REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

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Contents

I. Editorial

HSI Report 2/2024 chronicles the development of case law and legislation in the area of labour and social security law at European and international level in the period from April to June 2024.

The **CJEU overview** contains a number of noteworthy decisions. In the *Olympus* case (C-706/22), for example, the Court of Justice made a decision on strategies for avoiding co-determination: The negotiated procedure for the involvement of the employee representatives of an European company (SE) should not always be repeated, even if, exceptionally, no negotiations were carried out when it was founded. The decision has far-reaching consequences.

Further decisions deal, among other things, with issues relating to the role of women in the world of work. In the *Air Nostrum* case (C-314/23), an airline paid a lower "daily allowance" to the flight attendants, 94% of whom are women, than to the pilots, a group predominantly made up of men. The difference in treatment is due to the application of two separately negotiated collective agreements between different trade unions. In his Opinion, the Advocate General examined, among other things, whether the autonomy of the parties to the collective agreement is sufficient justification for this unequal treatment. In the *House of Jacobus* decision (C-284/23), the CJEU emphasises that a pregnant employee must be given a reasonable period of time to challenge her dismissal in court. German law does not fully comply with these requirements.

Some decisions also stand out among the **proceedings before the ECtHR**. In Case No. 49014/16 – *A.K. v. Russia*, a music teacher at a state special school was dismissed because of photos published on social media. Before the ECtHR, she invoked Art. 8 ECHR (right to respect for private and family life) and Art. 14 (prohibition of discrimination) in conjunction with Art. 8 ECHR to claim that her contract had been terminated due to her sexual orientation. Two of the other proceedings before this Court concerned measures in connection with COVID-19 in working life. More particularly, they concern the obligation to compulsory vaccination (No. 37284/23 – *Rucki and Others v. Latvia*) and the requirement to submit proof of vaccination (No. 18292/23 – *de Haro and Others v. France*).

We wish you a stimulating read and look forward to receiving your feedback at hsi@boeckler.de.

The editors
Prof Dr Martin Gruber-Risak, Prof Dr Daniel Hlava and Dr Ernesto Klengel

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II. Proceedings before the CJEU

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1. Collective redundancy

New pending case

Reference for a preliminary ruling from the Cour de cassation (France) lodged on 3 April 2024 – C-249/24 – *Ineo Infracom*

Law: Arts. 1 and 2 Collective Redundancies Directive 98/59/EC

Keywords: Dismissal within the meaning of the Collective Redundancies Directive – Dismissal for operational reasons – Rejection of temporary transfer by affected employees – Consultation of the works council

Note: Dismissals for reasons outside the control of the workers concerned are to be regarded as redundancies and are therefore relevant for determining whether the number of redundancies required for collective redundancy has been reached under Art. 1(1)(b) of the Collective Redundancies Directive. The first question referred relates to whether these conditions are met if an employee has previously refused to transfer to another job under a collective agreement on staff mobility. Since Section 17(1) of the (German) Employment Protection Act (KSchG) does not differentiate according to the reason for dismissal, the Court's answer to this question should have no bearing on the German legal situation.[1]

The second question referred relates to the involvement of employee representatives: is it sufficient for the works council to have been consulted before the conclusion of the collective agreement on internal staff mobility, or must it be consulted again before each collective redundancy?

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2. Data protection

Opinion

Opinion of Advocate General Pikmäe delivered on 11 April 2024 – C-768/21 – Land Hessen

Law: Art. 57(1) lit. a and f, Art. 58(2) lit. a to j in conjunction with Art. 77(1) GDPR (EU) 2016/679

[1] *Callsen*, in: Däubler/Deinert/Zwanziger (eds.), KSchR, 12th ed. 2024, § 17 para. 23.

Keywords: Data protection breach by employee – Remedy through disciplinary measures – Obligation of the supervisory authority to take further measures

Core statement: A minor breach of data protection by an employee can be remedied by measures taken by the responsible company itself, such as disciplinary measures. However, these must be appropriate and necessary. Additional remedial measures by the supervisory authority are required, however, if the protection of the rights of the data subject cannot be guaranteed by other means. The assessment depends on the circumstances of the individual case.

The data subject only has a subjective right to seek intervention by the supervisory authority if the authority's discretion to impose the measure has been reduced to zero. A fine as a particularly strict remedial measure may only be imposed if the circumstances in a specific case so require.

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3. Equal treatment

Decisions

Judgment of the Court (Seventh Chamber) of 16 May 2024 – C-673/22 – *INSS*

Law: Art. 5(8) Parental Leave Directive

Keywords: Equal treatment of single parents – Comparability of parental leave and maternity leave

Core statement: The request for a preliminary ruling is inadmissible because it refers to a legal question on parental leave, but the underlying facts of the case concern maternity leave.

Judgment of the Court (Seventh Chamber) of 27 June 2024 – C-284/23 – *Haus Jacobus*

Law: Arts. 10 and 12 of Directive 92/85/EEC on improving the safety and health protection of pregnant workers

Keywords: Protection against dismissal for pregnant women who find out about their pregnancy after the dismissal – Two-week deadline for admission of the delayed action – Right to effective judicial protection

Core statement: The time limit of two weeks for the application for retrospective authorisation to bring an action for unfair dismissal is too short if these procedural modalities make it excessively difficult to enforce the rights conferred on pregnant workers by Art. 10 of Directive 92/85/EEC.

Note: The judgment strengthens the protection against dismissal for pregnant employees in Germany.

According to Section 17 of the German Maternity Protection Act (MuSchG), pregnant women are protected against dismissal if the employer was aware of the pregnancy or was informed of it within two weeks of receipt of the notice of termination or, if that time limit is exceeded,

"if the person concerned is not responsible for the delay and the notification is then given to the employer immediately". The pregnant woman who learns of the pregnancy must therefore inform her employer "without delay".

But that is not all. The notification of the employer about the pregnancy establishes the special protection against dismissal for the pregnant woman. In order to assert this protection, however, the pregnant woman must then file an action for protection against dismissal, otherwise the dismissal is to be regarded as effective in accordance with Section 7 of the Employment Protection Act (KSchG). However, the applicable three-week period under Section 4 KSchG will often have expired by the time the employee learns of the pregnancy. However, ignorance of the pregnancy "for a reason for which the employee is not responsible" is to be regarded as an obstacle to bringing an action within three weeks (Section 5(1) sentence 2 KSchG), so that the action can still be brought. For this purpose, the employee must observe a deadline of two weeks after the obstacle has been removed, i.e. from the time at which she became aware of the pregnancy.

The CJEU considers this period to be too short, which is hardly surprising in light of the *Pontin* decision.[2] Within two weeks, it is very difficult to obtain legal advice and to file the action and the application for authorisation of the delayed action. In addition, the two-week period considerably shortens the timeframe for filing a lawsuit by one week for women who are unaware of their pregnancy. In addition, the start of the period pursuant to Section 5(3) KSchG does not appear to be "completely clear". After all, the pregnant woman was already required to inform the employer of her pregnancy (Section 17(1), second sentence, MuSchG), which, from the employer's point of view, takes away the weight of the argument of legal certainty: After all, the employer can expect that the employee will invoke her special protection against dismissal.

The question of the primacy of Union law was not put to the Court of Justice by the referring Labour Court (ArbG) of Mainz. It arises unproblematically from Art. 47 of the European Charter of Fundamental Rights, since Art. 12 of Directive 92/85/EEC specifies the fundamental right to an effective legal remedy, which is directly applicable.[3] Furthermore, unequal treatment on the basis of gender is of course at issue. The two-week period under Section 5(3) KSchG is therefore not applicable in this situation.

Opinion

Opinion of Advocate General Szpunar of 6 June 2024 – C-314/23 – *Air Nostrum*

Law: Art. 14(1) lit. c Equal Treatment Directive 2006/54/EC

Keywords: Collective agreements of different trade unions – Provision on daily allowances for different occupational groups – Indirect gender discrimination – Collective bargaining autonomy

Core statement: Indirect discrimination on grounds of gender may exist if the application of two separate collective agreements negotiated with different trade union representatives results in an airline paying a lower daily allowance to cabin crew, the majority of whom are women, than to technical flight crew, the majority of whom are men.

Note: In this case, the Advocate General had to deal with the question of whether the autonomy of the social partners alone can be a sufficient reason for the objective justification of unequal treatment or whether the differences in the level of daily allowances between two

[2] CJEU of 29 October 2009 – C-63/08 – *Pontin*: This case concerned an exclusion period of 15 days, see *Nebe*, EuZA 2010, 383, 394 f.; *ErfK-Schlachter*, § 17 MuSchG, para. 19; cf. *Gallner*, in: KR-Gemeinschaftskommentar zum Kündigungsschutzrecht, § 17 MuSchG, 13th edition, 2022, para. 214.

[3] CJEU of 20 February 2024 – C-715/20 – *K.L.*, see *Klengel/Schlachter* and *Gruber-Risak*, HSI-Report 1/2024, p. 4 et seq.

groups of employees must rather be justified by other objective factors that have nothing to do with discrimination on grounds of sex. Firstly, the Advocate General is of the opinion that the autonomy of the social partners in the context of the Equal Treatment Directive alone is not sufficient to objectively justify unequal treatment such as that at issue in the present case.

According to the Advocate General, accepting the autonomy of the social partners as the only objective justification for discrimination such as this would mean that employers could easily evade compliance with the fundamental principle of equal treatment by negotiating separately. Rather, the decisive factor is whether there are differences between the daily allowances of the two groups concerned and whether these differences are due to objective factors that are independent of discrimination on the basis of gender.

