

# Vicissitudes of the social case law of the Court of Justice in times of recession

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## Introduction

The economic downturn and its attendant restrictions in the field of social rights form the background against which present and past European social policy has to be re-situated, policy now devoid of ambition and inactive on the legislative front. The effects austerity policies are having on employment, poverty, the growth of informal working, inequality and social harmony are however well and truly visible (Robin-Olivier, 2012a). Employment law has not been spared, hit hard by the measures which public authorities and national legislatures have taken since 2008 aimed at increasing flexibility for undertakings. The employment law reforms currently taking place in many Member States are indeed justified using the argument that increasing labour market flexibility is a key measure in finding a way out of recession (Clauwaert and Schömann, 2012).

In response to the economic downturn, the European Commission has proposed an approach focusing on employment and aiming to release Europe from the austerity 'trap'<sup>1</sup>. The 'Employment Package' sets out to identify the most effective tools and methods for a job-rich recovery. It proposes no draft legislation enhancing workers' rights, with developments in employment law coming in the part of the report given over to the reform of the labour markets. Those developments take the

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1. L. Andor, European Commissioner responsible for employment, social affairs and inclusion, The key challenges of the crisis, National Union of General and Municipal Workers (GMB), Unite and Unison, Conference on the topic: Sorting out the crises: what's the EU got to do with it?, Manchester, 3 May 2012 (<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/321&format=HTML&aged=0&language=EN&guiLanguage=en>).

form of strategies, draft recommendations, action plans, surveys and exchanges of good practice (European Commission, 2012a). Launched in October 2012, the Commission's 2013 work programme proved equally disappointing in terms of actions to take place in the field of social policy. In relation to employment, the Commission will continue to work actively with the Member States and social partners, in particular on the basis of the Youth Guarantee and traineeship initiatives to be set out in the course of the autumn. Public services should be strengthened, as a means of supporting employment, according to the Commission, which also seeks to foster social inclusion by preparing the new generation of programmes under the European Social Fund (European Commission, 2012b). According to the European trade union movement, this programme is a serious threat to social dialogue at both interprofessional and sectoral level. The Commission in fact refused to include in its programme proposals for directives to incorporate three sectoral framework agreements (on health and safety in the hairdressing sector, on working conditions in sea fisheries and on working time in the inland waterways sector). Excluding those proposals endangers the future of interprofessional social dialogue, in particular in the context of revising the working time Directive<sup>2</sup>.

The sombre picture presented by the International Labour Organization (ILO) in its 2012 annual report on work throughout the world likewise reflects the risks which austerity brings, as observed within the EU. The report, optimistically entitled *Better Jobs for a Better Economy*, is extremely pessimistic about the future of jobs and working conditions worldwide. In respect of the EU, the international experts highlight a high level of unemployment, the high proportion of insecure employment and an increase in informal employment (ILO, 2012). These are considerations to be borne in mind as one sets out to examine the directions the Court's reasoning has taken in assessing the economic arguments raised before it to support any given interpretation of the instruments governing European social law.

The social case law of the Court of Justice has developed around a number of predominant themes. The issues raised and the responses to

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2. ETUI, News Bulletin – worker-participation.eu, Issue 3/2012, November 2012.

them reflect the strengths and weaknesses of the European social model (Robin-Olivier, 2012a). Those issues relate in particular to the increasingly fragmented category of the workers who benefit from the safeguards under European social law, the regulation of working time, equal treatment and non-discrimination. In what follows we will therefore look at a number of judgments delivered in 2012 on the misuse of successive fixed-term contracts, the definition of 'worker', issues surrounding the right to paid annual leave, allowances in lieu of leave not taken, how paid and other kinds of leave interact, age-related discrimination and the thorny question of proof in cases of discrimination at the time of recruitment.

## **1. Abuse of successive fixed-term contracts: the *Kücük and Huet* cases**

Clause 5(1)(a) of the framework agreement on fixed-term work annexed to Council Directive 1999/70/EC on fixed-term work (Council of the European Union, 1999) seeks to prevent abuse through the successive use of more than one fixed-term contract<sup>3</sup>. Member States can choose to adopt one or more of the measures amongst the protections laid down by the framework agreement, intended to regulate the grounds for renewing contracts, to limit the number of renewals or successive contracts, or to limit the total duration of the employment relationship under fixed-term contracts. The *Kücük and Huet* cases gave the Court an opportunity to look at that clause, and we will see that its reasoning gives grounds to be surprised, if not disappointed.

Germany chose to monitor the objective reason justifying successive contracts. The need to replace an absent employee, in the event of maternity or parental leave, for example, is regarded as a legitimate case of a contract being renewed or of successive contracts. Ms *Kücük*<sup>4</sup>,

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3. '1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships'.

4. Case C-586/10, *Kücük*, 26 January 2012, not yet published in the Court Reports.

employed by the Land Nordrhein-Westfalen, worked as a clerk in a Cologne court from 1996 to 2007 under 13 successive fixed-term contracts each based on the need to provide cover for absent employees, in particular due to parental leave. Believing herself to be the victim of abusive use of successive short-term contracts, she brought proceedings seeking to have her last employment relationship recognised as a contract of indefinite duration. Her case having been dismissed by the trial court, she brought an appeal to the Federal Labour Court which referred three questions to the Court of Justice for a preliminary ruling.

Did the temporary need for replacement staff under the German law constitute first of all an objective reason within the meaning of clause 5(1)(a) of the framework agreement? According to the law laid down in *Angelidaki*<sup>5</sup>, the concept of an objective reason referred to 'precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts'. The same applies to the temporary requirement to provide cover for absent employees. The German law allowing successive fixed-term contracts for replacement staff was therefore compatible with that clause. According to the Court, encouraging the replacement of absent employees in that way enables other legitimate EU social policy objectives to be pursued, such as protecting maternity and effective exercise of the right to parental leave, which presuppose that the worker can resume his or her job at the end of the period of absence. The use of fixed-term contracts and of successive fixed-term contracts therefore makes complete sense.

