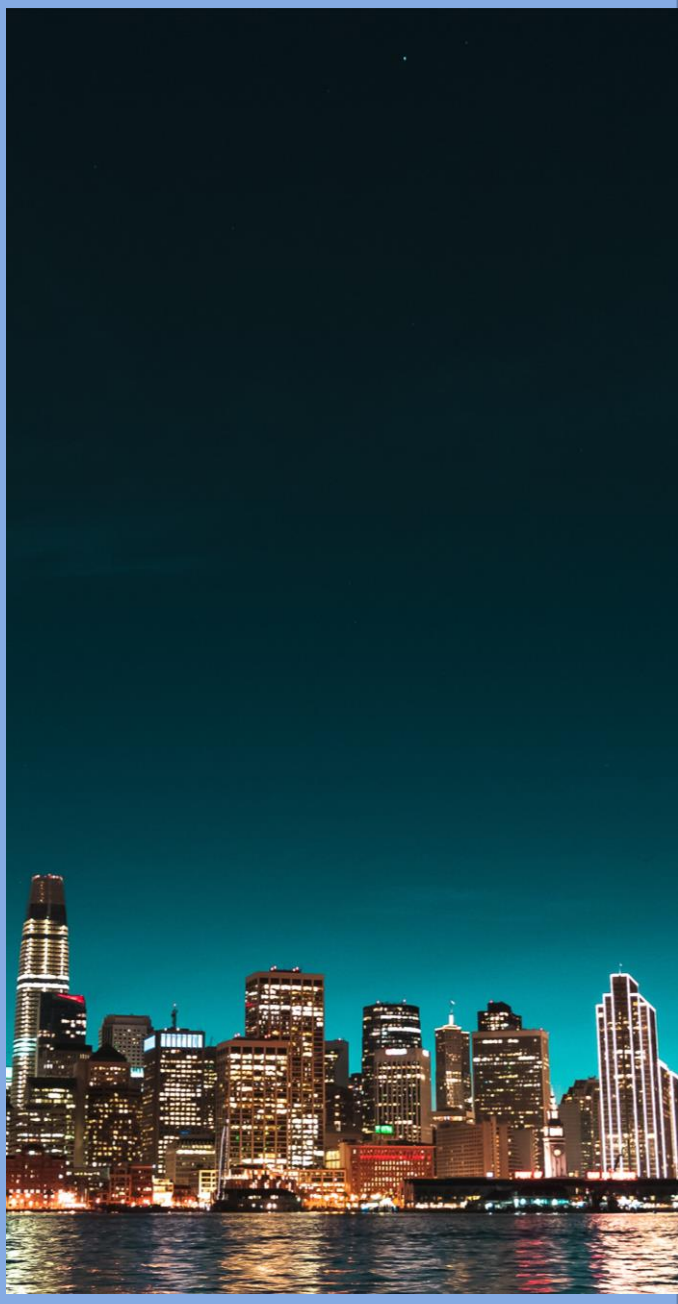
Bird & Bird

EU Employment Law Report

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

Q2 2022



Legislative developments

Draft Directive on minimum wages

On 28 October 2020, the European Commission adopted a proposal for a Directive on adequate minimum wages. The intention of the directive is to establish a framework to improve the adequacy of minimum wages and to increase workers' access to minimum wage protection. It aims at promoting collective bargaining on wages and improving the enforcement and monitoring of the minimum wage protection.

Moreover, Member States with statutory minimum wages will need to put in place a sound governance framework for setting and updating minimum wages, which means:

- clear criteria for minimum wage setting;
- the use of indicative reference values to guide the assessment of the adequacy of minimum wage;
- regular and timely updates of minimum wages;
- establishing consultative bodies, in which social partners will be able to participate;
- ensuring that variations and deductions of statutory minimum wages respect the principles of non-discrimination and proportionality, including the pursuit of a legitimate aim; and
- effectively involving social partners in statutory minimum wage setting and updating.

