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"Judgments from the ECJ: appreciations, challenges and possible future developments through the eyes of European Judges"

FINAL REPORT

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1. Introduction

The eighteenth Congress of the European Association of Labour Court Judges took place on the 6th and 7th June 2014 at the Grand Hotel Union, Ljubljana, Slovenia at the kind invitation of our hosts, the Supreme Court of Slovenia. The subject of the Congress was

> "**Judgments from the European Court of Justice – Challenges and possible future developments through the eyes of European Judges"**

The Congress was attended by 35 Judges from 14 countries of the EU and the EEA.

Ljubljana is one of the least known of European Union capitals, but also one of the most beautiful, built on the banks of the Ljubljianica river (which I believe means "River of Love"). Slovenia became independent for the first time in its history in 1991, escaping from its long obeisance to the Austro-Hungarian Empire and, more recently, from the disintegrating state of Yugoslavia.

Slovenia proved a very fitting place to discuss the role of the European Court of Justice (now re-named the Court of Justice of the European Union in a vain attempt to distinguish it, in the mind of the public, from the European Court of Human Rights). This is because Slovenia is at the heart of Europe, but is also a comparatively recent member state, still adapting its national laws to the European treaties and directives and the judgment of the European Court of Justice8

The European Court of Justice interprets the European Treaty and the Regulations and Directives which emanate from the institutions that form part of the EU, but its role goes beyond that in seeking to build up acceptance of, and enthusiasm for, EU law before the national courts of the 27 member states. Many EU countries have highly refined and developed bodies of law which, they are tempted to feel, have little to gain by the overview of a supra-national court, but the citizens and the judges of many of the smaller and newer countries greatly feel the benefit of the ECJ in encouraging and, indeed, forcing, the judiciary to act positively when faced with European concepts which challenge established approaches.

The methodology of the Congress was, as usual, the preparation of a Questionnaire, by Gerrard Boot, our Secretary-General, which led to 19 National Reports. These were brought together in a Synthesis prepared by Dawn Shotter, our treasurer. This Synthesis formed the basic source material for the discussions at our Congress.

The Congress was opened by Nina Betetto, Vice-President of the Slovenian

Supreme Court who spoke of the experience of the more recent entrants into the EU and the important role played by the European Court of Justice in assisting these countries to build the principles of efficiency and equivalence of EU law before national courts, which may be tempted to adopt a "strategy of avoidance" when faced with European concepts which challenge established approaches. This can make national courts reluctant to make references to the European Court of Justice. However, the proportion of references to the ECJ made by the new member states has increased from a tiny percentage up to 19% of all references in 2011 (and no doubt still rising)[1]. This demonstrates that the impact of European Law is growing in the new member states, which should help to bring the various national systems together. This is an important factor in enabling businesses and individuals to operate transnationally throughout the EU.

The subject matter of the Congress led to a rather different approach from previous Congresses. The Congress was not restricted to a specific aspect of labour law, but rather to the role of the European Court of Justice and its impact on labour law as a whole and also its impact on specific aspects of labour law. This led to a wide-ranging and valuable series of Reports which were able to pin-point the importance of particular decisions to individual countries.

In preparing the Report, therefore, we have looked at the role of the European Court in developing a common system of European justice, the extent to which it can and should impose its views on national systems, the process by which the European Court deals with issues arising in the national courts and also the impact of ECJ judgment on specific areas of law.

2. Role of the European Court of Justice

a) History.

The European Court of Justice (ECJ) was established in 1952 (even before the creation of the European Economic Community in 1957), to adjudicate upon the European Iron and Steel Community created by the Treaty of Paris 1951. When the Treaty of Rome was signed in 1957, the Court was incorporated into the institutions of the EEC, later to become the European Union.

The creators of the EEC were determined that it would not just operate through the goodwill of the member states, but would have its own independent institutions, namely the Council of Ministers, drawn from the national governments, the European Commission, its civil service, and the Parliament, (which originally was an advisory body, but is now directly elected and keen to increase its power at the expense of the Council of Ministers). However, the founding fathers were aware that these institutions required a

[1] See December 2013 Newsletter of the Network of Supreme Court Presidents

Court of Law, which could adjudicate on disputes and ensure that the Treaty obligations were complied with. It was based from the start in Luxembourg.

There was no expectation, at the time, that a new body of law would emerge which was independent of the laws of the member states, the term *acquis européenne* in fact, pre-dates the EEC and has been used also in relation to the principles enshrined in membership of the much wider Council of Europe, enforced by the European Court of Human Rights[2] (the Strasbourg Court). The two courts are routinely confused with each other by journalists, politicians and the public - though not, of course, by lawyers!

b) Jurisdiction and scope

There are three means of entry to the ECJ – by a claim from the Commission, by a claim by a member state, or by a reference from a national court under Article 267 (previously 234) of the European Treaty.

