EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/6 Choice of Belgian law in an employment contract extends to all provisions that regulate the mutual rights and obligations of the parties to the contract (BE)

According to the Belgian Supreme Court, a choice of Belgian law for an employment relationship extends to all provisions beyond the employment contract. If parties choose to apply Belgian law to their employment relationship, this choice may extend to all provisions of Belgian law which regulate the mutual rights and obligations of the parties. This includes legislation on well-being at work and, hence, the payment of a protection indemnity following dismissal after filing a claim for harassment.

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Legal background

Article 32*tredecies* of the Act of 4 August 1996 on well-being of workers at work ('Article 32*t*') provides that an employee is entitled to a protection indemnity of six months' pay, when they

are dismissed for reasons that are related to the filing of a complaint for harassment. If the dismissal occurs within the first twelve months following the complaint, the burden of proof is reversed: the employer must pay the protection indemnity, unless it proves that the dismissal is unrelated to the complaint.

Facts

A worker employed in Spain (the 'Claimant') filed a complaint for harassment at work on 24 February 2010 with her employer's prevention advisor in Belgium. A few weeks later, on 15 March 2010, the employment contract was terminated unilaterally by the employer (the 'Defendant') without serious cause. On 24 March 2010, the Claimant applied for re-instatement, but the Defendant refused.
Subsequently, the Claimant started proceedings and claimed a protection indemnity based on Article 32t, but the Defendant asserted that the application of the Act at issue was limited to Belgian territory.

Judgment

The Labour Tribunal, competent in first instance, held that it followed from the parties' choice of Belgian law that this included Article 32t. On appeal, the Labour Court reversed the judgment. It held that Article 3 of the Rome Convention (now Article 3 of the Rome I Regulation) stipulates that the choice of law prevails. However, Article 10 of the Rome Convention (now Article 12 of the Rome I Regulation) stipulates that the applicable law in principle shall govern:

interpretation of the contract;
performance of the contract;
within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages insofar as it is governed by rules of law;
the various ways of extinguishing obligations, and prescription and limitation of actions; and
the consequences of nullity of the contract.

In other words, according to the Labour Court, the choice of law was limited to the contract itself, taking into account specific limits laid down for this choice when made for an employment contract. Consequently, Article 6 of the Rome Convention (Article 8 of the Rome I Regulation) could not deprive the employee of the protection of mandatory rules which would have applied if no choice of law would have been made (as expressed in that Article).
The Labour Court added that, for the application of laws concerning police and security –

including all mandatory provisions of labour law that protect the interests of employees, such as the Act of 4 August 1996 – the employment relationship must have a sufficiently close link with Belgium, in the form of a certain duration of employment in Belgium or a certain persistence of this employment. This requirement was based on well-settled case law from the Supreme Court which found its legal basis in Article 3 of the Belgian Civil Code. According to this provision, which has now been repealed and replaced by a provision similar to Article 8 of the Rome I Regulation in the Belgian Code of international private law, laws concerning police and security were applicable to all persons residing in Belgium.
The Labour Court held that there was no sufficiently close link with Belgium with a certain duration and persistence. Since 6 May 2006, even before she had been recruited by the Defendant, the Claimant had been domiciled in Spain and usually performed her work there as well. She had not (or hardly) performed any duties in Belgium. Consequently, it held that Article 32t was not applicable, as a result of which the indemnity was not granted.
Before the Supreme Court, the Claimant argued that:

Nothing in Articles 3 and 10 of the Rome Convention provides that the choice of law should be limited, as regards the execution of the employment contract, to employment contract law in the strict sense, excluding mandatory rules such as the ones under scrutiny.
Compliance with the legislation on well-being at work, including protection against harassment, relates to the execution of the employment contract.
Article 6 of the Rome Convention applies despite a choice of law or when no choice has been made, but it does not restrict the choice to be made in itself.
Article 3 of the Belgian Civil Code has been repealed and should not have been applied to the case.
At the moment of the dismissal, the Claimant exercised her job responsibilities in various countries without any permanent link with Spain. This should have led the judge to refer to Belgium as the country in which the place of business through which she was engaged is situated.
Likewise, the Labour Court did not examine whether the Claimant had a close connection with Belgium, whereas it should have done so based on Article 6 of the Rome Convention. As a result, various factors, such as the fact that the Claimant was Belgian, paid her social security contributions in Belgium, and received her salary and benefits by virtue of Belgian law were not taken into consideration. The Claimant asserted that this should have been done.

The Supreme Court followed the reasoning of the Claimant. It inferred from Article 10 of the Rome Convention that when the parties have designated the applicable law for the contract as a whole, this choice of law by the parties extends to all provisions of the designated law which

regulate the mutual rights and obligations of the parties to the contract.
Article 32t relates to the performance of the employment contract by the employer for the benefit of its employee and, according to the Court, is a provision to which the choice of law of the parties may extend.
The Supreme Court also held that the Labour Court had infringed Article 6(2) of the Rome Convention, by not examining whether this choice of law should be discarded because it would violate mandatory provisions of the law that would have been applicable in the absence of choice.
According to the Supreme Court, the decision of the Labour Court infringed Articles 6(2) and 10(1) of the Rome Convention. Therefore, the Supreme Court annulled the decision insofar as it ruled out the claim to obtain a protection indemnity based on Article 32t and referred the case so limited to the Labour Court of Brussels.

Commentary

This is an interesting case from the perspective of private international law as the Belgian Supreme Court makes it clear that the choice of law in an employment contract may extend to all provisions that regulate the mutual rights and obligations of the parties to the contract. So, this choice is not limited to employment contract law in the strict sense. It may extend to well-being at work and more widely to all employment rules, i.e. rules that apply to the parties because of the employment relationship existing between them.
This decision seems well grounded in law. It also respects the intent of the drafters of the Rome Convention, i.e. to make the choice of law the cornerstone of the system for designating the law applicable to contractual obligations.
The position of the Labour Court was, on the other hand, much more difficult to understand as it interpreted the rights and obligations that should flow from an employment contract extremely narrowly.
The Labour Court also failed to distinguish between two questions, which should have been kept separate when it determined the law applicable to an employment contract. First, one should examine whether a choice of law has been made. Then, if this is the case, this choice should be respected unless it deprives the employee of the protection of mandatory provisions, which would have been applicable despite that choice.
Stated differently, the structure of the Rome Convention (now Rome I Regulation) is such that the *mandatory* nature of the provisions designated based on a choice of law should have no bearing on the assessment as to whether these provisions fall within the scope of applicable law. The mandatory nature of these provisions should intervene only in a second step, when determining if there are compelling reasons to ignore the choice of law made by the parties.

Subject: Private international law, Applicable law

Parties: Anonymous
Court:*Hof van Cassatie* (Belgian Supreme Court)
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