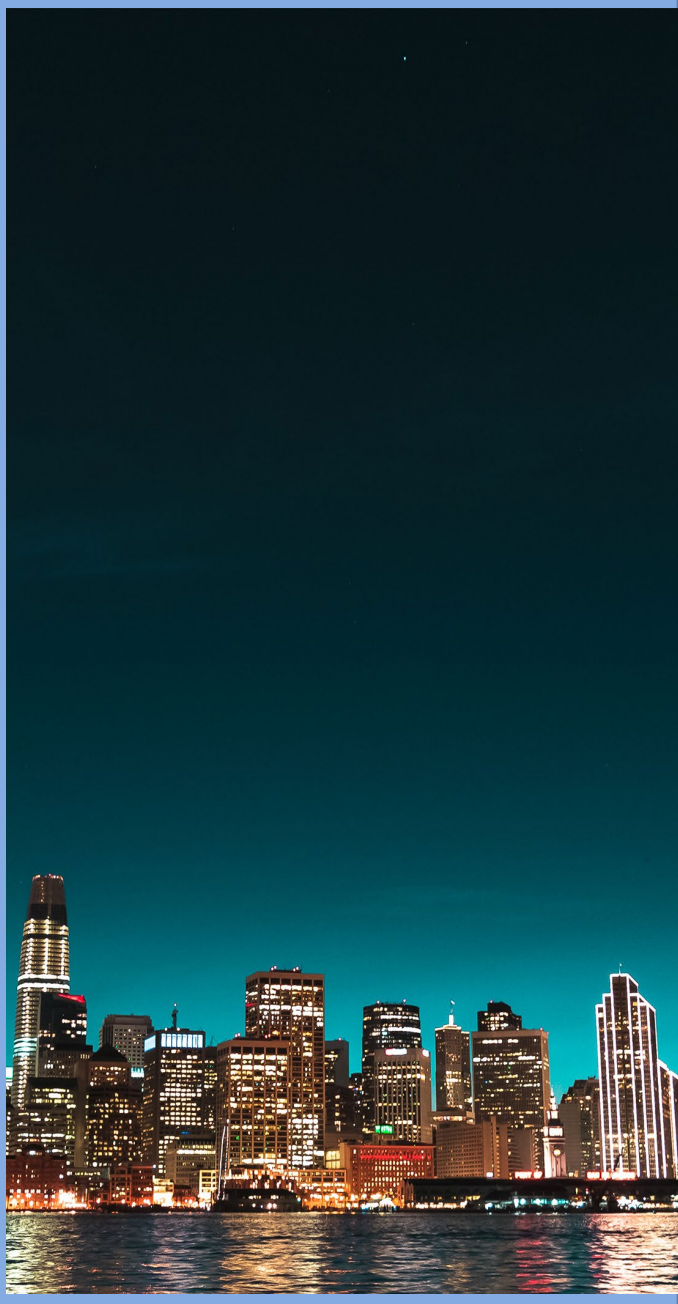
Bird & Bird

EU Employment Law Report

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

Q1 2022



Legislative developments

During the first quarter of 2022, no major developments have been noted on the legislative front within the European Union.

The policy declaration of the European Commission for the year 2022 does not contain specific new projects for legislation or regulation within the area of social policy. Obviously, all pending initiatives of the European Commission (on the protection of platform workers, minimum wages and collective bargaining for certain self-employed, for instance) will continue their usual course of the legislative process, with the active involvement of the European Parliament.

Social policy

XXXX v. HR Rail SA, 10 February 2022, C-485/20

Abstract

A worker with a disability, including a worker doing a traineeship as part of his or her recruitment, who is declared incapable of performing the essential duties of the post that he or she occupies, may benefit from reassignment to another post for which he or she is competent, capable and available. That reassignment must not, however, impose a disproportionate burden on the employer.

Facts

HR Rail hired a specialized railway maintenance employee with probationary period. In December 2017, this employee was diagnosed with a heart condition, after which a pacemaker had to be fitted. As a result, he could no longer perform his duties where he was frequently exposed to electromagnetic fields. In June 2018, the Belgian Social Security FPS recognized the employee as a person with a disability. The employer dismissed the employee during his probationary period. The employee alleged to be the victim of discrimination on the grounds of disability. The question was brought before the ECJ whether in that situation, his employer was obliged, under Directive 2000/78/EC and in order to prevent any discrimination on the grounds of disability, to appoint him to another position which he was able to exercise (e.g. warehouse worker), rather than to dismiss him.

