

# **Social developments in the European Union 2011**

**Thirteenth annual report**

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Edited by  
David Natali and Bart Vanhercke

European Trade Union Institute (ETUI)  
European Social Observatory (OSE)

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# ***Römer, Casteels, Prigge: overview of a number of judgments delivered by the Court of Justice of the European Union in 2011***

Dalila Ghailani

The Court of Justice of the European Union (CJEU) is central to the European institutional framework and applies and interprets Community law. By virtue of its regulatory function it is involved in a variety of disputes and acts as a constitutional court in interpreting the EU Treaty. The successive enlargements have strengthened its role and increased its caseload as a result of the growth in the number of national courts which can apply to it for preliminary rulings (Moreau, 2009).

Somewhat absent from the Treaty of Rome, the social dimension of the EU has gradually developed in step with socio-economic changes and the growing economic and monetary integration of the Member States. The Community social *acquis* comprises over 200 pieces of legislation whose application still raises as many preliminary questions as ever (Yung, 2009). The case law on social matters has made a significant contribution not only to clarifying the rights of European citizens, but also to defining the principles of the effectiveness of Community law, effective judicial protection and freedom of movement for citizens (Moreau, 2009).

We propose to review below a number of judgments delivered by the Court in the past year. Given the limited space available, we have made a selection from amongst the topics analysed and the relevant cases. We have therefore focused on topics which concern the fundamental rights of workers but also contain less legal technicality. The aim has been to enable readers who are unfamiliar with the law to learn about some of the cases brought before the Court whilst minimising their complexity. For those reasons, reference will be made successively to the principles of equal treatment and non-discrimination, social security for migrant workers and working conditions. The much more technical issues of the

rights and obligations of employers and workers will not be discussed but we invite interested readers to look at the judgments in *Scattolon* and *CLECE*<sup>1</sup> (transfer of undertakings), *Defossez* and *Anderson*<sup>2</sup> (employer insolvency) and *Claes*<sup>3</sup> (collective redundancy and the duty to consult).

## 1. The principles of equal treatment and non-discrimination

Since the Treaty of Amsterdam entered into force in 1999, the EU has had power to legislate against discrimination based on gender, race or ethnic origin, religion or belief, disability, age or sexual orientation. In so far as Article 13 EC (Article 19 TFEU) does not have direct effect, the principle of equal treatment has been implemented through the two ‘discrimination’ directives adopted in 2000. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, adopted in November 2000 (Council of the European Union, 2000a), laid down a general framework intended to foster equal treatment in employment and occupation to combat discrimination based on religion or belief, disability, age or sexual orientation<sup>4</sup>. More than 10 years have elapsed since adoption of those two fundamental texts which all Members States had to put into operation by 2003 (Uyen Do, 2011).

### 1.1 Comparability between marriage and life partnerships in the field of pensions: the *Römer* case

Only one case had been brought before the Court concerning an issue associated with sexual orientation: *Maruko*<sup>5</sup>, which concerned a survivor’s

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1. Case C-108/10, *Scattolon*, 6 September 2010, not yet published in the Court Reports; Case C-463/09, *CLECE*, 20 January 2011, not yet published in the Court Reports.
  2. Case C-477/09, *Defossez*, 10 March 2011, not yet published in the Court Reports; Case C-30/10, *Anderson*, 10 February 2011, not yet published in the Court Reports.
  3. Joined Cases C-235/10 to C-239/10, *Claes*, 3 March 2011, not yet published in the Court Reports.
  4. Directive 2000/43/EEC, adopted in June 2000, for its part gives protection to people of a different racial or ethnic origin in fields such as employment, social protection, social advantages, education and access to and supply of goods and services, including housing (Council of the European Union, 2000a).
  5. Case C-267/06 [2008] *Maruko* ECR I-1757. The partner of a deceased person contested the provision of German law under which a compulsory occupational pension scheme was limited to workers in a relationship with a life partner of the opposite sex. It was settled case

pension for the same-sex partner. The *Römer*<sup>6</sup> case enabled the Court to revisit these issues for the second time in its history.

