ARTICLE

EELC Law Review 2018 - Part 2

Annual leave

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Introduction

2018 was a very important year for the right to annual leave. We saw some very principled ECJ judgments which are likely to have a long lasting impact. In particular, the ECJ's interpretation of the Charter of Fundamental Rights of the EU (CFREU) has broadened the scope of the right to annual leave enormously. Aside from these judgments, we will discuss a few other cases.

Independent contractors

We start our review with an important case which actually was delivered in December 2017, *Conley King* (C-214/16). Mr King worked on a 'self-employed commission only' contract. It appears from the facts that both Mr King and his employer/principal, The Sash Window Workshop, assumed that the former had no right to paid annual leave. However, after their long-lasting contract ended, he did claim payment of untaken leave. Already iIn the proceedings before the case got to the ECJ, it was already found that Mr King was a worker within the meaning of Directive 2003/88 and thus was entitled to annual leave (Article 7). As much of the leave had lapsed – UK law in principle requires leave to be taken in the same year as it was acquired – the referring court asked the ECJ how to deal with this. The ECJ held that Directive 2003/88 precludes national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

Although the outcome of the case does not seem surprising, it demonstrated that the ECJ monitors any provisions on expiry or lapse of rights to annual leave very closely. A more practical consequence of the *Conley King* judgment is that it may have demonstrated to a greater audience that independent contractors also may also be entitled to annual leave. This is no surprise from a legal perspective – independent contractors can be workers within the meaning of Directive 2003/88 – but the message that independent contractors may be entitled

to annual leave could be relevant in the debate on the gig economy and platform work.

Accrual of rights during parental leave

In the *Dicu* case (C-12/17), the ECJ allowed a Romanian provision which excluded parental leave from being treated as a period of actual work during the reference period in which a worker accrues his/her annual leave. This had led a worker taking parental leave to accruing fewer rights to annual leave. Compared to sick leave and maternity leave, parental leave appears to have been considered a more voluntary form of leave and therefore does not get the same protection.

6 November judgments

On 6 November 2018, the ECJ delivered what arguably are the judgments of the year in the *Kreuziger* case (C-619/16), joined cases *Bauer* and *Willmeroth* (C-569/16 and C-570/16) and the *Max Planck* case (C-684/16). These cases appear to have become landmark cases, as the ECJ both introduced a duty for the employer to enable employees to take their leave (*Kreuziger*, *Max Planck*) and enabled a direct appeal to Article 31(2) (right to annual leave) CFREU (*Bauer et al.* and *Max Planck*).

Regarding the first issue, both *Kreuziger* and *Max Planck* concerned workers who had outstanding, untaken leave at the moment that their employment contract had ended. While Article 7(2) of Directive 2003/88 enables the possibility to pay an allowance in lieu in this situation, it appears that the German (case) law at issue required that employees had actually requested to take the leave during their employment, before they would be entitled to this compensation. As they had not done requested (enough) leave, their employers refused to pay such an allowance.

The ECJ held that such an automatic loss of rights is not allowed under the terms of the Directive. As a weaker party in the employment relationship, the employee must not be dissuaded to from exercising the right to annual leave, especially when claiming that this right may have detrimental effects for the employment relationship. Any practice or omission by an employer that may potentially deter the worker from taking his or her right to annual leave is forbidden. In fact, the employer must ensure that the worker is given the opportunity to take the paid annual leave, by encouraging him or her, formally if need be, to do so, while informing him or her, accurately and in good time so as to ensure that the leave is still capable of procuring the rest and relaxation to which it is supposed to contribute. Further, if the worker does not take the leave, it will be lost at the end of the reference period or authorised carry-over period, or upon termination of the employment relationship where the termination

occurs during such a period. Moreover, the employer must be able to prove that he it has done so.

These cases take employer obligations a whole lot further. Whereas an employer's primary task was to accommodate the employee wanting to take annual leave, the employer now has an active role and must ensure that the worker takes the leave. If he the employer does not, the employee will remain entitled to his outstanding leave or a corresponding payment at the end of the employment.

