Introduction from the Editor-in-Chief

Equality and nondiscrimination are founding principles of any democratic system and have a central place in employment legislation. The principle of equal treatment is important to guarantee the rights of workers generally, given their legally and factually subordinate position in relation to their employer. Moreover, rights to equal treatment and nondiscrimination are invaluable to protecting vulnerable groups in the labor market. The current issue of *International Labor Rights Case Law* features three commentaries that deal with cases involving alleged discrimination against undocumented migrant workers, women, and religious groups.

Professor Beth Lyon of Cornell Law School discusses a decision of the Inter-American Commission on Human Rights that deals with the protection of undocumented migrant workers in the United States. Two Mexican nationals were injured while working in the United States. One fell from a tree on an apple farm in Pennsylvania and the other fractured his hand in a fall from scaffolding during a construction job in Kansas. Both workers challenged the difference in legal protection afforded undocumented and documented workers under U.S. law, arguing that offering less protection to undocumented workers violates the American Declaration on the Rights and Duties of Man. The Commission found that the differential treatment did indeed violate the right to equality before the law, the right to a fair trial, the right to social security and the right to juridical personality and civil rights. According to Lyon, the decision is in line with the “long-standing treaty interpretations designating immigration status as a protected category and with more recent interpretations requiring nondiscrimination in the context of equal application of labor protections for undocumented workers.” She argues that the decision is an important step in the gradual development of a normative framework for protecting migrant workers.

Dr. Panos Kapotas of the University of Portsmouth comments on the decision of the UN Committee on the Elimination of Discrimination against Women (CEDAW) in *D.S. v Slovakia*. The claimant argued that a reorganization was used as a pretext to hide the discriminatory ground for her dismissal. Kapotas points out that the decision of the national courts—that the initial burden of proof lies with the victim—can be seen as a “textbook example of how the

two-stage burden of proof test in discrimination cases should not be applied.” He explains the reversal of the burden of proof: when a claimant establishes “facts from which it may be presumed that discrimination may have occurred,” the burden shifts to the defending party. According to Kapotas, this is a cornerstone of the Court of Justice of the European Union jurisprudence on evidentiary burden. He argues that the CEDAW decision shows that reluctance to shift the burden of proof “removes the possibility of further judicial scrutiny and ipso facto deprives claimants from an effective remedy.”

Professor Lucy Vickers of Oxford Brookes University discusses the judgment of the Court of Justice of the European Union (CJEU) in *Bougnaoui v Micropole SA*. Although Ms. Bougnaoui was warned by her employer not to wear a headscarf when she had contact with clients she nevertheless did so. The Court had to consider whether the request not to wear a headscarf could be considered a “genuine occupational requirement,” which could justify potential discrimination. Vickers looks at this exception in light of recent case law and the requirements that the limitations should have a legitimate aim and need to be proportionate. She concludes that the CJEU “seems to have missed the chance to establish similarly strong standards for the protection of religious equality in its first religious discrimination case.” Although the employers’ desire to retain a neutral work environment in terms of religion may be a legitimate aim, the resulting restriction is not necessarily proportionate.

As always, the editorial team welcomes suggestions from our readers of cases for inclusion in later issues. Please email ILaRC@TheHagueInstitute.org.

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September 2017