As far as Labour Court Judges are concerned, their main role in relation to the ECJ is to decide whether to make references under article 267. The process of such references is considered in the next section.

The role of the ECJ is set out in the Treaty. On a claim from the Commission or from another Member State it decides whether a Member State has fulfilled its obligations under the treaties. However, on a reference from a national court it decides on "the interpretation of the treaties" and the "validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union." The interpretation of the treaties includes the interpretation of Directives and Regulations.

There is no mention in the treaties of the *acquis européenne*, but it is clear that the Judgments of the ECJ have built up a substantial body of law, which should be uniformly applied throughout the EU and which take precedence over the national laws in the event of any conflict. This has been an important development and means that national judges, particularly in the field of social and employment law, need to be aware of the judgments of the ECJ, not only those based on references by their own national courts, but also references from other national courts.

This has led, for example, in Hungary to a separate section of the Hungarian Labour Court to which cases with a European element are referred. As Nina Beletto, the vice-president of the Slovenian Supreme Court, mentioned, in her opening address, Slovenian judges, too, have increasingly become aware of the need to take into account European law, when considering national cases. Many judges, throughout the EU, have been trained and brought up on their own national law, with little interest in how similar issues have been resolved elsewhere. There is considerable loyalty to established national interpretations and resistance to advocates who seek to impose a European

[2] More eloquently entitled in French "Cour européenne des droits de l'homme".

Andriani Papadopoulou 8/1/2015 09:37
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interpretation which may conflict with previous national judgments. There is no doubt that that attitude is changing and there is an increasing awareness of European law and an increasing willingness to apply it in national courts[3].

c) Tensions

Tensions between the authority of the national courts and of the European Court of Justice range over a wide field and over a wide range of countries. For example, Nordic countries are reluctant to accept the decisions in *Laval*[4] and *Viking*[5], which give precedence to the European right of freedom of movement of "persons, services and capital"[6] over national traditions which protect rights and benefits gained from Collective Agreements.

In Italy and Germany there are considerable tensions about potential conflicts between the national constitution and the EC Treaty. In Hungary[7] the Commission has challenged a decision to dismiss the Chief Justice, which brings European Law into a national constitutional issue. The French Conseil d'Etat has never referred any issue to the ECJ.

d) **Charter of Fundamental Rights**.

This issue of conflict of laws has become more raw and controversial with the incorporation, by the Treaty of Lisbon (now Article 6 of the European Treaty), of the Charter of Fundamental Rights[8] into national law. This has enabled the European Court to go beyond the words of the Directives so as to interpret national judgments in the light of the terms of the Convention. An interesting example is Article 30 "Protection in the event of unjustified dismissal". In our Congresses in Paris and Budapest in 2003 and 2004, we considered protection for unjustified dismissal. This was then regarded as an issue of national law. All but one member state,[9] provided protection from unjustified dismissal, but the level of protection and compensation was very variable. For example the United Kingdom has a long [two year] qualification period and seeks to approach the matter on an assessment of the reasonableness of the employer and not substantive justification. The incorporation of Article 30 into European Law creates the opportunity for references to be made to the ECJ on this topic. A case has been referred to the ECJ from Hungary on this issue[10], as dealt with below.

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[3] In Estonia, for example, the National Report states that there are increasing moves to reduce the pay gap between men and women , to deal with age discrimination and to empower people with disabilities to work, backed up by European law.

[4] C341/05

[5] `Viking Gas v Kosan Gas C-46/10

[6] s 45, 49, 56 and 57

[7] Commission v Hungary

[8] Considered by the EALCJ in our Congresses in Seville in 1997 and Dublin in 2001 – see "Fundamental Social Rights at Work in the European Community" 1999 ISBN 0 7546 2054 9 and the Report from Dublin in our website www.ealcj.org.

[9] Denmark, which relied solely on rights emanating from collective agreements and the employment contract

[10] Bay v Hivatal C 491/12

The outcome of the incorporation of the Charter into EU law, therefore, has had a much more significant effect than was anticipated. Its forerunner, the European Social Charter was only treated as a background document. It means that any aspect of any claim in a national court which relates to an Article of the Charter can be made the subject of a reference. In relation to labour law, which is the particular interest of our Association, it means that such issues as respect for private and family life (eg making people work week-ends, looking at their emails, freedom of thought, conscience and religion, equality, diversity and the right to a fair trial) can all be made the subject of a reference relating to the interpretation of the treaties. It therefore brings into the European sphere matters which were previously considered to be matters of national Constitutional law, or matters to be referred to the Strasbourg Court.

The attitude of the ECJ and, indeed, the national courts to these powers is important and will become increasingly important. There has been a suggestion in recent years that the ECJ is willing to impose their interpretation of the directives, rather than to allow for a measure of appreciation by national courts. A similar approach to constitutional issues is likely to bring it into conflict with the national Constitutional Courts.

