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Law Review

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EELC's review of the year 2017

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Introduction

Prof. Ruben Houweling and Prof. Catherine Barnard[1]

This is the first time we have produced a review of employment law cases from the last year, based on analysis by various members of our academic board. But before looking at their findings, we would first like to make some general remarks.

Political developments

2017 saw general elections in a number of EU Member States. Those who are EU supporters may have feared that the numerous polls predicting the strong growth of nationalist parties would have become reality. In the end, the Dutch elections resulted in a win for the moderately conservative right-wing party, after which France and Germany followed with wins for strongly EU-minded parties and France and Germany seem to be trying to re-establish firm cooperation between them within the EU. The future will tell how other Member States will react, especially Eastern European countries, with Hungary and Poland at the forefront. Having been part of the EU since 2004, these countries now seem reluctant to move forward on topics such as a refugee deal (for which the EU has commenced infringement proceedings against them), freedom of speech and the neutrality of the courts.

The Brexit negotiations are of course another major challenge to the EU

In the past year, it has proved difficult to reach consensus on a wide variety of topics, albeit that a joint report was published in December 2017 which showed that a political agreement was possible on two of the three main issues – EU citizens' rights and the so-called Brexit Bill. Dealing with the difficult question of a border between Northern Ireland and the Republic of Ireland is proving significantly more challenging. While the EU seems to operate successfully as one block, the British seem internally divided, making the negotiation process more complicated. The (initial) deadline of 29 March 2019 approaches quickly, but the Brexit consequences for both British and EU citizens and businesses should be clear much earlier. This can be illustrated by the fact that a Dutch court (in Amsterdam) intends to ask the ECJ essentially whether British citizens in EU countries remain EU citizens after Brexit. At this moment, the outcome is uncertain, but we will keep you up-to-date in a feature EELC issue.

EU Social Developments

The EU saw various developments that impact its social agenda. Most notably, in October 2017, **the European Council reached agreement (by qualified majority) on amendments to the Posted Workers Directive**. With these, the EU aims to protect employees as well as creating a level playing field, correcting the balance that had appeared to favour of the free movement of services. Reaching this agreement has been a breakthrough, as earlier in 2017, the EU seemed to have reached an impasse, when President Macron of France made extra demands. On 1 March 2018, the EU Member States, the European Commission and the European Parliament reached agreement on the amendments.

The final agreement limits, *inter alia*, the posting of workers to a maximum of one year, after which a 'harder core' of employment conditions will apply to posted workers. It should be noted that some of the countries that may benefit most from the Posted Workers Directive, Poland, Hungary, Lithuania and Estonia voted against the agreement.

Further, the EU has initiated plans to extend parental leave (for fathers), presented a directive proposal that

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modernises Directive 91/533/EEC on the obligation to inform employees of the conditions applicable to the employment relationship and started public consultations on a European Labour Authority and a European Social Security Number (which closed in the first week of this year).

Of particular note was the proclamation of the European Pillar of Social Rights by the EU Parliament, Council, Commission and Member States. It aims to prioritise the social agenda within the EU. The social pillar consists of twenty principles from equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. An online social scoreboard will track Member States' progress, albeit not in a legally binding way.

ECJ and ECtHR

Apart from legislative developments, there were a number of interesting judgments from the ECJ and the ECtHR. Landmark rulings from the ECJ were *Achbita* (C-157/15), *Bougnaoui* (C-188/15), *Asklepios* (C-680/15 and C-681/15) and *FNV/Smallsteps* (C-126/16). Meanwhile, *Barbulescu* (no. 61496/08) may be characterized as a landmark case for the European Court of Human Rights.

While various ECJ judgments are discussed in more detail by the individual academic board members, **one trend may be an emphasis on the freedom to conduct a business** in very different situations. This has served as a justification for (possibly) restricting the wearing of headscarfs in *Achbita* and *Bougnaoui*; preventing a buyer of a business from being bound by a collective agreement which he could not negotiate or amend (*Asklepios*) – whereas, in late 2016, this stood in the way of a Greek rejection of a proposal for a collective dismissal by a French multinational (*AGET Iraklis*, C-201/15). It could be argued that the ECJ is currently trying to shift the balance back towards employers following earlier case law that tended towards employees. This risks a backlash against the Court from the trade unions, as was witnessed following the infamous judgments in *Viking* and *Laval*.

Concluding remarks

While we are very curious to see what 2018 will bring to the EU – and to social law in particular, given the introduction of the European Pillar on Social Rights – we are excited to bring you this review of 2017. As you will see, each academic board member has taken his or her own approach. Some have chosen to provide a general overview, whilst others discuss particular cases in greater depth. We hope that you enjoy these reviews.

Private international law

Prof. Zef Even and Amber Zwanenburg[2]

In 2017, there were two interesting cases on the international jurisdiction of the courts. First, there was the Dutch Supreme Court ruling on *Holterman/Spies* (EELC 2017/35) – following a preliminary ruling by the ECJ (C-47/14). Second, there was the ECJ ruling in *Ryanair* (C-168/16 and C-169/16), in which the ECJ provided guidance on how to determine the 'habitual place of work' in the air transport sector. Both cases concern the Brussels I Regulation (the 'Brussels Regulation') but remain relevant under the Brussels I Recast Regulation.

The *Holterman/Spies* case concerns the **jurisdictional rules that apply** when an individual is liable both in his capacity as the manager director of a company based on breach of the duty to perform his tasks properly under company law, and that person's liability as an employee of the company – separate from his capacity as manager. Companies tend to try to steer away from Section 5 of the Brussels Regulation – which contains special jurisdictional provisions with regard to employment contracts – by claiming breach of company law instead. Section 5 leaves the company no choice but to claim before the court of the Member State where the employee is domiciled.

Instead, in this case, a claim was submitted in the Netherlands, relying on Section 2, based on which a claim can be made to the court of in the place of establishment of the company. The ECJ ruled that Section 5 of Brussels Regulation prevents the applicability of Section 2 in the case of a claim against a director if the relationship with the director is considered to be an employment contract within the meaning of the Brussels Regulation. It clarified that an employment contract exists if, for a certain period, the director has performed services for and under the direction of the company in return for pay. A key consideration is whether there is a relationship of subordination between the managing director and the company. In this regard, the ECJ advised national courts to examine the extent to which a manager director, in his or her capacity as a shareholder of the company, could influence the administrative body of the company of which s/he was the manager. If the ability to influence that body was not negligible, it would be appropriate to conclude that there was no relationship of subordination.

The Dutch case report (EELC 2017/35) explained what happened to the case following the ECJ's preliminary ruling. The Dutch Supreme Court ruled on the facts that there was an employment agreement under Section 5 of the Brussels Regulation. It noted that (i) the manag-

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ing director was obliged under his employment contract to spend all his working time with the company and was not allowed to perform any side-activities; (ii) the employment agreement contained clauses on salary, bonus and holiday; (iii) the employment agreement was concluded for five years and was to be tacitly extended for two years (unless it was terminated by a notice period of 12 months) and (iv) although the managing director owned 15% of the shares of the company, the employment agreement explicitly stated that he was obliged to follow the instructions of the shareholders' meeting. The Dutch Supreme Court further explained that if a managing director can be dismissed against his or her will by the shareholders, this is indicative of a relationship of subordination. A contrario, if, on the other hand, s/he holds the majority of the shares, this is indicative that there will be no such relationship.

