EU Employment Law Report

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

Q4 2022

Jurisprudence

Collective labour relations

Employee involvement in European Company

PG v. Ministero della Giustizia a.o., 7 April 2022, C-236/20

Facts

Two German trade unions contested the arrangements for appointing employees' representatives within the Supervisory Board of a European company (SE), on the basis that, in the absence of a separate ballot, there was no guarantee that the employees' representatives within that Board would actually include a trade union representative. This led to the request for a preliminary ruling on the interpretation of EU Directive 2001/86 supplementing the Statute for a European company with regard to the involvement of employees.

Decision

Directive 2001/86 does not set up a single European model of employee involvement applicable to the SE, in view of the great diversity of rules and practices existing in the Member States as regards the manner in which employees' representatives are involved in decision-making within companies. However, following the "before-and-after principle", the Directive aims to secure the employees' acquired rights as regards such involvement. In Germany the specific ballot for trade union representatives is a characteristic element of the participation regime. In order to ensure employment involvement in an SE created by way of transformation a separate ballot must therefore be organized.

Relevance

Where national law requires a separate ballot as regards the composition of the Supervisory Board of a European company, it should be organized. The Court also stated that the right to nominate a certain proportion of candidates cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries, and establishments, in such a way as to ensure that those trade unions are treated equally in respect of that right.

Equal Treatment & Non-discrimination

Collective bargaining agreement & equal treatment of temporary agency workers

Facts

A German temporary worker brought a claim seeking payment of a sum equivalent to the difference in pay between temporary agency workers and comparable workers recruited directly by the user undertaking. The difference in pay resulted from a collective bargaining agreement for retail workers in the Land of Bavaria (Germany) that granted a lower pay to temporary workers than to workers of the user.

Decision

Member States can authorize social partners to conclude collective agreements which authorize differences in treatment with regard to working conditions of temporary agency workers. However, the workers "overall protection" must be ensured. That is only the case if they are afforded, in return, advantages intended to compensate for the effects of that difference in treatment. These compensating advantages must relate to the basic working and employment conditions, namely those concerning the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

Compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, in concrete terms, by comparing, for a given job, the basic working and employment conditions of the temporary worker to those of the workers of the user and checking whether the countervailing benefits can counterbalance the difference in treatment suffered. Ensuring "overall protection" does not require the temporary worker to have a permanent contract of employment with a temporary work agency. Neither is there an obligation on Member States to lay down criteria to respect this overall protection, where Member States have given the social partners the option of concluding collective bargaining agreements on that score. However, such collective bargaining agreements must be amenable to effective judicial review.

Relevance

The decision defines the concept of "overall protection of temporary agency workers" (art 5 (3) Directive 2008/104) and provides criteria to assess whether this notion is effectively respected. It also reiterates the members states' right to leave it up to the social partners' broad discretion to negotiate and conclude collective bargaining agreements, albeit in accordance with EU law and subject to judicial review.

Religion & philosophical beliefs

ECJ 13 October 2022, C-344/20

Facts

A candidate who was unsuccessful in obtaining an internship with a social housing company, brought legal actions against the latter on the basis of discrimination on the ground of religious belief. As she had made it clear she would not take off her headscarf as required by the company's neutrality policy, she felt she was discriminated against on account of her religious beliefs.

Decision

A company policy prohibiting the visible wearing of religious, philosophical or spiritual signs does not constitute direct discrimination on the ground of religion or belief if it is applied to all workers in a general and undifferentiated way. However, such a rule may amount to indirect discrimination if it is established (which is for the Labour Courts to do) that the neutrality obligation puts persons adhering to a particular religion or belief at a particular disadvantage. That would not be the case if (i) a difference in treatment is based on a legitimate aim and (ii) the means to achieve that aim are appropriate and necessary, which is for the courts to ascertain.

The mere desire to pursue a policy of neutrality could be considered as a legitimate aim but can only objectively justify the difference in treatment based on religion or belief where there is a genuine need on the part of that employer. That is for the latter to demonstrate, taking into consideration, i.a. the legitimate wishes of customers

or users and adverse consequences that the employer would suffer in the absence of such a policy, given the nature of its activities and the context in which they are carried out.

Relevance

This decision reiterates the main principles of established case-law by the ECJ on the much-debated issue of discrimination based on religion as a result of prohibitions on the wearing of religious signs at work. It also clarifies that religion, and philosophical or spiritual belief are to be considered as one single ground of discrimination under Directive 200/78 on equal treatment in employment and occupation.