An example of this, which was debated in the Congress and is dealt with elsewhere in this Report, is the right to holiday pay while off sick and the right to carry over holiday pay to subsequent years when an individual is sick for a large part of the year. The Directive sets out a minimum of four weeks' annual leave "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" [11].

The question arose as to how this right should be exercised where an employee was absent sick for all or part of the leave period. The ECJ could have left it to national courts to decide on this aspect, as indicated by the terms of the Directive. Instead it chose to rule on what was appropriate, namely that a person who is away sick should be allowed to retain their leave entitlement until their return, even where it lasts for more than a year. This is an example of the ECJ seeking to impose uniformity on the national jurisdictions, not only on the general principle, but also on the detail.

e) European Court of Human Rights

This leads to another issue, which the EALCJ may well address in a future Congress, namely the overlap between the role of the ECJ and of the European Court of Human Rights - the Strasbourg Court. In the past the Luxembourg Court has been seen as dealing primarily with commercial and social issues, which are the main subject of Directives. The Strasbourg Court has been more inclined to deal with personal rights, particularly relating to freedom of speech and expression and the right to life, liberty and a private

[11] Art 7 Directive 2003/88/EC

life.

It must be remembered that the Strasbourg Court has no direct relationship with the European Union. It was created by the Council of Europe, which presently consists of 47 member states, including all the states of the European Union, but also eastern european countries like Russia and Ukraine. It can provide direct access to individual litigants and the European Convention of Human Rights, which it exists to enforce, has been incorporated into the law of several of the member states[12]. The extension of the jurisdiction of the Luxembourg Court means that there is a risk that the two Courts will come into conflict. This is exacerbated by the proposal contained in the Lisbon Treaty that the European Union should accede to the European Convention of Human Rights, in which case it would arguably be required to accept the judgments of the Strasbourg Court in precedence over those of the Luxembourg Court.

f) Primacy

The clear principle of the European Treaty is that the European Court of Justice will have primacy over all national courts. However, such primacy cannot be used pro-actively by the court. The ECJ can only adjudicate on matters which are put before it. This is dealt with in more detail in the next section. The only way in which judgments of national courts can be challenged is by a reference. Lower courts have a discretion whether to refer an issue to the ECJ but "where any such question is raised in a case pending before s court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal **shall** bring the matter before the Court".[13]

There is particular concern about this issue, at present, in Italy where a controversial law was passed to try to resolve an anomaly whereby many teachers had been appointed on fixed-term contracts in order to avoid their becoming public servants with greater security of tenure and benefits. To make them all public servants would have put a great strain on the Italian economy. The idea was regularise this practice by allowing them to have indeterminate fixed-term contracts, this anomaly being justified by economic and social reasons. The matter went to the Constitutional Court, which was reluctant to refer the matter to the ECJ. They were out-flanked by an inferior court, the Tribunal di Napoli, which decided to exercise their discretion to refer this issue[14] and this led to the Constitutional Court referring the question to the ECJ for the first time. The Advocate-General's Opinion has now been given in this case and he recommends a finding against the Italian government.

The senior Italian judges present at our Congress expressed concern about

[12] e.g. United Kingdom, Human Rights Act 1998
[13] Article 267 of European Treaty
[14] Mascolo v Ministerio dell Istruziano C-22/13

this restriction upon the sovereignty of the Italian State. It is one thing to make references from the Corte di Cassasione, but the Constitutional Court was created as the guardian and interpretor of the Italian Constitution and therefore of the Italian State. The French Constitutional Court has never referred a case and the German Constitutional Court has shown a similar reluctance. Perhaps surprisingly, the British Supreme Court has shown no such reluctance, perhaps because there is no written constitution.

These are unresolved issues. Is there any limit on the right of the European Court of Justice to adjudicate on constitutional issues of a member state? The discussions of the Congress made it clear that the Role of the European Court of Justice is an area of law which we will be hearing much about in the future.
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3. The Referral System.

The main point of contact between Labour Judges and the European Court of Justice is in respect of references under Article 237 of the European Treaty. This power is dealt with above.

Many of our delegates are members of Courts of Last Instance, which are under an obligation to refer appropriate issues to the ECJ. Other delegates are in a position to exercise a discretion to refer.

Is there an issue of European Law? Nearly all Directives have been incorporated into national law by national statutes or secondary legislation. As a result it is not always apparent that an issue which arises in a national court is a matter of European Law. In the first place, the Court will simply be interpreting the national legislation and applying it to the facts and circumstances of the particular case.