Legal context

- Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Decision

The ECJ ruled that the concept of 'reasonable accommodation' implies that an employee who has been declared unable to perform the essential functions of his previous job because of his or her disability must be assigned to another job for which he has the necessary competence, ability and availability, provided that this measure does not impose a disproportionate burden on the employer. This includes an employee serving a probationary period after being recruited.

Employers must take the appropriate measures necessary in the specific case to enable disabled individuals to have access to employment, to pursue a profession, to advance in their careers and to participate in education and training, provided that this does not impose a disproportionate burden on them.

The measures listed in the Directive include, for example, a transfer to another job. This applies to both the public and private sectors, including public bodies.

Equal treatment

CJ v. Tesoreria General de la Seguridad Social, 24 February 2022, C-389/20

Abstract

Spanish legislation excluding domestic employees from unemployment benefit while they are almost exclusively women is contrary to EU law. That exclusion constitutes indirect discrimination on grounds of sex as regards access to social security benefits.

We discussed this case and the opinion of the Advocate-General in a previous Report in this series (Q3 – 2021).

Facts

A domestic employee applied to the Spanish General Social Security Fund ('TGSS') to pay contributions in respect of unemployment protection in order to acquire the right to those benefits. The TGSS rejected that application on the grounds that the Spanish legislation expressly prevented her from contributing to that scheme in order to obtain protection from unemployment. The employee then appealed to the Spanish Administrative claiming that the national legislation places domestic workers in a situation of social distress when their employment ends for reasons which are not attributable to themselves. That prevents them from obtaining not only unemployment benefit but also the other types of social assistance which are dependent on entitlement to unemployment benefit having come to an end.

The Spanish court emphasized that the category of workers in question consists almost exclusively of women, which is why it asks the ECJ to interpret the directive on equality in matters of social security, in order to determine whether there is indirect discrimination on grounds of sex, which is prohibited by that directive.

Legal context

- Article 4, §1 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Decision:

The ECJ holds that the directive on equality in matters of social security precludes a national provision which excludes unemployment benefit from the social security benefits granted to domestic workers by a statutory social security scheme, since that provision places female workers at a particular disadvantage compared with male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex.

The Court confirms that the objectives raised by the Spanish government are legitimate from a social policy perspective. However, it considers that the Spanish legislation does not appear to be appropriate to achieve those objectives, since it does not appear to be pursued in a consistent and systematic manner with regard to these objectives.

Finally, the ECJ considers that the Spanish legislation appears to go beyond what is necessary to achieve those objectives. Exclusion from unemployment protection entails the impossibility of obtaining other social security benefits to which domestic workers would be entitled and the granting of which is conditional on the extinction of the right to unemployment benefit. That exclusion would thus lead to a greater lack of social protection resulting in a situation of social distress.

Working time – Overtime pay – Annual leave

DS v Koch Personaldienstleistungen GmbH 13 January 2022, C-514/20

Abstract

EU social law precludes a provision in a collective labor agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

Facts

A German worker brought an action against his employer on the basis of the fact that, when exercising his right to paid annual leave, the remuneration received in a given month was lower than what he would have received had he not taken leave during that month. The reason for this was that under the applicable collective labor agreement the right to overtime pay was linked to the hours actually worked, excluding hours of paid leave. In so far as this provision entailed a reduction in the worker's right to overtime pay and thus deter the worker from asserting his right to annual leave, the question was brought before the ECJ as to its compatibility with the fundamental right to an annual period of paid leave.

Legal context

- Article 31 (2) Charter of Fundamental Rights of the European Union ("the Charter")
- Article 7 Directive 2003/88/EC 4 November 2003 concerning certain aspects of the organization of working time

Decision

The Court underscored the importance of the right to paid annual leave as a particularly important principle of EU social law from which there must be no derogations. When the remuneration paid on account of entitlement to paid annual leave is less than the normal remuneration that the worker receives during periods actually worked, the latter might well be encouraged not to take his or her paid annual leave. In the specific circumstances of this case, the applicant indeed received a remuneration that was lower than which he would have received, if he had not taken leave during that month.