An employee of the *Freie und Hansestadt Hamburg* from 1950 to 1990, Mr Römer received a retirement pension with a related supplementary pension of 615.88 euros. Having entered into a registered life partnership with his companion under the German legislation<sup>7</sup> ('LPartG'), he requested his former employer to recalculate the amount of his supplementary retirement pension taking into account from 1 November 2001 a tax deduction which would increase his monthly pension by 302.11 euros. The *Freie und Hansestadt Hamburg* refused on the grounds that according to the *Land* of Hambourg law on supplementary retirement and survivors' pensions for employees of the *Freie und Hansestadt Hamburg*<sup>8</sup> ('the First RGG'), that deduction was reserved for married, not permanently separated, partners and pensioners entitled to claim child benefit or an equivalent benefit. The Hamburg Labour Court, hearing the case, asked the Court of Justice if the concept of a 'married pensioner not permanently separated', under Paragraph 10(6)(1) of the first RGG, included a pensioner who had entered into a registered life partnership under the LPartG.

Referring to the interpretation of Article 157(2) TFEU in *Maruko*<sup>9</sup>, the Court pointed out that a retirement pension is pay within the scope of application of Article 157 TFEU and of Directive 2000/78 wherever it 'is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment' (paragraph 46).

As to whether there was discrimination, the CJEU noted that whilst admittedly 'legislation on the marital status of persons falls within the competence of the Member States' (paragraph 38), that competence is constrained by EU law. Indeed, 'the purpose of Directive 2000/78 is to

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law that such schemes were to be treated as pay, and different treatment between partners of the opposite sex and same-sex partners was therefore direct discrimination on grounds of sexual orientation.

6. Case C-147/08, *Römer*, 10 May 2011, not yet published in the Court Reports.
7. Gesetz über die Eingetragene Lebenspartnerschaft of 16 November 2001 ('LPartG').
8. *Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg* of 28 June 2000 ('the First RGG').
9. 'For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'.

combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment' (paragraph 38). Having made that clarification, the Court could then determine whether or not there was discrimination. According to Article 2(2)(a) of Directive 2000/78, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation' in respect of employment and occupation, on grounds relating to religion, belief, disability, age or sexual orientation. The Court had to determine, on the one hand, whether the situations were comparable and, on the other, whether the treatment was less favourable.

According to the *Maruko* judgment, for situations to be comparable they do not have to be identical, and the assessment of comparability 'must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned' (paragraph 42). The CJEU compares situations on the basis of the rights and obligations of spouses and registered life partners. Pointing out that registered life partnerships were established 'to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life ... the regime of which has been gradually made equivalent to that of marriage' (paragraph 44), the Court drew the conclusion that 'there is no significant legal difference between those two types of status of persons as understood in German law' (paragraph 45). Even though the legal status of life partnerships converged with that of marriage only after the facts of the case (in 2004), the Court found that since the outset the two regimes were intended to be in alignment in so far as the 2001 legislation provided that life partners had mutual duties 'to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together' (paragraph 47). The situations were indeed comparable.

Was the treatment less favourable? The applicant's supplementary retirement pension would be higher if he were married rather than in a registered life partnership. The contested German legislation established unequal treatment contrary to EU law, in so far as 'marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the LPartG, which is reserved to persons of the same gender' (paragraph 52).

From what date did equal treatment have to apply – from expiry of the period for transposition of the Directive or from the date on which the life partnership was registered, 15 October 2001? To find that equal treatment had to apply between registration of the life partnership and expiry of the transposition period of Directive 2000/78 would imply recognising that the applicant had a right to non-discrimination on grounds of sexual orientation enforceable in the courts against his employer independently of the Directive. Reiterating its reasoning in *Mangold* and *Küçükdeveci* (Ghailani, 2007 and 2011), the Court pointed out that in so far as it is based on Article 13 EC, Directive 2000/78 does not itself enshrine the principle of equal treatment in work and occupation. Without expressly describing it as a general principle of EU law, the Court examined the principle of non-discrimination based on sexual orientation on the basis of the same criteria as those used in the aforementioned judgments relating to the general principle of non-discrimination on grounds of age. In order to be applicable in the present case, the principle had to fall within the scope of application of EU law. However, Article 13 EC (Article 19 TFEU) does not relate to employment and occupation-based social welfare benefits. Furthermore, the contested legislation was not a text transposing Directive 2000/78/EC. The Court held that the right to equal treatment could only be relied upon from expiry of the time limit for transposing Directive 2000/78/EC (3/12/2003).

We would draw attention to the absence of any reference to Article 21 of the Charter of Fundamental Rights which prohibits any discrimination based on sexual orientation. That omission is curious to say the least. Clarification of the interrelation between the various pieces of legislation in force and of their legal scope would therefore be helpful.