The judges attending the Congress are all well aware of the case law of the ECJ and there was some discussion about the extent to which it is binding upon them. Reference was made to *C.I.L.F.I.T. v Ministero della Sanita*[15] and the cases which followed. National laws vary as to the extent to which courts are bound to follow the judgments of more senior courts. This is particularly relevant where the Directive does not have direct effect in the particular case, because the respondent is not an organ of the state.

Nevertheless, the general view was that, even where there was only indirect effect, the Court would follow a comparable ruling in the ECJ in preference to their own interpretation or, indeed, the interpretation of their superior national court. There was, however, no real indication that courts would take into account rulings by other national courts of other EU countries on european

[15] C-238/81 [1982] ECR 3415

law.[16]

The Article refers to "where such a question is raised before a court or tribunal". This raises the issue of whether the national Court can identify the issue of European Law itself without intervention from the parties or whether it can only make a reference where the parties ask for one.

The judges, particularly those of first instance, were very much aware of the negative aspects of making a reference. Courts are under intense pressure to complete cases promptly. In Lithuania, for example, there is a requirement that cases be completed within two months. A reference will take 18 months to 2 years to resolve. Even then the answer to the reference will not necessarily resolve the case and there may be argument about the meaning of the ECJ Judgment and further issues to be decided, which may in turn give rise to new issues of european law.

The feeling was that, if there was a plain issue of european law, the inferior Court might raise the issue with the parties, but would be reluctant to make a reference unless the parties wished them to do so, or the question was of fundamental importance to a large number of other people engaged in, or contemplating similar litigation. For example, the UK delegate had been involved in a case where an embassy servant had been denied their rights under the Working Time Regulations. The question was whether the State Immunity provisions over-rode those Regulations. The case involved European legislation and the European Charter of Fundamental Rights, but no-one asked for a reference and the case was decided on the interpretation of UK and European Law without making a reference.

The first instance judges also considered that, in many cases, it may be desirable to leave the making of a reference to an appeal court. By this time, the facts will have been finally decided and the particular issues of law in dispute will have been identified. There is a danger, if the First Instance court makes a reference, that new issues will be raised on appeal which will require a second reference.

The problem was also raised that a new judgment of the ECJ might cast doubt on the correctness of a judgment or ruling which had already been given by the national court. There was some consideration of whether it might be appropriate to recall the parties and re-consider the judgment, but the general view was that judgments, when made, are final, even when they are wrong, subject, of course, to the right of appeal. This means that courts cannot generally review judgments whose correctness is called into question by ECJ judgments made some time after the case has been completed.

In respect of Courts of Last Instance, the discussion was rather different. By

[16] This contrasts with the practice in UK and Ireland, in cases about the common law rather than european law, which is to consider decisions of other Common Law countries in cases where there is an absence of relevant precedent from the national court.

this stage, because it is a senior court, it is likely that there will be a serious and important question to be resolved in respect of which the parties disagree. The ECJ has made clear that in such circumstances the national court should make a reference unless the correct application of european law is "so obvious as to leave no scope for any reasonable doubt".[17] This is the so-called *acte claire* principle. The Last Instance judges took the view that this would very rarely arise, except where there was an existing judgment of the ECJ which covered it.

There is, however, the point raised in the previous section, namely that some courts of last instance, particularly constitutional courts, regard their primary obligation to be to the National Constitution and are very reluctant to refer constitutional issues to the ECJ even where the constitutional issue is related to the European Treaty or the European Charter of Fundamental Rights.

4. Specific Issues.

a) Burden of Proof

The EU has taken vigorous steps to ensure uniformity of enforcement of anti-discrimination legislation. In our discussions about discrimination, in particular racial discrimination, it is apparent that there has been a sea change in attitudes throughout the EU. When we first discussed the matter in 1998, anti-discrimination provisions were contained in National Constitutions, but often without specific legislation to assist enforcement. This has changed, but, it is apparent even now that, in many countries, the number of cases where direct racial discrimination is alleged and proved are small, despite research by, for example, the FRA[18] that a large proportion of people from ethnic minorities report having suffered direct discrimination.

An important factor in successfully bringing discrimination claims is the burden of proof. A person from an ethnic minority may apply for a job and be refused. He may suspect that his race was a factor, but there is no direct evidence. The employer, when the allegation is made, may refuse to provide any information about the selection process and this has been held to be within his rights. In *Meister v. Speech Design*[19] the ECJ held that, on privacy grounds, a claimant had no automatic right to disclosure of information about the selection process. So how, is a victim of discrimination to prove his case? It was felt that the way in which the ECJ dealt with this in *Meister* had helped the national courts to deal with this balance.