However, does the need to replace staff have the same effect where the replacement staffing requirement is constant and could be satisfied by hiring an employee under a contract of indefinite duration? The Court stated, somewhat equivocally, that '[t]he mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the framework agreement or that there is abuse within the

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5. Joined Cases C-378/07 to C-380/07 [2009] *Angelidaki*, ECR I-03071.

meaning of that clause' (paragraph 56). The Court slightly qualified that view, continuing: 'in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer', thereby answering the third question referred to it.

That outcome raises a number of question marks. The Court had expressed itself more clearly in *Angelidaki*, holding that the famous clause 5 was intended effectively to prevent the misuse of fixed-term employment contracts and that national provisions serving as the basis for those contracts whereas in reality the needs covered are fixed and permanent, are contrary to the objective pursued. The facts in *Küçük* showed clearly that there was a fixed and permanent need: 13 successive contracts, over 11 years, in an authority often employing a high proportion of women, with regular, if not to say permanent, needs to replace staff. The Court seemed however to favour the management-based arguments, such as the need for management freedom to which the Land refers in paragraph 22, over the social arguments such as combating the increasing insecurity of employment which the Court acknowledged in paragraph 25. To justify its approach it resorted to analysing the contracts separately one after the other, which is somewhat perplexing. Provided each contract is motivated by a need to replace staff, as envisaged by the German law, it is legitimate to have successive contracts. The context can only be taken into account at a later date, in the light of the number and cumulative duration of the contracts, and can potentially lead to a finding of abuse. This would be a matter of a deviant practice rather than a shortcoming in the German law, which the judgment does not call into question (Driguez, 2012a).

Ultimately, the judgment preserved the courts' ability to penalise any such abuse, but the Court of Justice quite clearly missed an opportunity to remind Member States of their obligation under clause 5(1)(a) of the framework agreement to prevent the abuse of successive fixed-term contracts. Merely ascertaining whether there are legitimate reasons for those contracts cannot satisfy that requirement.

The *Huet* case<sup>6</sup> related to the position of a Researcher at the University of Western Brittany who had held his post for six years under several successive fixed-term contracts. The Law of 26 July 2005 transposing Community law to the civil service, as did a 1984 law, sets the maximum duration of successive fixed-term contracts at six years and provides that the last contract can only be renewed for an indefinite duration. Relying confidently on that legislation, on expiry of his last fixed-term contract Mr Huet requested a contract of indefinite duration. That contract was signed and provided that the Researcher would occupy the post of Research Officer with lower remuneration than that received as a Researcher under the earlier fixed-term contracts. The administrative proceedings seeking to amend his contract having failed, Mr Huet brought an appeal before the Administrative Court of Rennes.

It fell to the Court of Justice, in a reference for a preliminary ruling, to decide whether clause 5 of the framework agreement must be interpreted as requiring that the contract of indefinite duration into which the fixed-term contract is converted after a certain period, by virtue of the national law, must reproduce in identical terms the principal clauses of the previous fixed-term contract.

Although silent on whether the fixed-term contract should be converted into a contract of indefinite duration, the Court would take a deliberately broad approach to clause 5, riding roughshod over the objections of the European Commission. Whilst that measure to prevent the misuse of successive fixed-term contracts is not expressly established, the list of measures is none the less not exhaustive and Member States can include provisions other than those already established. However, the fact that the framework agreement is silent means also that Member States are not subject a priori to any constraints in relation to the conversion of fixed-term contracts into contracts of indefinite duration. The Court pointed out moreover that the framework agreement merely establishes general principles and minimum requirements intended to protect employees under fixed-term contracts against discrimination and abuse.

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6. Case C-251/11, *Huet*, 8 March 2012, not yet published in the Court Reports.

The freedom thereby given to the Member States is however not absolute and must not under any circumstances compromise the practical effect of the framework agreement. If Member States adopt measures to prevent abuse, the measures must effectively prevent it. As the French Government pointed out to the Court, 'if a Member State were to permit the conversion of a fixed-term employment contract into an employment contract of indefinite duration to be accompanied by material amendments to the principal clauses of the previous contract in a way that is, overall, unfavourable to the employee under contract, when the subject-matter of that employee's tasks and the nature of his functions remain unchanged, it is not inconceivable that that employee might be deterred from entering into the new contract offered to him, thereby losing the benefit of stable employment, viewed as a major element in the protection of workers' (paragraph 44). The Court accordingly invited the national courts to ascertain whether converting the contract to a contract of indefinite duration involved material amendments to the previous clauses of the employment contract, for the same tasks and functions, which would infringe clause 5 of the framework agreement and Directive 1999/70/EC. Since the remuneration was reduced, there could be no room for doubt.

Here too the decision raises a number of unknowns, in particular as to how the fixed-term contract dovetails with the contract of indefinite duration. The Court spoke of the contract being converted, which corresponds neither to the case before it nor to the legislation since the contract of indefinite duration was requested on expiry of the last fixed-term contract. There was no conversion in the strict sense of the term because the fixed-term contract had come to an end. Nor was the contract recognised as one of indefinite duration<sup>7</sup> by the national court by way of a penalty on the employer and a remedy for the employee. Does the judgment therefore apply indifferently to all situations where fixed-term contracts and contracts of indefinite duration succeed one another? Would it not have been more appropriate to distinguish between succession, conversion and recognition as of indefinite duration? The answer may indeed be different depending on whether a new contract is concluded on expiry of a fixed-term contract, or

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7. Which in French civil law is a remedy for the abuse of successive contracts or of the duration of contracts.

whether the same contract is converted into a contract of indefinite duration by the employer or recognised as such by a court.

