Bird & Bird

Employment law Report

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

Q2 – 2020

Legislative & Policy initiatives

Consultation on the Digital Services Act

Improving working conditions of platform workers by removing EU competition barriers on collective bargaining

What is the scope of the consultation?

On 30 June 2020, the European Commission announced its intention to launch a public consultation process on the issue of how to ensure that EU competition rules do not stand in the way of collective bargaining for independent platform workers. Traditionally the Court of Justice has always considered that collective bargaining with workers falls outside the scope of the application of EU competition rules. However, where self-employed workers are considered as "undertakings", the agreements they enter into (eg. by collective bargaining) may be captured by the EU competition rules. At the heart of this initiative lies the concern to reconcile the prohibition of anticompetitive agreements with the need to protect platform workers. The initiative therefore seeks to ensure that working conditions can be improved through collective agreements not only for employees, but also for those self-employed who need protection, i.e. the gig-economy workers. Various stakeholders from the public and private sector (competition authorities, trade unions, employers' organisations, practitioners, academia, etc.) are invited to participate in this process.

In parallel to the on-going public process, the Commission is also engaging closely with social partners, trade unions and employers' organisations. This autumn the Commission will publish the inception impact assessment setting out the initial options for future actions and actually launch the public consultation.

Case law

Coordination of Social Security

Judgment of 2 April 2020, *Caisse pour l'avenir des enfants v FV and GW*, C-802/18

Abstract

A family allowance is a social security benefit subject to equal treatment. It cannot be refused to the child of the spouse of a frontier worker where that worker supports the child.

Facts

On 23 July 2016, the Luxembourg law on family allowances was amended by excluding the children of a spouse or partner of non-resident workers from the concept of "members of the family". As a result, a household of a frontier worker and his spouse with three children no longer received family allowances for the child of the spouse that was (biologically) not the frontier worker's. The worker challenged this decision, notably on the basis that a family allowance is a social advantage, linked to his salaried employment in Luxembourg within the framework of freedom of movement.

Legal context

- EU Charter of Fundamental Rights: Freedom of movement and of residence (Art. 45).
- Directive 2004/38/CE of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
- Regulation 492/2011 of 5 April 2011 on freedom of movement for workers within the Union.

Decision

In its preliminary ruling, the European Court of Justice (ECJ) confirmed the frontier worker's analysis. First, the Court observed that the allowance is paid on the basis of a legally defined position as children of a worker residing in Luxembourg or children of non-resident workers. Furthermore, this benefit is a public contribution to the financial burden involved in the maintenance of children and therefore constitutes a social security benefit, in the sense of the Regulation on the coordination of social security systems and therefore subject to the principle of equal treatment. A distinction based on the residence where a worker can claim the benefit for all children residing in Luxembourg, regardless of whether or not he/she is the biological parent, whereas a frontier worker can claim this benefit only for his/her own children, constitutes indirect discrimination on the grounds of nationality. The Court found that such distinction constitutes indirect discrimination on the grounds of nationality that was not deemed permissible as the distinction was not objectively justified.

Order of the Court (Eighth Chamber) of 22 April 2020, *B v Yodel Delivery Network Ltd*, C-692/19

Abstract

A self-employed gig-economy worker may be reclassified as an employee if his independence is merely notional.

Facts

Under his contract as a self-employed worker as a parcel delivery courier ("B") working for an e-platform (Yodel Delivery Network Ltd.), B was allowed to appoint a subcontractor and to provide similar services to third companies. B claimed that his status was that of a worker as regulated in the Working Time Directive. The fact that he was not required to "personally" and "exclusively" work for his employer would thus preclude him from the status of worker under UK law (Working Time Regulations 1998). The UK court referred to the ECJ for a preliminary ruling on the compatibility of this law with the Working Time Directive 2003/88.

Legal context

- Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

Decision

The Court ruled on the preliminary question by reasoned order, as it held its answer to the question could be clearly deduced from existing case-law and/or admitted of no reasonable doubt. The Court reiterated that the concept of worker has an autonomous meaning specific to EU law. Its essential feature being that for a certain period of time a person performs services for and under the discretion of another person in return for which he receives remuneration. Classification of an "independent contractor" under national law does not prevent that person from being classified as an employee within the meaning of EU law, if his independence is merely notional. In this case, the Court considered the contractor appeared to have a great deal of latitude in line with his status as a self-employed contractor.

The Court enumerated four elements that are indicative of his independence: i.e. his discretion to use subcontractors, to accept or refuse tasks, to work for competitors or to fix his own working hours within certain parameters and pointed to the great deal of latitude he appears to have. The Court ultimately left it to the referring court to establish (i) that this independence is not fictitious and (ii) whether or not it is possible to establish a relationship of insubordination with the worker.

For further analysis from the UK perspective see Bird & Bird Frontline UK April Issue.

Relevant to this decision is the abovementioned announcement of the EU Commission on 30 June 2020 to launch a public consultation process to protect the working conditions of gig-economy workers by ensuring EU competition rules do not prevent them from participating in collective bargaining.

Judgment of 4 June 2020, *Fetico e.a. v Grupo de Empresas DIA SA e.a* (Grand Chamber), C-588/18

Abstract

Special leave days for events (e.g. childbirth, marriage,etc.) that occur during weekly rest periods or annual paid leave cannot be taken outside those periods.

Facts

In 2009, the Court had decided that a worker who is on sick leave during a period of previously scheduled annual leave has the right, at his or her request and so that he or she may actually use the annual leave, to take that leave at a time that does not overlap with the period of sick leave. Spanish workers' trade unions held that the same reasoning should apply for workers on special leave as provided in the collective agreement (e.g. marriage, childbirth, death of a spouse, moving out of one's residence, etc. When one of these events occurs during a period of paid annual leave or weekly rest periods, the paid special leave which is justified by that event should be allowed to be taken outside those periods.

The Spanish Court referred the case for a preliminary ruling requesting whether Article 5 and 7 of Directive 2003/88 must be interpreted as precluding national rules that do not allow workers to claim the special leave for which they provide on days when they are required to work, in so far as the needs and obligations met by that special leave arise during the weekly rest periods or periods of paid annual leave that are the subject of those articles.

Legal context

- Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

Decision

The Court rejected the interpretation proposed by the trade unions. It reiterated that the aim of the directive is simply to lay down minimum health and safety requirements for the organisation of working time and that it does not affect the right of the Member States to apply provisions of national law that are more favourable to the protection of workers. As the rules on special leave go beyond the minimum EU requirements, they fall within the scope of the national competences. Moreover, this special leave is inextricably linked to working time as such, since its purpose is solely to enable workers to take time off from work to meet certain specific needs or requirements that require their personal presence. Consequently, workers will not have recourse to such leave during weekly rest periods or periods of paid annual leave, and this special leave cannot be regarded as comparable to sick leave.

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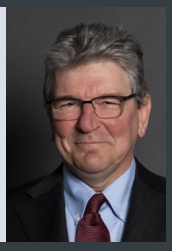

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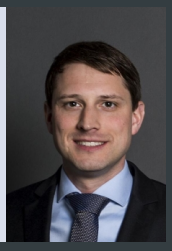

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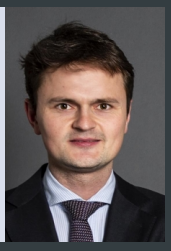

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