Dalila Ghailani

European social policy: contribution of the European Court of Justice in 2003

Introduction

A legal system can only function and survive if adherence to its rules is monitored and guaranteed by an independent authority. This principle is more difficult to apply within a community of States as the joint law might be interpreted differently from one country to the next. The Court of Justice of the European Communities (CJEC) was established for this reason as soon as the ECSC was created. This Court subsequently became the joint judicial institution of the three Communities.

The Court of Justice has played a significant role in the construction of a Social Europe in that it has tried to interpret Community texts in accordance with the idea of social justice and the requirements of European integration at popular level, insofar as these objectives corresponded with the general aims of the Treaties. Essential questions concerning the balance to be sought within European societies between economic and social matters have been decided by the Court (Bosco, 2000).

After some years of frenetic activity during which the Court was able to surprise, innovate and build (Dehousse, 1997), it now appears to be entering a calmer phase, based on consolidation, as the rulings made in 2003 show. The Court's case law in the three areas which concern us is well established, and it has simply reaffirmed the principles derived from earlier rulings.

An ever-increasing number of cases are being brought before the Court and it would not be possible to analyse all of them. We have therefore chosen a few which we have divided into three sections: the first part concerns equal treatment for men and women, the second social security for migrant workers and their families, and the third the rights and obligations of employees and employers.

1. Men-Women: the principle of equal treatment

In the last few years there has been a huge increase in case law on the area of equal treatment between men and women. This development is linked to the expansion in regulation in this area. Independently of the proliferation of national and contractual measures which may conceal prohibited forms of discrimination, some of the Court's rulings have acted as catalysts to national litigation and therefore to new referrals to the Court for preliminary rulings (Lanquetin, 2003). The *Bilka* and *Barber* rulings on occupational pensions, the *Kalanke* ruling on limits to positive action, and the *P/S* ruling which extended the application of the latter principle to discrimination affecting transsexuals, are all illustrative in this respect. Other rulings join an already well-established body of case law relating to equal pay for part-time employees, the definition of pay, and the scope of the principle of non-discrimination (Van Raepenbusch, 2003).

We propose to set out those rulings made in 2003 which we believe to reflect recent tendencies in case law most accurately, without attempting an exhaustive survey.

1.1 Compulsory military service limited to men only: Alexander Dory v. Federal Republic of Germany, 11 March 2003 ([1])

In Germany, the obligation to perform military service applies only to men who have attained the age of eighteen years. Mr Dory, who is of the correct age for military service, applied to the competent authority, the *Kreiswehrersatzamt*, to be exempted from it. He submitted that the German legislation on military service, the *Wehrpflichtgesetz,* was contrary to Community law. Taking the Court's case law as his basis, he believes

1 CJEC, 11 March 2003, *Dory v. FRG*, C-186/01, Rec. p. I-2479.

that there are no longer any objective reasons to justify the fact that women are exempted from military service (2). The *Kreiswehrersatzamt* rejected Mr Dory's request for an exemption. He then appealed to the *Verwaltungsgericht,* the administrative tribunal in Stuttgart. Mr Dory submits that compulsory military service has the effect of prohibiting the exercise of an occupation during the period of that service and of delaying access to employment. It therefore falls under Directive 76/207/EEC (Council of the European Communities, 1976) (3) and constitutes prohibited discrimination. It is contrary in any event to the general principle of equality of men and women set out in Article 3(2) of the EC Treaty (4).

The administrative tribunal stayed the proceedings and referred to the Court of Justice the question of whether the fact that in Germany military service is compulsory only for men is contrary to Community law.

The Court began by underlining that measures taken by Member States with regard to the organisation of their armed forces are not excluded from the application of Community law solely because they are taken in the interests of public security or national defence. Thus, the Court held that Directive 76/207 was applicable to access to posts in the armed forces and that it was for the Court to verify whether the measures taken by the national authorities, in the exercise of their recognised discretion, did in fact have the purpose of guaranteeing public security and whether they were appropriate and necessary to achieve that aim (5).

It does not follow that Community law governs the Member States' choices of military organisation for the defence of their territory or of their essential interests. Germany's decision to ensure its defence in part

2 CJEC, 11January 2000, *Kreil*, C-285/98, Rec. p. I-69.

3 Article 3 states that: "*Application of the principle of equal treatment means that there shall be no discrimination whatsover on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy*".

4 "*In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women*".

5 CJEC, 26 October, 1999, *Sirdar*, C-273/97, Rec. p. I-7403.

by compulsory military service is the expression of such a choice of military organisation to which Community law is not applicable. Such a choice, enshrined in the German Constitution, consists in imposing on men an obligation to serve the interests of territorial security, albeit in many cases to the detriment of access of young people to the labour market and in the progress of their careers.

The Court concluded that the existence of adverse consequences for access to employment cannot have the effect of compelling the Member State either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service. This would encroach on the competences of the Member States.