## 1.2 The age limit for airline pilots: *Prigge*

Age is the ground of discrimination most often invoked before the Court. No fewer than nine judgments have been delivered since 2005, when the *Mangold*<sup>10</sup> ruling was made. Much has been written about the case because it gave rise to the first decision based on the directive on

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10. Case C-144/04 *Mangold* [2005] ECR I-9981.

equality in employment and occupation, and it signalled a progressive new direction in Community law. The *Prigge*<sup>11</sup> judgment, concerning an age limit imposed for carrying on an occupation, will not go unnoticed in so far as it is the first to reject the justification for such a measure. It highlights the need to be clear about the meaning and conditions for using derogations which are rarely relied upon in the context of Directive 2000/78/EC.

International and German legislation provides that an airline pilot, aged between 60 and 64, can only continue to carry out their activity if they are a member of a crew comprising several pilots, who must be aged less than 60. It furthermore prohibits all pilots from carrying out their activity beyond the age of 65. The collective agreement applicable to Lufthansa flight crew nevertheless prevents its pilots from piloting aircraft beyond the age of 60. The employment contracts of three pilots employed for many years were automatically terminated, in accordance with the collective agreement, when they reached 60. Believing themselves to be victims of discrimination on grounds of age, they brought proceedings in the German courts claiming that their employment relationships with Lufthansa had not ended at the age of 60. Hearing the case on appeal, the *Bundesarbeitsgericht* enquired of the Court of Justice whether the age limit under the collective agreement could be justified by the aim of ensuring air traffic safety, in the light of Articles 2(5), 4(1) or 6(1) of the Directive.

After pointing out that the right to collective negotiation enshrined in Article 28 of the Charter of Fundamental Rights does not however relieve the social partners of the requirement to comply with the principle of non-discrimination on grounds of age, recognised as a general principle of EU law and embodied in Directive 2000/78/EC, the Court examined the grounds adduced in defence of the contested clause, known as a 'sunset clause'. It focused for the first time on the requirements for using the derogation under Article 2(5) of the Directive according to which: 'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order

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11. Case C-447/09 *Prigge and Others*, 13 September 2011, not yet published in the Court Reports.



and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.’ In the case before the Court, the measures intended to prevent accidents by controlling the physical fitness of pilots did contribute to the objective of public security. However, in the absence of express powers on the part of the social partners to adopt measures in the fields covered by that Article, the Court refused to treat the provision of the collective agreement as a legislative measure. It had all the more reason to do so since there was already international and national legislation on air transport safety which did not consider it necessary to prohibit pilots over the age of 60 from continuing to do their job.

The Court analysed the possible justification based on Article 4(1) of the Directive. Unequal treatment does not amount to discrimination ‘where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’. The judgment is important because the Court has only ruled once on this issue, in *Wolf*<sup>2</sup>, concerning an age limit for access to the profession of firefighter (Ghailani, 2011). The need for particular physical capacities could be regarded as a genuine and determining requirement to work as an airline pilot, and air transport safety was a legitimate aim. On the other hand, the measure prohibiting flying after the age of 60 was disproportionate. In contrast to *Wolf*, in which Germany had submitted a scientific study demonstrating the direct link between the age and the physical capacity of firefighters, no evidence was submitted proving such a link in relation to aircraft pilots. It was all the more disproportionate, the Court observed, in so far as national and international legislation allowed pilots to fly up to the age of 65 provided certain safety conditions concerning the composition of the crew around them were satisfied. As regards whether Article 6(1), properly raised, could apply, the Court held that the aim of ensuring air traffic safety was not one of the ‘legitimate employment policy, labour market and vocational training objectives’ to which that article refers.

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12. Case C-229/08 *Wolf* [2010] ECR I-1.

*Prigge* is interesting in so far as for the first time the Court invited a national court to censure a sunset clause which was incompatible with Directive 2000/78/EC<sup>13</sup>. In the cases previously brought before it, unequal treatment was justified by social policy considerations in respect of which the Court found that the public authorities and social partners had wide discretion. In *Prigge*, the justification was based directly on considerations of individuals' health and physical aptitude. As in *Wolf*, the Court required a convincing demonstration to the judge that the treatment, which remained nonetheless an encroachment upon a fundamental right, was necessary and proportionate<sup>14</sup>.

### 1.3 Equal treatment between men and women in relation to insurance: the *Test-Achats* case

By ruling that the derogation provided for in Directive 2004/113/EC implementing the principle of equal treatment between men and women is invalid, the Court put an end to insurance premiums adjusted in consideration of the fact that sex is a determining factor in assessing certain risks.