In other words, employers cannot limit themselves to a reference to two separate collective bargaining sessions, but must specifically demonstrate that the priorities of each group were different, that they were genuinely and independently negotiated, and that the parties actually negotiated according to their respective priorities, insisting on certain aspects and showing flexibility on others in order to reach an agreement that takes into account the interests of both parties.[4]

New pending case

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 1 February 2024, received on 12 April 2024 – C-258/24 – *Katholische Schwangerschaftsberatung*

Law: Art. 4 Equal Treatment Framework Directive 2000/78/EC; Art. 10(1) and Art. 21(1) European Charter of Fundamental Rights

Keywords: Dismissal for leaving the church – Catholic pregnancy counselling centre – Discrimination on grounds of religion

Note: After a case pending before the CJEU[5] concerning the dismissal of a midwife for leaving the church became moot due to acknowledgement by the employer, the BAG has now presented another "church resignation case". Cases concerning the secondary employment law of churches are fraught with controversy and tension. The CJEU[6] has ruled against the German provision of Section 9(1), Alt. 1, of the Equal Treatment Act (AGG) in its interpretation in the light of German constitutional law, which was significantly influenced by the Federal Constitutional Court,[7] according to which occupational requirements for church employees can be justified solely by reference to the churches' right to self-determination, without taking into account the type of activity or its circumstances.[8]

In this case, the employee of a Catholic pregnancy counselling center declared her withdrawal from the church while she was on parental leave. The employer, invoking Art. 5 in conjunction with Art. 4 of the Basic Regulations of the Catholic Church and considering her leaving the church to be a serious breach of loyalty, terminated her employment after the end of her parental leave.

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[4] *Ittner/Schaich*, ZESAR 1/2024, 22 et seq.

[5] Case No. C-630/22 – *Church hospital*; see HSI Report 4/2022, p. 15 et seq.

[6] Judgment of 17 April 2018 – C-414/16 – *Egenberger* and subsequently BAG of 25 October 2018 – 8 AZR 501/14; constitutional complaint pending under case No. 2 BvR 934/19.

[7] Federal Constitutional Court of 4 June 1985 – 2 BvR 1703/83; of 22 October 2014 – 2 BvR 661/12.

[8] More detailed *Stein*, Das kirchliche Selbstbestimmungsrecht im Arbeitsrecht und seine Grenzen, HSI-Schriftenreihe Vol. 47, p. 89 et seq.

The BAG has doubts about the compatibility of this measure with Union law, as, on the one hand, the employer does not make the activities to be carried out in its employ dependent on membership in a specific organised church or religious community. Only leaving the Catholic Church stands in the way of (continued) employment. On the other hand, leaving the church alone does not allow any conclusions to be drawn about the proper fulfilment of the requirements of the job or loyal behaviour towards the employer – as possible grounds for justification under Art. 4, No. 2, of the Equal Treatment Framework Directive – in accordance with the moral code of the Catholic Church.

However, the BAG does not completely rule out a justification for unequal treatment if the moral code of the church is an objectively specified job requirement within the meaning of Art. 4, No. 1, of the Equal Treatment Framework Directive. This objectivity could result above all from the protected autonomy of the churches (Art. 17 TFEU and Art. 10 EUCFR).

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4. Fixed-term employment

Decisions

Judgment of the Court (Sixth Chamber) of 27 June 2024 – C-41/23 – *Peigli*

Law: Clauses 4 and 5, No. 1, Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC); Art. 7 Working Time Directive 2003/88/EC

Keywords: Equal treatment in employment and occupation – Honorary and full-time judges and public prosecutors – Measures to penalise the improper use of fixed-term employment contracts – Paid annual leave

Core statements:

1. Honorary judges and public prosecutors must not be excluded from compensation during court holidays or from the statutory social security benefits to which full-time judges and public prosecutors are entitled.

2. Successive extensions of the employment contracts of honorary judges and public prosecutors require effective and dissuasive sanctions in order to limit the abuse of rights.

Judgment of the Court (Sixth Chamber) of 13 June 2024 – Joined Cases C-331/22 and C-332/22 – *DG*

Law: Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Fixed-term employment contracts in the public sector – Interim civil servants – Successive fixed-term employment contracts or relationships

Core statement: A chain of fixed-term contracts in public administration can be classified as abusive under national law if it results from the fact that the authority does not comply with the time limits provided for in national law to fill a vacant position and the fixed-term employment relationships are used to cover a permanent and long-term need for labour.

With regard to the sanction against such an abuse, it is generally not sufficient if financial compensation is only due to employees who are unsuccessful in the application procedure.

New pending cases

Reference for a preliminary ruling from the Corte d'appello di Firenze (Italy) lodged on 8 January 2024, received on 26 March 2024 – C-226/24 and C-212/24 – *Barbavi and Others*

Law: Clause 4, No. 1, Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Prohibition of discrimination – Fixed-term employment – Flat-rate daily or minute-by-minute billing of working hours – Social security contributions

Note: At issue is a collective agreement provision according to which fixed-term employees in agriculture are paid according to the hours actually worked per day, while permanent employees are paid a flat rate of six hours and 30 minutes per working day.

Reference for a preliminary ruling from the Corte di Appello di L'Aquila (Italy) lodged on 4 April 2024, received on 9 April 2024 – C-253/24 – *Pelavi*

Law: Arts. 31 and 47 European Charter of Fundamental Rights; Art. 7 Working Time Directive 2003/88/EC; Clauses 4 and 5, No. 1, Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Honorary judges – Classification as an employee – Fixed term – Evaluation procedure – Annual leave entitlement

Note: The Italian court refers to the CJEU the question of whether honorary judges who are to be classified as "workers" lose their right to paid leave in respect of the period prior to their confirmation and whether compensation is a sufficient measure to protect against abuse of rights, whereby the judges concerned must waive all previously accrued leave entitlement.

Reference for a preliminary ruling from the Tribunale di Lecce (Italy) of 16 April 2024 – C-268/24 – *Lalfi*

Law: Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 99/70/EC)

Keywords: Teachers – Continuing education and training – Exclusion of fixed-term employees from a benefit – Comparability of fixed-term and permanent teachers

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5. General matters

Decisions

Judgment of the Court (Fourth Chamber) of 8 May 2024 – C-75/22 – *Czech Republic*

Law: Art. 3(1) lit. g and h, Art. 51(1) Professional Recognition Directive 2005/36/EC

Keywords: Recognition of professional qualifications – Member States' obligation to make arrangements for the recognition of professional qualifications – Adaptation period – Professional title of veterinary surgeon and architect in the host Member State – Administrative procedural provision for the recognition of the profession in the host Member State

Core statement: Member States must enable the authorities of the host Member State to determine the legal status of persons who wish to complete an adaptation period or prepare for an aptitude test. The authorities of the host Member State must be given a period of one month to acknowledge receipt of the application for recognition of professional qualifications and to inform applicants of any missing documents.

Judgment of the Court (Second Chamber) of 16 May 2024 – C-706/22 – *Group Works Council*

Law: Art. 12(2) Regulation (EC) No. 2157/2001 on the Statute for an SE; Arts. 3 to 7 Directive 2001/86/EC

Keywords: Societas Europaea (SE) – Involvement of employees – Implementation of the negotiation procedure for the involvement of employees – SE founded and registered without employees, which has become the parent company of subsidiaries employing employees – Obligation to conduct a negotiation procedure retroactively – Abuse of rights

Core statement: If a holding SE is founded without employee participation because it does not employ any employees at the time of foundation, but later becomes the controlling company of subsidiaries employing employees, this does not necessarily mean that negotiations on employee participation must be made up for later. However, an obligation to catch up may arise in abusive situations.

Note: See note by *Langbein/Gieseke* (in German) in HSI Report 2/2024, p. 4.

Judgment of the Court (Ninth Chamber) of 16 May 2024 – C-405/23 – *Touristic Aviation Services*

Law: Art. 5(3) Regulation (EC) No 261/2004 on compensation and assistance in the event of denied boarding and of cancellation or long delay of flights

Keywords: Compensation for passengers in the event of long flight delays – Exemption from the obligation to pay – Exceptional circumstances – Airport operator's staff shortage

Core statement: A shortage of staff with the airport operator responsible for loading baggage onto aircraft may constitute an "extraordinary circumstance" in the sense of the regulation that exempts the air carrier from the obligation to pay compensation. However, the air carrier must prove that this circumstance could not have been avoided even if all reasonable measures had been taken and that it had taken preventive measures.

Note: At German airports, baggage loading is usually organised by the airport operator, even if the air carrier can under German law carry out this activity itself. According to the CJEU, a

lack of staff at the airport operator responsible for baggage loading can be an "extraordinary circumstance" that is beyond the control of the air carrier and releases it from the obligation to pay compensation to passengers. For this to be the case, the company must actually be unable to exercise control over the operator. The air carrier must prove that all reasonable measures have been taken to prevent and remedy the staff shortage. One such measure may be the use of other service providers.

The decision furthermore gives cause to reflect on the consequences of strike-related flight cancellations. In this case, the airline only has to make compensation payments for internal causes, thus if its own staff go on strike.[9] If "external" staff, such as air traffic controllers, strike, the airline is exempt from making payments, which has considerable impact on the pressure exerted by the strike. The present decision points out that the airline is also obliged to take measures to prevent flight cancellations in the event of strikes by "external parties".

Judgment of the Court (Fifth Chamber) of 20 June 2024 – C-540/22 – *Staatssecretaris van Justitie en Veiligheid*

Law: Art. 56 and 57 TFEU

Keywords: Posting of third-country workers – Residence permit in the host Member State – Freedom to provide services – Period of validity of residence permits issued – Fees for the issue of residence permits

Core statements:

1. Third-country workers who are posted by a service provider established in one Member State to another Member State do not have a “derived right of residence” in the host Member State based on the posting undertaking’ freedom to provide services.

2. For postings lasting longer than three months, the posting company may be obliged under the law of the host country to obtain a residence permit for each third-country-national worker, to notify the authorities of the host country of the service in advance and to communicate to those authorities the residence permits the workers hold in the country of establishment, as well as their employment contracts.

3. The duration of this residence permit may, in accordance with national law, be subject to a time limit which is shorter than the duration for which the service is expected to be provided in the host State. It may also be limited to the duration of the work permit in the country of origin.

4. The fees charged for issuing the residence permit may be higher than the fees incurred in the case of applications by EU citizens, provided that these fees correspond approximately to the administrative costs incurred for processing.

Note: The posting of workers from third countries is a business model that is based on the different social standards and the different requirements for the granting of residence permits in the EU Member States. Posted third-country nationals are among the most vulnerable groups of workers, their legal status is complex and the enforcement of labour law standards is insufficient.[10] This legal dispute deals with some fundamental legal issues in this area.