A further difficulty concerns the practical implementation of the answer by the Court of Justice. A material amendment to working conditions, in terms of remuneration, for example, is clearly inconceivable where the job and functions are identical. Yet what about a contractual amendment which redefines the assigned functions and the resulting remuneration? What would have happened if Mr Huet had actually had to work as a research officer as established in his contract, and stop his activities as a researcher, which were clearly incompatible with his new functions?

Lastly, in the view of the Court, any amendments which are made must be assessed overall (paragraph 46). Less favourable terms on certain points could therefore be offset by improvements on others, thereby bringing a certain degree of subjectivity into the analysis (Driguez, 2012b).

There is no doubt that the economic crisis we are experiencing has had an impact in this area. During the downturn and the ensuing recession, many Member States amended their legislation, in particular on fixed-term employment, in order to allow more flexibility in the use of those contracts. Lithuania, the Netherlands and Poland made amendments of that kind on a temporary basis to stimulate or maintain jobs, primarily for the period 2010-2012. Other Member States have not set a time limit. This is the case in Spain, Italy, Portugal, Romania, Sweden, Slovakia and the Czech Republic. The intensive use of fixed-term contracts, made easier in the context of austerity measures, has in any event led to a significant increase in the number of cases brought before the Court of Justice (GHK Consultancy, forthcoming).

## **2. The right to paid annual leave, allowances in lieu and interaction with other types of leave: *Dominguez, Anged and Neidel***

The Court has continued its work to construct a European paid leave system through the *Dominguez*, *Anged* and *Neidel* cases. The many opportunities it has had in recent years to interpret Article 7 of Directive 2003/88/EC concerning certain aspects of the organisation of

working time<sup>8</sup> (European Parliament and Council of the European Union, 2003) have led to the Member States revisiting their legislation to bring it into line with the Directive.

*Dominguez*<sup>9</sup> concerned a French national who suffered an accident on the way to work, and was on sick leave from November 2005 to January 2007. Her employer having refused to grant her paid leave for the annual reference period during which her contract was suspended, Ms Dominguez brought proceedings unsuccessfully before the industrial relations court and then the Court of Appeal. She then brought an appeal to the Court of Cassation which referred three questions to the Luxembourg Court for a preliminary ruling.

Is Article 7 of the Directive compatible with Article L. 3141-3 of the French Employment Code under which in order to become entitled to leave the employee must show that he or she has worked for the same employer for the equivalent of at least 10 days' actual work? A worker whose contract is suspended for virtually the whole of the reference year is therefore deprived of any entitlement to leave. That applies where the employment contract is suspended due to an accident on the way to work, a work-related accident or occupational disease. Since this relates to the acquisition of an entitlement, actual work is understood in the strict sense. The periods when the contract is suspended will only be taken into account for calculating the length of the leave, that is to say, for its implementing arrangements.

The Court pointed out first of all that according to settled case law (*BECTU* and *KHS*<sup>10</sup>; Ghailani, 2012), entitlement to paid annual leave must be regarded 'as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined

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8. '1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.  
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated'.
  9. Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest atlantique*, 24 January 2012, not yet published in the Court Reports.
  10. Case C-173/99 [2001] *BECTU* ECR I-1152; Case C-214/10, *KHS*, 22 November 2011, not yet published in the Court Reports.

within the limits expressly laid down by Council Directive 93/104/EC' (paragraph 16). Acquisition of entitlement to paid leave cannot be subject to any requirement of a minimum period of actual work (*Shultz-Hoff and Others*<sup>11</sup>; Ghailani, 2010). The French statutory provision is therefore incompatible with Article 7 of the Directive in that regard.

However, can that incompatibility be relied upon in a dispute between private individuals such as that between a worker and his or her employer? The Court of Justice first of all invited the national court to uphold the employee's claim by virtue of its obligation to interpret the law in conformity with EU law, although without thereby going so far as ruling *contra legem*. It nevertheless urged the national court to be bold and exploit the leeway contained in the provision in dispute by treating certain periods when the employment contract is suspended as time actually worked. It showed that if the suspension of the contract as result of an accident on the way to work could be treated as a suspension due to a work-related accident, the problem would be resolved. However, an analysis of that kind would conceal the fact that the period during which the contract was suspended due to a work-related accident is not taken into account for the purposes of becoming entitled to leave, only for calculating the number of days' leave acquired.

Moreover, can Article 7 of the Directive be directly relied upon in the present case? According to the Court, Article 7 does have direct effect because it is sufficiently precise and unconditional. It is, however, for the Court of Cassation to ascertain whether the dispute can be described as vertical in so far as the employer (a social security body), although a legal person existing under private law, had been 'made responsible pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals' (paragraph 39). If the national court did not find that to be so, the Court of Justice points out, the person concerned would be entitled to hold the State liable.

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11. Joined Cases C-350/06 and C-520/06 [2009] *Schultz-Hoff and Others* ECR I-179.

As regards whether the annual duration of paid leave can be changed beyond the minimum of four weeks laid down by Article 7 of the Directive depending on the reason for the worker's absence on sick leave, there are several reasons for replying that it can. The Directive imposes a minimum level of harmonisation and does not preclude such distinctions which fall within the Member States' power to implement the law, provided those States uphold the right of all workers to take a minimum of four weeks' leave. Furthermore, increased leave would be an improvement in the situation of certain workers, which could not be prohibited.

