EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/52 Greek austerity bills do not apply to Greek citizens employed in Germany (GE)

<p>The highest administrative court in the Netherlands has delivered a razor-sharp ruling on the intra-community service provision set out in Articles 56 and 57 of the Treaty on the Functioning of the European Union). This concerns 'new' EU-nationals who are still under transitional measures with regard to access to the labour markets of 'old' EU Member States. The judgment was preceded by a request from the Chairman to a State Councillor Advocate General to deliver his opinion on various aspects of punitive administrative law practice in the Netherlands. Both the opinion and the judgment are a welcome clarification and addition (or even correction) on the practice.</p>

Summary

Foreign states do not have state immunity in disputes under private labour law if the employee's activities are not sovereign tasks. However, overriding mandatory provisions under to Article 9(3) of Regulation No 593/2008 (Rome I) which cannot be classified as law of the forum or the place of performance may still be considered by national courts if national law allows this.

Facts

The employee, a Greek citizen, had been employed since 1996 as a teacher at a private primary school in Nuremberg, Germany. The school was run by the Greek state, under employment contracts governed by German law. In order to reduce public spending and because of

agreements with the European Commission, the European Central Bank ('ECB') and the International Monetary Fund ('IMF'), Greece passed Acts Nos. 3833/2010 and 3845/2010. These contained salary cuts for all its public-sector employees. The Acts did not differentiate between employment carried out in Greece or abroad.Based on this, the defendant school reduced the employee's annual pay for the period from October 2010 to December 2012 (roughly € 20,000, gross). The employee initiated court proceedings, seeking judicial confirmation that his employment relationship was subject to German law and that Greek law did not affect his salary, as this was calculated in accordance with German collective bargaining law (the 'TV-L'). The defendant argued that this law should be applied to the employment relationship.

While the German industrial tribunal ('Arbeitsgericht') in Nuremberg rejected the claim, the State Labour Court and, following that, the Federal Labour Court ('Bundesarbeitsgericht', the 'BAG') ruled in favour of the employee.

Before this decision, the BAG had requested a preliminary ruling under Article 267 TFEU regarding the interpretation of Article 9(3) of Rome I in the context of the principle of that member states must practice 'mutual sincere cooperation' pursuant to Article 4(3) TEU. Article 9(3) of Rome I says as follows:

"Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

The ECJ found (Nikiforidis, C-135/15) that Article 9(3)(i) precluded overriding mandatory provisions, other than those of the State of the forum or of the State where the contractual obligations must be or have been performed being applied and (ii) did not preclude it from taking other overriding mandatory provisions into account where this was provided for by national law applicable to the contract. It found that this interpretation should not be overridden by the principle of sincere cooperation.

Judgment

State immunity

The defendant argued that the German courts had no jurisdiction because the issue would be

covered by state immunity and therefore could not be tried in foreign courts. It pointed out that states enjoy state immunity in line with Section 20 GVG (German Courts Constitution Act) and with the principles of international law (Article 25 GG, the German Basic Law).

However, the BAG held that Greece was not covered by state immunity regarding the employee's contract because the affected actions are not sovereign. Sovereign acts of foreign states enjoy state immunity but non-sovereign acts do not.The BAG held that employment relationships under private law can only fall within state immunity if the tasks undertaken are sovereign ones. The BAG held that the State Labour Court was correct in holding that the employee's job did not involve sovereign acts.

Overriding mandatory provisions

Articles 3(1) and 8(1) of the Rome-I Regulation determine the basic principle of free choice of law. Article 9 sets out certain exceptions. Article 9(3) allows the Court to take the public interest of foreign states into consideration, though this is interpreted restrictively.

The Court based its decision on existing law, namely Article 34 EGBGB (i.e. the Introductory Bill to the German Civil Code). The ECJ answered the BAG's first question to the effect that an employment contract made before 17 December 2009 falls within the scope of Rome I there has been such a significant variation of the contract that the agreement made amounts to a new contract.

The State Labour Court had found that the employment relationship had commenced in 1996, but had not changed during that time. Therefore, the BAG had to apply the old law, which was more ambiguous than Article 9(3).

For these reasons and because of the ECJ's preliminary ruling, the BAG decided that foreign laws do not need to be considered as binding legal rules, although they can be taken into consideration as part of the evidence.

In particular, the court referred to the possibility under German law of balancing the employee's rights with the employer's interest in cutting salaries because of the severe financial crises in Greece. The BAG found it unnecessary to apply the Greek austerity laws because it was possible to dismiss with the option of altered employment instead – and this would have the effect of fulfilling the state's obligations. The court followed the ECJ's preliminary ruling that this interpretation of the law is not affected by Article 4(3) TEU (sincere cooperation).

This led the BAG to rule that the cuts to the employee's salary were invalid and not justified by

the Greek austerity measures.

Commentary

The BAG's ruling and the findings of the ECJ provide new insights into which law is applicable in a transnational context. While the BAG found that Rome I did not apply in the case at hand, the decision remains relevant for future cases. The BAG's ruling includes a short discussion on whether Greek law applied, concluding that foreign rules do not override German law. This is useful guidance for future cases dealing directly with Article 9(3) Rome I.

The decision paves the way for the courts to take mandatory provisions of foreign states into account in accordance with Article 9(3). While they are not to be considered as binding legal rules, national courts are free to include them as evidence.

Subject: Private international law, applicable law

Parties: Mr Nikiforidis – v – Greece

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 26 April 2017

Case number: 5 AZR 962/13

Internet publication: http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2017/2017-08-07/5_AZR_962-13.pdf

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Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2017-04-26
Case number: 5 AZR 962/13