SUMMARY

2013/47 When is employment “genuine” for social security purposes? (PL)

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Summary

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Facts

The plaintiff was a Polish resident who was self-employed in Poland. She had paid social security contributions there since January 2003. Under the Polish system, the basis for the calculation of contributions for self-employed persons is the income declared by themselves, but not less than 60% of the average salary in Poland. In 2012, the minimum basis for the calculation of contributions pursuant to this 60% provision was PLN 2115,60 (approximately EUR 503) per month and the aggregated social security contributions (retirement and invalidity, health, sickness and unemployment) amounted to PLN 981,26 (approximately EUR 233,50) per month. A self-employed person such as the plaintiff, was obliged to pay contributions each month irrespective of his or her actual income.

On 1 November 2010, the plaintiff concluded a part-time (1/8) employment contract in

Slovakia. Her job was to distribute leaflets and to encourage participation in online training. Her monthly salary there was EUR 38.50. Shortly afterwards she quit the Polish social security system and stopped paying Polish contributions. In March 2011, she applied to the Polish Social Security Institution (the 'ZUS'), seeking confirmation that exclusively Slovak social security legislation applied to her.

The ZUS asked her to provide details and evidence on her place of work, her duties, and how often she performed work under her Slovak employment contract. She failed to provide the information, only producing her Slovak employment contract. The ZUS therefore determined Polish legislation to be applicable to her.

The plaintiff brought legal proceedings. The court upheld the ZUS's decision, pointing out that in the five-month period between November 2010 and May 2011, she had worked in Slovakia for a total of no more than two days, even though the Slovak employer had continued to pay her salary during the entire five-month period. According to the Polish court there existed no genuine employment in Slovakia and therefore there was no need to apply the EU rules on coordination.

The Court of Appeal rejected the plaintiff's appeal, pointing out that under Polish law, the Slovak contract of employment was invalid. It rejected the argument that an assessment of the Slovak contract by the Polish courts was in conflict with the rules on jurisdiction. The plaintiff appealed to the Supreme Court.

Judgment

The Supreme Court overturned the judgments of both lower courts as well as the ZUS's decision and referred the case for re-examination by the ZUS.

The Supreme Court applied the EU rules on the coordination of social security systems as provided in Regulations 883/2004 and 987/2009. Article 13(3) of Regulation 883/2004 provides that "*a person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person or, if he pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph* [1]." Articles 14 and 16 of Regulation 987/2009 provide more detailed rules, including rules on how to identify the applicable social security legislation in the event this is not immediately apparent.

The Supreme Court, citing the ECJ's judgments in *De Jaeck* (C-340/97) and *Hervein* (C-393 and 394/99), held that the issue of whether or not a person is 'employed' within the

meaning of Regulation 883/2004 is a matter to be determined exclusively by the court of the Member State where the work is performed, in this case, Slovakia. In such cases, the notion of 'employment' is not an autonomous EU-notion, such as is the case where the principle of free movement is involved (see the ECJ's judgments in *Levin*, C-53/81 and *Koelzsch*, C-29/10). Therefore, although the Polish courts may determine whether Polish or Slovak social security legislation applies to the plaintiff, they lack the power to determine whether her status under Slovak law qualifies as one of (self-) employment.

In the event the national authorities concerned are in doubt as to the applicable law, they should follow the procedure set out in Articles 6, 15 and 15 of Regulation 987/2009. Article 6 provides that, where there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States pending either agreement between those Member States or a "dialogue and a conciliation procedure" before the Administrative Commission pursuant to its Decision A1 of 12 June 2009 (OJ 24 April 2010 nr. C 106 p. 721).

In this case, therefore, the ZUS should have verified with its Slovak counterpart whether the plaintiff was actually insured in Slovakia.

Commentary

The Supreme Court focused on the procedural aspect only. It seems that the decision of the ZUS was at least substantively correct since there was no effective and genuine employment in Slovakia and therefore the rules of coordination did not apply here. The plaintiff worked in Slovakia only two days and regularly received salary for seven months. Her salary was so low that it did not cover her basic needs, nor even, it seems, the cost of travel between the place of residence (Poland) and place of work (Slovakia). In return the 'employee' was totally exempted from the mandatory Polish system and therefore was not obliged to pay social security dues in Poland. Application of Regulation 883/2004 would result in lack of effective social security coverage for her. If we applied the jurisprudence of the ECJ from the Levin case (C-53/81) (where provisions on freedom of movement also cover a national who pursues an activity that yields an income lower than that considered as the minimum required for subsistence provided that such an activity is effective and genuine), the fact that the plaintiff did not effectively and genuinely work in Slovakia would lead to a conclusion that EU legislation on social security did not apply to her and the only competent legislation was that of Poland. However the ZUS made a mistake by not first asking the Slovak institution or bringing the case before the Administrative Commission.

Academic commentary (Professor A.M. Swiatkowski)

I support the national correspondent's observation that the Polish Supreme Court concentrated only on procedural issues. However, it is worth mentioning that the district court that adjudicated the case in the first instance applied the provisions of the Polish Labour Code to an employment relationship performed by a Polish citizen abroad while she was employed by a foreign employer. Neither the Appellate Court nor the Polish Supreme Court spotted that, as a general rule, in the case of conflict of social security laws, individuals employed simultaneously in two or more Member States fall within the scope of the social security law of the Member State in which they reside, provided that they carry out a considerable part of their work in that country[1]. The plaintiff lived in Poland, carried out professional activities in Poland on a full-time basis as a self-employed person and was employed at the same time to a very limited extent (1/8th) in Slovakia. In my opinion, she must have decided to enter into an employment relationship with a Slovak employer mostly for the purpose of escaping coverage under the Polish system of social security.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): Under German Law, self-employed persons are - with a small number of exceptions provided by the law - not obliged to pay a minimum amount of social security contributions. Pension insurance can be mandatory for self-employed persons with a generally low and unstable income such as free-lance teachers or midwifes. In order to determine whether or not the mandatory insurance applies, the person can file for confirmation from the German Pension Insurance pursuant to Section 7a of Social Code Volume VI. In order to determine whether or not the person is subject to an instruction-dependent employment relationship (problem of fictitious self-employment when the person only has one principal contractor) the German Pension Insurance would be held to consider if such an employment relationship persists in another Member State. It remains unclear from the case mentioned above whether the person in question was on the one hand self-employed in Poland while being in an employment relationship in Slovakia. Article 14 of Directive 987/2009 would apply in such case, applying the social system of the member state in which an employment relationship is held.

Pursuant to the judgments of *Hervein* and *De Jaeck*, it would appear that a German Court would have rendered the same judgment, not allowing the German Pension Insurance to determine whether or not a valid employment relationship was in place in another Member State.

Footnote

1 For further information on that subject see A.M.Swiatkowski, European Union Private International Labour Law, The Jagiellonian University Press, Krakow 2012, p. 122.

Subject: Social insurance

Parties: NN - v - Zakład Ubezpieczen Społecznych (ZUS) – Social Security Institution

Court: Sad Najwyzszy (Supreme Court)

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