As the method of calculation of working time, such as at issue in these proceedings, was liable to deter the worker from exercising his or her right to paid annual leave during the month in which he or she worked overtime, it was therefore considered incompatible with the right to paid annual leave provided for in the provisions as outlined above.

Freedom to provide services – Posting of workers

LM v Bezirkshauptmannschaft Hartberg-Fürstenfeld, 10 February 2022, C-219/20

Abstract

A five-year limitation period for failure to comply with obligations relating to the remuneration of posted workers is lawful in determining if the threshold for a collective redundancy is triggered, employers must look at any period of dismissals and not merely "*ex post*" or "*ex ante*" the concerned employee's dismissal date.

Facts

A Slovakian company had posted several workers to Austria. A fine was imposed on its Austrian representative on the basis of a check carried out in 2016 that showed a failure to comply with certain obligations relating to the remuneration of these workers. The question arose as to the compatibility with certain provisions of EU law (see below) of the five-year limitation period under Austrian law with regards to the relatively petty offence the representative was alleged to have committed.

Legal context

- Article 41 (1) and 47 Charter of Fundamental Rights of the EU
- Article 3 (1) Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Decision

Quite adequately, the Court started by ruling out its jurisdiction with respect to the interpretation of the provision of the European Convention of Human Rights (art 6), while asserting its jurisdiction with regards to the corresponding article 47 of the Charter (right to an effective remedy and to a fair trial) as well as article 41 (right to good administration).

The referring court had not identified the provisions of EU law that the national legislation at issue had sought to implement, prompting the Austrian government to invoke the inadmissibility of the request. The Court rejects this defense. The national legislation is considered as an implementation of EU law within the meaning of article 51.1 of the Charter: it sets the limitation period applicable to an administrative offence that penalizes the underpayment of posted workers and thus imposes a penalty under national law to ensure that the EU obligations on minimum pay for posted workers are complied with.

The question as redefined by the Court is whether the provision on minimum rates of pay for posted workers, read in conjunction with article 47 and the principle of good administration, must be interpreted as precluding national legislation providing for a five-year limitation period for failure to comply with obligations relating to the remuneration of posted workers.

The Court concludes this is not the case. The five-year term seeks to ensure compliance with the obligation relating to the minimum rate of pay. Service providers posting workers to the territory of a Member State can reasonably be expected to retain evidence of the payment of wages to those workers for several years. A five-year term is not unreasonable.

ECJ 8 March 2022, NE v. Bezirkshauptmannschaft Hartberg-Fürstenfel, C-205/20

Abstract

National courts must ensure that penalties for non-compliance with administrative obligations in the context of posting of workers are proportionate.

Facts

The company CONVOI, established in Slovakia and represented by NE, posted workers to a company established in Fürstenfeld (Austria). The administrative authority of the district of Hartberg Fürstenfeld (Austria) imposed a fine of EUR 54 000 on NE, for failure to comply with a number of obligations laid down by Austrian employment law, relating, in particular, to the retention and making available of wage and social security records. NE brought an action against that decision before the referring court, the Regional Administrative Court, Styria, Austria.

In October 2018, that court, questioning the conformity with EU law and, in particular, with the principle of proportionality set out inter alia in Article 20 of Directive 2014/67 of penalties such as those imposed by the Austrian legislation at issue, had brought the matter before the ECJ for a preliminary ruling. In its order of 19 December 2019, Bezirkshauptmannschaft Hartberg Fürstenfeld, the ECJ had held that the combination of various elements of the Austrian system of penalties imposed for non-compliance with obligations to retain documents concerning the posting of workers was disproportionate.

The national legislature did not amend the legislation at issue, and having regard to the solution adopted by the ECJ in the judgment of 4 October 2018, Link Logistik N&N, the referring court decided to ask the Court whether and, if so, to what extent that legislation may be disapplied. Indeed, in that judgment of 4 October 2018 the ECJ had considered that a provision of EU law similar to Article 20 of Directive 2014/67 has no direct effect.

Legal context

- Article 20 of Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System

Decision

As a first step, the ECJ holds that Article 20 of Directive 2014/67, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may those be relied on by individuals before national courts against a Member State which has transposed it incorrectly.