A Slovak temporary employment company assigns employees with Ukrainian nationality who have a residence permit in Slovakia to a company in the Netherlands. In this case, the duration of the posting was to exceed the limit of 90 days within 180 days, which is why a separate residence permit was required under Dutch law. Fees of approximately €300 were

[9] CJEU of 23 March 2021 – C-28/20 – *Airhelp*.

[10] See also Commission report on the application and implementation of Directive (EU) 2018/957 of 30 May 2024 – COM(2024) 320 final under 4, also on the need for legal policy action.

incurred for each permit. The period of validity of the residence permit was limited to the duration of the documents issued in Slovakia. It therefore originally expired before the end of the service, but was later extended in due time before expiry.

The applicants were of the opinion that the Slovak residence permit did not require a separate residence permit in the Netherlands, especially as the Dutch authorities already had the data required to issue the residence permit on the basis of a mandatory notification. Furthermore, it is inadmissible to limit the duration of the permit to a period that is shorter than the service. They also found the fees to be too high.

The Court rejects the assumption that posted third-country nationals have a right of residence in the country of assignment based on the posting company's freedom to provide services. The Posted Workers Directive 96/71 and the Services Directive 2006/123 are not applicable to posting arrangements involving third-country nationals. Furthermore, pursuant to Art. 1(2) of Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, the residence permit issued to a third-country national in a Member State is only valid in that country and, moreover, pursuant to Art. 3(2) lit. e, not in the case of posting. Art. 21 of the Schengen Convention (CISA) states that third-country nationals may move freely within the territory of another state for a maximum of 90 days within 180 days.[11] However, the legal residence requirements for stays by third-country nationals that go beyond this are not harmonised and are the responsibility of the Member States. Only the freedom to provide services sets limits to the Member States' authorisation to require a residence permit.[12] At this point, the Court refers to the fundamental freedoms doctrine and postulates that measures applied indiscriminately to domestic and foreign companies also restrict the freedom to provide services if these requirements differ from those to which the posting companies are already subject in the country of origin, even though they pursue the same objective.

Of the reasons put forward by the Dutch government to justify the restriction, the CJEU recognises two in the present case. (1.) The objectives of protecting its own labour market and monitoring to ensure that the service provider pursues the stated purpose are not pursued in a coherent manner in the Dutch legal system. (2.) However, the interests of the posted workers in obtaining a legally secure identity document and the interest of the Dutch authorities in simplifying controls by means of the document and checking that the posted worker does not pose a threat to public order argue in favour of the Dutch regulation. The restriction of the freedom to provide services by the present regulation is therefore justified.

The limited period of validity of the licence in the host country should also be accepted – any impact on the freedom to provide services is too uncertain. With regard to the amount of the fees, it should be considered whether they are proportionate to the administrative burden. The fact that the fees for EU citizens are significantly lower does not mean that they are inadmissible. However, it is an indication that the fees are disproportionate if the administrative burden is not higher for third-country nationals than for EU citizens.

The CJEU's result is legally justifiable. In view of the new directives that have come into force, it appears to be moving away from previous decisions according to which it is disproportionate to require a residence permit in the country of assignment.[13] However, the judgment’s very extensive reasoning shows once again that the approach of using the posting company's freedom to provide services cannot adequately reflect the socio-political issues on the table. After all, employees from third countries regularly work and live in precarious conditions and the question of their right of residence, their work permit and their working conditions is a highly explosive issue in terms of migration and social policy. The

[11] See CJEU of 7 March 2017 – C638/16 PPU – *X and X*, para. 44.
[12] CJEU of 21 September 2006 – C168/04 – *Commission v. Austria*, paras. 59 and 60.
[13] See also CJEU of 9 August 1994 – C-43/93 – *Vander Elst*; of 19 January 2006 – C-244/04 – *Commission v. Germany*.

question of how this situation can be effectively improved is only marginally relevant from a legal perspective through the fundamental freedom approach. On the other hand, the assumption that it is in the interest of employees to obtain a residence permit in the host country seems rather strange, at least at first glance. The freedom of movement for workers is not considered in the ruling, probably because the employees are not seeking access to the labour market.[14]

Opinions

Opinion of Advocate General Rantos of 11 April 2024 – C-792/22 – *Energotehnica*

Law: Art. 1(1) and (2), Art. 5 OSH Framework Directive 89/391/EEC

Keywords: Health and safety – Death of a worker – Effectiveness of EU law – Binding effect of an administrative court judgment on criminal proceedings

Core statement: An administrative court judgment can establish with binding effect for criminal proceedings that there is no "accident at work". The criminal court is then prevented from imposing criminal or civil sanctions against either the employees responsible for the place of work or the employer. However, the principle of effectiveness of Union law requires that potential joint plaintiffs must have the opportunity to present evidence for the categorisation of this event as an "accident at work".

Opinion of Advocate General Szpunar of 30 April 2024 – C-650/22 – *FIFA*

Law: Art. 17 and 9 of the Regulations Governing the Status and Transfer of FIFA Players; Art. 45 and 101 TFEU

Keywords: Professional football players – FIFA regulations on status and transfer – Joint and several liability of the players and the new club – Prohibition of issuing the certificate required for the transfer of players to this other club

Core statement: A rule that stipulates that players and the new club are jointly and severally liable for the payment of compensation to the former club for termination of contract without just cause is incompatible with the free movement of workers enshrined in Art. 45 TFEU, unless it can be proven that the new club was not involved in the termination of the player's contract.

Furthermore, a football association must issue the international transfer certificate (ITC) even if there is a legal dispute between the former club and the player.

Note: In this case, the special features of professional football must be emphasised first. The international football association’s (FIFA's) tasks include the enactment and enforcement of football rules and regulations, such as those governing the status and transfer of players. Its members are the national associations responsible in each country, including the Royal Belgian Football Association (hereinafter URBSFA), which in turn are obliged to comply with FIFA's regulations and decisions at all times and to implement them accordingly (Art. 14 FIFA Statutes).

In 2013, professional footballer Lassana Diarra signed a four-year fixed-term employment contract with the Russian club FC Lokomotiv Moscow, which the club terminated a year later. The club then applied to the competent FIFA chamber for compensation for breach of contract. If professional players have to pay compensation, FIFA regulations stipulate that they and the new club are subject to both collective and individual liability (Art. 17 para. 2). In the event of non-compliance, sporting sanctions are also to be expected (Art. 17 para. 4).

[14] *Klaus*, ZAR 2014, 148.

Furthermore, the former club may not issue an ITC if there is a contractual dispute between it and the player. Against this backdrop, the Cour d'appel de Mons (Mons Court of Appeal) referred the matter to the CJEU. According to Advocate General *Szpunar,* FIFA's rules on contractual relationships between players and football clubs may prove to be incompatible with EU rules on competition and freedom of movement. In his Opinion, the Advocate General comes to the conclusion that there are no doubts about the restrictive nature of the FIFA regulations with regard to the free movement of labour enshrined in Art. 45 TFEU. He finds that the design of the joint liability prevents football clubs from signing players for fear of financial risk. The potential sanctions against the clubs could also deter football clubs and thus prevent players from practising their profession at a football club in another Member State. With regard to the competition rules, *Spzunar* concludes that FIFA's rules, by their very nature, restrict the ability of players to switch clubs and, conversely, restrict the ability of new clubs to sign players, thereby inevitably restricting competition between football clubs.

The restrictions on free movement imposed by the rules on joint and several liability could only be justified if their application could be waived if it could be proven that the new football club was not involved in the premature and unjustified termination of the contract, *Spunzar* said. The rules for issuing the ITC could also be justified if effective interim measures could be taken at the same time in a case where it was merely alleged that players had not complied with the terms of the contract, which had led to its cancellation by the club. Similarly, the restrictions on competition could only be justified if they were necessary and required to pursue one or more objectives.

Opinion of the Advocate General Sánchez-Bordona of 13 June 2024 – C-242/23 – *Tecno*37*

Law: Art. 25(1) Services Directive 2006/123/EC; Art. 59(3) Professional Recognition Directive 2005/36/EC

Keywords: Prohibition directed at real estate agents against operating as property managers

Core statement: A preventive and general prohibition on practising the professions of real estate agent and residential property manager at the same time is not compatible with the freedom to provide services. However, such a prohibition is in line with EU law insofar as it is aimed at preventing conflicts of interest that arise when the brokered property is co-owned by the person entrusted with its management.

Opinion of Advocate General Sánchez-Bordona of 13 June 2024 – C-368/23 – *Fautromb*

Law: Arts. 22 and 52 Directive 2006/43/EC on statutory audits of annual accounts; Art. 25 Services Directive 2006/123/EC

Keywords: Prohibition on auditors from engaging in other professional activities

Core statement: The preliminary ruling procedure is inadmissible. In the alternative, it should be recognised that auditors may not, in principle, be prohibited from carrying out commercial activities other than activities ancillary to the profession of accountant, either themselves or via an intermediary.

New pending cases

Reference for a preliminary ruling from the Tribunale civile di Padova (Italy) lodged on 14 August 2023, received on 28 August 2023 – C-543/23 – *Gnattai*

Law: Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Teachers – Fixed term – Concept of "comparable permanent employee" – Restoration of professional career – Public selection procedure

Note: The CJEU is asked to answer the following questions:

1. May fixed-term employees at so-called state-equivalent schools (*scuole paritarie*) be disadvantaged in relation to permanent employees of the Italian Ministry of Education and Merit with regard to the restoration of their professional career solely because they have not successfully competed in a public selection procedure or taught at a legally recognised state-equivalent school?

2. May, for the purposes of remuneration, only those teaching activities that were performed in the service of this ministry or other specified schools be taken into account when restoring the professional career, so that teachers employed on a fixed-term basis at the equivalent schools are disadvantaged?

3. In the event of incompatibility of national laws, is the conflicting national law to be disapplied?

Reference for a preliminary ruling from the Riigikohus (Estonia) lodged on 22 March 2024, received on 12 March 2024 – C-219/24 – *Tallinna linn*

Law: Art. 14(3) and Appendix VII Nos. 1 and 2 of Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents

Keywords: Occupational health and safety – Hazards – Compulsory vaccination

Note: Can employers require employees to be vaccinated because they handle hazardous biological substances?