The decision has the virtue of drawing a sharp distinction between the fact of entitlement to paid leave arising and implementation, by definitively separating the fact of becoming entitled from any period of actual work during the reference year. The Court seemed to attach entitlement to a minimum of four weeks' paid leave solely to the fact of being an employed worker, that is to say, to the existence of an employment contract throughout the reference period, whether or not it is suspended. Ms Dominguez argued for that outcome relying on Article 31(2) of the Charter of Fundamental Rights, although it raises question marks as to how it would be implemented. If Member States were authorised to maintain requirements for implementation, in particular for calculating the duration of entitlement to leave, based on the period of actual work, the distinction between the entitlement arising and its implementation would become academic. In the present case, Article L. 3141-3 of the Employment Code provides that an employee is entitled to leave of two and a half working days for each month of work. Since under French law the time when an employment contract is suspended following an accident on the way to work is not treated as time actually worked, in contrast to work-related accidents (L. 3141-5), an employee who is absent for the whole reference period should not be entitled to any days' leave. The result is therefore the same as imposing a requirement of actual work for the entitlement to arise (Driguez, 2012c). That would not be the case if the practical effect of the Community provision and its interpretation by the Court of Justice did not also require either that accidents on the way to work be treated as work-related accidents for the purpose of taking into account the period of actual work (proposed in paragraphs 30 and 31 of the judgment) or a calling into question of the rule that days of paid leave are acquired as a result of actual work. That latter hypothesis would lead to a finding that an employment contract

gives rise as an automatic matter of law to the acquisition of entitlement to paid leave irrespective of the reason for its suspension, including disciplinary dismissal. That would be completely untenable.

Lastly, the judgment was rather disappointing on the issue of whether entitlement to paid leave has direct effect and whether it can be relied on in a dispute between private individuals, since the Court declined to respond to a number of well-nuanced arguments exchanged between the parties, on whether an EU social law principle of particular importance can be likened to a general principle of law and on the scope of the reference to entitlement to paid leave in the Charter of Fundamental Rights (Article 31) in a dispute between private individuals (Driguez, 2012c).

The *Neidel* case<sup>12</sup> will undoubtedly give rise to amendments in the regulations applicable to public servants in the Land of Hesse in Germany. A fireman became unfit for service due to sickness some two years before his retirement, and he was never able to return to work. On his retirement, he applied for an allowance in lieu of paid leave corresponding to the number of days' leave he had not been able to take over those last two years as a result of sickness. His local authority refused, arguing that the law governing the German civil service did not provide for payment for days' leave not taken and that Directive 2003/88 did not apply to public servants. The Frankfurt Administrative Court, hearing the case, referred to the Court of Justice on the interpretation of Article 7 of the Directive according to which the minimum period of four weeks' paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

As regards the directive's scope of application *ratione personae*, the Court had no doubt that it must extend to any worker of any status whatsoever, whether under public law or private law. The Directive applies to public servants, and firefighters are not one of the exceptions it lays down.

The following question referred to the Court of Justice related to the material scope of Article 7(2): does that article confer entitlement to compensation on a public servant who retires without having been able,

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12. Case C-337/10, *Neidel*, 3 May 2012, not yet published in the Court Reports.

as a result of sickness, to take the days' leave acquired? The answer is to be found in the *Schult-Hoff* judgment which held that national provisions or practices which do not provide for any compensation when the employment relationship is terminated, in lieu of paid annual leave which the worker has not been able to take because he or she was sick during the reference period are incompatible with EU law (Ghailani, 2010). The reasons for the termination are of little importance and the principle also applies in the event of retirement. As the Court has pointed out, entitlement to paid leave must be regarded as a particularly important principle of EU social law, and a worker cannot be denied that entitlement as a result of sickness.

The Court then set out a number of factors for determining the amount of the allowance owing to Mr Neidel. In terms of the extent of the minimum paid leave requirement, the Directive establishes a minimum of four weeks' leave, but Mr Neidel's status gave him more in order to take into account days worked on public holidays. Does the Directive therefore preclude days' leave granted over and above the minimum of four weeks from conferring entitlement to a compensatory allowance in lieu when the employment relationship is terminated in a case where the leave could not be taken due to sickness? As pointed out in *Dominguez*, the Directive only lays down minimum requirements for Member States, which are free to establish the legal provisions applicable to further entitlement granted to workers. The Directive does not in fact regulate leave beyond the minimum four-week entitlement and nothing prevents further days' leave from giving rise to no allowance in lieu. Two sets of legal provisions will therefore apply: the first four weeks of leave will be subject to EU law and interpretations of it by the Court of Justice, and any further leave granted beyond that will be governed only by the national rules.

The last question related to the extent of the right to carry over leave not taken for over two years because the worker was unfit for service due to sickness. German law provided for paid leave to be carried over, by taking that leave, only for nine months following the reference period. On expiry of that period the entitlement lapsed. The Court has already ruled on the right to carry over leave in which a balance must be struck between preserving the right to leave and the fact that beyond a certain point there is no genuine requirement to carry over leave because the leave 'ceases to have its positive effect for the worker as a

rest period' (paragraph 39). In *KHS*<sup>13</sup> the Court held that the need to taken into account the objective pursued meant that the carry-over period must be capable of being substantially longer than the reference period in respect of which it is granted (Ghailani, 2012). In this case, it was found that carrying over leave for nine months did infringe the Directive because it unduly restricted the right to accumulate paid annual leave not taken because the worker was unfit for service.

The judgment in *Anged*<sup>14</sup>, for its part, concerns how paid leave interacts with other kinds of leave caused by a worker being unfit to work, such as maternity or sick leave. The question which the Spanish Supreme Court referred for a preliminary ruling in the context of a collective action brought by several trade unions pinpoints precisely that interaction: does Article 7(1) of the Directive preclude a national provision under which a worker who becomes unfit for work during a period of paid annual leave is not entitled subsequently to the paid annual leave which coincided with the period of unfitness for work?

