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## **Recent Developments in Jurisdiction Regarding European Labour and Social Law**

### *Introduction*

In 2012 and 2013, numerous decisions of the ECJ on labour and social law have been delivered. Therefore, these comments are restricted to a – of course very subjective – selection. The report focuses on labour law and begins with the individual labour law, which most of the decisions pertain to (e.g. conclusion, content and termination of an employment relationship). This section is followed by two judgements on international jurisdiction and international labour contract law and then by decisions on collective labour law. The conclusion finally is dedicated to the recent developments in the area of social law, followed by a few basic considerations. There is no tendency within the jurisdiction of the ECJ towards a particular development, whatsoever it is still strongly engaged with the national law of the Member States and therefore enforces changes within there. The anti-discrimination jurisdiction points some consolidation, particularly in regard to age discrimination. The ECJ also continued and expanded the jurisdiction concerning the law of holidays, which began with the verdict in *Schultz-Hoff*<sup>1</sup> in 2009. In contrast to the aforementioned developments, it is striking that there is nothing essentially new to report concerning the transfer of undertakings after the sensational judgment *Alemo-Herron*<sup>2</sup> in the summer of last year. In the daily press, the two decisions *Galina Meister*<sup>3</sup> and *Kücüük*<sup>4</sup> have caused quite a stir.

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<sup>1</sup> Case C-350/06 and C-520/06 [2009], ECR 2009, p. I-179 = ECLI:EU:C:2009:18.

<sup>2</sup> Case C-426/11 [2013], ECLI:EU:C:2013:521.

<sup>3</sup> Case C-415/10 [2012], ECLI:EU:C:2012:217.

<sup>4</sup> Case C-586/10 [2012], ECLI:EU:C:2012:39.

## *Jurisdiction in the field of labour law*

### 1. Individual labour law

#### a) Basics

##### aa) Definition of an employee under Union law

The concept of an employee is not specifically defined under German and European law. If the definition is not given in the law of the Member States<sup>5</sup>, as required by some union directives, it has to be derived from the deliberations of the ECJ in its judgements on the free movement of workers. Accordingly, an employee is a person who provides paid services to a third party subject to directives, if these services are customary in the employment market<sup>6</sup>. According to this definition, in contrast to the German understanding, officials also are employed. In the judgment *Neidel* of 3<sup>rd</sup> May 2012, the ECJ confirmed this jurisdiction and applied it on a directive<sup>7</sup> that does not contain any reference to national law<sup>8</sup>.

##### bb) Arbitrary limits on the national sovereignty of definition

In Contrast such a reference is found with the Directive on the framework agreement on part-time work<sup>9</sup>, however, the judgement *O'Brien* from 1<sup>st</sup> March 2012<sup>10</sup> is dealing with. The judgment sets boundaries to the national sovereignty of definition. An English law had excluded certain part-time judges from pension, if they do not receive a fixed salary but are paid on the basis of daily fees. The plaintiff relied on the fact that the national law discriminates against part-time employees. The British government has been of the opinion that they, in contrast those judges who are employed without an employment contract, are not employees within the meaning of national law and therefore did not fall within the scope of the Directive. The Court has rightly held that Member States cannot remove certain groups from the scope

<sup>5</sup> E.g. Art. 1 (3) Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Art 2 (2) Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship and § 2 of the annex to Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

<sup>6</sup> Case C-94/07 [2008], ECR 2008, p. I-5939 = ECLI:EU:C:2008:425; Case C-456/02 [2004], ECR 2004, p. I-7573 = ECLI:EU:C:2004:488.

<sup>7</sup> Art. 7 of the Directive 2003/88/EC concerning certain aspects of the organisation of working time.

<sup>8</sup> Case C-337/10 [2012], ECLI:EU:C:2012:263.

<sup>9</sup> See § 2 No. 1 of the annex to Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work.

<sup>10</sup> Case C-393/10 [2012], ECLI:EU:C:2012:110.

of the Directive without any reason. A removal is only possible, if the legal relationship is significantly different in its essence of what is considered by national law as an employment relationship. The Court established criteria based on the well-known differentiation of workers and self-employed. The current demarcation criteria have recently been reconfirmed and concretized by the German Federal Labour Court (Bundesarbeitsgericht – BAG)<sup>11</sup>. The reason for the limitation of national sovereignty of definition is found in the *effet utile*. The effective implementation of the equal treatment principle necessitates a prohibition of arbitrary action in the specific case.

b) Agreement upon the employment relationship

aa) No right to information from the anti-discrimination directive

The first judgment to mention regarding the conclusion of an employment relationship is *Master* of 19<sup>th</sup> April 2012<sup>12</sup>. Galina Meister, according to a decision of the LAG Hamburg a “court known AGG-hopping artists”, had made<sup>13</sup>, amongst others, a claim against her employer to obtain information about the application documents of a successful applicant. Her own application had been rejected. With the aid of the documents she wanted to prove her being better qualified than the one who was chosen. The BAG asked the ECJ whether such a right to information results from the anti-discrimination directives or not. The directives provide for the well-known rules of evidence<sup>14</sup>: If the applicant refers to discrimination, first he has only to establish facts which suggest such. Subsequently, the employer must prove that he did not discriminate. The ECJ has rightly held that the directives explicitly refer neither a right to information, nor open up the field of interpretation. With its decision, the ECJ builds on its case-law regarding the identical predecessor regulation to the burden of proof in cases of discrimination based on sex<sup>15</sup>. Again in the *Kelly* case<sup>16</sup>, the ECJ denied a specific inquiry and insight claim of the applicant based on the directive, but did not exclude that a refusal to

<sup>11</sup> BAG, case 10 AZR 282/12 [2013], NZA 2013, p. 1348.

