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EU Employment Law Report

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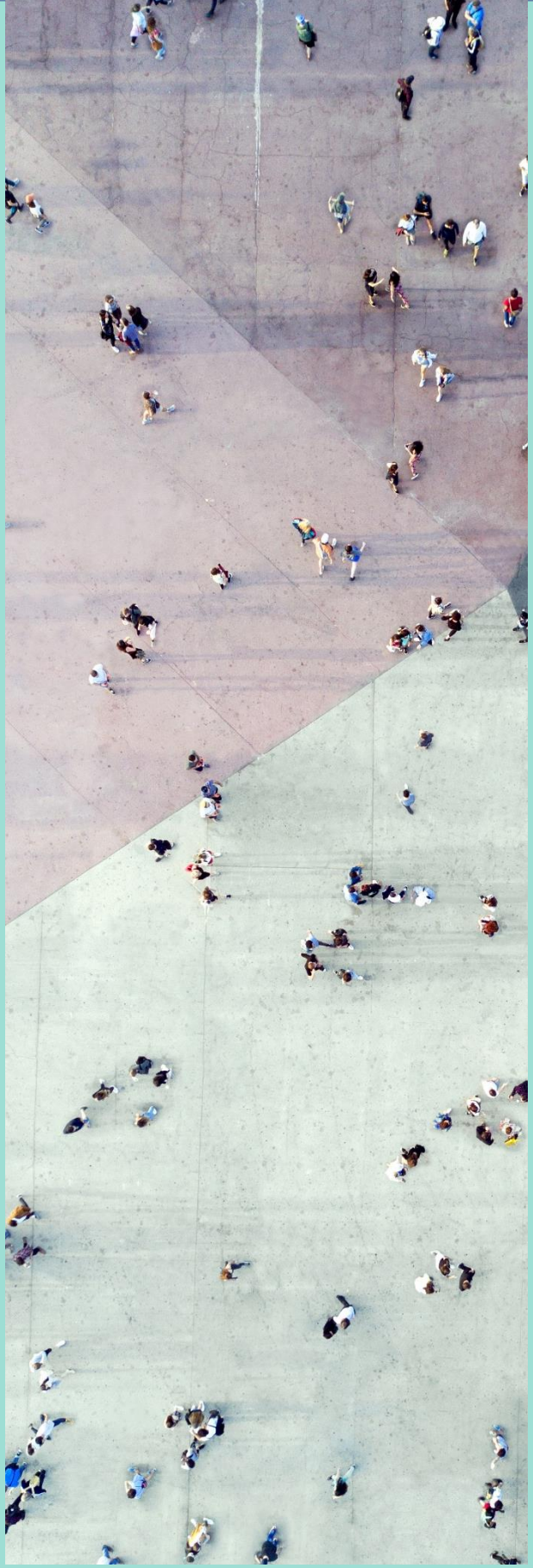
Q1 & Q2 2023

EU case-law



Employee data protection

J.M. v. Apulaistietosuojavaltuutettu, Pankki S, 22 June 2023, C-579/21

Abstract

The European Court of Justice (ECJ) ruled that while individuals have the right to know the date of and reasons for the consultation of their personal data, such information does, in principle, not include the names of the employees who consulted this information.

Facts

An employee of Pankki S, who was also a customer of the bank, discovered that other bank staff members had accessed his personal data between November and December 2013. He requested Pankki S to provide him with the employees' identities, the dates his data was consulted and the reasons for processing his data. Pankki S refused to disclose the employees' identities but provided some details about the consultations, which the bank claimed were undertaken to investigate a potential conflict of interest.

Decision

The ECJ clarified that under Article 15 of the General Data Protection Regulation (GDPR), individuals have the right to obtain information about the consultation operations conducted on their personal data, including the dates and purposes of those operations. However, there is only an absolute right to know the employees' identities if necessary to exercise the data subject's rights effectively, and the rights and freedoms of the employees are duly considered. Balancing the rights and freedoms of all parties involved is crucial in cases of conflict.

The ECJ emphasised that when choosing means of communication, it is important to respect the rights and freedoms of all individuals concerned and to prioritise methods that do not infringe upon those rights. The Court ruled that the fact that Pankki S is a banking institution engaged in regulated activities and that the data subject is both a customer and an employee of the bank does not affect the scope of the data subject's right to access information about the consultation of their personal data.

Relevance

This decision clarifies the scope of information to be given to data subjects on consultation of their personal data. While this includes the right to be informed of the dates and purposes for consulting their data, companies are not required to disclose the identities of the employees who consulted these data unless it is necessary for the effective exercise of the data subject's rights and the rights and freedoms of the employees are properly considered.