The case was between the *Association belge des consommateurs Test-Achats ASBL* and the Belgian *Conseil des Ministres* (Council of Ministers) concerning annulment of the Law of 21 December 2007 combating discrimination between men and women, in respect of the different treatment in relation to insurance premiums<sup>15</sup>. Directive 2004/113/EC (Council of the European Union, 2004) prohibits any direct or indirect discrimination on grounds of sex in fields other than the labour market. Under Article 5(1) of the Directive, 'Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the

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13. The Court upheld a sunset clause providing for the compulsory retirement of prosecutors at the age of 65 in *Fuchs* and *Khöler*: Joined Cases C-159/10 and C-160/10 *Fuchs* and *Khöler*, 21 July 2011, not yet published in the Court Reports.

14. Laetitia Driguez, note at CJEU, November 2011, Europe 2011, commentary 430. See also: Joined Cases C-297/10 and C-298/10, *Hennigs* and *Land Berlin*, 8 September 2011, not yet published in the Court Reports. The Court's judgment provides a further illustration of discrimination on grounds of age and could be seen as a signal to the social partners to remove the discriminatory provisions which persist in collective agreements, whilst ensuring that in order to do so they will temporarily be given a degree of latitude in applying EU law.

15. Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, 1 March 2011, not yet published in the Court Reports.

use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits'.

Prior to *Test-Achats*, Article 5(2) of the Directive allowed Member States to derogate from the rule of unisex insurance premiums and benefits: 'Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated'. Belgian law established a derogation in relation to life insurance, the legality of which was called into question in the *Test-Achats* case.

The Court relied on several provisions in ascertaining whether Article 5(2) was valid: Articles 21 and 23 of the Charter of Fundamental Rights which prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas, and Article 19(1) (ex Article 13 EC), the second subparagraph of Article 3(3) and Article 8 TFEU<sup>16</sup>. The use of actuarial factors related to sex enabling insurance premiums to be adjusted was very widespread in the provision of insurance services at the time the Directive was adopted. In seeking the progressive achievement of equality between men and women in the field, it was permissible for the legislature to implement the rule of unisex premiums and benefits gradually, with appropriate transitional periods. Beyond that, the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. Moreover, the comparability of situations must be assessed in the light of the subject-matter and

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16. According to Article 19(1), 'the Council, ... after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The second subparagraph of Article 3(3) provides that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. According to Article 8 TFEU, 'in all its activities, the European Union is to aim to eliminate inequalities, and to promote equality, between men and women'.

purpose of the EU measure which makes the distinction in question. The Court held that 'Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable' (paragraph 30). In so far as there was a risk that the derogation available under Article 5(2) could be an indefinite derogation, it was ruled invalid in the light of the principle of equality between men and women enshrined in the Charter of Fundamental Rights. The Court qualified the timescale of that invalidity, making it effective 'upon the expiry of an appropriate transitional period' (paragraph 33) which it set as 21 December 2012.

Hailed by the Commissioner for Justice, Viviane Reding, as signalling 'an important moment for gender equality' (European Commission, 2011a), the *Test-Achats* judgment was widely covered by the press which of course headlined the increase in insurance premiums for women, particularly motor insurance premiums, in December 2012. In September 2011, Viviane Reding met with the principal EU insurance companies to consider the measures which the sector was having to take in order to comply with the Court's judgment (European Commission, 2011b). Guidelines were adopted by the Commission on 22 December 2011, based on consultation of the Member States, insurers and consumers, to meet the need for practical advice on the implications of the *Test-Achats* ruling (European Commission, 2011c). They are aimed at both at consumers and insurance companies and make clear that the judgment applies only to new policies taken out from 21 December 2012. The guidelines also give examples of insurance practices based on differentiating between men and women which are compatible with the principle of unisex premiums and benefits and which therefore will not need to be changed as a result of the *Test-Achats* ruling.

## 2. Social security for migrant workers

### 2.1 The acquisition of definitive entitlements to supplementary pension benefits: *Casteels v BA*

The first pillar of social protection, that is to say, the statutory regimes for basic social security, was very quickly provided for at European level under Article 42 EC (now Article 48 TFEU) by means of coordinating regulations (European Parliament and Council of the European Union, 2004). The same cannot be said of statutory or collective agreement-based supplementary regimes. The difficulties caused by occupational mobility in relation to supplementary social protection are nevertheless real, and all the more significant in view of the comparative decline in significance of the basic statutory regimes under the first pillar, in which the replacement ratio has tended to fall in comparison with final earnings. Progress in EU level harmonisation is still modest (Council of the European Union, 1998) in this field (Hennion *et al.*, 2010).

