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EU Employment Law Report

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

Q3 & Q4 2023

EU case-law

Free movement of football players

Court of Justice 21 December 2023 – (C-680/21)

Facts

The Union of European Football Associations adopted rules stipulating that professional football clubs participating in its international interclub football competitions must include a minimum of 8 'home-grown players' on their match sheet. The Belgian national football association defines 'home-grown players' as players who, regardless of their nationality, have been trained for at least three years by a Belgian club

Questions referred to the Court

Royal Antwerp, a professional football club based in Belgium, and a football player brought an action before the Brussels Court of First Instance and this court asked the Court of Justice – among others - whether the rules on 'home-grown players' are compatible with the freedom of workers laid down in article 45 TFEU. Royal Antwerp and the football player argued that these rules are likely to give rise to indirect discrimination at the expense of players who are not considered home-grown.

Findings of the Court

The Court of Justice recalls that measures such as the rules on home-grown players are allowed if it can be demonstrated that (i) the measures pursue a legitimate objective in the public interest and that (ii) the principle of proportionality is respected. Although it is up to the referring court to assess whether these conditions are fulfilled and adequately demonstrated, the Court of Justice confirmed that the objective of encouraging the recruitment and training of young professional football players constitutes a legitimate objective in the public interest, and that the principle of proportionality is not necessarily violated.

The impact of quarantine to the right to paid leave

Court of Justice 14 December 2023- (C206/22)

Facts

An employee was granted paid annual leave for December 2020. As a result of him being required to quarantine after contact with an infected individual, he was not able to take this leave, so he requested the days of paid annual leave to be carried over. His employer refused this carry-over.

Question referred to the Court

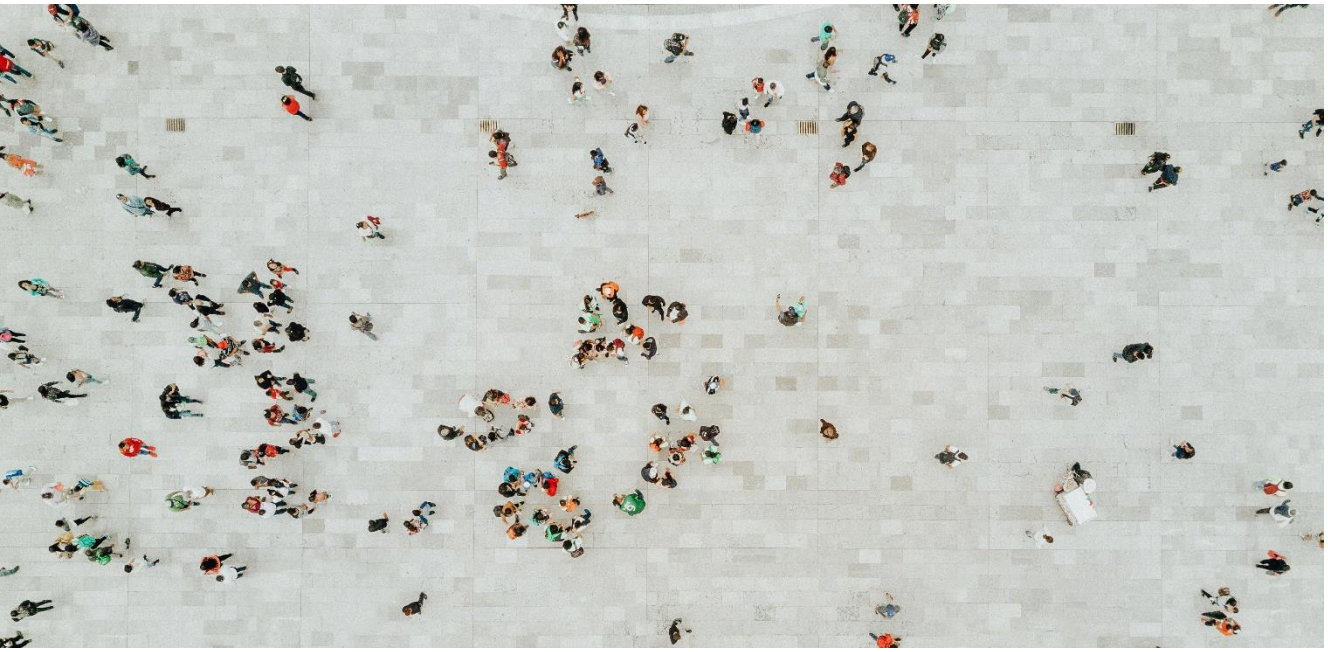
The employee brought an action before the local court, which asked the Court of Justice whether local case law was compatible with Directive 2003/88. Local case law only requires employers to carry over the days of leave granted if workers can demonstrate incapacity for work. A mere quarantine does not amount to incapacity for work, so therefore, no carry-over should be implemented.