<sup>12</sup> Case C-415/10 [2012], ECLI:EU:C:2012:217.

<sup>13</sup> LAG Hamburg, case H 3 Sa 102/07 [2007], BeckRS 2008, No. 54040.

<sup>14</sup> See the rules of burden of proof in Art. 8 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 10 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation und Art. 19 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>15</sup> See Art. 4 of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, repealed with effect of the 08/15/2009.

<sup>16</sup> Case C-104/10 [2011], ECR 2011, p. I-6813 = ECLI:EU:C:2011:506.

supply information in individual cases could undermine the objectives of the Directive. Apart from that, the ECJ in the case *Master* raised the question of whether the denial of any information by the employer is an indication for a reversal of the burden of proof. This has been in principle affirmed by the Court. Otherwise the directive would not have been – contrary to the objective of the *effet utile* – implemented effectively. It is, however, doubtful to assume a reversal of the burden of proof in case an employer refuses to supply information on other applicants. A vacancy for instance, which is directed only at women and thus is a relevant indication of discrimination, is different in quality than the refusal to pass on personal data on other candidates. In addition, the employer is confronted with aspects of data protection legislation, which the ECJ does not mention at all. The decision is contrary to an earlier judgment, in which the ECJ admonished national courts to respect the confidentiality provisions of EU law when assessing the denial of information<sup>17</sup>. The BAG points in the same direction with its judgment of 25<sup>th</sup> April 2013, which is to implement the requirements of the ECJ<sup>18</sup>. According to the judgment, the burden of proof is not reversed just because information on the application process is denied and mere discrimination characteristics such as age, ethnicity or gender are evidenced. The reversal of the burden of proof therefore requires additional circumstances. Such a circumstance cannot be found in a sheer assertion to be the best candidate, as the BAG rightly noticed. This does in fact not exclude that the negative decision of the employer is based on other, non-discriminatory reasons. This is especially true because a private employer is not bound by the principle of “best candidates” under Article 33 (2) of the German constitution.

bb) Allocation of discriminatory statements by third parties

The somewhat older decisions *Feryn*<sup>19</sup> and *Coleman*<sup>20</sup> concerning discrimination in recruitment are adjusted by another judgment: *Asociatia ACCEPT*<sup>21</sup> of April 25<sup>th</sup> 2013. *George Becali*, who claims to be “Patron” and “financier” of a Romanian football club, stated in an interview on possible player transfers, under no circumstances to tolerate homosexual players in “his” club. This is indisputably an indication of discrimination based on sexual identity. The club itself disagreed with the attribution of a third party’s utterance. *Becali* was neither responsible for the personnel policy of the Association,

<sup>17</sup> Case C-104/10 [2011], ECR 2011, p. I-6813 = ECLI:EU:C:2011:506.

<sup>18</sup> BAG, case 8 AZR 287/08 [2013], BeckRS 2013, 68457, No. 55 ff., 58.

<sup>19</sup> Case C-54/07 [2008], ECR 2008, p. I-5187 = ECLI:EU:C:2008:397.

<sup>20</sup> Case C-303/06 [2008], ECR 2008, p. I-5603 = ECLI:EU:C:2008:415.

<sup>21</sup> Case C-303/06 [2008], ECR 2008, p. I-5603 = ECLI:EU:C:2008:415.

nor had he any other relevant legal powers. According to the ECJ, a third party needs not have any legal powers to trigger the reversal of the burden of proof. Especially if the person is considered by the public and the media to be a main stockholder. The employer had also not distanced itself from the statement, which is to be considered as an incriminating indication. With an overall assessment of these facts a discrimination is to be suspected. According to the national court, the relationship between the club and Mr. *Becali* is atypical<sup>22</sup>, and as such the case in total is to be estimated. The ECJ reduces the requirements for the reversal of the burden of proof by signifying that it's not about a legal attribution of utterances but rather about a relationship of particular proximity to the employer. This proximity is able to give information on a particular recruitment policy. For its analysis, the ECJ takes into account the public image and perception of the third party. In doing so, however, the ECJ is too short-sighted. The evaluation of a third party's statement should focus on the organization of the relationship between the third party and the employer, especially on how much influence the third party has on the policy of recruitment. Unfortunately, this is not taken into account by the ECJ. Following the premise of the ECJ judgment, it is logical to evaluate the association's lack of distancing as further evidence of a discriminatory act. Taking the decision of the ECJ to the fact that it requires no imputation in a legal sense, the criteria for determining the proximity between the third party and the employer are in need to be further specified and put on a high level of requirements. Only this will ensure that the employer does not virtually become liable for the statements made by third parties unless it dissociates itself sufficiently. Nevertheless, in future German employers should counter such statements, if the third party is visible to the public and arrogates influence on recruitment issues to itself.

c) Content of the employment relationship

aa) Discrimination

The judgment *Tyrolean Airways* of June 7<sup>th</sup> 2012 dealt with a collective work agreement and one requirement it laid down which needed to be fulfilled so as to rise to a certain salary grade. In particular, it was necessary to gather the needed work experience within just one and the same airline. The question arising was: is it discriminatory to attach the rise to the next salary grade just on the work experience within one airline (here: Tyrolean) so that the employer also has to take into consideration the time spent with other air-

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<sup>22</sup> Case C-81/12 [2013], ECLI:EU:C:2013:275.

lines<sup>23</sup>? The Court has denied discrimination. A difference in treatment was assumed, but it was based neither directly nor indirectly on the age of worker. Work experience acquired for another employer needs generally not be taken into account, regardless of how old the worker was at the time of entry. The fact that in some cases older workers may be disadvantaged if their previous service will not be considered is not sufficient for an indirect discrimination. Despite the classification of work experience as a neutral criterion, the judgment does not give a *carte blanche* for discrimination. It is still necessary to have a close look to the individual case, since the Court has not decided on the consideration of cross-company-acquired work experience.

