REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

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I. Editorial

HSI Report 1/2024 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 January to March 2024.

The CJEU rulings concern, among other things, fixed-term employment relationships. Of particular interest is the decision in Case C-715/20 – *K.L.* on the obligation to notify the employee of the reason for termination in the case of employment relationships that have been fixed-term under Polish law. In this case, the Grand Senate further developed the doctrine of the direct effect of a Directive concering employment relationships in the private sector by attaching great importance to the right to effective legal protection (Art. 47 CFR). Another case deals with the questions of whether the constitutional right to access on equal terms to public office can be used as a defence against the termination of a fixed-term contract as a consequence of a faulty fixed-term contract (C-59/22 and others – *Conserería de Presidencia and Others*). In contrast, the decision C-589/22 – *Resorts Mallorca Hotels International* dealt with the point in time when employee representatives were consulted in the case of collective redundancies.

The ECtHR rulings concern the question of whether men are unjustifiably disadvantaged if the parental allowance is unfavourable to them (No. 15284/19 – *B.T. v. Russia*). In the *Diaconeasa* case (No. 53162/21), the Romanian state withdrew the support of a personal assistant from a woman in need of care, referring to existing family support. A new case before the ECtHR also concerns restrictions on the right to strike in critical infrastructure (emergency services in the healthcare sector), which were also discussed in Germany during the strike of the train drivers' union (No. 33144/21 – *Trade Union of Social Services Employees v. Hungary*).

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. Annual leave

Decision

Judgment of the Court (First Chamber) of 18 January 2024 – C-218/22 – *Comune di Copertino*

Law: Art. 7 Working Time Directive 2003/88/EC; Art. 31(2) European Charter of Fundamental Rights

Keywords: Allowance in lieu of leave in the case of voluntary termination – Public service - Control of public expenditure – Organisational requirements of employers

Core statement: The entitlement to an allowance in lieu of days of paid leave is guaranteed even if employees resign, and cannot be made dependent on proof that they did not take the leave for reasons for which they are not responsible.

Note: In this case, the plaintiff terminated his employment relationship and demanded compensation for the annual leave not taken, which the employer refused to pay with reference to national law. Under Italian law, the right to compensation for public sector employees lapses if the holiday was not taken for reasons for which the employee is responsible. In the cases *Maschek*[1] and *job-medium*,[2] the CJEU had already ruled that the reason for the termination of the employment relationship was not decisive for the entitlement to an allowance in lieu. However, the conflicting Italian provision was upheld on the grounds that it served to curb public expenditure and was necessary due to organisational requirements regarding planning of the leave period and encouraging employees to actually take their leave.

The CJEU emphasises the particular importance of the right to paid annual leave as a fundamental right under Article 7(1) Working Time Directive in conjunction with Article 31(2) European Charter of Fundamental Rights (CFR). This right can only be restricted under the conditions laid down in Article 52(1) CFR. Among other things, the objective of the restriction must serve the public interest. However, the cited objective of curbing public expenditure contradicts the fourth recital of the Working Time Directive, according to which the effective protection of workers' health and safety must not be subordinated to purely economic considerations. The law is therefore in breach of EU law.

Even if the further objective of encouraging employees to actually take leave corresponds to the purpose of the Working Time Directive, this reason alone cannot justify the national regulation. When loss of the right to compensation is at stake, it is precisely a question of whether the employer has specifically and transparently put the employee in a position to

[1] CJEU 20 of July 2016 – C-341/15 – *Maschek*, paras. 28 and 29.
[2] CJEU 25 of November 2021 – C-233/20 – *job-medium*, paras. 32 and 34.

take his paid annual leave and has sufficiently informed him of an impending loss of leave days.[3] The referring court had to decide whether the defendant had met these requirements.

In this decision, the CJEU (following its case law[4]) again leaves no doubt as to the importance it attaches to the fundamental right to paid annual leave. As a core element of European labour protection, the entitlement to leave or compensation can only be restricted in narrowly defined exceptional situations: Employers must actively, specifically and transparently inform employees of their existing remaining leave; blanket regulations can be no substitute for this.

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2. Collective redundancy

Decision

Judgment of the Court (Seventh Chamber) of 22 February 2024 – C-589/22 – *Resorts Mallorca Hotels International*

Law: Arts. 1(1), 2(1) Collective Redundancies Directive 98/59/EC

Keywords: Information and consultation in the event of collective redundancies – Timely notification – Number of intended redundancies – Relevant date of notification

Core statement: The consultation obligation under Article 2(1) of the Collective Redundancies Directive arises as soon as employers consider or plan a reduction of jobs as part of a restructuring plan, and not only when they become aware of the number of prospective redundancies.

Note: The point in time at which the employee representatives must be informed of a mass dismissal is a question of practical relevance that has become relevant to the decision in these proceedings.

The employer operated hotels on the Balearic Islands. On 30 December 2019, it signed an agreement with a purchaser regarding the sale of 13 of the hotels. The present proceedings concern the employees who worked at the employer's administrative headquarters. Following the transaction, they were asked whether they would be willing to voluntarily transfer to the new owner. As a result, nine employees were able to do so on the basis of a contractual agreement, leaving 32 employees still working for the employer. Nine of them have now been dismissed for organisation al and production-related reasons. The employer only consulted the employee representatives after the "voluntary" transfer of the employees to the acquiring company. The plaintiffs in the main proceedings claimed that this was too late.

The Court of Justice has given a clear answer to this question in line with previous case law: Under EU law, the timeliness of the consultation is determined by the time at which the reduction of jobs is considered or planned.[5] The fact that employees are to be offered the opportunity to change employer on a voluntary basis as an intermediate step is not relevant. This is borne out by the purpose of the consultation obligation to avoid or minimise terminations of employment contracts and mitigate their consequences. This is the very

[3] CJEU of 6 November 2018 – C-684/16 – *Max Planck Society for the Advancement of Science*, paras. 45 and 46; EuArbK/Gallner, 5th ed. 2024, Directive 2003/88/EC Art. 7 marginal Nos. 55 et seq.
[4] See only: CJEU of 6 November 2018 – C-619/16 – *Kreuziger*; of 25 November 2021 – C-233/20 – *job-medium*.
[5] CJEU of 22 February 2024 – C-589/22 – *Ressorts Mallorca Hotels International* (operative part); and previously CJEU of 10 September 2009 – C-44/08 – *AEK*, para. 41.

purpose for which the measure of offering employees jobs at the acquiring company is carried out in the context of the impending job cuts. Therefore, the collective redundancy procedure must be initiated before these measures take place.

The courts will have to take this into account when interpreting Section 17(2) of the German Employment Protection Act (KSchG), according to which employers must consult "in good time" if redundancies subject to notification are "intended".[6] Based on the case law of the CJEU, this does not refer to the actual decision to effect redundancies, but to an earlier point in time when redundancies are planned, even if intermediate measures are still being considered to avoid compulsory redundancies.

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3. Data protection

Decision

Judgment of the Court (Third Chamber) of 25 January 2024 – C-687/21 – *MediaMarktSaturn*

Law: Arts. 5, 24, 32 and 82 GDPR (EU) 2016/679

Keywords: Data disclosure due to employee error – Compensation – Compensatory function – Appropriate protective measures – Severity of the breach – Knowledge of the breach

Core statement: If employees mistakenly disclose personal data to third parties, this does not in itself allow the conclusion that the data protection measures to be taken by employers as controllers within the meaning of Articles 24 and 32 GDPR were inappropriate. The claim for damages under Article 82 GDPR has a compensatory and not a punitive function, especially in the case of non-material damage. The severity of the breach, which could have been avoided, e.g. through better control and organisation of data security by the controller, is not to be taken into account in calculating the amount of compensation. For a claim for damages, not only the violation of the GDPR must be proven, but also material or non-material damage. If the third party did not become aware of the personal data, there is only a hypothetical risk of misuse of the data and therefore no damage.

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4. Equal treatment

Decision

Judgment of the Court (First Chamber) of 18 January 2024 – C-631/22 – *Ca Na Negreta*

Law: Art. 5 Employment Equality Directive 2000/78/EC, Arts. 21, 26 European Charter of Fundamental Rights, Art. 27 UN Convention on the Rights of Persons with Disabilities

[6] See *Callsen*, in: Däubler/Deinert/Zwanziger, Kündigungsschutzrecht, 12th ed. 2024, Section17 KSchG marginal No. 39: at least two weeks before the dismissal.

Keywords: Disability due to an accident at work – Permanent incapacity for work – Automatic dismissal due to incapacity – Reasonable accommodations

Core statement: Before terminating the employment of disabled employees on the grounds of their disability, which makes it impossible for them to perform the contractually agreed tasks, employers must make or maintain reasonable accommodations or demonstrate that the accommodations would impose a disproportionate burden on them.

Note: Disabilities are rarely congenital (3%) and mainly occur over the course of a lifetime due to illness (90%) or accidents (1%).[7] This is why support and protection measures are important to ensure that people with disabilities can participate in working life and access the general, inclusive labour market if they become disabled during their employment, as stipulated in Article 27 UN CRPD and Article 26 EU CFR.

The plaintiff in the main proceedings, a trained lorry driver, was no longer able to carry out his previous job as a result of an accident at work and was then assigned to a job in the company that was compatible with his limitations. After some time he was recognised as having a total permanent incapacity, which is also a disability under Spanish law. However, the problem lay precisely in the recognition of the occupational disability: under current Spanish law (unchanged since 1980), the employment relationship can be terminated on grounds of total permanent incapacity. The employee was therefore dismissed, against which he filed a lawsuit.