The *Casteels*<sup>17</sup> ruling provides an opportunity to review these issues, particularly the acquisition of definitive rights to supplementary pension benefits, as part of an interpretation of Article 45 TFEU which enshrines the principle of freedom of movement for workers in the EU. Maurits Casteels was employed by British Airways in 1974 and spent his whole working life with the company. After working for 14 years in Belgium, he moved to the Düsseldorf establishment in 1988. Less than three years later, he was transferred to France, which he left in 1996 to return to an establishment in Belgium. On expiry of his period of employment in Germany, he had not acquired entitlement to supplementary retirement benefits on the grounds that he had not completed the statutory period of activity under that scheme. Article 7(b)(1) of the collective agreement on pensions in force at the Düsseldorf establishment was also relied on against him, according to which employees who voluntarily leave the company before expiry of five years' service are entitled only to the benefits guaranteed by the contributions they have paid themselves. British Airways furthermore refused to allow him to avail himself of Article 7(2) according to which, after five years' service but before

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17. Case C-379/09, *Casteels v British Airways*, 10 March 2011, not yet published in the Court Reports.

completing the statutory entitlement periods, an employee who leaves the company is also entitled to the pension benefits guaranteed as at that date by the contributions paid by BA.

The national court raised two points. The first related to whether the transfer of an employee, with his agreement, to a different establishment of the same employer in another Member State could be treated as a voluntary departure by that the worker. The second point concerned whether Article 7 of the collective agreement applicable in the case was compatible with Article 45 (ex Article 39 EC) and Article 48 (ex Article 42 EC) TFEU on the freedom of movement for workers.

Having pointed out that Article 48 TFEU does not have direct effect, the Court focused on whether the collective agreement in force at the Düsseldorf establishment was compatible with Article 45 TFEU which enshrines the principle of the freedom of movement for workers. It is settled case law that the provisions of collective agreements must be in line with the Treaty. Article 7 of that agreement, however, although applicable indistinguishably to all employees, does penalise employees of the company who have spent part of their working life outside Germany. 'By making no provision for account to be taken of years of service completed by a BA employee in a BA establishment in another Member State, and by treating the consensual transfer of a BA employee to a BA establishment in another Member State as a voluntary departure from BA' (paragraph 29), the collective agreement in question established a regime which 'constitutes an obstacle to the freedom of movement for workers' and cannot be permitted in so far as it does not pursue an objective in the general interest (paragraph 30).

Moreover, a worker who has been transferred to a different non-German establishment of BA is treated as having left the company and is thereafter entitled only to the benefits guaranteed by their contributions alone whereas a worker consenting to be transferred to a different establishment in Germany is not treated under the collective agreement as leaving the company and can claim the benefits guaranteed both by their contributions and by the employer's contributions. The former is quite clearly disadvantaged. Incompatibility with Article 48 TFEU was so evident that the Court did not dwell on whether there could be any justification for such an obstacle but took pains to point out to the national court its duty to interpret domestic provisions in conformity with EU rules.

The facts which gave rise to the *Casteels* judgment were very specific in so far as Mr Casteels had worked for the same company despite the transfers. It is therefore not easy to say how such a decision would be applied in the case of an employee working for company A in the United Kingdom, for example, who was transferred to company B belonging to the same group but in a different Member State (Slaughter and May, 2011). Court of Justice case law has an essential role in the field of coordinating social security regimes and has in the past already enabled the material scope of Regulation 1408/71 to be extended to special schemes for civil servants as a result of its ruling in *Vougiakas*<sup>18</sup>. Along the same lines, *Casteels* could be read as a sign of encouragement urging the European Commission to launch new initiatives on the portability of supplementary pension entitlements and to reopen the debate on the issue, which has been at a standstill since the 2007 proposal for a directive to improve the portability of supplementary pension rights was put on hold (European Commission, 2007a). The White Paper on pensions, expected in February 2012, is expected moreover to include a certain number of proposals on the role of supplementary pensions in achieving pension adequacy (Petitjean, 2011).

