

European social policy: some thoughts on the case law

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Introduction

This account of the case law of the Court of Justice has taken as its time period that between 1 January and 31 December 2010 and as its subject-matter the various areas which make up social policy. The aim here has been to take stock of a number of judgments which have particularly caught our attention, with no intention whatsoever of being exhaustive and inevitably making a subjective selection.

Certain topics seem to be particularly to the fore in European social policy. We will refer briefly to four of these, which have given rise to significant case law developments in the period under analysis. Combating discrimination is one of these topics. Community law on discrimination is developing essentially through challenges to measures or practices giving rise to different treatment on grounds of age. Age cannot be completely excluded from the criteria for making distinctions between employees, as it is not always an illegitimate consideration. The special nature of the prohibition on age-based discrimination has led to a large number of questions being referred to the Court (Robin-Olivier, 2010). The *Wolf*, *Petersen* and *Küçükdeveci* cases, to mention only those, have afforded the Court an opportunity to clarify the matter for us.

Elsewhere, equal treatment of men and women and the protection of women during pregnancy and motherhood have likewise generated significant case law developments. The difficulties associated with the pay implications of measures to protect pregnant workers and workers who have recently given birth or are breastfeeding are particularly well illustrated by the judgments in *Gassmayr* and *Parviainen*.

Another topic in the news is that of the organisation of working time. It would be difficult to gloss over the failed revision in 2009 of the 2003 Directive on the organisation of working time, which demonstrated clearly the difficulty in finding compromises acceptable to both the Member States and the European institutions. The European Parliament and the Council in fact failed to reach agreement despite the Commission's endeavours. However, as soon as the review procedure had come to an end, the Commission issued a fresh consultation of the social partners with the aim of undertaking a complete review of the text of the Directive (CEC, 2010). During this long period of review, the European legislation has remained applicable and the Court of Justice has continued to put it into effect (Robin-Olivier, 2010). The *Fuß* and *Union Syndicales Solidaires Isère* judgments are evidence of this activity by the Court and we will return to them in this chapter.

Lastly, flexicurity is still on the agenda in European discourse, generating the spread of 'atypical' contracts. These contracts have attracted strong criticism whilst at the same time undergoing regulation which is, if nothing else, dense. The Court's case law has revealed the importance which this regulation has acquired for the protection of workers (Robin-Olivier, 2010). This can be seen in the *Bruno* and *Pettini* judgment on part-time working.

1. Equality and non-discrimination

1.1 The general principle of non-discrimination related to age: *Wolf, Petersen, Küçükdeveci*

The pressures on the labour market in Europe, when combined with certain demographic facts of life, have led Member States to adopt regulatory measures involving the exclusion of certain categories of workers on grounds relating to age. This is evidenced by the large amount of case law made on the subject in 2010.

The first three cases are set in Germany. Mr *Wolf*, who had applied for an intermediate career post in the fire service of the Land of Hesse,

1. Case C-229/08, *Wolf*, 12 January 2010, not yet published in the Court Reports.

aged slightly over 30, was refused access to the selection procedure on the grounds of the age limit of 30. The Frankfurt Verwaltungsgericht (Administrative Court), hearing the case, asked the Court of Justice whether the German legislation was compatible with Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Council of the European Union, 2000). Finding the contested provision to be the result of the requirement for a minimum period of service before retirement and a balanced age structure in the service, the national court enquired whether the setting of an age limit on recruitment could be justified under Article 6(1) which allows Member States to establish such differences in treatment on grounds of age for reasons related to employment policy or vocational training.

Somewhat surprisingly, the Court of Justice saw fit to base its arguments on the justification contained in Article 4(1) of the Directive, on genuine and determining occupational requirements, finding that the explanations advanced by the German Government in response to the written questions put by the Court during the proceedings were well-founded. Interpreting that article, the Court pointed out that 'it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement' (paragraph 35). In the case before it, age cannot of itself be a genuine requirement for performing an intermediate post in the fire service. It is on the contrary necessary to look at which essential characteristics associated with a maximum age of 30 can be defined as such genuine requirements, themselves to be defined. Physical fitness attracted the attention of the Court, which reasoned in two stages: on the one hand, is this characteristic a genuine and determining occupational requirement? On the other, is the objective pursued by the legislation giving rise to the inequality legitimate and is the requirement proportionate?

As regards pursuit of a legitimate objective, the Court found that the need to guarantee the operational capacity and proper functioning of the professional fire service does fall within the article. In relation to the physical fitness of firefighters as a genuine and determining occupational requirement, the Court noted that persons in the intermediate career take part alongside others in fighting fires, suggesting that the possession of high physical capacities may be regarded as a genuine and determining

occupational requirement. The Court also found that the possession of high physical capacities is related to age. It remained to determine whether setting the limit at 30 years is proportionate to the aim pursued, and the Court held that it is, for reasons of training, length of service and proper management of the age of the workforce. It found that the difference in treatment on grounds of age is justified here on the basis of Article 4(1) of Directive 2000/78/EC.

The *Petersen* judgment², delivered the same day, enabled the Court to specify how a maximum age limit for practising a profession can be justified by public health and employment policy considerations. The case arose from the prohibition which prevented Ms Petersen, a 68-year-old dentist, from continuing to practise under the German Social Security Code by setting 68 as the age limit for panel medical practitioners in the unemployment insurance system. Uncertain as to whether this legislation is compatible with Directive 2000/78, the Dortmund Administrative Court referred to the Court of Justice for a preliminary ruling.

The Court of Justice observed that the age limit in question pursued several objectives, including protection of the health of patients insured under the statutory health insurance scheme. Is such an objective legitimate, when it is known that the measure is based on a supposed decline in ability from a certain age, without taking into account the actual ability of those concerned? Article 6(1) of the Directive is aimed only at social policy objectives such as those relating to employment, the labour market and occupational training. The public health objective does not seem to come into the picture. However, the Court would find that the objective pursued is legitimate in the light, not of Article 6(1) but rather of Article 2(5) according to which: 'This Directive shall be without prejudice to measures laid down by national law which [...] are necessary [...] for the protection of health'. Given the broad discretion given to Member States in this field, 'a Member State may find it necessary to set an age limit for the practice of a medical profession such as that of a dentist in order to protect the health of patients' (paragraph 52). This objective can also justify measures intended to ensure the financial balance of the national health system.