Reference for a preliminary ruling from the Bayerischer Anwaltsgerichtshof (Bavarian Bar Court) lodged on 5 March 2022, received on 9 May 2023 – C-295/23 – *Halmer Rechtsanwaltsgesellschaft*

Law: Art. 63(1) TFEU

Keywords: Admission to the bar – Law firm

Note: Is it contrary to the free movement of capital or another fundamental freedom if admission to the bar is to be withdrawn if a person is admitted to a law firm who does not fulfil the requirements?

Reference for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 9 May 2024, received on 10 May 2024 – C-345/24 – *AGCOM*

Law: Regulation (EU) 2018/644 on cross-border parcel delivery services, Arts. 14, 114 and 169 TFEU

Keywords: Parcel delivery services – Information obligations on working conditions and contracts with companies – national delivery services

Note: May national regulatory authorities also impose general information obligations on providers of non-cross-border delivery services? What are the limits of such information obligations, including with regard to necessity and proportionality?

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6. Insolvency

Decision

Judgment of the Court (Second Chamber) of 8 May 2024 – C-20/23 – *Instituto da Segurança Social and Others*

Law: Art. 23(4) Restructuring and Insolvency Directive (EU) 2019/1023

Keywords: Judicial cooperation in civil matters – Insolvency proceedings – Application for discharge of debt – Exclusion of debts to the tax authorities and social security – Necessity of justification

Core statement: Tax and social security claims can be exempted from residual debt discharge in the context of insolvency proceedings, even though they are not listed in Art. 23(4) of the Restructuring and Insolvency Directive, provided this is sufficiently justified under national law.

Note: The claimant was released from his residual debt in October 2022 as part of insolvency proceedings under Portuguese law. However, the tax and social security claims were excluded from this. The claimant is contesting this exemption. Although Art. 23(4) of the Restructuring and Insolvency Directive contains a list of exceptions to the discharge of residual debt, tax and social security debts are not included in this list. The Court of Justice has now recognised that this list is not exhaustive. The wording alone indicates this, as the list is introduced with the phrase "such as in the case of".

However, the EU legislature has stated that such exceptions must be sufficiently justified.[15] The need to cover the financial requirements of the state and other public institutions, to distribute income and wealth justly and to promote social justice and equal opportunities, as well as the necessary corrections to economic inequalities, are also considered to be justifications. This justification does not have to be explicitly stated in the legal act implementing the directive.

The Court also stated that there was no apparent infringement of the freedom to conduct a business, Art. 16 of the European Charter of Fundamental Rights, or the fundamental economic freedoms due to the Portuguese regulation. In Germany, liabilities arising from willful unlawful acts are excluded from residual debt discharge in accordance with Section 302 No. 1 of the Insolvency Code (InsO) (see Art. 23(4), lit. c, Restructuring and Insolvency Directive). This also includes the withholding of wages (Section 266a (1) Criminal Code, StGB), meaning that unpaid social security contributions are excluded from residual debt discharge.[16] This legal situation can be upheld on the basis of the present decision.

[15] Cf. recital 78 of the Restructuring and Insolvency Directive.
[16] Cf. *Lau/Schlicht*, in: Röger, Insolvenzarbeitsrecht, 2nd ed. 2024, § 2 marginal No. 247.

Opinions

Opinion of Advocate General de la Tour of 16 May 2024 – Joined Cases C-289/23 and C-305/23 – *Corván and Others*

Law: Art. 23(2) and (4) Restructuring Directive (EU) 2019/1023

Keywords: Restructuring, insolvency and debt relief proceedings – Debt relief for tax and social security claims – Upper limit for debt relief

Core statement: Debt relief for a specific category of debt may be capped by a ceiling, beyond which no further debt relief is granted, if this is justified.

Note: The relevant legal questions in the present proceedings follow on from the judgment in the case of *Instituto da Segurança Social and Others*,[17] according to which taxes and social security contributions can be excluded from debt relief. The question here is whether debt relief can also only be determined for amounts that exceed specified limits (under Spanish law: €5,000 or €10,000). The Advocate General does not see this as a serious problem.

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7. Social security

Decisions

Judgment of the Court (Seventh Chamber) of 11 April 2024 – C-116/23 – *Sozialministeriumservice*

Law: Art. 45(2) TFEU, Art. 4 Coordination Regulation (EC) 883/2004 and Art. 7(2) Free Movement of Persons Regulation (EU) 492/2011

Keywords: Sickness benefits – Scope – Care leave allowance – EU citizens who live and work in another Member State and care for family members in their Member State of origin – Ancillary nature in respect of the care allowance – Equal treatment

Core statement: The granting of care leave allowance to family members or employees may not be made dependent on the person in need of care receiving care allowance if this in turn requires the person in need of care to be resident in Austria. Such unequal treatment must be objectively justified by a legitimate objective.

Note: Family carers who agree with their employer to take time off work to care for close relatives are entitled to care leave benefits under Austrian law. At the start of the carers' leave, the relative in need of care must receive a care allowance of level 3 or higher according to the Austrian Federal Care Allowance Act (BPGG). However, this entitlement only applies to persons in need of care who are habitually resident in Austria (Section 3a BPGG). This criterion is easier to fulfil for Austrian nationals than for nationals of other EU Member States. It therefore constitutes indirect unequal treatment based on nationality. Whether this is justified on objective grounds, which could also include the aim of limiting the public funds used to people in need of care level 3, as the increased care requirements could make it impossible to pursue a professional activity, is a matter for the national court to assess. The equivalence of benefits and situations under Art. 5 of the Coordination

[17] CJEU of 8 May 2024 – C-20/23 – *Instituto da Segurança Social and Others*, see above.

Regulation and thus the receipt of care allowance under the legislation of another Member State must also be taken into account.

Under German law, proof of the need for care must be provided in the form of a medical certificate for leave from work in accordance with Section 2 of the Care Leave Act (PflegeZG) (short-term absence from work) and for care leave in accordance with Section 3 PflegeZG by submitting a certificate from the care insurance fund or medical service confirming that the person concerned is in need of care. The entitlement to care support allowance in the event of short-term absence from work in accordance with Section 44(3) of Book XI of the German Social Code is not dependent on the place of residence of the person in need of care.[18] This basically prevents indirect discrimination on the basis of nationality. However, this could be the case if the care support allowance is granted on the condition that the family member requiring care is insured with a German long-term care insurance company.[19]

Judgment of the Court (Seventh Chamber) of 18 April 2024 – C-195/23 – *Partena*

Law: Art. 14 Protocol (No. 7) on the privileges and immunities of the European Union; principle of applicability of only one social security system under the Coordination Regulation (EC) No. 883/2004; Art. 4(3) TEU

Keywords: Union civil servants – Part-time self-employment – Obligation to contribute to the social security system of the Union institutions

Core statement: European Union officials are subject to the social security system of the Union institutions, even if they pursue a secondary occupation. The Member State in which this activity is carried out may not impose compulsory affiliation of these Union officials to its social security system.

Judgment of the Court (Seventh Chamber) of 25 April 2024 – C-36/23 – *Familienkasse Sachsen*

Law: Art. 68(3) and Art. 84 Coordination Regulation (EC) No 883/2004; Art. 60(5) Implementing Regulation (EC) No 987/2009

Keywords: Recovery of family benefits – Overlapping of entitlements – No application in the Member State of residence of the child – Obligation to forward the application of the subordinate Member State – Fiction of application

Core statement: Family benefits paid may not be partially recovered by the subordinate competent Member State if the legislation of the primary competent State provides for entitlement to family benefits but they were not actually determined or paid there. However, the institution of the subordinate competent Member State may claim reimbursement from the primary competent institution of the amount exceeding the amount it was obliged to pay under the Regulation.

Note: Can family benefits such as the German child benefit be reclaimed from a parent and in some cases denied because there was an entitlement to this family benefit in another Member State but it was not paid out due to a missing application? This question, which has considerable financial consequences for those affected, is at the center of the proceedings.

The claimant was a Polish national employed in Germany whose wife and child lived in Poland. In his application for German child benefit, he stated that his wife was not gainfully

[18] *Molitor*, in: Rolfs/Giesen/Meßling/Udsching, BeckOK Sozialrecht, 73rd ed., § 44 SGB XI marginal No. 11.

[19] GKV-Spitzenverband, Gemeinsames Rundschreiben zu den leistungsrechtlichen Vorschriften des SGB XI vom 14 November 2023, p. 331; DVKA, Meine Pflegeversicherung bei Wohnort im Ausland, p. 5; BMFSSJ, Wichtige Hinweise zum Thema Auszeit im Akutfall.

employed. The competent family benefits office then determined that German legislation took precedence and granted his application. In the course of the child benefit claim, the Polish legal situation changed to the effect that family benefits are granted irrespective of income. The family benefits office then reviewed the child benefit claim. The Polish authorities then stated that the wife had been paying contributions into the social insurance for farmers since 2006 and was gainfully employed. Due to the wife's gainful employment, according to the family benefits office, the primary responsibility shifted to the Polish benefits institution (Art. 68(1), lit. b(i) Coordination Regulation), which was then contacted with a request to check the entitlement. The Polish institution replied that the wife had not received the family benefit as she had not submitted an application. The family benefits office subsequently cancelled the assessment of child benefit in the amount of the family benefit provided for in Poland for the period from July 2019 on the grounds that a material entitlement existed there and demanded that the claimant repay the overpaid child benefit, with the result that the claimant actually only received the amount of child benefit in excess of the Polish amount under German law.

The CJEU had already ruled on the predecessor Regulation (EEC) No. 1408/71 that it was not sufficient if benefits could only potentially be paid in another Member State. The entitlement to family benefits was therefore only to be suspended if the benefit was actually paid by the other Member State, without the filing of an application being relevant.[20] In the Coordination Regulation (EC) No. 883/2004 now in force, the procedure between the institutions of the Member States has been reorganised: Claims submitted to the lower-tier competent institution must be forwarded by the latter to the higher-tier competent institution, which is also obliged to pay the difference, if any. The primary competent institution must in turn treat and process this claim as if it had been submitted to it (Art. 68 para. 3, Art. 84 Coordination Regulation). Can this fictitious application mean that the subordinate competent institution must also pay the difference with effect for the past alone and may reclaim child benefit?