1.2 A pregnant woman's right to reinstatement in her job before the end of parental leave: Wiekke Busch v. Klinikum Neustadt GmbH & Co., 27 February 2003 (6)

Ms Busch has worked as a nurse for *Klinikum Neustadt* since April 1998. After the birth of her first child in June 2000, she took parental leave which should have lasted for three years. In October 2000, she became pregnant again. By letter of 30 January 2001, Ms Busch made a request for permission to terminate her parental leave early and return to full-time work as a nurse, which was accepted by her employer after there was a job vacancy in a ward in March 2001. Her employer did not ask if she was pregnant. Ms Busch thus returned to work on 9 April 2001. The next day, she informed her employer for the first time that she was seven months pregnant. Pursuant to Paragraph 3(2) of the *Mutterschutzgesetz*, the legislation on maternity protection, her maternity leave was to start on 23 May 2001, six weeks prior to the expected date of birth. The clinic released her from her obligation to work with effect from 11 April 2001 and, by letter of 19 April 2001, rescinded its consent to her returning to work, on grounds of fraudulent misrepresentation and mistake as to an essential characteristic (7). In support of its position,

6 CJEC, 27 February 2003, *Wiebke Busch v. Klinikum Neustadt GmbH*, C-320/01, Rec. p.I-2041.

7 According to Article 123(1) of the German Civil Code, "*Whoever has been induced to make a declaration of intention by fraud or unlawfully by threats may rescind the declaration*".

the clinic submitted that, having regard to the prohibitions on working under Paragraph 4(2) of the *Mutterschutzgesetz* ([8]), Ms Busch would not have been able to carry out her duties effectively.

Ms Busch brought a case before the *Arbeitsgericht Lübeck* which questioned the compatibility of German law with the principle of equal treatment for men and women as guaranteed by Directive 76/207. That court decided to suspend the proceedings and refer the following two questions to the CJEC for a preliminary ruling. First, does Article 2(1) ([9]) of the Directive prevent a woman who wishes, with the agreement of her employer, to return to work before the end of her parental leave from being obliged to inform the employer if she knows she is pregnant again where she cannot fully carry out the proposed work because a prohibition of employment applies in respect of certain particular tasks? Second, does it constitute unlawful discrimination on the grounds of sex, within the meaning of the Directive, if the employer then has the right to rescind his consent to the shortening of parental leave because he was mistaken about the fact that the woman was pregnant?

In Ms Busch's view, the obligation for a woman to declare her pregnancy before returning to work at the end of a shortened period of parental leave constitutes discrimination against her on the grounds of sex. The financial loss for the employer through granting the protection due to pregnant women and, where appropriate, grants of leave due to prohibitions of work, should not be taken into consideration.

The clinic submits that the fact that she failed to inform the employer, knowing that she would not be able to perform her duties fully,

---

Article 119 states furthermore that "*A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may rescind the declaration if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation*".

8 "*It is in particular prohibited to allocate to pregnant women : 1) tasks which involve regularly lifting, moving or transporting by hand and without mechanical aid, weights of more than 5 kg or, occasionally, weights of more than 10 kg …*".

9 *"For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsover on grounds of sex either directly or indirectly by reference in particular to marital or family statu.*."

constituted a breach of the duty of employee loyalty inherent in any contract of employment. In any event, the obligation to inform the employer in those circumstances, even if it did constitute discrimination on grounds of sex, was justified by the existence of legislative provisions enacted to protect pregnant women.

The Commission submits that the refusal by the employer, on account of pregnancy, to reinstate an employee before the end of parental leave constitutes direct sex discrimination, contrary to Article 3(1) of Directive 76/207. Moreover, according to the settled case law of the Court, discrimination against women cannot be justified by the existence of measures in place to protect pregnant women ([10]). Nor can the financial loss suffered by the employer justify refusing employment on grounds of pregnancy ([11]) even when the contract of employment is for a fixed term ([12]). The principle also applies where the employment relationship already exists.

In the light of the foregoing, the Court concluded, first, that Article 2(1) of Directive 76/207 is to be interpreted as precluding a requirement that an employee who, with the consent of her employer, wishes to return to work before the end of her parental leave must inform her employer that she is pregnant in the event that, because of certain legislative prohibitions, she will be unable to carry out all of her duties, and, second, that the same article precludes an employer from contesting under national law the consent it gave to the reinstatement of an employee before the end of her parental leave on the grounds that it was in error as to her being pregnant.

Readers who are interested in the issue of equal treatment are advised to read the three following rulings: *Steinicke*, *Schönheit* and *Kutz-Bauer* The first concerns the principle of equal treatment as applied in a part-time work scheme for older employees. The second concerns equal pay and retirement pensions for public servants. The *Kutz-Bauer* ruling

10 CJEC, 5 May 1994, *Habermann-Beltermann*, C-421/92, Rec. p.I-1657.

11 CJEC, 8 November 1990, *Dekker*, C-177/88, Rec. p. I-3941, point 12, and CJEC, 3 February 2000, *Mahlberg*, C-207/98, Rec. p.I-549.

12 CJEC, 4 October, 2001, *Tele Danmark*, C-109/00, Rec. p. I-6993.

recapitulates that where a collective bargaining agreement introduces unlawful discrimination, national authorities must use all possible means to set that discrimination aside without waiting for the agreement to come in line with Community law (13).

2. Social security for migrant workers and members of their families: application of Regulation 1408/71

The area of social security for migrant workers continued to provide subject matter for a significant portion of the Court's social case law in 2003.

