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EU Employment Law Report

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

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Case law

Non-discrimination

ECJ 26 January 2021, VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład (C-16/19)

Abstract

In case 'VL', the ECJ has ruled that a difference in treatment between persons sharing the same protected ground may be discriminatory if based on said ground. However, discrimination usually occurs when persons sharing a protected ground are treated less favourably compared to others who do not. The decision is available here.

Facts

VL, an employee of a hospital in Kraków, submitted a disability certificate to her employer in December 2011. In 2013, the hospital decided to grant a monthly allowance to employees who would submit disability certificates to reduce the contributions due to the authorities. Polish employers with fewer than 6% of workers with disabilities are sanctioned, and this measure aimed to motivate employees with a disability to request a certificate. VL, along with 16 other employees, submitted her disability certificate before the hospital's decision and was excluded from the benefit of this allowance.

VL brought an action against her employer, arguing that she had been the subject of discrimination regarding pay, contrary to EU law.

Legal context

Article 2 of the Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Decision

The Polish Court referred to the ECJ on whether indirect discrimination within the meaning of Article 2 (b) of the said Directive may be taken to occur where a distinction is made by an employer within a group of workers defined by a protected characteristic – in this instance, disability – without the workers with disabilities in question being treated less favourably than workers who do not have disabilities.

The ECJ reminded that Article 2, (b), must not be read as only prohibiting differences in treatment between persons who have disabilities compared to persons who do not have disabilities. The ECJ's interpretation of the Directive is that while, in general, the cases of discrimination based on disability in which it applies concern differences in treatment between people with and without disabilities, its scope is not limited to such comparisons. The principle of equal treatment enshrined in Directive 2000/78 is thus intended to protect a worker who has a disability against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities but also as compared with other workers who have disabilities.

This difference in treatment may thus be regarded as discriminatory. It is up to the referring Court to analyse whether (or not) it qualifies as an (in)direct discrimination based on the factual circumstances.

ECJ, 17 March 2021, KO v. Consulmarketing SpA (C-652/19)

Abstract

In this case, the ECJ ruled on the application of a less advantageous protection system to fixed-term contracts concluded before the entry into force of a better protection and converted into contracts of an indefinite duration after that date. In the case at hand, it ruled that this difference in treatment was not discriminatory because there were objective reasons justifying the different treatment of fixed-term workers. The decision is available here.

Facts

The Tribunale di Milano (District Court of Milan, Italy) refused to reinstate an Italian worker who had been made redundant in a collective layoff. The collective layoff was declared to be unlawful, but unlike the other workers who were all reinstated, the individual in this case was not. The District Court considered that the employee could not benefit from the same protection system as the other workers who had been made redundant, on the ground that her initial fixed-term employment contract had become an indefinite duration contract after 7 March 2015, the date of entry into force of Legislative Decree No 23/2015, which pursuant to Italian law, is assimilated to a new hire.

In the context of the proceedings brought against that decision, the employee claims, among other things, (i) that the applicable national legislation does not comply with EU law; and (ii) infringement of the principle of equal treatment. Employees who are treated as new hires despite their past service under fixed-term contracts can only benefit from capped damages in case of irregular collective layoff and are hence in a less favourable situation than others who are then reinstated. The referring Court decided to refer these questions to the ECJ.

Legal context

Article 1(2)(a) of EU Directive *98/59/EC* of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies provides that the Directive does not apply, among other things, to "*collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts*".

Articles 20 and 30 of the Charter of Fundamental Rights of the European Union respectively provide for the general principles of equality between citizens and protection of employees against unjustified dismissals.

Clause 4 of the EU social partners' framework agreement on fixed-time work annexed to EU Directive 1999/70/EC provides that: *"(…) 1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds. (…) 4. Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds* (…)".

Decision

The ECJ ruled that the Italian national legislation providing the concurrent application of two different systems protecting permanent employees dismissed in the framework of an unlawful collective layoff falls out of the scope of Directive 95/59/EC. Therefore, the ECJ could not examine the matter in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union.

It further ruled that the abovementioned Clause 4 of the framework agreement on fixed-term work does not preclude national legislation from providing a new system to protect permanent workers. In the event of the unlawful dismissal of a worker whose fixed-term contract came into effect before the date of entry into force of that legislation, the contract converts to an indefinite duration contract after that date. In this particular

case, the ECJ reasoned that treating the conversion of a fixed-term employment contract into a contract of indefinite duration like a new recruitment is part of a wider reform of Italian social law, the aim of which is to promote permanent recruitment. In those circumstances, such a measure treating the conversion of an employment contract like a new recruitment forms part of a specific context, from both a factual and legal point of view, exceptionally justifying the difference in treatment.