Findings of the Court

Firstly, the Court of Justice confirmed that a quarantine does indeed not amount to incapacity for work. Although both quarantine and incapacity for work are unforeseeable events beyond the control of the person subject to it, a person in a situation of quarantine is not subject to physical or psychological constraints caused by an illness. Taking this into account, the rule on the carry-over should not automatically be applied in case of a quarantine.

Secondly, the Court of Justice also ruled that employers cannot restrict their employees in pursuing their own interests during a period of annual leave. However, this does not mean that employers are required to compensate for the disadvantage arising from a quarantine ordered by a public authority. Directive 2003/88 is not intended to ensure that any event capable of preventing employees to fully enjoy a period of leave is a reason for granting additional leave.

The Court of Justice concluded that the local case law is compatible with Directive 2003/88.



The impact of the limited duration of an employment contract on the determination of seniority

Court of Justice 30 November 2023 –(C-270/22)

Facts

Several civil servants worked as teachers under multiple fixed-term employment contracts before being employed for an unfixed term. The Ministry of Education reconstructed their careers to determine the length of service acquired under the fixed-term employment contracts.

Question referred to the Court

The civil servants brought an action before the local Italian court, arguing that their seniority was not calculated correctly, because the lengths of service as calculated by the Ministry was below the actual lengths of service.

The local court referred several questions to the Court of Justice, as it doubts the compatibility of local law with clause 4 of the framework agreement on fixed term work concluded on 18 March 1999.

Under local law, no seniority should be taken into account for periods of employment during which the civil servants are employed under an employment contract of limited duration if (i) the period of employment lasted less than 180 days per school year or (ii) the employment was not carried out continuously between 1 February and the end of the final assessment of the pupils. And even if these conditions were fulfilled and consequently, the corresponding periods of employment were considered, then they were not immediately considered in full, but only for 2/3.

Findings of the Court

The Court of Justice recalls that clause 4 of the framework agreement intends to ensure compliance with the principle of non-discrimination, by stipulating that, in respect of employment conditions, it is prohibited to treat fixed-term workers less favourably than permanent workers, solely because they are employed for a fixed term, unless different treatment is justified on objective grounds.

The Court of Justice rules that the local law in question does violate this clause. According to the Court, it is apparent that local law established a difference in treatment to the detriment of teachers on fixed-term contracts in comparison with permanent teachers, who are not subject to the above mentioned thresholds. While the Court confirms that there could be objective grounds for such difference in treatment, it also ruled that the local law exceeds what is necessary and does not comply with the principle of proportionality.

Neutrality at the workplace and discrimination based on religion

Court of Justice 28 November 2023 – (C-148/22)

Facts

An employee requested authorisation to wear an Islamic headscarf in the workplace. She worked as “head of office” in a Belgian municipality, a function which she performed primarily without being in contact with users of public service.

Question referred to the Court

When her employer refused the request based on a requirement of exclusive neutrality in the workplace, she claimed that she had been discriminated against because of her religion.

The local court had doubts related to the compatibility of this refusal with Directive 2000/78, and referred a question to the Court of Justice in this regard.

Findings of the Court

The Court of Justice ruled that there could be a risk of indirect discrimination, but such risk can be excluded if the difference in treatment is objectively justified by a legitimate aim and if the principle of proportionality is adhered to. The Court found that the member states have a margin of discretion in this regard. Provided that the rule is appropriate, necessary and proportionate, it may be justified to prohibit employees from visibly wearing in the workplace any sign revealing philosophical or religious beliefs by the desire to establish an entirely neutral administrative environment.

