SUMMARY

2017/36 A Dutch insight into the applicability of the Posted Workers Directive on international road transport. But still: a long and winding road ahead? (NL)

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Summary

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Facts

The Dutch limited liability company Van den Bosch B.V. ('VdB') is active in the road transport sector. Two of its sister companies are situated in Germany and Hungary: Van den Bosch Transporte Gmbh and Silo-Tank Kft, respectively. VdB is party to the collective labour agreement on the transport of goods in the Netherlands ('CLA Goederenvervoer'). On the employees' side, CLA Goederenvervoer was signed by the Dutch trade union FNV. By mistake the District Court held that CLA Goederenvervoer was generally binding, but that error was rectified on appeal.

CLA Goederenvervoer contains a so-called charter provision:

- The employer must stipulate in subcontracting agreements, executed in or from the

employer's company located in the Netherlands, entered into with independent contractors who act as employers, that their employees are granted the same basic working and employment conditions as contained in [CLA Goederenvervoer], if this results from the Posted Workers Directive, even if the law of a country other than the Netherlands is chosen.

- The employer must inform the employees referred to in paragraph 1 of this article about the basic working and employment conditions that apply to them.

- Paragraphs 1 and 2 of this article do not apply if the workers referred to in paragraph 1 of this article fall directly within the scope of [CLA Goederenvervoer], because the entire [collective agreement] applies to them in any event.

A same type of stipulation applies to the hiring of drivers from companies outside the Netherlands.

VdB entered into an agreement with its sister companies and they were consequently responsible for the transport of goods from VdB, essentially, under a charter agreement. The sister companies use their own drivers. German or Hungarian law applied to the employment agreements of the drivers. The drivers received instructions from VdB and VdB paid their wages, though these were subsequently recharged to the sister companies and social security and tax were paid in the countries of the sister companies. Net expense allowances were paid in Euros. The employees from the Hungarian company, Silo-Tank, stated that they performed their work in, or at least 'from', the establishment of VdB in the Netherlands. The tachograph and on-board computers were registered in the name of VdB. The employees had an email address and obtained a certificate in the Netherlands from VdB's Academy. VdB used the same branding as Silo Tank.

First proceedings: the Dutch trade union FNV – v – VdB

The FNV demanded application of the core employment conditions deriving from CLA Goederenvervoer to the employment agreements of the foreign employees working under charter agreements and brought an action against both VdB and its sister companies. VdB refused to apply these conditions, arguing that the Posted Workers Directive 96/71/EC did not apply to this situation and that therefore the charter provision did not apply either. VdB explained that many Dutch companies have acquired or established Eastern European companies in countries such as Poland, Hungary and the Baltic states and that this is having an impact on road transport throughout the EU. If VdB were to apply Dutch employment conditions to its dealings with its sister company, it could not make a profit and would not be able to retain the work. It felt that these kinds of issues are something that will need to be remedied on an EU level.

Second proceedings: the employees of Silo-Tank – v – VdB and Silo-Tank

In the second case – running in parallel with the first – the employees took proceedings against both VdB and Silo Tank. They stated that they were in fact employed by VdB, rather than of Silo Tank, but in any event, their employment terms were subject to the laws of the Netherlands. The employees argued that the contract with Silo-Tank was a sham. A third company, situated in the Netherlands, Compagny Services B.V., gave the employees their instructions and performed planning and administrative activities. The employees had to ask for permission to take leave in the Netherlands. Newsletters were sent to them from the Netherlands. The tank passes of the drivers were registered in the name of VdB. The sister companies rented their equipment from a Dutch company. After taking legal proceedings, the employees were fired by Silo Tank. They claimed against VdB that their termination was void and also claimed for payment of wages. They then did the same against Silo Tank in Hungary.

VdB and Silo Tank challenged the claims. They stated that VdB had acquired Silo Tank in order to be able to transport goods using cheaper Hungarian drivers, as is permitted in the EU under free market rules. They said the arrangement was not a sham, as Silo Tank was a genuinely independent legal entity, employing 60 employees. Silo Tank entered into employment agreements with the employees concerned. The termination of the employment agreements is the subject of litigation in Hungary, and should not be pursued in the Netherlands. There is no employment relationship between the employees and VdB. The fact that the on-board computers were registered in the name of VdB was because VdB owns the licence for the entire group, the group has one training facility and that happens to be in the Netherlands, and the fact that entire group uses the same branding is perfectly logical. These factors do not indicate that the employment agreements are with VdB. Although VdB did give instructions to the employees when performing their charter activities, this was logical, but also insufficient to indicate employment agreements were in place. Further, the employment agreements between the employees and Silo-Tank are subject to Hungarian law. Dutch law simply does not apply: neither on the basis of the Rome I Regulation nor through the Posted Workers Directive. According to VdB and Silo-Tank, the employees did not habitually perform their work in or from the Netherlands.