2. Case C-341/08, *Petersen*, 12 January 2010, not yet published in the Court Reports.

However, the age limit in question affects only panel dentists, and therefore casts doubt on the consistency of the measure. If the age limit is intended to protect the health of patients, it should cover all patients and not only those of panel practitioners. An age limit affecting only panel practitioners cannot be regarded as necessary for the protection of health within the meaning of Article 2(5).

The other objective adduced to justify the age limit related to the sharing out of employment between the generations in the profession of panel dentists. This is undoubtedly an objective relating to employment policies and therefore falls within Article 6(1) of the Directive. According to the Court such an objective is legitimate and proportionate. Indeed, 'it does not appear unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones' (paragraph 70). The Court stated that 68 seems sufficiently high to serve as the endpoint of admission to practise, but did nevertheless set a limit: 'Where the number of panel dentists in the labour market concerned is not excessive in relation to the needs of patients, entry into that market is usually possible for new practitioners, especially young ones, regardless of the presence of dentists who have passed a certain age, in this case 68. In that case the introduction of an age limit might be neither appropriate nor necessary for achieving the aim pursued' (paragraph 71).

The *Kücükdevici* judgment³, delivered on 19 January, confirmed the existence and extent of a general principle of Community law prohibiting any discrimination based on age. The case challenged the second sentence of Paragraph 622(2) of the BGB (German Civil Code) concerning calculation of a notice period for dismissal which precluded taking into account periods of employment before a worker reached the age of 25. Dismissed by Swedex in 2007, Ms Kücükdevici disputed the refusal to take into account in calculating the notice period the seven years she had worked for the company between the ages of 18 and 25. On referral from the *Landesarbeitsgericht Düsseldorf* (Higher Labour Court, Düsseldorf), the Court examined whether the objectives advanced to

3. Case C-555/07, *Kücükdevici*, 19 January 2010, not yet published in the Court Reports.

justify this difference in treatment based on age are legitimate and whether the means adopted to achieve them are proportionate. The objectives adduced included those of strengthening the protection of workers according to their length of service in the undertaking and of facilitating the recruitment of younger people by increasing the flexibility of personnel management. The Court found those objectives to be legitimate since they belonged to the field of employment policy. Advocate General Bot had taken a different view, finding that setting short notice periods did not favour the vocational integration of young workers and was intended only to give greater flexibility to employers. That objective therefore cannot in his view be regarded as legitimate under Article 6(1) which envisages only general interest objectives. The Court however did not endorse his thesis and took the view that the fact that a measure relates to a general social policy objective seems sufficient.

As regards whether the measure is proportionate, the Court found in terms of the flexibility objective that the legislation does not contribute to achieving the objective since it applies to all workers who joined the undertaking before the age of 25 whatever their age at the time of their dismissal. Nor can the measure be regarded as appropriate to achieving the objective of strengthening the protection of workers according to their length of service in the undertaking, since the extension of the notice period for dismissal is delayed for employees who joined the undertaking between the ages of 18 and 25. The legislation furthermore affects young employees unequally, having a greater impact on those who entered active life early and not those who started work later. Failure to include years worked under the age of 25 in calculating the notice period does therefore constitute discrimination based on age prohibited by Directive 2000/78.

It remained for the Court to rule on the consequences of its finding that such discrimination exists: what should the German court do in response to national legislation contrary to Community law? The question concerns the effect of directives, to which the Court has consistently refused to give horizontal direct effect. If the sufficiently precise provisions of a directive can be relied on against a State, they cannot be relied on against an individual (paragraph 46). In the present case, the requirement to interpret national legislation in conformity with European law cannot not extend to disapplying the very clear provision of German law. The Court would therefore analyse the

situation not in the light of the Directive, but in the light of the general principle of European law prohibiting any discrimination based on age, which does have direct effect. In setting out the grounds for its decision, it followed the same line of argument as in *Mangold*⁴: Directive 2000/78 does not of itself embody the principle of equal treatment in employment and occupation, which derives from international instruments and the constitutional traditions common to the Member States. The Directive merely gives expression to the principle of non-discrimination based on age considered as a general principle of European law (paragraph 53). The Court went on to refer to the Charter of Fundamental Rights which prohibits amongst other things discrimination based on age (paragraph 22). The Court had already referred to the Charter on previous occasions, but the judgment in *Kücükdevci* afforded an opportunity to apply the Charter for the first time since the Lisbon Treaty had given it the same legal value as the Treaties (Kokott and Sobotta, 2010).

It remained to determine the effects of that principle. If it is to be required to conform with Community law, national legislation must fall within its scope of application. That is the case here. The circumstances of dismissal in question in the present case do fall within the scope of Directive 2000/78. The Court therefore found that: 'it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue'. It was in the light of that discrimination that the Court would examine whether there was any discrimination. Upholding that general principle allows the provisions of Directive 2000/78 to be given horizontal direct effect and enables the national court to set aside national provisions contrary to the principle (Michéa, 2010).

The *Kücükdevci* judgment enabled the debate started by the (strongly criticised) *Mangold* judgment to be brought to a close: the prohibition on discrimination as result of age is a general principle of European law under which the national courts have to disapply any national provision contrary to the principle, within the field of application of Community

4. Case C-144/04 *Mangold* [2005] ECR. I-9981.

law. This finding reinforces the scope of the non-discrimination rules. Furthermore, the Member States have great freedom as regards the objectives justifying differences in treatment. The objective does not necessarily have to be stated in the legislation in issue, but may be deduced from the general context of the measure. Furthermore, the Court has accepted the legitimacy of objectives associated with the protection of public health. It is, on the other hand, stricter in monitoring the consistency of the measure and its proportionality (*Petersen*). Lastly, as Laulom observes, *Wolf* has brought about a new source of complexity – the fact that whether age limits are lawful can be examined under Article 4(1). Such a justification will however come into play only rarely: age is too general a characteristic. Imposing age limits could lead back to the very stereotypes which the prohibition on discrimination as result of age is intended to combat. The evaluation of physical or intellectual capacity must be individual above anything else and the age criterion should only be allowed in exceptional cases (Laulom, 2010).