The CJEU clarifies at the outset that the principles established in its previous case law continue to apply. The forwarding obligation and application fiction are intended to simplify administrative procedures and prevent those affected from losing their entitlements for formal reasons, thus facilitating the free movement of migrant workers overall.[21] Furthermore, a distinction should be made between application and entitlement to family benefits: Although the application requirement can be fulfilled with the fiction, all other formal and material eligibility requirements, which are determined by national law, must also be met in order for the benefit to actually be granted – as required by the CJEU.[22] This decision is the sole responsibility of the competent institution, which is why the institution of another Member State is limited to determining whether the benefit is actually granted. If, as in the present case, the Polish institution does not comment on the application for transfer and does not pay the family benefit, the subordinate competent German institution must pay the child benefit in full in accordance with the amount provided for under German law, but can later claim reimbursement from the Polish institution. Reimbursements are also excluded in the event of a breach of the information obligation of the person concerned and the submission of false facts. Remedial action is to be taken through national measures.[23]

The decision clearly follows the principles of EU social security law: The priority rules under Art. 68 of the Coordination Regulation ensure, on the one hand, the uniformity of the social security legislation and are intended to exclude both double benefits and gaps in coverage. On the other hand, they are intended to ensure that recipients of benefits from several

[20] CJEU of 4 July 1990 – C-117/98 – *Kracht*; of 14 October 2010 – C-16/09 – *Schwemmer*.
[21] CJEU of 29 September 2022 – C-3/21 – *Chief Appeals Officer and Others*, para. 26.
[22] CJEU of 22 October 2015 – C-378/14 – *Trapkowski*, para. 46; of 14 October 2010 – C-16/09 – *Schwemmer*, para. 35.
[23] CJEU of 29 September 2022 – C-3/21 – *Chief Appeals Officer and others*, para. 43.

Member States receive the most favourable total amount for them and thus actually contribute to the family budget.[24] In addition, the principle of sincere cooperation (specifically Art. 60(5) Implementing Regulation, Art. 84 Coordination Regulation) obliges the institutions to process applications for family benefits jointly and, if necessary, to reimburse each other.[25] Seeking reimbursements with reference to the procedural rules introduced for those affected, with the result that they are only granted the excess amount of child benefit, would not only run counter to these principles but also to the aim of the regulations.

As early as 2020, the (German) Federal Fiscal Court ruled[26] that, subject to the coordination provisions of Art. 68 Coordination Regulation (EC) No. 883/2004, it is possible to limit German child benefit to the difference if a foreign entitlement exists, even if this entitlement has not been determined and paid. In addition, the fictitious claim would also be triggered if the first Member State had no knowledge of the foreign connection and therefore did not forward the claim. This legal opinion must now be urgently reviewed. Section 65(1), first sentence, of the Income Tax Act (EStG) and Section 70(2) EStG in conjunction with Section 37(2) of the Fiscal Code (AO) must also be applied in accordance with EU law.

Judgment of the Court (Third Chamber) of 16 May 2024 – C-27/23 – Hocinx

Law: Art. 7(2) Free Movement of Persons Regulation (EU) No. 492/2011; Art. 67 Coordination Regulation (EC) No. 883/2004; Art. 60 Implementing Regulation (EC) No. 987/2009

Keywords: Resident and non-resident workers – Child benefit – Difference in treatment – Justification

Core statement: It is incompatible with Union law for frontier workers not to be able to receive child benefit linked to paid employment for a child who is placed with them by a court decision and for whom they have custody, while children who are placed abroad by a court decision within the same Member State are entitled to that child benefit, which is paid to the natural or legal person who has custody. The condition for the granting of benefits to non-resident workers that they must provide for the maintenance of the child is only authorised if the national legislation provides for such a condition for the granting of this child benefit also to residents who have custody of the child placed in their household.

New pending cases

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 15 March 2024, received on 15 March 2024 – C-203/24 – *Hakamp*

Law: Art. 14(8) Implementing Regulation (EC) No 987/2009; Art. 13(1) Coordination Regulation (EC) No 883/2004

Keywords: Activity in several Member States – Employees in inland navigation – Social security legislation – Substantial part of the activity

Note: In the case of inland waterway transport, the CJEU is asked to clarify which circumstances can be used to assess whether a person spends the required "substantial part of the activity" in the Member State of residence. In the present case, the employee carries out (only) 22% of his work in the Member State of residence.

[24] CJEU of 18 September 2019 – C-32/18 – *Moser*, para. 42.
[25] CJEU of 25 November 2021 – C-372/20 – *Austrian tax office*, para. 66.
[26] Judgment of 9 December 2021 – III R 73/18, also BFH of 25 February 2021 – III R 23/20.

Reference for a preliminary ruling from the Cour de cassation (Luxembourg) lodged on 25 April 2024, received on 26 April 2024 – C-297/24 to C-307/24 – *Broslon and Others*

Law: Art. 1, lit. l, and Art. 67 Coordination Regulation (EC) No. 883/2004 in conjunction with Art. 7(2) Free Movement of Persons Regulation (EU) No. 492/2011 and Art. 2, No. 2, Free Movement of Persons Directive 2004/38/EC

Keywords: Cross-border commuters – Child benefit – Withdrawal for non-biological children – Income for maintenance payments – Unequal treatment

Note: The Court of Justice has made the right of cross-border workers to receive child benefit for the child of their spouse or partner who is not a biological relation subject to proof that they are responsible for the maintenance of this child.[27] The Luxembourg court is now asking about the exact requirements for "maintenance" (e.g. solely on the basis of joint residence or the age of the child).

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8. Working time

Decision

Judgment of the Court of Justice (Second Chamber) of 20 June 2024 – C-367/23 – *Artemis security*

Law: Art. 9(1) lit. a Working Time Directive 2003/88/EC

Keywords: Free health examination of night workers – Causality between failure to examine and disadvantage experienced as a prerequisite for compensation

Core statement: The employee's claim for compensation due to a breach by the employer of the obligation to provide increased medical supervision during night work can be made dependent on proof of causality.

Note: The CJEU had already ruled in the *Fuß* case of 14 October 2010[28] that exceeding the maximum average weekly working time in accordance with Art. 6 of the Working Time Directive leads to a claim for damages by employees without it being necessary to prove the existence of a specific disadvantage. Nevertheless, according to the CJEU, these considerations are not transferable to the obligations to provide medical supervision during night work in accordance with Art. 9(1), lit. a, of the Working Time Directive. The CJEU refers to the recitals of the Working Time Directive. While recital 5 states that all workers should "have adequate rest periods" and recitals 7 and 9 state that "research has shown that ... long periods of night work can be detrimental to the health of workers" and that "there is a need to limit the duration of periods of night work", recital 9 states that night workers are entitled to a "free health assessment" before starting work, and thereafter at regular intervals, and that " whenever possible they should be transferred to day work for which they are suited if they suffer from health problems".

[27] CJEU of 2 April 2020 – C-802/18 – *Caisse pour l'avenir des enfants.*
[28] CJEU of 14 October 2010 – C-243/09 – *Fuß*; para. 53, see HSI Report 3/2023, p. 13.

This is ultimately also in line with the purpose of the health assessment measures, namely to ensure that workers are and remain able to carry out such work involving specific health risks and that any illness is diagnosed in good time, its treatment is ensured and its progression is prevented, in particular by transferring workers to a job involving daytime work. In contrast to exceeding the maximum average weekly working time in Art. 6 of the Working Time Directive, which in itself leads to damage to the employees concerned, as their health is impaired due to the loss of the rest period to which they are entitled, the lack of a medical examination does not necessarily lead to an impairment of health and therefore does not inevitably lead to recoverable damage to the employees.

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III. Proceedings before the ECtHR

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Translated from the German by Allison Felmy

1. Ban on discrimination

Decision

Judgment (Third Section) of 7 May 2024 – No. 49014/16 – *A. K. v. Russia*

Law: Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination)

Keywords: Termination of employment – Publication of private photos on social media – Unequal treatment due to sexual orientation

Core statement: In a democratic society, the harmonious interaction of individuals and groups with different identities is essential for the realisation of social cohesion, so that pluralism, which is based on a genuine recognition and respect for diversity, is of particular importance.

Note:[29] The complainant had been employed as a music teacher in a state school under private law since 2011. In November 2014, photos published on social media were leaked to the school management. These showed the complainant hugging and kissing other women during a trip or party. In another photo, she appeared to display a middle finger gesture directed at a person behind the camera. In December 2014, the school management terminated the employment relationship on the grounds that the complainant had committed immoral acts that were incompatible with her educational duties as a teacher.

An action brought against the dismissal was unsuccessful before the national courts. The reason given was that the complainant had publicly revealed her sexual orientation and published "indecent photos" on the internet. The complainant's sexual orientation as such had no significance for the decision, but the publication of the photos was immoral as it was not in line with her educational mandate as a teacher. In any case, the reason for her dismissal was not her "non-traditional sexual orientation".

The complainant claims that the termination of her employment relationship disproportionately interfered with her private life and that she was discriminated against on the basis of her sexual orientation.

Since the facts on which the violations of the ECHR are based occurred before 16 September 2022, the date on which the Russian Federation ceased to be a party to the ECHR, the Court has jurisdiction to examine the complaint.[30]

The Court clearly emphasises that pluralism, tolerance and open-mindedness are of particular importance in a democratic society. Democracy is based on a true recognition and

[29] See the comment (in German) by *Varlamov/Hofmann*, HSI Report 2/2024, p. 10.
[30] ECtHR of 17 January 2023 – No. 40792/10 – *Fedotova and Others v. Russia*; ECtHR of 25 January 2023 – Nos. 8019/16, 43800/14 and 28525/20 – *Ukraine and the Netherlands v. Russia*.

respect for diversity. The harmonious interaction of persons and groups with different identities is therefore essential for the realisation of social cohesion. [31]

The private life protected under Art. 8 ECHR can concern both the physical and psychological integrity of a person as well as their sex life and sexual orientation. Only particularly serious reasons can therefore justify interference in the most intimate area of private life.[32] It is also recognised that labour disputes also fall within the scope of Art. 8 ECHR if they affect a person's social and professional reputation.[33] With regard to the activities of teachers, it must be taken into account that their special responsibilities as persons of authority for pupils also apply to a certain extent to their extracurricular activities.[34] With regard to a violation of Art. 14 ECHR, the Court points out that the provision only excludes discrimination in relation to the rights and freedoms recognised by the ECHR. According to case law, discrimination on the grounds of sexual orientation falls within the scope of Art. 14 ECHR (in conjunction with Art. 8 ECHR).

