EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 7 November 2013, case C-522/12 (Tevfik Isbir - v - DB Services GmbH), Private international law, Posting of workers and expatriates

Facts

The plaintiff in this case was Mr Isbir. He was employed by the defendant, DB Services. Under that company's collective wage agreement (the "DB collective agreement") he received an hourly wage of € 7.56 until 31 March 2008 and € 7.90 afterwards.

DB Services fell within the scope of the collective wage agreement for the cleaning sector (the "cleaning sector collective agreement"), which had been declared universally binding. This collective agreement provided for slightly higher minimum wages: € 7.87 per hour until 1 March 2008 and € 8.15 per hour afterwards. Mr Isbir brought legal proceedings in which he claimed the balance between the wages he had received and the wages he should have been paid according to the cleaning sector collective agreement. DB Services acknowledged that Mr Isbir was entitled to payment of, respectively, € 7.87 and € 8.15 per hour and that, if one took into account only the hourly wages he had actually received, he had been underpaid. However, pursuant to the DB collective agreement, Mr Isbir had also been paid € 600 in August 2007 and € 150 in January 2008 (the "lump sum payments"). When one took into account these lump sum payments, Mr Isbir had received on average no less than, € 7.87 and € 8.15 per hour respectively. Moreover, DB Services had paid certain sums into a savings account on behalf of Mr Isbir, pursuant to a German law designed to allow workers to acquire capital (the Fifth Law on Capital Formation).

National proceedings

The parties litigated their dispute all the way to the highest court for labour matters, the

Bundesarbeitsgericht. The issue before this court was whether or not to include the lump sum payments in the minimum wage. The court recognised that this issue was a purely national one. However, the German legislature intended that "internal situations" and "situations falling within the scope of EU law, especially as regards cross-border posting of workers" should be interpreted uniformly and, given that the German law on mandatory working conditions concerning cross-border services (the "AEntG") transposes Posting Directive 96/71, there was, indirectly, an element of EU law involved. Accordingly, the Bundesarbeitsgericht referred questions to the ECJ on the interpretation of "minimum rates of pay" within the meaning of Article 3(1)(c) of Directive 96/71.This Article 3(1)(c) provides:

"Member States shall ensure that [...] the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down [...] by collective agreements [...] which have been declared universally applicable [...] in so far as they concern [...] the minimum rates of pay [...].

For the purpose of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."

ECJ's findings

1.The ECJ reformulated the questions referred to it as asking whether Article 3(1)(c) of Directive 96/71 is to be interpreted as precluding the inclusion in the concept of "minimum wage" of elements of remuneration such as the lump sum payments and the capital formation contribution (§ 32).

2.The purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States. The latter are free to choose a system at the national level, provided that it does not hinder the provision of services between the Member States. Furthermore, Article 3(1) of the directive leaves it to the Member State to which a worker is posted to determine the minimum rates of pay. Thus, the task of defining what the constituent elements of the minimum wage are, comes within the law of the Member State concerned, as defined by the national courts (§ 33-37).

3.In 2005, in its Commission - v - Germany judgment (C-34/102), the ECJ held that certain allowances and supplements cannot be treated as constituent elements of the national minimum wage, namely payments which "alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives for that service, on the other". For example, if an employer requires a worker to carry out additional work

(overtime) or to work under particular conditions (e.g. night shift), the compensation for that additional service is not taken into account for the purpose of calculating the minimum wage (§ 38-40).

4.The lump sum payments in this case appear to be in consideration for Mr Isbir's usual work. Admittedly, those payments were made outside the period in which the work was performed. However, that fact does not, in itself, affect the classification of the remuneration, provided that the lump sum payments were intended to introduce an increase in wages (§ 41-43).

5.The capital formation contribution seems to alter the relationship between work and remuneration. If this is indeed the case, it cannot be regarded as forming part of the usual relationship between the work done and the financial consideration for that work (§ 43-44).

Ruling

Article 3(1)(c) of Directive 96/71 [...] is to be interpreted as meaning that it does not preclude the inclusion in the minimum wage of elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives by way of remuneration for that service, on the other. It is for the national court to verify whether that is the case as regards the elements of remuneration at issue in the main proceedings.

Creator: European Court of Justice (ECJ)
Verdict at: 2013-11-07
Case number: C-522/12