Lastly, two other cases relating to discrimination on grounds of age were delivered on 12 October 2010, bringing the issue of the employment of older people before the Court. These were the *Rosenblatt*⁵ and *Andersen*⁶ cases. We will refer to them only very briefly and would invite the interested reader to read the judgments in full.

Ms Rosenblatt, a German worker whose employment contract had been terminated as result of her reaching the retirement age at 65, disputed the termination of her employment contract on the grounds that, according to her, it constituted discrimination on grounds of age. In Germany, the Law on equal treatment establishes that clauses on the automatic termination of employment contracts as a result of the worker reaching retirement age can escape the prohibition on discrimination based on age. Again according to that Law, the power to agree such clauses can be given to the social partners and implemented by collective agreements.

5. Case C-45/09, *Rosenblatt*, 12 October 2010, not yet published in the Court Reports.

6. Case C-499/08, *Andersen*, 12 October 2010, not yet published in the Court Reports.

The Hamburg Labour Court enquired of the Court of Justice whether or not those clauses contravene the prohibition on discrimination on grounds of age under Directive 2000/78. The Court conceded that there was indeed a difference in treatment based on age, and examined whether it was justified. It pointed out first of all that this type of clause is practised in many States and 'is widely used in employment relationships'. The clause is the reflection of a balance between diverging but legitimate interests, those of employers and workers, closely linked to the political choices relating to employment and retirement. Discrimination on grounds of age is therefore justified. Furthermore, the clause on automatic termination of employment contracts is not based on age alone, but on acquisition of the right to the financial compensation consisting of a retirement pension. For these reasons, amongst others, the clauses on automatic termination of employment contracts, as established in the German legislation in question, do not infringe the Community Directive.

The *Andersen* case for its part concerned denial of a severance allowance to workers who are eligible for an occupational retirement pension at the time of termination of their contract. In Denmark, workers with 12 years of service in the same undertaking are entitled to a severance allowance. However, the allowance is not paid if at the date of their dismissal the worker is entitled to an old-age pension under an occupational retirement scheme, even if they do not intend to stop working. According to the Court, such legislation does contravene Directive 2000/78. This is a difference in treatment on grounds of age which is not justified 'objectively and reasonably', nor proportionate to the objective pursued, in this case, facilitating the transition to a new job.

1.2 Equal treatment for men and women: *Roca Álvarez* and *Brouwer*

In the *Roca Álvarez* case⁷, the Court of Justice was called upon to give a preliminary ruling relating to the reconciliation of family and working life from the perspective of equal treatment for men and women.

7. Case C-104/09, *Roca Álvarez*, 30 September 2010, not yet published in the Court Reports.

Having requested from his employer the breastfeeding leave established by the Workers' Statute (*Estatuto de los Trabajadores*) for the parents of children under nine months, Mr Roca Álvarez was refused the right to take that leave on the grounds that the child's mother was not herself an employed person. Hearing the case on appeal, the *Tribunal Superior de Justicia de Galicia* (High Court of Justice of Galicia) found that the 1900 provision was originally intended to enable breastfeeding by allowing women to be absent during the working day or to reduce its duration. However, this legislation has been renewed and detached from the biological fact of breastfeeding and must therefore to be regarded as time devoted to the child. From that point of view, the legislation establishes that the leave in question can be taken by the mother or by the father without distinction, where both work. The High Court of Justice of Galicia observed that in this context the fact that the father's right to the so-called 'breastfeeding' leave is dependent on the right of the mother, who must herself be an employed person within the meaning of the legislation, amounts to denying employed fathers entitlement to the leave in their own right. That court stayed the proceedings and referred to the Court of Justice as to whether this situation is compatible with Directive 76/207/EC on 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 of Justice found that there is difference in treatment between the sexes. The measure offers and reserves the right to the leave to all mothers having the status of employed persons. Fathers only have the right on two conditions: both parents must work and the child's mother must herself be an employed person. The fact of being a parent is not sufficient to gain entitlement to leave (paragraph 23). According to earlier case law, the positions of the father and mother of a young child are comparable with regard to their possible need to reduce their daily working time in order to look after their child⁸.

Can this difference in treatment be justified? Directive 76/207 does in fact provide that there may be different treatment if its purpose is to ensure the protection of women in connection with pregnancy and maternity or to promote equal opportunity for men and women in the

8 . Case C-476/99 *Lommers* [2002] ECR I-2891.

light of existing inequalities. Any concern to protect the woman's biological condition and the special relationship between mother and child is easily dismissed since the Spanish court had already pointed out that the provision has become detached from the practice of breastfeeding. The Court of Justice likewise rejected the justification based on reducing de facto inequality in women's professional careers. The fact of reserving the right to leave to mothers with the status of employed persons is 'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties' (paragraph 36). Furthermore, this could have the effect that a woman, such as the mother of Mr Roca Álvarez's child, who is self-employed, would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone (paragraph 37). The Court therefore held that the Spanish provision is incompatible with Directive 76/207.

We shall dwell only very briefly on the *Brouwer* judgment⁹ delivered on 29 July, which afforded the Court an opportunity to reaffirm the principle of equality between men and women in a different sphere, that of the calculation of retirement pensions. In Belgium for the years 1984 to 1994, the calculation of old-age and retirement pensions for female frontier workers, concerning equal work or work of equal value, was based on notional and/or flat-rate daily wages lower than those for male frontier workers. The Court held that such legislation was contrary to Article 4(4) of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Council of the European Communities, 1979).

