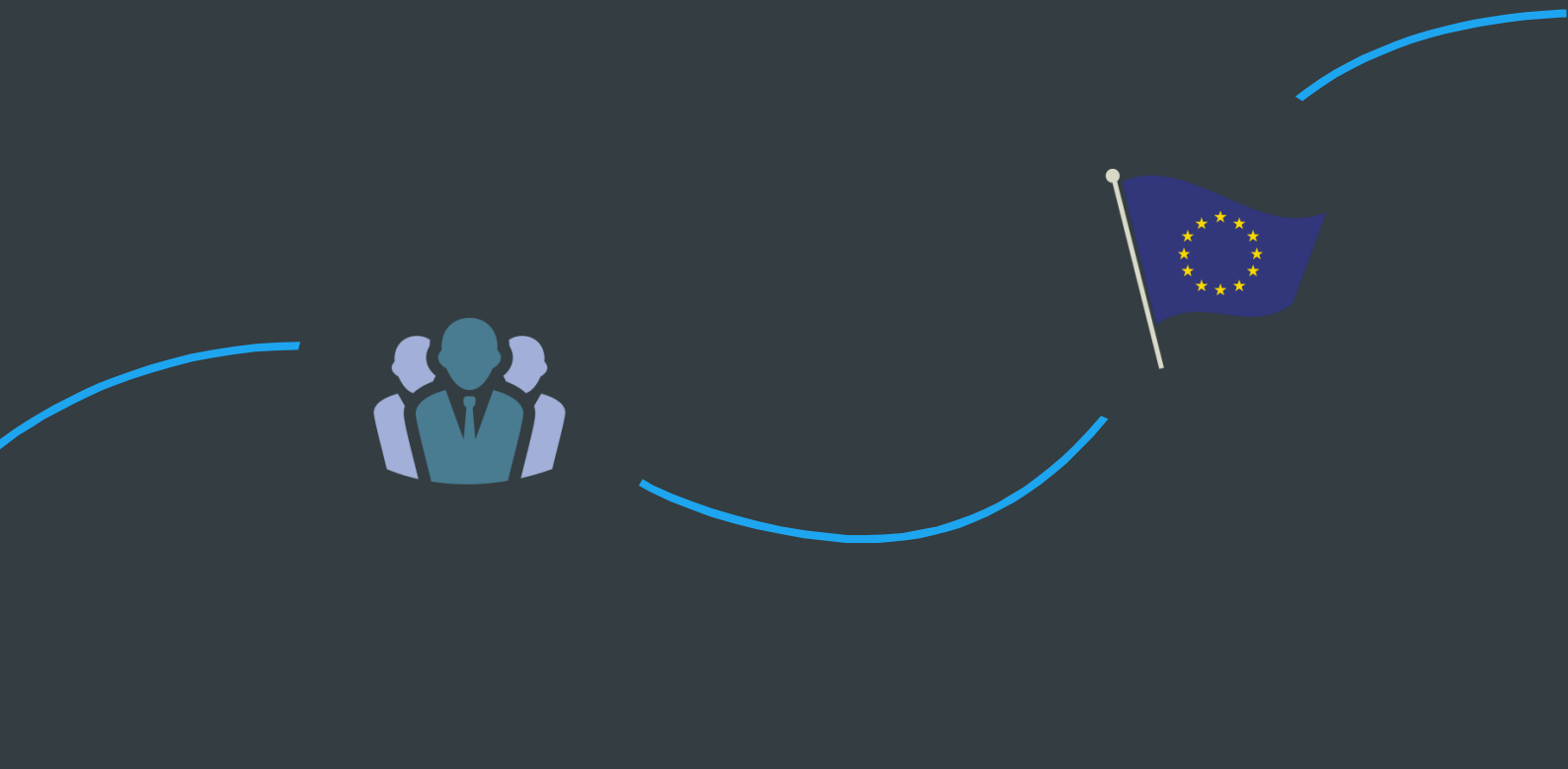

Legislative initiatives

During the reference period, the only remarkable evolution in EU legislative initiatives is the EU Council's formal approval of the **Directive on Whistle-blower Protection** ('WBP') on 7 October 2019. This Directive was already discussed in our previous Employment Law Report Q3 and Q2 as well as in our Bird & Bird News Centre.

Case-law

Over the past few months, several interesting decisions were rendered by the European Court of Justice ('ECJ') and the European Court of Human Rights ('ECtHR') on both employment and social security matters. The following overview addresses decisions in the area of **coordination of social security**, **privacy**, **free movement of workers** within the EU, **discrimination**, **holidays** and **posting of workers**.

