EELC EUROPEAN EMPLOYMENT LAW CASES

NEWSITEM

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It's that time of year... and what a year it was

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It's that time of year again. The time to reflect on what happened and what is to come. The time to make those lists of best movies, best songs, best times spent, etcetera. Looking back on 2021 from an academic perspective – maybe a bit to my surprise – I must conclude that this year was quite an interesting one.

Due to major events, such as the second year of the Covid-19-pandemic, the alarming reports on global warming, geopolitical tensions at the Eastern European borders and increasing polarization on (labour) markets, one could easily forget the number of ECJ (landmark) cases and EU legislation that influences our labour markets.

My "Top 5 most relevant labour law cases and developments 2021", is as follows:

#5 - Stand-by time

Taking the fifth place, I would note the multiple rulings on 'stand-by time'. Starting with Radio Television Slovenia (ECLI:EU:C:2021:182) in March and ending with the MG-case (ECLI:EU:C:2021:909), the ECJ explained and expanded the outlines on 'stand-by time'. Specific work

maintaining television transmitters situated far away from residential areas wasn't necessarily regarded as 'working time'. Breaks during which the employee must remain ready to respond to a call-out within a two-minute time limit on the other hand, is most likely regarded as 'working time'. The impact of the time limit imposed on the worker to return to his or her professional activities must be such that it suffices to constrain, objectively and very significantly, the ability that he or she has freely to manage, during those periods, the time during which his or her professional services are not required (ECLI:EU:C:2021:722).

#4 - Successive fixed-term employment contracts

In 2021, a number of cases concerned successive fixed-term employment contracts. More than once, the Court repeated its decision that the renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature, but rather fixed and permanent, is not justified for the purposes of Clause 5(1)(a) of the framework agreement, in so far as such use of fixed-term employment contracts or relationships conflicts directly with the premiss on which the framework agreement is founded; namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (i.e. ECLI:EU:C:2021:514). This ruling is especially welcome to combat (ab)use in Member States with high percentages of fixed-term workers, such as The Netherlands (over 25% of the labour market).

#3 – Headscarf

On July 15, the ECJ ruled in an interesting case on a prohibition on wearing any visible form of expression of political, philosophical or religious beliefs in the workplace. In both cases, this prohibition led to suspension and dismissal of workers who refused to remove their

headscarf. The ECJ held that the employer's need to present a neutral image towards customers or to prevent social disputes may justify such a prohibition. However, that justification must correspond to a genuine need on the part of the employer and, in reconciling the rights and interests at issue, the national courts may take into account the specific context of their Member State and, in particular, more favourable national provisions on the protection of freedom of religion (ECLI:EU:C:2021:594). With this ruling the ECJ further shaped its rulings in G4S Secure Solutions (EU:C:2017:203), and Bougnaoui and ADDH (EU:C:2017:204). The fundamental right of equal treatment and the fundamental right of freedom to conduct a business seem to be a bit more balanced now.

#2 – Draft proposal Directive on platform work

Going out with a bang... That's what one might say about the draft proposal Directive on improving working conditions in platform work (December 2021). The proposed Directive seeks to ensure that people working through digital labour platforms are granted the legal employment status that corresponds to their actual work arrangements. It provides a list of control criteria to determine whether the platform is an "employer". If the platform meets at least two of those criteria, it is legally presumed to be an employer. Platforms will have the right to contest or "rebut" this classification, with the burden of proving that there is no employment relationship resting on them. In various EELC-numbers we've mentioned platform work cases across Europe. This proposed Directive will contribute to more cases in EELC regarding platform work, but hopefully even more legal certainty for platform workers. Most definitively to be continued.

#1 – Draft proposal Directive on equal treatment men and women

The most hopeful development is the Councils agreement of December 6 on its position on a draft law on pay transparency which will help to tackle the existing pay discrimination at work and contribute to closing the gender pay gap. As Janez Cigler Kralj (Minister for labour, family, social affairs and equal opportunities) said: "There is simply no justification that women still earn much less than their male peers." The proposed law aims to empower workers to enforce their right to equal pay for equal work or work of equal value between men and women through a set of binding measures on pay transparency. Member states agreed that employers have to make sure their employees have access to the – objective and gender-neutral – criteria used to define their pay and career progression. In accordance with national laws and practices, workers and their representatives have the right to request and receive information on their individual pay level and the average pay levels for workers doing the same work or work of equal value, broken down by sex. Employers also need to indicate the initial pay level or range to be paid to future workers – either in the job vacancy notice or prior to the conclusion of the employment contract. Employers with at least 250 employees have to provide, on an annual basis, information such as the pay gap between female and male workers in their organisation. Employers must share this information with their relevant national authority and may also make it publicly available. They also need to provide this information to their workers and their representatives. In cases where this pay reporting demonstrates a difference in average pay level between female and male workers of at least 5% and the employer has not justified this difference by objective and gender-neutral criteria, employers with at least 250 workers will have to conduct a joint pay assessment in cooperation with their workers' representatives.

Ending on a positive note…

If we are able to tackle this gender gap with strong legislation and a united Europe, I am hopeful we can overcome the other major

challenges we're faced with in the world today. Together we are stronger. With this hopeful thought I'm looking forward to the Christmas Holiday season.