1.3 The protection of pregnant women and those who have recently given birth: *Parviainen* and *Gassmayr*

These two judgments ruled on the interpretation to be given to the concepts of remuneration and adequate allowances contained in Article 11 of Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant

9. Case C-577/08, *Brouwer*; 29 July 2010, not yet published in the Court Reports.

workers and workers who have recently given birth or are breastfeeding (Council of the European Communities, 1992).

In *Parviainen*¹⁰ an air hostess brought proceedings against the Finnish airline employing her in respect of the remuneration she was paid when she was temporarily transferred to ground work for safety reasons during her pregnancy. As an air hostess and purser, 40% of her remuneration consisted of various allowances (for seniority, night work, work on Sundays, long-haul flights). In accordance with the rules of the airline, her remuneration during the temporary transfer was calculated by adding to the employee's previous basic salary a pay supplement corresponding to an average of the allowances paid to all air hostesses and stewards in the same pay grade, which for the applicant resulted in a reduction in her income.

In the *Gassmayr* case¹¹ for its part, an Austrian doctor brought an action against the hospital employing her concerning the refusal to take into account allowances for on-call duty, included in the applicant's remuneration until she stopped work, in calculation of the adequate allowances paid to the worker who was at that time pregnant and prevented from working on health grounds and then during her maternity leave. Since on-call duty overtime represents a significant part of the remuneration of junior hospital doctors, Ms Gassmayr claimed that the adequate allowance in question should include an average of the on-call duty allowances paid over an earlier period. The hospital declined on the grounds that payment of that type of allowance was absolutely not a flat-rate emolument since it was intended only to remunerate actual extra work.

The Finnish and Austrian national courts therefore referred to the Court of Justice for clarification of the obligations under Article 11 of Directive 92/85. Articles 11(1) and 11(2) guarantee to pregnant workers who, for safety reasons, have to accept a move to a different job or, where such a move is impossible, have to be granted leave, and workers on maternity leave 'maintenance of a payment and/or entitlement to an adequate allowance'. The sole clarification as to the level of payment is

10. Case C-471/08, *Parviainen*, 1 July 2010, not yet published in the Court Reports.

11. Case C-194/08, *Gassmayr*, 1 July 2010, not yet published in the Court Reports.

contained in Article 11(3), which relates only to maternity leave, according to which the allowance is deemed adequate 'if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health'. After confirming that Article 11 does have direct effect (*Gassmayr*, paragraphs 43-53), the Court would make the necessary clarifications, although not without first pointing out that Article 11 under no circumstances guarantees entitlement to maintenance in full of the earlier pay, whichever period one is looking at during the pregnancy or maternity leave.

To ascertain the relevant level of remuneration, in contrast, one must according to Community law differentiate depending on the period concerned. During the pregnancy, when the worker is in principle still at work (Article 11(1)), a distinction must be made depending on whether she is, for safety reasons, temporarily transferred to a different job or whether she is granted leave. In the first situation, according to the Court, the pregnant worker must continue to be paid the basic salary under her employment contract. In terms of allowances, what is payable depends on the type of allowance. The employee is entitled to 'allowances which relate to her professional status such as, in particular, her seniority, her length of service and her professional qualifications' (*Parviainen*, paragraph 60). Conversely, the Court declined to uphold the right to maintenance of pay components or allowances dependent 'on the performance [...] of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance' (*Gassmayr*, paragraph 65). The Court also stated that the remuneration paid to a pregnant worker following a move to a different job could not be less than that paid to workers in the job to which she is temporarily transferred, both in relation to salary and the allowances relating to that job. In the case under analysis, from the outset Ms Parviainen could not claim maintenance of her allowances. It is therefore for the national court to ascertain whether the arrangements intended to supplement the basic salary by a flat-rate average of the allowances paid to flight personnel in the same grade prejudices the applicant's rights under the Directive.

Where leave is granted during the pregnancy, the same principles apply, as illustrated in *Gassmayr*, which refers expressly to *Parviainen*. Since the allowances relating to the job are excluded from the

entitlements guaranteed by the Directive in the case of temporary transfer, the same applies to on-call duty allowances, which are not extra flat-rate allowances and are intended exclusively to compensate extra work where the worker is called upon outside their normal working hours.

The issue of the amount of allowances paid during maternity leave was raised in *Gassmayr*: should the on-call duty allowances usually paid to the worker be taken into account in determining the level of remuneration or of the adequate allowance to which the Directive refers? Here again, the Court declined to interpret Article 11(2) as affording a right to maintenance of the earlier pay in full in so far as Article 11(3) establishes a more detailed rule than in the earlier situations – the worker is entitled to receive income at least equivalent to the allowance established by national legislation in the case of sick leave. The Directive establishes only the minimum protection, and does not prevent Member States from offering more favourable conditions. The Austrian system entitled Ms Gassmayr to maintenance of her full salary with the exception of on-call duty allowances, which went beyond the minimum and had to be upheld by the Court (Jacqmain, 2010).

2. Working conditions

2.1 The organisation of working time: *Union Syndicale Solidaires Isère, Fuß*

In the first case, *Union Syndicale Solidaires Isère* (the Solidaires Isère association of trade unions) brought proceedings claiming misuse of powers before the French *Conseil d'État* (Council of State) against an implementing decree relating to educational commitment contracts, implementing the Law on association-based voluntary service and educational commitment¹². These contracts cover the casual seasonal involvement in the duties of activity leader or director in an educational centre for children organised during school holidays and at other times. The French legislation establishes on the one hand that the cumulative

12. Case C-428/09, *Union Syndicale Solidaires Isère*, 14 October 2010, not yet published in the Court Reports.

duration of contracts entered into by the same person cannot exceed 80 days in a period of 12 consecutive months and on the other hand that a person employed under the contract must have a weekly rest period of not less than 24 consecutive hours. The legislation is, conversely, silent as regards the daily rest period, the fact being that the contract in question is not subject to the provisions on working time in the Labour Code. Is such legislation therefore compatible with the requirements relating to rest periods contained in Directive 2003/88 concerning certain aspects of the organisation of working time (Council of the European Union, 2003)?

