EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ COURT WATCH ECJ 12 February 2015, case C-396/13 (Sähköalojen ammattiliitto ry – v – Elektrobudowa Spólka Akcyjna), Freedom of movement, Minimum wage/social dumping

Facts

Elektrobudowa is a Polish company. It posted 186 of its Polish employees to work for the Finnish company ESA on the construction site of a nuclear power plant in Finland. The employment contracts of the employees were governed by Polish law. The employees claimed that Elektrobudowa had underpaid them, as they had been paid less than the relevant Finnish collective agreements entitled them to. The collective agreements had been declared universally applicable. The employees assigned their claims to a Finnish union for the purpose of bringing wage claims against their employer on their behalf, as is customary in Finland.

National proceedings

Elektrobudowa raised two defences. The first was that Polish law prohibits employees from assigning a wage claim to a third party. The second defence was that the pay claims were incompatible with the Posting Directive 96/71 and with Article 56 TFEU on the freedom to provide services. The court in which the claims were brought referred six questions to the ECJ.

By questions 1-5, the referring court essentially asked whether Directive 96/71, read in conjunction with Article 47 of the Charter (regarding the right to an effective remedy) prevents a rule of the Member State of the seat of the undertaking that has posted workers (in this case, Poland) to the territory of another Member State (in this case, Finland) from prohibiting the assignment of claims arising from employment relationships and effectively barring a trade union from bringing an action before a court of the second Member State and recovering pay claims assigned to it by the posted workers.

By question 6, the referring court asks, in essence, whether Article 3 of Directive 96/71, read in the light of Articles 56 and 57 TFEU, must be interpreted as meaning that it precludes the exclusion of certain elements of pay from the minimum wage.

ECJ's findings

Re questions 1-5: there is nothing in the present case that gives any grounds for calling into question the action the plaintiff union has brought before the Finnish courts (§ 20-26).
Re question 6: the first subparagraph of Article 3(1) of Directive 96/71 pursues a dual objective. First, it seeks to ensure a climate of fair competition between national undertakings and undertakings that provide services transnationally, inasmuch as it requires the latter to afford their workers the terms and conditions of employment laid down in the host Member State (as regards a limited list of matters). Secondly, the provision aims to ensure that posted workers will have the rules of the host Member State for minimum protection as regards the terms and conditions of employment that apply to them while they work on a temporary basis in the territory of that Member State (§ 30).
The second subparagraph of Article 3(7) of the directive provides: "Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging." The task of defining what the constituent elements of the minimum wage are is a matter for the law of the Member State of the posting, but only insofar as the definition, (resulting from relevant national law or collective agreements or from the case law of the national courts), does not have the effect of impeding the freedom to provide services between Member States (§ 33-34).
According to the Court's settled case law, allowances and supplements that are not defined as constituent elements of the minimum wage by the law or practice of the Member State to whose territory the worker is posted, and which alter the relationship between the service provided by the worker and the consideration he receives in return for that service, cannot be treated as elements of that kind (§ 35-36).
The wording of the second subparagraph of Article 3(1) of Directive 96/71 makes quite clear

that minimum rates of pay are to be defined by the national law and/or practice of the Member State to whose territory the worker is posted. It is implicit in that wording that the method of calculating those rates and the criteria used are also a matter for the host Member State. It follows, first, that the rules in force in the host Member State may determine whether the calculation of the minimum wage must be carried out on an hourly or a piecework basis. Secondly, the rules for categorising workers into pay groups (applied in the host Member State based on various criteria including the workers' qualifications, training and experience and/or the nature of the work), apply instead of the rules that are apply to the posted workers in the home Member State (§ 39-43).
However, if they are to be enforceable against an employer posting workers, the rules on the method of calculating the minimum wage and on the categorisation of those workers into pay groups applied in the host Member State, must also be binding and meet the requirements of transparency. This means, in particular, that they must be accessible and clear. It is for the national court to ascertain whether those conditions are met in the case before it (§ 40 and 44).
The relevant collective labour agreements in Finland provide for the payment of a daily allowance to posted workers. Under those agreements, the allowance takes the form of a flat-rate daily payment. The allowance is intended to ensure the social protection of the workers, making up for the disadvantages entailed by the fact that the workers are removed from their usual environment. It follows that such an allowance must be classified as an 'allowance specific to the posting' within the meaning of the second subparagraph of Article 3(7) of Directive 96/71. That provision of the directive states that such an allowance is part of the minimum wage. Accordingly, the daily allowance at issue must be paid to posted workers such as those concerned in the main proceedings to the same extent as it is paid to local workers when they are posted within Finland (§ 46-51).
According to the relevant provisions of the Finnish collective agreements, compensation for travelling time is paid to workers if their daily commute to and from work is of more than one hour's duration. For the purposes of calculating the duration of that commute, it is necessary to determine the time actually spent by the posted workers in travelling between the place where they are accommodated in Finland and their place of work, which is located at the construction site in Finland. Since compensation for travelling time is not paid in reimbursement of expenditure actually incurred by the worker on account of the posting, it must be regarded as an allowance specific to the posting and thus part of the minimum wage. It must therefore be held that compensation for travelling time, such as that at issue in the main proceedings, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of the posted workers (§ 54-57).

As regards the question of whether Article 3 of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that coverage of the cost of the accommodation of the workers is to be regarded as an element of their minimum wage, the ECJ finds that, on the wording of Article 3(7) of the directive, that cannot be the case (§ 58-60).
So far as concerns meal vouchers, the provision of those vouchers is based neither on law, regulation or administrative provision of the host Member State nor on the relevant collective agreements, but derives from the employment relationship established in Poland between the posted workers and their employer, ESA. Further, like the allowances paid to offset accommodation costs, these allowances are paid to compensate for living costs actually incurred by the workers on account of their posting. Accordingly, it is clear from the wording of paragraphs 1 and 7 of Article 3 of Directive 96/71 that the allowances concerned are not to be considered as part of the minimum wage within the meaning of Article 3 of the directive (§ 61-63).
Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of requiring payment to be made in respect of that leave is to put the worker, during the leave, in a position, as regards his salary, comparable to periods of work. Thus, the pay the worker receives during leave is intrinsically linked to the pay he receives in return for his services. Accordingly, Article 3 of Directive 96/71 must be interpreted as meaning that the minimum pay that the worker must receive for minimum paid annual holidays corresponds to the minimum wage to which the worker is entitled during the reference period (§ 64 -69).

Ruling

In circumstances such as those of the case before the referring court, Directive 96/71, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, prevents a rule of the Member State of the seat of the undertaking that has posted workers to the territory of another Member State — under which the assignment of claims arising from employment relationships is prohibited — from barring a trade union from bringing an action before a court of the second Member State, in which the work is performed, in order to recover for the posted workers, pay claims which relate to the minimum wage, within the meaning of Directive 96/71, and which have been assigned to it, that assignment being in conformity with the law in force in the second Member State.
Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that:

it does not preclude a calculation of the minimum wage for hourly work and/or for piecework based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify;
a daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned; compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify;
coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage;
an allowance taking the form of meal vouchers provided to the posted workers is not to be regarded as part of the latter's minimum wage; and
the pay the posted workers must receive for their minimum paid annual holidays corresponds to the minimum wage to which those workers are entitled during the reference period.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-02-12
Case number: C-396/13