An employer who wishes to impose a strict neutrality policy will have to draft clear, coherent and undifferentiating work rules on that matter and be able to provide proof of a genuine need for such a policy within the company.

Age

ECJ 17 November 2022, C569/21

Facts

A 33 y old candidate for a position as psychologist within the police force challenged the age limit of 30 as a form of discrimination based on age.

Decision

While an age limit for entry into the police force can be justified on account of the need for specific physical aptitude (protecting the public against criminals, maintaining law and order), this would not be the case for psychologists whose tasks are more of a technical-scientific nature, notwithstanding the fact they may be called on to intervene in exceptional situations (e.g. calamities). The Court also recalled that an age limit can be justified on account of the time that is needed to train the persons for the job or in order to ensure that they are employed for a sufficiently long time before retirement. For lack of factual data on that matter it was unable to examine if this was the case.

Relevance

The decision reiterates the basic principles as regards age discrimination.

ECJ 20 October 2022, C-301/22

Facts

Romanian magistrates who were in service prior to 1 January 2010 (the “former magistrates”) were entitled to certain wage increases under a specific Romanian Act. Those who were hired after that date (“the plaintiffs”) and hence excluded from this wage increase considered they were discriminated against, since they did the same work, for the same period of time and in the service of the same employer.

Decision

The Court held there was no direct discrimination based on age, since the age of the magistrates did not even come into play with regards to the difference in treatment. This was the result of the entry into force of new legislation and the application in time of a new law, and therefore not tantamount to discrimination on the basis of age. Moreover, it was the date of hiring – and not the age of the persons in question – that was decisive as regards the applicability of the new statute. On the question of whether the list of criteria enumerated in Directive 2000/78 is exhaustive, the Court reiterated its established jurisprudence that it is indeed.

Relevance

A national law that is only applicable to situations that have arisen after its entry into force does not in itself constitute a discrimination on account of age.

Fixed-term work

ECJ 13 December 2022, 40/20 and C-173/20

Facts

Several university researchers challenged their employers' refusal to transform their fixed-term contracts into contracts of indefinite duration and/or to allow them to undergo appraisal so that they may be added to the list of associate professors.

Decision

The Court reiterated the purpose of the EU Framework Agreement on fixed-term contracts: (1) to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and (2) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts. National legislation can permit universities to conclude three year fixed-term contracts with researchers, extendable for a maximum of two years, without making the conclusion or extension of these contracts conditional on objective temporary or exceptional requirements. It is equally admissible for national legislation to set the maximum total duration of employment contracts for researchers at 12 years. A difference in treatment between two categories of fixed-term workers (in this case: university researchers vs researchers for public research bodies) falls outside the scope of the Framework Agreement as it deals with differences in treatment between fixed-term workers and permanent workers in a comparable situation.

However, there is an issue of inadmissible unequal treatment where researchers with a fixed-term contract who find themselves in a comparable situation as those with a contract of indefinite duration (i.e. having the same national academic qualification, carrying out the same activities and providing the same teaching services) are denied the possibility to undergo a specific appraisal procedure in order that they may be added to a list of associate professors.

Relevance

The conditions of professional career development are considered employment conditions for the purpose of the principle of non-discrimination of Clause 4 of the Framework Agreement. Workers on a fixed-term contract who find themselves in a comparable situation to those with a contract of indefinite duration cannot be treated differently, without objective justification, i.e. on account of a genuine need to treat them differently and that is appropriate and necessary to achieve that purpose.

Law applicable to contractual obligation – Reg. n° 1215/2012 – Rome I Regulation

ECJ 20 October 2022

Facts

An employee, domiciled in Germany, had worked for a Canadian company until both parties decided to transfer their contractual relationship to a Swiss company, terminating their existing contract. The employee signed a new (written) employment contract with the Swiss company as well as an additional contract with his former Canadian employer whereby the latter accepted direct liability for the obligations of the Swiss company under the employment contract. When the Swiss company terminated the employee's contract a few months later, the latter initiated proceedings before a German jurisdiction. In view of the Swiss company's insolvency the employee sought to obtain a Court order against the Canadian company to pay him the amounts the Swiss company owed him.

The German Labour Court (Stuttgart) dismissed the action on the ground that it had no international jurisdiction (overturned on appeal).

