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THE question of direct effect has exercised EU lawyers for decades. To some, the evolving case law appears like angels dancing on the head of a pin. *KL v X* (C-715/20, EU:C:2024:139) invites yet another guest to this heavenly host. The judgment of the Court of Justice of the European Union ("CJEU") arose out of a request for a preliminary ruling concerning Clause 4 of the Framework Agreement on Fixed-term Work (annexed to Directive No 1999/70/EC (OJ L175, 10/07/1999)) and the Charter of Fundamental Rights ("CFR"). KL argued that he had been unlawfully dismissed by X sp. zo.o. ("X"). The thrust of KL's case was that, as a fixed-term worker, he suffered discrimination because his employer was not required to state the reasons for his dismissal, whereas such a duty would have arisen under Article 30(4) of the Polish Labour Code had KL been employed on a permanent contract. This, so KL argued, was incompatible with the principle of non-discrimination enshrined in Clause 4 of the Framework Agreement, which provides: "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers . . . unless different treatment is justified on objective grounds." Consequently, the Polish District Court issued a preliminary reference asking: (1) whether Clause 4 of the Framework Agreement precluded legislation under which a duty to give reasons arises solely in respect of workers with a permanent contract; and, if so (2) whether Clause 4 can be relied upon in a dispute between a natural and legal person (i.e. in a "horizontal dispute"). Both the constitutionality and compatibility of Article 30(4) of the Labour Code had already received attention by the Polish Constitutional Court in 2008 and the Polish Supreme Court in 2019 (see [23] and [26]). While the Supreme Court harboured doubts, it ultimately stopped short of disapplying the provision.

The CJEU began its analysis by confirming that the modalities for termination under Polish law fell within the concept of "employment conditions" in the Framework Agreement and, although already decided on the point, added that the prohibition against discrimination in Clause 4 is but a specific expression of the more general principle of equality and must not be interpreted restrictively. The court next examined the actual impact of the different requirements and concluded that a fixed-term worker would, as a matter of fact, be treated less favourably by being denied reasons for his or her dismissal. This finding was grounded in a purposive comparison centred on the relative ability to prepare and initiate legal action challenging the termination. In emphasising the

importance of such information at the pre-litigation stage, the court proved itself keenly alive to the practical imperatives of effective access to justice. It was therefore unimpressed by Poland's submission that the absence of reasons was not, technically, a bar to initiating proceedings. While true in a formal sense, this would put a fixed-term worker in the paradoxical and somewhat Kafkaesque position of having to substantiate an action with evidence which had been denied to him or her. Nor did Poland find favour with its argument that the difference in treatment could be justified by the social policy of achieving full productive employment through greater employer flexibility. After some deliberation, the court considered this aim too abstract and general, and the measure to achieve it unnecessary.

This left just one more hurdle: the rule against horizontal direct effect of directives. The all-too-familiar problem was as follows. National courts are duty-bound to interpret domestic law in a manner that is consistent with EU law and, where this is not possible, primacy of EU law would, in a vertical situation, require the incompatible national law to be disapplied. The same obligation does not, however, arise in a horizontal situation since a directive, in this case Clause 4 of the Framework Agreement, cannot in and of itself impose obligations on individuals (see *Popławski*, C-573/17, EU:C:2019:530, at [65]–[67] and *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, at [32]). A different route was needed to navigate this impasse. And here we come to the most notable part of the judgment, both for what it says and – perhaps even more so – what it does not. The first step was its finding that the implementation of Clause 4 of the Framework Agreement fell under Article 51(1) of the CFR, which requires a Member State to ensure compliance with fundamental rights, including Article 47 CFR. Second, it found that the right of access to an effective remedy enshrined in Article 47 CFR is informed by a wide conception of access to justice and includes being given sufficient facts necessary to assess the prospects of legal proceedings *prior* to initiating an action. This finding is consistent with the realities of dispute resolution. Although one customarily thinks of access to justice in terms of access to legal assistance, such assistance is of no use unless the relevant facts are known, both for a strategic assessment of possible causes of action and to substantiate an eventual claim with evidence. Consequently, by its third and final step, the court held that Article 30(4) of the Labour Code must in relevant parts be disapplied to give full effect to Article 47 CFR.

However elegant an analytical sequence, there remains a penumbra of uncertainty surrounding the way in which Article 47 CFR was engaged, namely: whether it was invested with the power to apply on a self-standing

basis or in combination with a specific, concrete right under EU law. Two conceptional and partly intertwined currents run through the judgment. There is, on the one hand, evidence of the court engaging Article 47 CFR without pairing it to any specific right (at [75]–[79]); and, on the other hand, indications that it read Article 47 CFR in conjunction with Clause 4(1) of the Framework Agreement (at [81]). The first conception diverges from the view of Advocate General Pitruzzella, who opined that Article 47 CFR was structurally constrained to situations where the matter both: (1) fell within the scope of EU law and (2) a concrete, substantive right or freedom guaranteed by EU law had been violated. In his opinion, KL could not derive a right from Clause 4 of the Framework Agreement nor any other right in the CFR, and, as such, Article 47 CFR could not apply. The Advocate General relied on *Egenberger* (C–414/16, EU:C:2018:257) and *Staatssecretaris van Justitie en Veiligheid* (C-19/21, EU:C:2022:605) to substantiate his position on the law. While these decisions allow for such a reading, it is unclear that they *require* it. In *Egenberger*, Articles 21 and 47 CFR were both engaged and read together, but the latter's application was not made conditional on that of the former, with indications at [76]–[79] of *Egenberger* suggesting the matter is more nuanced. In *Staatssecretaris van Justitie en Veiligheid*, the question was one of scope. That case, and in particular the dicta at [50], concerned the dissimilar situation of a third country national who could not avail himself of Article 47 CFR because he had no right under the Dublin Regulation nor the CFR.

This leads to the second conceptual current where we have evidence, albeit less pronounced, of something resembling the test countenanced by the Advocate General yet with a different conclusion. But how can this be made to work in circumstances where the court had already found that KL could not derive a right from Clause 4 of the Framework Agreement? Absent further elaboration, it is suggested that there are two ways the reasoning might cohere. The first possibility is that although the right emanating from the directive cannot itself *disapply* Article 30(4) of the Polish Labour Code, it is, however, sufficiently potent to *engage* Article 47 CFR, which, in turn, imposes obligations capable of producing their effect in a horizontal situation. Alternatively, or additionally, the court may have proceeded on the implicit understanding that, since the prohibition against discrimination in Clause 4 of the Framework Agreement is an expression of the general EU principle of equality before the law, it was in fact *this* general principle (in its widest sense) on which KL could rely to engage Article 47 CFR. So much for present speculations. It will, as it should be, the task of a future court

to clarify some of the uncertainty surrounding the geometry and applicability of Article 47 CFR.

The decision in *KL v X* has the potential to exercise a weighty influence on the law of remedies, poised as it is to assume the vanguard of the ever-returning, ever-intriguing jurisprudence on horizontal direct effect. And while the intermittent lack of depth in its fundamental rights analysis cannot be overlooked, the court's pragmatic and reality-grounded reasoning of what it means to provide access to justice adds a special significance to its contemporary importance. Indeed, this may ultimately be the realm in which the peals of its range and power will reverberate.

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