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EU Employment Law Report

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

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Case law 

Insolvency –Protection of Workers

NI, OJ, PK / Sociálna poist'ovna 25 November 2020, C-799/19

Abstract

An informal state of insolvency does not fall within the scope of Directive 2008/94. Compensation due from an employer to an employee's close surviving relatives for non-material damage suffered as a result of an accident at work may only be regarded as constituting claims arising from contracts of employment where it is covered by the notion of pay as defined under national law.

Facts

The widow and children of a worker who was killed in an accident at work sought to obtain payment of the compensation awarded to them by a Court for non-material damage, excluded by law from coverage by the Social Insurance Agency, and in fact irrecoverable because of the employer's informal insolvency.

The applicants brought an action seeking payment from the Social Insurance Agency as a guarantor of employees' outstanding claims within the meaning of article 3 of Directive 2008/94 as a result of the employer's insolvency.

Legal context

Directive 2008/94 of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer

Decision

The Slovak Court referred to the ECJ on and (i) whether employees' outstanding claims also cover non-material damage suffered as a result of a lethal accident at work (ii) the concept of insolvency in relation to an action of enforcement of a judicially recognised claim.

By its second question the Court wished to know if the fact that an employer finds himself in a state of informal insolvency (i.e. unable to pay the compensation he was condemned to pay) amounts to "insolvency" in the sense of Directive 2008/94. The Court clearly stated that it does not, notwithstanding Member States' right to extend employee protection to such a situation of insolvency, which is for the referring Court to assess.

Regarding the workers' protection under Directive 2008/94 the Court reiterated its social objective to guarantee a minimum of protection through the payment of outstanding claims resulting from contracts of employment and relating to pay for a specific period. Where guarantee institutions must take responsibility for outstanding pay, it is for national law to define the term "pay" and therefore specify which forms of compensation fall within the scope of article 3 of the Directive. National laws may have introduced more favourable provisions to the employees, and which cover costs other than those that are strictly wage-related.

Collective redundancies

UQ/Marclean Technologies SLU (KUL), 11 November 2020, C-300/19

Abstract

In determining if the threshold for a collective redundancy is triggered, employers must look at any period of dismissals and not merely "*ex post*" or "*ex ante*" the concerned employee's dismissal date.

Facts

A Spanish worker disputed her dismissal as unlawful because it was part of covert collective redundancies and held it should have been considered as part of a collective redundancy. The question arose as to how the period over which the dismissals took place should be calculated.

The Spanish Court sought to obtain a preliminary ruling as to whether Spanish law is compatible with EU law regarding its methods of calculating the 90-day period, i.e. 90 days prior to the applicant's dismissal or 90 days after that date if the employer has acted abusively.

Legal context

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

Decision

The Directive seeks to offer workers enhanced protection by granting them (and their associations) certain specific rights in the case of collective redundancies. One of the conditions that trigger the Directive's applicability pertains to the number of dismissals that take place over a given period (30 or 90 days, depending on the choice made by each Member State).

After having stated that methods of calculating these periods are not a matter for Member States to decide, Advocate General Bobek had rejected both the methods whereby the number of dismissals is calculated *ex ante* and *ex post* the dismissal at issue as unsatisfactory (i) on the basis of the text of the Directive, that provides for "any" period of as well (therefore not limited to the date of dismissal of the worker in question) as well as (ii) the objective of the Directive that seeks to award greater protection to workers.

Following the opinion of the Advocate General Bobek, the Court concludes that worker protection under Directive 98/59 will be triggered if the worker was dismissed within a consecutive 30 or 90-day period, however calculated (i.e. both in retrospect as looking forward), in which the number of redundancies reaches the required threshold.

Posting of Workers – Transport Sector

FNV v Van den Bosch Transporten BV e.a., 1 December 2020, C-815/18

Abstract

The Posting of Workers Directive applies to international transport. It takes place in the territory of another Member State if the worker's activities are sufficiently connected to that territory, which is to be assessed on the basis of all relevant circumstances related to worker's activity.

Facts

Workers from Germany and Hungary and employed by the Dutch company's German and Hungarian sister companies perform work as drivers on international transports under charter contracts between the Dutch company and its German and Hungarian partners. Charter operations started in the Netherlands, and the journeys ended there, although most of the transport operations took place outside of the Netherlands.

The Dutch Transport Union (FNV) brought an action against all three companies seeking an order requiring those companies to comply with basic conditions as set out under the "Goods Transport' Collective Labour Agreement, on account of these workers being "posted workers" within the meaning of Directive 96/71.

Legal context

Article 56 TFEU

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Decision

With the exception of merchant navy seagoing personnel, the Directive 96/71 applies to any transnational provision of services involving the posting of workers, irrespective of the economic sector to which that provision of services relates and therefore also to the road transport sector.

For a worker to be considered as "posted" to another territory, the performance of his work should show a sufficient connection with that territory, which is to be determined on the basis of an overall assessment of all the factors that characterise the activity of the worker. Operations such as loading or unloading goods, maintenance or cleaning of transport vehicles are relevant provided they are carried out by the driver and not by third parties. If a worker provides only "very limited services" in the territory of a Member State, he cannot be regarded as posted to that country. The Court cites the examples of a worker merely transiting through the territory of a Member State or the worker who performs only cross-border transport from the Member State where the transport undertaking is established to another Member State.

The existence of a group affiliation between undertakings that are parties to a contract for the hiring out of workers is not deemed relevant in order to determine whether there has been a posting of workers.