The second and most important aspect of the judgments was at issue in the cases *Bauer et al.* and *Max Planck*. The problem for private parties is that, in many EU Member States, it is difficult to enforce their rights if the national legislation is not compliant with EU legislation. Private parties cannot directly invoke directives against each other and have to rely on state liability, which often is difficult. However, with *Bauer et al.* and *Max Planck* the ECJ circumvented this problem, by allowing private parties a direct appeal to Article 31(2) CFREU, forcing national judges to disregard provisions that are contrary to this Article.

Article 31(2) CFREU reads: "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." This Article is even more succinct and less concrete than Article 7 of Directive 2003/88, but it seems that the ECJ applies its case law on Article 7 of Directive 2003/88 equally to Article 31(2). Moreover, within the context of the CFREU, the right to annual leave is even dubbed an *essential* right of EU law.

A lot can be said about the ECJ's considerations, but from a practical point of view it is important to note that the ECJ acknowledges the direct horizontal effect of the right to annual leave of Article 31(2). The arguments by the ECJ recalled supranational sources (namely the Community Charter of the Fundamental Social Rights of Workers, the European Social Charter Revisited (revised) of 1996, and the ILO Convention No 132), to hold that the right to annual leave is not just an essential principle of EU social law (*Bauer et al.*, para. 79), but "mandatory and unconditional in nature" so that Article 31(2) "is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter" (*Bauer et al.*, para 85).

Within an employment law context, we already were already aware of such direct effect in discrimination cases (e.g., *Mangold*, C-144/04 and *Kücükdeveci*, C-155/07), but this direct

effect appeared to stem from the fact that the principle of non-discrimination on grounds of age was a general principle of EU law. A few years ago, a direct effect of Article 27 CFREU was denied in the case *Association de Médiation Sociale* (C-176/12) because that norm is not in itself sufficient to confer on individuals an individual right which they may invoke as such. Therefore, *Bauer et al.* appears to be the first employment law case, which acknowledges with such emphasis the direct effect of the CFREU.

As the right to annual leave now has direct effect, we probably will not be seeing state liability cases on this field anymore. This has always been a problematic way for employees who have fallen victim to wrong implementation of EU legislation, as the *Francovich* doctrine offered several ways out for EU Member States. For example, in 2018 the Danish case which featured in EELC 2018/10 saw the Government defending successfully in a case which concerned the wrong implementation of the right to annual leave. In 2009, the *Pereda* judgment (C-277/08) had rendered Danish provisions on annual leave and sick leave invalid, and the employee got sick (and therefore disadvantaged by national legislation) in 2010. The Supreme Court agreed with the employee that the Danish Government should have enacted an amended Holiday Act earlier than in January 2012. However, it considered that 1 January 2011 would have been a realistic deadline, as a result of which the employee remained empty-handed.

Holiday pay

In December 2018, the ECJ delivered another interesting judgment. In case C-385/17 (*Hein*), it had to rule on the definition of 'pay'. A collective agreement contained a definition of holiday pay which resulted in lower pay if in the reference period no/less work was performed due to short-time working. As the ECJ has held many times before, holiday pay must be comparable to regular pay, as otherwise this would be deemed to be deterring workers from taking their leave. This case turned out to be no different: this practice is not compatible with EU law. However, the ECJ made an interesting remark (paragraphs 46 and 47): incidental overtime, given its exceptional and unforeseeable nature does not, in principle, form part of holiday pay, but regular overtime does.

Interestingly, EELC 2018/43 featured a British case – delivered prior to the *Hein* judgment – in which the Employment Appeal Tribunal held that both non-guaranteed and voluntary overtime should be taken into account when calculating holiday pay. To that end, it referred to EU case law to that date (*Williams – v – British Airways*, C-155/10). Had the *Hein* judgment been delivered earlier, the outcome would probably have been different.

Concluding remarks

As we said at the start of this review: 2018 has been a very important year for the right to annual leave. In particular the cases *Conley King* and the '6 November judgments' have strengthened the right to annual leave. It now appears to have an even stronger position in EU law, firmly protected by Article 31(2) CFREU having a direct horizontal effect. The days that when the right to annual leave could still be regarded as some kind of luxury, are over.