When an employee wishes to bring a claim against his or her employer under the Brussels Regulation, the main connecting factor determining the competent court is the 'habitual place of work'. Determining the **'habitual place of work' for mobile workers**, has proven to be complicated. See, for example, a Dutch road transport case at EELC 2017/36. In September 2017, the ECJ gave further guidance in a case concerning mobile workers in the air transport sector. The (joined) cases (C-168/16 and C-169/16) revolve around Ryanair and the question of how to determine the place where cabin crew having their 'home base' at Charleroi airport 'habitually carry out their work'. With regards to determining the 'habitual place of work', the ECJ referred to settled case law, in which it has repeatedly held that the concept must be interpreted broadly. It repeated a set of indicia following from two ECJ cases concerning road transport (*Koelzsch*, C-29/10 and *Voogsgeerd*, C-384/10). It also stated that, when determining the place from which airline cabin crew habitually carry out their work, the concept of 'home base' is a 'significant indicium'.

The cases that led to the ECJ ruling have now been remitted to the Mons Higher Labour Court in Belgium. Charleroi airport was the designated as the 'home base' and so it is likely that court of Charleroi will assume jurisdiction – following which it will have to decide what law to apply. It is very likely that EELC readers will be able to read about the outcome sometime in 2018. Anthony Kerr in his comment in EELC 2017-4 (pp.236-238) gave an indication of the approach the Belgian court may take, as this can be gleaned from the outcome of a prior Norwegian case.

Whilst on the topic of international transport, the Dutch Appellate Court's insight into the applicability of the Posted Workers Directive on international road transport is worth a mention (EELC 2017/36). In this case, the Dutch Appellate Court held that working *from* a given place is not relevant when applying the Posted Workers Directive. The case is currently pending before the Dutch Supreme Court, and we expect it will ask some preliminary questions to the ECJ.

Developments concerning the posting of workers are proceeding apace. The **debate on the effectiveness of the Posted Workers Directive** has proven to be a hot topic due to the large number of workers being sent from new to old Member States, generating waves of protest across the old Member States against cheap labour originating from the new Member States.

The Austrian case report EELC 2017/19 gives an interesting insight into the Austrian Anti-Wage and Social Dumping Law and the difficulties faced. But aside from national initiatives of this kind, the long debated Posting of Workers Enforcement Directive (which had to be implemented by Member States by 18 June 2016), aims to improve the implementation and enforcement of the Posting of Workers Directive by setting a framework of measures and control mechanisms. The first issue of 2017 covered a case on the Belgium implementation of this Directive into national law (EELC 2017/11). Although the Directive attempts to address some of the issues surrounding effective enforcement, in practice it seems not to alleviate many of the concerns raised. In particular, it does not prevent unequal treatment between posted and local workers. In 2016, the European Commission launched a set of proposals for further revision of the Posted Workers Directive and in October 2017, the debate got a new boost when the Council reached agreement about a new proposal. At this moment, March 2018, the European Parliament and Council are gradually sketching the contours of an agreement on this reform. In short, never a dull moment!

Age discrimination

Daiva Petrylaitė[3]

Directive 2000/78/EC contains a number of provisions specially designed to regulate discrimination on grounds of age, in particular, some exceptions to the prohibition. Article 6 of the Directive allows Member States to provide that a difference in treatment on grounds of age does not constitute discrimination if, under national law, it is objectively and duly justified by a legitimate aim, including lawful employment policy, labour market and vocational training objectives, and that the objective is pursued using appropriate and necessary measures. Under the general application of Article 2(2)(b) of Directive 2000/78/EC, indirect discrimination does not include cases where a different situation can be justified by an objectively legitimate aim, if this objective is pursued by appropriate and necessary measures. Consequently, Article 6(1) of the Directive allows employers to treat people differently based on their age, if there is,

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for example, a legitimate employment policy, labour market or vocational training objective, and means to achieve it are appropriate and necessary.

Article 6(1) of Directive 2000/78/EC includes the following:

a. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
b. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; and
c. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Although this list appears exhaustive, it is not considered to be strictly limited. However, employers should check their policies against the principles set out in Article 6(1) of the Directive, namely, having a legitimate aim, an appropriate means of achieving that aim and the maintenance of proportionality.

A Danish dispute (EELC 2017/14) reveals **the relationship between EU and national law** insofar as it relates non-discrimination based on age in employment relationships. The Danish Court ruled that in an employment relationship where the employer is a private business, the employee is not entitled to rely on general principles of EU law which are not enshrined in EU treaties if the state of the law in Denmark is clear and does not allow for an EU-compliant interpretation. This, despite the preliminary ruling of the ECJ in *Rasmussen* (C-441/14) according to which "*EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation*."

Certain national courts have to deal with disputes where age discrimination is a derivative fact. This occurred in Germany, in a case on **qualification requirements for a job and age discrimination** (EELC 2017/3). The German Federal Labour Court found that objective qualification requirements should not be regarded as a prerequisite for entitlement to compensation for discrimination (because of refusal to recruit). The applicant needed to be genuinely interested in the job. Nevertheless, the Court made clear that the advertisement used by the defendant – for a lawyer with 0 to 2 years of professional work experience to complete a young and dynamic team – could be considered as discrimination on grounds of age.

Often enough, **length of service** is examined as the basis of age discrimination. For example, in a Hungarian case (EELC 2017/2), the Supreme Court stated that length of service is not a protected characteristic under discrimination law. The Court ruled that the length of service of an employee is not directly connected to age, therefore treatment of an employee based on length of service with a specific organisation cannot be considered age discriminatory. The Court relied on the *Tyrolean Airways* judgment (C-132/11) where the ECJ ruled that "*a difference in treatment based on the date of recruitment by the employer is not directly or indirectly based on age or on an event linked to age*". The Hungarian court mentioned that "*No one had tried to argue that length of service fell outside age, but within 'miscellaneous', as length of service is not something that characterises the daily existence of a person*".

The ECJ ruled in *Bowman* (C-539/16) that **length of service** on which a wage system was based under a collective agreement, was not age-discriminatory.

Retirement age as the criterion for termination cannot be justified, as was found in an Austrian case, published in EELC 2017/1. The Austrian Supreme Court held that the selection of employees for redundancy based on their entitlement to an early retirement pension constituted unfair dismissal on grounds of direct age discrimination. Although it was accepted that this could have been a legitimate aim within the meaning of Article 6(1) of Directive 2000/78/EC, the means to achieve that aim were not considered appropriate and necessary. The Court stressed that a balance must be struck between the interests of older and younger employees, taking into account that it is generally easier for younger employees to find a new job. The Court held that, as the redundancy policy was based on a criterion that was inextricably linked to the age of employees, there was direct discrimination. The Court stated that the prohibition must be understood in the light of the right to engage in work, which is recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union. Particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. The Court emphasized that economic factors affecting the employer are not a legitimate aim that could justify the selection of older (and therefore generally more expensive) employees. On the contrary, a legitimate aim could be to make a fair selection of employees for redundancy.

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Age as the justified criterion for termination was investigated by the ECJ in *Abercrombie* (C-143/16). Interestingly, in this case, the subject of the dispute was not retirement but youth. The question was whether an employer could terminate the on-call employment contract of someone under 25. The ECJ found that Articles 2(1), 2(2)(a) and 6(1) of Directive 2000/78/EC must be interpreted as not precluding a provision, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary. In the present case, the ECJ justified and interpreted the provisions of the first subparagraph of Article 6(1) of the Directive, that Member States may provide that differences of treatment on grounds of age do not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. The Court stated that encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved and the objective of promoting the position of young people on the labour market in order to promote their vocational integration or ensure their protection can be regarded as legitimate for the purposes of Article 6(1) of Directive 2000/78. Facilitating the recruitment of younger workers by increasing the flexibility of personnel management constitutes a legitimate aim and therefore this was a legitimate aim for the purposes of Article 6(1) of Directive 2000/78.