#### bb) Expiration and transfer of leave entitlement

##### (1) Previous decisions

Beginning with *Schultz -Hoff*<sup>24</sup> in 2009, the ECJ thoroughly shook up the right to leave as it had never happened before in another area of labour law. Since then – in brief words – the following rules apply: the right to statutory leave only expires and also has no longer to be paid out, if the employee had the opportunity to take the leave. This is not the case, if the employee was continuously ill during the whole work period. This jurisdiction is based on the Working Time Directive<sup>25</sup>. Since 2011, the ECJ also refers to the Charter of Fundamental Rights, but apparently without considering its article 31 (2) as a genuine EU fundamental right. Therefore the ECJ denotes the right to paid annual leave merely as a “particularly important principle of EU social law”. The danger of an “endless” accumulation of annual leave entitlements has been recognised by the Court in its judgment *KHS* in 2011<sup>26</sup>. The court countered: to fulfil the purpose of the leave, holiday and according leave compensation claims can only exist as long as a reference to recovery is possible. Inspired by a provision in a German collective agreement<sup>27</sup>, such a reference has been denied by the ECJ in case of an elapsed period of 15 months taken down in a nationally collective agreement. After the expiry of the mentioned period, the holiday or the payment in lieu of vacation can no longer be claimed. The judgment *Neidel*<sup>28</sup> of the year 2012 stated: an elapsed time

<sup>23</sup> Case C-132/11 [2012], ECLI:EU:C:2012:329.

<sup>24</sup> Case C-350/06 and C-520/06 [2009], ECR 2009, p. I-179 = ECLI:EU:C:2009:18.

<sup>25</sup> Especially Art. 7 of the Directive 2003/88/EC concerning certain aspects of the organisation of working time.

<sup>26</sup> Case C 214/10 [2011], ECR 2011, p. I-11757 = ECLI:EU:C:2011:761.

<sup>27</sup> § 11 No. 3 “Einheitlicher Manteltarifvertrag für die Metall- und Elektroindustrie Nordrhein-Westfalen” [2003].

<sup>28</sup> Case C 337/10 [2012], ECLI:EU:C:2012:263.

of nine months is not enough. The discussion should not be opened again. Both judgments are underwhelming; especially the 15-month time limit is case-related and was therefore set arbitrarily. However, the jurisdiction of the ECJ has to be noted. The BAG has adapted the EU jurisdiction to the statutory minimum leave of four weeks provided by the German holiday rights in the way of directive-compliant interpretation<sup>29</sup>.

### *No annual minimum working time as an eligibility requirement*

In the judgment *Dominguez* of 24<sup>th</sup> January 2012, based on a French submission, the ECJ ruled that leave entitlement cannot be made dependent on an effective annual minimum working time<sup>30</sup>. In this specific case, the plaintiff was supposed to have worked at least ten days during the reference period to acquire a holiday claim. The decision is justified by the fact that the Directive<sup>31</sup> for leave entitlement does not distinguish between workers who did work, and those who were incapable of working. However, according to the ECJ the duration of the absence from work and its cause may affect the duration of the leave, if the duration of paid annual leave is definitely longer than the minimum of four weeks mentioned in Article 7 (1) of the directive. German law is not affected by the decision because §§ 1, 3 BUrlG do already not presuppose work during the leave year.

### *Catching up on leave in case of illness during holiday*

In the case *ANGED* of 21<sup>st</sup> June 2012, based on a Spanish submission, the ECJ ruled that an employee who is incapacitated for work during his paid annual leave is entitled to catch up on the appropriate holiday later<sup>32</sup>. The reasoning by reference to the purpose of the Working Time Directive and the social principle of paid annual leave is too short-sighted though. Nevertheless, in its result the decision is right. Since who is incapacitated for work is not able to recover from work. Under German law § 9 BUrlG applies, providing that such days of incapacity must not be taken into account for the annual leave, if they are proven by a medical certificate.

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<sup>29</sup> BAG, case 9 AZR 983/07 [2009], NZA 2009, p. 538.

<sup>30</sup> Case C 282/10 [2012], ECLI:EU:C:2012:33.

<sup>31</sup> Art. 7 of the Directive 2003/88/EC concerning certain aspects of the organisation of working time.

<sup>32</sup> Case C-78/11 [2012], ECLI:EU:C:2012:372.

### Catching up on the holiday outside of a fixed reference period

The judgment *Maestre García* of 21<sup>st</sup> February 2013 shows a similar tendency. As the Court rightly noted, an employee cannot be forced to accept compensation payments for vacation which he could not take due to sick leave<sup>33</sup>. He is allowed to make up for the failed vacation later even if free time has to be taken outside of a specified reference period set by the employer. The employer must provide the holiday even outside of such a period and cannot be counter with the argument of contrary corporate interests.

### Allowance in lieu of the directive

In the aforementioned judgment *Neidel* the ECJ ruled that a right to payment in lieu of holiday also arises, if national law does not provide for that<sup>34</sup>. This is relevant to the Hessian civil service law. The compensation claim arises directly from Article 7 (2) of the Directive<sup>35</sup> immediately when an official is transferred right from disease to retirement. Under European law the scope of the claim is limited to a minimum leave of four weeks.