## 2.2 Recognition of the status of worker in relation to social security: the *Borger* case

The concept of a worker is complex and is defined in different ways depending on the rules of EU law to be applied. A ‘worker’ is a legal category with many faces and no real single meaning. In *Tanja Borger v Tiroler Gebietskrankenkasse*<sup>19</sup>, the Court of Justice was called upon to rule on the notion of an ‘employed person’ within the meaning of Article 1(a) of Council Regulation (EEC) No.1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

The main proceedings were between Tanja Borger, an Austrian National, and her employer, the *Tiroler Gebietskrankenkasse*. Having taken unpaid leave of two years following the birth of her son with

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18. Case C-443/93 *Vougiakas* [1995] ECR I-4033.

19. Case C-516/09, *Borger*, 10 March 2011, not yet published in the Court Reports.

payment of childcare allowance and maintenance of entitlement to social security, she requested an extension of that leave for six months. Although her employer granted extension of the unpaid leave for six months, the social security fund refused to pay her childcare allowance and to maintain entitlement to social security for the period. According to the social security fund, the claim was unfounded on the grounds that, on the one hand, Ms Borger was not in a *de facto* employment relationship in Austria and, on the other hand, the whole family had been living for a year in Switzerland where the father was working, and that the Swiss institutions should therefore be approached for family benefits. Unsuccessful on the merits, the social security fund brought all the available appeals up to the appeal in cassation. The Court of Justice was asked whether or not Ms Borger, who had been on unpaid leave for two and a half years, could be recognised as having the status of worker within the meaning of Regulation 1408/71/EEC.

Referring to its earlier case law, the Court observed that a 'a person has the status of 'worker', within the meaning of Regulation No.1408/71, where he or she is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme referred to in Article 1(a) of that regulation, irrespective of the existence of an employment relationship' (paragraph 26). The Court rejected the three types of objection made by the referring court. Neither the fact that Tanja Borger was covered by a social security scheme unrelated to any past or current professional activity (paragraph 28), nor the fact that she deliberately extended her unpaid leave (paragraph 29), nor the fact that she lived in Switzerland during that leave (paragraph 30), could affect her status as an employed person. It was the fact of being insured under a social security regime which the national court had to verify, and not the existence of an employment relationship.

Limited in scope, the Regulation is intended only to coordinate entitlements and not to establish them. It is for the Member States to indicate who are the beneficiaries of the social security regimes for which employed work gives rise to, and constitutes, the initial point of connection. It is worth noting that Regulation 883/2004 (which replaced Regulation 1408/71) no longer refers to workers but evokes 'activity as an employed person' which, by virtue of Article 1, also covers equivalent situations.



We would refer readers interested in the issues of social security for migrant workers to the ruling in *Stewart*<sup>20</sup> in which the Court found that the fact that short-term incapacity benefit in youth was non-contributory did not preclude waiver of the residence and presence clauses which restricted grant of the benefit.

### 3. Working conditions

#### 3.1 Entitlement to paid annual leave where the worker has been unfit for work: *KHS v Winfried Schulte*

For several years the Court of Justice has been making rulings very favourable to absent employees. In *Pereda*<sup>21</sup>, it emerged that an employee who falls sick before taking annual leave is entitled to carry over that annual leave, and the right to carry over is probably acquired even if the employee falls ill during the annual leave. Similarly, according to the judgment in *Schultz-Hoff* and *Stringer*<sup>22</sup>, an employee who is unable to take leave before expiry of the leave year is entitled to carry over the leave. Does that favourable case law mean that, however long the time off work, the right to annual leave can be accumulated and carried over indefinitely? The question was determined, most reasonably, on 22 November 2011 in the case between KHS and Winfried Schulte<sup>23</sup>.

Employed by KHS AG since 1964, Mr Schulte was covered by a collective agreement which provided for a right to 30 days' paid annual leave a year. The agreement permitted allowances in lieu of paid annual leave not taken only at the end of the employment relationship and provided that entitlement to paid annual leave not taken because of sickness would lapse on expiry of a carry-over period of 15 months after the leave period (calendar year). After suffering a heart attack in 2002, Mr Schulte was declared unfit for work and was in receipt of an invalidity pension until August 2008, the date when his employment

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20. Case C-503/09, *Stewart*, 21 July 2011, not yet published in the Court Reports.

21. Case C-277/08 *Pereda* [2009] ECR I-8405.

22. Joined Cases C-350/06 and C-520/06 *Schultz-Hoff* and *Stringer* [2009] ECR I-179.

23. Case C-214/10, *KHS AG v Winfried Schulte*, 22 November 2011, not yet published in the Court Reports.

relationship with KHS ended. Having been on sick leave during all the leave periods, he was deprived of his right to paid annual leave in 2006, 2007 and 2008 and brought proceedings to obtain allowances in lieu of that leave.