ECJ 17 March 2021, Academia de Studii Economice din Bucureşti v. Organismul Intermediar pentru Programul Operaţional Capital Uman - Ministerul Educaţiei Naţionale (C-585/19)

Abstract

The ECJ ruled in that case that the minimum rest period of 11 consecutive hours per 24-hour period held in the Working Time Directive must be applied jointly to all employment contracts it would have with one same employee. The ruling is available here.

Facts

The ASE participated in a sectoral operational project for human resources development in Romania financed by the National Ministry for National Education. The latter refused to cover a credit entry of approximately €2,800 relating to salary costs for employees in the project implementation team. The sums corresponding to those costs were declared ineligible on the ground that the number of hours which those employees could have worked on a daily basis was exceeded.

The administration rejected an internal appeal brought by the ASE against this decision on the basis that the 13-hour daily working time limit held in Article 3 of the Working Time Directive would only apply to each employee's contract of employment taken separately. The ASE challenged that decision before the referring Court, stating that the sums declared ineligible correspond to the salary costs of certain experts. The experts, they explained, had been combining their regular working hours under their base employment agreement with ASE with the hours worked in connection with the project, along with other projects and activities. The total number of hours worked per day thus exceeded 13 hours, and the effective rest period per day was consequently lower than 11 hours.

The referring Court decided to refer several questions to the ECJ for a preliminary ruling, namely, to know whether the daily minimum rest period of 11 consecutive hours held by the Working time Directive should be considered with regard to individual contracts or to all contracts with the same employer or with different employers.

Legal context

The relevant legal provisions at stake are found in Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (the "Working Time Directive"). Article 2 reads "(…) "*working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice* (…)". Article 3 further provides that "(…) *Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period* (…)".

Decision

The ECJ started by recalling that the Working Time Directive requires Member States to take the necessary measures to ensure that "*all workers*" have a rest period of at least 11 consecutive hours per 24-hour period. It then insisted that this reference to "*all workers*" favours an interpretation whereby that provision is applied to *each* worker if several employment contracts are concluded between one worker and one single employer. The use of the indefinite pronoun "*all*"" places emphasis on the worker, whether or not he has concluded several contracts with his employer, as far as the entitlement to a rest period of at least 11 consecutive hours per 24-hour period is concerned. That is in line with the objective of the Directive, which is

to ensure a better level of protection of employees' health and safety by guaranteeing, among other things, minimum daily rest periods.

Therefore, rest time under one agreement can logically not be regarded as working time under another one concluded with the same employer… Working time and rest periods cannot coincide.

Consequently, if an employee has several employment contracts with the same employer, the working time limits must be applied *jointly* to each of them. The ECJ further refused to consider the question of limiting the consequences of this judgment in time.

Working time and standby duty

ECJ Judgments on 9 March 2021 in cases D. J. v. Radiotelevizija Slovenija (C-344/19) and RJ v. Stadt Offenbach am Main (C-580/19)

Abstract

The ECJ looked at whether standby time was working time for the purposes of the Working Time Directive in the instances of a firefighter and a specialist technician operator. The Court held that it must be considered whether in all the circumstances the constraints imposed on that worker during standby "objectively and very significantly" affect their ability to freely manage their time and pursue their own interests when their employer does not require their services.

The first decision is available here, and our British colleagues already covered this topic in their recent frontline UK employment law update available here. The second decision is available here.

Facts

In case C-344/19, a specialist technician responsible for ensuring the operation, for several consecutive days, of television transmission centres situated in the mountains in Slovenia provided, in addition to his twelve hours of normal work, services consisting in standby time, of six hours per day, according to a standby system. During those periods, he was not obliged to stay at the workplace physically but was required to remain reachable by phone and to be able to be on-site within the hour, where necessary. Because of the geographical location and difficult access to the transmission centres, he had no other choice than to stay there while carrying out his standby duty, in service accommodation set at his disposal by his employer, without many opportunities for leisure pursuits.

In case C-580/19, a firefighter working in Offenbach, Germany, was also regularly required to be on standby duty when not at work. He needed to be reachable at all times and able to get to an incident anywhere within the city limits. He was required to reach his workplace within 20 minutes of receiving a call. He also needed to be in uniform with his service vehicle when he attended.

Both claimants argued that his time spent on standby should be considered working time. The respective referring courts - the Vrhovno sodišče (Supreme Court, Slovenia) for the first case, and the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany) for the second, asked the ECJ:

1. Whether under the Working Time Directive, standby time which included such obligations as the claimant's constituted working time, if the employer had not prescribed a place where the employee must be present during that time.
2. If so, whether the likelihood or extent of being called upon while on standby should be considered under the Working Time Directive.