X-FAB Dresden GmbH & Co. KG v. FC, 9 February 2023, C-453/21

Abstract

The ECJ clarified the interpretation and validity of provisions in the GDPR concerning the dismissal of data protection officers (DPOs). The Court held that national legislation allowing for the dismissal of a DPO for just cause, unrelated to their tasks, is permissible if it does not undermine the GDPR's objectives. A conflict of interest may exist when DPOs are assigned tasks that impede their ability to monitor data protection compliance independently.

Facts

The case involved a dispute between X-FAB Dresden GmbH & Co. KG (X-FAB) and FC, an employee and DPO of X-FAB. The employee was dismissed from the DPO position by X-FAB since he held a simultaneous role as chair of the works council, which was considered incompatible with his position as DPO and thus a just cause for dismissal as DPO. The employee challenged the compatibility of German law with EU law.

Decision

The ECJ examined the provisions of the GDPR, focusing on Article 38(3) on non-dismissal and penalising the DPO and Article 38(6) on the need for a DPO to be free of conflict of interests. It concluded that national legislation allowing for the dismissal of a DPO for just cause, even if unrelated to their tasks, is not prohibited by the GDPR. However, such legislation must not undermine the GDPR's objectives, for example, by preventing the dismissal of a DPO (i) who no longer possesses the professional qualities to perform his tasks or (ii) who is no longer able to carry out his tasks in an independent manner on account of a conflict of interest. The Court further clarified that a conflict of interests could arise if a DPO is assigned tasks that compromise their ability to monitor data protection compliance independently. The national courts should determine a conflict of interest on a case-by-case basis, considering the organisational structure and applicable rules of the controller or processor.

Relevance

This decision confirms that national legislation may impose stricter conditions for the dismissal of DPOs than those provided by the GDPR, as long as the legislation does not undermine the regulation's objectives. The Court leaves it to the national courts to determine whether a conflict of interest exists as defined by the Court.

Freedom of movement of workers

Thermalhotel Fontana Hotelbetriebsgesellschaft mbH v. Bezirkshauptmannschaft Südoststeiermark, 15 June 2023, C-411/22

Abstract

In case C-411/22, the ECJ ruled that the freedom of movement for workers precludes the legislation of a Member State to make compensation conditional on the imposition of an isolation measure by its own administrative authorities

Facts

In late 2020, employees of Thermalhotel Fontana in Austria were tested for Covid-19, and positive results were reported to the Austrian health authority. Some of the employees were residents of Slovenia and Hungary, so the Austrian authority did not impose isolation measures on them but informed the respective authorities of Slovenia and Hungary. Those authorities imposed isolation measures on the employees in their own countries. Thermalhotel Fontana continued to pay the affected employees during the isolation periods according to Austrian labour law. The hotel sought compensation for the loss of earnings suffered by its employees during isolation, but the administrative authority refused their application.

Decision

The Austrian administrative Court referred questions to the ECJ regarding employee compensation during isolation. The ECJ ruled that such compensation does not fall under the regulation on the coordination of social security systems because it does not fulfil the conditions of being granted without an individual assessment of personal needs or relating to the risks specified in the regulation. Furthermore, the ECJ found that the legislation conditioning compensation on isolation measures imposed by the same Member State violates the principle of freedom of movement for workers and constitutes indirect discrimination.

Relevance

This decision clarifies that legislation linking compensation to isolation measures imposed by a specific Member State can be discriminatory and against the freedom of movement for workers. While it affirms the principle of freedom of movement, its practical scope in the post-pandemic era is limited to companies affected by such measures as set out in the decision.

Untaken statutory holidays upon retirement

FI v. Bayerische Motoren Werke AG, 27 April 2023, C-192/22

Abstract

The ECJ ruled in case C-192/22 that a national law provision that allows workers' paid annual leave to expire when they are unable to take the leave due to illness before the work release phase, as part of a progressive retirement scheme, violates Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union.

Facts

The case involved a dispute between an employee and a private sector company named Bayerische Motoren Werke AG regarding the employee's entitlement to an allowance instead of untaken leave. The employee had worked under a progressive retirement scheme and was released from work due to illness before being able to take two and two-thirds days of leave. He claimed compensation for the untaken leave accruals.

Decision

The ECJ considered the relevant EU and German law. It emphasised the importance of the right to paid annual leave and its protection under Article 7 of Directive 2003/88 and Article 31(2) of the Charter. The Court concluded that a national law provision allowing the lapse of acquired leave due to illness before the work release phase, even in cases of short-term absence, violates EU law and must be set aside.