Hearing the case on appeal, the Higher Labour Court of Hamm wished to know whether German law was compatible with Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (Council of the European Union, 2003), Article 7(1) of which provides 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'.

The Court wisely took the view that 'a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period' (paragraph 34). It based its reasoning on the dual purpose of paid leave as apparent from *Pereda*: on the one hand, it enables workers to rest from carrying out the work they are required to do under their contract of employment and, on the other, to enjoy a period of relaxation and leisure. So, 'the right to paid annual leave acquired by a worker who is unfit for work for several consecutive reference periods can reflect both the aspects of its purpose [...] only in so far as the carry-over does not exceed a certain temporal limit. Beyond such a limit annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure' (paragraph 33). Granting a right to accumulate annual leave entitlement indefinitely would go beyond the very purpose of the right to paid annual leave.

From what moment, then, can paid annual leave acquired despite the involuntary absence of the employee no longer be carried over? Taking its inspiration from Article 9(1) of ILO Convention 132 on paid annual leave, the CJEU held that 'it may reasonably be considered that a period of 15 months for carrying over the right to paid annual leave, [...], is not contrary to the purpose of that right, in that it ensures that the latter retains its positive effect for the worker as a rest period' (paragraph 43).

The Court stated that ‘any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several consecutive reference periods’, and that period must ‘inter alia ensure that the worker can have, if need be, rest periods that may be staggered, planned in advance and available in the longer term’, with the effect that ‘[a]ny carry-over period must be substantially longer than the reference period in respect of which it is granted’ (paragraph 38). However, ‘[t]hat carry-over period must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail’ (paragraph 39).

Amongst the questions which are undoubtedly going to be raised is whether the carrying-over should relate solely to the minimum four weeks’ annual leave required by the Directive or to all the statutory leave or leave under a collective agreement. Similarly, it will need to be decided whether, in calculating the number of days’ leave (and therefore the number of days’ leave which can be carried over), all periods of absence should be taken into account or only those treated as actual working time<sup>24</sup>.

### 3.2 Abusive use of fixed-term contracts: *Lufthansa v Kumpu*

European legislation on fixed-term contracts went down the social dialogue route, since Directive 1999/70/EC of 28 June 1999 (Council of the European Union, 1999) implemented the framework agreement concluded between the social partners at European level. The intention was to take into account the increasingly frequent use contracts of this kind and the loss of security which they can bring, in other words, to reconcile employee protection and undertakings’ needs for flexibility. The framework agreement was presented as ‘a new contribution to a better balance between the flexibility of working time and worker security’ (Hennion *et al.*, 2010). The Directive was a precursor of the

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**24.** See also the judgment in *Williams* by means of which the Court clarified the components to be taken into account in calculating the remuneration paid during the paid annual leave in the case of airline pilots whose remuneration includes a fixed basic salary and a large number of supplements. Case C-155/10, *Williams and Others*, 15 September 2011, not yet published in the Court Reports.

concept of flexicurity, first mooted by the Commission in 2006 in its Green Paper on modernisation of labour law (European Commission, 2006), and passed on in turn by a Communication devoted entirely to that new approach (European Commission, 2007b).

The Court reviewed the German law transposing Directive 1999/70/EC on the framework agreement on fixed-term work (Council of the European Union, 1999), which afforded an opportunity to rule on interpretation of the provision relating to successive fixed-term contracts. The proceedings were between Lufthansa and Gertraud Kumpa<sup>25</sup>. An air hostess since 1971 with the airline PanAmerican World Airways Inc, Ms Kumpa became an employee of Lufthansa when it purchased the assets of PanAmerican World Airways Inc. The German law which came into force on 1 January 2001 and the collective agreement applicable to Lufthansa cabin crew allowed the company to terminate the contract of an air hostess recruited under a contract of indefinite duration in the year of her 55<sup>th</sup> birthday, and thereafter continue the employment relationship until she reached the age of 60 on the basis of successive fixed-term contracts. Whilst the collective agreement precluded working as cabin crew beyond the age of 60, it nevertheless included an option to continue the employment relationship as ground staff, under a fixed-term contract and at the discretion of the employer, which, in the case in question, refused to do so. Her employment contract having been terminated, the employee brought proceedings seeking to continue her employment contract on the basis that the collective agreement and the German transposing legislation were incompatible with Directive 1999/70.