In essence, the referring court was concerned with the question of whether it is permissible under national law to terminate the employment relationship without first complying with the existing duty of reasonable accommodation (Art. 5 Employment Equality Directive; Art. 2 Ley *General de derechos de las personas con discapacidad y de su inclusión social*).[8]

Encouragingly, the CJEU focussed on the question of disability-friendly employment prior to dismissal. The court repeated its statements from the *HR Rail* case,[9] according to which a transfer to a disability-friendly workplace also constitutes a reasonable accommodation.[10] This means that the implementation of a reasonable accommodation must always be examined before a dismissal on the grounds of a disability. The Spanish provision is contrary to EU law.

The decision is consistent with the CJEU's previous case law and once again emphasises the particular importance of reasonable accommodation for overcoming environmental, structural barriers to participation and the application of the principle of equal treatment.

At the same time, the case is a reminder of the Member States' obligations to protect the rights of people with disabilities and to promote their equal participation. This applies all the more as the UN CRPD has been in force in the EU since 2011. National legislators and the application of the law are called upon to review existing regulations with regard to equality and anti-discrimination requirements. The same applies to parties to collective agreements and works and staff councils.[11]

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[7] Federal Statistical Office, press release No. 259 of 22 June 2022.

[8] Reasonable accommodations are the effective and practicable adjustments to be made by employers in specific individual cases in order to ensure the exercise of professional activity. Their only limit is a disproportionate burden on the employer.

[9] CJEU of 10 February 2022 – C-485/20 – *HR Rail*, paras 41, 43, 45, 48.

[10] *Rabe-Rosendahl*, Diskussionsforum Reha-Recht, article B7-2022 , for more details on the obligations of employers and specific options for suitable accommodations.

[11] On the exclusion from certain activities and the obligation to provide reasonable accommodation CJEU, decisions of 15 July 2021 – C-795/19 – *Tartu Vangla* with comment by *Rabe-Rosendahl*, Diskussionsforum Reha-Recht, contribution B3-2022 (minimum hearing threshold in the prison service); 21 October 2021 – C-824/19 – *Komisia za zashtita ot diskriminatsia* with comment by *Boysen,* Diskussionsforum Reha-Recht, contributions B1-2022 and B2-2022 *(Blind lay assessors).*

For German law, for example, the Federal Labour Court ruled as early as 2013 that dismissals are unjustified if reasonable accommodations[12] were not made. In this case, the justification of unequal treatment due to essential and decisive occupational requirements (Sec. 8(1) General Act on Equal Treatment - AGG) is also ruled out.[13]

New pending cases

Reference for a preliminary ruling from the Audiencia Nacional (Spain), lodged on 22 May 2023 – 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 discrimination on grounds of sex

Note: In the present proceedings, the question arises as to whether there is indirect discrimination on grounds of sex if a trade union for pilots in a company has negotiated better conditions in its collective agreement than the trade union for flight attendants represented in the same company, if the group of pilots favoured by the collective agreement consists mainly of men, but the group of flight attendants consists mainly of women.

Reference for a preliminary ruling from the Tribunale ordinario di Ravenna (Italy) lodged on 5 January 2024 – C-5/24 – *Pauni*

Law: Arts. 1, 2(1) and (2), 3(1) lit. c Employment Equality Directive 2000/78

Keywords: Discrimination on grounds of disability – Protection against dismissal – No exception for disability – Reasonable accommodations

Note: Under Italian law, employees who fall ill or have an accident are protected against dismissal for a period of 180 days (with a further 120 unpaid days at the employee's request). However, there is no such time limit for employees suffering from cancer. As there is no exception for employees with disabilities, the question arises whether this constitutes indirect discrimination. On the other hand, the question is whether granting (un)paid leave after the period of 180 or 120 days can be a reasonable accommodation.

Reference for a preliminary ruling from the Corte suprema di cassazione (Court of Cassation, Italy), dated 17 January 2024, lodged on 19 January 2024 – C-38/24 – *Bervidi*

Law: Arts. 2 and 5 Employment Equality Directive 2000/78/EC

Keywords: Child with disability – Discrimination against the carer – Reasonable accommodations

Note: The mother and carer of a child with a disability asked her employer to adjust her working hours and tasks so that she could look after her son. Unlike her colleagues, who requested adjustments for health reasons, the employer rejected her request because she herself was neither ill nor disabled. Carers are not covered by protection against

[12] In German labour law, the obligation to make reasonable accommodations is derived from an interpretation of Section 241(2) BGB (BAG of 19 December 2013 – 6 AZR 190/12) in conformity with EU law; a derivation from Section 12 AGG (Kocher/Wenckebach, SR 2013, 17, 26 et seq.) is also considered possible.

[13] BAG of 19 December 2013 – 6 AZR 190/12; *Fuerst*, in: Deinert/Welti, Behindertenrecht, 2nd ed., 3. reasonable accommodations marginal No. 8.

discrimination under Italian law.[14] In the *Coleman* case,[15] the CJEU ruled that the principle of equal treatment under the Employment Equality Directive is not limited to persons who themselves have a disability in the event of direct discrimination. Parents who care for their children with disabilities can also invoke the prohibition of direct discrimination.

Based on this, the CJEU is now presented with questions on the scope and limits of associated discrimination which were discussed after the *Coleman* decision[16] and are also of practical significance[17]:

a) Does the protection against discrimination for family carers of a child with a disability also apply in the case of indirect discrimination?

b) Does the duty to make reasonable accommodations (Art. 5) apply to these carers?[18]

c) Who is a "carer" and therefore included in the scope of protection?

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5. Fixed-term employment

Decisions

Judgment of the Court of Justice (Grand Chamber) of 20 February 2024 – C-715/20 – *X*

Law: Clause 4 Framework Agreement on Fixed-Term Work, Art. 47 European Charter of Fundamental Rights

Keywords: Fixed-term employment contract – Principle of non-discrimination – No obligation to state reasons for dismissal when terminating fixed-term employment relationships – Horizontal direct effect

Core statement: If an employer is not required to give reasons for termination when terminating a fixed-term employment relationship, whereas such an obligation does exist when terminating permanent employment relationships, this is contrary to EU law. In order to guarantee the legal protection arising from Article 47 of the European Charter of Fundamental Rights, the court must disapply any conflicting national provision.

Note: The Grand Chamber of the CJEU had to rule on the Polish regulation according to which employers are exempt from the otherwise general obligation to give written notice of the reason for termination when dismissing fixed-term employees. The Court rejected the Polish government's general reasoning that this regulation was necessary for labour market policy reasons in order to facilitate the employment of workers through fixed-term contracts. This argument could be used to undermine the ban on discrimination against fixed-term employees at will. Furthermore, it found that the flexibility of the labour market is not affected by giving reasons for termination.

[14] *Janda/Herman*, ZESAR 2023, 455, 460; *Nebe/Gröhl/Thoma*, ZESAR 2021, 157, 158 et seq. point out the lack of protective measures in German law.
[15] CJEU of 17 July 2008 – C-303/06 – *Coleman*.
[16] *Schlachter*, RdA 2010, 104, 106 et seq.; *Nebe*, Diskussionsforum Reha-Recht, article 1/2011, p. 5 et seq.; *Bayreuther*, NZA 2008, 986, 987 et seq.
[17] For example, in the interpretation of Sections 1, 7 AGG, Section 19a SGB IV, Section 33c SGB I and Section 164(2) SGB IX.
[18] The CJEU already rejected this interpretation in the *Coleman* case (CJEU of 17 July 2008 – C-303/06, paras. 39-42); see also Bayreuther, NZA 2008, 986, 988 et seq.

Of particular interest is the Court's position on the consequences of this breach of Union law. It does not attribute any horizontal third-party effect to the prohibition of discrimination in the Directive, meaning that a worker employed a private employer could not invoke the violation of EU law. However, the Court of Justice refers to Article 47 of the Charter of Fundamental Rights of the EU. According to Article 51(1) CFR, this is applicable to the implementation of the Framework Agreement on Fixed-Term Work. For the substantive examination, it does not refer to the general principle of equality of Article 20 CFR, but to the right to an effective legal remedy under Article 47 CFR. The fixed-term workers would be burdened by the effort and costs associated with the preparation of legal proceedings, which would prevent them from effectively exercising their right of appeal. Due to this violation of fundamental rights, the Polish provision, which does not provide for a duty to state reasons for the dismissal of fixed-term workers, is inapplicable between private parties (see in detail the comment by *Klengel/Schlachter* in the German version of this Report, p. 4 et seq.).

Judgment of the Court (Sixth Chamber) of 22 February 2024 – Joined Cases C-59/22, C-110/22 and C-159/22 – *Consejería de Presidencia and Others*

Law: Clauses 2, 3 and 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Abuse of rights through automatic extension of fixed-term employment relationships – Public service – Transformation of fixed-term into permanent contracts – Principles for filling public offices

Core statement: If a fixed-term employment contract in the public sector is automatically extended (again for a fixed term) because the public authority fails to carry out a selection procedure to fill the position permanently, the prohibition of abuse of rights pursuant to Section 5 of the Framework Agreement on Fixed-Term Work applies. The legitimacy or abusive nature of these contracts must be taken into account when determining the amount of a sanction (under Spanish law: flat-rate compensation of 20 days' pay per year of employment). If the liability of the administration is regulated as a sanctioning instrument, the relevant national provisions must be effective and dissuasive. The conversion of fixed-term contracts into open-ended contracts is a suitable sanctioning instrument for abusive fixed-term contracts in the administration as well. Union law may require the established national case law on the principles of the procedure for filling permanent posts in the public sector to be amended if it is incompatible with the objectives of Union law on fixed-term contracts.

Judgment of the Court (Sixth Chamber) of 25 January 2024 – C-389/22 – *Croce Rossa Italiana and Others*

Law: Clauses 2, 3, 4 and 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Obligation to submit – Chain limitation – Conversion of the status "fixed-term employee" to the status "permanent employee"

Core statement: A national court of last instance may derogate from its obligation to refer a case to the Court of Justice if the interpretation of EU law is so obvious that it leaves no room for reasonable doubt and the court has come to the conclusion that this clear interpretation would also be binding on other national courts and the Court of Justice.

