SUMMARY

2015/32 Only ‘real’ employee, with actual activity in Member State of application, entitled to A1 certificate (LI)

<p>An individual who claims to be both self-employed and employed in different Member States, but cannot prove his employment is not automatically entitled to obtain certificate A1 in the Member State in which he says he is employed under Article 13(3) of Regulation (EC) No 883/2004 on the coordination of social security systems (‘Regulation 883/2004’). Therefore, the rejection of an application for certificate A1 by the Member State where the person claimed to be employed was reasonable and legitimate</p>

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Facts

The claimant in this case was KW, a Polish national living and working in Poland. He worked

there as a self-employed person. In 2013, while continuing to work in Poland on a self-employed basis, he accepted employment in Lithuania with a Lithuanian company. He applied for an A1 certificate for the right to be be subject to Lithuanian social security law.

An A1 certificate is a document based on Article 13 of Regulation 883/2004, which concerns the application of social security legislation within the EU. The principal rule for posting situations is to be found in Article 11(1). This says that individuals are subject to the legislation of a single Member State only. Article 12(1) deals with the most common situation, which is where an employee is posted to another Member State to work there as an employee. Article 12(2) deals with situations in which a self-employed person who normally performs a selfemployed activity in one Member State, pursues a similar activity in another Member State. Article 13 deals with hybrid situations. One of these situations is regulated in Article 13(3):

"A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person."

The judgment is not particularly clear about what KW was seeking. However, he seems to have applied for an A1 certificate stating that both his self-employment in Poland and his employment in Lithuania were governed by Lithuanian social security law, i.e. that he was not covered by – and did not have to contribute to – the Polish social security system. He applied for the certificate in Poland and, when his application was rejected, he applied again in Lithuania. The Lithuanian authorities (the Užsieno išmokų tarnyba, or 'UIT') also turned down his application. Applying Article 13(3) of Regulation 883/2004, the authorities determined thatKW had failed to provide evidence that he was really employed in Lithuania. Although he had submitted a copy of an employment agreement with a Lithuanian company, there was no evidence that he actually pursued a more-than-marginal activity under that contract.

KW disagreed with the rejection of his A1 application and brought proceedings before the first instance court of Vilnius.

Judgment

The court began by noting that the situation was governed by Article 13(3) of Regulation 883/2004. Contrary to subsections 1 and 2, subsection 3 of Article 13 does not refer to the requirement that the person's activity in any Member State should be "substantial". Nevertheless, the court held that where a person claims applicability of Article 13(3), there should be evidence that the person actually does perform his activity as an employee in the

Member State in question, in this case Lithuania. Article 13(3) does not apply in cases where there is an employment contract but no more than marginal activity. In this case, KW had failed to provide sufficient evidence that his employment in Lithuania was real. On the contrary, the circumstances of the case suggested that his employment there was bogus. How likely is it that someone would travel over 700 kilometres to work in another Member State for a salary of EUR 43 per month? It would seem that KW's application had more to do with a desire to obtain a tax advantage than with his right to free movement within the EU.

The court concluded that the UIT had rightly turned down KW's application for an A1 certificate. KW has not appealed.

Commentary

This case deals with 'tax tourism'. In situations such as that of KW, the level of tax and social insurance contributions in Lithuania would appear to be lower than in Poland. Perhaps KW thought he had discovered a loophole in Regulation 883/2004. Pursuant to the text of Article 13(3) of that Regulation, a person who is self-employed in one Member State (in this case, Poland) and regularly employed in another Member State would owe social insurance contributions in that other Member State only. Article 13(3) does not require the employment in the other Member State to be substantial. This is notable, because Articles 13(1) and 13(2) do have this requirement. This is, I assume, to avoid bogus constructions aimed at tax evasion. Why Article 13(3) lacks such a requirement is not clear. Neither the implementing Regulation - Regulation 987/2009 - nor the 'Practical Guide – the applicable legislation in the EU, EEA and Switzerland' issued by the European Commission (see www.ec.europa.eu/social/main.jsp?catld=868) provide the answer. Article 14(8) of Regulation 987/2009 provides guidelines and the Practical Guide has two extensive paragraphs on the definition of "substantial activity": one covering the situation where an employee works in two or more Member States as an employee and one where a self-employed person works in two or more Member States as a self-employed person. However, Regulation 987/2009 and the Practical Guide are silent on how substantial work needs to be in hybrid situations such as that at issue in the case reported above.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): This is a very interesting case. German legal literature – much like the Practical Guide - offers no simple answer. Notably, section 3 of Article 13 of Regulation 883/2004 does not refer to substantial employment in a Member State as opposed to self-employment in another Member State. It seems to me that the Lithuanian Court chose an elegant solution in this case: rather than interpreting Article 13 in a way that it would only

apply to 'substantial' employment, it held that actual employment in Lithuania was not proven by the plaintiff and did therefore not exist. However, had the employment been real, would the Court have gone as far as to deny the claim, in contravention of the wording of the Regulation?

Subject: Cross-border social insurance

Parties: Employee – v - Foreign Benefit Office of the State Social Insurance Fund Board

Court: Vilnius Region Administrative Court

Date: 31 March 2015

Case number: I-4862-580/2015

Publication: http://liteko.teismai.lt/viesasprendimupaieska/ paieska.aspx?detali=2&bnr=I-4862-580/2015&byloseilesnr=&proce sinisnr=&eilnr=False&tid=&br=&dr=&nuo=&iki=&teis=&tk=&bb=& rakt=&txt=&kat=&term=

Creator: Vilnius Region Administrative Court
Verdict at: 2015-03-31
Case number: I-4862-580/2015