Judgment

First proceedings: the Dutch trade union FNV – v – VdB

According to the District Court, the activities performed by the sister companies fell within the definition of a transnational secondment. In other words, the sister companies were seconding their employees to VdB.

District Court, 's Hertogenbosch 8 January 2015 (FNV Bondgenoten – v – Van Den Bosch Transporten B.V.), ECLI:NL:RBOBR:2015:19.

The District Court further assessed whether the secondments were genuine, by applying the Enforcement Directive (2014/67). It concluded that the sister companies performed substantial activities. Whether the work was temporary needed to be assessed on a case-by-case basis for each employee, although, in the case at hand, the outcome would be the same either way. If the work was performed on a permanent basis in the Netherlands, Dutch law – including the core employment conditions set out in the collective labour agreement – would apply in accordance with Rome I. If the work was temporary, the core employment conditions in the collective labour agreement would apply based on the Posted Workers Directive. In both cases, the core employment conditions in the CLA Goederenvervoer applied.

The Court of Appeal took another view.

Court of Appeal 's Hertogenbosch 2 May 2017 (Van Den Bosch Transporten B.V. c.s. – v – FNV), ECLI:NL:GHSHE:2017:1873.

The next question was whether the Posted Workers Directive applied. The Court of Appeal held that the case could fall within the ambit of Article 1(3)(a) of the Posted Workers Directive. VdB, but disputed that the Posted Workers Directive could apply if the work was not performed in the Netherlands, but rather from the Netherlands. It found that although this last criterion may apply when establishing which is the applicable law under Rome I, this does not apply to the Posted Workers Directive. Articles 1.1 and 1.3 of the Posted Workers Directive stipulate that the posting needs to take place 'to the territory of a Member State', not from the territory of a Member State. The same applies to Article 2 of the Posted Workers Directive, where it clarifies that a 'posted worker' carries out his or her work in the territory of a Member State other than the State in which he or she normally works, as opposed to from another Member State.

The same wording can be found in the opinion of Advocate General Wahl in case C-396/13. The Posted Workers Directive therefore does not apply to situations such as this. A broad interpretation of the Posted Workers Directive that would not only include working in another Member State but also working from another Member State, would not do justice to the aim of the Posted Workers Directive, which is to promote the freedom to provide services and to protect the internal market of the Member State involved.

Which Member State should be protected when 'working from' would apply? The country of the party that instructed the company performing the charter agreement? Or the country in which most time is spent driving? Or the country in which the goods are loaded and unloaded?

Moreover, the original proposal of the Commission of the Posted Workers Directive referred to Com 91, 230 def 346 providing services in another Member State, and deemed it unnecessary to add a list of exceptions. The combination of Article 1 and 2 of the Directive already make it clear that the Directive does not apply to, inter alia, international road transport.

Second proceedings: the employees of Silo-Tank – v – VdB and Silo-Tank

According to the District Court, there is no choice of law clause in the contract.

District Court 's-Hertogenbosch 8 January 2015 (employees – v – Van den Bosch Transporten B.V.), ECLI:NL:RBOBR:2015:18.

Meanwhile, the District Court noted that part of the wage claim of the employees was based on CLA Goederenvervoer, and that this document was generally binding (although, in the event, this turned out to be erroneous). The District Court ruled that the core employment terms of the CLA Goederenvervoer applied in any event, through the Posted Workers Directive. Therefore, regardless whether Dutch law applied, those terms must be adhered to. With regard to the applicability of the Posted Workers Directive, the same line of reasoning as mentioned above was applied. The litigating parties were allowed to comment on exactly which provisions of CLA Goederenvervoer they considered to be core.

Again, the Court of Appeal took a different approach.

Appellate Court 's-Hertogenbosch 2 May 2017 (Silo-Tank – v – 10 Hungarian employees), ECLI:NL:GHSHE:2017:1874.

