SUMMARY

2014/9 Jurisdiction of French courts in case of transnational dispute (FR)

<p>Where an employee works for stable periods, successively, in various countries, the jurisdiction of his last place of work should be used in the event of a dispute, provided it has been the “clear will of the parties” that the employee would carry out his activities in that place on a lasting basis.</p>

Summary

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Facts

Mr. Inzirillo was hired on 5 February 2007 by ABN AMRO Management Services Ltd as a quantitative analyst of derivative products under a UK employment contract. In October 2007, ABN AMRO Management Services was purchased by the Royal Bank of Scotland in London and Mr. Inzirillo's employment contract was transferred to the latter. In 2008, Mr. Inzirillo obtained his employer's authorization to work partly from his home located in Slough, England. In August 2009, he decided on his own initiative to move to France and he continued to work from his home in Lille and went back to London once a week. In November 2009, he signed a new employment contract with the same employer with his place of work described as London.

In December 2010, Mr. Inzirillo was made redundant for economic reasons. He sued the Royal Bank of Scotland for unfair dismissal, first in the UK Courts and then at the French Employment Tribunal of Lille (after withdrawing his claim in the UK), arguing that his last

place of work was Lille, where he spent 80% of his working time. The Royal Bank of Scotland argued that the French Employment Tribunal was not competent for territorial reasons, but this was not accepted by the summary application judges. The Royal Bank of Scotland lodged an appeal against their decision, which was overturned by the Court of Appeals of Douai on 29 June 2012.

Mr. Inzirillo challenged the Court of Appeal's decision and brought the case before the French Supreme Court.

Judgment

The Supreme Court upheld the decision of the Court of Appeals of Douai, holding that pursuant to Article 19 (2a) of EU Regulation 44/2001 of 22 December 2000, an employer domiciled in a Member State can be sued in another Member State in the courts of the place where the employee habitually carries out his work or in the courts of the last place where he did so. The habitual place of work is the place where the employee spends most of his time working for his employer, taking into account the entire period of activity of the employee. In the case of working periods in successive countries, the jurisdiction of last place of activity can be used, provided it is the clear will of the parties that the employee will carry out his activities in that place on a lasting basis.

The Supreme Court added that under the terms of the employee's last employment contract, which entered into force on 1 November 2009, the authorization obtained in 2008 to work partly from his home in Slough had not modified his place of work within the Global Banking & Markets department in London. This was because the employer had never agreed to the transfer of his workplace to France and its tolerance of his home-working arrangement while he was no longer domiciled in the UK could only be regarded as a temporary derogation from his employment contract, which had designated the Global Banking & Markets department in London as his workplace. Moreover, throughout the period of his activity from 5 February 2007 to 29 December 2010, he had spent most of his working time within the Global Banking & Markets department in London and this had consistently remained the effective centre of his working activities.

The Supreme Court concluded that the Court of Appeals of Douai had correctly ruled that in the absence of the parties' clear intention that Mr. Inzirillo would perform his duties on a lasting basis from his home in France, the Global Banking & Markets department in London had remained the place where the employee habitually carried out his work within the meaning of Article 19 (2a) of Regulation 44/2001.

Commentary

The French Supreme Court has provided a useful indication about which court is competent when an employee working mainly from home decides to move to another Member State – in this case, from the UK to France. Article 19 (2a) of Regulation 44/2001 provides that "*an employer domiciled in a Member State can be sued in another Member State, in the courts of the place where the employee habitually carries out his work or in the courts of the last place where he did so*". According to Mr. Inzirillo, as of the date he had moved to France, 80% of his work was carried out from his home in Lille and only 20% in London. But the French Supreme Court was not persuaded by his arguments and concluded that the French Employment Tribunal of Lille had no jurisdiction to hear the case.

The Supreme Court reiterated its previous case law, which stated that *"the habitual place of work is where the employee spends the majority of his working time, taking into account the entire period of the employee's activity*"[1].This position is consistent with European Court of Justice case law. In a decision of 27 February 2002 the ECJ ruled that: "*the entire period of activity of the employee is taken into account in determining the place where the employee has carried out the most significant part of his work and as such is the centre of his contractual relationship with the employer*"[2]. In the case at hand, this factor alone was sufficient to indicate that it was the UK courts that had territorial jurisdiction because during the whole period of his activity, Mr. Inzirillo had spent 29 months in London compared to 17 months in France.

However, the Supreme Court went further in its reasoning by introducing a novel notion which is "the clear will of the parties". The Court held that in the case of stable periods of work in successive countries, the territorial jurisdiction of the last place of activity should be retained "if it has been the clear will of the parties that the employee would lastingly carry out his activities in that place". In other words, the habitual place of work is not only the place where the employee spends most of his working time (taking into account the whole period of his activity) but also the place both parties have 'clearly' agreed upon as being the workplace.