2.1 Situation of retired migrant workers: Sante Pasquini v. Istituto nazionale della previdenza sociale, 19 June 2003 (14)

The Italian pensions system provides that migrant workers have the right to the payment of an advance on their pension, to which a further payment is added in order to attain the minimum Italian pension level. Where the person additionally has the right to a foreign pension, there is no entitlement to this supplement, and it is recovered on the basis of the sums which may have been paid *pro rata* by the foreign insurance bodies. Moreover, the system provides that pensions paid under the general compulsory scheme may, after the interested party has been informed, be corrected or recovered at any time by the payment authorities in the event of an error in their award or payment.

Mr Sante Pasquini, who currently lives in Luxembourg, worked in turn in Italy (140 weeks), France (336 weeks) and Luxembourg (1,256 weeks). In 1987, on the eve of his sixtieth birthday, he obtained from the INPS (Istituto Nazionale Previdenza Sociale) a retirement pension to which additions were made to bring it up to the level of the minimum provided for Italian pensions, given that at the time he was receiving neither a French nor a Luxembourg pension. In July 1988, the INPS recalculated the pension granted and reduced it because of the award of

13 CJEC, 11 September 2003, *Steinicke*, C-77/02, not yet published; CJEC, 23 October 2003, *Schönheit*, C-4/02, not yet published; CJEC, 20 March 2003, *Kutz-Bauer*, C-187/00, Rec. p. I-2741.

14 CJEC, 19 June 2003, *Pasquini*, C-34/02, not yet published.

a *pro rata* French pension. Again in 1988, the Luxembourg pensions fund also granted a retirement pension, but delayed informing the INPS (November 1999).

In 2000, having received this information, the INPS recalculated the Italian pension and retroactively reduced its amount as from 1 July 1988. To recover the sums paid though not due (EUR 29,000), the INPS totally ceased payment of the pension. The administrative appeal brought by Mr Pasquini before the INPS was rejected on the ground that Article 13 of Law No.412/91 involving provisions on the public finances ([15]) is not applicable to recovery of sums paid though not due in connection with the withdrawal of the supplement bringing the total up to the level of the minimum pension as a result of the award of a foreign pension, since at the time of assessment the beneficiary was informed that the amount of the pension was provisional.

Mr Pasquini brought an action before the *Tribunale ordinario di Roma* challenging the non-applicability to his situation of the Italian rules concerning recovery of sums paid though not due ([16]). He claimed that the Italian legislation was contrary to the general principles enshrined in Regulations 1408/71 (Council of the European Communities, 1971) and 574/72 (Council of the European Communities, 1972).

The *Tribunale ordinario di Roma* asked the Court of Justice whether a provision of national law which provides for the recovery of an undue payment is compatible with the objectives of Community regulations on the application of social security schemes to employed persons, and whether it is possible to apply *a contrario* the time limit of two years from the notification of the recovery of undue payments provided for in the transitional rules ([17]) for the application of the social security regulations, in cases of reduction of rights previously conferred.

---

15 "*In the event of the omission or incomplete communication by the insured person of any facts which may affect either the right to a pension or the amount thereof and of which the competent body is not already aware, the latter is authorised to proceed to the recovery of the sums paid though not due*".

16 Article 2946 of the Italian Civil Code does lay down a general limitation period of ten years for debts.

17 Articles 94, 95, 95(a) and 95(b) of Regulation 1408/71, the transitional provisions applicable following the entry into force of this Regulation or its amendments, each

The Court specifies first that the two-year time-limit cannot be applied by analogy, given that this is a transitional measure applying only to amendments to the Regulation. The Court then reiterates that Regulation 1408/71 ensures the coordination and not the harmonisation of national legislation in the field of social security. It is the national law of the Member State concerned which is applicable to the limitation or the recovery of the payment of sums not due. In relation to migrant workers, Member States must, when exercising this power, observe the Community principles of equivalence and effectiveness.The procedural rules governing the treatment of situations arising out of the exercise of a freedom provided for in the Treaty must be no less favourable than those governing purely internal situations. If there is a rule precluding the recovery of sums paid but not due as a result of the accumulation of various schemes under domestic law from a recipient who acted in good faith, then this rule must be applied to Mr Pasquini. The Court notes that, for Italian pensions arising from different domestic schemes, Italian law obliges the INPS to monitor annually the income of pensioners and their impact on both the right to receive a pension and the amounts involved. If the INPS had monitored the pensions awarded to migrant workers according to the rule applicable to domestic schemes, the payment of sums not due would in any event have been limited to a one-year period.

2.2 Hospital treatment of a pensioner during a stay in a Member State other than the State in which he resides: Idryma Koinonikon Asfalisseon v. Vasileios Ionnidis, 25 February 2003 ([18])

Mr Ioannidis resides in Greece and receives an old-age pension. During a stay in Germany, he was admitted to hospital as a matter of urgency because of recurring pains in the thorax connected with angina pectoris. The interested party had a valid E 111 form, issued by the Greek social

---

contain similar provisions relating to applications for the revision of pension calculations in the light of the new provisions applicable.