If call-off contracts for fixed-term employees can be extended and renewed over several years without interruption, this is in breach of Union law. This does not apply if the underlying national regulations contain measures to prevent e creation of a chain of fixed-term contracts.

It does not violate the principle of non-discrimination if, as part of an organisational restructuring, only permanent employees are given the option of continued employment, but not fixed-term employees whose contract is due to expire.

Order of the Court (Seventh Chamber) of 8 January 2024 – C-278/23 – *Biltena*

Law: Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Chain limitation – Teaching activities in non-military subjects at military schools – Prohibition on converting fixed-term employment contracts to permanent contracts

Core statement: Contract extensions for civilian staff teaching non-military subjects at military schools cannot be justified by the "organisational requirements of these schools".

Opinion

Opinion of Advocate General Kokott of 29 January 2024 – C-548/22 – *Presidenza del Consiglio dei ministri and Others*

Law: Clause 4 No. 1, Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Discrimination – Honorary judges and public prosecutors – Chain employment relationships – Conversion to permanent employment relationship – Waiver of all claims for the period prior to conversion

Core statement: Regulations that require the waiver of all claims that have arisen on the basis of the fixed-term employment relationship when converting a fixed-term employment relationship of honorary judges and public prosecutors into a permanent one may be justified if there is additional, appropriate compensation for the claims.

If the conversion procedure is unsuccessful and continued employment is possible, appropriate lump-sum compensation for past activities is required.

New pending case

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (Spain) lodged on 11 July 2023 – C-434/23 – *Consorcio Gallego de Servicios de Igualdad y Bienestar and Others*

Law: Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Abusive fixed-term contracts – Public service – Conversion of fixed-term contracts as a sanction – Principles for filling public offices

Note: This referral question again concerns the Spanish regulations on the termination of fixed-term contracts in the civil service, their sanctioning and the relationship to the constitutional requirements for access to public office (see also the judgment of 22 April 2024 in the cases C-59/22 and others - *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid;* see above, p. 10).

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6. General matters

Decision

Judgment of the Court (Second Chamber) of 25 January 2024 – C-438/22 – *Em akaunt BG*

Law: Art. 2 Competition Regulation 1/2003/EC, Art. 101 (1) and (2) TFEU

Keywords: Minimum fees for lawyers – Determination by professional association – Mandatory obligation – Restraint of competition

Core statement: The statutory authorisation of a professional association to set generally binding minimum fees for legal services by regulation is contrary to EU law. It is a restraint of competition by object and cannot be justified.

Note: In the underlying legal dispute, the plaintiff took legal action against excessive legal fees. The point of contention was a minimum fee for lawyers set by a regulation of the professional association of lawyers, from which neither the court nor the lawyers were allowed to deviate under national law. This regulation was now the object of scrutiny under EU law.

Following on from its previous case law,[19] the CJEU ruled that a national law that prohibits lawyers and courts from falling below a minimum remuneration set by a professional association is incompatible with Article 101(1) TFEU in conjunction with Article 4(3) TEU. This is because the declared aim of such a minimum remuneration, set by private actors by means of a regulation, is to restrict free competition. A national regulation that would make such an "intended" restriction of competition binding could therefore not be justified by the pursuit of legitimate purposes.

This decision is unlikely to have any effect on lawyers' fees under German law, as they are set in the RVG, a parliamentary law, and not by a business association; in the case at hand, the Bulgarian Bar Association.[20] However, the decision shows the limits under EU law of the regulation of minimum fees by professional associations of self-employed persons.

Opinion

Opinion of the Advocate General of Advocate General Pikmäe of 29 February 2024 – C-8/23 – *Conseil national de l'ordre des médecins*

Law: Art. 21 and Annex V Professional Qualifications Directive 2005/36/EC; Arts. 45, 49 TFEU

Keywords: Recognition of professional qualifications – Doctors – Qualification in the home Member State – Non-recognition of this qualification by the host Member State

Core statement: Member States must automatically recognise evidence of formal qualifications of medical specialists issued in another Member State only if the basic medical training has already been recognised by another Member State. Irrespective of this, the evidence of formal qualifications as a medical specialist can continue to be recognised in accordance with the general rules for the recognition of evidence of formal qualifications or, where applicable, on the basis of Article 45 or Article 49 TFEU.

[19] CJEU of 23 November 2017 – C-427/16 – *CHEZ Elektro Bulgaria.*
[20] See in this regard CJEU of 19 February 2002 – C-309/99 – *Wouters*.

New pending cases

Reference for a preliminary ruling from the Curtea de Apel Iaşi (Romania) lodged on 14 November 2023 – C-678/23 – *Spitalul Clinic de Pneumoftiziologie Iaşi*

Law: Art. 9, Art. 11 (6) of the Occupational Safety and Health Framework Directive 89/391/EEC; Art. 31 (1); Art. 47 EU-GRC

Keywords: Occupational safety and health – Possibility for employees to appeal directly to authorities and courts – Direct vertical effect of the directive

Note: In this case, a national regulation is under scrutiny that prohibits employees from appealing directly to the competent authorities and courts in the event of possible employer violations regarding occupational health and safety and job classification.

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria), lodged on 13 February 2024 – C-115/24 – *Österreichische Zahnärztekammer*

Law: Art. 3 lit. d Patient Mobility Directive 2011/24/EU; E-Commerce Directive 2000/31/EC; Art. 5(3) Professional Qualifications Directive 2005/36/EC; Arts. 56 et seq. TFEU

Keywords: Cross-border healthcare services – Telemedicine – Place of healthcare provision – Country of origin principle

Reference for a preliminary ruling from the Cour d'appel de Liège (Belgium), lodged on 14 February 2024 – C-119/24 – *Chefquet*

Law: Art. 45 TFEU

Keywords: Income tax – Surcharge for non-residents as compensation for a municipal tax – Free movement of labour

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7. Insolvency

Decision

Judgment of the Court (Fourth Chamber) of 16 November 2023 – Joined Cases C-583/21 bis C-586/21 – *NC*

Law: Art. 1(1) Transfer of Undertakings Directive 2001/23/EC

Keywords: Term “transfer of business” – Transfer of a notarial practice – Seniority

Core statement: If a notary replaces the former holder of a notary's office with responsibility for a specific district, carries out the same activity in the same premises with the same material facilities and takes over both the roll of deeds and a substantial part of the staff, the provisions of the Transfer of Undertakings Directive apply, provided that the identity of the notarial practice is retained.

Note: According to the CJEU, the transfer of a notary's office to a successor can be categorised as a transfer of business. The fact that notaries carry out public-sector activities does not preclude the categorisation as an economic activity within the meaning of Article 1(1) lit. c of the Transfer of Undertakings Directive. The decisive factor for the question of whether a transfer has taken place is that the transferring entity, the notarial practice, retains

its identity. A contract between the transferor and transferee is not necessary, so that the succession in post can also fulfil the requirements.[21] Under Spanish law, the new notary continues the notarial practice. Whether a transfer can be assumed on the basis of such a transfer must be determined by taking into account all the circumstances of the individual case, whereby the criteria developed in case law must be applied. What is relevant here is that, under Spanish law, the entire notarial practice is to be regarded as a "public institution", in which human labour is of particular importance.

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8. Part-time employment

New pending case

Reference for a preliminary ruling from the Curtea de Apel Iași (Romania) lodged on 17 November 2023 – C-706/23 – *Școala gimnazială «Mihai Eminescu»*

Law: Art. 31(2) European Charter of Fundamental Rights; Art. 7(1) Working Time Directive 2003/88/EC; Clause 4 Framework Agreement on Part-Term Work (implemented by Directive 97/81/EC); Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Accumulation of permanent and fixed-term employment contracts – Entitlement to leave and meal allowance only for basic post

Note: Two Romanian teachers concluded a permanent and later a second, but temporary, employment contract with the same school. Under Romanian law, leave and meal allowances are only granted for the basic post, thus not for the fixed-term position. The referring court has doubts as to the conformity of this provision with EU law.

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9. Temporary agency work

Decision

Judgment of the Court (Sixth Chamber) of 22 February 2024 – C-649/22 – *Randstad Empleo and Others*

Law: Arts. 5(1), (3)1 lit. f Temporary Agency Work Directive 2008/104/EC

Keywords: Equal treatment of temporary agency workers – Total permanent incapacity due to an accident at work – Compensation – Basic working and employment conditions

Core statement: Compensation for total permanent incapacity to work due to an accident at work in the user company and resulting in the termination of the employment relationship can be "basic work and employment conditions". The principle of equal treatment prohibits a national interpretation of the law that results in the compensation in such a case being lower for temporary agency workers than for comparable employees of the user company.

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[21] CJEU of 16 February 2023 – C675/21 – *Strong Charon*, with explanatory notes in HSI Report 1/2023, p. 28-29.

10. Social security

Decisions

Judgment of the Court (Second Chamber) of 22 February 2024 – C-283/21 – *Deutsche Rentenversicherung Bund*

Law: Art. 44(2) Implementing Regulation (EC) No 987/2009, Art. 21 TFEU

Keywords: Pension for incapacity to work – Child-raising periods in another Member State – Only credited periods, no contribution period before child-raising period – Sufficient link to the pension system of the competent Member State

Core statement: Child-raising periods in another Member State must be taken into account under pension law even if only non-contributory insurance periods were completed in the competent Member State before and after the child-raising period.