Case law demonstrates that the prohibition of age discrimination is difficult to implement. It is not hard to determine different treatment by age, but it is more difficult to assess whether it is lawful. As can be seen from the ECJ cases, in assessing situations of possible age discrimination, the objective and legitimate aim of the different legal regulation is of particular importance. It is also relevant how much this different legal regulation influences the balance of interests of employees of different age in aspects such as the opportunity to participate in the labour market, as well as dignity of economic, cultural and social life, including the right to appropriate social-economic guarantees (i.e. wage, vocational training and etc.).

Disability Discrimination

doc. JUDr. Petr Hůrka, Ph.D[4]

The relevant EU legislation, in particular Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the "**Directive**") lays down fundamental principles of equal treatment and the prohibition of discrimination in employment relations and pre-employment relations.

Disability is on the list of protected characteristics. The provisions of the Directive as implemented and transposed in the EU member states, including the Czech Republic, thus prohibit any direct or indirect discrimination on grounds of disability.

Assertion versus existence of disability as discrimination ground

In terms of the latest case law, *Peninsula Business Service Limited – v – Baker* is particularly interesting (EELC 2017/15). As the case is relatively new, it is uncertain what impact will it have on European case law, but the judgment of the Employment Appeal Tribunal (EAT) is worth following, because of its approach towards the **difference between asserting a disability and there actually being one**.

In the case, the claimant was a lawyer who told his manager that he suffered from dyslexia. Later, the claimant was put under covert surveillance due to suspicion of a different manager that the claimant was not working for his employer and was instead building up a private caseload. Based on that, the claimant brought harassment and victimisation claims to the EAT, claiming in particular that the decision to be put under surveillance was taken because of the dyslexia. There seem to be two major issues that are resolved by the EAT judgment. Firstly, the EAT dealt with whether it was sufficient for the claimant only to claim that he has a disability (such as dyslexia) or whether this must actually be proved. Secondly, the EAT distinguished between the potential existence of a discrimination ground and discrimination as such.

In my view, the EAT was right that in a discrimination dispute, the claimant should prove that (s)he has a protected characteristic, rather than just asserting it. In the case of some characteristics, this may be quite obvious (e.g. in case of discrimination on grounds of age it is easy to prove the age of a person) but in other cases the claimant will need to provide evidence to prove that (s)he is of certain religion or belief or has a specific disability.

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If the concept of **presumption of discrimination in terms of burden of proof**[5] were to be interpreted to mean that it is enough for the claimant simply to assert the existence of a protected characteristic, such as disability, the scope of discrimination would become extremely wide and this may open the floodgates to claims. It would be all too easy for people to make claims and allow the shifting of the burden of proof to put the onus on the employer to disprove them.

A similar approach can be found in relevant Czech case law. In cases of discrimination, both the Constitutional Court and the Supreme Court have consistently held that the claimant must both claim and prove that s/he has been treated unfairly. The shifting of burden of proof merely ensures that the facts of the treatment are proven before the defendant has to prove that it was not a case of unlawful discrimination.[6]

Existence of discrimination ground versus discrimination

The EAT specified that in order to make a finding of unlawful discrimination, the allegedly discriminatory acts of the defendant needed to be shown to be based on discriminatory grounds. In other words, the mere fact that the claimant was disabled did not necessarily mean s/he had suffered unlawful discrimination. A difference in treatment may be justifiable.

Difference between judgments and the need for further clarification

EELC has also featured a number of other cases on disability discrimination. For example, a decision by the Belgian Labour Tribunal of Liege featured in EELC 2017/4, which I found rather surprising, as it was somewhat harsh towards the defendant. In the case of a morbidly obese driving instructor, the Labour Tribunal ruled that the employer needed to make the following reasonable adjustments: to buy a bigger car, set the employee up to teach theory and assign students of normal weight to him. These seem to me to be excessive, especially in terms of cost. In my view, it should not be necessary for an employer to be forced to buy or redesign tools or equipment or reorganise work in order to be able to employ somebody who is morbidly obese.

This kind of approach is likely to lead to a situation where employers refuse to specify why they are turning down a job applicant, for example. This is especially the case if the discriminatory grounds become broader, as happened in the case of *Kaltoft* (C-354/13), in which it was found that obesity may constitute a disability and would therefore be a protected characteristic.

I believe that there is a major difference between the said approach and the approach of the German State Labour Court in the case featured in EELC 2017/16. This case also featured an obese employee. He claimed that the only reason his fixed term contract was not being extended was because he was obese. The German State Labour Court ruled that if an employee works for a fixed term, s/he is not entitled to an extension of this term on grounds of an allegation of disability discrimination based on obesity. The ruling further stated that Grade III obesity cannot be seen as a disability and therefore the employer's decision not to extend the contract was not based on a forbidden ground under sections 7.1 or 1 of the AGG. Neither the TEU nor the TFEU prohibit discrimination on grounds of obesity, as such. Even Directive 2000/78 does not list obesity as a prohibited ground of discrimination. I believe this approach to be correct.

However, the difference between these two approaches shows that further clarification may be needed, preferably at EU level, in terms of the scope of 'disability', as well as the interpretation of Article 5 of the Directive, namely what constitutes "disproportionate burden on the employer". In my view the EAT case shows the correct path for further development of case law related to discrimination on grounds of disability.

Gender discrimination

Jean-Philippe Lhernould[7]

Pregnant women are protected by Directive 2006/54/EC (gender discrimination) and Directive 92/85/EEC (safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding). Despite this set of highly protective rules, they remain subject *de facto* to unfair treatment. One example occurred in the context of the transfer of a business in Cyprus. The new owner made a pregnant employee redundant, claiming afterwards that he was not aware of her condition at the time of the redundancy – which she had told to the transferor prior to her transfer. Unsurprisingly, the employment court held that, having regard to national law as harmonised by Directive 92/85/EEC and ECJ case law, a pregnant employee enjoys full protection against dismissal once she has informed her employer about her pregnancy. It held that her dismissal was sex discriminatory and therefore unlawful (EELC 2017/5).

This said, the **protection of pregnant women at work is not absolute**. A Danish dispute provides a good example of a case where the protection was insufficient. The Danish Supreme Court had to decide whether an employee who had declared she was pregnant after having been selected for redundancy, had been a victim of discrimination because she had not been reassigned to a vacant position during the notice period. The Danish

5. Cf. Article 10 of the Directive.
6. Cf. Judgment of the Constitutional Court No. Pl. ÚS 37/04 dated 26 April 2006, judgment of the Supreme Court No. 21 Cdo 246/2008 dated 11 November 2009, decision of the Supreme Court No. 21 Cdo 572/2011, dated 3 July 2012.
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Supreme Court ruled in favour of the employer, establishing as a general principle arising from its case law that the fairness of a dismissal must be assessed on the facts at the time of notice. There is therefore no duty to offer pregnant employees or those on maternity leave and already on notice, any position that falls vacant after the date of notice. The employer must, however, be able to demonstrate that, at the time of the dismissal, it did not know of any positions that were likely to fall vacant before the notice period ended (EELC 2017/6). Would the ECJ come to the same conclusion? This is questionable, as Article 10 of Directive 92/85/EEC "*laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave*" (ECJ 4 October 2001, C-109/00, *Tele Danmark*, §26).