Decision

The matter raised the issue of whether an employee can sue a legal person which is not his employer, but which is, by virtue of a letter of comfort, directly liable to the employee for claims arising from an individual contract with a third party, before the courts for the last place where or from where he habitually carried out

his work. The Court considered that is indeed possible, provided there is a hierarchical relationship between that person and the employee, which is for the referring court to assess.

Relevance

When establishing its jurisdiction, the Courts must take into all factors to assess whether there was an employment relationship characterized by the existence of a hierarchical relationship. The fact that the Canadian company had only signed a letter of comfort with the employee was not sufficient to preclude out of hand the existence of such a relationship between the employee and that company.

Coordination of social security systems

ECJ 13 October 2022, C-713/20

Facts

For the calculation of workers' (who did not reside in the Netherlands) entitlement to social security benefits, the Dutch Social Security Office had refused to take into account the periods in between their temporary contracts, when they did not effectively work for the Dutch Temporary Agency. The question brought before the ECJ was whether a temporary worker who lives in a different state than his work state remains affiliated to the social security system of his work state for the time he is unoccupied in between his temporary contracts or whether he then falls within the scope of the legislation of his state of residence.

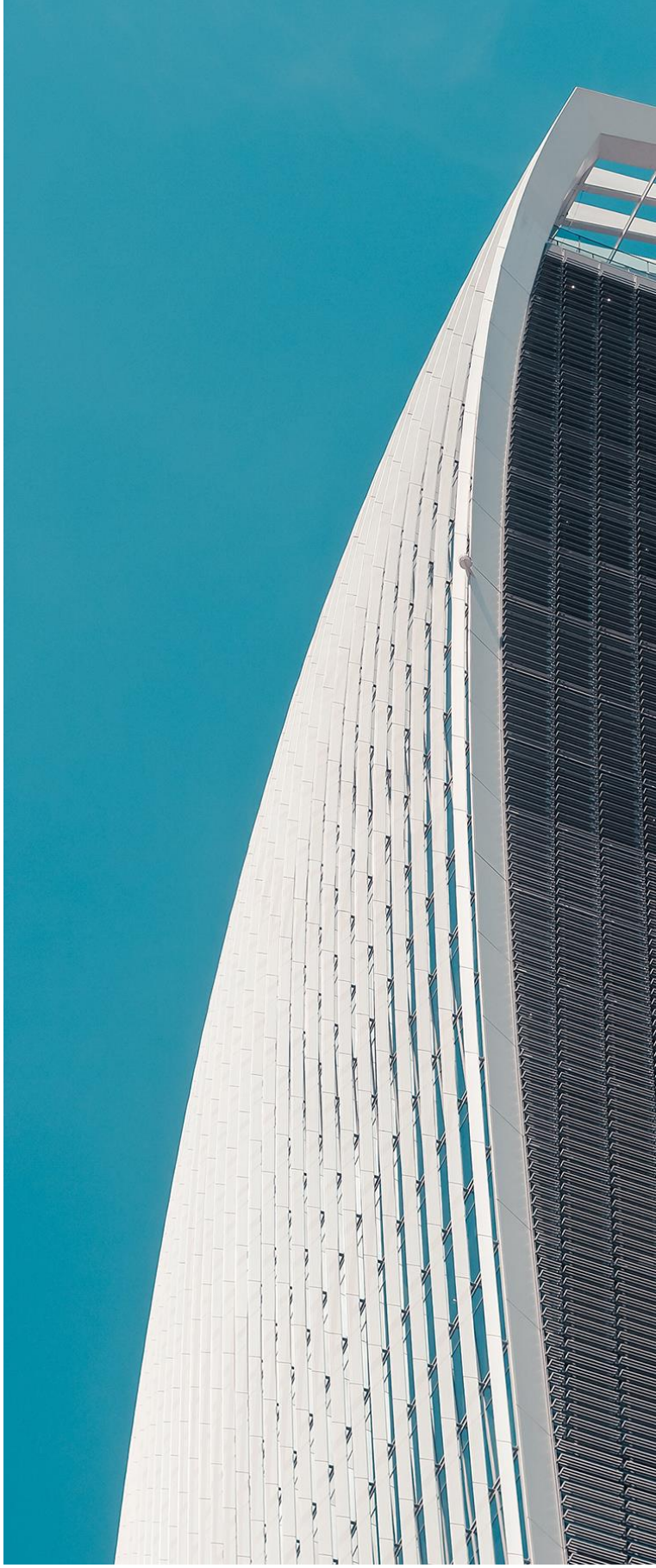
Decision

As there was no employment contract in between the temporary occupation of the worker, and voluntary work or household do not qualify as employment for the purpose of the Dutch law, the workers were not within the scope of (article 11, par 3, a) of Regulation 883/2004 and therefore not subject to Dutch social security but the social security of their state of residence (article 11, par 3 e).