### *No entitlement to leave at “short-time work zero”*

Based on a German submission, in *Heimann and Toltschin* on 8<sup>th</sup> November 2012 the ECJ approved the legal implications of “short-time work zero” on leave entitlement in Germany<sup>36</sup>. For “short-time work zero” the principle benefit obligations are suspended. Therefore employees concerned do not acquire a leave entitlement. Even if there might be the impression of a parallel to *Schultz-Hoff*, there is in fact none. Following the judgment *Schultz-Hoff* the holiday entitlement might actually arise. However, the Court rightly ruled, that no working due to “short-time zero” and no working due to sick leave is not comparable. For “short-time work zero” the reciprocal principal obligations are suspended. The suspension is based on a social plan in the form of a company agreement as emphasized by the ECJ. In addition, the workers concerned, in contrast to sick workers can rest as they wished or pursue leisure activities. It is still unclear how the decision affects similar situations, for example inactive employment relationships with a long-lasting sick leave. The BAG ruled in 2012 that holiday entitlements do arise during this period<sup>37</sup>. If the ECJ once has to decide this question, it will – due to its

<sup>33</sup> Case C-194/12 [2013], ECLI:EU:C:2013:102.

<sup>34</sup> Case C-337/10 [2012], ECLI:EU:C:2012:263.

<sup>35</sup> Directive 2003/88/EC concerning certain aspects of the organisation of working time.

<sup>36</sup> Case C-229/11 and C-230/11 [2012], ECLI:EU:C:2012:693.

<sup>37</sup> BAG, case 9 AZR 353/10 [2012], NZA 2012, p. 1216.

opinion upon “short-time work zero” and the mentioned related suspension of the principal obligations – probably come to the same conclusion for employment relationships being inactive because of illness.

*No proportional reduction of leave  
in case of transition to part-time*

In the decision *Brandes*, dated 13<sup>th</sup> June 2013, the ECJ found that a reduction of weekly working days does not entail a proportional reduction of the so far untaken leave<sup>38</sup>. Therefore, transition to a part-time position does not shorten proportionately the leave entitlement acquired during full-time work. This has been decided differently before by the BAG<sup>39</sup>. To justify its decision, the ECJ once again refers to the Working Time Directive and the right to paid annual leave as a special principle of EU social law. The decisive factor, however, is rather that the acquired full-time leave entitlement cannot justifiably become meaningless simply because the leave is taken later on during a part-time employment. It goes without saying that in the future under German law the holiday has to be calculated according to the period it arises in.

d) Termination of employment

aa) Discrimination

(1) Previous decisions

One focus of the ECJ’s recent jurisdiction was possible age discrimination in the termination of employment when statutes or collective agreements provide for an automatic termination because of reaching a particular retirement age. In 2007 the judgment *Palacios* clarified that the prohibition of age discrimination does not preclude statutes or collective agreements from linking a statutory retirement age to an automatic termination of employment<sup>40</sup>. Such a forced exit from working life is – formulated briefly – justified by the necessary economic “relay race” of generations. The fact that a low old-age pension basically is not able to lead towards the change of generations has been ruled by the ECJ in the judgment *Rosenbladt* in 2007 concerning a collective agreement retirement age and a pension of about € 250<sup>41</sup>.

<sup>38</sup> Case C-415/12 [2013], ECLI:EU:C:2013:398.

<sup>39</sup> BAG, case 9 AZR 314/97 [1998], NZA 1999, p. 156.

<sup>40</sup> Case C-411/05 [2007], ECR 2007, p. I-8531 = ECLI:EU:C:2007:604.

<sup>41</sup> Case C-45/09 [2010], ECR 2010, p. I-9391 = ECLI:EU:C:2010:601.

### *Age limit justified despite low pension*

The aforementioned judgment is followed by the judgment *Hörnfeldt* of 5<sup>th</sup> July 2012. It concerned a statutory age limit as well<sup>42</sup>, in particular the Swedish “67-year rule”, which allows the termination of an employment relationship without notice as from the age of 67 years. The plaintiff took the view that an exception to this rule was required due to the circumstances of his case. In his opinion, because of part-time working and short occupation the pension was “unreasonably low”. The Court approved the legal provision with the well-known reasons, namely with its purpose to ensure higher future pensions and the access of younger people to the employment market. Thus the provision pursued legitimate objectives of labour market policy in an appropriate way. Also the lack of hardship provision did not render the law disproportionate. An age limit does not prevent an employee from pursuing a working career with another employer for financial reasons. In addition, national law provides a primary care. This finally yields that a low pension does not preclude an age limit, which is linked to the statutory retirement age.

### *Calculation date/time in redundancy scheme compensation*

The decision *Odar* of 6<sup>th</sup> December 2012 relates to two discrimination characteristics, age and disability, and refers to a compensation claim in redundancy schemes<sup>43</sup>. A formula according to which compensation payments are to be calculated on the earliest possible retirement age was ruled to be unfair by the ECJ since it indirectly discriminates against disabled employees. After all, if they were not disabled, they would regularly retire later and thus receive a higher compensation. The scheme was found to be disproportionate. It does not take into consideration that disabled workers have more difficulties to reintegrate into the employment market and that they are also financially burdened more strongly associated with their disability. However, the ECJ allows calculation methods linked to a certain age (in this case 54 years), which lead to a lower compensation than younger employees would receive. In principle such a calculation method amounts to discrimination due to age. Yet, the economic disadvantages resulting from the loss of a job can vary greatly amongst workers of different ages. With regard to their bridge-to-the-future function, redundancy schemes therefore are justified age differentiations.

