

SUMMARY

2014/28 Employer may not delegate duty to have wage records on hand (AT)

Any employer established in a foreign country is required to keep readily available, in German, the documents that are required to verify the remuneration of employees pursuant to Austrian law. These documents must be kept at the place of work in Austria during the period when the employee is actually working there. The employer may not delegate this duty to employees by instructing them to keep the documents with them.

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Facts

A German cleaning company employed two German national, residents of Germany, to clean the sanitary rooms at a gas station in Austria. When the employees were checked by Austrian tax authority officials, they could not provide the documents required under section 7d (1) of the Austrian Employment Contract Law Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*, 'AVRAG'). This provision obligates employers established in a foreign country to keep readily available, in German, the documents that are required to verify compliance with the Austrian rules on the minimum wage (the 'pay documents'). These documents must be kept at the place or site of work in Austria during the period in which the employee is actually working there. The pay documents include the employment contract (or

a written statement evidencing the terms of employment), the records of hours worked and the pay records or evidence of the employer having paid the employee (e.g. remittance receipts issued by a bank).

Failure to keep the pay documents available is sanctioned by an administrative fine in the amount of € 500 to € 5,000. In the case of recurrence, the fines increase to between € 1,000 and € 10,000. In the case at hand, the competent District Authority (*Bezirkshauptmannschaft*) fined the employer the minimum of € 500 for each employee.

The employer appealed, pointing out that he had instructed the employees to keep available their employment contracts and the proof of registration with the German social security authorities. The remaining pay documents had been available at his office in Germany and could have been sent to the Austrian authority within a short period of time.

Judgment

The Administrative Court Court of Lower Austria (*Landesverwaltungsgericht Niederösterreich*) dismissed the appeal, mainly on the grounds that under the relevant legislation the employer may not delegate his duty to keep the pay documents available at the workplace of the employees. Section 7d (1) AVRAG allows the documents to be kept at another place in Austria if the requirement to make them available at the place of work is not reasonable. In such a case they must be transmitted to the authority upon request within 24 hours. However, in the case at hand, the Court held that it was not unreasonable to keep the pay documents at the place of work, since the gas station had the facility to keep such documents available in an orderly way. Further, according to the submissions of the complainant, the documents were not kept at a place within Austria, but at the employer's office in Germany. Therefore, the conditions of section 7d (1) AVRAG had not been met even if it was not reasonable to keep the pay documents at the workplace.

Commentary

In May 2011, the Act to Combat Wage and Social Dumping (*Lohn- und Sozialdumping-Bekämpfungsgesetz, 'LSDB-G'*) amended the AVRAG and other laws with the aim of enforcing the local minimum wage for workers who were posted to or hired from foreign employers. This principle derives from the Posting of Workers Directive 96/91/EC, implemented in Austria in 1999. Since then, workers posted to or hired out in Austria can sue their foreign employer for failure to pay them the minimum pay established in the relevant Austrian collective bargaining agreement. However, as practice has shown, only very few workers have taken their employer to court. The LSDB-G introduced a system where compliance with the minimum wage set by collective bargaining agreements were to be verified by a public

administrative authority, even if that was against the will of the employees concerned.

Underpayment, frustration of the rules around verification of compliance and the failure to keep pay documents readily available constitute administrative offences. If an underpayment affects no more than three employees, the fine is between € 1,000 and € 10,000 for each employee and in the case of repetition, between € 2,000 and € 20,000. If more than three employees are affected, the fine is between € 2,000 and € 20,000 for each employee and in the case of repetition between € 4,000 and € 50,000.

If more than three employees are paid less than the minimum pay level or if underpayment occurs repeatedly, the competent District Administration Authority is required to prohibit an employer established in a foreign country from carrying out work for at least one year and any violation of this prohibition is punishable with a fine of between € 2,000 and € 20,000.

In order to ensure prosecution of these offences and the enforcement of fines, the District Administration Authority may issue an administrative order (*Bescheid*) enabling collection from the employer's customer or (in the case of temporary agency work) from the user undertaking, of a portion of any outstanding compensation or remuneration as a security deposit. The minimum amount of the security deposit is normally € 5,000, although the amount must not exceed the maximum possible fine.

Comments from other jurisdictions

Germany (Klaus Thönißen): Just as in Austria, every employer is obliged to provide particular documents (under section 19 of the Posted Workers Act and section 17 of the Minimum Wage Act) in the German language if asked by the authorities. But in contrast to Austria, these do not have to be kept at the workplace or worksite unless the competent authority asks an employer to do so. In principle, an employer is simply obliged to keep the documents within German territory.

Note that the German Parliament (*Bundestag*) recently passed a bill on the minimum wage (see this issue of EELC, nr 34). Therefore, the German authorities are now also checking whether either German or foreign employers are actually paying the minimum wage to their employees. In Germany this monitoring is handled by the Federal Custom Agency and its subsidiary bodies.

The Netherlands (Peter Vas Nunes): In 1993 the British Prime Minister John Major famously observed, "France can complain all it likes. If investors and business choose to come to Britain rather than pay the costs of socialism in France, let them call it "social dumping", I call it dumping socialism". This remark illustrates in a nutshell the ongoing debate between the free

marketeers and the freedoms of movement enshrined in the TFEU on the one hand, and, on the other hand, the protectionist reaction to the influx of workers from low-wage Member States into the labour markets of higher-wage Member States. At this time, the tide seems to be favouring the latter. On 15 May this year, the EP and the Council of Ministers adopted Directive 2014/67 on the enforcement of the Posting Directive 96/71. The directive is the result of a compromise, particularly on the vexed issue of co-liability of contractors for minimum wages and non-statutory social insurance contributions owed by their subcontractors. Article 12(1) provides that:

“In order to tackle fraud and abuse, Member States may [...] take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains, the contractor of which the employer (service provider) [...] is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners [...].”

Article 9 deals with administrative measures such as those at issue in the Austrian case reported above.

The Member States have until 18 June 2016 to transpose the directive, which is bound to generate a great deal of litigation.

Subject: Private international law, Posting of workers and expatriates

Parties: X (employer) - v - State

Court: Landesverwaltungsgericht Niederösterreich (Administrative Court of Lower Austria)

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