SUMMARY

2012/9: To which country was the contract more closely connected? (NL)

<p>A Dutch employee lives in Germany but works in The Netherlands for a German employer. There is no choice of governing law, but all relevant circumstances other than the place of work point in the direction of Germany. Under these circumstances, is an exception to the principle that an employment relationship is governed by the lex loci labori warranted.</p>

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Facts

The plaintiff in this case was a Dutch woman who lived in Germany, not far from the Dutch/German border. In 1995 she entered into an employment contract with a German employer, the defendant. Her position was General Manager (*Geschäftsführerin/Vertrieb*) of the employer's Dutch branch office. The contract was drafted in the German language, her salary was expressed in German marks, she became a member of a German pension fund, she was insured under the German social insurance system, she was paid a commuting expense benefit to cover the cost of commuting from her home in Germany to her work in The Netherlands and the contract made reference to a number of German statutory provisions. However, the contract was silent on governing law.

On 19 June 2006 the employer informed the plaintiff that as of 1 July 2006, by reason of redundancy, she was being relocated to the employer's office in Dortmund, Germany where her position would be Regional Manager (*Bereichsleiterin*). Under German law such a unilateral amendment of an employee's terms of employment is possible pursuant to the doctrine of €nderungskŸndigung. Pursuant to this concept, an employer is entitled to give notice of termination with a simultaneous offer of a new contract on amended terms. An employee who rejects the offer loses his or her job, unless acceptance is made on the condition that it is not socially unjustified (*social ungerechtfertigt*) and challenged on that basis. Under Dutch law an employer has no such right, at least not unconditionally.

The plaintiff did go to Dortmund, but after two days of work she called in sick. A number of court cases followed, in one of which a Dutch court award the plaintiff over half a million Euros. In the case reported here, the plaintiff applied, *inter alia*, for a court order declaring the (former) employment relationship between the parties to have been governed by Dutch law. The courts of first and second instance declared as requested. They based their judgments on Article 6(2) of the 1980 Rome Convention on the law applicable to contractual obligations (replaced in 2009 by Regulation 593/2008). Article 6(2) of the Rome Convention reads:

"*Notwithstanding [..], a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) […];

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country."

It was common ground between the parties that the plaintiff habitually carried out her work in The Netherlands and that, therefore, Dutch law would govern her contract pursuant to subsection (a), were it not that the employer invoked the final sentence of Article 6(2). The employer argued that this sentence ("*unless it appears from the circumstances as a whole ….*") applied, given that until the Euro was introduced the plaintiff's salary had been paid in German marks, that the employer was German, that the plaintiff's pension was insured in Germany, that she lived in Germany, that her contract made reference to several German statutory provisions and that she was paid a commuting allowance. The appellate court found these circumstances to be insufficient to justify applying the final sentence of Article 6(2).

The employer appealed to the Supreme Court.

Judgment

The Supreme Court began by quoting from the ECJ's ruling in the recent *Koelzsch* case (C-29/10), in which the ECJ stressed that Article 6 of the Rome Convention aims to protect employees, who are the weaker party in a contract of employment, and that, therefore, the main rule of Article 6(2), namely that a contract of employment is governed by the law of the country in which the employee habitually carries out his work, should be construed broadly. In the Koelzsch case, the issue was whether subsection a of Article 6 (2) takes precedence over subsection b, but it seems logical to apply the same reasoning to the question of the relationship between subsection a and the final sentence of Article 6(2).

The Supreme Court went on to note that Dutch law provides employees with more protection against "€nderungskundigung" than German law.

The above considerations might lead to the conclusion that Dutch law governs the employment relationship in question. However, it must be said that there are circumstances (salary in marks, residence in Germany, etc.) indicating a closer connection to Germany. If Article 6(2) of the Rome Convention were to be interpreted as meaning that in a case such as this, with strong links to Germany, the law of the country where the work is performed always governs the employment relationship, the final sentence of Article 6(2) would be meaningless. Under these circumstances the Supreme Court decided to refer the following questions to the ECJ:

1. does Article 6(2) of the Rome Convention mean that, if an employee carries out his work in one country, not merely habitually but also for a lengthy period of time and without interruption, the laws of that country govern the employment relationship in all cases, even where all the other circumstances of the case point to a strong link between the employment contract and another country?

2. Is it necessary for an affirmative answer to question 1 for the employer and the employee to have had the intention (or to have been aware) at the time they entered into the contract, or at least at the time the work began, that the work would be carried out without interruption in one and the same country for a lengthy period of time?

Commentary

To my knowledge there is, surprisingly, little if any case law on the scope of the final sentence of Article 6 (2) of the Rome Convention, now Article 8 (4) of Regulation 593/2008. This referral to the ECJ provides a welcome opportunity for that court to enlighten us.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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