The Court firstly finds that the photos published by the complainant on social media documenting her same-sex relationship were not morally reprehensible or immoral behaviour. As far as the photo with the middle finger gesture is concerned, this behaviour is considered distasteful. However, it was not clear in what context the photo was taken. It was therefore not possible to assess the extent to which the gesture, made in a private setting, could justify the complainant's dismissal. The other photos, which, without being obscene, merely depict the complainant's affection for other women, cannot be considered an immoral act. Insofar as the termination of the employment relationship is based on the publication of these photos, it is obviously disproportionate to the legitimate objective.

Even if the national courts tried to make it clear that the complainant's dismissal was not justified by her sexual orientation, but by the "immoral" acts she had instigated, the Court assumes that the complainant's sexuality was the reason for the termination of her employment. The hostile reaction of the school management was unmistakably due to the lack of acceptance of the complainant's sexuality and was therefore manifestly discriminatory. The unequal treatment based solely on considerations of sexual orientation is unacceptable.[35]

The Court therefore recognised a violation of both Art. 8 ECHR and Art. 14 ECHR. The defendant government was ordered to pay compensation in the amount of €10,000 and to pay the financial loss of €6,500 caused by the dismissal of the complainant.

New proceedings (notified to the respective government)

No. 37400/22 – *Vasile-Acrivopol v. Romania (Fourth Section)* – lodged on 22 July 2022 – communicated on 18 June 2024

Law: Art. 6 ECHR (right to a fair trial); Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 12 (general prohibition of discrimination)

Keywords: Different remuneration for the same activity – Discriminatory treatment – Taking into account the opinion of an independent commission

[31] ECtHR of 29 April 1999 – Nos. 25088/94, 28331/95 and 28443/95 – *Chassagnou and Others v. France*; ECtHR of 1 July 2014 – No. 43835/11 – *S.A.S. v. France*; ECtHR of 17 February 2004 – No. 44158/98 – *Gorzelik and Others v. Poland*.
[32] ECtHR of 4 December 2008 – Nos. 30562/04 and 30566/04 – *Marper and Others v. United Kingdom*; ECtHR of 24 February 1983 – No. 7525/76 – *Dudgeon v. United Kingdom*.
[33] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[34] ECtHR of 26 September 1995 – No. 17851/91 – *Vogt v. Germany*.
[35] ECtHR of 7 November 2013 – Nos. 29381/09 and 32684/09 – *Vallianatos and others v. Greece*.

Note: The complainant is a civil servant in the county administration of Braşov, Romania. Civil servants in other county administrations in comparable positions receive a higher remuneration for their work. The National Council for Combating Discrimination (CNCD) pointed out in a statement that the complainant's situation gave rise to a presumption of discriminatory treatment. The complainant then brought an action for payment of the same remuneration as comparable civil servants in other administrations. The district court upheld the claim and relied on the opinion of the CNCD. The court of appeal overturned this decision without taking the CNCD's opinion into account.

The complainant firstly alleges a violation of Art. 6 ECHR because the court of appeal did not take into account the opinion of the CNCD and therefore did not give sufficient reasons for its decision. He also believes that he was discriminated against with respect to comparable civil servants due to the lower remuneration.

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2. Freedom of expression

Decision

Judgment (First Section) of 20 June 2024 – No. 4110/20 – *Boronyák v. Hungary*

Law: Art. 10 ECHR

Keywords: Contractual penalty against employees – Disclosure of confidential information – Effectiveness of a confidentiality clause

Core statement The justification for disclosing confidential information about employers must be assessed against the public interest in access to this information and whether disclosure of confidential data causes reputational damage.

Note: The complainant, an actor, concluded a fee contract with a production company in 2000 for the casting of a leading role in a television series. In the contract, the complainant undertook to maintain confidentiality about the details of the contract and in particular the amount of the fee. In the event of a breach of the confidentiality obligation, the complainant was obliged to pay a contractual penalty equivalent to €26,000. The production of the series was discontinued in 2012 and the contract with the complainant was cancelled. As part of an internet portal's research into the production costs of the series, the complainant gave an interview in which he stated that fees in the agreed amount had not been paid by the production company. The latter brought an action against the internet portal seeking cancellation of the publication. The complainant was heard as a witness in this trial and testified before the court regarding the terms of his contract.

The production company then brought an action against the complainant for payment of the agreed contractual penalty. The national courts ruled against the complainant in all instances. The main reason given was that the agreement on the confidentiality obligation was voluntary. Furthermore, there was no particular public interest in the disclosed business information, which is why there was a right to confidential treatment.

The complainant is of the opinion that the sanctions imposed on him disproportionately interfere with his right to freedom of expression within the meaning of Art. 10 ECHR.

According to the case law of the Court of Justice, freedom of expression under Art. 10 ECHR also extends to legal relationships between both public and private employers. In this respect, the state has a positive obligation to protect this right against interference by private individuals.[36] Accordingly, it had to be examined whether the decisions of the domestic courts had sufficiently weighed the complainant's right to freedom of expression against the interest of his contractual partner in protecting its business interests. Firstly, it must be taken into account that the complainant voluntarily agreed to enter into the contractual confidentiality agreement. Furthermore, the degree of public interest in the disclosure of confidential information is decisive for the protection of freedom of expression.[37] In cases where the information relates to unlawful or reprehensible acts or practices by the employer, it can be assumed that there is a greater public interest in its publication.[38] If, as here, it is only a matter of disclosing details of the business relationship, the employer's interest in maintaining confidentiality prevails. The disclosure of information that is obtained in the context of an employment contract and whose confidentiality is necessary for the employer's business activities may affect their private interests. In the case of the complainant, the Court assumes that the public interest in this information is not so significant that its disclosure by the complainant is protected by freedom of expression. This must take second place to the employer's interest in confidentiality. The proportionality of the contractual penalty was also examined by the national courts. The Court sees no reason to deviate from this assessment. As a result, it finds that there is no violation of Art. 10 ECHR.

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3. Procedural law

Decision

Judgment (Second Section) of 9 April 2024 – No. 73532/16 – *Sözen v. Türkiye*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Termination of the term of office of a judge of the Council of State – Law on the reform of the judiciary – Lack of access to the court

Core statement: In a democratic state governed by the rule of law, it is incompatible with the independence of the judiciary if judges are deprived of the opportunity to have their premature dismissal from office reviewed by a court.

Note: The complainant is an administrative judge and has been a judge of the State Council, a court of appeal in Turkey comparable to the German Federal Administrative Court, since 2011. Its members are elected to this position for a period of twelve years in accordance with national law. As part of a judicial reform, the responsibilities of the courts were changed in 2016, which led to a reduction in the tasks of the judges at the courts of appeal and thus to a reduction in the number of judges. A law passed for this purpose provided for the early termination of the term of office of 79 judges of the Council of State, including the

[36] ECtHR of 14 February 2023 – No. 21884/18 – *Halet v. Luxembourg*.
[37] ECtHR of 15 February 2005 – No. 68416/01 – *Steel and Morris v. United Kingdom*.
[38] ECtHR of 14 February 2023 – No. 21884/18 – *Halet v. Luxembourg*.

complainant. He was initially assigned the task of investigating judge. Criminal proceedings were initiated against him following the events of the attempted coup on 15 July 2016.

As a formal legal remedy against the premature termination of the term of office of judges of the Council of State was not provided for by law, the complainant lodged an individual complaint with the Constitutional Court. The Court found that the complainant's rights were impaired by the premature termination of the judge's term of office. However, the statutory provision did not violate the principles of the independence of the courts or the statutory guarantees of judges. Therefore, there is no interference with the complainant's rights.

The complainant alleges a violation of Art. 6 ECHR, as no legal remedy was provided by law against the decision to exclude him prematurely from the Council of State.

The Court states that Art. 6 ECHR, insofar as it concerns disputes relating to civil law claims and obligations, can also concern disputes about the existence of the employment relationships of civil servants and judges, since any interference with the employment relationship must be based on a legal act.[39] This applies in particular to the premature termination of a judge's term of office, without this necessarily entailing the termination of the judge's office as a whole.[40] Due to the independence of the judiciary, judges must be protected from arbitrary measures that may arise from the legislative and executive powers. Only control by an independent judicial body can effectively guarantee this protection. Therefore, decisions concerning the career or status of judges must be accompanied by procedurally verifiable guarantees, otherwise public confidence in the functioning of the judiciary is at stake.[41] National law may provide for the exclusion of judicial review of such a decision in the event of the premature termination of the employment of civil servants or judges. However, in such a case, there must be objective reasons that are in the interests of the state for the application of Art. 6 ECHR to be excluded.[42] Applying the so-called *Eskelinen* test, the Court concludes that the complainant had no possibility under domestic law to have the exclusion from the Council of State reviewed by a court. The mere reorganisation of the judiciary through a comprehensive legislative reform does not constitute a sufficient state interest. Therefore, the denial of access to a court was disproportionate. The fact that the complainant was prosecuted at a later date for his alleged involvement in the attempted coup of 15 July 2016 must also be disregarded in the assessment. Even in the context of a state of emergency, the principle of the rule of law takes precedence, which in a democratic society also includes access to a court.

The Court therefore found a violation of Art. 6 ECHR and awarded the complainant compensation of €7,800.

Judgment (Second Section) of 25 June 2024 – No 5890119 – *Kurkut and Others v. Türkiye*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Refusal of access to the civil service – Negative background check – Lack of disclosure of check results – Presumption of innocence

[39] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.
[40] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 29 June 2021 – Nos. 26691/18 and 27367/18 – *Broda and Bojara v. Poland*; ECtHR of 22 July 2021 – No. 11423/19 – *Gumenyuk v. Ukraine*; ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.
[41] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Türkiye*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzeda v. Poland*; ECtHR of 22 July 2021 – No. 11423/19 – *Gumenyuk v. Ukraine*.
[42] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen v. Finland*.