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<sup>42</sup> Case C-141/11 [2012], ECLI:EU:C:2012:421.

<sup>43</sup> Case C-152/11 [2012], ECLI:EU:C:2012:772.

Both, the results yielded as well as the arguments are convincing and should henceforth be considered in the interpretation of the German AGG.

### *Long term illness as a disability*

The judgment in *Ring and Skouboe* of 11<sup>th</sup> April 2013 relates to a notice in connection with disability discrimination<sup>44</sup> and complements the judgment *Chacón Navas* from the year 2006<sup>45</sup>. Considering the EU has meanwhile fully acceded to the United Nations Convention on the Rights of Persons with Disabilities, the ECJ clarified correctly that a disease-related restriction of long duration, which prevents a person from full participation in working life, can fulfil the term “disability”. Moreover, the ECJ stated that the reduction of working time is a preventive measure an employer has to take so as to enable people with disabilities to work. These deliberations are persuasive and should henceforward be considered in the interpretation of the German AGG. The BAG has recently decided that an asymptomatic HIV infection may be a disability in legal terms<sup>46</sup>.

#### bb) Fixed-term contracts

(1) A series connection of fixed-term contracts is not fundamentally unfair

The case of *Kücüük* of 26<sup>th</sup> January 2012 dealt with so-called “repeated fixed-term contracts”<sup>47</sup>. The plaintiff had been employed on a fixed-term basis over and over again. Almost all fixed-terms employments had been based on the objective reason of a temporary replacement. The ECJ ruled that an extension of a fixed-term contract to cover a permanent need may be justified in principle by the Directive on the framework agreement on fixed-term employment contracts. Even repeated or permanent fixed-term contracts are not per se abusive. However, an abuse of rights can arise under the circumstances of the individual case. The BAG has implemented these requirements in 2012<sup>48</sup> by establishing – in addition to the examination of a substantive reason – an abuse control pursuant to § 242 BGB. To this end, all circumstances of the case are to be assessed, such as the total duration of fixed-term contracts, the number and respective duration of the single contracts or the fact that the employee was always employed on the same job with the same activities. The BAG ruled that 13 fixed-term contracts in a period of eleven

<sup>44</sup> Case C-335/11 and C-337/11 [2013], ECLI:EU:C:2013:222.

<sup>45</sup> Case C-13/05 [2006], ECR 2006, p. I-6467 = ECLI:EU:C:2006:456.

<sup>46</sup> BAG, case 6 AZR 190/12 [2013], BeckRS 2014, No. 66665.

<sup>47</sup> Case C-586/10 [2012], ECLI:EU:C:2012:39.

<sup>48</sup> BAG, case 7 AZR 443/09 [2012], NZA 2012, p. 1351.

years indicate abuse, however, four fixed-term contracts over seven years and nine months do not<sup>49</sup>. Nevertheless, the assumption of a so-indexed abuse of rights may conflict with circumstances of the individual case<sup>50</sup>.

### *No deterioration owing to a transition to permanent employment*

The ECJ judgment of 8<sup>th</sup> March 2012 in the case *Huet* refers to the conversion of a fixed-term contract into a permanent one<sup>51</sup>. The ECJ merely stated that such a conversion must not be accompanied by profound changes in the provisions of the fixed-term contract. The judgment is not of major relevance to the German law as in these cases the content of the employment relationship is usually not degraded. The legal conversion of a fixed-term employment into a permanent one according to § 15 (5) TzBfG or § 16 TzBfG is not affected by the judgment since in this case the contract remains unchanged already by virtue of law<sup>52</sup>.

### *No legal protection for temporary workers*

The judgment *Della Rocca* of 11<sup>th</sup> April 2013 dealt with the applicability of the Directive on the framework agreement on fixed-term contracts<sup>53</sup> to temporary workers<sup>54</sup>. According to the ECJ, the directive does neither apply to the fixed-term employment relationship between the lender and the temporary worker – as questioned in the Italian original case – nor to the employment relationship between the borrower and the temporary worker. The Court justified the judgment by referring to the preamble of the framework agreement under which the directive is not intended to cover temporary workers. However, interpreting the directive in this way is doubtful. This is underlined by a pointed quote of *Gregory Thüsing*: such an interpretation has *not even been claimed by the worst servant of capital*<sup>55</sup>. The meaning of the preamble is rather that the directive is not applicable to the performance of the contract between the borrower as a “non-contractual employer” and the

<sup>49</sup> BAG, case 7 AZR 783/10 [2012], NZA 2012, p. 1359.

<sup>50</sup> BAG case 7 AZR 443/09 [2012], NZA 2012, p. 1351.

<sup>51</sup> Case C-251/11 [2012], ECLI:EU:C:2012:133.

<sup>52</sup> *Bayreuther* in Beck'scher Online-Kommentar [2013], § 15 TzBfG no. 28 and § 16 TzBfG No. 1.

<sup>53</sup> §§ 2 und 5 of the annex to Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

<sup>54</sup> Case C-290/12 [2013], ECLI:EU:C:2013:235.

<sup>55</sup> *Thüsing* in NJW-Editorial 19/2013.

temporary worker. The decision taken does not have an impact on German law since § 14 TzBfG is also applicable to employment relationships between lenders and temporary workers and other objective reasons according to § 14 (1) TzBfG are to be considered in the context of § 10 (1) 2 AÜG.

