on stand-by at his home with a 20 minute response time. The Court, relying on Case C-518/15, *Matzak*, ruled that this stand-by time represented working time even when no medical activity was actually performed. In so deciding, the Court noted the impossibility of organising leisure activities during the employee's stand- by time coupled with his obligation to be in a physical and mental condition enabling him to provide adequate medical services in emergency situations.

Fundamental Rights & Collective Labour Law

Petr Hůrka and Michal Vrajík[12]

Over the course of the previous year, various articles in EELC as well as case law have brought up the topics of fundamental rights and collective labour law. In this review we comment on selected cases.

Fair trial as a fundamental right of employees

Article 19(1) TEU stipulates that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. In case C-192/18, *Commission – v – Poland* the ECJ expressly ruled that should the extension of the service period of a judge depend on a decision of an administrative body such as the Minister for Justice that is not made under substantive conditions and detailed procedural rulings (see also C-619/18 *Commission – v – Poland (Independence of the Supreme Court)*), it is considered a breach of the obligation under the second subparagraph of Article 19(1) TEU.

On the other hand, the ECJ has also ruled that the right whether or not to grant any extension to the period of the judicial activity is not itself capable of endangering the principle of independence and impartiality of justice (Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter')).

Such simplification may be dangerous in this regard, because in our opinion just the fact that a judge is aware that their period of office may be extended at the sole discretion of the respective body may seriously impact their decision making. Even if safeguards and substantive conditions are laid down, the respective body still has the power to decide whether the judge's professional career shall continue, especially when such decisions are upheld by government.

Since executive and judicial power should remain separated (the 'checks and balances' system whose purpose is to make sure that no segment of State power shall overpower another segment), it is, in our opinion, advisable that any proceedings affecting the duration of the period of office of judicial staff shall be subject to specific declinatory or regulatory bodies within the judicial system and not the executive system.

Data protection privacy as a fundamental right of employees

The legislation of Member States imposes various obligations on employers (such as income tax, social security and health insurance obligations) who are then obliged to process personal data of employees to comply with legal obligations to which the controller (the employer) is subject,[13] and to perform an employment contract or in order to take steps prior to entering into an employment contract.[14] This also concerns rejected job applicants, if further data processing is necessary for the purposes of legitimate interests pursued by the employer.[15] Such an employer, however, must be aware that those legitimate interests shall stem from the legislation that enables potential claims (such as discrimination during the selection process), and only for the period during which such claims may arise. After its lapse the applicant's personal data must be erased.[16]

It should be also noted that personal data processing also concerns the fundamental rights of job applicants pursuant to the Charter.[17] For example, according to the Austrian Equal Treatment Act, a rejected job applicant may file a lawsuit and pursue a potential claim if the employment relationship has not been established on grounds of discrimination. The fixed period of six months since such rejection then also determines the period during which the (potential) employer holds a legitimate interest in processing their personal data for the sake of protection of their privacy pursuant to Article 6 of the Charter.

There is no European legislation, however, that would unify the period in which a job applicant may successfully bring the claim against the potential employer to court. For example, Czech law does not stipulate a special length of limitation period for such claims, thus general provisions, according to which the length of the limitation period is three years, shall apply.[18] According to respective offices for data protection of Member States, one additional month is given to the employer for the possible notification of a lawsuit. The seven-month period in Austria is then, from the Bavarian State Office for Data Protection's point of view, justified. Such simplification, however, may not fully respect the respective rules of the civil procedure proceedings of the particular Member State.

We therefore believe that it is not safe to assume that one additional month is enough for the notification of a lawsuit. Comments from other jurisdictions presume

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13. Article 6(1)(c) of the General Data Protection Regulation (the 'GDPR').
14. Article 6(1)(b) of the GDPR.
15. Article 6(1)(f) of the GDPR.
16. Sophie Mantler and Andreas Tinhofer, *For how long may data of a job applicant be stored? (AT)*, EELC 2019/5.
17. Article 8(2) of the Charter expressly provides that personal data concerning the subject must be processed fairly for specified purposes and on the basis of legitimate rights laid down by law, thus making personal data processing a fundamental right.
18. Section 629(1) of Act No. 89/2012 Coll., the Civil Code.