Another **gap in the protection of pregnant women** comes from the existence of superior employment rules of public order. The French *Cour de cassation* illustrated this unusual matter in the case of a female employee who, after having been informed that she would be made redundant because she no longer held a work permit, told her employer she was pregnant. The employer went ahead and dismissed her. For the French Cour de cassation: "*the public policy provisions of [Art. L.8251-1 of the French Labour Code] are applicable to an employer, such that it cannot, directly or indirectly, keep in its service or employ for any length of time, a foreign national who does not hold a work permit, so enabling him or her to pursue a salaried activity [in France], and an employee in such position cannot benefit from protective legal provisions forbidding or restraining the termination of pregnant employees*" (EELC 2017/17). In other words, if there is no valid employment contract, there can be no valid work-related protection. Rules of public order in relation to access to the national job market prevail over the protection granted to pregnant employees. This seems to imply that pregnant women are treated like any other employees, giving no credit at all to their protected status.

The **choice of comparator** is crucial to establishing gender discrimination. But in practice, it is difficult. One example comes from a UK case. A male employee who wished to take shared parental leave was informed that he would get three months of statutory pay, whereas a female employee would have been entitled to full salary during an equivalent period of maternity leave. According to a first instance decision of the Employment Tribunal, this situation amounted to direct sex discrimination (EELC 2017/28). But in my view the tribunal erred in its choice of comparator. The right comparator was a woman on additional paternity leave (e.g. a female spouse), rather than a woman on maternity leave. A second example, also from the UK, raises a more typical problem. Some women working in retail stores argued that retail store workers carry out work of equal value to the predominantly male workforce in the distribution centres, citing them as appropriate comparators for the purposes of an equal pay claim. The Employment Appeal Tribunal upheld their claim, even though the stores and distribution centres were run by different departments and the rates of pay were set by a different method (EELC 2017/42). Was there a single source (e.g. body responsible) which determined pay? We believe so. Indeed, if the work performed by a female employee is of equal value to that of a male employee working within the same 'establishment', which seemed to be the case in the dispute before English courts, the female employee should be entitled to the same pay unless the employer can demonstrate that the pay differential is due to a non-discriminatory factor. However, finding a single source of pay might be problematic in complex structures such as groups of companies.

Indirect discrimination is a disguised form of discrimination which national Courts are sometimes reluctant to combat. When certain advantages are reserved for full-time employees for example, it is highly likely that this will be to the detriment of female workers, who very often work part time. But in terms of social security, the ECJ does not seem to favour part-time workers: by application of the *pro rata principle*, "*taking into account of the actual years of service of a worker throughout his career is an objective criterion that is unrelated to any discrimination, allowing his pension entitlement to be reduced proportionately*" (13 July 2017, C-354/16, *Kleinsteuber*). In other words, distinctions made for part-time workers in calculating occupational pensions can be acceptable as long as the calculations are based on legitimate objectives in accordance with law.

Of course, some disputes in the field of gender discrimination are brought before the courts by men. This sometimes happens where a national regulation provides specific advantages to female employees on the grounds of **positive action**. What is the notion and scope of positive action? For the French *Cour de cassation:* "*interpreted in light of Article 157 §4 of the Treaty on the functioning of the European Union, a collective agreement may provide for the sole benefit of female employees a half-day of leave on International Women's Day, since this measure aims to establish equal opportunities between men and women by remedying de facto inequalities affecting women's opportunities*" (EELC 2017/31). However, the reasoning of the French court and the solution found are debatable. Pursuant to Article 157(4) TFEU, Article 2(4) of Directive 76/2007 and relevant ECJ case law (see e.g. *Kalanke* (C-450/93), *Badeck* (C-158/97) and *Lommers* (C-476/99)), positive action allows measures which, although discriminatory in appearance, are *de facto* intended to eliminate or reduce inequality. This is the case, for example, where women are under-represented in some jobs. However, the collective agreement granting a half-day of leave to female employees did not correspond to this pattern. Nowhere was it said in the dispute that women were under-represented in the company or in any particular jobs, nor was it said that they were suffering from any disadvantages. Further, the col-

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lective agreement did not specify how female employees should use the leave and it was therefore likely that it would just be treated as time off work – and not used to further the cause of equality in the workplace. Other criticisms can be made: why should male employees not also be involved in international women's day? All in all, rather than contributing to equal opportunities between male and female employees, the collective agreement (and the Cour de cassation in this case) held the stereotypical view that fighting for gender equality should only be engaged in by women. In my view, the EU concept of positive action was not adequately implemented here.

Discrimination and Religion

Erika Kovács[8]

The ECJ decided two long-awaited landmark cases regarding discrimination based on religion in 2017.

Previously, there had been uncertainty both at national and European level about the legal assessment of employers' managerial decisions concerning employees' religious behaviour. Whether wearing a veil could have an adverse effect on the establishment or could justify termination had been particularly controversial. Further, it was unclear whether an employer could prohibit employees from wearing a veil or sanction an employee for doing so in breach of a policy. Interestingly, all four published cases in EELC addressed Islamic headscarves.

In late 2016, EELC reported two cases on similar issues. In an Italian case (EELC 2016/39) the employer did not hire a job applicant because she refused to remove her hijab. The Italian Court of Appeal ruled that this was directly discriminatory on grounds of religion. An Austrian case (EELC 2016/53) raised several issues. First, the Supreme Court held that it was not discriminatory for a public notary to give notice of termination to his employee, who insisted on wearing a full face veil (a 'niqab') at work. According to the Austrian Supreme Court, the only way proper communication with the public could be ensured at the notary was by prohibiting face veils and therefore this was an appropriate measure. On the other hand, the fact that the employee's activities (particularly, client contact) were curtailed unilaterally and the employer's comments "mummery" and "ethnic experiment", were discriminatory.

The comments on both cases from other jurisdictions (as featured in EELC) proved that prohibiting employees from wearing religious symbols at the workplace based on the employer's right to direct work is topical in many (mostly Western European) Member States. Nevertheless, national case law on this issue is rare and the ECJ's first rulings appeared in 2017.

The ECJ's two landmark cases, *Achbita* (C-157/15) and *Bougnaoui* (C-188/15, see both EELC 2017 issue 2, pp. 102-106) brought some clarity on how the ECJ assesses **public displays of religion by employees**. Both cases raised the question of whether employers not involved in public service are allowed to ban the wearing of headscarves at work. The details of the two cases differ, leading to different results. In the *Achbita* case there was an abstract general internal rule which prohibited wearing any kind of political, philosophical and religious symbols or clothing at the workplace. The ECJ ruled that such rule was not indirectly discriminatory if pursued consistently and systematically, since it could be justified. To the contrary, in the *Bougnaoui* case the employer imposed an individual ban on an employee wearing a headscarf as a reaction to a customer complaint. This specific instruction constituted direct discrimination which could not be justified by the customer's wish. The ECJ ruled – correctly – that performing work without a headscarf cannot constitute a professional requirement for a female software designer.

The judgments left several questions open.

First, it is not clear how the ECJ would judge an internal rule that only prohibits the wearing of religious symbols or clothes. Is this still indirect – or is it, rather, direct and, hence, forbidden discrimination? Second, I have doubts about the ECJ's approach of requiring an employer to offer an employee another workplace without contact with clients instead of terminating her employment relationship. A *de facto* obligation to transfer an employee to another position within the company could have an adverse effect and be even discriminatory against the employee concerned. Third, it is still not clear whether wearing a religious symbol or piece of clothing can be seen as a genuine and determining occupational requirement within the meaning of Article 4(1) of Council Directive 2000/78/EC and, if so, under what conditions. Further, the ECJ has not directly examined whether the way these matters are dealt with conforms to the EU Charter of Fundamental Rights (particularly Article 10 on freedom of religion and Article 16 on the freedom to conduct a business).