18 CJEC, 25 February 2003, *IKA*, C-326/00, Rec. p. I-1703.

security institution (IKA). He asked the German sickness fund to pay the costs of his hospital treatment directly, it being up to the latter to obtain reimbursement from the IKA as provided for in Regulation 1408/71. Nevertheless, the German sickness fund asked the IKA to issue an E 112 form normally received when an insured person wishes to obtain permission to travel to another Member State in order to receive hospital treatment. The IKA refused on the grounds that the illness from which Mr Ioannidis suffered was chronic and the deterioration in his condition had not been sudden. Greek regulations (19) require that in order to be able to authorise the repayment of costs for hospital treatment which has already taken place abroad, the illness must manifest itself suddenly during the stay and treatment must be necessary immediately.

As Mr Ioannidis's request was acceded to, the IKA brought an action in the *Dioikitiko Protodikio Thessalonikis*. The latter referred to the Court of Justice questions on the compatibility of Articles 31 and 36 of Regulation 1408/71 (20) and Articles 31 and 93 (21) of Regulation 574/72 of the above-mentioned Greek rules.

The Court pointed out that it is for the national court to determine whether the hospital treatment received by the interested party was planned by him and whether his stay in another Member State was planned for medical purposes, in which case Regulation 1408/71 submits to prior authorisation any direct settlement of the cost of

19 Article 3(a)(4)(g) of Ruling 33651 /E. 1089 of the Labour Ministry, 2 June 1956, on the regulation of IKA hospital care.

20 Article 31 states: "*A pensioner entitled to draw a pension or pensions under the legislation of one or more Member States who is also entitled to benefits in kind under the legislation of one of those States shall, with members of his family, receive such benefits while staying in the territory of a Member State other than the one in which they reside: a) benefits in kind provided by the institution in the place of stay, (…). Such benefits shall be chargeable to the institution of the pensioner's place of residence*". Article 36 concerns the arrangements for reimbursement between institutions.

21 "*In order to receive benefits in kind under Article 31 of Regulation 1408/71, a pensioner shall submit to the institution of the place of stay a certified statement testifying that he is entitled to the said benefits. (…) If the pensioner does not submit the said certified statement, the institution of the place of stay shall obtain it directly from the institution of the place of residence*".

benefits in kind by the institution of the Member State in which the treatment is provided. In these particular circumstances, it seems that the national court considered that this was not the case.

The Court noted that, with respect to entitlement to hospital treatment which becomes necessary during a stay in a Member State other than the one in which the insured person resides, Regulation 1408/71 provides for differences between the situation of pensioners and that of employed or self-employed persons. The Court states that the aim of the Community legislature seems to have been to promote effective mobility of pensioners by taking into account their vulnerability and dependence in health terms.

The Community rules do not make entitlement to benefits in kind provided to pensioners during a stay in another Member State subject to the condition applying to employed and self-employed persons, that the state of health of the interested party makes the treatment immediately necessary.

The Court states that the right to the benefits in kind guaranteed to pensioners by Regulation 1408/71 cannot be restricted to cases where the treatment provided has become necessary because of a sudden illness. In particular, the fact that the pensioner was suffering from a chronic illness of which he was aware before his stay cannot prevent him from enjoying the benefit of the treatment required by changes in his state of health during the course of his stay. Furthermore, the Court states that the principle applicable with respect to guaranteed entitlement for pensioners in another Member State to medical treatment is that the expenses of the institution of the place of stay are to be refunded by the institution of the place of residence.

Nevertheless, the Court held in this regard that if the institution of the place of stay has wrongly refused to pay the expenses and if the institution of the place of residence has not contributed as it is obliged to to facilitating the payment of costs, it is for the latter institution to reimburse directly to the insured person cost of the treatment he has had to bear. This reimbursement cannot be made subject either to an

authorisation procedure or to the requirement that the illness manifested itself suddenly (22).

2.3 Freedom of choice of medical products and healthcare services for European citizens: Müller-Fauré and van Riet, 13 May 2003 (23)

The Court of Justice has already established in its previous rulings that medical activities are economic in nature and fall within the ambit of freedom to provide services. The fact that national governments have retained the power to organise their social security systems does not release them from complying with Community law. A requirement that the assumption of costs for medical care provided in another Member State by the national social security system must be subject to prior authorisation would inevitably be considered as a restriction on the principle of free circulation. Such rules would deter patients from applying to providers of medical services established in Member States other than those of the insurance fund (Palm, 2003). In this new ruling, the Court of Justice pursues the same reasoning employed in the Kholl, Decker and Smits-Peerbooms rulings (24).

While on holiday in Germany in October and November 1994, Ms Müller-Fauré consulted a dentist without having obtained prior authorisation from her sickness fund. When she returned from her holiday, she applied to the Zwijndrecht Fund for reimbursement of the costs of her treatment (the fitting of six crowns and a fixed prosthesis).

Ms Van Riet, who had been suffering from pain in her right wrist since 1985, asked the sickness fund in Amsterdam to assume the costs of an

22 See also v*an der Duin* and *van Wegberg-van Brederode* concerning the obligation for retired persons who have chosen to reside in another Member State to apply for prior autorisation before receiving medical care in another Member State, even if the latter is the debtor State for their pension. CJEC, 3 July 2003, *van der Duin v. ANOZ* and *ANOZ v. Van Wegberg-van Brederode*, C-156/01, not yet published.