The Court of Justice made use of a tried and tested line of argument: entitlement to paid annual leave must be regarded as a particularly important principle of social law from which there can be no derogations and which must not be interpreted restrictively. It is enshrined in Article 31(2) of the Charter of Fundamental Rights. The different types of leave have different purposes which must be observed in order to ensure that the various rights are effective: the purpose of entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of leisure, that of sick leave is so that the worker can recover from an illness that has caused him or her to be unfit for work. The same applies to maternity leave, addressed in this case, which is intended to promote the health and safety of pregnant workers or those who have recently given birth or who are breastfeeding at work.

The moment at which the worker becomes unfit for work is irrelevant, in so far as workers are entitled to take paid annual leave which coincides with a period of sick leave at a later point in time, irrespective of the point at which the incapacity for work arose. Any other interpretation

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13. Case C-214/10, *KHS*, 22 November 2011, not yet published in the Court Reports.

14. Case C-78/11, *Anged*, 21 June 2012, not yet published in the Court Reports.

would disregard the different purposes of the various types of leave. In so far as the operative part of the judgment relates to any incapacity for work, it covers both sick leave and maternity leave or leave for other reasons which make the worker unfit for work. Lastly the Court points out that, according to settled case law (*KHS* amongst other cases), the leave carried over can be taken outside the reference period.

The principle clearly laid down must now be implemented in the Member States, and will inevitably meet with a certain amount of reluctance.

### **3. The definition of 'worker' in Community law: *O'Brien and Sibilio***

The social policy directives do not define 'worker'. The definition is not however left entirely to national law, despite the explicit reference to national legislation in a number of texts. The Court of Justice has defined the term in Community law whilst emphasising that there is no single definition of 'worker' in Community law but that it varies according to the sphere in which it is used. In the light of recent case law, however, it would seem that rather than the definition of 'worker' itself, it is the degree to which it is Europeanised which varies according to the sphere in question. What is in fact happening is that the Court, whilst referring the definition back to national law, has established tools for reviewing the definition of the beneficiaries of European social legislation which give the impression of a partial Europeanisation (Robin-Olivier, 2012b). That is what occurred in *O'Brien*<sup>15</sup>.

The dispute was between a Crown Court recorder and the British Ministry of Justice concerning that authority's refusal to pay him a retirement pension. Mr O'Brien, a barrister by training, had worked for 27 years, up to his retirement, as a part-time Crown Court recorder. Unlike employed judges, part-time recorders are remunerated on a daily fee-paid basis and are not covered by the judicial pension scheme set up by legislation in 1981. The United Kingdom Supreme Court referred to the Court of Justice for a preliminary ruling on whether Directive

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15. Case C-393/10, *O'Brien*, 1 March 2012, not yet published in the Court Reports.

97/81/EC and the framework agreement on part-time work (Council of the European Union, 1997b), intended to ensure equal treatment of part-time and full-time workers, were applicable to the case before it.

The question was essentially whether or not recorders fell within the scope of application *ratione personae* of the framework agreement which ‘applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State’ (clause 2(1)). The United Kingdom refused to treat recorders as workers because they had no employment contract whatsoever with the ministry under whose auspices they worked. The Regulation transposing the Directive into UK law even explicitly excluded from its scope of application ‘any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis’.

Are the Member States nonetheless completely at liberty to determine who is a worker under an employment contract or employment relationship? The legislation on part-time work does not define ‘worker’, ‘employment contract’ or ‘employment relationship’, and they must be interpreted according to the purposes of each instrument in which they appear. Recital 16 of Directive 97/81/EC states expressly that it leaves Member States free to define its terms ‘in accordance with the national law and practices’, thereby allowing Member States to adapt the Directive to specific national requirements and to prevent over-rigid wording from constraining its implementation. According to the Court of Justice, the Member States therefore have discretion to define the concepts used in the framework agreement, although that power, it states, ‘is not unlimited’ (paragraph 34). The Court pointed out that the national definitions must safeguard the effectiveness of the Directive and the general principles of law. The scope of application of the Directive, which is widely drawn, covers, in addition to employment contracts, ‘any employment relationship’, and national definitions must therefore have regard for the contents of the framework agreement. The definition of ‘worker’ cannot be left to the whim of the Member States and the national courts must not confine themselves to national categorisations. In the present case, the sole fact that judges are treated as judicial office holders is insufficient in itself to prevent them from enjoying the rights established by that framework agreement.

The Court has suggested a number of principles and criteria to guide the national courts in their examination. The national courts must ascertain whether ‘the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of “workers” under national law’ (paragraph 42). They must consider the rules for appointing and removing judges, and also the way in which their work is organised. The Court emphasised as indicative of an employment relationship similar to employed work the fact that judges work ‘during defined times and periods’ (paragraph 45). Also militating in favour of treating recorders as employed workers is the fact that they were entitled to various benefits typical of the social security schemes for non-self-employed workers. As a result of those various factors to be assessed by the national courts, unless substantial differences are shown in the nature of the work, the national transposing legislation should be disapplied and recorders should be categorised as part-time ‘workers’ and allowed to benefit from the principle of equal treatment between full and part-time workers in relation to joining a pension scheme.

Two weeks later, the Court of Justice delivered a second, markedly more timid, judgment in the *Sibilio* case<sup>16</sup>, which sought to clarify whether a particular occupational relationship was covered by Directive 99/70/EC on fixed-term work (Council of the European Union, 1999).