Note: This judgment is a further decision[22] on the recognition of child-raising periods completed in another Member State under German law. In order for these periods to be taken into account, compulsory contribution periods for German pension insurance from employment or self-employment immediately before the birth of the child are required in accordance with Section 56(1) and (3) and Section 55 of the German Social Code, Book VI (SGB VI). The main point of contention in the previous decisions was the requirement according to these provisions that the periods immediately follow one another.[23]

The CJEU now had the opportunity to further explore the scope of application of the "sufficient link" criterion. In contrast to the previous cases, the claimant in the main proceedings did not pay in contributions to the Deutsche Rentenversicherung, either before or immediately after the child-raising period in the other Member State, as she was in vocational training or marginally employed. As defined in Article 1(t) of the Coordination Regulation, "periods of insurance" are not only periods subject to contributions, but also periods treated as such under national law, such as periods of child-raising. For the CJEU, a sufficient link can therefore also arise from such non-contributory periods. For this to be the case, the person concerned must have completed insurance periods *exclusively* in the Member State responsible for paying benefits, *both before and after* the child-raising period in another Member State (paras. 45, 47). Whereas in his Opinion[24] the Advocate General defined three conditions,[25] in particular, that periods of insurance are not required even after the child-raising period, the CJEU has reserved room for manoeuvre for the subsumption of further circumstances.

The limitation to "compulsory contribution periods" pursuant to Section 56(3), second sentence and Section 55 SGB VI can therefore no longer be upheld. The provisions must be interpreted in accordance with EU law. For the referred case, it should be noted on the one hand that periods of education pursuant to Section 54(1) No. 2, Section 54(4), Section 58(1) No. 4 SGB VI can be periods credited towards the qualifying period. On the other hand, marginally paid employment that was established from 2013 onwards is generally subject to pension insurance in accordance with Section 8(1) Nos. 1 and 1a of Book IV of the Social

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[22] CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 19 July 2012 – C-522/10 – *Reichel-Albert*.

[23] The CJEU assumes that the relevant provision of EU secondary legislation, Art. 44(2) Implementing Regulation, is not exhaustive and thus infers from the right to freedom of movement (Art. 21 TFEU) that a "sufficient link" between the child-raising period abroad and the insurance periods in the competent Member State is sufficient; CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 7 February 2002 – C-28/00 – *Kauer*; of 19 July 2012 – C-522/10 – *Reichel-Albert*; of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*.

[24] Advocate General Emiliou of 5 October 2023 – C-283/21 – *Deutsche Rentenversicherung Bund*.

[25] In detail HSI Report 4/2023, p. 21.

Code. For self-employed persons, it could also be of interest whether voluntary contributions (Sec. 55 SGB VI) are also considered periods of insurance.[26] The Federal Social Court will soon have the opportunity to take a position on the CJEU's decision.[27]

Judgment of the Court (Second Chamber) of 29 February 2024 – C-549/22 – *Raad van bestuur van de Sociale verzekeringsbank*

Law: Art. 68(4) EC-Algeria Association Agreement

Keywords: Surviving dependents of Algerian migrant workers – Transfer of survivors' benefits to Algeria – Survivors' benefits – Residence clause

Core statement: Article 68(4) of the EC-Algeria Association Agreement is directly applicable and applies to the surviving dependents of workers residing in Algeria who receive survivors' benefits, even if they are not workers themselves. A residence clause that reduces the amount of the survivors' benefits for these beneficiaries may be authorised.

Opinions

Opinion of Advocate General Pikamäe of 25 January 2024 – Joined Cases C-112/22 und C-223/22 – *CU*

Law: Art. 11(1) lit. d Long-Term Residents Directive 2003/109/EC

Keywords: Access to social assistance for third-country nationals with long-term residence status – Requirement of residence for at least ten years without interruption in the last two years – Equal treatment

Core statement: Access to social assistance measures may not be made conditional on residence of at least ten years (without interruption in the last two years) in the Member State concerned. Criminal sanctions for false declarations regarding these conditions also violate Union law.

Note: In the present case, the Neapolitan public prosecutor's office (Italy) brought an action against two third-country nationals with the legal status of long-term residents (Arts. 4-7 Long-Term Residents Directive). They are accused of unlawfully receiving monetary benefits by providing false information on the duration of their residence in an application for social benefits. In the view of the referring court, the national regulation on which the charges are based links the receipt of social benefits to excessively high requirements (ten years of residence in Italy, of which the last two years must be uninterrupted) and could therefore be in breach of EU law. If this were the case, its invalidity would render the underlying criminal proceedings irrelevant.

In his Opinion, the Advocate General concludes that the conditions at issue in the main proceedings constitute unequal treatment of third-country nationals who are long-term residents within the meaning of the Long-Term Residents Directive compared to Italian nationals. This is because unequal treatment based on residence or the duration of residence usually works in favour of nationals, as non-residents are usually foreigners, and thus, in the opinion of the CJEU,[28] constitutes indirect discrimination. However, anyone who fulfils the conditions set out in Articles 4 et seq. Long-Term Residents Directive, which

[26] The BAG has ruled that voluntary contributions are not sufficient if no compulsory contribution periods have been acquired due to employment in a third country (29 June 2016 – B 13 R 24/16 BH, para. 7).

[27] Pending under ref. No. B 5 R 2/23 R. On appeal, the LSG Rhineland-Palatinate did not recognise the period of education as a contribution period (14 December 2022 – L 4 R 187/21, para. 31).

[28] CJEU of 2 April 2020 – C-802/18 – *Caisse pour l'avenir des enfants* (child of the spouse of a frontier worker), para. 56 and the case law cited therein.

require, among other things, five years of uninterrupted and lawful residence in the relevant Member State, have also acquired the right to equal treatment with nationals in terms of social benefits in accordance with Article 11(1) of the Long-Term Residents Directive. On this basis, the indirectly discriminatory requirement of ten years' residence could not be justified. The underlying provision must therefore be disapplied. The criminal sanction is therefore also in breach of EU law.

Opinion of Advocate General Szpunar of 25 January 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: Family allowance – Term "family members" – Foster children – Discrimination against frontier workers

Core statement: It is incompatible with Union law for frontier workers to be unable to receive family allowance based on employment for foster children who are in their care and for whom they have custody, whereas children who are placed in care by a court decision within the same Member State are entitled to that family allowance.

The condition for the granting of benefits to non-resident workers, according to which they must provide for the child's maintenance, is only permissible if the national legislation also provides for such a condition for the granting of this benefit to residents who have custody of the child living in their household and with whom the child officially and actually lives on a continuous basis.

New pending cases

Reference for a preliminary ruling from the Landessozialgericht für das Saarland (Germany) lodged on 4 December 2023 – C-743/23 – *GKV-Spitzenverband*

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

Keywords: Migrant workers – Competent state – Substantial part of activity – Working time in third countries

Note: An employee living in Germany and employed in Switzerland spends the same number of working days in both countries. However, he carries out the majority of his work in third countries. For the referring Saarland Social Court, the question is whether the periods of employment in the third countries are to be taken into account when determining the competent state, which would mean that the proportion of activity in Germany is less than 25% and therefore does not constitute a substantial part of his activities within the meaning of Article 13(1) Coordination Regulation (EC) No. 883/2004 in conjunction with Article 14(8) Implementing Regulation (EC) No. 987/2009.

Reference for a preliminary ruling from the Ret i Svendborg (Denmark) lodged on 4 January 2024 – C-7/24 – *Deutsche Rentenversicherung Nord und BG Verkehr*

Law: Art. 85(1) Coordination Regulation (EC) No 883/2004

Keywords: Accident at work resulting in death – Right of recourse among social insurance institutions – Prerequisites

Core statement: A German employee died as a result of an accident at work in Denmark. The widow's claim to survivors' benefits in Denmark was rejected on the grounds that the employee was subject to the German social security system. As a result, Deutsche Rentenversicherung Nord (DRV) paid out and took over the widow's legal status. The DRV is now seeking recourse from the Danish social insurance institution. The Danish court therefore asks the CJEU whether a right of recourse under Article 85(1) of the Coordination Regulation presupposes that there is a legal basis for the type of damages or compensation in the Member State in which the damage occurred.

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11. Working Time

New pending case

Reference for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain) lodged on 9 February 2024 – C-110/24 – *Stas-IV*

Law: Art. 2 Working Time Directive 2003/88/EC

Keywords: Term "working time" – Journeys with a company vehicle between the base and the work site

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III. Proceedings before the ECtHR

Compiled and commented by Karsten Jessolat, DGB Rechtsschutz GmbH, Gewerkschaftliches Centrum für Revision und Europäisches Recht, Kassel

1. Ban on discrimination

Decision

Judgment (Third Section) of 19 March 2024 – No. 15284/19 – *B.T. v. Russland*

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

Keywords: Entitlement of a male police officer to parental leave – Discrimination on grounds of sex – Grounds for justification

Core statement: If the refusal of parental leave on the basis of a national regulation is justified by the special responsibility associated with the professional activity, this is not a justification for discrimination on grounds of sex.

Note: The case concerns the different treatment of female and male police officers in the granting of parental leave. The complainant was head of the road police in the Ministry of Internal Affairs of the *Digorskiy* district of the *Republic of North Ossetia-Alania*. His daughter was born on 26 May 2017. For health reasons, the child's mother was unable to care for the child, which was confirmed both medically and by a notary. The complainant therefore applied for parental leave for the period until his daughter reached the age of three. According to national regulations, male employees are only entitled to parental leave if there are objective reasons to believe that the child would grow up without parental care because its mother is unable to provide care. The complainant's employer rejected his application for parental leave on the grounds that persons who have to ensure the protection of public safety and order are not entitled to parental leave on the basis of a statutory order due to their special function. An appeal against the employer's decision was unsuccessful before the district court. The Supreme Court confirmed the opinion of the court of first instance.

The complainant claims that the refusal to grant him parental leave constitutes discrimination on grounds of sex under Article 14 ECHR in conjunction with Article 8 ECHR.