Relevance

This decision reaffirms the significance of the right to paid annual leave and emphasises the protection of workers' interests in terms of rest periods and health. Untaken accrued holidays must be paid out to employees when they leave, including in cases involving progressive retirement schemes and incapacity for work.

Working time and daily rest periods

IH v. MÁV-START Vasúti Személyszállító Zrt., 2 March 2023, C-477/21

Abstract

In this case, the ECJ ruled that daily and weekly rest periods are separate and autonomous rights under the Working Time Directive. The directive requires both a minimum daily rest period and a minimum weekly rest period. Granting daily rest concurrently with a weekly rest period would undermine the right to daily rest, and the length of the weekly rest period provided by national legislation cannot deprive workers of their right to daily rest.

Facts

A train driver employed by MÁV-START, the Hungarian national railway company, challenged the company's decision not to grant him a daily rest period of at least 11 consecutive hours when it precedes or follows a weekly rest period or a period of leave. MÁV-START argued that the employee was not disadvantaged since the applicable collective agreement provided a weekly rest period exceeding the minimum required by the Working Time Directive.

Decision

The ECJ reiterated that daily and weekly rest periods serve different purposes and are independent rights. Daily rest allows workers to have uninterrupted time away from work following a period of work. Weekly rest provides workers with a designated rest period every seven days. The Court emphasised that workers must enjoy the actual benefits of both rights.

Granting daily rest as part of the weekly rest period would undermine the right to daily rest, rendering it meaningless in cases where workers benefit from their right to weekly rest. The directive expressly states that the weekly rest period is additional to the daily rest period, affirming their separate nature. The Court also clarified that more favourable provisions in national legislation regarding the length of the weekly rest period could not diminish workers' other rights conferred by the directive. Therefore, regardless of the duration of the weekly rest period stipulated by national law, workers must be granted their right to daily rest.

Relevance

This ECJ decision clarifies the distinction between daily and weekly rest periods. It highlights that both rights are independent and must be guaranteed to workers.

Transfers of Undertakings

Strong Charon – Soluções de Segurança SA v. 2045 – Empresa de Segurança SA, 16 February 2023, C-675/21

Abstract

In this case, the ECJ clarified the scope of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (TUPE Directive). To assess whether a transfer falls within the scope of the TUPE Directive, the absence of a contractual link between a transferor and a transferee is irrelevant. On the other hand, the number of transferred employees can be relevant, especially if it concerns labour-intensive undertakings.

Facts

F.L. was an employee of Strong Charon, a company delivering security services. F.L. worked for Strong Charon as of 2003 as a security guard. As of 2017, he worked at the company premises of a client of Strong Charon. In 2019, the client selected a company called 2045 – Empresa as the new service provider. Consequently, Strong Charon informed F.L. that 2045 - Empresa would be his new employer. 2045 – Empresa, however, refused to consider F.L. as part of its personnel. The Portuguese courts asked the ECJ whether the absence of a contractual link between Strong Charon and 2045 – Empresa indicated that the TUPE Directive was not applicable. Additionally, the ECJ was requested to rule whether the fact that only a very limited number of employees was taken over is decisive in assessing the applicability of the TUPE Directive, considering the characteristics of the activities.

Decision

The ECJ firstly ruled that the absence of a contractual link between a transferor and a transferee has no bearing on the establishment of the existence of a transfer because such absence does not imply that the economic identity of the entity was not maintained. Secondly, the ECJ states that in labour-intensive undertakings, such as undertakings related to security services, the number of employees taken over can be relevant to assess the applicability of the TUPE Directive. The ECJ ruled that the fact that only a very limited number of employees were taken over, without them having specific skills and knowledge essential to the services, is not likely to establish the existence of a transfer.

Relevance

This decision highlights, once again, that a contractual link between a transferor and a transferee, or the absence of such link, is not decisive for the establishment of the existence of a transfer of undertaking. It also emphasises that the nature of the undertaking should be considered. In labour-intensive undertakings, the number of employees, their skills and their knowledge should be considered.

Equal treatment

JK v.TP S.A. PTPA, 12 January 2023, C-356/21

Abstract

The scope of Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation also extends to self-employed workers. The freedom of contract cannot justify refusing to conclude a contract with a self-employed worker for discriminatory reasons.

