SUMMARY

ECJ 4 October 2012, case C-115/11 (Format - v - ZUS), Free movement, Social insurance

Facts

Mr Kita, a Polish national living in Poland, was employed by the Polish subcontractor "Format". Format's business consisted of subcontracting work on construction projects in other EU countries and of recruiting and employing staff in Poland to work on those sites.

Mr Kita worked for Format twice in France (for over four months in 2006 and just under eight months in 2007) and once in Finland (for four months in 2008). Each time, upon termination of his contract, he returned to Poland. Each time that Format sent Mr Kita to work on its project in France (2x) and Finland, it entered into an employment contract that defined the place of employment as being "operations and building sites in Poland and within the territory of the European Union (i.e. Ireland, France, Great Britain, Germany and Finland), as instructed by the employer". Thus, under the terms of the contract, Format could, at will, instruct Mr Kita to move from a building site in one Member State to a site in another Member State.

In the course of 2008, Format applied to the Polish Social Security Institution "ZUS" for E101 certificates covering the years 2008 and 2009. An E101 certificate under the former Regulation 1408/71 [Editor: now an A1 certificate under Directive 883/2004] is a certificate, issued to an employer in respect of an employee, stating that the latter remains covered by the social security legislation of his home country and, therefore, not by the legislation of the country where he is to work temporarily.

In other words, what Format wanted, is permission to apply the (cheaper) Polish social insurance legislation to Mr Kita rather than the (more expensive) legislation of the Member

State where Mr Kita was to perform his work. The relevant provisions of Regulation 1408/71 are Articles 13 and 14. Article 13 basically provides that an employee shall be governed by the social insurance legislation of a single Member State only and, if he works in one Member State, he is subject to the legislation of that State. Article 14(1) provides that, subject to certain conditions, “a person employed in the territory of a Member State by an undertaking to which he is normally attached, who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State”. Article 14(2) gives different rules for “a person normally employed in the territory of two or more Member States”.

National proceedings

The ZUS refused to issue E101 certificates on the ground that Mr Kita was not “a person normally employed in the territory of two or more Member States” within the meaning of Article 14(2) of the Regulation. Format appealed to the local Social Security Court. It ruled in favour of the ZUS. Both Format and Mr Kita appealed. The Court of Appeal referred questions to the ECJ.

The referring court started from the premise, which was not contested before the ECJ, that Article 14(1) of Regulation 1408/71 did not apply to Mr Kita’s situation, on the ground that Format did not usually carry out significant activities in Poland, as required by Article 14(1) according to the ECJ’s case law. Therefore, the issue narrowed down to a choice between Article 13 (place of work) or Article 14(2) (normally employed in two or more Member States).

ECJ’s findings

1. The referring court essentially wished to know whether the concept of “a person normally employed in the territory of two or more Member States” within the meaning of Article 14(2) refers not only to employees who work concurrently in more than one Member State, but also to those who, at least under the terms of their employment contract, are required to perform their work in several Member States, without that work having to be carried out in several Member States at the same time or almost simultaneously (§ 35).

2. To fall within Article 14(2), a person must “normally” be employed in two or more Member States. It follows that, if employment in a single Member State constitutes the normal arrangement for the person concerned, such employment cannot fall within the scope of Article 14(2). In a situation such as that of Mr Kita, it is necessary to take account of the existence of a divergence between the terms of the contract (work to be performed anywhere

within the EU) and the way in which the obligations were performed in practice (in one country at a time) (§ 39-41).

3. E101 certificates tend to be issued before or at the start of the period they cover. The assessment of the facts must be carried out at that time. That is why the description of the work to be performed abroad as evidenced by the contractual document is of particular importance - provided, of course, that the terms of those documents are consistent with the foreseeable activities (§ 42-43).

4. When assessing the facts with a view to determining the social security legislation applicable for the purpose of issuing an E101 certificate, the institution concerned may, where appropriate, take account not only of the wording of the contractual documents, but also of factors such as the way in which employment contracts between the employer and the worker concerned had previously been implemented in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the company concerned, insofar as those factors may throw light on the nature of the work in question (§ 45).

5. Given that Mr Kita performed work continuously for several months in one Member State at a time, returning to Poland when the work was finished, it cannot validly be maintained that an employed person in a situation such as Mr Kita's can fall within the concept of "a person normally employed in the territory of two or more Member States" within the meaning of Article 14(2) of Regulation 1408/71 (§ 46-49).

Ruling

Article 14(2)(b) of Regulation (EEC) No. 1408/71 [...] must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a person who, under successive employment contracts stating the place of employment to be the territory of several Member States, in fact works during the term of each of those contracts only on the territory of one of those States at a time, cannot fall within the concept of "a person normally employed in the territory of two or more Member States", within the meaning of that provision.

Creator: European Court of Justice (ECJ)
Verdict at: 2012-10-04
Case number: C-115/11