The Court first points out that the facts giving rise to the alleged violation occurred before the date (16 September 2022) on which the Russian Federation ceased to be a member of the Council of Europe. The Court therefore finds that it has jurisdiction to examine the complaint.[29]

With regard to the merits of the complaint, the Court refers to its previous case law.[30] According to this, state regulations on the granting of parental leave must be compatible with Article 14 ECHR. The Court finds men to be in a comparable situation with women as regards parental leave and parental leave allowance. Unlike maternity leave, which is exclusively intended to allow the woman to recover from the delivery, parental leave is

[29] ECtHR of 17 January 2023 – Nos. 40792/10, 30538/14 and 43439/14 – *Fedotova and Others v. Russia*; ECtHR of 6 June 2023 – No. 2134/23 – *Pivkina v. Russia*.

[30] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 6 July 2021 – No. 66180/09 – *Gruba and Others v. Russia*.

intended to allow both parents to personally take equal care of the child in the subsequent period. The Court emphasises once again that gender stereotypes according to which men are regarded as the main breadwinners and women as the main carers cannot justify a difference in treatment on grounds of sex in relation to the entitlement to parental leave. Even in so far as the national courts have refused to grant parental leave because of the special responsibility of police officers for security and order, this cannot justify unequal treatment on grounds of sex. The Court therefore, unanimously concluding that the applicant was discriminated against on grounds of sex, recognised a violation of Article 14 ECHR in conjunction with Article 8 ECHR. As the complainant did not apply for compensation, no such compensation was awarded.

New proceedings (notified to the respective government)

Nos. 25200/23 and 32160/23 – *Feki and L. O. v. France* (Fifth Section) – lodged on 20 July 2023 and 14 August 2023 – communicated on 19 February 2024

Law: Art. 14 ECHR (prohibition of discrimination); Art. 1 Protocol No. 1 (protection of property)

Keywords: Rejection of claim to unemployment benefit – Residence status "student"

Note: The complainants are a Tunisian and a Cameroonian national. At the time in question, they held temporary residence permits, on the basis of which they resided in France as students. They were also working part-time and their employment contracts expired in 2020 and 2017, respectively. The complainants subsequently registered as jobseekers and applied for the associated state benefits. The applications were rejected on the grounds that foreign nationals with the residence status of "student" were not entitled to claim state benefits as jobseekers. Appeals against this were unsuccessful in all instances.

The complaints allege a violation of the prohibition of discrimination, as they are excluded from state benefits because of their residence status as students, in contrast to other foreign claimants.[31]

No. 43200/22 – *Draženović v. Croatia* (Second Section) – lodged on 2 September 2022 – communicated on 26 January 2024

Law: Art. 1 Protocol No. 12 (general prohibition of discrimination)

Keywords: Extension of the fixed term of civil servant employment – Applicability of Directive 1999/70/EC

Note: The complainant was employed from 2003 as a civil servant at the Civil Court of the City of *Zagreb*. His civil servant status was repeatedly extended for a fixed term until its termination on 31 March 2016. According to the relevant Croatian labour law provisions, fixed-term employment relationships that are repeatedly extended within a period of three years are deemed to have been concluded for an indefinite term. The complainant is of the opinion that Directive 1999/70/EC (Fixed-Term Work Directive) also applies to civil servant employment, with the consequence that his employment cannot be terminated. The national courts have dismissed an action brought in this regard on the grounds that labour law provisions, including the Fixed-term Work Directive, do not apply to civil servant relationships unless this is expressly provided for by law.

[31] ECtHR of 16 September 196 – No. 17371/90 – *Gaygusuz v. Austria*; ECtHR of 30 September 2003 – No. 40892/98 – *Koua Poirrez v. France*; ECtHR of 27 November 2007 – *Luczak v. Poland*.

The complainant therefore claims to have been discriminated against in comparison to other employees on the basis of his civil servant status pursuant to Article 1 Protocol No. 12.

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2. Freedom of association

New proceedings (notified to the respective government)

No. 33144/21 - *Trade union of employees in social services v. Hungary* (First Section) - lodged on 9 June 2021 - communicated on 16 February 2024

Law: Art. 11 ECHR (freedom of assembly and association); Art. 13 ECHR (right to an effective remedy)

Keywords: Right to strike – Maintenance of essential services – Effective legal protection

Note: The complainant, the Trade Union of Social Services Employees (*Szociális Ágazatban Dolgozók Szakszerveztete*), in cooperation with the Trade Union of Hungarian Civil Servants and Public Employees (*Magyar Köztisztviselők, Közalkalmazottak és Közszolgálati Dolgozók Szakszervezete*), decided to organise a strike to enforce a series of measures to improve their working conditions. The strike action was to take place on individual days between February and December 2020. According to Hungarian law, a strike concerning employers providing essential services to the population may only be organised if an agreement has been reached with the employers on the maintenance of essential services during the strike or a court decision has been made on this. In December 2019, the complainant informed the government in which areas and to what extent services would be maintained during the strike action. The government rejected the offer, but the labour court granted the request and at the same time determined the minimum services to be maintained during the strike days. The court of appeal overturned this decision on the grounds that no strike could take place during the Covid-19 pandemic. The court of appeal overturned this decision and restored the first-instance decision. However, this final decision was only served on the parties after the time for which the strike action was planned, meaning that it could no longer be carried out.

The complainant claims that its right to strike under Article 11 ECHR was violated by the government's actions.[32] In addition, it alleges a violation of Article 13 ECHR, as the complainant was not given the opportunity to enforce its right to strike by means of interim legal protection before the strike measures were implemented.

No. 63624/19 – *Alfonsi and Others v. Italy* (First Section) – lodged on 2 December 2019 – communicated on 1 February 2024

Law: Art. 11 ECHR (freedom of assembly and association); Art. 14 ECHR (prohibition of discrimination)

Keywords: Disbandment of a police unit – Transfer to other administrations – Loss of trade union rights

Note: The complainants are former employees of a civilian police unit (*Corpo forestale dello Stato*) formed to protect agricultural and forestry properties. The unit was disbanded by law

[32] ECtHR of 8 April 2014 – No. 31045/10 – *National Union of Rail, Maritime and Transport Workers v. United Kingdom*.

and both its tasks and its employees were transferred to other state administrations with military status. Due to legal regulations, employees in military facilities are not authorised to join trade unions or exercise the right to strike.

The complainants therefore claim that the transfer to military facilities has led to restrictions on their right to freedom of association under Article 11 ECHR.[33] Furthermore, they allege a violation of Article 14 ECHR, as they are disadvantaged compared to other public servants.

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3. Freedom of expression

Decision

Judgment (Fourth Section) of 20 February 2024 – No. 16915/21 – *Danileț v. Romania*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Publication of messages on Facebook – Disciplinary measure against judges – Lack of balancing of interests

Core statement: The complainant was a judge at the Cluj Regional Court at the time in question. He was nationally known for his participation in debates on topics such as democracy, the rule of law and the judiciary. In January 2019, he published two messages on his Facebook page in which he drew attention to threats to democracy and criticised the judiciary for not doing enough to counter these efforts. As a result, disciplinary proceedings were initiated against him, alleging that he had damaged the reputation of the judiciary. The disciplinary chamber of the Supreme Judicial Council (CSM) ordered the complainant's salary to be reduced by 5% for a period of two months as a disciplinary measure. The decision was based on the grounds that the complainant had questioned the impartiality and independence of the judiciary with his statement, which contradicted the requirement of restraint to which judges are bound. The complainant appealed against this decision. The Supreme Court upheld the decision of the disciplinary chamber.

The complainant alleges a violation of Article 10 ECHR and is of the opinion that the disciplinary measure imposed on him constitutes a disproportionate interference with the exercise of his right to freedom of expression.

It is undisputed between the parties that the disciplinary measure has a domestic legal basis, according to which damage to the reputation of the judiciary can constitute a disciplinary offence. The resulting interference with the complainant's right to freedom of expression, which is intended to guarantee the authority and impartiality of the judiciary, can be regarded as a legitimate aim within the meaning of the ECHR.[34] When considering the necessity of the interference in a democratic society, the national authorities and courts must weigh the interests concerned, taking into account Article 10 ECHR and the case law of the Court of Justice on this subject. Accordingly, freedom of expression is one of the essential foundations of a democratic society, which applies not only to information and ideas that are regarded as positive, but also to those that offend, shock or disturb. This constitutes the essence of pluralism, tolerance and the spirit of openness without which a democratic society cannot exist. National authorities and courts may restrict freedom of expression if the circumstances of the individual case justify it.[35] In a democratic society, issues relating to the

[33] ECtHR of 17 December 2023 – Nos. 59433/18, 59477/18, 59481/18 and 59494/18 – *Humpert and Others v. Germany*.
[34] ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Türkiye*.
[35] ECtHR of 23 June 2016 – No. 20621/12 – *Baka v. Hungary*; ECtHR of 14 February 2023 No. 21884/18 – *Halet v. Luxembourg*.

administration of justice are in the public interest and enjoy a high level of protection under Article 10 ECHR. The mere fact that a political debate concerns the judiciary is not sufficient to prevent judges from commenting on this issue.[36] However, judges and public prosecutors are subject to a certain degree of restraint in view of the special role of the judiciary in society and in particular in matters relating to the authority and impartiality of the judiciary. The restraint required of them is not lacking simply because information is disseminated via the internet, a medium in which it can be accessed millions of times in a short space of time.[37] Measured against these principles, the Court concludes in the present case that the criticism expressed by the complainant, even if it lacked linguistic restraint, did not have any obviously unlawful, defamatory, hateful or violent content. Neither the disciplinary chamber of the CSM nor the Court of Appeal weighed the conflicting interests or took into account the criteria established by the Court of Justice. As a result, they did not attach the necessary importance to the complainant's freedom of expression. The Court found a violation of Article 10 ECHR by four votes to three, without awarding compensation to the complainant. However, the defendant government was ordered to pay the costs and expenses incurred by the complainant.

In a concurring separate opinion, Judge *Răduleţu* shares the Court's legal opinion. However, he criticises the fact that current case law does not contain any general rules on the duty of judges and public prosecutors to exercise their right to freedom of expression.