Silo-Tank is situated in Hungary and also performs work unrelated to VdB;
the employees are domiciles in Hungary, pay their taxes and are insured under social security law in that country;
the employees received pay from the moment they left Hungary;
the transportation tasks only partially took place in the Netherlands (both in mileage and in time);
under these circumstances, the mere fact that the transportation started in the Netherlands and ended there, and the employees received instructions from VdB in the Netherlands, were insufficient to lead to the conclusion that the Netherlands was the country of habitual work.

This meant, according to the Court of Appeal, that Dutch law did not apply on the basis of the Rome Convention/Rome I.

In line with this reasoning, the Court of Appeal also held that the Posted Workers Directive did not apply. The effect was that the employees' claims were denied.

Commentary

There has been ample of litigation between Dutch trade unions and Dutch international transport companies using the services of foreign drivers. This case report focusses on VdB, but a previous set of cases focussed on another Dutch company, Vos. All these cases boil down to the same questions about the charter provision of CLA Goederenvervoer: (i) is there a contract with a subcontractor; (ii) is the contract "executed in or from" the employer's company located in the Netherlands; and (iii) does the Posted Workers Directive apply?

In both the case reported above and in the Vos cases, FNV lost. On appeal, Vos argued that its East European subsidiaries had substantial operations of their own and the drivers were not managed from the Netherlands. According to FNV, a precondition for the Dutch collective labour agreement to apply is to do with where the work is organised, as opposed to whether the East European subsidiaries have a material presence in their own country. The Court of Appeal ruled (Court of Appeal Arnhem-Leeuwarden 17 May 2016, ECLI:NL:GHARL:2016:3792) that FNV had presented insufficient evidence that the contract was executed in or from the Netherlands or that the Posted Workers Directive and its Enforcement Directive should be applied. The Court of Appeal also found that FNV had not provided sufficient evidence that the foreign subsidiaries were not operating independently from the Dutch office, so that the allegation of posting has not been adequately substantiated.

The case report above has added some new insights to these controversies. The Court of Appeal has made it clear that working from a given place is not relevant when applying the Posted Workers Directive. That is a blow to FNV in cases like these.

But international road transport remains a thorny issue. Its high mobility simply does not sit well with current EU legislation. This was made clear by the Commission in its communication, COM(2016) 128 final, when it proposed to amend the Posted Workers Directive. Paragraph 10 of the recitals of this proposal said as follows: "Because of the highly mobile nature of work in international road transport, the implementation of the posting of workers directive raises particular legal questions and difficulties (especially where the link with the Member State concerned is insufficient). It would be most suitable if these challenges could be addressed through sector-specific legislation, together with other EU initiatives aimed at improving the functioning of the internal road transport market."

In its proposal of 31 May 2017, as published in COM (2017) 278 final, the Commission followed

up. It proposed not applying points (b) (holidays) and (c) (the minimum wage) of the first subparagraph of Article 3(1) of the Posted Workers Directive to drivers in the road transport sector employed by the undertakings referred to in Article 1(3)(a) of that Directive, when performing international carriage operations where the period of posting to their territory to perform these operations is shorter than or equal to three days during a period of one calendar month. If the three day term is exceeded, however, points (b) and (c) should apply to the entire month of posting to the territory of the Member State concerned.

This proposal may bring the clarity that is needed, but until then, litigation is likely to continue. The FNV has already announced in the media that it will take this matter to the Dutch Supreme Court. It will be interesting to see how the Supreme Court will navigate its way through this puzzle. Will the Court ask preliminary questions to the ECJ? As the Beatles would say, there is a long and winding road ahead. A road about which we will, of course, keep you 'posted'.

Subject: Private international law, posting of workers

Parties: Van Den Bosch Transporten B.V. c.s. – v – FNV and Silo-Tank – v – 10 Hungarian employees

Court: Gerechtshof 's Hertogenbosch (Court of Appeal 's-Hertogenbosch)

Date: 2 May 2017

Case number: ECLI:NL:GHSHE:2017:1873 and ECLI:NL:GHSHE:2017:1874

Internet publication:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:1873

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:1874

Creator: Gerechtshof 's Hertogenbosch (Court of Appeal 's-Hertogenbosch)
Verdict at: 2017-05-02
Case number: ECLINLGHSHE20171873 and ECLINLGHSHE20171874