23 CJEC, 13 May 2003, *Müller-Fauré* and *van Riet*, C-385/99, not yet published.

24 CJEC, 28 April 1998, *Kholl and Decker*, C-158/96 and C-120/95, Rec. p. I1931; CJEC, 12 July 2001, *Smits and Peerbooms*, C-157/99, Rec. p. I-5473.

arthroscopy and an ulnar reduction which she had undergone without prior authorisation in Belgium in May 1993. Care before and after the treatment and the treatment itself were provided within a much shorter time period than in the Netherlands, partly in hospital and partly elsewhere.

In both cases, the sickness fund refused to reimburse the cost of the care because appropriate treatment was available in the Netherlands within a reasonable period.

The *Centrale Raad van Beroep,* before which the interested parties brought appeals, referred to the CJEC the question of the compatibility of the Dutch rules with the principle of freedom to provide services guaranteed by the Treaty. According to the Court, the Dutch rules deter, or even prevent, insured persons from applying to providers of medical services established in Member States other than that of the insurance fund and constitute, both for insured persons and services providers, a barrier to freedom to provide services.

The Court considered whether this barrier might be justified. It pointed out that the risk of seriously undermining the financial balance of the social security system and ensuring that there is a high-quality, balanced medical and hospital service open to all, are reasons capable of justifying a barrier of this kind. The Court takes the view that in this regard a distinction should be drawn between hospital services and non-hospital services.

As regards hospital services, the Court has already found in its judgment in *Smits and Peerbooms* that the requirement for prior authorisation within a health care scheme based on a system of agreements makes it possible to ensure that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment in the State concerned, and to prevent any wastage of financial, technical and human resources. The requirement for prior authorisation for hospital treatment provided in another Member State is therefore justified. The conditions attached to the grant of such authorisation must however be justified in the light of the overriding considerations mentioned above, must satisfy the requirement of proportionality and must preclude arbitrary behaviour on the part of the national authorities. As regards the condition concerning

whether treatment is necessary, laid down by the Dutch legislation, the Court considers that prior authorisation may only be refused if treatment which is the same or equally effective can be obtained without undue delay from an establishment with which insured person's sickness insurance fund has an agreement. The national authorities are required to have regard not only to the patient's medical condition and, where appropriate, of the degree of pain or the nature of the patient's disability, which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history.

As regards non-hospital services, the Court considers that no specific evidence has been put before it to support the assertion that the abolition of the requirement for prior authorisation for non-hospital services would give rise to patients travelling to other countries in such large numbers (despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there) that the financial balance of the Netherlands social security system would be seriously upset and that the overall level of public health protection would be jeopardised – which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services.

Moreover, the Court considered whether the removal of the requirement for prior authorisation is such as to call into question the essential characteristics of the system of access to health care in the Netherlands. In this respect, the Court pointed out that it is for the Member States to organise their social security systems. Nevertheless, the Member States must comply with Community law when exercising that power. Achievement of the fundamental freedoms, such as the freedom to provide services, inevitably requires Member States to make some adjustments to their national systems of social security.

The Court considers that when applying Regulation 1408/71 on social security for migrant workers and members of their families, those Member States which have established a system providing benefits in kind must provide mechanisms for *ex post facto* reimbursement for care provided in a Member State other than the competent State. Insured persons can claim reimbursement of the cost of the treatment received only within the limits of the cover provided by the sickness insurance

scheme of the Member State of affiliation. Nothing precludes a competent Member State with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another Member State can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria.

The Court concluded that it has not been demonstrated that the removal of the requirement for prior authorisation would undermine the essential characteristics of the Netherlands sickness insurance scheme. The principle of the freedom to provide services does preclude legislation such as the Netherlands rules which require the insured person to have obtained prior authorisation, even in the context of a system of benefits in kind for non-hospital care provided in another Member State by a healthcare provider with which the insured person's sickness fund has not concluded an agreement ([25]).

3. The rights and obligations of employees and employers

3.1 Setting a time-limit in national law for lodging applications for compensation in the event of an employer's insolvency: Peter Pflücke v. Bundesanstalt für Arbeit, 18 September 2003 ([26])

Mr Pflücke was employed as a bricklayer by G. & S. Bau GmbH in Pfaffenhofen (Germany) until he handed in his notice, which took effect on 30 June 1997. His former employer, from which he is still seeking payment of wages for June 1997, completely ceased trading on 31 December 1997, and is now the subject of insolvency proceedings which were commenced on 2 January 1998.

Under German law, in order to recover that claim for outstanding pay from the competent guaranteed institution, the *Bundesanstalt,* Mr Pflücke should have applied to that institution for payment of insolvency compensation within two months of the date on which the insolvency

25 For a study of problems relating to the mobility of patients and cross-border treatment, see Baeten, R., "Patiëntenmobiliteit en grensoverschrijdende zorg", *Handboek gezondheidseconomie*, September 2003, pp.131-195.