Finally, it is important to note that there is a case pending before the ECJ on possible religious discrimination (C-193/17, *Cresco – v – Achatzi*). This one, unlike the rest, does not concern headscarves but deals with the Austrian national rule under which Good Friday is a holiday, but only for members of certain churches. It questions whether this discriminates against other employees, if employees belonging to one of those churches are paid extra for work done on Good Friday, whereas other employees are not.

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Collective Dismissals

Prof. Ruben Houweling and Jan-Pieter Vos, Erasmus University Rotterdam, The Netherlands[9]

2017 saw relatively few judgments about **collective dismissals**, in fact, all ECJ judgments featuring in EELC came from Poland – albeit that there, they have had a substantial impact. Only EELC's first issue in 2017 contained judgments on the collective redundancy directive (and its implementation) from other countries, albeit cases dating from 2016.

Collective redundancies and fundamental freedoms

When it comes to collective redundancies, the ECJ's function is usually to correct wrong or incomplete implementation or to provide the right interpretation of the Collective Redundancy Directive (98/59/EC). Its *AGET Iraklis* judgment (21 December 2016, *C-201/15*) was a peculiar one, as the ECJ considered the approach taken by Greece to have been too strict. The cement producer AGET Iraklis, a subsidiary of the French Lafarge group, wanted to shut down its plan in Chaldika and relocate production to its two other plants in Greece. This involved a collective redundancy and so AGET Iraklis tried but failed to reach agreement with the relevant trade unions. In accordance with Greek law, AGET Iraklis then sought approval from the Minister for Labour. Such approval is granted very rarely, which has the effect that the trade unions tend to avoid reaching agreement on collective redundancies. AGET Iraklis did not manage to obtain approval and appealed against the decision. AGET Iraklis argued that Greek law – and in particular, the Minister's systematic opposition to collective redundancies – was contrary to the freedom of establishment (Article 49 TFEU) and capital (Article 63 TFEU) and to the freedom to conduct a business (Article 16 of the Charter).

Ultimately, the ECJ held that EU directives in principle only offer a minimum level of protection, but Member States may adopt more favourable laws for workers. However, at the same time, **collective dismissal legislation can be limited by the EU fundamental freedoms**. This can also be the case if the legislation applies to domestic companies. In this case, *AGET Iraklis*' freedom to conduct its business, and, in particular, its freedom of contract in relation to its business' workforce was hampered. Greece's economic justification for this approach was dismissed straightaway – as purely economic reasons cannot serve as justification, and the social policy considerations it cited also were insufficient in this case.

Spanish Supreme Court annuls Spanish legislation

Sometimes EU directives have not been properly implemented by a Member State and the ECJ is required to come to the rescue. But in Spain, the Supreme Court took the burden and set aside Spanish legislation in favour of the Collective Redundancy Directive (EELC 2017/7). The Directive was implemented wrongly, as the number of redundancies allowable within a certain timeframe was not in line with the Directive. Referring to both the principles of uniform interpretation (e.g. *Faccini Dori*, C-91/92 and *Francovich*, C-479/93) and direct effect (e.g. *Mangold*, C-144/04 and *Kücükdeveci*, C-555/07), the Supreme Court found 27 terminations invalid – which must have had enormous consequences for the employer.

Conditional Termination

The spotlight regarding collective redundancies has been, as mentioned, on Poland. It was the source of two ECJ judgments of 21 September 2017 (*Halina Socha*, C-149/16 and *Ciupa c.s.*, C-429/16). Both concerned whether a notification of a unilateral amendment of employment conditions to the detriment of employees, which could lead to termination if refused, must be regarded as 'redundancy' within the meaning of Article 1(1) of the Collective Dismissal Directive. Interestingly, the status of the '**conditional termination**' had already been the subject of a judgment of the Polish Supreme Court at the end of 2016 (EELC 2017/48) – and the Supreme Court had held that the changes qualified as dismissal.

The ECJ took the same approach. It referred to its *Pujante Rivera* judgment (C-422/14), in which it had held that unilateral, significant amendments to the essential elements of an employment contract for reasons unrelated to the employee constitute a redundancy. It then took another step and held that any changes which could reasonably be expected to result in the termination of employment contracts, constitute redundancy within the meaning of the Collective Redundancy Directive.

The judgments also contain observations on the **moment at which consultations should take place**. They must be done when the employer is contemplating making the unilateral amendments, as refusal of them will result in dismissal. It is likely that these judgments will influence the practice of Member States that are grappling with these 'conditional terminations'.

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Dismissal and the right to privacy

JUDr. Andrej Poruban, PhD[10]

Conflicts between employers and employees about privacy are nothing new, but **a growing number of workplace disputes on this subject has caught the attention of many courts**. The latest landmark decision was made by the Grand Chamber of the European Court of Human Rights (*Bărbulescu – v – Romania*, 5 September 2017, EELC 2017 issue 4, p. 242-244). The facts of the case are relatively clear and commonplace in the internet era. The applicant was fired for breaching a company policy which banned employees' use of work equipment for private reasons. He used instant messaging services, which were monitored by the employer. The employee had unsuccessfully sued his employer in the Romanian courts and then brought a claim under Article 8 of the European Convention on Human Rights, which protects the right to private and family life, home and correspondence. It was the first case about the tracking of an employee's electronic communications by a private commercial company and provoked some debate about the sensitive issue of the 'horizontal effect' of Article 8. In fact, the action was not the result of direct intervention by a State authority but the Grand Chamber found there to be some horizontal application of the Convention right. It overturned a Chamber judgment of 12 January 2016 and found that employees' rights to privacy had not been adequately protected by the national authorities.

The *Bărbulescu* case was a unique opportunity to expand jurisprudence within this field and define the scope of a person's reasonable expectation of privacy. The Court (Grand Chamber) specified the **criteria that national authorities must apply** when assessing whether a measure to monitor employees' communications is proportionate to the aim pursued and whether the employee concerned is protected against arbitrary actions. In particular, the authorities should determine (paragraph 121):

i. whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications;
ii. the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy;
iii. whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content;
iv. whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications;
v. the consequences of the monitoring for the employee concerned and the use made by the employer of the results of the monitoring operation; and
vi. whether the employee has been provided with adequate safeguards, especially when the employer's monitoring operations are of an intrusive nature.

This case is also relevant to EU law. The right to privacy is one of the main areas where human rights and fundamental freedoms and EU law tend to overlap. Whether the EU data protection framework provides higher standards than those protected under the European Convention on Human Rights is a matter of debate. The Romanian Supreme Court of Cassation and Justice as the highest national court missed the chance to request a preliminary ruling of the ECJ, so it seems that these questions still need further clarification in the context of data protection Directive 95/46/EC and new General Data Protection Regulation.

One of the first echoes from the *Bărbulescu* rulings is a public sector Slovak case (EELC 2017/21). The Ministry of the Interior dismissed an employee on disciplinary grounds since he had used his work email address for private reasons, which was not allowed. At the time there was no clear domestic law on the issue. The Supreme Court of the Slovak Republic took relevant international and constitutional standards into consideration, namely legality, legitimacy and proportionality and held that the courts of lower instances had been entitled to see the content of the employee's emails and to base their decision on that evidence. It upheld the dismissal decision because the employee's conduct had been inappropriate. Interestingly, the Court made reference to the first *Bărbulescu* judgment of the Chamber in favour of the employer to justify its decision, despite the fact that the case was still pending before the Grand Chamber.

Other courts came to similar conclusions even before the ending of Bărbulescu's case in Strasbourg. The Supreme Civil and Criminal Court of Greece had weighed up the employee's right to privacy of communication and the company's right to free competition (EELC 2017/22). The Supreme Court applied the proportionality principle in a concrete way, based on the facts, and struck a fair balance between the interests at stake. The Supreme Court ruled that evidence of wrongdoing obtained by a company against two former employees was admissible in court, as it was legitimate that the company should have the opportunity to defend its right to free competition.