Coordination of Social Security

Opinion of Advocate General Pikamäe of 26 November 2019, *AFMB Ltd. and Others* v *Raad van Bestuur van Sociale Verzekeringsbank*, C-610/18

Abstract

The ECJ has not yet made a decision in this case. However, given the importance of the decision for the transport sector and the interpretation of the European rules on the coordination of social security, we have prepared a summary of the opinion rendered by the Advocate General. It is likely that the court will follow this opinion.

According to the Advocate General, the effective employer of lorry drivers active in the international road transport sector is the entity, which recruits the drivers for an indefinite period, exercises effective control over the drivers and actually pays the wages.

Facts

A Cypriot company applied the Cypriot social security scheme (considerably less expensive compared to the Dutch social security scheme) to Dutch resident drivers employed in the Netherlands and made available to Dutch transport companies.

The Dutch social security authorities maintain that, since the Dutch transport undertakings recruited the drivers, exercised effective control over them for an indefinite period and actually paid wages, the Dutch undertakings must be regarded as the lorry drivers' actual "employer" within the meaning of Regulation (EC) No 883/2004 on the coordination of social security systems. The Dutch Social security law should therefore apply to these drivers.

The Cypriot company, on the other hand, claimed that the Cypriot social security scheme applies since the Cypriot undertaking enacted the employment contracts with the Dutch drivers and made the drivers available to the Dutch transport undertakings with which it entered into fleet management agreements.

Confronted with this question, the Centrale Raad van Beroep (the Higher Netherlands' Social Security and Civil Service Court) asked the ECJ for clarification as to who is the "employer" of drivers within the meaning of the European Regulation: the transport undertakings established in the Netherlands or the Cypriot one?

Applicable rules

In order to ensure that EU resident workers moving within the EU are always protected and subject to the social security scheme of only one Member State, the above-mentioned EU regulation regulates such situations as follows: the connection factor for determining the applicable national legislation is the registered office of the employer (Article 13, 1., b), i)) . Since EU regulation does not define the concept of "employer" nor does it expressly refer to the law of the Member States to define it, reference must be made to the criteria developed by the ECJ (e.g. the effective link of authority, who engaged the employee, paid his/her salary, sanctioned and dismissed him/her, etc.).

Opinion of the Advocate General

The Advocate General unsurprisingly held that the formal contractual relationship between the drivers and the Cypriot undertaking is merely indicative and may be called into question if there are factual indications of another *de facto* employer. The employer of lorry drivers employed in the international road transport sector is the transport undertaking which recruited those drivers for an indefinite period, exercises effective control over the drivers and actually bears the wage costs. With regard to the construction consisting in the posting of those workers to the Dutch company, the Advocate General made it clear that this was not a "posting" as such but rather a "making available" of workers for an indefinite period. Finally, he concluded that when the Cypriot company relies on its alleged status as an employer to request the Dutch social security institutions to declare the Cypriot legislation applicable to the drivers in question, it is committing an abuse of law, as this construction is intended to circumvent European social security law.

Consequences and next steps

Chances are high that the ECJ will follow the Advocate General's opinion in its preliminary ruling. The decision will have important consequences for the current organisation of the European road transport sector. The sector is notorious for skirting the edges of the regulatory framework.

Privacy

Judgment of 17 October 2019, López Ribalda and Others v. Spain, ECtHR Grand Chamber

Abstract

Hidden cameras are not a violation of the right to privacy if there is a well-reasoned justification to use surveillance (i.e. suspicion of theft) and employees are notified of the surveillance in advance.

Legal Context

Article 8 of the European Convention on Human Rights ('ECHR') provides that "*everyone has the right to respect for his private and family life, his home and his correspondence*" (=right to privacy).

Contents of the Judgment

The Grand Chamber of the Court of Appeal has decided that camera surveillance at the workplace using hidden cameras, with a view to establishing theft by staff, is not contrary to the right to privacy as protected by Article 8 of the ECHR. The Grand Chamber overruled the decision of the Third Chamber, which came to the opposite decision.

The camera inspection was justified because some employees were suspected of theft. The court also found that the camera surveillance only concerned the cash register area, the most sensitive area for committing the suspected thefts. The duration of the surveillance (i.e. 10 days) was not considered excessive and did not go beyond what was necessary to confirm the suspicion of theft.

Practical note to employers

At first sight, this might seem like a remarkable decision. Nevertheless, employers should be cautious when using cameras at the workplace. The court clearly decides that using cameras is only compliant with article 8 ECHR in very exceptional circumstances (see *supra* §2). Therefore, it is important to always have a well-reasoned justification to use surveillance and respect a fair balance between the interests of the company and the privacy expectations of the employees.