As a second step, the ECJ finds that the principle of primacy of EU law imposes on national authorities the obligation to disapply national legislation of which a part is contrary to the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67 only to the extent necessary to enable the imposition of proportionate penalties. Recalling that, although national legislation such as that at issue in the main proceedings is appropriate for attaining the legitimate objectives pursued, the ECJ reiterates that that legislation goes beyond the limits of what is necessary to attain those objectives due to combination of its various characteristics.

Working time – night work daytime work – equal treatment

VB v Glavna Direktsia 'Pozharna bezopasnost i zashitita na C-815/18, 24 February 2022

Abstract

The protection of night workers as acknowledged under EU law does not imply an obligation to impose for a shorter maximum working time on this category of workers as opposed to regular workers. Workers of the private sector can be treated differently than those of the public sector, in that the latter may not benefit from a maximum working time of 7 hours for night workers. Such a difference in treatment does not necessarily amount to discrimination.

Facts

A Bulgarian firefighter claimed additional pay on account of his night duties.

Legal context

- Article 12 (a) of Directive 2003/88 of 4 November 2003 concerning certain aspects of working time
- Articles 20 and 31 of the Charter of Fundamental Rights of the EU

Decision

The Court highlights the importance of article 8 of Directive 2003/88 that imposes minimal measures that seek to protect night workers, such as a maximum working time on night work, i.e. not more than 8 h on average per 24 h and not more than 8 h where particular risks or significant physical or mental strains are implied. However, these provisions do not require for national legislations to impose a lower maximum working time for night workers as compared to daytime workers. Other protective measures must be taken, as regards wages, salary, indemnities or other advantages in order to compensate for this more arduous form of work.

Workers from the private sector may be treated more favorably, in this particular case on account of the fact that the maximum working time for night work is limited to 7 hours, as opposed to 8 hours in the public sector. This is not necessarily in violation of the right to fair and just working conditions (art 31 Charter), nor of the right to equality (art 20). It remains for the national Courts to assess whether this difference in treatment is based on an objective and reasonable criterion, i.e. whether it is proportionate with the goal that the legislation seeks to pursue. The Court provides some guidance as to how that assessment must be done by insisting on the comparison to be made as specific and concrete as possible.

Temporary agency work

NP / Daimler AG, Mercedes Benz Werk Berlin, 17 March 2022, C-232/20

Abstract

The notion of "temporary" does not preclude the possibility for an agency worker to take up a position that exists permanently and not only as a replacement.

Facts

A worker was employed for almost 5 years as a temporary agency worker, assigned to work at Daimler. He had not been hired to replace another worker. In April 2017 a new provision of German law was introduced: assignments exceeding 18 months could not be considered as temporary and would henceforth allow for the worker (for assignments after April 2017) to invoke the existence of an employment contract between himself and the user. The applicant held the provision was contrary to EU law and claimed he had an employment relationship with Daimler, the user undertaking.

Legal context

- Art 1(1), 3 and 5 Directive 2008/104/EC of 19 November 2008 on temporary agency work

Decision

As regards the concept of "temporary", the Court explains this does not refer to the position with the user undertaking but rather to the terms of the assignment during which the worker is placed at the disposal of the user undertaking. A worker can be a temporary worker, even if his position with the user is permanent and not merely in replacement of an existing employment relationship. It is the worker's relationship with the agency that is temporary by nature.

On the question of whether 55 months of "temporary agency work" can be considered as a misuse of successive assignments, the Court reiterates what it had set out in its decision of 14 October 2020, i.e. that the provision on the prevention of misuse (art 5 (5)) does not require Member States to limit the number of successive assignments, nor does it or any other provision lay down specific measures which the Member States should take in that respect. Whether or not successive assignments amount to a misuse or means to circumvent the Directive is for the national courts to assess, by taking into account the idiosyncrasies of the business, as well as the national legislation and an objective reason for making use of successive contracts.

To the extent that the new legal provision only applies to assignments as of April 2017 and could thus deprive a worker, whose assignment could no longer be considered as temporary, from the protection of the Directive, it could be considered as contrary to the Directive. This would not necessarily impose a duty on the national judge to set aside this provision of transitory law, as this would require an interpretation *contra legem*.

Finally, in the absence of a provision of national law that imposes the sanction of an employment relationship being presumed between the worker and the user when the working relationship is no longer temporary, no such individual right to an employment relationship can be derived from the Directive.

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