The courts have regularly taken up new privacy issues as technology evolves

An employee in Portugal was dismissed mainly on the basis of data gathered by GPS, which the employee alleged had been obtained by breaching his right to privacy. The Labour Code provides that remote surveillance in the workplace is, in principle, forbidden. However, the Guimarães Court of Appeal held that it was

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lawful for an employer to obtain these data in order to check the number of kilometres actually travelled against those declared by the employee (EELC 2017/20). It found that the GPS equipment installed in the vehicle of employee was not intended to check on his professional performance, but rather to check the number of kilometres travelled.

These judgments are not the final word on this expanding issue. It is evident that there is a fine line between acceptable and unacceptable monitoring of employees even after *Bărbulescu* ruling. It remains to be seen whether the national courts will still entirely rely on Article 8 of the European Convention on Human Rights or whether they will start to veer towards the new General Data Protection Regulation. After all, the GDPR can be applied against private parties, which is new.

Free movement

Jan-Pieter Vos and Prof. Luca Ratti[11]

EU case law has seen a wide variety of cases within the field of free movement of workers. They were relevant to a wide range of topics, although only a few directly related to Article 45 TFEU.

Free movement and co-determination rights

Employee involvement in the management of national companies has not been harmonised, as a Fifth Directive never was adopted. The co-determination model has only been employed within the context of the European Works Council, transfers of undertakings and cross-border mergers. Does this allow for the transfer of co-determination rights to another country? The *Erzberger* case (CJEU 18 July 2017, C-566/15) saw an odd attempt to change the election of workers' representatives to the supervisory board of TUI AG, a German company employing 50,000 people. Only employees in its German subsidiaries were eligible to become supervisory board members. One of TUI's shareholders, Mr Erzberger, argued that TUI's supervisory board was not properly constituted as it discriminated on grounds of nationality. Moreover, he stated that this was contrary to Article 45 TFEU as it tended to dissuade workers from exercising their right to free movement throughout the EU (they would lose membership of the board if they crossed borders). As Mr Erzberger was not an employee himself, he must have had other motives for bringing the case, though it is not known what those were. Regardless, in the end, the Court dismissed Mr Erzberger's claims. It held that the rules relating to free movement of workers did not apply to those who had never exercised their freedom to move within the EU and who did not intend to do so. As for (German) employees who may feel limited in their rights of free movement, as they might lose those rights, the free movement of workers does not grant the right to rely, in the host Member State, on the same conditions of employment as enjoyed in the Member State of origin.

Coordination issues

EELC's first issue in 2017 featured a few cases from December 2016, most notably the ECJ judgments of 15 December 2016, C-401/15 – C-403/15 (*Depesme*), in which it the ECJ held that Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 on freedom of movement for workers within the EU must be interpreted as meaning that the right to benefit indirectly from social advantages such as study finance also applies to stepchildren, where the worker supports that child. In its judgment, the ECJ also referred to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. This may imply that other (older) directives which also were replaced by Directive 2014/54/EU, should be interpreted in line with this Directive as far as possible.

In its judgment of 1 February 2017, C-430/15 (*Tolley*), the ECJ held that, in the application of Regulation (EEC) 1408/71 and Regulation (EC) 307/1999 (the coordination regulations), the laws of the home state remain applicable to pensions. While the home state cannot make the right to a disability pension subject to the worker living in that state, the employee must still obtain the approval of the home state – even if the home state cannot reasonably refuse its approval. Further, the ECJ held that Tolley must continue to be considered an employed person within the scope of Regulation 1408/71, even after stopping work.

ECJ 13 July 2017, C-89/16 (*Szoja*) saw a Polish citizen claiming social security in Slovakia, as he was employed there. However, his activities in Slovakia were pretty marginal compared to his activities as a self-employed person in Poland. Given this situation, the Polish social insurance institution had notified its Slovakian counterpart that Szoja would be covered by Polish social insurance. The Slovakian institute did not dispute the decision. As the social security scheme for employees is generally better than for self-employed persons, in principle, the employee one applies. However, to avoid abuse, marginal activities are excluded. To that extent, Article 14 of Regulation (EC) 2009/987 was amended to include paragraph 5b, which states that marginal activities should be disregarded for the purposes of determining the applicable legislation under Article 13 of Regulation (EC) 2004/883 (Basic Regulation). It seems that the referring court had missed this change, as it asked essentially the same question (whether marginal activities had to be taken into account). The ECJ held that Article 13(3) of Regulation (EC) No 883/2004, as amended by Regulation (EU) No 465/2012, must be interpreted as meaning that, in order to determine the national legislation applicable under that provision to a person who pursues both an activity as an employed

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person and an activity as a self-employed person in different Member States, the requirements laid down in Article 14(5b) and Article 16 of Regulation (EC) No 987/2009, as amended by Regulation No 465/2012, must be taken into account. This judgment shows that **cross-border social security and coordination issues can be very complex** and that it is very important to follow developments closely.

A1 certificates

The *A-Rosa* judgment (27 April 2017, C-620/15) confirmed the **value of the E101 certificate** (the predecessor of the A1 certificate) once more. Even when the conditions under which workers carry out their activities do not fall within the scope of Regulation 1408/71, the certificate still holds its value. The authorities that dispute the validity of the certificate should communicate their concerns to the institute that issued it and refer the matter to the Administrative Commission. This approach by the ECJ is very strict and almost impossible to deviate from. So far, the only exception to the validity of an A1 certificate is in the case of fraud – as held in the *Altun* judgment of 6 February 2018 (see the Court Watch section).

Free movement and retention of rights

The right to free movement does not mean that *all* rights from one Member State are retained once an employee crosses the border. The *Eschenbrenner* case (2 March 2017, C-496/15) demonstrated once again that the **freedom of movement does not necessarily imply that a worker is entitled to the same benefits once he crosses the border**. The case featured a French frontier worker whose German employer became subject to insolvency proceedings. While Eschenbrenner had always been a French tax resident and was taxed there prior to the insolvency proceedings, his insolvency benefit was calculated based on German income tax, leading to a lower income for Mr Eschenbrenner. Eschenbrenner's claim that this was precluded by Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 was dismissed by the ECJ.

Outlook

In 2018, we expect that there will be **developments in the status of the A1-certificate**. *Altun* has been a good start, but there is also *Alpenrind* (C-527/16), which, hopefully, will clarify whether A1-certificates are binding on the courts in other countries and how this relates to the Administrative Procedure – in line with the Opinion of A-G Saugmandsgaard Øe, which was delivered on 31 January 2018. We also expect developments in the revision of the Posted Worker's Directive, to which Member States reached agreement in October 2017 and in connection with which EU Parliament negotiators declared a "common understanding of the contours of a possible agreement" in March 2018.

Transfer of Undertaking

Prof. Niklas Bruun[12]

Since its adoption in the late 70's, the scope of application of Directive 77/187/EEC (the Acquired Rights Directive) has given rise to many disputes. The case law from the ECJ has since then quite successfully harmonised the definition of a transfer so that we know more or less when the Directive applies and which characteristics must be taken into account when assessing whether a transfer has taken place. These criteria have also been partly codified by Council Directive 98/50/EC amending Directive 77/187/EEC.[13]

Even now, the Directive and its national implementation laws seem to cause a large quantity of court cases in Europe. This is partly because on the one hand, the Directive provides a minimum standard, which is mainly restricted to the effect of the transfer on the conditions of employment and on the required information and consultation procedures, while on the other hand, its aim is only to achieve partial harmonisation, as opposed to a uniform level of protection in the EU.[14] Therefore, several issues related to post-transfer situations still cause problems of interpretation. In 2017, the ECJ made at least five preliminary rulings referring to this Directive.