Judges *Kucsko-Stadlmayer, Bormann* and *Eicke,* in a dissenting opinion, reject the Court's interpretation of the law. On the contrary, they are of the opinion that the manner in which the complainant expressed his criticism did not correspond to the restraint required of him as a judge. Even if the national authorities had had the possibility of imposing a more lenient disciplinary measure, the reduction of the complainant's salary by 5% for two months could not be considered disproportionate.

Judgment (Second Section) of 20 February 2024 – No. 48340/20 – *Dede v. Türkiye*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Termination of employment – Criticism of employer's business practices – Sending an e-mail to the company's employees

Core statement: Even if employees are obliged to be loyal to their employer in accordance with the principle of good faith applicable in the employment relationship, this does not restrict their right to freedom of expression.

Note: The complainant was employed by a financial services company from 2010. In December 2016, he sent an email to employees in the HR department via his work email account in which he criticised his employer's business practices, sometimes using sarcastic language. The employer then terminated the employment relationship with immediate effect for good cause. In response to the action for unfair dismissal brought against it, the labour court found that the termination of the employment relationship was not justified. The judgment was overturned on appeal by the employer. The appellate court took the view that the complainant's behaviour had disturbed the peace at the workplace and the content of the email exceeded the limits of permissible criticism of the employer. Even if only the business practices were criticised, the complainant had disturbed the peace with his formulations, though not containing any insults or threats, and this entitled the employer to terminate the

[36] ECtHR of 23 April 2015 – No. 29369/10 – *Morice v. France*; ECtHR of 28799 – No. 28369/95 – *Wille v. Liechtenstein*.
[37] ECtHR of 23 June 2020 – No. 10795/14 – *Vladimir Kharitonov v. Russia*; ECtHR of 15 June 2021 – No. 3576/19 – *Melike v. Türkiye*; ECtHR of 16 June 2015 – No. 64569/09 – *Delfi AS v. Estonia*; ECtHR of 8 November 2016 – No. 18030/11 – *Magyar Helsinki Bizottság v. Hungary*.

employment relationship. A constitutional complaint lodged against this decision was rejected as inadmissible.

The complaint argues that the termination of the employment relationship constitutes a violation of the right to freedom of expression within the meaning of Article 10 ECHR.

According to the case law of the Court of Justice, Article 10 ECHR extends not only to employment relationships under public law, but also to employment relationships governed by private law.[38] This follows from the fact that the state also has a positive obligation to take protective measures to ensure freedom of expression.[39] When domestic courts assess dismissals by employers that may constitute an interference with the right to freedom of expression, they must observe Article 10 ECHR and the case law of the Court of Justice in this regard. In particular, they must take into account a fair balance between the conflicting interests, although they do have a margin of discretion. In the present case, the e-mail at issue was distributed exclusively within the employer's business operations and did not reach a wider public. Even if the criticism of the employer's business practices was possibly provocative, it was not offensive and therefore did not exceed the limits of permissible criticism. The Court's assessment concludes that the national courts did not take into account all the facts and considerations relevant to the assessment of the case. Therefore, they did not convincingly show that the interference with the complainant's right to freedom of expression, which was linked to the termination of the employment relationship, was objectively justified. The Court unanimously recognised a violation of Article 10 ECHR and awarded the complainant compensation in the amount of € 2,600 plus reimbursement of costs and expenses associated with the proceedings.

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4. Individual complaint

Decision

Judgment (Fourth Section) of 05 March 2024 – No. 37364/10 – *Boškoćević v. Serbia*

Law: Art. 34 ECHR (individual applications)

Keywords: Threat of dismissal – Obstruction of the exercise of the right of appeal

Core statement: For the effective operation of the system of individual petition, it is of utmost importance that potential complainants be able to communicate freely with the Court without being subjected to any form of pressure by state authorities to withdraw their complaints.

Note: The complainant was, until his retirement in 2017, employed by a public corporation, the *Šar* Mountains National Park (*Javno preduzeće "Nacionalni park Šar planina"*). The assets of the corporation are owned by the state. The government is authorised to appoint and dismiss the managing directors as well as the members of management and the supervisory board. In 2005, the complainant sued his employer and the Serbian Ministry of Science and Environmental Protection jointly and severally for payment of remuneration claims that were based on a ministerial decree but were no longer paid due to its amendment. In a judgment dated 21 November 2007, the competent municipal court ordered

[38] ECtHR of 21 July 2011 – No. 28274/08 – *Heinisch v. Germany*; ECtHR of 15 June 2021 – No. 35786/19 – *Melike v. Türkiye*.

[39] ECtHR of 12 September 2011 – Nos. 28955/06, 28957/06, 28959/06 and 28964/06 – *Palomo Sánchez and Others v. Spain*.

both the employer and the ministry to pay the claims asserted as well as claims arising in the future. In response to the appeal lodged against this, the district court partially overturned the decision and found that only the employer, but not the ministry, was obliged to pay the claims. The title could not be enforced, in particular because the employer's accounts were blocked. The complainant was invited to sign an agreement according to which the claims would be settled if he withdrew the application for enforcement. After this agreement was signed by the parties, the complainant withdrew his application for enforcement, whereupon the enforcement proceedings were discontinued. Nevertheless, he complained to the employer's management and claimed that he had been forced to sign the agreement. A constitutional complaint lodged against the agreement was rejected on the grounds that the agreement was a contract under private law, which cannot be the subject of a constitutional complaint.

The complainant lodged a complaint with the Court for violation of Article 6 ECHR on the grounds that the district court's decision was not enforced, pointing out in particular that he had signed the agreement that led to the termination of the enforcement proceedings against his will.

About a month after the complainant submitted the application to the Court of Justice, he was informed by the employer's managing director that he might reveal official secrets with this complaint and thus violate his duties under employment law. He was therefore warned that he could expect to be dismissed from his job if he continued the proceedings.

For this reason, the complainant also alleged a violation of Article 34 ECHR, as the defendant government had obstructed him in the exercise of his right to lodge a complaint with the Court.

Insofar as the complaint is based on Article 6 ECHR, the Court finds that, since the complainant did not bring an action against the agreement on non-enforcement of the judgment, he did not exhaust legal remedies, so that the requirements of Article 35(1) ECHR were not met in this respect.

Insofar as the complaint is based on a violation of Article 34 ECHR, the Court first of all notes that the complainant's employer is a public corporation under state administration. The employer must therefore be regarded as a state organisation[40] for whose actions the defendant government is responsible. With regard to the merits of the complaint, the Court first states that it is of the utmost importance for the effective operation of the system of individual petition that complainants be able communicate freely with the Court without being put under pressure.[41] The term "pressure" includes not only direct coercion, but also any other unauthorised indirect action that is likely to dissuade applicants from lodging a petition, which must be assessed in the light of the circumstances of the individual case.[42] If the complainant has been threatened with dismissal from his employment if he submits certain documents to the Court, he has been put under pressure and thus hindered in exercising his right of application. The Court therefore unanimously found a violation of Article 34 ECHR. In the absence of an application for compensation, the complainant was not awarded such compensation.

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[40] ECtHR of 16 October 2018 – Nos. 57691/09 and 19719/10 – *KP Vodovod Kraljevo v. Serbia*; ECtHR of 18 November 2020 – No. 54155/16 – *Slovenia v. Croatia*.
[41] ECtHR of 27 March 2008 – No. 44009/05 – *Shtukaturov v. Russia.*
[42] ECtHR of 8 July 1999 – No. 23763/94 – *Tanrıkulu v. Turkey*.

5. Procedural law

Decisions

Judgment (Second Section) of 26 March 2024 – No. 54699/14 – *Kartal v. Türkiye*

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

Keywords: Premature termination of the term of office of the Vice-President of the Judicial Council – Lack of possibility of judicial review – Violation of the rule of law

Core statement: A national provision that excludes access to a court is only compatible with Article 6 ECHR in individual cases if it complies with the principle of the rule of law which is expressly mentioned in the preamble to the ECHR and is inherent in its individual articles.

Note: The complainant was a judge and, in this capacity, Vice-President of the Inspection Board of the High Council of Judges and Prosecutors (HSK). An amendment to the law of 15 February 2014 adopted by the parliament to make the functioning of the judiciary more effective resulted, inter alia, in the termination of the complainant's term of office as Vice-President of the HSK when the law entered into force on 27 February 2014. The complainant was appointed public prosecutor with a court of appeal on 6 March 2014.

The law of 15 February 2014 was declared unconstitutional by the Constitutional Court in its ruling of 10 April 2014 with effect from 14 August 2014. As decisions of the Constitutional Court cannot be applied retroactively under the Turkish constitution, the complainant was not reappointed to the office of Vice President of the HSK after the Constitutional Court's decision was announced. A constitutional complaint lodged against this was rejected as inadmissible.

In August 2016, the complainant was dismissed from his job as part of the measures imposed during the state of emergency following the attempted coup against the Turkish government on 15 July 2016. In October 2017, he was sentenced to several years in prison for membership in a terrorist organisation that was allegedly involved in the coup attempt.

The complainant alleges a violation of Article 6 ECHR. He claims that he was denied access to a court due to the lack of opportunity to challenge the legally ordered termination of his office as Vice-President of the HSK.

The Court first points out that the applicability of the civil law part of Article 6 ECHR to disputes between civil servants and the state is governed by the so-called *Eskelinen* test. According to this test, labour law disputes of civil servants are civil law disputes unless access to a court is expressly excluded for these civil servants under national law and the exclusion is justified by objective reasons that must be in the state interest. These conditions are cumulative, so that it is sufficient for one of the conditions to be found fulfilled.[43] Applying these principles and in the light of its recent case law,[44] the Court does not consider it necessary in the present case to rule on whether the first condition of the *Eskelinen* test is met. As regards the second condition, namely whether the exclusion of the complainant from access to a court was justified on objective grounds of public interest, the Court points to the special role of the judiciary as guarantor of the law and the fundamental values associated with it in a state governed by the rule of law. Due to the special trust that judges enjoy among the public,[45] the judiciary has a prominent position among the state institutions in a

[43] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

[44] ECtHR of 20 June 2023 – No. 24492/21 – *Oktay Alkan v. Türkiye*.