Core statement: The concept of a fair trial implies the right to an adversarial proceeding in which the parties, in addition to having the opportunity to present all the evidence necessary for the success of their claims, are also entitled to be made aware of the evidence presented or statements submitted by all parties to the proceedings.

Note: The complainants applied for various positions in the public administration in Turkey. They each had the necessary qualifications. Due to the attempted coup on 15 July 2016 and the associated state of emergency, several decrees were issued requiring a positive background check for recruitment to the civil service. The decrees were subsequently approved by parliament and thus became law. These laws were declared unconstitutional by the Constitutional Court in July 2019.

The checks included not only criminal convictions, but also previous acquittals, police investigations and suspicions as well as a character assessment. The complainants' applications were rejected on the basis of a negative background check. They were not informed of any further reasons for the decisions, in particular the results of the negative background check and the resulting factual reasons for the rejection. An action brought against the rejection decision was rejected in all instances on the grounds that the decision to make recruitment dependent on a positive background check was lawful and complied with statutory provisions.

The complaint alleges that the complainants were not informed of the information obtained in connection with the background check and the resulting allegations, so that they were unable to question their accuracy in the administrative proceedings. In addition, the background checks were arbitrary, as they did not contain an objective assessment of the complainants. As a result, the right to a fair trial within the meaning of Art. 6 ECHR was not guaranteed due to the violation of the principles of adversarial proceedings and equality of arms.

The ECtHR emphasises that, according to its case law, the scope of judicial review and the obligation to state reasons for judicial decisions[43] are not absolute. The parties to a legal dispute must be given sufficient opportunity to put forward their point of view under conditions that do not put them at a disadvantage compared to their opponents.[44] It follows that, as part of a fair trial, the parties must be given the opportunity to present the arguments and evidence necessary for the success of their claims. In addition, they must also be made aware of all evidence and statements made by the other parties to the proceedings so that they can respond to them in order to influence the court's decision.[45] However, in cases where a plaintiff is denied access to evidence for reasons of general interest, it must be ensured that the requirements of adversarial proceedings and equality of arms in court are taken into account and that appropriate safeguards are provided to protect the interests of the parties concerned.[46]

In the opinion of the Court of Justice, the national courts did not exercise their powers to review the official decisions effectively and appropriately. They did not pass on to the complainants the information on the negative background checks obtained ex officio in the judicial proceedings and did not ask them to comment on this. The Court also points out that the Constitutional Court in 2019 declared the relevant legal provision on which the administrative decisions relied unconstitutional. Even if this circumstance cannot have any impact on the complainant's proceedings due to the prohibition of retroactivity, it shows that the contested measures are now being questioned even by the domestic courts.

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[43] ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho and others v. Portugal*.
[44] ECtHR of 18 February 2009 – No. 55707/00 – *Andrejeva v. Latvia*.
[45] ECtHR of 3 May 2016 – No. 7183/11 – *Letinčić v. Croatia*.
[46] ECtHR of 19 September 2017 – No. 35289/11 – *Regner v. Czech Republic*.

The Court therefore found a violation of Art. 6 ECHR and awarded the complainants compensation in the amount of €2,000 each.

(In)admissibility

Decision (First Section) of 4 June 2024 – No. 31732/18/15 – *Ciszewski v. Poland*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Change of civil servant status to employee status – Voluntary conclusion of an employment contract – Avoidance of the contract

Core statement: The right of access to a court under Art. 6 ECHR extends not only to the judicial assertion of civil claims and obligations, but also exists when the unlawfulness of an interference with the exercise of these rights is complained about.

Note: The complainants were civil servants until 2017 and worked in the Customs Administration. Due to a change in the law, the previously independent customs administration was merged with the tax administration in March 2017 and the complainants were assigned to another department. At various times in May and June 2017, they were offered positions as employees in the tax audit service. The complainants accepted the proposals and signed corresponding employment contracts. They subsequently brought an action before the competent local administrative courts and applied for an order of continuation of their civil servant status. The courts declared that they did not have jurisdiction to decide and dismissed the action as inadmissible, as the conclusion of the employment contracts were not administrative acts. The complainants did not challenge the employment contracts before the labour or civil courts.

The complainants claim that they have been denied access to a court within the meaning of Art. 6 ECHR.

The ECtHR assumes that the complaint alleges the loss of civil servant status as a result of the establishment of an employment relationship under private law. Therefore, the application of Art. 6 ECHR can only be considered if the complainants, as civil servants, would have been denied access to a court under domestic law due to this subject matter of the dispute and this exclusion would have been objectively justified.[47] It is not up to the Court of Justice to fulfil the tasks of the national courts, which have to interpret national legislation. The Court only has to review whether this interpretation is in line with the ECHR.[48] If the national courts have rejected the complainants' applications as inadmissible on the grounds described above, this does not deny them access to a court. This follows in particular from the fact that the complainants had access to the ordinary courts. However, they did not make use of this option. The Court therefore finds that the complainants were not excluded from access to a court, so that the complaint of a violation of Art. 6 ECHR was manifestly unfounded and the complaint was therefore inadmissible.

New proceedings (notified to the respective government)

No. 28724/23 – *Chaidos v. Greece* (Third Section) – lodged on 14 July 2023 – communicated on 4 April 2024

Law: Art. 6 ECHR (right to a fair trial)

[47] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen v. Finland*; ECtHR of 19 September 2017 – No. 35289/11 – *Regner v. Czech Republic*.

[48] ECtHR of 18 February 1999 – No. 26083/94 – *Waite and Kennedy v. Germany*.

Keywords: Review of the adjustment of the pension – Excessive duration of proceedings – Effective remedy

Note: On 28 August 2007, the complainant applied to the competent Court of Audit for the cancellation of the adjustment of his pension. This request was partially granted in a decision dated 20 December 2019. He lodged an appeal against this decision, which was finally rejected in March 2022. He then applied to the Court of Audit for compensation due to the excessive length of the proceedings, as a final decision on his application was not made until fifteen years later. The claim was rejected by the Court of Audit on the grounds that the length of the proceedings had not been excessive. There was no right of appeal against this decision.

The question here is whether the complainant's application for cancellation of the adjustment of his pension was decided within a reasonable period of time[49] and whether there was an effective domestic legal remedy against the refusal of compensation within the meaning of Art. 13 ECHR.

No. 37358/21 – *Markush v. Ukraine* (Fifth Section) – lodged on 15 July 2021 – communicated on 4 April 2024

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life)

Keywords: Dismissal from the judiciary – Parliamentary decision – Lack of access to a court

Note: The complainant was a member of the Constitutional Court of Ukraine. She was dismissed from office in February 2014 following a parliamentary decision. She was accused of having violated her oath of office. By the same parliamentary decision, various other judges were dismissed from their posts at the Constitutional Court.[50] The complainant filed an unsuccessful lawsuit against the dismissal.

The complainant claims that she had no opportunity to have the parliamentary decision reviewed by a court, so she was denied access to a court within the meaning of Art. 6 ECHR. In addition, her right to respect for private life was violated by the dismissal.[51]

No. 440492/20 – *Hoxha v. Albania* (Third Section) – lodged on 31 August 2020 – communicated on 14 June 2024

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Action for protection against dismissal – Reasons for the court decision

Note: The complainant had brought an action against the employer's termination of his employment contract. The court of first instance ordered the employer to pay compensation in the amount of three months' salary as the notice period was not observed and to pay a further two months' salary as the complainant was not notified of the termination within the statutory period. With regard to the finding that the employment relationship continued, the court dismissed the claim. The court of appeal appealed to by the complainant reduced the compensation due to non-compliance with the notice period to two months' salary and dismissed the further claim.

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[49] ECtHR of 8 June 2006 – No. 75529/01 – *Sürmeli v. Germany*.

[50] ECtHR of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*; ECtHR of 13 July 2023 – No. 47052/18 – *Golovin v. Ukraine*.

[51] ECtHR of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*; ECtHR of 13 July 2023 – No. 47052/18 – *Golovin v. Ukraine*.

The complainant alleges a violation of Art. 6 ECHR on grounds that the decision of the court of appeal was not sufficiently reasoned.[52]

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4. Protection of privacy

(In)admissibility

Decision (Third Section) of 9 April 2024 – No. 21141/20 – *Bala v. Albania*

Law: Art. 8 ECHR (right to respect for private family life))

Keywords: Review of the income of members of the judiciary – Discontinuation of review proceedings due to termination of employment – 15-year ban on practising law

Core statement: If a violation of Art. 8 ECHR is asserted, it must be demonstrated and proven with regard to Art. 34 ECHR that the serious consequences of the contested measure significantly affect private life.

Note: The complainant worked as a legal advisor at the Albanian Constitutional Court from 2008 to 2017. As part of the fight against corruption in the judiciary, the vetting of all members of the judiciary was ordered by law in 2016. The complainant also had to undergo this review. In 2017, she was offered a position outside the judiciary, whereupon she resigned from the Constitutional Court. For this reason, the review procedure was discontinued. According to national law, participants in the vetting procedure for judges and public prosecutors whose proceedings were terminated due to resignation from office may not be appointed as judges or public prosecutors for 15 years. In 2018, various judgeships at the Constitutional Court became vacant, for which the complainant applied. She was rejected on the grounds that she could no longer be appointed as a judge in the judicial service for 15 years due to the termination of the review procedure. The appeals lodged against this decision before the domestic courts were unsuccessful.

The complainant took the view that the rejection of her application for the position of judge at the Constitutional Court due to the termination of the review proceedings and the associated 15-year ban on practising her profession had violated Art. 8 ECHR and that she had suffered a loss of reputation.