Collective Dismissals

Prof. Daiva Petrylaitė[8]

Four judgments about collective dismissals were reviewed during 2018 in EELC: two of them are judgments of the ECJ and two judgments of national Supreme Courts.

Collective redundancies and protection of female employees during pregnancy

The ECJ clarified the right to the protection from termination of employment of pregnant workers under Article 10 of Directive 92/85 (Pregnant Workers Directive) in the case of collective redundancies covered by Directive 98/59 (Collective Redundancy Directive) in the *Porras Guisado* judgment (C-103/16).

Quoting the Advocate General (point 53 of the Opinion), the ECJ stated that, when a pregnant worker (or a worker who has recently given birth or is breastfeeding) is dismissed within the context of a collective redundancy procedure, she belongs both to the group of workers protected under Directive 92/85 and to the group of workers protected under Directive 98/59; on that basis, she should benefit, at the same time, from the rights provided for by both of those Directives. With references to its previous judgments, the ECJ held that when the dismissal decision is taken for reasons essentially connected with the worker's pregnancy, it is incompatible with the prohibition on dismissal laid down in Article 10 of the Pregnant Workers Directive; by contrast, a dismissal decision taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with the worker's pregnancy would not be contrary to Article 10 of Directive 92/85 (*Danosa*, C-232/09). Meanwhile, according to the Court, Article 1(1)(a) of the Collective Redundancy Directive states that 'collective redundancies' refers to dismissals effected by an employer for one or more reasons not related to the individual workers concerned, provided that certain conditions concerning numbers and periods of time are satisfied (*Rodríguez Mayor and Others*, C-323/08). The Court found that a reason or reasons, not related to the individual workers concerned, for making the collective redundancies within the meaning of Article 1(1) of Directive 98/59 fall within the exceptional cases not related to the condition of pregnant workers within the meaning of Article 10(1) of Directive 92/85. On that basis, the Court

concluded that Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59.

This judgment of the Court is significant, first of all in its interpretation of the scope of the female workers' protection against termination from employment enshrined in the Pregnant Workers Directive. Secondly, the reasons that force the employer to carry out collective redundancies according to the Collective Redundancy Directive, at the same time, are recognised as legitimate and sufficient to apply such redundancy procedures, *inter alia*, to pregnant workers.

Definition of 'undertaking controlling the employer' in case of collective redundancies

The Court in the judgment *Miriam Bichat and Others* (joined cases C-61/17, C-62/17 and C-72/17) clarified Article 2(4) of Directive 98/59 (Collective Redundancy Directive) as far as it states that the decision regarding collective redundancies is being taken by an '*undertaking controlling the employer*'. According to the Court, in interpreting the origins and the objective of the first subparagraph of Article 2(4) of Directive 98/59, the term '*undertaking controlling the employer*' covers all undertakings which, by virtue of belonging to the same group or having a shareholding that gives it the majority of votes in the general meeting and/or the decision-making bodies within the employer, are able to require the latter to adopt a decision contemplating or planning for collective redundancies. In addition, the Court stated that a simple contractual relationship, in so far as such a relationship does not allow an undertaking to exercise a decisive influence on dismissal decisions taken by the employer, cannot be considered sufficient to establish a situation of control within the meaning of the first subparagraph of Article 2(4) of Directive 98/59. The resuming Court clarified that the first subparagraph of Article 2(4) of Directive 98/59 must be interpreted as meaning that the term '*undertaking controlling the employer*' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies.

In this judgment, the Court gave a significant explanation concerning the term '*undertaking controlling the employer*', first of all, taking into account that this term doesn't refer to the national law, it should be interpreted in the same way throughout the European Union; secondly, the Court referring to its previous judgments clarified that the term 'control' refers to a situation in which an undertaking may adopt a strategic or commercial decision compelling the employer to contemplate or to plan for collective redundancies. On this basis, the Court

stated that the term '*undertaking controlling the employer*' in the context of the Directive, should be applied in a narrower sense, i.e. as an undertaking whose influence is ensured through shareholdings and voting rights but not based on a contractual or de facto influence.