It is not the intention of the directive to oblige Member States to introduce minimum wages, nor does it establish the level of pay or set a harmonised minimum wage.

It has long been quiet about this directive on minimum wage, but in June of this year, a political agreement has been reached. The political agreement reached by the European Parliament and the Council is now subject to formal approval by the co-legislators. This is expected after the summer recess.

Once published in the Official Journal, the directive will enter into force 20 days after publication and Member States will then need to transpose the new elements of the directive into national law within two years.

Directive on transparent and predictable working conditions

On 1 August, the deadline for the EU Member States to transpose the Directive on transparent and predictable working conditions into national law lapsed. The directive determines new rules providing workers with the right to more predictability in their working conditions, for instance, regarding assignments and working time.

Although the deadline has lapsed, not all Member States have implemented the directive yet (more than half the Member States failed to meet the deadline).

We will dig deeper into this subject in our next issue covering the third quarter of 2022.

Fixed-term employment

PG v. Ministero della Giustizia a.o., 7 April 2022, C-236/20

Abstract

The succession of four fixed-term contracts for four years each is contrary to the framework agreement on fixed-term work.

Facts

The case concerned an Italian magistrate (peace judge). This magistrate carried out the same tasks as an ordinary judge but did not benefit from the legal status of a public sector employee and did not enjoy protection for pension and social security purposes, including in matters relating to health, maternity and family, or the right to leave.

The case was brought before an Italian court that decided to involve the ECJ by asking for a preliminary ruling about the application of the EU framework agreement on fixed-term work.

Legal context

- Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43)

Decision

The Italian court asked the ECJ the question of whether the framework agreement on fixed-term work precludes national legislation pursuant to which a fixed-term employment relationship can be renewed a maximum of three times successively, each renewal being for a duration of 4 years and for a total duration that does not exceed 16 years, and which does not provide for the possibility of penalising in an effective and dissuasive way the abusive continuance of the employment relationship.

In accordance with Clause 5 of the framework agreement, Member States are to introduce measures relating to the number of successive renewals of fixed-term employment contracts or relationships and/or the maximum total duration of such contracts or relationships. Italian legislation indeed establishes a limit to the number of successive renewals and the maximum duration of those fixed-term contracts.

However, in the case at hand, there was no provision in Italian law to make it possible to punish in an effective and dissuasive way the improper renewal of fixed-term employment relationships. Without any penalty, the national legislation appears to be incapable of preventing and, where relevant, punishing the abuse of successive fixed-term employment contracts or relationships. Following Clause 5(1) of the framework agreement on fixed-term work has not been respected.

Temporary agency work

ES / Luso Temp – Empresa de Trabalho Temporário SA, 12 May 2022, C-426/20

Abstract

Agency workers are entitled to the same vacation pay for outstanding untaken vacation days as other employees.

Facts

A Portuguese agency worker whose contract was ended claims the payment of untaken paid vacation days. However, in Portugal, the calculation method for the payment of untaken vacation days for agency workers differs from the general calculation method used for regular employees. The system applied to agency workers is less favourable than the general system. The Portuguese judge presiding over the case, however, had doubts about the compatibility of this separate less favourable scheme for agency workers with the Directive 2008/104 on temporary agency work.

Legal context

- Clauses 5 (equal treatment) and 3 (essential labour conditions) of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work

Decision

The ECJ points out that article 5 of the Directive 2008/104 on temporary agency work (Temporary Agency Work Directive) guarantees that temporary agency workers benefit from at least the same essential working conditions as those they would receive had they been directly hired by the user. Article 31 of the EU Charter of Fundamental Rights guarantees the right to yearly vacation with pay. For temporary workers, the right to annual leave is part of the essential working conditions of article 5 of the Temporary Agency Work Directive. This also includes the financial compensation awarded to an employee that cannot take up his or her vacation days because the employee's employment ended.

The court determined that the Temporary Agency Work Directive precludes national regulations that provide lower compensation for untaken vacation days for agency workers compared to employees directly employed by the user.

