EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/8: Posted workers may benefit from the application of Belgian law (BE)

<p>The Belgian courts have jurisdiction over foreign employers who post their workers in Belgian territory. Belgian law on temporary work, temping and the lending of employees constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention (now Article 9 of “Rome I”) and thus applies to posted workers on Belgian territory, notwithstanding any choice of law to the contrary. If the legislation is not complied with, the employee will be deemed to be employed by the receiving company under an open-ended employment contract subject to Belgian labour law.</p>

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Facts

At the end of 2005, S, who is a Canadian citizen and employee of I LLC in the United States, was offered the post of Vice President of Innovation as part of a secondment to I SA, the

headquarters of the group in Belgium.

To this end, a secondment agreement was signed by the three parties concerned, in which it was provided that S should be posted to I SA for a period of 36 months.

From 1 January 2006, S worked at the group's headquarters in Belgium without interruption.

In December 2007, before the fixed period of three years was up, S was informed by I SA that his assignment to Belgium would be prematurely terminated on 30 June 2008 and that as of 1 July 2008, he would be reintegrated within I LLC in the United States. Yet, at the same time it was made clear to S that his overall employment with the group would come to an end on 30 June 2008.

Subsequently, S received a draft "separation agreement" prepared by I LLC under the laws of the State of New York and US federal law.

S rejected the separation agreement based on his view that the (more beneficial) mandatory provisions of Belgian labour law applied and that these had not been taken into account in the proposed settlement agreement. He requested an improved offer.

In the absence of any reaction by I LLC or I SA, S concluded in April 2008 that it was clear that not only had the group decided to terminate his assignment in Belgium but it had never intended to revive his employment contract in the United States.

S subsequently brought an action before the Belgian Labour Court against I SA and I LLC, which he considered to be his joint employers, claiming a severance payment under Belgian law on the basis of the termination of his employment contract.

The Labour Court held that it lacked jurisdiction to hear the action and dismissed S's claims. S appealed to the Labour Court of Appeal of Brussels.

Judgment

The Labour Court of Appeal was confronted with multiple fundamental questions in relation to international employment law, as follows:

1. Do the Belgian courts have jurisdiction over I LLC, the US employer?

The Court accepted that the Belgian Courts have jurisdiction over I LLC based on section 5 of the Belgian International Private Law Code. Section 5 contains the general rule that the Belgian courts shall have jurisdiction if, upon lodging the action, one of the defendants has his place of residence, its registered office or its place of business in Belgium, unless the action is brought solely in order to exclude the defendant from the jurisdiction of his or its country of origin. Since I SA, the second defendant, had its registered office in Belgium, I LLC could properly be subject to the jurisdiction of the Belgian courts.

Moreover, the Labour Court of Appeal specified that since the claim concerned the posting of a worker, account also had to be taken of Directive 96/71, the “Posting Directive”. Article 6 of the Posting Directive provides that the worker must have the opportunity to bring proceedings in the country in whose territory he or she is (or was) posted, in order to enable the worker to enforce compliance with the terms and conditions of employment that apply as a result of the posting. This opportunity was transposed into Belgian law by the Act of 3 June 2007 on miscellaneous labour provisions.

2. Does Belgian law apply?

Although the secondment agreement was drafted under US law and it was therefore implied that US law would be the choice of law in any dispute, S was of the opinion that Belgian law applied to the termination of his overall employment with I.

S invoked Article 7(2) of the Convention on the law applicable to contractual obligations signed in Rome on 19 June 1980 (the Rome Convention, now Article 9 of “Rome I”), which provides that its provisions shall not operate to restrict the application of mandatory rules of

the forum, irrespective of the law otherwise applicable to the contract. S argued that the Belgian Act of 24 July 1987 on temporary work, temping and the lending of personnel (the "Lending Act") constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention.

In general terms, Article 31 of the Lending Act prohibits employers from lending employees to a third party (the "user") where the user requires them to perform professional activities for its benefit, if the user exercises any element of so-called "employer authority" over the employee. Effectively, employer authority means guidance and authority over employees. In practice employer authority can be established if, for example, the user stipulates the content of the employee's work; sets the amount of his or her salary; requires the employee to report to it; and/or takes the decision to terminate the assignment.

Article 31(3) of the Lending Act provides that, in cases of infringement of this prohibition, the employee is deemed to have been employed by the user under an open-ended employment contract as of the commencement of his or her work with the user.