Employed as a ‘socially useful worker’ by an Italian local authority, Mr Sibilio was paid less remuneration than his salaried worker colleagues carrying out the same duties and with the same length of service as him, for the three and a half years that the job lasted, on the grounds that he had a special kind of relationship with the local authority. Under the Italian regulations, the use of workers in the context of socially useful activities did not give rise to employment relationships with the user public authorities. Those activities are aimed at workers who have been dismissed, who are on the mobility lists and receive unemployment benefits, and workers who have been made redundant and receive an extraordinary salary top-up benefit. Those workers cannot be used for less than 20 hours a week, but for those first 20 hours their remuneration consists of a fixed monthly allowance paid by the National Social

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16. Case C-157/11, *Sibilio*, 15 March 2012, not yet published in the Court Reports.

Security Institute financed by the National Employment Fund. The worker is however entitled to various social benefits available to employees (paid leave, sick leave, maternity leave).

After becoming a member of the permanent staff, Mr Sibilio claimed arrears of salary for the previous years, relying on the framework agreement on fixed-term contracts and the principle of equal treatment. The Naples court referred to the Court of Justice for a preliminary ruling on whether or not the relationship concerning ‘socially useful activities’ fell within the framework agreement. The Court of Justice gave a threefold reply.

It pointed out first of all that whilst the framework agreement defines its scope of application by reference ‘to fixed-term workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State’ (clause 2(1)), those terms do not correspond to a uniform situation on the ground. In so far as the framework agreement is moreover not a harmonising instrument, it is for Member States to determine which situations are or are not fixed-term employment contracts or relationships. At first analysis, since, according to the Italian legislation, socially useful workers do not have an employment relationship, they do not fall within the framework agreement (paragraph 47).

In line with *O’Brien*, the Court conceded that it is not nevertheless necessary to adhere to the formal categorisation used by the national law and that it is for the national court to ascertain whether that categorisation is a sham, masking a genuine employment relationship (paragraph 49). However, the Court of Justice stopped there and declined to advance any criteria for defining a genuine employment relationship. The situation of a socially useful worker as described by the Naples court did however present all the characteristics of a classic employment relationship. The Court of Justice was going to focus, on the contrary, on whether that type of relationship could be removed from the scope of the framework agreement using the derogation permitted by clause 2(2).

The Polish Government and the European Commission pointed out in their observations that even if it had to be found that there was an employment relationship, Italy could use the derogation under clause

2(2) for employment contracts or relationships concluded within the framework of a training, integration and vocational retraining programme targeting a specific sector of the public' in order to exclude socially useful workers from the agreement and from equal treatment (paragraph 53). The Court advanced more arguments in that vein, referring to the margin of discretion left to the Member States and/or social partners and barely pointing out that any such derogation must involve consultation with the social partners. However, Italy had not applied to use that derogation and the observations of the Italian Government did not even seek to benefit from it, which is perfectly reasonable in so far as there is not even supposed to be an employment relationship at all.

The Court refrained from saying that any such derogation would have to be interpreted strictly and that only occupational relationships actually involving a training, integration or retraining initiative in the context of specific programmes would justify waiving the requirement for equal treatment. Flying in the face of the facts but adhering to a literal analysis of the texts, the Court found that socially useful workers do fall within the scope of the derogation and held that clause 2 of the agreement does not preclude the regulations in question if all the conditions are satisfied.

#### **4. Discrimination on grounds of age: *Tyrolean Airways and Hörnfeldt***

Failure to take into account professional experience acquired with companies belonging to the same group of companies is not discrimination based on the age of the worker. This is what emerges from the judgment in *Tyrolean Airways*<sup>17</sup>, which applies Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Council of the European Union, 2000b). The judgment warrants particular attention for the limitations it highlights in the Community rules on equal treatment.

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17. Case C-132/11, *Tyrolean Airways*, 7 June 2012, not yet published in the Court Reports.

The dispute was between the airline *Tyrolean Airways* (TA) and its works council concerning how to interpret a provision in the company's collective agreement. That provision provides that flight and cabin crews are to be graded in two categories A and B, which determine their remuneration, and advancement from category A to category B occurs on the completion of three years of service after the recruitment of the employee as a member of the cabin crew. The Austrian courts hearing the case wished to know whether the provision covered only recruitment by TA or if it could include earlier recruitment by the two other companies in the group, the parent company Austrian Airlines (which owns 100% of TA) or its subsidiary Lauda Air, which merged with Austrian Airlines in 2003. In other words, did the length of service and experience acquired in the other airlines in the group, the technical and qualitative content of which is broadly similar to the experience which would have been acquired at TA, have to be taken into account in determining the remuneration of workers recruited by TA?

In the view of the Austrian court, a finding that it did not would give rise to a possible discrimination on grounds of age, incompatible with Directive 2000/78/EC. It therefore referred that question to the Court of Justice for a preliminary ruling. The Court of Justice dismissed that analysis. The Directive prohibits direct or indirect discrimination based on the age of a worker, unless there is a particular reason for not doing so. A provision involving different treatment depending on the date on which the worker was recruited is not directly or indirectly related to age or an event associated with age, the Court indicated. It was professional experience rather than age which was at issue here. Directive 2000/78/EC therefore does not preclude the disputed provision of the TA collective agreement.

Although in legal terms that outcome flows from the Directive, it needs pointing out nonetheless that the clause in question does give rise to unequal treatment in relation to remuneration between workers who can prove the same professional experience, depending on whether they spent their whole career at TA or whether they were initially recruited by another company in the group and then changed employer when they joined TA. This is indeed a limitation of the Community mechanism under Directive 2000/78/EC. Despite its title, the Directive addresses not inequality but discrimination, that is to say, inequality based on illegitimate criteria.