Part-time employment

FN / Universiteit Antwerpen, 5 May 2022, C-265/20

Abstract

A difference in treatment between part-time and full-time appointments, whereby only full-time appointments can benefit from an automatic permanent appointment, constitutes a difference in treatment that violates the framework agreement on part-time work, unless there are objective grounds to justify such a difference in treatment.

Facts

An employee was employed by a Belgian university for approximately 20-years and was part of the academic staff under the Flemish University Decree. The employee held a series of posts in the faculties of law and economics as an assistant, doctoral assistant, lecturer, researcher, senior lecturer and lastly professor. For each appointment, the employee received a fixed-term employment contract for one to three years. All contracts were part-time between 10% and 75% of a full-time position. The employee was never offered a permanent appointment. At the last renewal of the appointment, the employee was offered a teaching assignment of 20% of a full-time equivalent (equal to 135 teaching hours), while he had previously been working 60% (165 teaching hours). Following the offer, the employee claimed damages for unlawful termination.

In the context of these discussions, the employee pointed out that some of his colleagues in similar situations were appointed full-time and for an indefinite period. The claim was dismissed by the court of first instance, but in appeal, the court had some questions about the compliance of the employee's situation with the EU Directives on part-time and fixed-term work. These questions were therefore referred to the ECJ.

Legal context

- Clause 4.1 of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10),
- Clause 4.1 of the framework agreement on fixed-term work concluded on 18 March annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