The Court was first asked whether the Directive is applicable to educational commitment contracts: do those activities fall within the scope of the Directive and do persons employed under those contracts have true status as workers? The Court had already had occasion to assert that the scope of the Directive must be interpreted widely and that exceptions must be interpreted restrictively. Further, persons employed under the contracts are indeed workers within the autonomous meaning of the term specific to European Union law. It is irrelevant that those persons may work under fixed-term contracts or are only partially subject to the Labour Code. The European criteria for defining a worker are satisfied – a person who performs services for and under the direction of another person in return for which he receives remuneration.

Then came the issue of whether the decree is compatible with the requirements of the Directive relating to rest periods. Article 3 of the Directive provides that the Member States must guarantee to all workers entitlement to a minimum rest period of 11 consecutive hours in each 24-hour period. There are however exceptions to this provision, set out in Article 17. The fact that the decree is silent as to the daily rest period clearly contravenes Article 3. Yet are educational commitment contracts covered by any derogations? According to the case law established in *Jaeger*¹³, the derogations must be interpreted strictly: persons employed under the contracts do not fall within the category of workers whose working time is not measured or predetermined (executives with autonomous decision-making powers, family workers,

13. Case C-151/02 *Jaeger* [2003] ECR 2003 I-8389.

workers in religious communities) set out in Article 17(1). On the other hand, the Court does concede that their activity can be treated as a security and surveillance activity requiring a permanent presence in order to protect property and persons as referred to in Article 17(3)(b). This derogation is however subject to a requirement that 'the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection' (Article 17(2)).

According to *Jaeger*, the compensatory rest period requirement means that the worker must be entirely free to dispose of their time and the rest periods must follow on immediately from the working time for which they are supposed to compensate. The provision establishing that the contracts are limited to 80 days in one year quite clearly does not satisfy the requirement for compensatory rest periods. Nor is the Court persuaded by the arguments of the French Government that the activities of staff at holiday and leisure centres are exceptional cases in which compensatory rest periods cannot be granted on grounds that the staff are required to supervise the children day and night. Nor is it persuaded by the fact that the ceiling of 80 days' work in one year is a measure affording appropriate protection.

In the past the Court of Justice has favoured employees on the issue of working time¹⁴ and it has continued in that vein, holding firmly that national legislation which does not allow 'workers to enjoy the right to a daily rest period for the entire duration of the employment contract, even if the contract concerned has a maximum duration of 80 days per annum, not only nullifies an individual right expressly granted by that directive but is also contrary to its objective' (paragraph 60). One must recall the health and safety objective pursued by the Directive. Depriving workers of daily rest periods is in the Court's view tantamount to placing them in danger.

The judgment in *Fuß*¹⁵, delivered the same day, enabled the Court to draw attention to the direct effect of the rule imposing a 48-hour

14. See, amongst others, Case C-350/06 *Schultz-Hoff* [2009] ECR I-179.

15. Case C-243/09, *Fuß*, 14 October 2010, not yet published in the Court Reports.

maximum on the duration of weekly working time, and to restate the rights of workers if it is contravened. Mr Fuß, a firefighter with officer grade, employed in 2007 on operational duties in the fire prevention and protection section of the fire service of Stadt Halle in the Land of Sachsen-Anhalt, refused to submit to the work roster set at 54 hours a week. His superiors therefore transferred him to a central control room where the weekly working time was 40 hours. Refusing this compulsory transfer, Mr Fuß brought proceedings before an administrative tribunal claiming contravention of Directive 2003/88. Stadt Halle, for its part, argued that the purpose of the transfer was solely to meet the firefighter's request and not to punish him, before it reviewed the entire organisation of the service to bring it into line with the requirements of the Directive.

Unsuccessful at first instance, Mr Fuß brought proceedings before the *Verwaltungsgericht Halle* (Administrative Court, Halle) which referred to the Court of Justice on the interpretation to be given to Article 22(1)(1)(b) as regards the outcome for employees who refuse to work under conditions derogating from the rule in Article 6. The Court would however reword the question, finding that the national authorities had not availed themselves of the derogation under Article 22. It therefore focused on Article 6(b) which requires that 'the average working time for each seven-day period, including overtime, does not exceed 48 hours'.

On the matter of whether or not contravention of Article 6(b) depends on detriment suffered by the worker relying on the provision, the Court replied that it did not. The maximum weekly working time is a particularly important rule of European Union employment law which does apply to firefighting. Nor moreover does Article 17(3) establish any derogation for this type of activity and neither the Federal Republic nor Land Sachsen-Anhalt had, at the time of the facts, availed itself of the possibility of derogation under Article 22. The Court concluded that exceeding the maximum working time laid down by Article 6 of itself contravenes the rule, irrespective of whether or not there was any detriment.

On the consequences for individuals of this contravention, the Court had already held that the provision had direct effect, since the obligation is unconditional and sufficiently precise to confer rights

which can be directly relied upon by individuals against the State or decentralised public authorities on expiry of the time-limit for its transposition. The requirement to ensure implementation in full of Article 6 and the fundamental right to effective judicial protection prompted the Court to reproach the practice of transferring a worker who relies on application of the rule against an authority which has failed to comply with its obligation to transpose it: 'the effect of a compulsory transfer such as that in the main proceedings deprives of all substance [...] the right [...] conferred by Article 6(b) [...] of Directive 2003/88'.

That response should prompt the German court to set aside the transfer decision. In the meantime, the legislation applicable in the operational service was amended in 2007 to reduce the average maximum working time to 48 hours and activate the option to derogate under Article 22(1)¹⁶.

2.2 The rights of part-time workers: Joined Cases *Bruno* and *Pettini*

Continuing its work to ensure the effectiveness of social rights established by the European directives resulting from framework agreements, the Court has ruled on the rights of part-time workers and on the Italian system for calculating periods of service for the purposes of defining their pension rights¹⁷.