Free movement of workers

Judgment of 10 October 2019, A. Krah v. Universität Wien , C-703/17

Abstract

An EU university must take all earlier equivalent professional experiences performed in other EU universities into account to determine its lecturers' compensation. Limiting the amount of prior equivalent professional experience performed elsewhere constitutes an obstacle to the founding principle of free movement of workers within the EU. Not considering other experiences that are not equivalent but only useful for the other job is permitted.

Facts

A German national holding a doctorate in history worked for five years as a teaching assistant at the University of Munich. She then worked for the University of Vienna, initially as a teaching assistant and later on as a (postdoctoral) senior lecturer.

The University of Vienna used a salary structure for postdoctoral senior lecturers that determined the applicable salary scale by only taking into account a maximum of four years of earlier equivalent and relevant professional experiences carried out in other universities.

The employee brought the case before the Arbeits- und Sozialgericht Wien (the labour and social security tribunal of Vienna, Austria), where she claimed that all previous periods of employment she performed as a teaching assistant (relevant for her current role) and as a senior lecturer (equivalent to her current role) had to be taken into account to determine the applicable salary scale. According to her, this resulted in arrears of compensation and late payment interests being due.

The tribunal decided to refer two questions for a preliminary ruling to the ECJ to know (i) whether the limitation on the taking into account of "equivalent" earlier periods of employment is allowed by EU law, and (ii) if the same applies to previous professional experiences that are different but "relevant" for the lecturer's current role.

Legal context

Article 45(1) of the Treaty on the Functioning of the European Union ('TFEU') provides that the freedom of movement for workers shall be secured within the Union.

Article 7(1) of Regulation (EU) No 492/2011 provides that a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work.

Decision

Regarding the obstacle

The ECJ ruled that limiting the recognition of previous equivalent professional service to four years constitutes an obstacle to the principle of free movement of workers within the EU (Article 45(1) TFEU). That limitation is liable to deter a postdoctoral senior lecturer who has accrued equivalent professional experience exceeding that period to leave his/her Member State of origin and to apply for such a position at the University of Vienna. The court states in this respect that such a senior lecturer would be subject to less advantageous salary conditions compared to postdoctoral senior lecturers that have carried out the same work during periods of service of the same duration at the University of Vienna.

Not taking into account other previous activities that are dissimilar to the current role of postdoctoral senior lecturer (e.g. extra-university activities or internships) but that could be beneficial for this role is however not an obstacle to the principle of free movement of workers within EU and possible (Article 45 TFEU).

Regarding the justification of the obstacle

The ECJ agreed with the purpose of the Austrian rule (i.e. reward acquired professional experience enabling the employee to perform his or her duties in a better way). Nevertheless, limitation to 4 years was not appropriate to ensure fulfilment of that objective.

Discrimination

Judgment of 12 December 2019, WA v. Instituto Nacional de la Seguridad Social, C-450/18

Abstract

The demographic contribution made by women (i.e. reproduction involves a greater sacrifice for women in personal and professional terms) with two children to social security alone cannot justify the difference in treatment between men and women when it comes to a pension supplement.

Facts

The Spanish national institute of social security (INSS) granted WA a permanent absolute incapacity pension of 100% of the basic amount. WA appealed this decision, arguing that as the father of two daughters, under Spanish law he was entitled to receive an additional pension representing 5% of his initial pension. The INSS dismissed his appeal, explaining that this pension supplement is granted exclusively to women in those circumstances because of their demographic contribution to social security. The referring court states that Article 60(1) of the LGSS (=general Spanish law on social security) entitles women who have had at least two biological or adopted children to receive the pension supplement in question, on account of their demographic contribution to social security, whereas men in an identical situation do not have that entitlement. The demographic contribution of women would be higher because reproduction involves a greater sacrifice for women in personal and professional terms.

The Spanish court expresses doubts about whether such a provision is compatible with EU law and therefore referred the following question to the ECJ for a preliminary ruling:

> "*Does Article 60(1) of the LGSS which grants the right to receive a pension supplement –– in view of their demographic contribution to social security –– to women who have had biological or adopted children and are in receipt of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system, but, on the other hand, does not grant that right to men in an identical situation, infringe the principle of equal treatment which prohibits all discrimination on grounds of sex, enshrined in Article 157 of the [TFUE] and in Directive [76/207], as amended by Directive [2002/73] and recast by Directive [2006/54]*?"

Legal context

Article 157 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') provides that each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 ensures the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Decision

The ECJ found that the directive on the equal treatment of men and women in matters of social security precludes the Spanish law. The demographic contribution made by women with two children to social security alone cannot justify the difference in treatment between men and women. The Spanish law also cannot be justified by one of the derogations found in the directive, nor by the Article 157(4) TFEU, which permits positive discrimination so as to compensate for disadvantages experienced by women over the course of their professional careers.