In Sweden, since a law passed in 2002, all employed workers have been subject to the 67-year rule. That rule gives any worker an unconditional right to work up to the last day of the month of their 67<sup>th</sup> birthday. It also permits employers to terminate the employment contract without dismissal from that date. In the *Hörmfeldt* case<sup>18</sup> the Södertörn District Court referred to the Court of Justice for a preliminary ruling on whether that rule is compatible with Directive 2000/78/EC. The proceedings arose from the contested termination of the employment contract of a former postal worker who had worked part-time up to the age of 67 and who, finding that he would be entitled to a retirement pension of around EUR 715, wished to continue working. In so far as the right to terminate a contract without dismissal at the age of 67 is without the slightest doubt a difference in treatment based on age, the debate turned on whether that inequality is justified under Article 6 of the Directive. The trial court referred two questions concerning whether the measure is legitimate in the light of the objectives pursued and whether the measure is appropriate and necessary in order to achieve those objectives.

The first question related to the consequences of the fact that the law makes no mention of the objectives of the 67 year rule. As held in *Fuchs and Köhler*<sup>19</sup> (Ghailani, 2012), the fact that the aim is not mentioned does not necessarily mean that the measure cannot be justified. The aims can be made clear by the preparatory documents or as in this case by the observations submitted by the government in question during the proceedings (paragraphs 24 to 26).

The Court was receptive to various arguments coterminous with objectives relating to employment policy and labour-market policy. The measure was introduced in 2002 to postpone the retirement age from 65 to 67, and the principal reasons given seek to explain the benefits of allowing workers to work longer if they wish – better pensions, demographic considerations and shortage of labour. The employer’s right to terminate the contract without dismissal from the age of 67 is justified by the fact that the ‘67-year rule’ is intended to make it easier for young people to enter the labour market and reflects a political and social

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18. Case C-141/11, *Hörmfeldt*, 5 July 2012, not yet published in the Court Reports.

19. Joined Cases C-159/10 and C-160/10, 21 July 2011, *Fuchs and Köhler*, not yet published in the Court Reports.

consensus on the balance to be struck between the interest of workers in working up to 67 and a smooth transition to retirement. The Court found the rule to be compatible with the Directive (paragraph 26).

Given that the objectives are legitimate, is the 67-year rule nonetheless appropriate and necessary? The Court based its reasoning on the discretion given to the Member States and social partners where they are the source of the legislation and held that the ability to retire workers at 67 is indeed appropriate to achieving the aims described (paragraph 32).

The main legal issue raised by the national court concerned the fact that the 67-year rule makes no reference to retirement pensions whereas according to the judgment in *Palacios de Villa*<sup>20</sup> it is a requirement if a sunset clause is to be valid (paragraph 35). In the view of the Court of Justice, however, it is merely one element amongst others to be taken into consideration. The Court drew up a list of the costs and benefits and minimised the disadvantages of the rule for workers. It pointed out that, unless a collective agreement provides otherwise, this is not a sunset clause, that retirement is not automatic and that nothing prevents someone continuing to work if the employer agrees. Furthermore, in Sweden 67 is an age at which workers can draw their statutory and occupational pensions or, at the very least, receive basic cover (available in common with retirement pensions from the age of 65), and housing and/or old age allowances for those on the lowest incomes. Lastly, as the referring court quite correctly pointed out and was affirmed by the Court of Justice, the level of the retirement pension has not been a decisive factor in whether the measure is acceptable since a sunset clause at 60 was accepted in *Rosenblatt*<sup>21</sup>. That case concerned a worker whose retirement pension was much lower than that of Mr Hörnfeldt (paragraph 45).

The Court accordingly found the Swedish 67-year rule to be compatible with Article 6 of Directive 2000/78/EC.

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20. Case C-411/05 [2007] *Palacios de Villa* ECR I-8531.

21. Case C-45/09 [2010] *Rosenblatt* ECR I-9391.

## 5. The burden of proof in cases of discrimination at the time of recruitment: *Meister*

Discrimination at the time of recruitment is one of the most difficult claims to prove unless one is dealing with a particularly hapless employer flaunting discriminatory selection criteria. Opaque recruitment procedures therefore undermine the effectiveness of the right to equal treatment. Short of going to the extent of proving discrimination, which the claimant is not required to do by the directives in the framework of a 'shared burden of proof' system, merely making a plausible allegation of facts suggesting that it exists is difficult because a job applicant often has little information enabling comparison with the successful candidate and because any selection process is based on both subjective and objective criteria (Jaqmain, 2012). *Meister*<sup>22</sup> nevertheless provided the Court of Justice with an opportunity to reinforce the requirement for recruiting employers to be transparent.

Ms Meister, a 45 year old Russian national, had applied twice for a position as a software engineer with a German company. Twice her applications were rejected before she was even called for interview, despite the fact that she met the qualification requirements for the position. Taking the view that she was the victim of multiple discrimination based on her sex, age and ethnic origin, she asked the recruiting company for information about the profile of the successful candidate, and was refused. Her action having been unsuccessful at first instance and on appeal, Ms Meister brought an appeal on a point of law before the Federal Labour Court. That court referred to the Court of Justice for a preliminary ruling on whether a right could be inferred from various directives relating to combating unequal treatment which entitled the claimant to disclosure of information by the defendant.

The Court of Justice referred unhesitatingly to its judgment in *Kelly*<sup>23</sup> relating to an unsuccessful applicant for vocational training. Interpreting in that case Article 4(1) of Directive 97/80/EC on the burden of proof in

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<sup>22</sup>. Case C-415/10, *Meister*, 19 April 2012, not yet published in the Court Reports.