26 CJEC, 18 September 2003, *Peter Pflücke*, C-125/01, not yet published.

proceedings were commenced, in other words between 3 January and 2 March 1998. Mr Pflücke did not make any such application during that period. His legal counsel at the time merely notified Mr Pflücke's claim for outstanding pay to the court in charge of the insolvency proceedings on 2 February 1998. The court-appointed receiver then certified the existence of pay arrears. The certificate that he sent to Mr Pflücke on 10 March 1999 was forwarded to the *Bundesanstalt* by Mr Pflücke on 9 April 1999. On 9 June 1999, Mr Pflücke expressly applied for insolvency compensation from the *Bundesanstalt*. The *Bundesanstalt* rejected that application, maintaining that Mr Pflücke was not entitled to insolvency compensation since he had not applied for it within the period prescribed. His application having been rejected by the *Bundesanstalt*, Mr Pflücke brought an action challenging that decision before the *Sozialgericht Leipzig*.

The *Sozialgericht Leipzig* seeks to ascertain whether Directive 80/987 (Council of the European Communities, 1980) ([27]) precludes the application of a time-limit laid down by national law for the lodging of an application by an employee seeking to obtain, in accordance with the detailed rules laid down in that directive, payment of insolvency compensation. It therefore referred this matter to the Court of Justice for a preliminary ruling.

Directive 80/987 does not contain any provision on this subject. Articles 4, 5 and 10 of Directive 80/987, which permits the Member States not only to set the detailed rules regarding the organisation, financing and operation of the guarantee institution, but also to limit, in certain circumstances, the protection which it is designed to provide to employees, provide for neither a temporal limitation of the rights that employees derive from that directive nor a restriction on Member States' freedom to set a time-limit for lodging applications. Article 9 of Directive 80/987 can be explained by the fact that the directive merely guarantees employees a minimum level of protection under Community law in the event of insolvency of their employer. That article cannot

27 Article 9 states: "*This Directive is without prejudice to Member States' ability to apply or introduce legislative, regulatory or administratove provisions which are more favourable to employees*".

therefore be interpreted as precluding Member States from setting a time-limit for lodging applications.

Member States are, in principle, free to provide in their national law for a time-limit for the lodging of an application by an employee seeking to obtain, in accordance with the detailed rules laid down in Directive 80/987, payment of insolvency compensation, provided however that such provisions respect the general principles of Community law. Such time-limits prescribed in national law may not be less favourable than those governing similar domestic applications (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness). The setting of reasonable time-limits essentially satisfies the principle of effectiveness, inasmuch as it constitutes an application of the principle of legal certainty. Compared with the time-limits applicable in other Member States, the two-month time-limit laid down by German law is not the shortest. Nevertheless, the fact remains that several other Member States prescribe significantly longer periods or have chosen not to set such a time-limit. The national court must therefore determine whether the time-limit at issue in the main proceedings is justified by overriding reasons relating to legal certainty, in particular the proper working of the guarantee institution.

The Court therefore concluded that Directive 80/987 does not preclude the application of a time-limit laid down by national law for the lodging of an application by an employee seeing to obtain payment of insolvency compensation in accordance with the provisions of that directive, provided that the time-limit adheres to the principles of equivalence and effectiveness. It is settled case-law that if the national court finds that the national provision laying down the time-limit is not compatible with the requirements of Community law and that no compatible interpretation of that provision is possible, that court must refuse to apply it.

Readers who are interested in this subject should also read the *Walcher* and *Mau* rulings. The first concerns the assimilation in German national law of shareholder loans to capital contributions leading to a total loss of entitlement to insolvency compensation. The second deals with the

notion of the onset of the employer's insolvency and the interpretation of the notion of an employment relationship under Directive 80/987 ([28]).

3.2 Safeguarding of employees' rights in the event of transfers of undertakings: right to early retirement: Martin and Others v. South Bank University, 6 November 2003 ([29])

The situation of employees in the event of transfers of undertakings, businesses or parts of undertakings or businesses is governed by Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings (Council of the European Communities, 1977). The text of the Directive has been modified by Directive 98/50/EEC of 29 June 1988 (Council of the European Communities, 1988) in order to reflect the Court of Justice's case law on the subject. For reasons of clarity and rationality, the Council of the European Union has more recently codified Directive 77/187: a new directive, 2001/23 of 12 March 2001, has been adopted (Council of the European Union, 2001).

The facts in the case, *Martin and Others*, are as follows. Prior to 1 November 1994, Ms Martin and Others were employed as nursing lecturers at the Redwood College of Health Studies which formed part of the National Health Service (NHS). Their employment contract stated that their employment was governed by the conditions of the General and Nurses and Midwives Whitley Council. Following the attachment of nursing education to the Ministry of Education and Employment, Redwood College became part of South Bank University (SBU).

Shortly before that, SBU informed the staff at Redwood College that they would be offered a new employment contract. They were not obliged to accept SBU's conditions of service. SBU did state however that, in any event, the employees would not be able to continue their membership of the NHS retirement scheme and that they would have

28 CJEC, 11 September 2003, *Maria Walcher,* C-201/01, not yet published; CJEC, 15 May 2003, *Karem Mau,* C-160/01, Rec. p. I-4791.