Facts

Between 2010 and 2017, a self-employed contractor, J.K., worked for the Polish company TP, which operates a nationwide public television channel. Following the publication of a YouTube video by J.K. and his partner, a video aimed at promoting tolerance towards same-sex couples, TP informed J.K. of its decision to cancel two one-week shifts that were planned for December 2017. Subsequently, J.K. brought an action before the District Court of Warsaw, seeking compensation for the harm resulting from the termination of the professional relationship by TP for reasons linked to his sexual orientation. The District Courts expressed doubts about the compatibility of Polish law with EU law insofar as the freedom of choice of contracting parties excludes the protection against discrimination, provided that the choice is not based on sex, race, ethnic origin or nationality.

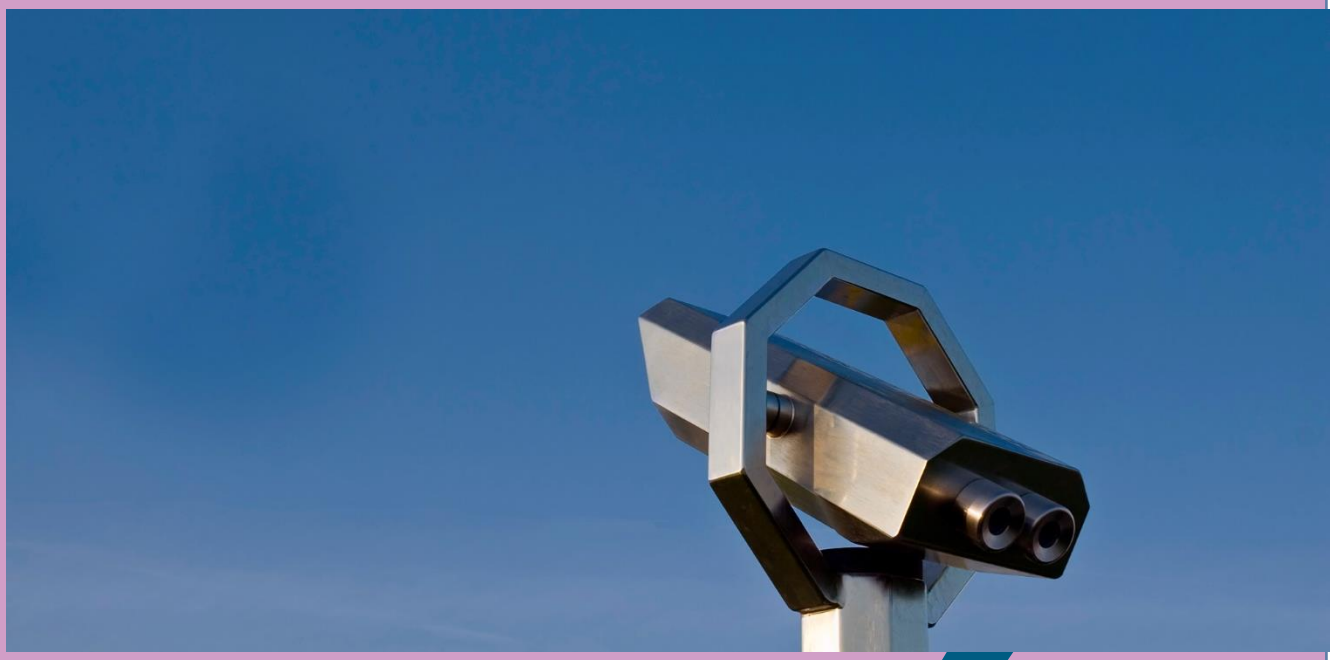
Decision

The Court of Justice holds that the relevant Polish provision is incompatible with the Framework Directive. The provision that allows the refusal of TP, based on the sexual orientation of J.K., to conclude or renew a contract constitutes a breach of EU law. The freedom of choice of contracting parties cannot result in excluding the protection against discrimination. The Court of Justice states that the scope of the Framework Directive and, more specifically, the terms "employment", "self-employment" and "occupation" must be interpreted broadly. Activities carried out by self-employed workers to earn their livelihood fall within the scope of Directive 2000/78. The activities must be genuine and pursued in the context of a legal relationship characterised by a degree of stability. The same broad interpretation method is to be applied to the concept of "conditions of access". It may include the conclusion of a contract.

Relevance

This decision highlights that self-employment falls within the Framework Directive and that the freedom of choice of contracting parties cannot justify refusing to conclude a contract with a self-employed worker for discriminatory reasons.

Regulatory developments



Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms ("EU Pay Transparency Directive")

In March 2023, the EU Pay Transparency Directive was approved. The directive aims to implement measures to close the gender pay gap by giving employees the right to access information needed for determining whether they are paid fairly and by providing them with tools to claim equal pay.