Bruno and *Pettini* are employed as cabin crew members by Alitalia. They brought proceedings claiming that their contributions for the purposes of welfare benefits should be the same as the total number of weeks in the period of part-time work. They stated that they had requested and been granted conversion of their full-time employment contracts into part-time employment contracts, known as 'vertical-cyclical' contracts. The 'vertical-cyclical part-time' arrangements are a method of organisation under which the employee works only during

16. L. Driguez, note at ECJ, 14 October 2010, *Europe 2010*, commentary 429.

17. Joined Cases C-395/08 and C-396/08, *Bruno* and *Pettini*, 10 June 2010, not yet published in the Court Reports.

certain weeks or certain months of the year, on full or reduced hours. Accordingly, they worked during certain months of the year and not during others. The National Institution for Social Welfare (INPS) took the view that only the periods worked could be contribution periods for pension purposes, to the exclusion of periods not worked.

Having been ruled against at first instance, the INPS appealed the decision asserting that, under the Italian legislation, the weekly contributions which must be taken into account for the purposes of retirement benefits are those for which remuneration was effectively paid (or which are recognised as such for that purpose). The Rome Court of Appeal stayed the proceedings and referred to the Court of Justice: in the case of vertical part-time work, is legislation which excludes periods not worked from calculation of the period of service required to acquire entitlement to a retirement pension compatible with Articles 1, 4 and 5 of Directive 97/81 concerning the Framework Agreement on part-time work concluded by the social partners (Council of the European Union, 1997)?

Before tackling the merits, the Court dwelt first on whether the Directive is applicable in the case brought before it. Since it relates to pension rights, the substantive scope posed a problem in so far as the Framework Agreement covers only employment conditions. In the absence of any clarification in the text or its sources, the Court would opt to analyse the notion systematically and to interpret the term broadly by reference to the fundamental objectives of European social policy which seek the improvement in living and working conditions for workers and their protection from discrimination, which must include the right to remuneration.

Can the pensions in question fall within the general definition of remuneration? The Court based itself on its earlier case law founded on ex-Article 141 enshrining equal treatment of men and women in relation to pay: pensions are treated as pay and fall within the definition of working conditions if entitlement to them derives from an employment relationship. Pensions associated with statutory social security schemes are therefore excluded even where linked to the occupational activity. There are additional cumulative criteria alongside this main criterion: pensions are linked to an employment relationship

if they concern only a particular category of workers, are directly related to the period of service completed and their amount is calculated by reference to the last salary. The Court leaves the interpretation to the Italian court pointing out that neither the nature of the INPS, its activity as manager of the Social Security system nor the public ownership of Alitalia are decisive factors.

The other difficulty concerning the admissibility of the Directive related to its temporal scope. The Court has confirmed that calculation of the period of service required to acquire pension rights is governed by Directive 97/81, including periods worked prior to the date on which it came into force. New rules apply, unless specifically provided otherwise, immediately to the future effects of a situation which arose under the old rule.

The Court then came to the substantive issue – does the method of calculating periods of service used by the INPS for workers with vertical-cyclical part-time arrangements contravene the principle of non-discrimination between full-time and part-time workers contained in Clause 4 of the Framework Agreement?

First, the Court examined whether the fact that periods not worked by part-time workers are excluded from calculation of the period of service leads to them being treated less favourably than full-time workers in comparable situations. It started by pointing out that: 'For a full-time worker, the period taken into account in calculating the qualifying period of service is the same as that of the employment relationship. By contrast, for vertical-cyclical part-time workers, the period of service is not calculated on the same basis, since it is calculated only by reference to the duration of the periods actually worked, taking account of the reduction in working hours' (paragraph 61). In the view of the Court, this amounts to a difference in treatment based solely on the fact of part-time work. It observed that for a period of employment of 12 consecutive months a full-time worker qualifies for one year's period of service for the purposes of determining his or her pension entitlement. The part-time worker will be credited for the same period with a period of service of only 75% of that of their full-time colleague. Although their employment contracts are in effect of equivalent duration, one acquires a qualifying period of service for the retirement

pension more slowly than the other. Having found that legislation such as that in issue in the main proceedings treats vertical-cyclical part-time workers less favourably than full-time workers, for the sole reason that they work part-time, the Court asked itself whether that difference could be justified by objective reasons.

Both the INPS and the Italian Government justify that difference in treatment on the basis that vertical-cyclical part-time contracts of employment are, under Italian law, treated as suspended during the periods not worked, with no remuneration or contributions being paid during those periods.

Although the Court was doubtful whether the applicants' line of argument was relevant, it found that 'it is for the referring court, to the full extent of its discretion under national law, to interpret and apply national law in conformity with the requirements of European Union law and, where such an interpretation is not possible, to disapply any provision of domestic law that would be contrary to those requirements' (paragraph 74).

Accordingly, contrary to the Advocate General's Opinion, the Court of Justice ruled that: 'With regard to retirement pensions, Clause 4 of the Framework Agreement on part-time work [...] must be interpreted as precluding national legislation which, for vertical-cyclical part-time workers, disregards periods not worked in calculating the period of service required to qualify for such a pension, unless such a difference in treatment is justified on objective grounds'.

By casting doubt on the lawfulness of the method of calculating pension rights for vertical-cyclical part-time workers, the European judges have raised the issue of the definition of vertical-cyclical part-time work in the Italian system and the statutory provisions applicable to it, which will inevitably have repercussions in Italian employment law¹⁸.

18. L. Driguez, note at ECJ, 10 June 2010, *Istituto nazionale della previdenza sociale*, C-395/08 and C-396/08, *Europe 2010*, commentary 287.

See also, on the applicability of the Framework Agreement to fixed-term work, Case C-98/09 *Sorge*, 24 June 2010, not yet published in the Court Reports, and *Zentralbetriebsrat der Landeskrankenhäuser Tirols* of 22 April on part-time work, C-486/08.