29 CJEC, 6 November 2003, *Martin and Others.v. South Bank University,* C-4/01, not yet published.

three options: to leave the NHS pension scheme as it was and to join a new pension scheme; to transfer pension rights from the NHS scheme to one of SBU's retirement schemes; or to leave the NHS pension scheme as it was and not to join a new pension scheme.

The applicants did not accept the terms and conditions of employment offered by SBU and accordingly remained on the terms specified in their contracts of employment as at the time of transfer. However, they all joined the Teachers' Superannuation Scheme. They also applied to transfer their existing NHS pension rights into that scheme. Ms Martin alone could not do so because she was over 60 at the time of the transfer of Redwood College.

In October 1996, the Ministry of Education and Employment announced the change to the terms of finance for early retirement, and SBU informed all university staff aged over 50 that it was unlikely to be able to offer early retirement after 31 March 1997. Ms Martin and Mr Daby therefore accepted SBU's offer of early retirement. The applicants claimed to be entitled to the NHS terms of early retirement instead of SBU's terms. In order to resolve the dispute, the Employment Tribunal held it to be necessary to refer to the Court of Justice for a preliminary ruling.

The Court pointed out that Article 3(1) makes it clear that rights which are contingent upon either dismissal or premature retirement by agreement with the employer fall within the definition of "rights and obligations" and are therefore covered by that article.

Furthermore, early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of early retirement arising from an agreement between the employer and the employee to employees who have reached a certain age, do not constitute old-age, invalidity or survivors' benefits under the supplementary company or inter-company pension schemes within the meaning of Article 3(3) of Directive 77/187 ([30]).

30 "*Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of*

Article 3 of that directive is to be interpreted as meaning that obligations arising upon the grant of such early retirement, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards the employees concerned, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments, and regardless of the practical arrangements adopted for such implementation.

Article 3 of Directive 77/187 precludes the transferee from offering the employees of a transferred entity terms less favourable than those offered to them by the transferor in respect of early retirement, and those employees from accepting those terms, where those terms are merely brought into line with the terms offered to the transferee's other employees at the time of the transfer, unless the more favourable terms previously offered by the transferor arose from a collective agreement which is no longer legally binding on the employees of the entity transferred, having regard to the conditions set out in Article 3(2).

Where, in breach of the public policy obligations imposed by Article 3 of Directive 77/187, the transferee offered employees of the entity transferred early retirement less favourable than that to which they were entitled under their employment relationship with the transferor and those employees accepted such early retirement, it is for the transferee to grant the necessary compensation to ensure that those employees are accorded early retirement on the terms applicable to their employment relationship with the transferor.

3.3 Protection of the health and safety of workers: Landeshauptstadt Kiel v. Norbert Jaeger, 9 September 2003 (31)

The Directive on the organisation of working time of 23 November 1993 (Council of the European Union, 1993) establishes major principles and minimum rules on daily and weekly rest periods, annual

the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph".

31 CJCE, 9 September 2003, *Norbert Jaeger*, C-151/02, not yet published.

paid leave, maximum weekly working time, night work, shift work and patterns of work. The Directive authorises many derogations which leave open broad options for Member States with respect to flexibility in the organisation and planning of working time.

In 2000, in *Simap* ([32]), the Court made an important ruling for the application of this directive in the area of on-call periods carried out in the place of work. The Court made plain the scope of the directive and clarified the definition of working time. A further opportunity for the Court to give a decision on this area arose in the *Jaeger* ruling.

Mr Jaeger, who works as a doctor at Kiel hospital (Germany), regularly carries out on-call duty, which involves staying at the clinic and working when required. This is offset in part by the grant of free time and in part by the payment of supplementary remuneration. He is allocated a room with a bed in the hospital, where he may sleep when his services are not required. German labour law distinguishes between readiness for work ("*Arbeitsbereitschaft*"), on-call service ("*Bereitschaftsdienst*") and stand-by ("*Rufbereitschaft*").

Under German law only readiness for work is as a general rule deemed to constitute full working time. Conversely, both on-call service and stand-by are categorised as rest time, save for the part of the service during which the employee has in fact performed his professional tasks. Mr Jaeger is of the view that the on-call duty performed by him in the context of the emergency service must in its entirety be deemed to constitute working time.

The Court pointed out that the objective of Directive 93/104 on certain aspects of the organisation of working time is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks. This directive defines the characteristic components of the definition of "working time" as *"any period during which the worker is working, at the employer's disposal and carrying out his activity or duties"*. The *Landesarbeitsgericht Schleswig-Holstein*, to which the case was referred by the

32 CJEC, 3 October 2000, *Simap*, C-303/98, Rec. p. I-7963.

Landeshaupstadt Kiel, referred the question of whether the German rules are in conformity with the Community directive to the Court of Justice.

Referring to the *Simap* ruling, the Court considered that the decisive factor in determining whether the characteristic features of the concept of working time within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. According to the Court, the fact that such doctors were obliged to be present and available at the workplace with a view to providing their professional services had to be regarded as coming within the ambit of the performance of their duties. That conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional services are not required.

The Court adds that a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints than a doctor who is on stand-by, since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required.