Relevance

Actual employment in the work state is required for the social security system of the work state to be applicable.

Regulatory developments



Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union

While the actual setting of the level of minimum wages is strictly within the national Member States' remit, this Directive outlines a series of minimum requirements on that matter with a view to ultimately lift minimum wages across the EU, to prevent in-work poverty as well as to reduce the gender pay gap, the latter in view of the consideration that women are statistically most likely to suffer from inadequate wages.

While 22 of the 28 EU Member States have a statutory minimum wage set at national level, others have a system whereby minimum wages are set by collective bargaining agreements or a hybrid system with a combination of both.

Although the Directive does not seek to establish a uniform mechanism, nor to define a one and unique "adequate EU minimum wage", it imposes a duty on Member States to actively promote collective bargaining where the collective bargaining rate is below 80 percent (which is the case for most EU States) by requiring them to draw up action plans, to be updated regularly and reviewed at least every five years and notified to the Commission. Where States have statutory minimum wages, the Directive imposes a duty to set up necessary procedures for setting and updating these wages and outlines the criteria for the assessment of the adequacy of its minimum wages.

The Directive will have to be transposed in national law by 15 November 2024.

There was considerable pushback against this Directive from countries where collective bargaining is deeply embedded in the national "DNA" (e.g. Sweden and Denmark) and where the Directive is thus perceived as an overreach from Brussels. On the 18th of January 2023 the Danish Ministry of Employment has officially announced it will seek the annulment of this Directive before the European Court of Justice, as a matter of principle, insisting that wage formation must take place in Denmark and not in the EU The Government has brought an action for annulment against the Minimum Wage Directive (bm.dk).

Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures

This Directive seeks to achieve a more balanced representation of women and men among the directors of listed companies. It does not apply to micro, small and medium-sized companies. The objectives to be reached by the Member States are to ensure that by 30 June 2026, in listed companies, members of the underrepresented sex hold at least 40% of non-executive director positions. If Member States choose to apply the new rules to both executive and non-executive directors, the target would be 33 % of all director positions by 2026.

The Directive sets out means to achieve this directive (e.g. on selection processes, the burden of proof on the priority of the underrepresented sex in the selection of equally qualified candidates) and requires for Member States to impose a duty to report to the competent authorities once a year about the gender representation on their boards and to make that information available on their websites.

The Directive must be transposed by 28 December 2024. By 29 December 2025 and every two years thereafter, Member States shall report to the Commission on its implementation.

In the pipeline

On 7 December 2022 the European Commission adopted two proposals to strengthen equality bodies, in particular their independence, resources and powers, with a view to enhance their capacity to combat discrimination in Europe more effectively. Equality bodies are public institutions that provide assistance to victims of discrimination and issue reports and recommendations. As it is left to Member States' discretion to define the rules on the setting-up and functioning of such bodies, significant differences exist across the EU. In order to strengthen the role and independence of such bodies within the EU, the Commission has now proposed a set of uniform binding rules.

Proposal for a Council Directive on standards for equality bodies

Proposal for a Directive of the European Parliament and the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation

The proposals also seek to the competence of these bodies to the Employment Equality Directive The Employment Equality Directive (2000/78/EC) and the Gender Equality Directive in the field of social security Gender Equality Directive in the field of Social Security (79/7/EEC).

Pieter De Koster

Partner

+3222826081
pieter.dekoster@twobirds.com

Cecilia Lahaye

Counsel

+3222826084
cecilia.lahaye@twobirds.com

Anton Aerts

Counsel

+3222826083
anton.aerts@twobirds.com

Jehan de Wasseige

Associate

+3222826029
jehan.dewasseige@twobirds.com

Guillaume Nolens

Associate

+3222826031
guillaume.nolens@twobirds.com

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dublin • Dusseldorf • Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco • Shanghai • Singapore • Stockholm • Sydney • Warsaw