### 3) Cross-border issues

#### aa) No limit to the choice of court by agreement on jurisdiction

On 19<sup>th</sup> July 2012, the ECJ decided the case *Mahamdia*<sup>56</sup>. It related to questions of international jurisdiction, in particular the interpretation of the Articles 18 and 21 Brussels I regulation (EuGVVO – the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). The judgment was based on an action of a motorist employed at the Algerian Embassy in Germany. He possessed both the German and Algerian nationality. He filed a suit for remuneration and a declaratory action for the illegality of termination. Although the employment contract contained an agreement on the exclusive competence of the Algerian courts, the ECJ rightly interpreted the relevant Article 21 Brussels I regulation in the following way: the provision applies to all agreements on jurisdiction made before the dispute has arisen, if they extend the choice of jurisdiction given by the Brussels I regulation. The disputed agreement did not meet those requirements. Moreover, the ECJ considered an embassy as a branch establishing a jurisdiction within the meaning of Article 18 (2) Brussels I regulation, if the employee does not exercise public powers.

#### bb) The ratio of standard-link-rules and escape clauses on applicable law

The judgment *Schlecker/Boedeker* of 12<sup>th</sup> September 2013 concerns the interpretation of Article 6 (2) of the Rome Convention and thus the EU conflict-of-law provisions<sup>57</sup>. The Rome Convention is still applicable to contracts concluded prior to the 17<sup>th</sup> December 2009. The applicable regulations have been transferred essentially unchanged to Article 8 (2-4) Rome I Regulation. The submitted case involved the question of whether to apply Dutch or German labour law to the employment relationship of the plaintiff. The plaintiff had steadily worked for more than eleven years in the Netherlands. The contract did not include a choice of law, thus under Article 6 (2b) Rome Convention the law of the State in which the branch is located, in that case Dutch law, applies. This is the so-called standard-link-rule<sup>58</sup>. Nevertheless,

<sup>56</sup> Case C-154/11 [2012], ECLI:EU:C:2012:491.

<sup>57</sup> Case C-64/12 [2013], ECLI:EU:C:2013:551.

<sup>58</sup> See already case C-29/10 [2011], ECR 2011, p. I-1595 = ECLI:EU:C:2011:151; case C-384/10 [2011], ECR 2011, p. I-13275 = ECLI:EU:C:2011:842.

according to the regulation the law of another State, here German law, might be applicable if the case is, taking into consideration the overall circumstances, manifestly more closely connected to another country. This so-called *escape clause* has been addressed for the first time by the ECJ in the case *Schlecker*. The clause is applicable even if the employment is not only *ordinarily* carried out in the same country, but also in case of a long period of time without interruption. In other words, the clause shall also apply when all other circumstances except for the location of employment point to another state. In applying the clause “all the aspects that characterize the employment relationship” are to be taken into consideration. These were, in the particular case, the employee’s residence in Germany, the payment of salary in D-Mark prior to the introduction of the Euro, the employer being a German legal entity and the contract of employment referred to mandatory rules of German law.

### *Collective labour law* *Calculation of minimum wages*

The judgment in *Isbir* from 7<sup>th</sup> November 2013<sup>59</sup> specified the meaning of minimum wage-rates pursuant to Directive 96/71/EC on the posting of workers in the framework of the provision of services<sup>60</sup>. An employee demanded remuneration in accord to the provisions of a collective agreement confirmed to the German Law concerning the posting of workers (*Arbeitnehmerentsendegesetz – AEntG*). The employer brought forth that the remuneration paid is above the minimum wage. This resulted from the already applied collective agreement, which provided two lump-sum payments in addition to the normal remuneration and furthermore capital-forming payments as well. The ECJ ruled that in addition to the hourly wage, other elements of remuneration need to be taken into account regarding the minimum wage, as long as they do not change the correlation of performance and consideration. Hence, it does not matter how particular modalities of remuneration are called by the parties, but what is the purpose of these payments. Payments outside of the normal synallagmatic contractual relation such as saving schemes are not *wages in the strict sense* and are therefore irrelevant for the calculation of the minimum wage. After all, they are not meant to remunerate the work done.

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<sup>59</sup> Case C-522/12 [2013], ECLI:EU:C:2013:711.

<sup>60</sup> Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

## *Interpretation of dynamic reference clauses*

An important decision in the reporting period was taken on 18<sup>th</sup> July 2013. The judgment *Alemo-Herron*<sup>61</sup> based on a reference made by a British court. It dealt with the question of how small dynamic reference clauses in employment contracts are to be interpreted in case of a transfer of undertakings. Such clauses refer to collective agreements of a particular industry in a temporal-dynamic way. According to the new jurisdiction of the BAG they have to be interpreted in accordance with its wording. Therefore, according to aforementioned case law, the transferee of an undertaking has to consider that by means of a dynamic reference clause the usually more costly collective agreement of the transferor applies. In 2006 the ECJ approved the interpretation of such a clause by the BAG as an agreement of equal treatment<sup>62</sup>. Subsequently the transferee of an undertaking was bound to the wage tariff of the transferor only on a static meaning. The ECJ now ruled against the interpretation of the clause by BAG. The court held that according to the interpretation of Article 3 of the transfer of business directive<sup>63</sup> the transferee is not bound to collective agreements which enter in force after the transfer of business and on which he did not have any influence upon. Otherwise his margin of manoeuvre regarding adaption measures and as well his freedom of contract would be significantly restricted, thereby affecting his right to freedom of enterprise. This is a surprising result. The Court disregards that the Directive distinguishes rights arising out of employment contracts and those out of collective agreements in general as well as in regard to their fate after a transfer of undertaking. This becomes evident from the fact that the ECJ in the operative part and the grounds always refers to “Art. 3” of the Directive, whereas the national court refers more precisely to “Art. 3 Section 1”. The Advocate General, in turn, fails to recognize the difference between the law of obligations and normative effects in that he refers to “Art. 3 (3)” in his remarks<sup>64</sup>. Reference clauses stipulate rights and obligations in the nature of a contractual agreement. Thus the transfer of undertakings does not have any influence on a dynamic reference clause. The reference clause results from the employment contract itself and the transfer of undertakings does not affect the employment agreement concluded with the transferor. The situation is

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<sup>61</sup> Case C-426/11 [2013], ECLI:EU:C:2013:521.