The Court first points out that Art. 8 ECHR does not give rise to a right of access to public office.[53] The protection granted under Art. 8 ECHR can affect the existing employment relationship, as the resulting consequences, such as dismissal, can have an impact on private life.[54] In this case, it is up to the person concerned to credibly demonstrate that there is a serious interference which must be causally linked to the contested measure and which significantly affects their private life.[55] The complainant has not shown that she would have been selected by the judicial authorities to fill one of the judges' positions on the basis of her

[52] ECtHR of 21 January 1999 – No. 30544/96 – *García Ruiz v. Spain*; ECtHR of 20 March 2009 – No. 12686/03 – *Gorou v. Greece (No. 2)*; ECtHR of 18 December 2014 – No. 27473/11 – *N. A. v. Norway*.
[53] ECtHR of 12 October 2021 – Nos. 43391/18 and 17766/19 – *Bara and Kola v. Albania*; ECtHR of 8 November 2018 – No. 2683/12 – *Frezadou v. Greece*; ECtHR of 22 June 2023 – No. 53193/21 – *Lorenzo Bragado and Others v. Spain*.
[54] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[55] ECtHR of 21 November 2023 – No. 25240/20 – *Gyulumyan and Others v. Armenia*.

qualifications, so that there is a lack of causality between the contested measure and the alleged interference with her private life. In addition, there is a lack of evidence of a significant impairment of the complainant's private life. Since she has since taken up a position outside the judiciary, she has not suffered any financial loss as a result of the rejection of her application. Nor was there any damage to her reputation, as the complainant was not dismissed from the service due to misconduct, but terminated her employment of her own volition. The Court therefore came to the conclusion that Art. 8 ECHR was not applicable and therefore dismissed the complaint as inadmissible.

New proceedings (notified to the respective government)

No. 16399/20 – *Licaj v. Albania* (Third Section) – lodged on 8 April 2020 – communicated on 9 April 2024

Law: Art. 8 ECHR (right to respect for private and family life)

Keywords: Dismissal from judicial service – Anti-corruption review – Valuation of husband's assets

Note: The complainant has been a judge since 2000 and was most recently the president of a court of appeal. On the basis of a law to combat corruption, the income and assets of judges and public prosecutors were scrutinised.[56] As part of this investigation, it was established that irregularities were attributable to the complainant's husband with regard to property transactions concluded before their marriage. The complainant was removed from her position as a judge as a result of this audit.

The complainant alleges a violation of Art. 8 ECHR, whereby she objects in particular that the behaviour of her husband from the time before the marriage should not be attributed to her.

No. 50037/19 – *Teixeira Fernandes Lopes v. Portugal* (Fourth Section) – lodged on 19 September 2019 – communicated on 9 April 2024

Law: Art. 8 ECHR (right to respect for private and family life)

Keywords: Order to disclose personal data – Rejection of claims for damages – Interference with private life

Note: The complainant was employed by the General Inspectorate for Labour Conditions. In 2016, she applied for a transfer to a job closer to her home for health, family and personal reasons. Her immediate superior rejected this request. Following her complaint, the superior head of department overturned this decision and granted the complainant's transfer request. Her immediate superior then ordered that the file concerning the complainant's transfer procedure be forwarded to all employees in the department. This order was then implemented. Disciplinary proceedings were initiated against the superior, as a result of which he was suspended for two months without pay. At the same time, the complainant filed criminal charges against her superior and brought an action for damages. Both the criminal charges and the action for damages were dismissed in all instances.

[56] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*; ECtHR of 13 December 2022 – No. 40662/19 – *Sevdari v. Albania*; ECtHR of 13 December 2022 – No. 58997/18 – *Nikëhasani v. Albania*; ECtHR of 4 July 2023 – No. 41047/19 – *Thanza v. Albania*.

The complainant considers that the decisions of the national courts denying her the possibility of having the behaviour of her superior sanctioned violated her right to the protection of her private life and that she had no effective remedy against them.[57]

No. 37284/23 – *Rucki and Others v. Latvia* (Fifth Section) – lodged on 30 September 2023 – communicated on 4 April 2024

Law: Art. 8 ECHR (right to respect for private and family life)

Keywords: Suspension from service – Obligation to provide proof of vaccination against Covid-19 – Refusal to submit a vaccination certificate

Note: The complainants were civil servants in various public institutions in Latvia. Due to the Covid-19 pandemic, the Latvian government ordered in October 2021 that all employees in public administrations must provide proof of vaccination against Covid-19. Otherwise, they would be suspended from work without pay. These restrictions applied up to and including February 2022. The complainants did not submit the required vaccination certificate and were temporarily suspended from work without pay in accordance with the order. The actions brought against the measures were unsuccessful in all instances before the administrative courts.

The complainants are of the opinion that their personal integrity was violated by the requirement to present proof of vaccination. Furthermore, the measure interfered with their professional lives and the sanction imposed was disproportionate.

No. 18292/23 – *de Haro and Others v. France* (Fifth Section) – lodged on 24 April 2023 – communicated on 16 May 2024

Law: Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 1 (protection of property)

Keywords: Exemption from work without pay – Compulsory vaccination against Covid-19 – Refusal of vaccination

Note: The complainants are employees in healthcare professions and firefighters in France. Due to a law dated 5 August 2021, employees in the healthcare professions and in the fire service were obliged to be vaccinated against Covid-19.[58] The complainants refused to be vaccinated. As a result, they were released from work without pay. They brought an unsuccessful action against this measure before the competent courts. In addition, they applied to the *Conseil d'État* for the cancellation of the statutory provisions on compulsory vaccination, as in their opinion these regulations interfered with their private lives in an unlawful manner. The applications were rejected by the *Conseil d'État*.

In their complaint, the complainants claim that the statutory provisions on compulsory vaccination and the resulting unpaid leave of absence from work in the event of refusal to be vaccinated violate their right to respect for their private lives. In addition, they are being discriminated against in an unlawful manner compared to vaccinated persons. The unpaid exemption from work constitutes a disproportionate interference with the protection of their property.

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[57] ECtHR of 9 March 2023 – No. 36345/16 – *L. B. v. Hungary*; ECtHR of 17 July 2008 – No. 20511/03 – *I. v. Finland*; ECtHR of 26 January 2017 – No. 42788/06 – *Surikov v. Ukraine*.
[58] ECtHR of 13 September 2022 – No. 46061/21 – *Thevenon v. France*.

5. Social security

New proceedings (notified to the respective government)

No. 18220/15 – *Guidetti and Others v. Italy* (First Section) – lodged on 8 April 2015 – communicated on 5 April 2024

Law: Art. 6 ECHR (right to a fair trial); Art. 1 Protocol No. 1 (protection of property)

Keywords: Reduction of retirement benefits – Change in case law – Retroactive amendment to the law

Note: The complainants were employed as accountants and currently receive retirement pensions, the amount of which is based on the statutory provisions of 1995. In 2006, the modalities for calculating the amount of the pensions were changed, which meant a reduction in retirement benefits for the complainants. They brought an action against the reduction in pensions for the period from 2002 to 2004 and invoked a ruling by the Italian Court of Cassation that had been issued in the meantime, according to which the retroactive effect of the legislative amendment was inadmissible. In the course of the legal proceedings, which were meanwhile pending before the Court of Cassation on behalf of the complainants, a further amendment was made to the law, according to which the retroactive effect of the calculation modalities changed in 2006 was permissible. In application of this legal situation, the Court of Cassation changed its previous case law and dismissed the complaints of the complainants. The change in the calculation of retirement benefits introduced with the pension reform was now also relevant for the complainants.

The complaint asserts that the retroactive effect of the statutory change in the calculation of retirement benefits violates Art. 6 ECHR and interferes with the property protected by Art. 1 Protocol No. 1.

In particular, the Court of Justice will have to examine the question of whether the complainants were entitled to rely on the original legal situation and the domestic case law on this subject from the point of view of legal certainty and whether the retroactive application of the amended laws constitutes an encroachment on protected property.[59]

No. 3958/24 – *Mendieta Borrego v. Spain* (Fifth Section) – lodged on 25 January 2024 – communicated on 16 May 2024

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Granting of a survivor's pension – Registered civil partnership – Two-year existence of the registration as a prerequisite – Protection of legitimate expectations

Note: The complainant applied for a survivor's pension following the death of her civil partner. Until 2014, Spanish law stipulated that the granting of a survivor's pension was not dependent on the duration of the registered civil partnership. According to a ruling by the Constitutional Court on 11 March 2014, a survivor's pension was conditional on the registered civil partnership having lasted for two years at the time of the partner's death. When the complainant's partner died in June 2015, their registered civil partnership had not yet existed for two years. The survivor's pension applied for was rejected on these grounds. The appeals lodged against this decision were unsuccessful before the domestic courts.

[59] ECtHR of 24 September 2004 – No. 44912/98 – *Kopecký c. Slovakia*; ECtHR of 7 June 2011 – Nos. 43549/08, 6107/09 and 5087/09 – *Agrati and Others v. Italy*; ECtHR of 27 May 2004 – Nos. 42219/98 and 54563/00 – *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille v. France*.

The complainant alleges a violation of the right to protection of property pursuant to Art. 1 Protocol No. 1. She is of the opinion that she could rely on the granting of the survivor's pension, as the legal situation had only changed shortly before the death of her partner.

No. 46247/15 – *Sivka v. Ukraine (Fifth Section)* – lodged on 8 September 2015 – communicated on 5 June 2024

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Reclaiming overpaid retirement benefits – Notification of additional income

Note: The complainant had been receiving an early retirement pension since 2012. In 2014, the pension fund reviewed the payments and found that the complainant had received an excessive pension in the past because she had not declared income from a business she was running. The pension fund therefore decided to reduce the complainant's pension by 20% and demanded repayment of the overpaid benefits for the past. In the action brought against this, the complainant argued that, according to the statutory provisions, only dependent employment precluded the receipt of an early retirement pension and that the operation of a self-employed business was not relevant. In addition, her entrepreneurial status had already been cancelled by court order in 2008. The court of first instance overturned the pension fund's decision. The Court of Appeal overturned this decision and dismissed the claim. It was the complainant's responsibility to notify the authorities of the cancellation of the entrepreneur status. The appeal against this decision was unsuccessful.

The complaint alleges an interference with the property protected by Art. 1 Protocol No. 1, especially since the state authorities were aware that the complainant was no longer an entrepreneur at the time the pension was granted.

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