In these circumstances, on-call duty performed by a doctor where he is required by his employer to be physically present in a given place cannot be considered as rest when his services are not required. The Court therefore concludes that national rules such as those in force in Germany, which describe such on-call duty as rest, other than for the period during which the employee has actually carried out professional tasks, and which only provide for remuneration for the periods during which professional tasks were carried out, are contrary to the Community directive.

Conclusion

The rulings made by the highest Community court prove, if such proof were necessary, that the construction of the social dimension of Europe is definitely underway. Progress has not always been as rapid and

spectacular as was the case for the creation of the single market, but, despite a degree of reluctance on the part of Member States to accept legislative developments in this area, it is undeniable that employees are deriving from the Community legal order a range of increasingly extensive rights which can be directly invoked in national courts.

However, this is not always the case and the opposite also occasionally occurs. Thus, whilst the trade unions have welcomed the *Jaeger* ruling, since it confirms the basic principle according to which time which is not freely at the disposal of employees due to professional obligations should be considered as working time, there have been signs in some Member States that there would probably be serious problems in their medical sectors, were they to be obliged to implement this ruling. Some Member States (Germany, the Netherlands, Spain) which for reasons of principle had never been in favour of the individual exemption provided for in Directive 93/104, could think about the need to abandon Article 18(1)(b)(i) ([33]), since they might need this provision in order to address forthcoming difficulties over on-call duty. It is therefore possible that there will be a number of backward steps taken over the organisation of working time in Member States other than the United Kingdom. Anxious to avoid such a danger, the European Commission has decided to begin a process of very broad consultations which might lead to the amendment of the directive (CEC, 2003). The Court of Justice will in any event have another opportunity to give an opinion on this question in the context of the *Pfeiffer* ruling involving emergency service doctors, first aid workers and employees of the German Red Cross ([34]).

---

33 "*However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that: - no employer requires a worker to work more than 48 hours over a seven-day period (…) unless he has first obtained the worker's work, - no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work (…)*". Hitherto only the United Kingdom has applied this provision and has the largest proportion of employees working for very long hours.

34 *Pfeiffer and Others v. Deutsches Rotes Kreuz Kreisverband Waldshut eV*, C-397/01 to C-403/01.

In conclusion, it should be noted that in 2004 the European Court of Justice will be making decisions on a number of questions: does a female employee whose maternity leave coincides with the period fixed by a collective agreement for the annual holiday of the undertaking's employees have the right to benefit from annual holidays at a different time from that agreed upon ([35])? Must an old-age pension paid early for reasons of unemployment be assimilated to an old-age pension *stricto sensu*, or is it another benefit for which the setting of the retirement age does indeed have consequences ([36])? Is the principle of equal pay for male and female workers infringed by the German legislation which requires full- and part-time teachers to work the same amount of overtime before they have the right to overtime payments ([37])?

References

Baeten, R. (2003), "Patiëntenmobiliteit en grensoverschrijdende zorg", *Handboek gezondheidseconomie*, September 2003, pp.131-195.

Bosco, A. (2000), "Toward a Rethinking of the National Systems of Social Protections? Observations on the Recent Jurisprudence of the Court of Justice", *European Problems*, No.7, Groupement d'études et de recherches Notre Europe, July 2000 (http://www.notre-europe.asso.fr/fichiers/Probl7-en.pdf).

CEC (2003) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions and the social partners at Community level concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organisation of working time, COM (2003) 843 final of 30 December 2003 (http://europa.eu.int/comm/employment_social/labour_law/docs/version_finale_en.pdf).

35 *Gomez v. Continental Industrias del Cauchos SA*, C-342/01.

36 *Haackert v. Pensionsversicherungsanstalt der Angestellten*, C-303/02.

37 *Elsner-Lakeberg v. Land Nordrhein-Westfalen*, C-285/02.

Council of the European Communities (1971), Regulation (EEC) No.1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149 of 5 July 1971, pp.2-50.

Council of the European Communities (1976), Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O J L 39 of 14 February 1976, pp.40-42.

Council of the European Communities (1977), Council Directive 77/187/EEC of 14 February 1977 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61 of 5 March 1977, pp.26-28.

Council of the European Communities (1980), Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 283 of 20 October 1980, pp.23-27.

Council of the European Union (1993), Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307 of 13 December 1993, pp.18-24.

Council of the European Union (1988), Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 201 of 17 July 1998, pp.88-92.

Council of the European Communities (2001), Council Directive 2001/23/EEC of 12 March 2001 on the approximation the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 82 of 22 March 2001, pp.16-20.

Dehousse, R. (1997), *La Cour de justice des Communautés européennes*, Montchrestien, Paris.

Lanquetin, M.-T. (2003), "L'égalité de traitement entre les femmes et les hommes: sur la directive 2002/73/CE du 23 septembre 2002", *Droit Social,* No.3, March 2003, pp.312-322.

Palm, W. (2003), "La Cour de justice frappe à nouveau. Nouvel arrêt dans les affaires Muller-Fauré et van Riet", *AIMS*, No.18, June 2003.

Van Raepenbusch, S. (2003), "Tendances récentes de la jurisprudence sociale de la Cour de justice des Communautés européennes (1998-2003)", *Droit social*, No.7/8, July-August 2003, pp.751-763.