EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 11 September 2014, case C-91/13 (Essent Energie Productie BV - v - Minister van Sociale Zaken en Werkgelegenheid), Free movement, Work and residence permit

Facts

Essent is a Dutch company. It contracted with another Dutch company, BIS, to erect scaffolding at one of its power plants. BIS carried out the work using staff that were posted to it by a German company, Ekinci. Of the staff, 29 were Turkish nationals. Essent was fined € 264,000 by the Dutch Labour Inspectorate for using the services of non-EU nationals for whom it did not have work permits. Dutch law defines 'employer' within the meaning of the law on the employment of foreign nations (a law abbreviated 'Wav') as anyone who has work carried out by another. Thus, Essent was an employer of the 29 Turkish workers within the meaning of the Wav, even though their actual employer was Ekinci. Those Turkish workers resided and worked legally in Germany.

National proceedings

Essent objected to the fine. The objection was rejected and this was confirmed on appeal. Essent appealed to the highest administrative court in The Netherlands, the *Raad van State*. It referred questions to the ECJ. The questions related to the Association Agreement between the EU and Turkey, in particular the Additional Protocol to that agreement and Decision 1/80 pursuant to it.

ECJ's findings

Neither the Additional Protocol nor Decision 1/80 apply to a situation such as the one at issue (§ 21-35).
Although the referring court has not asked questions about Articles 56 and 57 TFEU on the freedom to provide services within the EU, the ECJ finds it necessary to provide the court with guidance on those provisions (§ 36).
The fact that Essent is not the direct recipient of the service of making the workers in question available, cannot prevent Essent from relying on Articles 56 and 57 TFEU. If Essent were denied that option, it would suffice for The Netherlands to adopt a broad definition of 'employer' in order to obstruct the freedom to provide services within the EU. Since Essent was the only party to be fined, the question as to the compatibility of the Dutch legislation at issue with Article 56 and 57 TFEU is directly relevant to the dispute regarding the lawfulness of the fine (§ 38-43).
The legislation at issue prohibits an employer established in a Member State other than The Netherlands from having work carried out in The Netherlands by a non-EU national who does not hold a work permit. The conditions and restrictions in terms of deadlines which have to be met in order to obtain a permit, and the administrative burden involved, impede the making available of third country workers to a user undertaking in The Netherlands by a service-providing undertaking established in another Member State, and, consequently, the provision of services by that undertaking. Whether this restriction on the freedom to provide services is justified by an objective in the public interest must be considered in terms of whether the restriction is necessary in order to pursue that objective effectively and by appropriate means (§ 44-49).
Although the desire to avoid disruption to the labour market is undoubtedly an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and posted to another Member State for the purpose of providing services there do not purport to gain access to the labour market of that second Member State, as they return to their country of origin or residence after the completion of their work. However, a Member State may check that an undertaking in another Member State which posts workers from a non-member country to its territory is not availing itself of the freedom to provide services for a purpose other than the performance of the service concerned. However, these checks must observe the limits imposed by EU law, in particular those stemming from the freedom to provide services, which cannot be merely illusory and whose exercise may not be made subject to the discretion of the authorities (§ 50-53).
A Member State retaining on a permanent basis a requirement for a work permit for third country nationals who are made available to an undertaking in its territory by an undertaking established in another Member State exceeds what is necessary to achieve the objective pursued by the Dutch legislation at issue. An obligation on the service provider to provide

information as to residence, work permit and social coverage of such third country nationals is less restrictive but just as effective (§ 54-59).

Ruling

Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which workers who are nationals of non-member countries are made available by an undertaking established in another Member State to a user undertaking established in the first Member State and the user undertaking in the first Member State uses them to carry out work on behalf of another undertaking established in the same Member State, this arrangement is subject to the condition that the workers have been issued with work permits.

Creator: European Court of Justice (ECJ)
Verdict at: 2014-09-11
Case number: C-91/13