Overtime for part time workers

Court of Justice 19 October 2023 – (C-660/20)

Facts

An employee works part time as a pilot. In the company he works for, a distinction is made between basic remuneration and additional remuneration, the latter being granted for additional flying duty hours if a certain number of flying hours is exceeded on a monthly basis. The hourly rates that are applicable for the calculation of the additional remuneration vary depending on (i) the type of flight (short-haul or long-haul) and on (ii) the trigger threshold that is (not) reached. The relevant collective agreements make no provision in case of part-time workers for the trigger thresholds to be reduced according to the part-time percentage.

Question referred to the Court

The referring court expresses doubts as to whether the refusal to reduce the trigger thresholds in proportion to the duration of the working time complies with the framework agreement on part-time work concluded on 6 June 1997.

Findings of the Court

The Court recalls that clause 4 of the framework agreement seeks to eliminate discrimination between part-time workers and full-time workers. Part-time workers are, in respect to employment conditions, not to be treated in a less favourable manner than comparable full-timeworkers solely because they work part time, unless different treatment is justified on objective grounds.

According to the Court, it is apparent that local law established a difference in treatment to the detriment of part time pilots in comparison full time pilots, as they are much less likely to reach the trigger thresholds than full time pilots and that reaching the threshold represent a longer flight-hour duty for part-time pilots in relation to their total working time. It concludes that the framework agreement precludes national legislation which makes the payment of additional remuneration for part-time and full-time workers uniformly contingent on the same number of working hours being exceeded.

Addressing discrimination based on sex

Court of Justice 14 September 2023 – (C-133/22)

Facts

A male individual was refused a certain pension supplement, as local law only grants this supplement to females. After having brought an action against the National Institute for Social Security before the local Spanish court, his right to the supplement was recognised retroactively, because local law was considered discriminatory, which was already confirmed by the Court of Justice in a similar case against the National Institute for Social Security. However, his claim for compensation was dismissed.

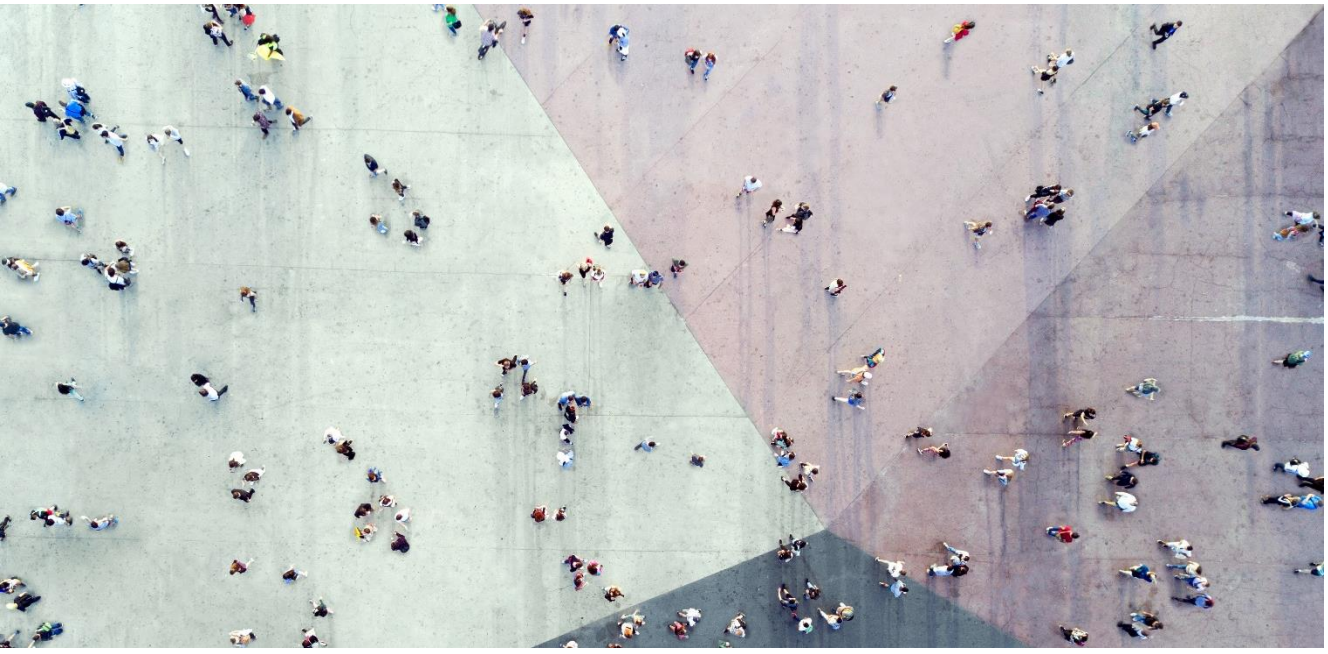
The individual lodged an appeal, and the local appeal court referred a question to the Court of Justice.