The Court accepted that the Lending Act constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention, as being "*national provisions, compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present in the national territory of that Member State and all legal relationships within that State*" (ECJ 23 November 1999, C-369/96 and C-376/96 *Arblade - v - Leloup*, ECR [1999]-I, 8451).

In coming to this conclusion, the Court referred inter alia to the Posting Directive 96/71, which lays down a number of core provisions that apply when an employee is temporarily posted to another Member State, irrespective of the law applicable to the employment relationship.

Article 3(1) of the Posting Directive 96/71 provides in this regard that the employer shall guarantee that its employees posted to another Member State are provided with certain minimal terms and conditions as per the law of that other Member State insofar they relate to, inter alia, "the conditions of hiring-out of workers, in particular the supply of workers by temporary employment agencies". In support, the Court also referred to the Belgian Act of 5

March 2002 on the posting of workers (which transposed the Posting Directive into Belgian Law). This refers to the Lending Act in its explanatory memorandum as being legislation that must be adhered to when employing personnel in Belgian territory.

After an extensive examination of the facts, the Court concluded that I LLC had indeed delegated a substantial part of its employer authority to I SA. The Court stated that by stipulating the content of S's work; requiring S to report to it; taking the decision to terminate the assignment; and to release him from his duties, I SA had exercised the fundamental elements of an employer's authority.

The Court deemed S to have been associated with I SA under an open-ended employment contract as of the commencement of his work in Belgium and concluded that this contract was subject to Belgian labour law based on Article 6(2) of the Rome Convention.

However, the Court established that the existence of a Belgian employment contract between S and I SA did not alter the fact that an employment contract continued to exist with I LLC, albeit that it was temporarily suspended. The Court judged that this contract was subject to US law because the secondment agreement included an implied choice of law in favour of US law during the period of assignment. Thus, US law also remained in effect in terms of labour relations between the employee and I LLC during the temporary assignment.

S invoked Article 6(1) of the Rome Convention to establish the application of mandatory provisions of Belgian law to the American contract. According to S, referring to criteria set by European jurisprudence (see *Mulox* C-125/92 and *Rutten* C-383/95), Belgium was the country in which he habitually carried out his work (i.e. his "country of habitual employment"), as this was where he (i) had established the effective centre of his activities; (ii) had an office from which he carried out his work; (iii) resided; (iv) returned after each business trip. In consequence, S reasoned that the mandatory provisions of Belgian law applied to the overall termination of his employment with I.

The Court rejected this reasoning. It was of the view that, in terms of the "country of habitual employment", the parties' intentions should be taken into account, as confirmed in recital 36 of the preamble to Regulation (EC) No. 593/2008 of the European Parliament and of the Council dated 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation"):

"*As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.*"

Although the Rome I Convention was not directly applicable to the case (because the employment contract in question had been concluded before 17 December 2009), the Court nevertheless found it instructive and the Court took the view that the secondment agreement illuminated the parties' intention that S should return to the US at the end of the assignment, where he had already been employed on an open-ended basis for seven years. The Court held that the US was the country of habitual employment and Belgium was the country of temporary employment.

3. Was the overall employment of S with I terminated?

S initially claimed a severance payment under Belgian law from I SA and I LLC, which he considered as his joint employers, on the basis of the overall termination of his employment with the group. In line with what had preceded, the Court was of the opinion that a distinction had to be made between the Belgian contract with I SA and the US contract with I LLC.

As regards the contract with I SA, the Court found that I SA had intended to terminate S's employment in Belgium without serving valid notice and that this unilateral release from duties constituted constructive dismissal under Belgian law. The Court granted S a severance payment equal to five months' salary.

As regards the contract with I LLC, the Court ordered a re-opening of proceedings, to allow the parties to make submissions as to the termination and its consequences under US law.

Commentary

The judgment of the Labour Court of Appeal of Brussels is remarkable in that it establishes some important legal and practical principles for multinationals employing posted workers in Belgium.

On the one hand, the Court has clearly confirmed that, within the scope of a lawful secondment to Belgium implying the employee's eventual return to his country of origin, Belgium cannot be considered as the country from which the seconded employee habitually carries out his work. Although the Rome I Regulation which confirms this principle did not apply to the case at hand, the Court used it to inform its interpretation of the Rome Convention, which did apply.

In doing so, the Court has marked a turn-around in the approach to seconded workers applied hitherto. Based on the ECJ cases of *Mulox* and *Rutten*, it had been thought that the mandatory provisions of Belgian law would apply to seconded employees as soon as they had been working for more than a year in Belgium. When that happened, the secondment could lose its character as "temporary employment" in the meaning of Article 6(2) of the Rome Convention and Belgium would become the country of habitual employment. The mandatory provisions of Belgian law - including the expensive termination laws - would apply.