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that the employer should be notified about the lawsuit during the period of one month from the delivery of the lawsuit to the respective court. However, certain civil procedure proceedings before actual delivery of the lawsuit to the employer may be required that may usually take two or three months (such as, but not limited to, payment of the court fee, that can be paid within 15 days from the delivery of notice of payment thereof according to Czech law).[19] It is advisable for employers to take local specifics of Member States' jurisdictions into account before actually deleting a job applicant's personal data. In case of any doubts, it is advisable to discuss this matter with the respective data protection offices. Since current European legislation is not unified in this regard, the question of deciding when the legitimate interest of the employer ceases to exist is largely left to local authorities.

EELC then also featured the case when a fundamental right of data protection privacy was breached as a consequence of misconduct of an employee who released data of 100,000 other employees online.[20] It should be noted that should the breach of personal data happen as an act in the course of the employment, such employer may be vicariously liable for the leak towards the affected employees. Current case law indicates that it may be difficult to assess whether the employee's action in general was during performance of work, but since such provisions seek third party protection, it should be interpreted broadly, which represents a certain level of danger for the employers as data controllers.

According to corresponding jurisdictions, the employer has the right to recover damages paid from the employee concerned who caused such personal data leak. It should, however, be noted that labour law in general may reduce the amount of compensation employees are obliged to pay, thus significantly reducing usefulness thereof. Under Czech law, for example, unless the damage was caused intentionally or if the employee was, for example, drunk or abused other addictive substances, the amount of damages may not exceed an amount equal to four-and-half times their average monthly earnings.[21] Considering the potential of rather high amounts of damages (including administrative fines that may be imposed on employers due to breach of the personal data protection legislation),[22] we are convinced that it is advisable for employers to cover such potential claims by corresponding damage liability insurance, or similar guarantee measures. In our opinion, the vast majority of similar cases happen due to the negligence of employees (*modus operandi* in the commented case establishing a very broad claim against the wrongdoer is not common in practice), thus potentially significantly reducing the potential remedy from the employee. It will be nevertheless interesting to follow future case law concerning such damages, especially concerning cases of extremely large groups of data subjects affected by a data breach.

19. Section 9(1) of Act No. 549/1991 Coll., on Court Fees.
20. Sean Illing, *Employer liable for wrongful disclosure of data by 'rogue' employee (UK)*, EELC 2019/19.
21. Section 257(2) of Act No. 262/2006 Coll., the Labour Code.
22. See Article 83 of the GDPR.

Two or more trade unions operating within the employer and its impacts on collective labour law

In EELC 2019/39 (UK), the High Court (the 'HC') discussed whether the employer may seek an interim junction to prevent strike action organised by two trade unions. Section 222 of the Trade Union and Labour Relations (Consolidation) Act 1992 sets out provisions concerning prohibited action that causes a trade union to lose its immunity against potential torts, such as breaching contracts of employment. These provisions prevent trade unions from taking industrial action that would actually force employees to become union members.[23]

In the commented case, however, two of the three trade unions within the employer put an industrial action in motion in which they asked for compensation in the amount of payments given to members of the third trade union as a settlement agreement associated with a previous dispute involving potential job losses. The HC ruled that such action was executed in order to seek equal treatment.

In our opinion, such exceptions from immunity should always follow the main principles of representation of employees in trade unions. Apart from the decision of each employee of their own free will whether they wish to be represented by a trade union, it should also be noted that such industrial action did not involve any intention of forcing the members of the third trade union to terminate their membership. We believe that in this particular case the HC rightly found that there were no circumstances to justify the granting of an interim injunction in any form. It is, on the other hand, unclear whether the HC took in account the interests of the employees who were not members of any trade union, because we assume that the concerned trade unions pressured the employer to pay such compensation only to their members, therefore indirectly coercing such employees to join them. The respective courts should always consider whether their actions harm any group of employees, eventually resulting in indirect discrimination of those who are not members of any trade union.

A different approach can be found in Czech law. Apart from Act No. 2/1991 Coll., on Collective Bargaining, which regulates only the conclusion of a collective bargaining agreement and disputes arising from such agreements, the right to strike is not expressly regulated by Czech law, much to the harm of all parties in our opinion. Since the employer also initiates court proceedings to secure issuance of an interim injunction which would prevent the industrial action pending a full trial on the grounds that a strike should be determined unlawful, the trade unions are commonly left in an uncertain situation as to whether the grounds are sufficient enough for a strike to be lawfully executed.

23. See also Article 11 of the European Convention on Human Rights

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We are further convinced that conclusions contained within commented case law would be difficult to implement in Czech law, because it is still unclear whether reasons stipulated therein are sufficient enough to make a lawful industrial action at all under Czech law. The authors can only hope that similar regulation will be adopted in Czech labour law in the future, for the sake of clarity for all parties involved.

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