[17] C.I.L.F.I.T above at para 5
[18] Fundamental Rights Agency of EU, based in Vienna- ss "EU-MIDIS at a glance" ISBN 978-92-9192-349-6.
[19] ECJ C415/10

The first tool is the reversal of the burden of proof in Article 9 of the Equal Treatment Directive.[20] This was seen as a very valuable tool and the ECJ has given helpful guidance on this –

> "when persons...establish...facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment"

The difference between different countries which emerged related to the extent to which courts are willing to draw inferences from facts, sufficient to cause the burden of proof to switch to the employer. The example given by the Greek delegate was of a person of Nigerian origin (which was not apparent from his name) who was offered a job from a paper qualification and, when he arrived to start work, was told that the job had been taken. The employer then refused to give any details.

The Greek response was that, in the absence of any details of the process, it would had been difficult to substantiate that his race was the crucial factor for the dismissal. The reaction of th UK delegates was that the sudden change, coupled with the refusal to explain, was sufficient for the court to draw an inference of discrimination, unless the employer gave a detailed explanation which was unrelated to the potential employee's race. The reaction of other countries varied, but most felt that the specific provision for a shift in the burden of proof would greatly assist the potential employee should he make a claim.

b) Justification

The concept of justification is not new. It goes back to the definition of indirect discrimination now enshrined in the Equality Directive[21] Article 2(b) that where an apparently neutral criterion or practice has an disparate effect on women [or men] amounts to indirect discrimination, unless it is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

For most of the protected characteristics, such as sex, religion, race etc. direct discrimination, i.e. acts tainted with intentional discrimination, cannot be justified. However, two new protected characteristics have been added which provide that direct discrimination on the grounds of age and disability related discrimination can be justified.

The issues raised by the prohibitions on age and disability related discrimination were considered at our Congress in Berlin in 2012.[22] There it became apparent that many countries have numerous entitlements and regulations which specifically relate benefits and detriments to specific ages.

[20] 2004/113/EC
[21] 2000/78/EC
[22] "Equality in employment for older and disabled people" www.ealcj.org.

This was particularly true of Germany, where many collective agreements have been freely negotiated whereby entitlement to such things as higher pay and fringe benefits are obtained at a particular age and which contain fixed compulsory retirement ages.

The definition of "justification" allows for a wide or narrow interpretation by the courts. It is open to the courts to look favourably upon long-standing systems, often freely negotiated and allow flexibility in the definition of a legitimate and proportionate means of achieving it. Alternatively the courts can take a strict approach and require strong objective evidence of the precise aim and the extent to which this is the best means of achieving it.

The debate in the Congress was in respect of the attitude of the European Court of Justice in adjudicating on decisions made in national courts as to the proper interpretation of the definition in respect of national rules and regulations. Again it would be open to the Court to take a broad view, that different national courts, dealing with different national conditions might come to different conclusions while applying the same definition, or they could take the view that there was a need for uniformity of interpretation and that the Court could impose its own interpretations.

It is generally accepted that sex, gender and religion are not relevant factors in selection for employment, dismissal or pay. However, it is at least arguable that age is never irrelevant. People can be too young and lack experience, or they can be too old and the capacity has left them. The object of the legislation is to persuade employers to concentrate on the relevant factors – speed, experience, quality of work etc. – rather than to make assumptions about age, which may prove inaccurate. However, there is also the issue of making space in the organisation for new, younger people who may otherwise be unemployed. Does this not sound a little like the out-dated idea that women should be willing to make way for men who have a wife and children to support?

The various cases have shown differing approaches. For example, it is essential that pilots should retain good eye-sight, alertness and swift reactions. But is that best ensured by a fixed retirement age of 55 or by rigorous testing of reactions? Or both? Should not governments seeking to justify such retirement ages provide research data on, for example, whether pilots are more likely to have an accident or an incident of some kind as they get older. In *Prigge*[23]the ECJ rejected the health and safety justification for making airline pilots retire at 55 years, on the basis that the risks associated with ageing can be dealt with by requiring pilots to take tests and checking up on their flying records. The same principle was used to challenge a Seafarers' Act in Norway requiring seafarers to retire at 62 on health grounds.

However, the ECJ have shown some sympathy for such justifications and there are still many national Regulations which contain fixed ages for

[23] C447/09

particular benefits and which have not yet been challenged. This is an area where ECJ judgments will continue to challenge long-standing approaches to compulsory retirement. [24]

c) Harassment

Harassment was taken as an example of an issue where the European Court had assisted in persuading Member States to address an issue which is a serious problem in all EU countries. This subject was dealt with fully in our Congress in Vienna in 2008[25], so it is not dealt with in detail in this report.

However, it was pointed out at our Congress that in 1989 only 7 EU countries recognised harassment as a protected right. Now all but 3 countries have clear definitions.

d) Transfer of Undertakings

From the earliest stages of the EEC, the problem of protecting workers in the event of a transfer of undertakings was appreciated and the Acquired Rights Directive was one of the first Directives in the labour field.