1.The **Piscarreta Ricardo** case (20 July 2017, C-416/16) focused on the employment contract of an employee who had been suspended for four years. Contrary to the prevailing Spanish legislation, the ECJ held that a person whose employment contract is suspended and who is not actually performing his or her duties, is covered by the Directive, insofar as that person is an employee under national law. The case related to a transfer within the context of a municipality that was restructured and the ECJ found that, provided that the identity of the undertaking is preserved after the transfer, the situation falls within the scope of the Directive.

2.In the Dutch so-called ***Pre-pack-case*** (27 June 2017, C-126/16), the ECJ made clear that the **exceptions under Article 5 of the Directive have to be interpreted narrowly**. Estro Groep BV, the largest childcare company in the Netherlands, with almost 380 childcare centres throughout the country and 3600 employees, had economic difficulties and a plan for restructuring was made. A new company, Smallsteps, was created in order to relaunch 243 of the childcare centres, retaining almost 2500 employees. On 5 June 2014, Estro Groep submitted a court application for the appointment of an insolvency administrator. On 20 June 2014, Smallsteps was created. On 3 July 2014, all staff were informed that a declaration of insolvency was to be submitted on 4 July 2014 and on 5 July 2014 the appli-

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13. Later consolidated as Directive 2001/23/EC.
14. See C-105/84 *Danmols Inventar*, para 26.

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cation was submitted and granted. On the same day, a 'pre-pack' was signed between the insolvency administrator and Smallsteps, whereby Smallsteps purchased 250 childcare centres and undertook to employ 2600 Estro Groep employees. On 7 July 2014, the insolvency administrator dismissed all the Estro Groep employees while Smallsteps offered new contracts to almost 2600 staff. Four former Estro Groep employees who were dismissed, but not offered new contracts took legal action and argued that they must be regarded as having been transferred to Smallsteps under the Directive.

The ECJ acknowledged that the pre-pack procedure had been undertaken to safeguard the value of the undertaking and also the employment of the employees (para 49). The ECJ did however also point out that the procedure had not taken place "under the supervision of a public authority" as required under Article 5(1). On the contrary, it was the undertaking's management which conducted the negotiations and adopted the decisions concerning the sale of the insolvent undertaking. The pre-pack was also aimed at continuation rather than liquidation of the undertaking, and so the fact that a pre-pack is normally used to maximise the proceeds of a transfer for all creditors was not relevant in this case. Note also that insolvency administrators and supervisory judges have no formal powers and are therefore not supervised by a public authority. Therefore there could not be any derogation from the protection scheme under Articles 3 and 4 of the Directive.

3.In ***Asklepios*** (27 April 2017, C-680/15 and C-681/15) the ECJ once again had to consider the **legal effect of so-called dynamic referral clauses**. These had earlier been dealt with in cases such as *Werhof* (C-499/04), *Alemo-Herron* (C-426/11) and *Östereichischer Gewerkschaftsbund* (C-328/13). In *Asklepios*, the employees had been employed by a hospital in Germany since the 70s and 80s. The hospital was owned by a local authority. In 1995 the local authority transferred the hospital to a limited liability company. In 1997, the part of the hospital where the workers were employed was transferred to KLS FM.

KLS FM did not belong to any employers' association and was not party to any collective agreement. The contracts of employment concluded between KLS FM and the workers contained a 'dynamic' referral clause providing that their employment relationship would be governed, as was the case before the transfer, by the Federal framework collective agreement for employees of municipal authorities and businesses, and also, in the future, by the collective agreements supplementing, amending and replacing it.

Subsequently, KLS FM became affiliated to a group of undertakings in the hospital sector. On 1 July 2008, the part of the business where the workers were employed was transferred from KLS FM to another company in the group: Asklepios. Like KLS FM, Asklepios was not bound to any collective agreement nor was it a member of any employers' association.

The employees brought legal proceedings seeking a declaration that their 'dynamic' referral clause would also remain in force after the transfer to Asklepios.

Asklepios contended that the Directive and Article 16 of the EU Charter precluded it from applying. It argued that, following the transfer of the workers to another employer, the agreements should be applied as they originally stood (statically), meaning that only the terms of employment agreed in the contract of employment concluded with the transferor, based on the collective agreements referred to by that contract could be relied on against the transferee.

The case ended up in the Federal Labour Court, Germany, which submitted a request for a preliminary ruling to the ECJ, asking, essentially, whether Article 3, read together with Article 16 of the Charter must be interpreted as meaning that, in the case of the transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extended to a clause which the transferor and employees had agreed, pursuant to which their employment relationship was governed, not only by the collective agreement in force on the date of the transfer, but also by collective agreements subsequent to the transfer, which supplemented, modified or replaced it, if national law allows for a transferee to make both consensual and unilateral adjustments. The ECJ answered this question in the affirmative.

This judgment can be seen as a revision of the controversial *Alemo-Herron*-judgment, which seemed categorically to preclude certain types of dynamic clauses without taking into account that these kinds of clauses might have to be applied in different national contexts. In fact, the well-formulated question by the Federal Labour Court, Germany in *Asklepios* made the Court revise its categoric position and it can be seen as a recognition that the Court's position in *Alemo-Herron* went too far.

4. In the ***Unionen*** case (6 April 2017, C-336/15) the Swedish Labour Court asked whether it was compatible with the Directive to apply a specific provision in the transferee's collective agreement a year after the transfer had taken place. The provision stipulated that continuous length of service with a single employer had led to an extended notice period. The question was whether it was possible not to take account of length of service with the transferor, when the employees, under an identical provision in the collective agreement applicable to the transferor, had the right to have that length of service taken into account.

It was clear under Swedish law that only the collective agreement of the transferee applied in this case. The disputed benefit was an extended notice period of six months. The Court did not really discuss the issues of principle under the Directive, but reformulated the

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question to fit into its earlier practice and decided it in favour of the employees in accordance with the principles set out in the *Scattolon* case (C-108/10).

5. The ***Securitas*** case (19 October 2017, C-200/16) dealt with a provision in a Portuguese collective agreement according to which the loss of a customer by an operator following the award of a service contract to another operator did not fall within the concept of a transfer of an undertaking or business. The ECJ, not surprisingly, concluded that Article 1(1) of the Directive must be interpreted as precluding a provision of national law which provides that the loss of a customer by an operator following the award of a service contract to another operator does not fall within the concept of a 'transfer of an undertaking [or] business' within the meaning of Article 1(1).

Summarizing, in 2017, the ECJ has granted employees protection in several instances – most importantly, in the pre pack case, but employees can also claim a significant win with *Asklepios*.

Collective action and the right to strike

Francesca Maffei, PhD.[15]

In Europe, national judgments in labour law disputes are often greatly influenced by the law-making and judicial activity of both the EU and the ILO. The case law covers a wide range of subjects, including some topics that were historically outside the competence of these international organisations, such as the right to strike and industrial relations more generally.

In particular with regard to the right to strike and take other collective action, national courts often have to have regard to EU law and international treaties because the exercise of this right (recognised as fundamental in the majority of Member States and in international institutions) may violate the 'European' freedom of establishment and the freedom to provide services and therefore requires careful balancing. The national courts often need to take 'advice' to understand this balance fully.