More specifically, employers will be bound by the following obligations:

- **Information obligation during the recruitment process**

  Employers must inform candidates about the initial pay scale in the job announcement or before the job interview. Employers are prohibited from asking candidates about their pay history.

- **Information obligation during employment, upon request of the employee**

  Upon the employee's request, employers must also provide the employee with information about their individual salary level and the average salary level of the personnel category to which the employee belongs, broken down by gender.

- **Reporting obligation**

  Thirdly, a reporting obligation on the gender pay gap is introduced for companies with more than 100 employees. Companies with over 100 but less than 250 employees must report every three years, while companies with more than 250 must report annually.

- **Pay gap assessment**

  If the gender pay gap exceeds 5%, a pay gap assessment must be conducted.

- **Remedies and enforcement**

  The directive is very exhaustive as regards legal means to ensure the effectiveness of the equal pay principle. It lays down a series of measures to ensure full access to justice and protection against adverse treatment for claimants and supporters/witnesses, including rules on extended limitation periods. It also lowers the threshold for initiating legal claims by shifting the burden of legal costs to the employer, even if the claimant was unsuccessful in making a claim, provided it was made on reasonable grounds. In addition to shifting the burden of proof and a legal scheme to protect the worker as a supporter/witness against adverse treatments, member states must also provide for a system of full compensation (including back pay) as well as effective sanctions and penalties.

Member states should transpose this directive into national legislation within three years, by 7 June 2026. Its future impact on businesses is not to be underestimated, especially given the sanction mechanisms the directive seeks to impose.

In the pipeline

Revision of the European Works Council Directive

In February 2023, the European Parliament promulgated a resolution calling for revising the European Works Council Directive of 2009. As a result, the EU Commission launched a first-stage consultation of the social partners to assess whether such revision would be warranted. Both the resolution and the consultation follow up on the European Commission's 2018 evaluation of the directive. In the meantime, the second consultation stage started on 26 July (to expire on 4 October 2023).

The EU Commission's suggested points of action include measures to:

- Abolish unjustified differences in I/C rights, meaning, for instance, that the legacy regimes (of so-called 'Article 13' EWC agreements) could be phased out and that the directive's remit could extend the transnational I/C rights to structurally independent but contractually linked groups of companies,
- Ensure a more efficient and effective process for setting up EWCs, meaning that the SNB process would be streamlined (i.e., shortened) and better supported (i.e., with a clear role for official trade union representatives and paid for by central management) in a more gender-balanced way,
- Secure, effective processes of I/C, including appropriate resources, for instance, by providing more certainty on the concept of transnationality, by finetuning the concept of effective consultation and addressing issues around confidentiality, and
- Improve effective enforcement of the directive, for instance, through dissuasive and proportionate sanctions (for national laws to have a genuine deterrence of violations of I/C rights) and by securing access to justice to enforce the I/C rights.

In terms of scope and content of a possible revision, the listed objectives pick up many of the desiderata of the European Parliament (see Bird & Bird article 'An (unexpected) revision of the EWC Directive underway', 30 January 2023). They are clearly inspired by the trade union movement's wish list.

Going forward, if the social partners do not reach an agreement on the revision by way of collective bargaining (under art 155 TFEU), then the EU Commission is expected to table a draft revising directive in the first quarter of 2024.

Proposal for a directive on the gig economy

See our EU Employment Law Report Q4 2021 (twobirds.com)

On 12 June 2023, the European Council agreed on the general approach for a directive on the gig economy and adopted its position on the proposal of the European Commission dated 9 December 2021. The directive seeks to address the misclassification of the contractual relationship between the platform and platform workers. Under the approach of the European Council, the worker will be legally presumed to be an employee (rather than a self-employed contractor) once the platform exerts control and direction over the performance of the work. This is assessed based on seven criteria. When at least three of the seven criteria are fulfilled, the presumption applies. Other measures aimed at protecting the workers are included as well.

Proposal for a regulation on artificial intelligence

The European Parliament adopted its position on an AI Regulation. The aim is to lay down harmonised rules on AI. A classification system will be set up, establishing different regulations depending on the risk an AI technology could pose to fundamental rights. Employment-related risks (i.e., risks that occur in the context of recruitment and selection, decision-making on promotion, task allocation, monitoring and termination) are classified as high risks. As a result, AI developers and users must adhere to strict regulations. These include regulations relating to testing, documentation and accountability. The AI systems must be designed to guarantee human oversight and accompanied by clear instructions for use. This way, risks related to health and safety, as well as to fundamental rights, should be prevented or minimised.

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