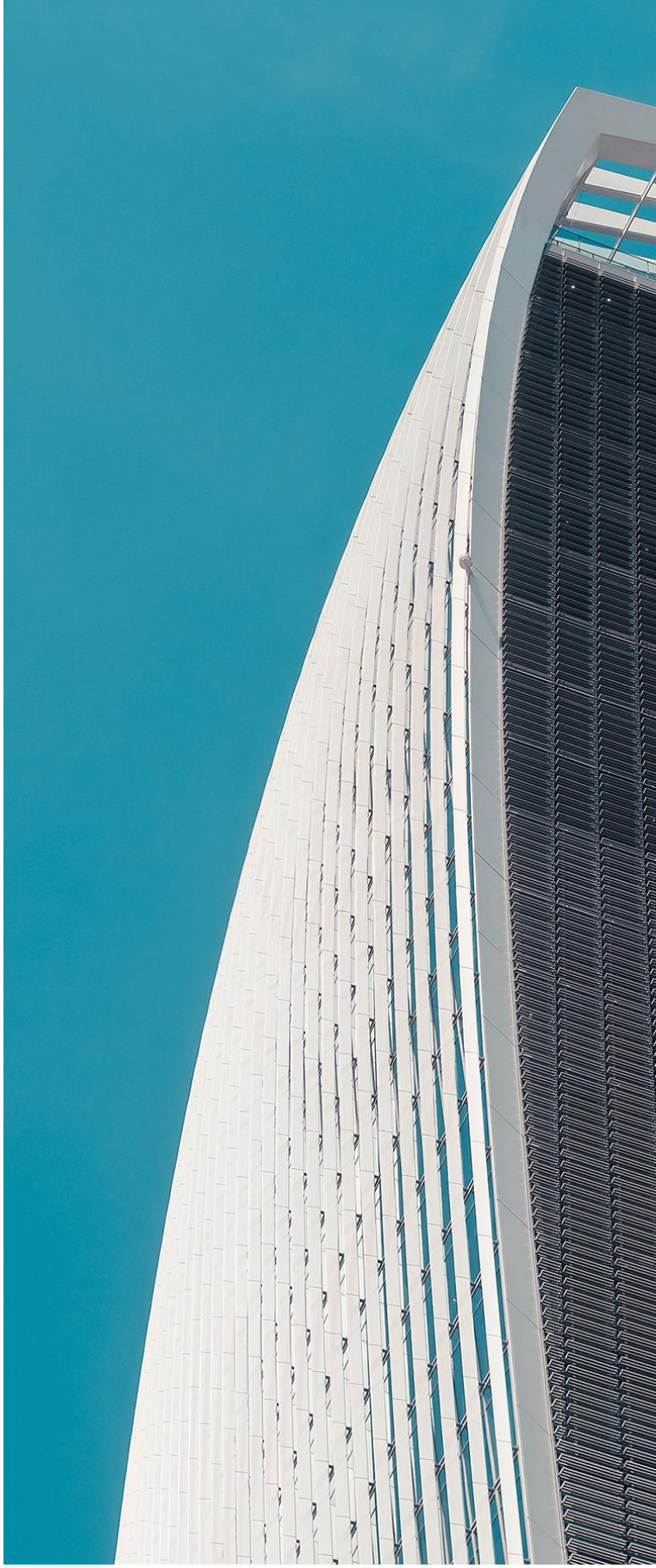
Decision

The first question concerns the compatibility of the framework agreement on part-time work with national legislation providing that independent academic staff holding a full-time teaching position will automatically be appointed on a permanent basis, whereas independent academic staff holding a part-time teaching position may be appointed on a permanent basis or employed on a temporary basis for renewable periods of a maximum of six years. The national legislation furthermore provides that a teaching position corresponding to at least 50% of a full-time teaching position opens the possibility of a permanent appointment.

The ECJ finds that the distinction made in the national legislation between part-time and full-time appointments, wherein only the full-time appointments benefitting from an automatic permanent appointment, constitutes a difference in treatment. The Court, however, points out that such a difference in treatment may be regarded as consistent with the principle of non-discrimination if it is justified on objective grounds. In the present case, the ECJ was not able to find any objective justification. Therefore, the Court determined that the distinction between part-time and full-time academic staff does not comply with Clause 4.1 of the framework agreement on part-time work.

A second question answered by the ECJ was whether national legislation needs to comply with objective criteria when determining the percentage of a full-time position to which that part-time teaching position corresponds.

In the case at hand, the employee's part-time teaching position represented 165 teaching hours corresponding to 60% of a full-time teaching position. By contrast, the offer of employment for 2009 involved 135 teaching hours, corresponding to 20% of a full-time teaching position. There was, therefore, a significant decrease in part-time percentage compared with the more relative reduction in the number of teaching hours. The ECJ concludes that no provision of the framework agreement on part-time work lays down any requirements for calculating the percentage of the workload of a comparable full-time worker to which the workload of a part-time worker corresponds.



Transfer of undertaking

Federatie Nederlandse Vakbeweging / Heiploeg Seafood International BV and Heitrans International BV, 28 April 2022, C-237/20

Abstract

Clauses 3 and 4 of the Acquired Rights Directive (organising the automatic transfer of all employees under the same employment conditions) do not apply to a national procedure which has as its primary aim to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as much as possible, provided that this procedure is governed by statutory or regulatory provisions.

Facts

The Dutch company Heiploeg group (referred to as Heiploeg-former) specialised in the wholesale trade of fish and seafood and related activities and suffered significant financial losses in 2011 and 2012. On top of these losses, the European Commission imposed a fine of €27 million on four companies including Heiploeg-former for participating in a cartel. These financial difficulties resulted in Heiploeg-former applying for insolvency.

Then, a new company was established, Heiploeg-new, which took over most of Heiploeg-former's business. The transfer was executed under a specific Dutch *pre-pack procedure*. This *pre-pack procedure* makes it possible, in the context of liquidating a debtor's assets, to prepare the sale of all or part of an undertaking forming part of its assets in order to increase the chances of creditors being repaid in full.

About two-thirds of Heiploeg-former's employees were also taken over by Heiploeg-new for the purpose of carrying out the activities which they carried out previously at the same workplace, while imposing less favourable conditions of employment on those employees.

The insolvency procedure was challenged by a Dutch union claiming that all employees should therefore have been transferred to Heiploeg-new under the same terms and conditions of employment. In this context, the Dutch court asked the ECJ two questions about the scope of clause 5(1) of the Acquired Rights Directive in case of a Transfer of Undertaking (Acquired Rights Directive) and, more specifically, whether the Dutch *pre-pack procedure* falls within the exception of clause 5(1) for bankruptcy proceedings.