The traditional relationship of master and servant was a personal one. So, if the master sold his business, the servant remained his employee. If the seller did not want to retain his services, the purchaser could choose whether to enter into a new contract of employment with the employee or to reject him. So any security the employee had was lost.

This problem was addressed in Italy in 1942 with a law which survived the Treaty of Rome and provided protection for employees in the event of a transfer. So, when the Acquired Rights Directive was introduced, Italy did not initially create any new legislation because they believed that it was covered by their existing law.

Transfer of Undertakings issues have become one of the major features of litigation in the European Court of Justice. It was last considered in detail in our Congress in Esch-sur-Alzette, Luxembourg on 25th and 26th November 2005.[26] The subject is too large to deal with fully in this Report. However, several aspects of Transfers of Undertakings were discussed at the Congress and we considered the significance of the ECJ jurisprudence in influencing the approaches of national courts.

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[24] Indeed the European approach strikes right at the heart of a new (2012) Slovenian Law entitling the state to dismiss public servants who have reached an age when they are entitled to a state pension, in order to save the public purse. This is being considered by the ECJ, but it indicates the extent to which national legislatures ignore European principles when there is a political imperative.

[25] "Harassment and violence at work" www.ealcj.org

[26] "Corporate Re-Structuring – strking the balane between flexibility and employee protection" www.ealcj.org

Many countries felt that Transfer of Undertakings was the most important area in which the ECJ had clarified European law and assisted in resolving national issues.

The delegates emphasised the specific purpose of the Directives which was to protect employees. This attitude can be seen in the Court's approach to several of the issues which arise from the general principle.

Firstly, there is the question of whether there has been a relevant transfer at all. Where there is agreement between the seller and the buyer of the business, there is usually little doubt that a transfer has occurred, even where the sale is of part of the business. In this area, the most concerning problem has been where the transfer is effected by a sale of shares, so that the company running the business is the same, but the share-holders are different.

Problems tend to arise where the transfer is involuntary, either because the transferor is insolvent or because the transferor loses a service contract with a public or private organisation and the new contractor, while carrying on the same business, often from the same premises and with the same vehicles and machinery, does not want to take over all or any of the work-force. Many countries had, in the past, had statutory protection, only in the case of voluntary transfers (i.e. where there was some kind of deal between the transferor and the transferee). However, ECJ cases have made it clear that the protection also applies in such cases as forfeiture of a lease, with a new lessee taking over the business, liquidation of the business, when the liquidator/administrator transfers the business to a new purchasers and changes of contractor in the case of out-sourcing[27]

This problem was addressed in the UK by the introduction of the concept of a "service provision change" providing protection even where it is uncertain whether there would be a transfer of the undertaking. This was an unusual example of the UK providing additional protection to that provided by the Directive. There is a similar system in France, with strict rules relating to outgoing and incoming contractors.

However, this protection does not apply in other EU countries and there have been many cases where, for example, on a change of public service bus contractors the buses remained the same, even if other aspects of the business changed[28]. In some contracts, such as cleaning contracts, the assets of the business are solely the personnel. It has been held that the transfer of a body of workers can amount to a relevant transfer (even, it seems, when there is only one employee![29] though the Congress took the

[27] See, for example, Boor v Minister for Public services C-425/02, Güney-Göres C-232/04 and Gul Demir C-233/04

[28] Oy Liikenne Ab C-172/99

[29] Christel Schmidt v Rijksdient voor Pensionen C-392/92, C-98/94)

view that this decision is probably out-dated). But employees may be tempted to take only a few of the former employees, with the bulk being replaced. This is still an area of difficulty.

Where a transfer has taken place of part of a business, there is still the difficulty of deciding which of the employees pass with the business and which are retained by the transferor. The assignment of existing employees by the transferor either to the transfererd part of the businese or, even, to the retained part of the business, is one of the areas of dispute.

The other main area discussed was the change of terms of employment as the transferee tries to integrate the transferred employees into their existing business. There was some criticism of the ECJ's intransigence in restricting genuine attempts at harmonisation

It was agreed, in the main, that the protection of employees in the event of transfer was an area where the ECJ had made a positive contribution to national laws protecting employees at a time when, through no fault of their own, they may stand to be dismissed and replaced by employees of the transferee business.

e) Fixed Term Contracts

Fixed term contracts are just one of the many atypical forms of employment created by employers either to deal with atypical situations or to try to ensure that employees do not obtained full legal protection. This was addressed at our Congress in Rome in 2010.[30]

It is fully accepted that there can be occasions when a fixed term contract is appropriate, leaving the employee without a job at the end of the period. The Congress emphasised that the Fixed Term Workers Directive was not intended to prohibit fixed term contracts. There are those who think that fixed term contracts are of themselves abusive, but the difficulty we focussed on is what happens when there is a succession of fixed term contracts, which indicate that the employer has a long-term need for the role.