As regards cabotage operations, the Court also considers that the Directive applies, if a driver carries out cabotage operations (under a charter contract between his employer and an undertaking located in another member state) and that the driver must, as a rule, be considered as posted to the territory of the Member State in which those operations are carried.

Equal treatment

FT / Universitatea Lucian Blaga Sibiu, GS e.a., 8 October 2020, nr. C-644/19

Abstract

A difference in treatment that results from holding or lacking doctoral status is not a ground for discrimination. If the situation of both categories of teaching staff is comparable, it is appropriate to examine if their difference in treatment relating to their remuneration is based on an objective ground.

Facts

FT held the teaching position as lecturer with tenure at a university, but the university refused FT's tenure status beyond age 65 because she no longer met the requirement of having doctoral supervisor status. She challenged this condition as amounting to indirect discrimination given that losing tenure only allowed her to engage in fixed-term employment contracts with lower remuneration than that of tenured lecturers.

Legal context

- Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- Framework Agreement on fixed-term work, annexed to Council Directive 1999/70/EC of 28 June 1999

Judgment

The grounds set out in Directive 2000/78 are listed exhaustively. A difference in treatment due to the holding or lack of doctoral status is a criterion that is not covered by Directive 2000/78.

Where lecturers lacking such doctoral status may only conclude fixed-term contracts, which entail lower remuneration, this could violate of article 4 (1) of the framework agreement on fixed-term work. It is for the national Court to determine if such a difference in treatment between members of the teaching staff due to a system of remuneration (permanent workers vs fixed-term workers) is justified by an objective reason.

Without prejudice to that assessment, the Court reiterates its earlier position that objectives related to personnel management and budget consideration cannot be considered objective and transparent criteria to justify a difference in treatment to the detriment of fixed-term workers.

Temporary agency work

JH v KG, 14 October 2020, nr C-681/18

Abstract

Directive 2008/104 imposes minimum requirements as regards the protection of temporary agency work. Member States must also take measure to preserve the temporary nature of temporary agency work.

Facts

An Italian temporary-agency worker who had been given several successive temporary agency contracts (8 in total) and various extensions (17 in total) with the same user over a period of approximately 3.5 years sought his national jurisdiction to declare that there was a permanent employment relationship between him and the user as the result of its unlawful use of successive and uninterrupted assignments.

The Italian Court referred to the ECJ for a preliminary ruling on whether the absence of a limit on successive assignments at the same user and the fact that the lawfulness of the use of temporary agency work is not made subject to the prerequisite that it must be justified by technical, production, organisation or replacement-related reasons is contrary to the duty imposed on Members States to prevent misuse of temporary agency work, in particular as regards preventing successive assignments designed to circumvent the provisions of the Directive.

Legal context

Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work. The Court also observes this Directive was adopted to supplement the regulatory framework established by Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work.

Judgment

The main objective of the minimum requirements set out by the Directive is to establish a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial markets. The provision on the prevention of misuse (art 5 (5)) does not require Member States to limit the number of successive assignments, nor does it or any other provision lay down specific measures which the Member States should take in that respect.

However, Directive 2008/104 also seeks to reconcile the objective of flexibility sought by undertakings and the objective of security corresponding to the protection of workers. The obligation on Member States to take measures to prevent misuse is sufficiently clear, precise and unconditional for it to be interpreted in the sense that Member States do not have the possibility to take “no measures at all” to preserve the temporary nature of temporary agency work.

It is for the national Courts to assess if the successive temporary agency contracts are not designed to circumvent the objectives of the Directive, thus concealing an actual permanent employment relationship, on the basis of the following considerations suggested by the ECJ: (i) do the successive assignments result in a period of service that is longer than what can be reasonably accepted as temporary (ii) is the balance as set out above between undertakings’ and workers’ interests upset (iii) can an objective explanation be given for the decision to have recourse to successive temporary contracts and if not, if any of the provisions of Directive d.2008/14 has been circumvented.

Legislative development

UK-EU Trade and Cooperation Agreement (TCA)

In the final days of 2020, a breakthrough was reached in the ongoing negotiations on the terms and conditions of the UK leaving the EU.

With regard to labour and social standards, the Agreement includes reciprocal commitments not to reduce the level of protection for workers or fail to enforce employment rights in a manner that has an effect on trade. This principle of "non-regression" applies in the areas of (a) fundamental rights at work, (b) occupational health and safety standards, (c) fair working conditions and employment standards, (d) information and consultation rights at company level and (e) restructuring of undertakings.

To that end, the TCA imposes on both parties the duty to have in place and maintain a system for effective domestic enforcement, and in particular, an effective system of labour inspections relating to working conditions and the protection of workers; to provide for administrative and judicial recourse against actions that violate labour law and social standards and to provide for appropriate remedies and sanctions. The role and autonomy of the social partners at national level, where relevant and in line with applicable law and practice, is expressly acknowledged.

For more details on the impact of the TCA and obstacles facing UK employers when sending their national employees to the EU for business purposes, and some wider considerations in connection with social security – see the 11 January 2021 report by our Head of UK Business Immigration Yuichi Sekine.

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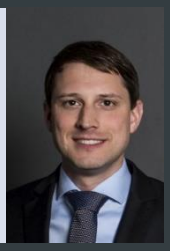

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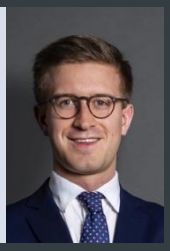

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