3. Rights and obligations of workers and employers

3.1 Collective representation of employees in the event of a transfer of an undertaking: *Federación de Servicios Públicos de la UGT*

*Federación de Servicios Públicos de la UGT*¹⁹ gave the Court an opportunity to interpret for the first time the definition of autonomy within the meaning of Article 6(1) of Directive 77/187/EEC on the safeguarding of employees' rights in the event of transfers of undertakings (Council of the European Communities, 1977). It was necessary to explore the meaning of Article 6(1) of the Directive according to which if the transferred undertaking retains its autonomy, the employees' representatives concerned by the transfer are preserved on the same terms after the transfer. The dispute was between a municipal authority in Andalusia and the Public Services Federation of UGT (one of the biggest Spanish trade unions). Following a municipal decree taking over in-house the outsourced public caretaking, cleaning and maintenance services for various public facilities entrusted until then to four private undertakings, the former employees had all been integrated into the staff of the municipal authority and assigned to the same duties as under their previous employer. There were no significant changes to the organisation of the work with the exception of the addition at the top of the hierarchy of competent municipal councillors and the mayor. Following the refusal by the municipal authority to allow the former employees' elected representatives time off in which to carry out their duties in accordance with their status, the UGT-FSP trade union brought proceedings before the employment court to assert the representatives' rights.

The Court of Justice first ascertained that it was indeed dealing with a transfer of an undertaking within the meaning of Article 1. It called to mind its settled case law establishing as the principal criterion for a transfer that the economic entity must retain its identity, whilst also entertaining broader forms of transfer. Although the Directive does not refer to transfers by legal transfer or merger, transfers resulting from unilateral decisions of public authorities are also covered by the

19. Case C-151/09, *Federación de Servicios Públicos de la UGT*, 29 July 2010, not yet published in the Court Reports.

provisions²⁰. At the same time, although traditionally the identity of the entity transferred consists of an organised grouping of persons and assets enabling the exercise of an economic activity which pursues a specific objective, the Court had in the past already accepted that in certain sectors an economic entity could function without significant tangible or intangible assets²¹. This does occur with labour-intensive activities. There is therefore a genuine transfer of an undertaking in the case in question.

The Court then focused on whether the retained activities preserve their autonomy within the new entity which has taken them over, in accordance with the criterion in Article 6(1). What is interesting about the judgment resides entirely in interpretation of this article. The Court stressed the meaning and impact of the term ‘autonomy’ in relation to the ‘identity’ referred to in Article 1. ‘Autonomy’ means all the powers to organise the activity and manage workers given to those in charge of the economic entity. Autonomy is preserved within the meaning of the Directive ‘if, after the transfer, the organisational powers of those in charge of the entity transferred remain, within the organisational structures of the transferee, essentially unchanged as compared with the situation pertaining before the transfer’ (paragraph 44). In other words, the transferred entity must not blend into the activities of the transferee. The Court underscores the importance of the fact ‘that all of those in charge of the entity transferred can exercise the organisational powers which they held previously, prior to the transfer, vis à vis other organisational structures of the new employer’ (paragraph 47). Where that occurs, it is irrelevant that certain organisational powers internal to the entity are redistributed or that a new tier of management is added provided it does substitute its own decision-making for that of those previously in charge, save exceptionally in urgent situations. Much to the disappointment of the Spanish public authorities, the Court is not persuaded either by the additional cost represented by paying for time off for trade union duties granted to the employees’ representatives, or the double representation and the difference in treatment arising temporarily within the staff of the municipality.

20. Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659.

21. Joined Cases C-127/96, C-229/96 and C-74/9 *Hernández Vidal* [1998] ECR I-8179.

The Court defines autonomy on the basis of the functioning of the undertaking and requires the courts to look both at the economic and managerial organisation of the undertaking or establishment transferred before ruling on the consequences ensuing from the transfer. It discharged the duty incumbent on it when a provision of Community law makes no express reference to the law of the Member States for the purposes of determining its meaning and scope, and the need for uniform application of Community law and the principle of equal treatment call for an autonomous and uniform interpretation of the provision²².

Let us point out very briefly that another judgment also relating to the applicability of Directive 2001/23/EC was delivered on 21 October 2010 in *Albron Catering BV*²³. A central employer within a group of Dutch companies posted staff to various companies in the group. An employee who on that basis worked for a catering supplier whose activity was then transferred to a different undertaking with which the person concerned then entered into service, sought a ruling that the transfer of the catering supply activities should be treated as a transfer of an undertaking giving entitlement to the protection under Directive 2001/23/EC of 12 March 2001. Hearing a reference for a preliminary ruling, the Court of Justice found that in the case of a transfer within the meaning of Directive 2001/23/EC of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that Directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.

3.2 The protection of employees' representatives by collective agreements: *Holst*

*Holst*²⁴ allowed the Court to establish that the Directive on informing and consulting employees could be transposed by means of collective

²². Laetitia Driguez, note at ECJ, 29 July 2010, C-151/09, *Europe 2010*, commentary 338.

²³. Case C-242/09, *Albron Catering BV*, 21 October 2010, not yet published in the Court Reports.

²⁴. Case C-405/08, *Holst*, 11 February 2010, not yet published in the Court Reports.

agreements of general application provided the guarantee afforded to employees' representatives in those agreements affords a minimum threshold of protection.

In Denmark, LO and DA, two major trade union and employers' confederations, entered into a cooperation agreement, the '*Samarbejdsaftalen*', which comprised one of the measures transposing Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (Council of the European Union, 2002). The agreement provides amongst other things for the creation of cooperation committees in companies with more than 35 employees. According to the agreement, the notice period for dismissing an employees' representative not already enjoying protection as a union representative is six weeks over and above that under the collective agreement.