<sup>62</sup> Case C-499/04 [2006], ECR 2006, p. I-2397 = ECLI:EU:C:2006:168.

<sup>63</sup> Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

<sup>64</sup> Conclusions of the Advocate General, 02/19/2013, case C-499/04, BeckRS 2013, No. 80324.

different when the collective agreement came into force by virtue of law. The provisions in the Directive are designed in accord to this distinction. But first of all, that is not what reference clauses are about. Secondly, unlike the ECJ suggested, the purpose of the transfer of business directive is not about balancing the interests of transferee and employee. Such a purpose is indicated in neither the directive itself nor its recitals. The directive is intended to protect the employee from the consequences of a transfer but not the transferee. However, under German law the judgment *Alemo-Herron* leads to the question of whether or not the BAG has to change its jurisdiction again and return to its prior jurisdiction on the interpretation of reference clauses as equal treatment agreements. The transferee would then be bound to collective agreements of the transferor on a static basis. That would probably meet the requirements set by the ECJ. The BAG, however, had given up this interpretation for good reasons. Therefore, it will probably again have to refer the question to the ECJ to confront the court with its incorrect reasoning and the differences between German and British law. Should the ECJ remain true to its chosen path, it is inconceivable the transferee to be engaged in collective agreement of an employers' association which he is not a member of and therefore is not competent collectively. Nonetheless, one might consider following the requirements of the ECJ by implementing the "necessary adjustments". This can be achieved by temporarily limiting the dynamic nature of a reference clause or even to facilitate the conditions for a notice in the purpose of a de-dynamisation.

### *Jurisprudence on social rights*

The following four decisions affect various versions of the so-called migrant workers regulation, which coordinates the social security in the European Union.

### *EU foreigners as jobseekers and their claim of Harzt-IV benefits*

Because of its importance it is worth mentioning the submission of the BSG (Federal social Court) to the ECJ of 12<sup>th</sup> December 2013<sup>65</sup> although a judgment has not been delivered yet. The case relates to a topical and both legally

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<sup>65</sup> BSG, case B 4 AS 9/13 R [2013], BeckRS 2014, No. 66151.

and politically controversially debated issue that occupies the social jurisdiction intensively. It is about the question of whether unemployed EU nationals residing in Germany to seek work (nationwide there are currently about 130,000 people affected<sup>66</sup>), are entitled to claim payment of basic social benefits for employable beneficiaries according to the German Social Code Part II (SGB II). This unemployment benefit is colloquially called “Hartz IV” and it aims at enabling beneficiaries to live a life in human dignity (§ 1 (1) German Social Code Part II – SGB II). The BSG believes that the plaintiff, a Swedish citizen of Bosnian origin, cannot base his claim to Hartz IV benefits on the European Convention on Social and Medical Assistance<sup>67</sup> since 2012, because the German federal government has declared a reservation to the Convention in 2011<sup>68</sup>. A claim to benefits may directly result from the SGB II. However, the SGB II contains an exclusion-clause precluding EU foreigners from Hartz IV for the time of job seeking. If the exclusion-clause applied to the plaintiff, he would be barred from receiving Hartz IV. There would be a claim, if the exclusion-clause was incompatible with European law. This must be clarified by the ECJ. Due to the differentiation based on nationality the exclusion clause might violate the principle of equal treatment established by the migrant worker Regulation<sup>69</sup>. However, it has not yet been decided whether this principle applies to so-called “special non-contributory cash benefits” as well<sup>70</sup>. Would it be held applicable the question arises how it correlates with the Free Movement Directive, which allows Member States to exclude social assistance to job seekers who are EU citizens<sup>71</sup>. Finally, the Court must examine, if the legislation violates the free movement of workers provisions (Art. 45 TFEU/AEUV).

### *Social security payments without legal residency requirements*

Lawyers specified in social law eagerly awaited the ECJ judgment in the matter of *Brey* finally delivered on 19<sup>th</sup> September 2013<sup>72</sup>. The decision has

<sup>66</sup> Press release of the LSG Nordrhein-Westfalen, 11/29/2013, “Harz-IV” claim for EU-Citizens from Romania.

<sup>67</sup> European Convention on Social and Medical Assistance SEV-No.: 014; [www.conventions.coe.int/Treaty/EN/Treaties/Html/014.htm](http://www.conventions.coe.int/Treaty/EN/Treaties/Html/014.htm).

<sup>68</sup> Geschäftsanweisung SGB II No. 8 23.2.2012 – SP II 21/SP II 23 – II-1101.1.

<sup>69</sup> Art. 4 Regulation (EC) No. 883/2004 on the coordination of social security systems.

<sup>70</sup> Ruled in Art. 70 Regulation (EC) No. 883/2004 on the coordination of social security systems.