For example, in EELC 2017/13, a subsidiary of a Danish company decided to employ four new workers in Norway. The local trade union insisted the company enter into a collective agreement, including a priority of engagement clause. As the company refused, the trade union organised a boycott with the purpose of forcing the employer to enter into this collective agreement. The Supreme Court decided to ask the European Free Trade Association (EFTA) Court whether this conflicted with the freedom of establishment rule laid down in Article 31 of the European Economic Area (EEA) Agreement. The EFTA Court held that a boycott, which is likely to discourage or even prevent the establishment of companies from other EEA States, constitutes a restriction on the freedom of establishment under Article 31 EEA. Following this advice, the Supreme Court declared the collective action at hand unlawful.

In EELC 2017/12, the Govia Thameslink Railway which goes to Gatwick Airport and 35% of whose the shares were owned by a French company, had been engaged in a longstanding dispute with a rail union. It used only one driver on passenger trains, whereas the trade union argued that a second safety-trained crew member should always be on board. **Once again, the exercise of collective action seemed to be in conflict with European economic freedoms** (as the company was owned by a foreign company). The British Court of Appeal held that industrial action was unlawful only if it was called with the object or purpose of infringing the cross-border European freedom of establishment (Article 49 TFEU) or the freedom to provide services (Article 56 TFEU). Conversely, when collective action has the effect but not the purpose of discouraging foreign companies from operating in another Member State, it is not unlawful. While every collective action discourages foreign companies from operating in a country, a strike only breaches the TFEU if its main objective is to discourage the exercise of the relevant freedom (e.g. as in ECJ *Viking*, C-438/05, and *Laval*, C-341/05).

In EELC 2017/26, the opinions of both the ILO Freedom of Association Committee and the European Court of Human Rights (ECtHR) were required. The Danish National Teacher's Union initially had filed a complaint with the ILO Committee about the lawfulness of a statutory intervention by the Danish Parliament (by means of an 'intervention act', which replaces a collective agreement) used to end industrial action which compromised important social services. The ILO Freedom of Association Committee has often been asked for advice about this kind of 'statutory' intervention and it has normally taken the view that **any government interference in labour disputes is inappropriate and social interests are not a legitimate reason for intervention**. But the Danish Parliament, despite the ILO's criticism, has always intervened in circumstances where industrial action can potentially threaten essential social services. In this particular case, after hearing the Danish Government, the ILO Committee decided to close the case, contrary to its earlier decisions. The High Court then deemed the intervention perfectly lawful. The trade union appealed to the ECtHR to ask if a statutory intervention could be considered as in line with Article 11 of the European Convention on Human Rights. The ECtHR has not yet decided. However, it is probable

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that it will adopt a less strict approach than the ILO Freedom of Association Committee since the ECtHR has previously accepted the maintenance of essential social services as a legitimate reason to restrict a right protected by the Convention.

In recent years, the threat of terrorism has strengthened the need for security. International and European sources have been used by national courts to justify **restrictions on collective action in the name of public safety**. For example, in EELC 2017/9, the Dutch Railway company introduced a new timetable which drivers and conductors found dissatisfactory. Since the company had not accepted employees' demands for a new work package, the train drivers and conductors' union called its members out on strike. The strike was scheduled for Friday 23 December 2016 and employees were asked to refuse to go to work until 11:00 on Amsterdam, Rotterdam and Hoofddorp train stations. In its judgment, the Dutch cantonal court referred to Article G of the European Social Charter (which allows for the possibility of limiting collective action for pressing social needs) to prohibit the strike, claiming that the safety of passengers could not be guaranteed. In the hearing, which took place a few days after the Berlin Christmas market attacks, the threat of terrorism was found to wield a decisive influence.

All these judgments concerning industrial action and directly referring to EU law and the ILO Conventions are innovative because the right to take collective action is a subject that is normally not within the competence of international institutions. International and European provisions concerning strikes and collective action are rare. Indeed, the ILO has not explicitly declared a right to strike but has concluded that freedom of association, in particular, the statements in Articles 3 and 10 of Convention No. 87, include a guarantee of the right to strike and it has developed case law on this right.

Similarly, the EU provisions about strikes are rather superficial. For example, Article 153(5) of the Treaty on the functioning of the European Union (TFEU) expressly excludes the right of association and the right to strike from the scope of application of Article 153. This does not mean, however, that the European Committee's competence is completely excluded but, as this article is usually the legal basis for adopting any directive or regulation, the right to associate and to strike can as a general rule, be considered as being outside of the EU's scope of authority.

This means, of course, that there are widely differing regulations on these rights amongst the Member States although the influence of EU law has been increasing since 2009, when the Nice Charter – which recognises the right to strike in Article 28 – acquired the same legal value as the European treaties. The European Social Charter has also become influential and it contains two fundamental rights relevant to collective labour relations, namely the right to organise (Article 5) and the right to bargain collectively (Article 6). These two key provisions ensure the rights of workers' organisations to further and protect workers' interests on the one hand and the right of individuals to take part in collective labour relations on the other. The right to strike is laid down in Article 6(4) of the Charter.

In certain other cases, international and European institutions only indirectly influence national judgments. Some controversial topics are not explicitly within their competence, but the solution still depends on international and EU law. For example, in EELC 2017/30, an employee argued that he had been discriminated against by his employer because of his union activities. The employer had stopped giving him work for some months and consequently he had not been paid. The issue concerned the burden of proof – a procedural topic that does not fall within EU competence – but the solution to the issue depended on the application of anti-discrimination law – which is within EU competence. The Lithuanian Supreme Court decided that the reversal of the burden of proof provided in Article 4 of the Lithuanian Law on Equal Treatment should not apply in cases *"of alleged discrimination based on participation in trade union activities."* Hence, the court decided that the claimant was required to prove his claim. The rule on the burden of proof set out in Article 4 of the Law on Equal Treatment is intended to implement relevant provisions of Directive 2000/78, yet this Directive does not prohibit discrimination based on participation in trade union activities. In reality, both the judgment and Article 4 of Lithuanian Law on Equal Treatment could be considered to be in breach of ILO Convention N°135 and Recommendation N° 143, which provide that States should ensure the burden of proof is on the employer in cases of alleged discriminatory dismissal or unfavourable change to the conditions of employment of a worker.

In EELC 2017/45, the issue concerned the lawfulness of a clause in a collective agreement, but – once again – the solution depended on how anti-discrimination law was applied. The case involved a part time employee who worked overtime for some months (i.e. more than the contractually agreed hours of work but less than a full time employee). At the end of that period, he claimed overtime payment for the work done (the collective agreement provided overtime rates of 25% above the regular hourly rate). The employer decided to pay the employee the regular hourly rate for the additional hours because, according to his interpretation of the collective clause, only the working hours exceeding a full-time employee's time were to be paid at the overtime rate. The German Supreme Court held that such a clause was not discriminatory and hence not unlawful, considering that EU discrimination law and an analogous application of the ECJ *Helmig* judgment (C-399/92) did not prevent this kind of clause, as long as full-time and part-time employees were paid at the same hourly rate.

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Finally, European institutions had the opportunity to exercise an influence in another case reported, EELC 2017/39, concerning **disciplinary sanctions provided by collective agreements** (another topic under national competence). A civil servant of a Luxemburg municipality received a disciplinary sanction based on the applicable collective agreement for his repeated refusal to carry out an order given by his employer. The employee claimed the sanction was void based on the legality principle. In his opinion, sanctions only could be founded on law, rather than collective agreements. The Court of Appeal in Luxembourg found that a disciplinary sanction could also be grounded on a collective agreement but 'contractual' disciplinary sanctions would only be valid if they described the consequences of any transgression by employees as precisely as possible. It therefore decided the disciplinary sanction imposed by the employer was void because it was too vague and imprecise. This judgment seems in line with two important recent ECJ decisions (*Achbita*, C-157/15 and *Bougnaoui*, C-188/15) that also stressed the importance of well-drafted internal rules.

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