This has arisen, particularly in Italy, but also in Hungary, where people have been recruited in public service posts, such as teachers, on fixed term contracts, to ensure that they do not get the fuller protection of public servants, who are outside the normal employment relationships. In some cases, such contracts had continued for 30 years.

The trouble is that in the perception of some national jurisdictions, neither the law nor the directive can convert employees under fixed term contracts into

[30] "Protecting Marginal Workers – identifying who is a worker with particular reference to the scope of the Part Time Workers, Fixed Term Worker sand Agency Workers Directive" - see www.ealcj.org - 11th and 12th June 2010..

public servants[31] who are not regarde3d as employees at all, but as office-holders.

There was some discussion of the various other forms of atypical and *parasubordinati* employment which are used to by-pass some of the protections provided by law and collective agreements. The current "hot topic" is zero-hours contracts, which are a cause of concern in all EU contracts. Under such contracts employers have power to vary hours at will and, in the end, to freeze an unpopular worker out simply by offering him no hours at all. There is no current national or EU legislation limiting such contracts and, therefore, there is little that the ECJ can do about it. The European Commissioner has expressed his concern [32] and some countries are contemplating regulations, but we are some way away from any EU legislation to protect atypical workers, let alone independent contractors.[33]

f) Holiday Pay

The Working Time Directive[34] has a short provision on annual leave providing that Member States shall "take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice".

All EU countries have implemented this. However, inevitably, issues arise about when and in what circumstances employees can take leave and how much they must be paid.

One such issue is part-timers. Obviously, part-timers should take leave *pro rata* and be paid accordingly. However, many part-timers work irregular hours and for irregular periods. When and how can they take their holidays? Some countries have decided that it is appropriate to pay part-time employees extra pay to cover holiday costs, but not necessarily to fix specific dates when they are on holiday. Is this an area where the ECJ should seek to obtain uniformity or an area where the national legislation or practice can set out the conditions for entitlement?

When people are sick, they cannot take holiday. And what if they fall sick while on holiday? Should the holiday entitlement be reduced *pro rata* if employees are off sick for a substantial period, as the purpose of holiday is to

[31] The UK has a specific provision converting successive fixed term contracts into permanent employment – Fixed Term Employees Regulations 2002, reg, 8. This appears to be contemplated by cl 5.2(b) of the Framework Directive 99/70/EC

[32] "We will only be able to speak about a robust recovery when the EU economy creates 200-300 thousand new jobs every month, year after year. And clearly, a real job-rich recovery must not be based on zero-hours contracts or long-term mini-jobs. Only if working people make a decent living, and can buy what others sell, will truly positive dynamics return to the European labour market." European Unemployment Commissioner, August 2013

[33] Independent workers – Freedom of Enslavement? – EALCJ Congress, Brussels 2014 www.ealcj.org

[34] 2003/88/EC Art 7

provide time for rest and recuperation after periods of working and people off sick are not in need of rest and recuperation? Or should people off sick be entitled to take outstanding holiday when they return, even if it is a long time later?[35] A carry-over period of 9 months is not enough[36] but is one year enough? Can people be required to take annual leave while off sick? What about return from maternity leave?[37] Do you get double parental leave for twins?[38] There are a mass of related issues.

The ECJ has decided that all this detail should not be left to national courts and legislation and has also taken a strong line in support of sick workers and part-timers who get money but not any holiday periods. The ECJ has also made clear that holiday pay should be based on actual pay and not on basic pay. Overtime, therefore, should be included when calculations are made as to holiday pay.

All these are part of the general package of protection for employees. After all, holidays are properly regarded as part of the general welfare requirement for employees and, for a person on low pay, the exclusion of their overtime from the holiday pay calculation may cause real hardship. On the other hand, there is a feeling that the ECJ does not always take into account the practical difficulties their pronouncements of principle create. A company may have had a lot of overtime available earlier in the year, but may now be struggling to meet the wages bill. An employee who returns from long-term sick may find that his fellow employees have been struggling to keep up in his absence. They may not like it if he immediately goes off on a long holiday.

g) Disability discrimination

The impact of the ECJ on disability discrimination was considered at our Congress in Berlin in 2012.[39] Disability discrimination is a comparatively recent aspect of european law, originating from the Equality Directive 2000/78/EC and we discovered considerable differences in approach from national courts.

The Congress's attention was drawn to a problem of implementation suffered by Italy, which did not fully implement Article 5. The problem has still not been resolved because of concern about the cost to small businesses of making expensive adjustments for one member of a small work-force.