In line with the Rome I Regulation, it is likely that Belgian judges will be reluctant to apply the mandatory provisions of Belgian law to lawful secondments where the employee is expected to resume working in the country of origin at the end of the secondment agreement. The door

through which Belgian law entered lawful secondment relationships, appears now to have closed.

On the other hand, the Court seems to have opened another door for Belgian law, by allowing an employment contract which is exclusively subject to Belgian law under the Lending Act to come into existence if it appears that the employer in the country of origin has delegated, even partially, its employer authority to the employer in the host country. If the host country employer is allowed to stipulate the content of the work, the amount of (variable) salary and to require the employee to report to it, for example, that will be considered to be a delegation of employer authority. In secondments within multinationals, delegation of this kind is quite common, but from now on there will be an increased risk that such delegation will lead to the unwanted application of Belgian law to the employment relationship.

It could be said that the judgment is excessive. This is particularly the case if one refers back to recital 36 of the preamble of the Rome I Regulation, according to which the conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily. According to this recital, the employment of a seconded employee should continue to be governed by the law of his or her country of origin.

But this needs to be put into perspective: the Lending Act allows a secondment to Belgium with delegation of employer authority within the scope of co-operation between companies belonging to the same economic and financial entity, provided the host employer fulfils certain formalities (approval or notification of the competent local authorities). In the case at hand, the host employer had omitted to do this and, as the delegation of employer authority to the host employer was so obvious, breach of the Lending Act was clearly established.

Logically, it is clear that the consequence of such a breach of the Lending Act should be the

coming into existence of an employment contract between the employee and the host employer. If the host employer does in fact exercise employer authority over the seconded employee, it is not excessive to assume that it is bound by an employment contract. An almost identical mechanism was applied by the ECJ in its Voogsgeerd judgment of 15 December 2011 (C-384/10). The ECJ accepted in that case that the place of business through which the employee was engaged, could be the place of business of an undertaking other than that which was formally referred to as the employer. This could occur if that undertaking had connections with the country of the secondment, such that that country could be regarded as the "place of business". In order for this to be established, there needed to be factual evidence of a situation that differed in reality from what it said in the contract - but it was possible to establish this even if employer authority had not formally been transferred to the other undertaking.

Comments from other jurisdictions

United Kingdom (Rebecca Mullard and Hannah Price): It is likely that this case would have been decided differently in the UK. Firstly, it is unlikely that a UK court would find that the secondment arrangement had given rise to two employment contracts existing simultaneously, one between the individual secondee and the seconding company and another between the individual and the host company. There would have to be exceptional circumstances making it impossible to explain the contractual situation in any other way to give rise to such a dual-contract scenario, which are not present on these facts. Secondly, although it might be possible for a secondment to give rise to an employment relationship between a seconded individual and the host company, there is no equivalent to the Belgian Lending Act in the UK and secondees are most likely to remain employees of the seconding company whilst on secondment. A court would only find that the individual was employed by the host company if the seconding company ceased having any obligations to the individual and the host company started exercising full control over the secondee. For example, if the host company paid the individual, agreed holidays and time off, conducted performance reviews, controlled the individual's work and handled any disciplinary and grievance matters, it is possible that a court would find there was a contract between it and the individual and not between the seconding company and the individual. However, the court will not do so unless it is necessary to give effect to the reality of the relationship and provided there is a contract between the seconding company and the individual it is unlikely to be necessary to imply that relationship between secondee and host.

Whilst the UK courts (as in Belgium) would determine the secondee's contractual entitlements by reference to the Rome Convention (or the Rome I Regulation depending upon when the contract was made), the secondee might also have statutory claims in connection with the termination of his employment (regardless of the choice of law of the contract). Under principles set out in a House of Lords decision, *Lawson – v - Serco*, an individual working in Great Britain at the time of his dismissal is likely to be able to bring a claim for unfair dismissal in the UK employment tribunal against his US employer, in connection with the termination of his employment. Such an individual is also likely to be able to bring other statutory claims in the UK, such as discrimination claims. This would be so even if the employer does not have a place of business in the UK. A recent Employment Appeal Tribunal decision, *Pervez – v - Macquarie* Bank Ltd (London Branch) and another, found that an employer with no place of business in the UK who seconded an employee to a group company based in the UK and then terminated his employment could be sued for unfair dismissal in the UK.

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