The Austrian Supreme Court judgments in collective redundancy cases

Regarding national precedents, only two cases, both Austrian, were reviewed in 2018. In the first judgment of the Austrian Supreme Court (EELC 2018/15) the question of applicable law was raised (the dispute arose as to whether the law of Austria or Germany applied), however the Court did not interpret or define the issues related to collective redundancies.

In another judgment (EELC 2018/38) the Austrian Supreme Court held that the employer must notify the Employment Service when it is contemplating collective redundancies, even if they are carried out by mutual agreement. The duty of notification is triggered if the employer proposes a mutual termination agreement to a relevant number of employees, provided the offer is binding and can be accepted by the employees within 30 days. If the employer fails to notify the Employment Service, any subsequent redundancies (or mutual terminations of employment occurring on the employer's initiative) are void, even if effected after 30 days.

Thus, the Court noted that collective redundancies should not be limited to cases where employment contracts are terminated at the initiative of the employer (for economic and other reasons not related to the employee), but also the termination of the employment contract by mutual agreement if it is initiated by the employer and the circumstances indicate that the initiative was caused for the same reasons as other collective redundancies during the fixed period.

Gig economy in 2018

Andrej Poruban[9]

In recent years, digital technologies have quickly become a focal point for discussions about the future of the traditional world of work. One of the major transformations has been the emergence of the so-called 'gig economy' under which the demand and supply of working activities is matched via mobile applications. These online platforms have diverse origins and encompass multiple services such as the ride-hailing system, food delivery, cleaning, home repairs and other skilled or routine work. The growth of this new phenomena raises new questions concerning misclassification of employment relationships.

In 2018, litigation in cases of worker/employee or self-employed contractors has flourished throughout Europe with different outcomes: e.g. in Spain - Juzgado de lo Social núm. 11 de

Barcelona, 29 May 2018, Juzgado de lo Social núm. 6 de Valencia, 1 June 2018, Juzgado de lo Social núm. 39 de Madrid, 3 September 2018; Italy - Tribunale Ordinario di Torino, 7 May 2018 (nevertheless, the Court of Appeal didn't uphold the decision, 11 January 2019), Tribunale di Milano, 10 September 2018; France - Cour de cassation, 28 November 2018.

One of the high profile cases was also featured in EELC 2018/9 and focused on the most visible example of the gig economy. In *Uber B.V. & Others – v – Aslam & Others* the Employment Appeal Tribunal (EAT) dealt with the practical realities of the relationship between Uber and its associated companies and their drivers. The group of former London drivers brought claims for the national minimum wage and paid annual leave. These entitlements extend to every 'worker'. The 'worker' is an intermediate category in UK law in between an 'employee', who is obliged to work for an employer when required in accordance with her/his contract, and has the greatest level of employment protection and an 'independent contractor', who works autonomously. In the Employment Tribunal the judge found that they were 'workers', rather than self-employed contractors, broadly as they were not in control of setting fares and were subject to various forms of control through the eponymous software app. That decision was upheld by the EAT. In the meantime, on 19 December 2018, the Court of Appeal rejected Uber's appeal (*Uber B.V. & Ors – v – Aslam & Ors* [2018] EWCA Civ 2748) and held that the original Employment Tribunal decision was correct – the claimants were entitled to the rights which come with worker status. The majority of the Court of Appeal clarified two pivotal issues. The drivers did not have a contract with their passengers and they could be considered to be working for Uber when they logged onto the app in their territory in order to be ready and willing to accept any trips offered. It is worth nothing that Uber gained some judicial support. One judge disagreed and raise some compelling points in favour of Uber's arguments. In a dissenting opinion, he found that the drivers were independent contractors and argued that the written terms in place are perfectly explicit and reflected that drivers provide their services to the passengers as principals, with Uber's role being that of intermediary. In this context, it's not surprising that the Court of Appeal has given Uber permission to appeal to the Supreme Court.