<sup>71</sup> Art. 24 Abs. 2 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>72</sup> Case C-140/12 [2013], ECLI:EU:C:2013:565.

shaken national restrictions on benefits for EU nationals. According to the Austrian law EU, social payments – resulting from the difference between the net income and the related statutory base rate for minimum pensions – could be denied to EU-citizens who are no legal residents in Austria. A stay of more than three months was lawful only if “sufficient financial resources” could be proven. Austria introduced these regulations to prevent abuse by EU citizens moving to Austria in order to obtain higher benefits. The ECJ ruled that a benefit with welfare character cannot be linked to the requirement of legal residency so that EU foreigners are automatically excluded. In the end, each individual case has to be examined in accordance with the principle of proportionality.

### *Social benefits for frontier workers only at place of residence*

The judgment *Jeltes, Peters and Arnold*<sup>73</sup>, which makes-a-law change, addressed atypical frontier workers and their entitlement to unemployment benefits. Frontier workers within the meaning of the Migrant Workers Regulation are workers who reside in a Member State and work in another<sup>74</sup>. So-called “real” frontier workers return every day or at least once a week to their resident city. The so-called “fake” frontier workers do not so, or at least very rarely<sup>75</sup>. In addition, the ECJ also distinguished so-called “atypical” frontier workers. In fact, they return to their place of residence regularly, but they build personal and occupational ties in their place of work. They are called “atypical” because, due to the aforementioned link to their country of employment, in the event of unemployment they have a higher chance to find work in this particular state. In the judgment *Miethé* from the year 1986, the ECJ had interpreted the Regulation contrary to its wording<sup>76</sup>: atypical frontier workers could claim unemployment benefits and reintegration services electively either in the country they had worked or the country of residence<sup>77</sup>. The judgment was justified due to the higher chances of reintegration in one

<sup>73</sup> Case C-443/11 [2013], ECLI:EU:C:2013:224.

<sup>74</sup> Vgl. Art. 1 lit. f Regulation (EC) No. 883/2004 on the coordination of social security systems.

<sup>75</sup> *Leopold* in Beck'scher Online-Kommentar Sozialrecht [2013], 883/2004 Art. 1 No. 19.

<sup>76</sup> Art. 71 Abs. 1 lit. a No. ii und lit. b of Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

<sup>77</sup> Case C-1/85 [1986], ECR 1986, p. 1837 = ECLI:EU:C:1986:243.

of both Member States. The regulation was amended in May 2010<sup>78</sup>. Now the regulation explicitly offers such a choice, but only for reintegration measures. The ECJ held that the special situation of frontier workers was thus considered sufficiently. Therefore the regulation is no longer to be interpreted in line with the *Miethe judgment*. A person can only apply for unemployment benefits at the place of residence. That can be a financial disadvantage, because in the application of the residence principle for unemployment benefits, employment times in the working country are disregarded.

### *Pension claims at the habitual residence in two member states*

What remains to mention is the judgment *Wencel* of 16<sup>th</sup> May 2013<sup>79</sup>. The ECJ had to decide if a Polish social security institution could seek reimbursement for a pension paid to the insured because for many years he had two habitual residences in two Member States and therefore already received a pension in Germany. The Court denied the question. First, pursuant to the Migrant Workers Regulation the pension may not be reduced solely because the claimant does not live in the same country where the pension fund is set up. Moreover, the regulation authorizes a reduction under national law if the claimant receives pension benefits through two different Member States. However, the benefit payable under the law of a Member State could be reduced only by the amount of benefits due under the law of another Member State. A retrospective and complete withdrawal is not allowed.

### *Basic considerations*

It is difficult to give a conclusion on a judicial review. Therefore these conclusions are meant to give some fundamental thoughts to consider. The working language of the ECJ is French. Is this still up-to-date? The language hinders many excellent lawyers from pursuing a career in Luxembourg. Does the ECJ need a case assignment plan structured according to responsibilities, which does not exist so far? The case reasoning given by the ECJ is often very superficial and also vulnerable. Without any doubt the ECJ is of outstanding importance. Nevertheless, should the Court take more care concerning its

<sup>78</sup> Amended on the 05/01/2010 Commission Regulation (EC) No 883/2005 in conjunction with Regulation (EC) No. 987/2009. The Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community remains effective under Art. 90 of the Commission Regulation (EC) No. 883/2005.

<sup>79</sup> Case C-589/10 [2013], ECLI:EU:C:2012:39.

reasoning? Is the ECJ under Article 267 TFEU allowed to put a page limit to submissions? And if so, is it fair not to translate the pages crossing this limit so that some parties are disadvantaged? Is there, contrary to previous practice, a need to involve judges of the Member States the respective case originates from in order to better estimate the impacts of the judgment on the national law? Besides, a systematic perusal of national literature to European law issues is not undertaken by the ECJ yet. This is a major shortcoming. And finally, would it not be useful to have European court of first instance for which the ECJ then acted as a court of appeal, which decides only on fundamental issues?

### **Streszczenie**

#### **Ostatnie zmiany w orzecznictwie dotyczącym europejskiego prawa pracy i prawa socjalnego**

Niniejszy komentarz dotyczy wybranych istotnych orzeczeń Europejskiego Trybunału Sprawiedliwości odnośnie do prawa pracy i prawa socjalnego wydanych w 2012 i 2013 roku. W swoim charakterystycznym obecnie stylu Europejski Trybunał Sprawiedliwości ponownie mocno ingerował w prawo krajowe państw członkowskich. Mimo że Trybunał zachował w zasadzie swoją ostatnią linię orzecznictwa, przegląd jego orzeczeń nie może być przeceniany.

**Słowa kluczowe:** prawo pracy, prawo socjalne, orzeczenie Europejskiego Trybunału Sprawiedliwości