The German legislation seems to present problems in that, for any worker aged over 58, it authorises an unlimited number of successive fixed-term contracts to be concluded with no objective justification, where there is no close objective connection with a previous employment contract of indefinite duration concluded with the same employer.

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**25.** Case C-109/09, *Lufthansa v Gertraud Kumpa*, 10 March 2011, not yet published in the Court Reports.

The Court based its reasoning on the framework agreement on fixed-term work, referring to the judgment in *Adelener*<sup>26</sup>. It emphasised the principles of the framework agreement: ‘the benefit of stable employment is viewed as a major element in the protection of workers’ (paragraph 31); ‘contracts of indefinite duration are the general form of employment relationship’ (paragraph 30). The Court inferred from this that the use of fixed-term contracts is exceptional in comparison with the use of contracts of indefinite duration (paragraph 30) – exceptional and therefore limited. It also emphasised the fact that ‘the framework agreement seeks to place limits on successive recourse to the latter category of employment relationship, a category regarded as a potential source of abuse to the disadvantage of workers’ (paragraph 31). Having drawn attention to those principles, the Court turned to the contested provision of the German Law on part-time employment and fixed-term employment contracts of 21 December 2000. Article 14 restricts the use of fixed-term contracts by making conclusion of fixed-term contracts subject to there being objective grounds for doing so, such as the need to replace an employee or to provide mentoring for young workers (Article 14(1)). It allows a fixed-term contract to be concluded where there are no objective grounds by imposing a limit of three renewals in a total period of two years (Article 14(2)). Article 14(3), however, qualifies that limitation on the use of fixed-term contracts: ‘The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins’, unless ‘there is a close objective connection with a previous employment contract of indefinite duration concluded with the same employer’.

The Court found that provision not to be contrary to clause 5(1) of the framework agreement and held that the *Bundesarbeitsgericht’s* interpretation of Article 14(3) was ‘contrary to the purpose of the framework agreement and of clause 5(1) thereof, which is to protect workers from instability of employment and to prevent abuses arising from the use of successive fixed-term employment contracts or relationships’ (paragraph 50). According to the referring court, the restriction on the unlimited use of successive fixed-term contracts for employees aged over 58 could not apply because Gertraud Kumpa had

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**26** Case C-212/04 *Adelener* [2006] ECR I-6057.

been employed by Lufthansa on the basis of successive fixed-term contracts since 2000. The Court's interpretation therefore satisfies the objectives both of combating successive contracts and of combating the conclusion of fixed-term contracts with no objective grounds and without limitation.

We would point out that the Court also ruled on equal treatment between fixed-term and permanent workers (clause 4(1) of the framework agreement) in *Rosado Santana*<sup>27</sup> in relation to the eligibility requirements for a competition for internal promotion in the administration of the Autonomous Community of Andalusia. The Court held that unless there were objective grounds, the functions performed as an interim worker should be taken into account in determining the length of service required to participate in a civil service competition.

## Conclusions

2011 was therefore a relatively quiet year in terms of case law. It will be remembered here that 2007 and 2008 had on the contrary been tumultuous. The *Laval* and *Viking* rulings in 2007, followed by *Rüffert* and *Luxembourg* in 2008 had in fact caused a veritable upheaval in the social field. There was nothing of that kind in 2011. Faithful to the task entrusted to it under the Treaty, the Court both confirmed its earlier case law and clarified some still obscure points of law. Through its case law, it also allowed a number of social realities to be reflected in legal terms. The *Römer* ruling is highly significant in this sense in so far as it places marriage on an equal footing with registered partnerships, a 'new' model of commitment for couples, very widespread in France and Germany in particular. The Court has also been a driving force of the Community legislative machine. Its decision in the *Casteels* case will undoubtedly have caused rather a stir at the European Commission by urging it to relaunch its suspended work on the problems relating to supplementary pensions. We have already referred to the consequences of the *Test-Achats* decision.

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27. Case C-177/10, *Rosado Santana*, 8 September 2011, not yet published in the Court Reports.

Although they are not fundamental, the other decisions referred to in this chapter are not unhelpful since they enabled the Court to clarify the meaning and objectives of certain provisions of Community law and to ensure that they are interpreted uniformly. That work of interpretation will continue to increase in the future in view of the growing number of national courts able to refer preliminary questions to the Court. 2012 will quite clearly be no exception. The Court will revisit the right to paid annual leave<sup>28</sup>. It will also rule on whether domestic provisions of French labour law are compatible with EU law and on the duty of the national courts to prevent the application of domestic provisions which are contrary to EU law.

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