[45] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

democratic society. Special attention must therefore be paid to protecting members of the judiciary from threats to their independence and autonomy.[46] Measured against this, the interests of the rule of law are impaired if the complainant is denied access to a court in order to have the legality of the measure imposed on him reviewed, so that Article 6 ECHR is applicable in the present case.

In substantive terms, the Court considers the complainant's right of access to a court to have been violated. Even if this case only concerns the termination of the office of the Vice-President of the HSK and the complainant could continue to act as a judge, the law reform interfered with the independence of the judiciary, which was then also criticised by the Constitutional Court. The fact that this decision could not have retroactive effect prevented the complainant from challenging the termination of his office. As there was no justification for this restriction of the right of access to a court, the Court unanimously found a violation of Article 6 ECHR and ordered the defendant government to pay compensation of €7,000 plus the costs and expenses incurred by the complainant in the proceedings.

In a concurring separate opinion, Judge *Koskelo* shares the view of the Court of Justice, while pointing to legal uncertainty created by the judgments of the Court of Justice in the wake of the *Eskelinen* decision. Specifically, with regard to the right of access to a court, he finds that questions of admissibility and merits have become conflated in a rather unusual way, although in principle these are to be assessed separately. In this respect, *Koskelo* stresses that the future case law of the Court of Justice should provide a greater degree of clarity.

Judgment (Second Section) of 19 March 2024 – No. 84388/17 – *Kural v. Türkiye*

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

Keywords: Transfer of a police officer – Non-compliance with a stay-of-execution decision by state authorities

Core statement: A defect in the proceedings for interim relief cannot be remedied in the main proceedings, as any damage suffered as a result of this defect has become irreversible and cannot be made good.

Note: The complainant, a deputy chief of police, was transferred to the post of lecturer at the police academy in February 2014 due to "service requirements" while retaining his rank and grade. He lodged an appeal against this measure and at the same time applied for a stay of execution regarding enforcement of the decision. The administrative court stayed the execution of the transfer order pending the final decision in the main proceedings. An appeal against the stay was rejected in May 2014. Irrespective of this, the employer implemented the original decision and transferred the complainant to the police academy. In November 2014, the administrative court overturned the transfer decision on the grounds that the employer had exercised its discretion incorrectly. Following the employer's appeal, the Supreme Administrative Court overturned this judgment and dismissed the complaint. An appeal to the Constitutional Court was unsuccessful.

The complainant is of the opinion that the national authorities did not comply with the decision to stay the execution of the transfer decision, in particular taking into account the first-instance decision of the administrative court, which upheld the complaint, thereby violating Article 6 ECHR.

The Court first states that Article 6 ECHR is in any case applicable to proceedings for interim relief if the main proceedings are of a civil nature and an interim measure can be effectively

[46] ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*; ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Türkiye*; ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.

considered in order to provisionally settle the disputed right.[47] Accordingly, Article 6 ECHR is applicable to the present case, so that the appeal is admissible. As regards its merits, the Court points out that the right to a judicial procedure protected by Article 6 ECHR would be futile if, under the domestic legal order, a final court decision did not have to be enforced. The enforcement of a court judgment is an integral part of a fair trial within the meaning of Article 6 ECHR.[48] Otherwise, the content of this provision would be deprived of its practical effectiveness.[49] Accordingly, the domestic authorities were obliged to comply with the decision to suspend the enforcement of the contested transfer and were not allowed to distinguish between the decisions in the main proceedings and those in the interim relief proceedings with regard to their binding nature. The defect resulting from the failure to implement the decision on the suspension of provisional enforcement is not remedied by the fact that the complainant's transfer was confirmed by the court in the main proceedings with final effect. In any case, he should have continued to be employed in his original position in implementation of the first-instance decision at least until was set aside by the appeal judgment. Any damage suffered by the appellant in the meantime as a result of the transfer may have become irreversible and irreparable. The Court therefore unanimously found a violation of Article 6 ECHR. The complainant was awarded compensation in the amount of €1,950 plus the costs and expenses incurred in the proceedings.

(In)admissibility

Decision (Third Section) of 30 January 2024 – No. 28003/15 – *Vanchev v. Bulgaria*

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

Keywords: Transfer of a public prosecutor – Judicial review – Applicability of Art. 6 ECHR

Core statement: A court decision on a transfer or secondment of civil servants does not constitute a civil law claim within the meaning of Article 6 ECHR.

Note: The complainant, who had held the office of public prosecutor since 1994, was appointed administrative director of a district public prosecutor's office in 2004. In 2011 and 2013, several disciplinary proceedings were initiated against the complainant for various breaches of official duty. The last disciplinary measure imposed on him, with which he was to be dismissed from the service, was set aside by the Supreme Court. Immediately after the court decision, the complainant was transferred from the post of administrative director to the post of public prosecutor at another public prosecutor's office. A complaint lodged against this was rejected as inadmissible on the grounds that the transfer was not an administrative act but an internal order. Appeals lodged against this were unsuccessful.

With his complaint, the applicant alleges a violation of Article 6 ECHR, as he was denied access to a court.

The Court points out that a prerequisite for the applicability of Article 6 ECHR is a legal dispute concerning a legal claim, the recognition of which can at least be considered justifiable under domestic law. It does not matter whether this right is protected by the ECHR. The legal dispute must concern both the existence of a right and the scope and manner of its exercise. The outcome of the legal dispute must have a direct impact on the right in question. The national provisions and their interpretation by the national courts must be used to decide

[47] ECtHR of 15 October 2009 – No. 17056/06 – *Micallef v. Malta*; ECtHR of 20 September 2022 – No. 51470/15 – *Mehmet Taner Şentürk v. Türkiye*.

[48] ECHR of 19 March 1997 – No. 18357/91 – *Hornsby v. Greece*; ECtHR of 11 January 2018 – No. 10613/16 – *Sharxhi and Others v. Albania*.

[49] ECtHR of 13 March 2018 – No. 67957/12 – *C. M. v. Belgium*.

whether the asserted claim is justified under national law.[50] With regard to employment relationships, it must be taken into account that, insofar as the assignment to a particular job is dependent on the discretion of the employer, this is not necessarily relevant to ensuring the livelihood of the persons concerned or their working conditions. Therefore, these circumstances do not constitute a material alteration of the employment contract for which national law provides protection against abuse.[51] In the present case, the Court therefore concludes that the transfer at issue did not have far-reaching consequences for the complainant's employment relationship. The contested measure cannot therefore be the subject of civil law claims within the meaning of Article 6 ECHR. The complaint was rejected as inadmissible pursuant to Article 35(3) lit. a ECHR and Article 35(4) ECHR.

New proceedings (notified to the respective government)

No. 10152/21 and 60273/21 – *Milošević v. Serbia (Fourth Section)* – lodged on 10 February 2021 und 24 November 2021 – communicated on 7 March 2024

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

Keywords: Application for postponement for health reasons – Judgment by default – Different treatment of similar facts

Core statement: The complainant had asserted claims for damages against his employer in six different proceedings. After he was summoned to the hearing, he applied to have the hearing postponed for health reasons. The court did not consider the request for postponement and issued default judgments against the complainant. In four of the proceedings, the court of appeal set aside the default judgments due to the violation of the right to a fair trial and ruled in favour of the complainant. In the other two proceedings, the first instance judgments were confirmed.

The complainant alleges a violation of Article 6 ECHR on the grounds that identical facts were obviously decided differently and that the confirmation of the default judgments in the appeal instance was arbitrary. The Court will examine the question of whether the principle of legal certainty was observed by the domestic courts.[52]

No. 50519/21 – *Kalinova v. Bulgaria* (Third Section) – lodged on 30 September 2021 – communicated on 15 February 2024

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

Keywords: Termination of employment – Revocation of a security clearance – Sufficient judicial review

Note: The complainant was employed by the state intelligence service as a legal adviser. She had a security clearance for access to classified information. Her security clearance was revoked in 2020 due to allegations that she had disclosed classified documents to unauthorised persons. The complainant unsuccessfully challenged the decision before the Supreme Administrative Court. As the security clearance was a prerequisite for carrying out her duties, the complainant's employment was terminated in June 2021.

[50] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*; ECtHR of 19 September 2023 – No. 39247/14 – *Davchev v. Bulgaria*.
[51] ECtHR of 19 September 2017 – No. 35289/11 – *Regner v. Czech Republic*.
[52] ECtHR of 29 November 2016 – No. In 6943/11 – *Lupeni Greek Catholic Parish and Others v. Romania*; ECtHR of 18 July 2013 – No. 29784/07 – *Stoilkovska v. The Former Yugoslav Republic of Macedonia*.

The complainant is of the opinion that her case was not sufficiently examined by the domestic authorities and courts and that she was therefore deprived of the possibility of sufficient judicial review with regard to Article 6 ECHR.[53]

No. 40283/19 – *Azevedo da Silva Barbosa v. Portugal (Fourth Section)* – lodged on 19 July 2019 – communicated on 10 January 2024

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

Keywords: Professional appraisal – Effects on professional development – Applicability of Art. 6 ECHR

Note: The complainant is a judge and was evaluated by the High Council of the Judiciary (CSM), whereby her performance was assessed as "good". This meant a downgrading from her previous evaluation and resulted in her transfer to a lower court. A complaint against the assessment before a judicial inspection of the Supreme Court was unsuccessful. The complainant alleges a violation of Article 6 ECHR, as this judicial inspection is not an independent and impartial tribunal within the meaning of this provision.