Holiday

Judgment of 19 November, Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan a.o., C-609/17 and C-610/17

Abstract

Based on EU law, the employees' right to carry over holidays that they could not take due to sick leave is limited to the 4 EU statutory weeks' holidays.

Facts

In two cases brought before Finnish jurisdictions, Finnish unions claimed that two of their affiliates who resumed work after a leave of absence due to sickness could carry over all the holiday entitlements that they could not have taken because of their absence – including those who did not derive from EU law.

The Finnish rules provide that such carry-over is only possible insofar as holiday entitlements derive from EU law i.e. four weeks.

The Finnish Labour Court referred the cases to ECJ to determine if such carry-over of holidays due to a sickness:

(i) only applied to the statutory minimum holiday entitlement deriving from EU law; or

(ii) also applied to other leave provided under national rules or (industry) collective agreements.

Legal context

Article 7(1) of the European Directive 2003/88/EC (the 'Working Time Directive') provides that every worker is entitled to paid annual leave of at least four weeks.

Article 31(2) of the Charter of Fundamental Rights of the European Union (the 'Charter') states that the right to annual leave is a fundamental right.

Decision

The ECJ ruled on 19 November 2019 that neither the Working Time Directive nor the Charter preclude rules in national laws or collective agreements that would prevent the carry-over of holiday entitlement other than the four-week minimum entitlement under the directive. Additional holidays are governed by national law and not by the EU legislation and Member States can freely determine the conditions to grant, exercise and transfer such additional holiday entitlement, including in the event of a sickness leave.

The ECJ further ruled that the right to annual leave granted by the Charter does not apply to domestic holiday legislation that goes beyond the minimum required by the directive.

Consequences

This judgment will affect the outcome of several pending disputes brought before national courts on this subject.

Article 51, (1) of the Charter limits its field of application to local legislation implementing EU law. By ruling that the Charter does not apply to holidays granted beyond the EU minimum of four-weeks, the ECJ holds that such higher standards are not part of the implementation of the Directive, which seems to be contrary to previous case law. Namely, C-596/16 *Bauer and Willmeroth* and C-684/16 *Max-Planck*. This is criticised by several authors.

Posting of workers

Judgment of 19 December, M. Dobersberger v. Magistrat der Stadt Wien, C-16/18

Abstract

The EU Directive 96/71/EC on the posting of workers within EU does not cover the provision of on-board services on international trains crossing through various Member States when the concerned workers perform all other services in the Member State where they are officially employed and where their shifts begin and end.

Facts

The Austrian national railway company outsourced the operating of its dining cars and the on-board service for some of its trains to a Hungarian company. The company performed the services using its own workers or by hiring out workers to another Hungarian sub-contractor. All workers lived and were hired in Hungary.

This was the case for a large number of trains travelling between Salzburg (Austria) or Munich (Germany) and Budapest (Hungary), stations of departure or terminus.

With the exception of on-board services (e.g. cleaning, food or drink services for passengers), all tasks of the Hungarian subcontractors' workers were performed on Hungarian soil (delivery of food and beverages, train loading, stock and turnover control).

Following a control by the Austrian social inspectorate, Mr. Dobersberger, the managing director of the Hungarian company was found guilty of various infringements resulting from the fact that these posted workers were not duly declared in Austria as requested by the local rules implementing the EU Directive no. 96/71/EC on the posting of workers within the EU.

The dispute ended up before the Verwaltungsgerichtshof (Austrian Supreme Administrative Court) that referred the case to the ECJ for four prejudicial questions in order to determine if the abovementioned activities where within the scope of the Directive and, if so, to which extent.

EU applicable rules

Articles 1(3)(a) of the EU Directive no. 96/71/EC on the posting of workers in the framework of the provision of services setting out the scope of application of the Directive

Article 56 TFEU that guarantees the free movement of services in transport sector within the EU.

Decision

The ECJ ruled that such workers who carry out all the activities of an international railway service, with the exception of on-board services during the train trip, in a single Member State and who start or end their service in that same Member State, do not have a sufficient link with the Member State(s) through which these trains pass to be considered as "posted workers" within the meaning of Directive 96/71/EC.

For the purpose of said directive, these workers were consequently considered to be fully employed in Hungary.

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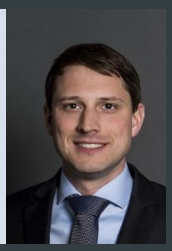

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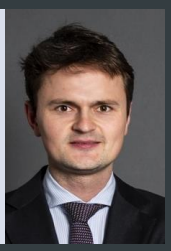

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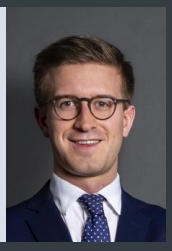

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