Question referred to the Court

The question referred to the Court was whether the practice consisting in systematically refusing to grant men the pension supplement in application of a discriminatory local law and in accordance with the administrative position published in this regard and obliging them to bring legal proceedings, is a separate form of discrimination (separate from the discrimination resulting from the application of local law) that should be addressed separately (by granting compensation for expenses related to the legal proceedings).

Findings of the Court

The Court of Justice answers this question affirmatively. If equal treatment can only be achieved after having obtained a favourable judicial decision, which lead to additional expenses, then the person involved should not only get retroactive recognition of the pension supplement to address the discrimination, but he should also be adequately compensated for these additional expenses, enabling the loss and damage actually sustained to be made good in full.



Collective dismissal

Court of Justice 13 July 2023 – (C-134/22)

Facts

A company would cease all business operations, and as a result, more than 10% of the workers it employed would be made redundant. A written communication was forwarded to the works council in this regard, but no copy was forwarded to the competent public authority. An employee whose employment was terminated in the context of the collective redundancy brought an action before the local German courts (first instance and appeal) for a finding of non-termination of his employment relationship, as forwarding the above-mentioned copy to the public authority was a condition for the validity of the dismissal.

Question referred to the Court

The local court on appeal asked the Court of Justice what the purpose of the requirement to provide the copy to the public authority, as laid down in Directive 98/59/EC, entails.

Findings of the Court

The Court of Justice confirmed that the forwarding of information to the competent public authority occurs only for information and preparatory purposes so that the authority can exercise its powers effectively. It is intended to enable the authority to anticipate the negative consequences of the projected collective redundancies. The employer's obligation is not intended to confer individual protection on workers affected by collective redundancies.

Regulatory developments

1. AI Act

On the 9th of December 2023, the EU Parliament reached a provisional agreement with the Council on the Artificial Intelligence Act. The goal is to protect citizens from AI-related harm and establish legal certainty to encourage investment and innovation. The AI Act outlines specific rules that AI systems must adhere to. While all AI systems need to comply with fundamental principles such as human oversight, transparency requirements, and non-discrimination, those classified as high-risk face stricter obligations. These include prior conformity assessments and post-market monitoring by authorities.

The potential applications of AI in the workplace are diverse, ranging from employee monitoring and evaluation to hiring processes and workflow optimization. However, most of these applications fall within the high-risk category, necessitating compliance with rigorous requirements.

2. Platform Workers Directive

The EU planned to introduce new rules on platform work: on the 13th of December 2023 the EU Council, under Spanish presidency, and EU Parliament reached a provisional agreement. The Council however refused to endorse the text that was negotiated considering the Spanish presidency to have overstepped its mandate in the negotiations. The criteria included in the text, resulting in most cases in an automatic qualification of platform workers as employees was a bridge to far to some Member States. The criteria included supervision of the performance, including by electronic means, control over the distribution or allocation of tasks, control over working conditions and restrictions on choosing working hours and restrictions on the freedom to organise work.

The Directive also provided in specific rules for the use of algorithms in the management of platform workers. The workers will need to be informed about the use of automated monitoring and decision-making systems. Moreover, the systems need to be carefully monitored by qualified staff (who are protected against adverse treatment), and human oversight is required for significant decisions. Also, processing certain kinds of personal data will be prohibited.

Back to the drawing board for the negotiators. The Belgian presidency who wanted to continue with the current text of the Directive was called back by other Member States notably France. They demand to restart discussions on a working version as close as possible to the general approach adopted by the Council, under the Swedish Presidency, in June 2023. An adoption of the Directive is therefore no longer expected before the European election in June this year.

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