Applying the facts, the Supreme Court held that the employer had never expressly agreed to the transfer of Mr Inzirillo's workplace to France but the latter had decided to move to France on his own initiative and for his personal convenience. According to the Supreme Court judges, his employment contract still designated London as his place of work and the employer's tolerance of his working from home - which meant that he was no longer domiciled in the UK - was just a temporary derogation from the terms of his employment contract.

We can only agree with this new approach. The flexibility brought to the employees by Regulation 44/2001 in the case of transnational disputes now has a new limit, which is the "clear will of the parties" with respect to the workplace. Indeed, even though the employee has

the right to choose his place of residence, his unilateral decision to change it for personal convenience – albeit that this was tolerated by his employer – does not mean that the employer must then have to defend itself in a foreign jurisdiction, against its legitimate expectation.

One should further expect this reasoning to apply in relation to the law on employment contracts, which also depends on the concept of 'habitual place of work' within the meaning of EU Regulation 593/2008 of 17 June 2008 ('Rome I') on the law applicable to contractual obligations.[3]

Comments from other jurisdictions

United Kingdom (Bethan Carney): This case provokes the question whether an employment tribunal in the UK would have accepted jurisdiction to hear Mr Inzirillo's claim in these circumstances. In my view it is likely that UK courts would have accepted jurisdiction – avoiding the possibility that a claimant would be left without a remedy in these particular circumstances. However, a UK employment tribunal would have applied a slightly different test and there is not, as far as I know, any UK case law covering the situation where an employee 'works from home' and chooses to work in a different country from the employer.

Although the law on unfair dismissal originally stated that an employee 'ordinarily working' outside Great Britain would not have the right to bring an unfair dismissal claim, the Employment Rights Act 1996 was amended in 1999 to delete this provision and it became silent as to its territorial scope. This silence resulted in several conflicting lower court decisions about when employees who worked abroad would be able to bring claims in the UK, as the courts struggled to work out the issue of jurisdiction. Some clarity was brought to the issue by the House of Lords (now known as the Supreme Court) in its decision in *Serco Ltd – v - Lawson [2006] ICR 250*. The House of Lords held that employees working in Great Britain would be able to bring a claim if they were working in the country at the time of dismissal (rather than just on a casual visit). This was not primarily a test about what the contract says about place of employment but about the factual circumstances (although the contract might help to throw light on the factual circumstances). The court also said that peripatetic employees who work in several different countries but are based in Britain should be able to bring claims in this country; also, employees working abroad for the purposes of a business based in the UK (e.g. as a foreign correspondent for a British newspaper) or those working in an extra-territorial British 'enclave' abroad, such as an army base. Finally those with 'equally strong' connections with Britain might be able to bring claims here but it is not sufficient merely to have been recruited in Britain by a British employer.

The latest decision on this vexed area of law is the Supreme Court decision of *Ravat - v - Halliburton Manufacturing and Services Ltd [2012] IRLR 315*. In this case, the court held that where the employee's work is not carried out in Great Britain, the correct question is to ask whether 'the connection with Great Britain is sufficiently strong' to let it be said that Parliament would have thought it appropriate for the employment tribunal to hear the claim. This will always be a question of fact and the sorts of facts that the courts have regarded as significant when considering this question are:

Where is the employee's home?
Where is the employer based?
What currency was the employee paid in?
Where were taxes paid?
Was the employee on the same salary and benefits structure as other UK employees?
What was the law governing the contract?
Where were the human resource issues governing the employee handled?
In which country was the contract formed?
To which workforce does the employee belong?
To which other countries does the employment have a connection and in what ways? (The courts will do a balancing exercise between the different countries.)

Mr Inzirillo's employer was British. It is likely that he was paid in pounds sterling and was regarded as part of the British workforce (with similar terms and conditions and benefits as other British employees). In these circumstances, it seems likely that a British court would think that his employment has a closer connection with Britain than with France. However, although the UK courts would probably have accepted jurisdiction initially, they will not hear a claim after it has been initiated and then withdrawn and so Mr Inzirillo will be 'estopped' from attempting to restore his claim in the UK.

Footnotes

[1] Cass. Soc. 31 March 2009, No. 08-40367

[2] ECJ 27 February 2002, C-37/00, Herbert Weber c / Universal Ogden Services Ltd, C37-00

[3] Article 8 of Regulation Rome I provides that "*an individual employment contract shall be governed by the law chosen by the parties. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by the law of the place he habitually carries out his work (...)*"

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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