SUMMARY

2013/48 Mandatory provisions of Rome Convention include international treaties (FR)

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Facts

An employee was hired by Cityjet Ltd, an Irish subsidiary of Air France, as cabin crew for work on planes commuting from Roissy airport in France to other European airports. Two fixed-term employment contracts were consecutively concluded. Both contracts provided that Irish law applied and were written in English. The case at hand relates to the second employment concluded for a three year period, from 9 January 2006 to 8 January 2009, that set a six month probationary period, extendable up to a maximum of twelve months.

The probationary period was renewed just before the end of the sixth month, for three months (until 10 October 2006). On 12 September 2006, the company ended the contractual relationship during the probationary period, arguing that the employee was a poor performer and was frequently absent. The employee brought a claim before the French Industrial Tribunal ('Conseil de prud'hommes'), claiming damages related to the termination of his

employment contract. On the merits of the case, the Court of Appeal ruled, on 18 November 2010, that:

the mandatory French labour law provisions, as defined by Article 6 of the Rome Convention should apply to the employment contract, as the usual place of work was in France;

the contract was for an indefinite term, given that its term exceeded the statutory maximum of 18 months and that it failed to satisfy the statutory condition that a fixed-term contract may not be entered into for the purpose of filling a permanent position that forms part of an employer's usual business;

no mandatory provisions of French labour law prohibited providing for a probationary period of one year in the framework of an indefinite term contract; consequently, no provision could have been substituted to the Irish law, chosen by the parties, in this respect; therefore, Irish law applied with respect to the length of the probationary period;

termination of the employment contract took place during the probationary period; consequently, the employer did not have to follow the mandatory French termination procedure.

The employee appealed to the Cour de cassation (Supreme Court).

Judgment

The Supreme Court's judgment is very brief. Basically, all it says is the following. Given that the employee's contract had been executed in France, that Article 2 of ILO Convention 158 constitutes French mandatory law and that a probationary period of one year is unreasonably long, the Court of Appeal's judgment was incompatible with said Article 2. The Supreme Court referred the case to another Court of Appeal, which will need to make a final decision.

Commentary

The Supreme Court reasoned as follows. To begin with, it agreed with the Court of Appeal that Article 6 of the Rome Convention should be applied. This provision (replaced in 2009 by Regulation 593/2008, commonly referred to as "Rome I") states that:

"1. … in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. … a contract of employment shall, in the absence of choice […], be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract [...]". Given that the employee habitually carried out his work in France, the fact that his contract was subject to Irish law did not deprive him of the protective provisions of mandatory French law. The issue, therefore, as whether there was such a provision of French law. At the time of the dismissal (2006), French statute was silent on probationary periods in permanent employment contracts. Therefore, if one were to look exclusively at domestic French law, the probationary period in question would be valid and therefore the employee would be unable to do anything against his dismissal. However, France had in 2006 already signed and ratified ILO Convention 158, the contents of which constitute mandatory French law. Article 4 of ILO Convention 158 provides that a contract of employment "shall not be terminated unless there is a valid reason". Article 2(2) of the Convention allows members of the ILO to exclude certain categories of employed persons from all or some of the provisions of the Convention, including "workers serving a period of probation [...] of reasonable duration". The Supreme Court found a probationary period of one year, renewal period included, to be unreasonable. Therefore the exception of Article 2(2) did not apply and the principal rule of Article 4 did apply, therefore the dismissal was without a valid reason and, as such, unfair. Although in practice, the Supreme Court's decision will have limited impact with respect to probationary periods (as in the meantime, provisions related to the length of probationary periods in indefinite-term employment contracts were introduced in French labour law on 25 June 20081), it is interesting, as it includes international treaties in the scope of what are regarded as mandatory provisions for employment contracts for the first time. In effect, the Supreme Court held that the "law" as provided by the 1980 Rome Convention is to be interpreted broadly, referring not only to domestic French law, but also to applicable international rules.

The outcome of this case was predictable. Indeed, in France, international treaties, such as ILO's conventions, are directly applicable. In practice, this means that employees could claim the application of any international treaty ratified by France that provides for more favourable provisions than French law.

That being said, this decision opens a new route for mobile workers, who can take advantage, not only of the international treaties ratified by the country whose law has been chosen in the employment contract, but also of those ratified by the country whose law applies in the absence of choice.

Comments from other jurisdictions

The Netherlands (Zef Even): This case is interesting, although I think its consequences will be somewhat limited. Apparently, (at least some) ILO conventions are directly applicable in the

jurisdiction of France. They are regarded as mandatory under French law. Therefore their contents should, in French courts, be regarded as "*rules which cannot be derogated from by contract*", as referred to in Article 3(3) of the 1980 Rome Convention. In consequence, these rules must be applied should French law be applicable in the absence of a choice of law.

The above only applies to countries that regard the contents of ILO conventions as directly applicable and of a mandatory nature. As a rule, this is not the case for the Netherlands. Traditionally the ILO rules are regarded as directed to the Dutch government and not so much to its citizens. Therefore, ILO rules are normally not considered as part of directly applicable Dutch mandatory law (unless, of course, these rules are implemented in Dutch legislation in a mandatory fashion).

The potential scope of the ruling would have been broader should the French Supreme Court have held the ILO conventions to be mandatory rules under Article 7 of the 1980 Rome Convention (in Rome I terminology: overriding mandatory provisions). In that situation, mobile workers could potentially claim that these conventions are regarded as "*crucial for safeguarding public interests*" and that also other courts in Europe should apply these rules, regardless of the law otherwise applicable.

Given the above, I doubt whether the current decision actually opens that many new routes for mobile workers. Nothing has really changed, except the position in France.

Footnote

1 Article L.1221-21 of the French Labour Code provides that the length of probationary periods – renewal period included – is limited to four months for workers and employees ("ouvriers et employés"), six months for techni- cians and lower management ("techniciens et agents de maîtrise"), and eight months for mid and top management ("cadres").

Subject: Applicable law

Parties: X - v - Cityjet Ltd

Court: Supreme Court

Date: 26 March 2013

Case Number: 11-25580

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