In particular, the Court of Justice will have to assess the question of whether internal proceedings relating to professional appraisals concern civil law claims and whether Article 6 ECHR is therefore applicable to the present case.[54]

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6. Protection of privacy

Decisions

Judgment (Fourth Section) of 20 February 2024 – No. 53162/21 – *Diaconeasa v. Romania*

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

Keywords: Withdrawal of personal assistance from a severely disabled person – Failure to establish the severity of the disability – Balancing of interests

Core statement: The protection of persons with disabilities is based on a complex and individualised assessment, which relies not only on medical findings relating to the health of those affected, but also on their individual living conditions.

Note: The complainant suffered a stroke in 2013, as a result of which she was unable to move or speak and was therefore dependent on constant assistance. In 2015 and 2016, she was twice granted personal assistance for a period of one year by the Commission for the Assessment of Adults with Disabilities. In 2017 and 2019, the complainant's state of health was reassessed and the result was that it had improved. The Commission therefore certified that personal assistance was no longer necessary. The complainant brought an action against this with the aim of ordering the Commission to continue to recognise her claim to personal assistance. The regional court ruled in favour of the complainant, stating that her state of health had not improved since 2016 and that she was still unable to care for herself.

[53] ECtHR of 21 July 2016 – No. 57148/08 – *Miryana Petrova v. Bulgaria*; ECtHR of 16 April 2013 – No. 40908/05 – *Fazliyski v. Bulgaria*; ECtHR of 19 July 2018 – No. 43503/08 – *Aleksandar Sabev v. Bulgaria*.

[54] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 9 October 2012 – No. 12628/09 – *Dzhidzheva-Trendafilova v. Bulgaria*.

The appeal lodged by the Commission led to the regional court's decision being overturned. The court of appeal took the view that, according to the medical documents submitted, the complainant was not completely incapable of caring for herself.

The complainant claimed that the denial of personal assistance disproportionately impaired her right to respect for her private life and therefore violated Article 8 ECHR.

In view of the basic principles established in its case law,[55] the Court assumes that Article 8 ECHR applies to the facts of the present case. Even if Article 8 ECHR is primarily concerned with the protection of individuals from arbitrary interference by state authority, in addition to this negative obligation, there may also be a positive obligation to take measures to ensure respect for private life, including in the area of relations between individuals.[56] Even if the state is granted a wide margin of appreciation in this respect,[57] in the event of interference in the private lives of particularly vulnerable groups in society, including people with disabilities or elderly people in need of care, there must be weighty reasons for the restrictions in question.[58] In the present case, the Court points out that it is not authorised to substitute its own views for those of the national authorities and to interpret and apply national law. However, the domestic courts have the task of interpreting domestic law in accordance with the ECHR. In this light, the Court concludes, taking into account the circumstances of the individual case, that the state authorities exercised their discretion incorrectly in determining the applicant's disability and her need for personal assistance. In particular, they failed to strike an appropriate balance between the competing public and private interests. The Court therefore unanimously found a violation of Article 8 ECHR and ordered the defendant government to pay the applicant compensation in the amount of €7,500.

(See also the comment by *Welti* in the German version of this Report, p. 11 et seq.)

New proceedings (notified to the respective government)

No. 54738/13 *Kozak and others v. Ukraine (Fifth Section)* – lodged on 15 August 2013 – communicated on 16 January 2024

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

Keywords: Dismissal from judicial service – Breach of judicial duties

Note: The three complainants are former judges on national courts who were dismissed from their positions as judges in disciplinary proceedings in 2013 and 2016 due to allegations of having broken an oath. Their dismissals were effected by decisions of the High Judicial Council and confirmed by the parliament or the president. Appeals against these decisions before the domestic courts were unsuccessful. The complainants claim that their dismissals were not reviewed by an independent and impartial tribunal, in violation of Article 6 ECHR. They also allege a violation of Article 8 ECHR, as dismissal from judicial service for breach of oath is not provided for by law.[59]

[55] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[56] ECtHR of 10 April 2007 – No. 6339/05 – *Evans v. United Kingdom*; ECtHR of 8 February 2022 – No. 62250/19 – *Jivan v. Romania*.
[57] ECtHR of 20 May 2014 – No. 4142/12 – *McDonald v. United Kingdom*.
[58] ECtHR of 8 February 2022 – No. 62250/19 – *Jivan v. Romania*.
[59] ECtHR of 9 September 2013 – No. 21722/11 – *Oleksandr Volkov v Ukraine*; ECtHR of 19/01/2017 – No. 5114/09 – *Kulykov and others v. Ukraine*.

No. 55602/21 – *Nedelkova v. North Macedonia (Second Section)* – lodged on 5 November 2021 – communicated on 7 February 2024

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

Keywords: Dismissal from judicial service – Proportionality of the measure – Impartiality of the court

Note: The complainant was President of the Supreme Court. She was dismissed from her position as a judge due to various breaches of duty (unauthorised absence from work for one day, taking unauthorised leave, refusal to work). The competent senate of the Supreme Court, which had to decide on the dismissal of the complainant, confirmed the employer's decision.

The complainant contests the independence of the competent senate of the Supreme Court within the meaning of Article 6 ECHR and considers her dismissal to be politically motivated.[60] She is also of the opinion that the measure was disproportionate and that the dismissal violated her right to respect for private life within the meaning of Article 8 ECHR.[61]

No. 4656/19 – *Correia Cartageno v. Portugal (Fourth Section)* – lodged on 11 January 2019 – communicated on 10 January 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 police service – Disciplinary proceedings due to criminal proceedings – Consequences of dismissal for private life

Note: The complainant was a police officer with the Republican National Guard (GNR) at the relevant time. During a traffic stop, he arrested a Brazilian national who was unable to provide proof of a residence permit. He released the arrested person without making a record of the incident or informing the immigration authorities. As a result, both a criminal investigation and disciplinary proceedings were initiated against the complainant. The criminal court sentenced him to a fine. He was not banned from carrying out official duties. As part of the disciplinary proceedings, the complainant was given early retirement on the basis of the criminal judgment. The appeals lodged against this were unsuccessful.

The complaint alleges a violation of both Article 6 ECHR and Article 8 ECHR. The questions raised are whether the complainant's right to be heard has been respected and whether the measure was proportionate.[62]

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7. Social security

New proceedings (notified to the respective government)

No. 38437/22 – *Puljić v. Croatia (Second Section)* – lodged on 3 August 2022 – communicated 9 January 2024

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

[60] ECtHR of 6 November 2018 – Nos. 55391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*.
[61] ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*.
[62] ECtHR of 12 February 2004 – No. 47287/99 – *Perez v. France*; ECtHR of 29 November 2016 – No. 24221/13 – *Carmel Saliba v. Malta*.

Keywords: Discontinuation of a survivor's pension – New findings on the existence of the requirements

Note: The complainant had been receiving a survivor's pension since 1997 as the widow of a Croatian war veteran who died in combat. The social insurance institution subsequently established that the complainant's husband was not a member of the Croatian armed forces and that he had neither taken part in the war nor been killed in action. Based on these findings, the complainant's survivor's pension was discontinued by decision dated 24 October 2016, as the necessary requirements were no longer met. The complaints lodged against this and a constitutional complaint were dismissed.

The applicant claims that the decision to deny her the continued payment of her survivor's pension is disproportionate and therefore constitutes a violation of Article 1 Protocol No. 1.[63]

No. 52147/21 – *Militaru v. Romania (Fourth Section)* – lodged on 7 October 2021 – communicated on 15 February 2024

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

Keywords: Amount of maternity benefit – Consideration of a retroactive salary increase

Note: The complainant was working as a judge at the relevant time and received maternity allowance in the period from 22 August 2016 to 22 May 2018. This is calculated on the basis of the average salary of the last twelve months before the birth of the child. Due to a court decision on the correct classification of the complainant, which became legally binding on 15 November 2017, her salary was increased retroactively from 9 April 2015. This increase was not taken into account when calculating the maternity allowance. In response to the complainant's complaint, the competent district court ordered the Ministry of Justice to pay the asserted differences in salary. On appeal, the judgment was overturned and the claim dismissed.

The complainant claims, with reference to Article 6 ECHR and Article 13 ECHR, that the legally binding decision determining the remuneration to which she is entitled, which is also the basis for the calculation of maternity pay, has not been fully implemented.[64] In addition, the failure to increase maternity pay interfered with the property protected by Article 1 Protocol No. 1. She also claims to be disadvantaged compared to other employees who have received the increased maternity pay.

No. 7421/17 - *Trade Union of the Chernobyl Nuclear Power Plant v. Ukraine (Fifth Section)* – lodged on 21 December 2016 – communicated on 8 January 2024

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

Keywords: Compensation of pension benefits – Obligation of a trade union – Lack of legal basis

Note: On the basis of a court decision, which was upheld by the Supreme Administrative Court, the trade union of the Chernobyl nuclear power plant was obliged to reimburse the State Pension Fund for the costs of granting early retirement pensions to five employees of this trade union. The domestic courts argued that the trade union's obligation arose from a

[63] ECtHR of 15 September 2009 – No. 10373/05 – *Moskal v. Poland*; ECtHR of 26 April 2018 – No. 48921/13 – *Čakarević v. Croatia*; ECtHR of 12 December 2019 – No. 32141/10 – *Romeva v. North Macedonia*.

[64] ECtHR of 28 June 2005 – No. 53037/99 – *Virgil Ionescu v. Romania*; ECtHR of 2 March 2010 – No. 26732/03 – *Antică and "R" v. Romania*.

transitional provision of the State Pension Act, according to which employees working in hazardous environments are entitled to early retirement pensions from their employers. As the state pension fund provided these benefits, the union as employer was obliged to reimburse the costs. The trade union took the opposing view that it was not obliged to reimburse the costs due to the transitional provisions, but that the law applicable before these provisions came into force should continue to apply.

The union claims a violation of Article 1 Protocol No. 1 and argues in particular that the transitional provisions of the State Pension Act were not clear and foreseeable.

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