The gig economy was also questioned by the ECJ in a landmark judgment *Asociación Profesional Elite Taxi v Uber Systems Spain SL* (C-434/15). The Spanish commercial court referred questions for a preliminary ruling on whether services provided by Uber are regarded as transport services, information society services or a combination of both. The ECJ recognised that the activity of the platform is not limited to a mere electronic intermediation and qualified Uber as a service in the field of transport. The company has created a supply of urban transport services itself and has organised it by selecting the drivers, providing an application which is indispensable for both the drivers and people who wish to make a

journey and regulating some key aspects of their offer. The ECJ also noted that Uber exercises a certain control over the quality of the vehicles, the drivers and their conduct which can, in some circumstances, result in them being excluded. Of course, this ruling remains silent about the characterisation of the relationship between platform/driver/passenger and leaves such effort to domestic legislation and case law. However, it may have a broader impact from a labour law perspective because the ECJ dealt with the same argumentation of Uber which claim to be solely an intermediary and de facto deny the role and responsibilities of an employer.

Despite developments in 2018 there is no clear-cut answer to the question of the employment qualification within the various platforms related to the gig economy and therefore case-by-case analysis is still required. In this context is therefore interesting to see the initial reactions of International Labour Organization. The report on the Future of Work published on January 2019 recommends to develop an international governance system for crowdworking websites and app-mediated work that sets and requires platforms to respect minimum rights and protections and looks to the ILO Maritime Labour Convention, 2006 as a model.

Fundamental rights: privacy and freedom of expression

Prof. Stein Evju[10]

Privacy and work intersect in many different ways. While private life and privacy, not necessarily one and the same, enjoy protection on the one hand they may, on the other hand, be impacted on by obligations vested in the employment relationship. The borderline between right and wrong is a multifarious challenge, illustrated in different ways by three cases reported in 2018, brought together here under the headline 'fundamental rights'.

Notwithstanding ECJ case law, most recently last year's judgment in *Matzak* (C-518/15), the distinction between standby duty and on-call availability is not clear cut in practice. The Portuguese Court of Appeal judgment (EELC 2018/33) and the comments triggered by it illustrate the point, at the same time highlighting a particular aspect of privacy rights. If a worker on standby or on call – terminology is not decisive – is free to move about and stay wherever s/he likes, the time thus spent as a rule is not deemed working time; it is only time actually spent working when called upon that is regarded as such. Restrictions on the worker's freedom in time or space may lead to a different conclusion. The intensity of measures involved in being available may do the same. Judging from comments made on the Portuguese decision the working time issue is at the outset considered differently in different jurisdictions. That may be the case also where a worker is required to carry an active GPS tracker outside of working hours for the purpose of availability. This may in itself or,

depending on an individual balancing of interests, amount to a violation of GDPR-based privacy protection and, as the case may be, of the right to privacy under Article 8 ECHR.

So-called social media is fertile ground for conflictual issues in the interface between private life, privacy rights and work-related obligations. Posts or mere 'likes' on internet platforms may be seen as offensive, inconsistent with and thus harmful to the employer's values and reputation, as exemplified by the Belgian judgment – EELC 2018/4 – upholding dismissal for serious misconduct on grounds of 'liking' a website associated with racist activity. Cases of this kind immediately engages freedom of expression, as guaranteed by Article 10 ECHR. Balancing this freedom with other freedom rights and conflicting interests is no mean task. The best to be said is that it requires comprehensive and careful consideration in the individual case, keeping in mind that dismissal – as the ECtHR has put it (e.g. in *Ognevenko*, 44873/09, paragraph 83) – is the most severe disciplinary sanction or penalty. Proportionality considerations beg to play an essential part.

Internet activities during working hours is another arena of potential conflict. An employer may legitimately restrict or prohibit employees' use of workplace IT resources during working hours. If detected, transgressions may lead to sanctions, similarly engaging a balancing of interests. The German *Bundesarbeitsgericht* (BAG) judgment (EELC 2018/5) is concerned with a prior stage, so to say, which likewise involves balancing of interests. Monitoring by the employer of employees' use of IT resources is permissible, but up to a point. Privacy rights under Article 8 ECHR and GDPR-related issues are involved. Whether information obtained through unlawful monitoring or surveillance may be used in evidence is in principle another matter. The BAG judgment and comments from other jurisdictions demonstrate that there is no unanimous or unambiguous answer to this. Some exclude unlawfully gathered evidence from use in court, whereas others do not. The landmark decision by the ECtHR (Grand Chamber) in *Bărbulescu* (no. 61496/08) elaborates on considerations relevant to assessments of conformity or violation of Article 8 ECHR. However, it does not provide a straightforward answer to whether unlawfully gathered evidence may be used in court. Arguably, an answer in the negative may be inferred by implication. It is a point of interest how this will play out with time in domestic case law.