Legal context

- Clause 5(1) of Directive 2001/23 codified Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Decision

The Dutch *pre-pack procedure* was already the subject of ECJ case-law. In an earlier case (FNV/Smallsteps BV, 22 June 2017, C-126/16), the Court determined that the pre-pack procedure did not fall under the exception of article 5(1) of the Acquired Rights Directive for transfers where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings. The transferee was therefore required to take over the employees under their former employment conditions.

In the case at hand, however, the Court seems to lean towards a different conclusion. The pre-pack procedure could fall under the exception of article 5(1) of the Acquired Rights Directive if such a procedure has as its primary aim to enable, in the insolvency proceedings, a liquidation of the undertaking as a going

concern which satisfies, to the greatest extent possible, the claims of all the creditors and preserves employment as much as possible. However, the pre-pack procedure at issue was governed solely by rules derived from case-law, and its application by different national courts was not uniform and therefore did not meet the requirements of legal certainty. Therefore, the Acquired Rights Directive applied in full to the transaction in question.

Protection employees in case of insolvency

HJ / Ministerstvo práce a sociálních věcí, 5 May 2022, C-101/21

Abstract

An employee that also exercises the function of CEO and member of the board cannot be automatically excluded from the benefits provided by national legislation on the protection of employees in the event of the insolvency of their employer, because this person exercises board member functions besides being an employee.

Facts

An architect under an employment contract with a company was also elected as chairman of the management board of that company. For that purpose, he entered into a contract with that company in which it was stated that he was not entitled to remuneration for the performance of that function. An addendum to his employment contract was signed stating that he occupied the position of CEO.

After the company went bankrupt, the architect applied for payment of his outstanding salary based on protective national legislation; however, his application was refused on the basis that he was not an employee. This was challenged in court by the architect. According to Czech case-law, a person acting as chairman of the board and CEO cannot be regarded as an employee in the meaning of the national legislation on the protection of employees in case of an insolvency. The Czech court, however, had doubts about the computability of this case-law with the Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, and therefore decided to submit the question to the ECJ.

Legal context

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

Decision

The ECJ decided that if national legislation allows cumulating an employment agreement with the function of CEO and a member of a statutory body of a trading company, this person cannot be deprived of the protection offered by the Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.

Equal treatment

Ligebehandlingsnævnet/HK/Danmark and HK/Privat, 2 June 2022, C-587/20

Abstract

The Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation applies to an elected sector convenor of a trade union organisation, which is not an employee or self-employed person within the meaning of Danish legislation.

Facts

A Danish trade union has an age limit to be able to participate in elections. Only members who are under the age of 60 on the date of the election may be elected. This age limited was challenge by a 63-year-old union representative when she was up for re-election. According to her this age limit constitutes a discrimination based on age.

The Danish court before which the case was brought however had doubts about whether a politically elected sector convenor falls within the scope of Directive 2000/78 as an elected convenor was not employed within the meaning of Danish labour law. The Danish court, therefore, referred a preliminary question to the ECJ.

Legal context

- Article (3)(1)(a) and (d) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Decision

The ECJ recalls that the Directive 2000/78 is to apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, self-employment or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

The scope of the directive is not limited solely to the conditions for accessing posts occupied by ‘workers’, within the meaning of Article 45 of the Treaty on the Functioning of the European Union. The directive does not seek to protect only workers as the weaker party in an employment relationship. Rather, it seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided. The ECJ, therefore, determined that the directive also applies to the role of sector convenor of a trade union organisation.

Furthermore, the ECJ determined that the application of the equal treatment directive is not precluded by the right to freedom of association. Freedom of association is not an absolute right, and its exercise may be subject to limitations provided for by law and respect the essence of that freedom and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This is the case for the limitations that flow from Directive 2000/78.

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