Mr Holst, a project engineer working for BWV, has the status of a salaried employee. As such, he enjoys the protection against unfair dismissal under the national legislation (known as the 'FL') and on such an occurrence can claim compensation of up to 6 months' salary. In 2001 he was also elected to the BWV cooperation committee. He is lastly a member of IDA, the Danish federation of engineers which is not a member of LO and has not entered into any collective agreement with BWV. IDA is therefore not a party to the *Samarbejdsaftalen*. On 24 January 2006 BWV gave Mr Holst notice of dismissal, in the context of a downsizing of the company, giving six months' notice. Acting on behalf of Mr Holst, IDA brought proceedings before the Esbjerg District Court (*Byretten i Esbjerg*) seeking damages under the 'FL' claiming that his dismissal was not based on objective reasons. It also asserted that Mr Holst, as an employees' representative on the cooperation committee, was entitled to enhanced protection against dismissal, under Article 7 of Directive 2002/14/EC. Unsuccessful at first instance, IDA appealed to the Western Regional Court (*Vestre Landsret*), which stayed the proceedings and referred to the Court of Justice for a preliminary ruling.

The Court was first asked as to the scope of the transposition of a directive by means of a collective agreement: can a collective agreement relating to the creation of cooperation committees apply to Mr Holst when he is not a member of a trade union which is party to the

agreement or is affiliated to the trade union which is a party to the agreement? On the basis of Article 11(1) of Directive 2002/14/EC, the Court of Justice pointed out that the Member States can leave it to management and labour to establish the provisions necessary to transpose the Directive. Furthermore, the Directive enables the Member States to give a leading role to management and labour, by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs. However, that possibility does not discharge the Member States from the obligation of ensuring, by appropriate laws, regulations or administrative measures, that all workers are afforded the full protection provided for in the Directive. That State guarantee must cover all cases where protection is not ensured by other means, in particular where the absence of protection is due to the fact that the workers are not union members. The Court found that the fact that a person is not a member of a trade union which is a party to the collective agreement does not of itself have the effect of removing that person from the legal protection conferred by the collective agreement in question. The Court therefore found that Directive 2002/14/EC does not preclude a worker who is not a member of a trade union which is a party to a collective agreement from benefiting under that agreement from the protection granted by it.

The Court was then asked as to the interpretation to be given to Article 7 of the Directive which provides that: 'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them'. In the Court's view, it is not apparent from either the wording or the spirit of Article 7 of Directive 2002/14/EC that employees' representatives must necessarily be granted more extensive protection against dismissal. What is more, since the Directive establishes only a general framework setting minimum requirements, the Community legislation intended to leave broad discretion to the Member States and to the social partners to adopt protection measures and guarantees in relation to employees' representatives. That discretion on the part of Member States is not, however, unlimited. The Court furthermore found that although Directive 2002/14/EC does not require that the protection granted to employees' representatives by implementing legislation or by a collective agreement concluded in order to transpose the Directive be

identical, that protection must nevertheless comply with the minimum threshold under Article 7. It points out that the dismissal of an employees' representative on grounds of that status is incompatible with the protection conferred by Article 7 of the Directive and, therefore, 'An employees' representative who has been the subject of a dismissal decision must [...] be in a position to ascertain, in the context of the appropriate administrative or judicial proceedings, whether that decision was taken on grounds of his status or performance of his functions as a representative and adequate sanctions must be applicable should it transpire that there is a connection between that representative's status or functions and the measure dismissing him' (paragraph 59).

In the Court's view, a collective agreement providing for protection of employees' representatives lower than that which the legislature considers necessary in implementing legislation to meet the minimum threshold of protection under Article 7 would not comply with that threshold. However, the question of whether the protection afforded by a collective agreement is lower than that afforded by the implementing legislation must be examined in the light of all the relevant national legal rules. It will be for the referring court to ascertain whether Mr Holst's dismissal was unfair and whether the provisions applicable to him are such as to ensure effective protection of his rights under Directive 2002/14/EC and Article 7 in particular. That effective protection 'cannot be guaranteed if only employees on the cooperation committee who are members of a union which is a party to the collective agreement in question can ensure that their dismissal is not due to their status or functions as employees' representatives' (paragraph 65). The national court might therefore find that the enhanced notice period under the agreement combined with the protection against unfair dismissal afforded to any employee under the general law is sufficient to reach that threshold and not require, as the implementing legislation does, examination of whether there is a compelling reason for dismissal²⁵.

25. L. Driguez, observations at ECJ, 11 February 2010, *Holst*, C-405/08, *Europe 2010*, commentary 140.

Conclusions

2010 saw intense activity by the Court. The questions referred to it for a preliminary ruling enabled it to perform its role of interpreting Community law, thereby ensuring uniform application of European legislation throughout all the Member States. The principle of non-discrimination based on age was explored in greater depth (*Wolf, Petersen, Küçükdeveci*) and the issue of the reconciliation of family and working life was revisited from the perspective of equal treatment of men and women (*Roca Álvarez, Parviainen, Gassmayr*). The questions relating to the organisation of working time and atypical contracts were examined once more (*Holst, Fuß, ...*). This work of interpretation will no doubt continue in 2011.

In *Defossez*²⁶, the Court will rule on interpretation of Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC, as regards ascertaining the competent guarantee institution for the payment of claims.

The case of *CLECE SA*²⁷ will enable the Court to enlighten the referring court as to whether Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses covers a situation in which a municipal authority which had previously engaged a private undertaking to clean its premises, then terminated that contract in order to carry out the cleaning itself, on that occasion recruiting only new staff. From a legal point of view, the case raises the question of the scope of that European Directive, and the Court must examine here whether the requirement necessary for a transfer of an undertaking – preservation of an economic unit – is still satisfied where neither the operational resources nor any worker whatsoever are transferred, and when the 'transfer' as such consists on the contrary only of retaining the function.

²⁶. Case C-477/09, *Defossez*.

²⁷. Case C-463/09, *Clece SA*, 20 January 2011.

It is compatible with the fundamental rights guaranteed in the European Union to take the sex of the insured into consideration as a risk factor when drawing up private life assurance contracts? This is the substance of the question which the Court will have to elucidate in *Association belge des consommateurs Test-Achats ASBL*²⁸. To do so, it will have to examine, for the first time, the substantive law provisions set out in Directive 2004/113/EC.

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