The concept, which is unique to disability discrimination, is "reasonable accommodation"[40]. This is separate from justification. An employer may well be justified in treating a disabled employee differently from an able one, if the disability means that they cannot do the job fully, but that justification can only be relied on if they have made reasonable accommodation to try and enable the employee to do the job. This does not just mean things like providing wheel chair access, but also less obvious adjustments, like allowing people to work from home. All

[35] Anged C78/11, Gerhard Schults-Hoff C-350/06, C-520/06, Pereda v Madrid Mollvad SA – 2009 [IRLR] 959

[36] Neidel v Stadt Frankfurt am Main - 2012

[37] Gomez v Continental Industries C-142/01

[38] Chatzi C-149/10

[39] See www.ealcj.org

[40] Article 5

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countries accepted and understood the concept, but the was some discussion about how far accommodation should go.

Some concern was also expressed about different definitions of disability. Most countries have some kind of system to give disabled people financial support. In many countries the definition of disability for social support is the same as the definition for disability discrimination, but this is not the case in UK and Ireland where the definition of disability is much wider for discrimination purposes. Thus a person with, say, a bad back which restricts his lifting ability would not receive social support, but might be protected from discrimination if, for example, lifting only formed a small part of the job.

h) Unjustified dismissal

As stated above, remedies for unjustified dismissal was one of the issues we considered at a previous Congress.[41] It was regarded as one area where EU law did not apply. In practice nearly all countries provided protection from unjustified dismissal, but their provisions varied.

Because it was a generally accepted principle, the right was included in the European Charter of Fundamental Rights enforceable under the Lisbon Treaty.

A case has been referred to the ECJ from Hungary on this issue[42],but I no Opinion has yet been issued. The Hungarian National Report seems to suggest that it has been rejected as inadmissible.

i) Freedom of movement

Although Title IV of the European Treaty is headed "Free movement of persons, services and capital", the relevant articles relate to free movement of workers[43], rights of establishment and freedom to provide services.

The Charter of Fundamental Rights for Workers relates to the Freedom of movement for workers. However, the other provisions related to rights of establishment and services, not contained in the Charter, are also relevant to the protection of workers, since foreign establishments and businesses often wish to employ foreign workers.

This whole subject has been considered on many occasions by the Congress, in particular at our Congress in Liverpool in 2009.[44] The ECJ judgments in *Laval*[45], *Viking*[46] and *Rufferts,* have had a substantial impact, particularly in countries, such as the Nordic countries, where employee protection depends

[41] "Termination of Employment at the Initiative of the Employer; the challenge for Corporae Responsibility" – Paris and Budapest 2003-4. See www.ealcj.org

[42] Bay v Hivatal C 491/12

[43] Article 45

[44] "The Impact of Mobility of Workers and Enterprises on Employment Rights" - www.ealcj.org

[45] C341/05

[46] Viking Gas v Kosan Gas C-46/10

heavily on collective agreements.

These cses demonstrate the problems that arise where different fundamental principles come into conflict. Migrant workers may well be prepared to work for lower wages and on less favourable conditions than the hard fought rights contained in collective agreements demanded by native workers.

Longer established Member States have been forced to amend many established laws, local as well as national which made it more difficult for foreigners to work in their country, for example a requirement that documents required to take up employment must be written the official language of the state or even of a province of a federated state[47]. More recent entrants have found this problem catching up with them as well.

National Reports highlighted that the principle has also caused problems in respect of the rights of EU citizens to the same benefits as nationals, eg taking into account length of service as a University Professor has to include length of service in another state[48]

5. Conclusion

Setting up a single body of law from the jurisprudence of 28 Member States is a massive task. However, it has become apparent over the 19 years of the EALCJ that, certainly among European judges, there is a lot of common ground as to how individual problems should be resolved. The legal employment problems facing western democracies are surprisingly similar.

There was consensus that, despite our criticisms of individual judgments, the European Court of Justice has been successful in bringing together the different systems within a single *acquis européenne.* This has been particularly true among the newer entrants, many of whom have suffered from the stagnation and authoritarianism of the communist system. The ECJ judgments have given confidence to national judges to follow European principles, rather than to avoid the issue by folllowing national precedents.

There are, however, risks of the court trying to impose its own views by extending and interpreting the words of the Directives and the Treaties. Prof. Alan Neal, the EALCJ Convenor, in his summary of the proceedings of the Copngress challenged the role of the ECJ in making social policy and the extent to which it should develop universally acknowledged fundamental rights into social concepts which are not universally accepted, bearing in mind that national governments have democratic legitimacy, whereas the ECJ depends on a platform of received concepts.

There are some signs of a more pragmatic approach, but it is important that

[47] *Las* C-202/11, a Belgian case, dealing with a matter of very considerable political importance in Belgium.
[48] Köbler C-224/01

the ECJ is prepared to look at the practical effects of their judgments both in countries with a strong free-market approach and those where many years of collective agreements, often applied *ergo omnes*, have provided protections for workers which are challenged by some of the principles of the EU, including freedom of movement and establishment.