Legal context

Article 1 of the Working Time Directive provides: "*1. This Directive lays down minimum safety and health requirements for the organisation of working time. 2. This Directive applies to: (a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and (b) certain aspects of night work, shift work and patterns of work (...)*". Article 2 further provides that: "(...) *1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;* 2. "rest period" means any period which is not working time (...)".

Decision

In both cases, the ECJ held that the relevant national Court must determine whether standby time should be considered working time, but it should not be interpreted restrictively in a way that prejudices workers' rights. The ECJ highlighted that, based on previous case-law:

1. During working time, the worker is usually at a location determined by their employer, available to the employer and, if necessary, able to provide their services immediately. The whole of that time is working time, regardless of the work carried out.
2. Therefore, a standby period outside the workplace would be working time provided there was an objective and very significant impact on the worker's opportunity to pursue personal/social interests, rather than merely a requirement to be contactable.

Right to freedom of expression

ECHR, 25 March 2021, Matalas v. Greece (nr. 1864/18)

Abstract

In this case, the European Court of Human Rights ("***ECHR***") held that the applicant's conviction for slanderous defamation for comments he had made in his capacity as CEO about the company's former legal adviser violated his right to freedom of expression. In convicting the applicant, the domestic Court had failed to provide proper reasons and assess the relevant facts. The Court decision is available here.

Facts

When the CEO asked the employees to provide him with information concerning their professional activity, its internal legal advisor informed him orally of the legal cases pending against the company. The CEO questioned the accuracy of this information and had the legal adviser removed from her position. He then sent her an official document stating, among others, that the company condemns the unprofessional and unethical behaviour that she had shown as well as her malicious intent to harm the company's interests. The legal advisor lodged a criminal complaint against the CEO, alleging slanderous defamation. The CEO was found guilty at first instance and on appeal. The CEO claimed before the ECHR that his criminal conviction for slanderous defamation had violated his right to freedom of expression (art. 10 of the European Convention of Human Rights).

Legal context

Article 10 of the European Convention of Human Rights provides that: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (...)*"

Decision

The ECHR held that the applicant's conviction had amounted to "*interference by public authority*" with his right to freedom of expression, leaving the question of whether it was "*necessary in a democratic society*".

It held that the language used by the applicant had been moderate and not insulting and that he had sent the official document privately (and not published nor made his allegations available to the outside world). The allegations, therefore, had a limited impact on the legal advisor's reputation.

Overall, the ECHR found that the nature and context of the impugned text should not have resulted in a (suspended) prison sentence as that sanction had inevitably had a chilling effect on free speech.

Determining the place of work where no work has been performed

ECJ 25 Februari 2021, BU v. Markt24 Gmbh, (C-804/19)

Abstract

In this case, the ECJ held that an employee living in Austria has to bring legal action against the employer with whom she had an employment contract in Germany because the main part of her contractual obligations had to be performed in Germany, even if no work was actually performed. The case is available here.

Facts

An Austrian resident was contacted in Salzburg (Austria) by an employee of Markt24, a company with its registered office in Germany. She signed a fixed-term employment contract with Markt24 (from 6 September to 15 December 2017). Markt24 had a (presumably registered) office in Salzburg at the beginning of the employment relationship, but the employment contract was signed outside the office in Salzburg. Although the new employee remained contactable by telephone and prepared to work, she did not, in fact, perform any work for Markt24.

On 27 April 2018, the employee filed a legal claim against Markt24 before the Salzburg Regional Court for outstanding payments from 6 September to 15 December 2017.

The Austrian Court asked the ECJ whether Article 21 of the Regulation applies in this case, whereby:

- an employee takes legal action against an employer in another Member State (Germany);

- the employment contract is signed in the Member State of the employee (Austria); and

- the agreed workplace was in the employer's Member State (Germany), even though the work was subsequently not performed (for reasons attributable to the employer).