<sup>23</sup>. Case C-104/10, *Kelly*, 21 July 2011, not yet published in the Court Reports.

the event of discrimination on grounds of sex<sup>24</sup> (Council of the European Union, 1997a) and Article 4 of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women in matters of employment and occupation (Council of the European Communities, 1976), the Court had confirmed the ‘shared burden of proof’ system established by that legislation. The burden on the plaintiff to establish facts from which direct or indirect discrimination can be presumed cannot, in the view of the Court, be made lighter by a right on the part of the candidate for a job or vocational training to disclosure by the recruiting employer or training provider of documents held by it alone which relate in particular to the files and profiles of competitors in the recruitment process or application for training. The only proviso to that response was to invite the national court to ensure that such a refusal to provide information does not deprive Directive 97/80/EC of its effectiveness (paragraph 39).

The directives to which that judgment related have been repealed but the new directives put before the Court of Justice for interpretation in this case contain substantively the same rules. Article 19(1) of Directive 2006/54/EC (European Parliament and Council of the European Union, 2006) reproduces word for word Article 4(1) of Directive 97/80/EC<sup>25</sup>. The other provisions which the Federal Labour Court addressed, namely Articles 8(1) of Directive 2000/43/EC<sup>26</sup> (Council of the European

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24. ‘1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’.
25. ‘Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:  
(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;  
(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;  
(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex’.
26. ‘1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a

Union, 2000a) and 10(1) of Directive 2000/78/EC<sup>27</sup> (Council of the European Union, 2000b) are more or less identical. The Court of Justice therefore confirmed the interpretation upheld in *Kelly*: those articles must be interpreted as ‘not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process’ (paragraph 46).

The judgment nevertheless contains a more striking change of direction. According to the Court, ‘it cannot be ruled out that a defendant’s refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination’ (paragraph 47). Those words are directed at the national court responsible for examining the evidence produced by both parties. Whilst not creating a new right to information on the part of the claimant and without adding to the investigative powers of the national court, the Court of Justice took the view that an obstinate and unjustified refusal to disclose objective information on the conduct of the recruitment process can be interpreted against the refusing party. Such a refusal can lend support to the claimant’s allegation of facts from which discrimination can be presumed. Here the Court reiterated the view of Advocate General Mengozzi, who found the company’s attitude suspect, declining as it did to call the applicant for interview, whilst not in any way disputing that she was qualified<sup>28</sup>.

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court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’.

**27.** ‘1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’.

**28.** Opinion of Advocate General Mengozzi delivered on 12 January 2012.

## Conclusions

From the decisions described we can discern both advances and retreats. Some have caused relief and others bewilderment.

EU law has not prevented companies from increasing the flexibility of their labour management by using short-term contracts. Counterbalancing that flexibility, measures have been adopted to ensure that workers employed under those contracts have comparable working conditions to those of other employees in accordance with the principle of equal treatment. Until now, the Court had shown a certain amount of resolve in reviewing national legislation authorising widespread use of fixed-term contracts. It is clear from the *Kücük* decision, however, that it no longer has the same will or the same ability to challenge the choices made at national level which give free rein to that form of external flexibility. The Court's solution shows a desire not to challenge national legislation head on, whilst opening up scope for contesting that legislation in specific cases where it is applied abusively. It did not go as far as to require, as a general rule, that renewals, even where justified by objective reasons, should be limited in time (Robin-Olivier, 2012d).

*Dominguez*, for its part, is fairly significant in terms of principles in so far as it draws a sharp distinction between the fact of entitlement to paid leave arising and its implementation, by definitively separating the entitlement from any period of actual work during the reference year. The decision led to an almost immediate amendment of the French legislation. By a law of 22 March 2012<sup>29</sup>, France amended Article L. 3141-3 of the Employment Code. Workers no longer need a minimum period of 10 days' actual work with the same employer to give rise to entitlement to paid leave. The adapted provision is still restrictive and will need implementing provisions in the future in so far as the legislature retained the distinction based on the cause of the sickness and the grounds for suspending the employment contract for the purposes of determining whether or not the worker has acquired entitlement to paid leave during the reference period. The Court nonetheless invited Member States to do the opposite.

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<sup>29</sup>. Law No.2012-387 of 22 March 2012 simplifying the law and reducing the administrative burden, Official Journal, 23 March 2012.

The difference in approach between the *O'Brien* and *Sibilio* judgments will also have been noted with great perplexity, even dismay as regards the latter. On the one hand we have legal professionals, barristers or solicitors, also working part-time as judges, and on the other the unemployed, present or future victims of redundancy. The unemployed have to be content with the 'integration or vocational retraining contracts' in which the Court tucked them away (paragraph 57 of the judgment) whereas in fact those workers do not necessarily need reintegration, the only thing they have in common is that they have lost their jobs and the trial court itself made clear that they are assigned to jobs designed to meet the institutional needs of the user authorities rather than exceptional purposes, for sometimes longer durations than initially expected and permitted by the regulations (a maximum of eight months). This is not a measure to support reintegration, merely a means for the Italian authorities to access manpower with no requirement to provide training, and at a lower price (Driguez, 2012d).

On a more positive note, *Meister* could signal the end of completely discretionary recruitment arrangements in so far as recruiting employers can no longer shelter behind the confidentiality of their procedure to refuse outright to provide any information without that attitude helping feed suspicions that it may be concealing discriminatory practices. It will be for the national courts to decide how much information should reasonably be disclosed before making a finding on the consequences of refusal. The Court of Justice itself was sensitive to such a refusal. In *Kelly*, the training body had provided the claimant with a certain amount of information in response, whereas in *Meister* the claimant could obtain nothing. That factual difference perhaps also contributed to the advance observed.

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