Collective Labour Law

Prof. Stein Evju[11]

There were merely two judgments in the field of collective labour law that featured in EELC 2018, both from domestic courts. Collective agreements are recognised as an important means of regulation over a wide range of issues in EU law. Yet there is no definition or autonomous

concept of 'collective agreement' in EU legislation or case law. This is deferred to national law, and the concept differs significantly across jurisdictions. The Danish Supreme Court decision (EELC 2018/22) is a case in point.

Formalities are few and far between when it comes to concluding a collective agreement between parties in Danish law, be that at national or at local level. The same is true for the other Scandinavian countries, Norway and Sweden. If collective bargaining and subsequent mediation fail to arrive at a settlement, as a rule recourse is taken to collective action. If the parties still do not reach a compromise on a renewed agreement, state intervention of some form is potentially a means to break the impasse. As opposed to Sweden, in Denmark and Norway there is a certain practice in this regard, however in different forms.

In Denmark, the prevailing practice, *if* state intervention is deemed necessary, is to adopt an *ad hoc* act by the *Folketinget* (National Assembly) on renewal of the collective agreement at issue, possibly with amendments drawn from preceding mediation proposals. The 'intervention act' sets a period of validity corresponding to that which would apply had the parties themselves arrived at an agreement. The objective of an 'intervention act' is indeed to establish a mutually binding regulation for the parties in the form of a collective agreement with all legal effects otherwise attributed to voluntary agreements. Similarly, in Norway there is no permanent legislation empowering the Government or a Minister to intervene. If collective action is seen to persist with no prospect of reaching a settlement, the *Stortinget* (National Assembly) may adopt an *ad hoc* act, not itself imposing a collective agreement but referring the dispute for settlement by an independent arbitration body, the National Wages Board. Pursuant to standing legislation, the Board's decisions have the same legal effect as a collective agreement, that is, in law they are collective agreements in their own right.

State intervention of this kind may be subject to criticism by ILO supervisory bodies, under ILO Convention No. 87, or by the European Committee of Social Rights pursuant to Article 6(4) of the European Social Charter (revised), which has been the case for both countries a number of times. However, it is significant to note that intervention is not *per se* a violation. This depends on an assessment of the individual case of intervention in pursuance of the ILO bodies' doctrine on 'essential services' etc. or the European Social Charter Article G exception clause, as demonstrated in case law of the supervisory bodies.

It must be emphasised, also, that such forms of *ad hoc* intervention are fundamentally different from adopting new legislation or executive measures of a general kind. Collective agreements in the Scandinavian context are binding only on the parties to the agreement and

their members concerned. They have no *erga omnes* effect, and no mechanisms of extension obtain.

Whether something is categorised in law as a collective agreement is self-evidently fundamentally important in many regards. In EU law this includes the possible implementation of, or derogation from, EU legislation. The latter is demonstrated by the Danish Supreme Court case, where the issue was whether the outcome of the intervention act could be deemed a 'collective agreement' within the meaning of Article 18 of the Working Time Directive (2003/88/EC). It is readily understandable that the Danish courts chose not to refer questions on this to the ECJ, which would run a risk of interference with embedded industrial relations. More generally, considering the widely differing concepts of collective bargaining and collective agreements across Member States it might open a Pandora's Box with incalculable consequences.

What a collective agreement can lawfully stipulate, once it obtains, is a different matter. The freedom of collective agreement parties is constrained by domestic and EU law. This is trite. So is its being commonplace that collective agreements lend themselves to interpretation. Methods of interpretation may differ, but it is common ground that courts construing collective agreement provisions should take due account of relevant legislation, to avoid conflicting outcomes as far as possible. Both aspects are illustrated by the German case (EELC 2017/45), in which the Court, seemingly, considered ECJ case law and German legislation implementing the Part Time Workers Directive (97/81/EC) arriving at a conclusion on what at the outset was an interpretation issue.

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