Legal context

The case confirmed the position set out in Article 21 of Regulation No 1215/2012 on the jurisdiction, recognition and enforcement of judgements ('Regulation'):

"1. An employer domiciled in a Member State may be sued

(a) in the courts of the Member State in which the employer is domiciled (has its seat); or

(b) in another Member State:

(i) in the courts of the place where or from where the employee habitually works or in the courts of the last place where the employee did so; or

(ii) if the employee does not or did not habitually work in just one country, in the courts of the place where the business which engaged the employee is or was located.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1'"

According to Article 7, part 5 of the Regulation a person domiciled in a Member State may be sued in another Member State: "*as regards a dispute arising out of the operation of a branch, agency or another establishment, in the courts of the place where the branch, agency or other establishment is situated*"

Decision

The Court confirmed this and stated that Article 21(1)(b)(i) of the Regulation applied in this case even though the employee never performed work for Markt24, either in Austria or Germany:

1. The CJEU holds that the presence of a contract of employment is relevant for triggering the protective regime: not its actual exercise, at least if the lack of performance of the contract is attributable to the employer.
2. If the employment contract has not been performed, the intention expressed by the contract's parties as to the workplace is, in principle, the only element that makes it possible to establish a habitual place of work. The interpretation best allows a high degree of predictability of rules of jurisdictions to be ensured since the place of work envisaged by the parties in the contract of employment is, in principle, easy to identify.

Finally, the ECJ held that the assessment of whether Article 7, part 5 of the Regulation applied in this case needed to be made by the referring Court given that when the employee signed the contract, Markt24 had a branch office in Salzburg.

Public policy 

First stage social partners consultation on improving the working conditions in platform work

At the end of February 2021, the EU Commission launched a first-phase consultation of the social partners in an open Q&A process. The purpose of the consultation was to invite European trade unions and employers' organisations to give their views on the need and direction of possible EU action to improve the working conditions of people working through digital labour platforms active in the EU.

If social partners conclude that they do not wish to enter negotiations on this issue among themselves, the Commission will proceed with the second stage of the consultation process seeking social partners' views on the content of the envisaged EU action. If again social partners do not signal their wish to negotiate, the Commission has announced that it will put forward an initiative by the end of the year.

In her Political Guidelines, Commission President **von der Leyen** stressed that "*digital transformation brings fast change that affects our labour markets*". She undertook the commitment to "*look at ways of improving the labour conditions of platform workers*".

Together with the recent public consultation launched by the Commission to allow collective bargaining for gig workers (see our article on the subject), this initiative is part of the Commission Work Programme 2021 that announced a legislative action on improving the working conditions of platform workers by the end of 2021.

Proposal for a directive on pay transparency to ensure equal pay for equal work

At the beginning of March 2021, the European Commission presented a proposal on pay transparency to ensure that women and men in the EU get equal pay for equal work. The legislative proposal focuses on two core elements of equal pay:

- Measures to ensure pay transparency for workers and employers. The measures include that certain compensation-related information is disclosed to job seekers, and other details must be made available to employees. Companies with more than 250 employees must publish reports on the gender pay gap within their organisation, and they would need to make a joint pay assessment when this report reveals a pay gap.
- Ensuring better access to justice for victims of pay discrimination. For example, workers who suffered gender pay discrimination can seek compensation and be represented in court by union representatives. The burden of proof of the absence of discrimination will lie with the employer, and Member States must fix the effective sanctions.

The proposal foresees further flexibility measures for SMEs. The proposal must now go to the EU Parliament and the Council for approval, after which there would be a two-year transposition deadline upon member states.

Proposal for a regulation on a "Digital Green Certificate"

At the end of March 2021, the European Commission proposed a regulation on a Digital Green Certificate to help guarantee free movement within the European Union and support the much-needed recovery of the travel and tourism sector.

This certificate would contain necessary key information such as name, date of birth, date of issuance, relevant details on Covid-19 vaccine/ test/recovery and a unique identifier.

The goal is to be accepted in all EU Member States and ensure that restrictions currently in place can be lifted in a coordinated manner. When travelling, every EU citizen or third-country national legally staying or residing in the EU, who holds a Digital Green Certificate, should be exempted from free movement restrictions in the same way as citizens from the visited Member State.

To facilitate its adoption by the summer, MEPs decided to accelerate the approval of the Digital Green Certificate, allowing for safe and free movement during the pandemic. The two data protection authorities – the European Data Protection Supervisor ("EDPS") and the European Data Protection Board ("EDBP") – recently adopted a joint opinion on the key privacy aspects this Regulation must address, the content of which was later discussed in the EU Parliament.

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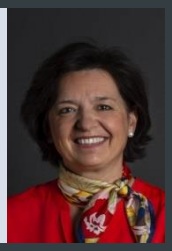

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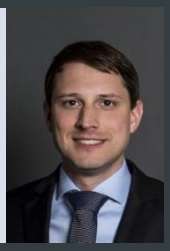

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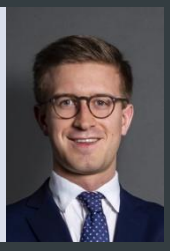

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