SUMMARY

2018/7 ‘Ryanair’ after ‘Ryanair’: Crew member still left empty-handed? (NL)

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Facts

From 1 January 2012, Ms G – a Polish national – worked as a customer service supervisor for the Irish airline, Ryanair. Initially, Ms G was based in Stockholm, Sweden. As from 1 April 2014, she and Ryanair agreed that she would be reassigned to the base in Eindhoven, the Netherlands. Thus, Ms G moved to Eindhoven. She gave birth here and rented an apartment. On 30 May 2017, she received a letter from Ryanair stating that she had been reassigned to the base in Dublin, Ireland. Ms G – a single mother of a 2-year-old comfortably settled in Eindhoven – did not want to move to Dublin and thus she refused.

However, Ms G's employment contract with Ryanair contained a unilateral amendment clause. This provided that Ryanair could change the employee's home base. In this way, Ryanair can anticipate the needs of personnel throughout its different bases. This clause is invoked regularly. Most of the time, the change of home base is mutually agreed upon but

Ryanair can also decide unilaterally. This can be the case when no one volunteers for a change of home base. In the case at hand, the base in Eindhoven was overstaffed, whilst the sales results were disappointing.

Upon Ms G's refusal to move to Dublin, Ryanair invited her to a hearing in Ireland. She refused to accept multiple invitations and both she and Ryanair stuck to their guns. Ms G was dismissed with immediate effect on 25 July 2017.

Legal background

In general, employees have a strong, protected legal position in the Netherlands. There is, for instance, extensive employee protection when it comes to termination of the employment agreement on the employer's initiative. Specific rules have to be met by the employer if it wants to terminate the employment agreement. Moreover, a preventive dismissal assessment is in force: the employer generally either has to obtain a dismissal permit from a government agency prior to terminating the employment agreement by notice or needs to ask the court to order that the employment agreement be dissolved. The employee is, as a rule, entitled to a statutory severance payment (transitievergoeding) upon termination of the employment agreement, if this has lasted at least 24 months and is terminated on the employer's initiative. However, this protection of the employee does not apply in the case of a so-called 'summary dismissal', whereby the employer immediately and unilaterally puts an end to the employment contract – as in the case at hand.

Dutch law authorises summary dismissal if the employee has engaged in such misconduct that the employer cannot reasonably be expected to continue the employment relationship. Employers may dismiss individual employees summarily for a range of 'urgent reasons', such as the refusal to obey reasonable orders. In the case of a justified summary dismissal most of the legal rules concerning dismissal, set out above, do not apply. No period of notice is required, nor is a dismissal permit or the rescission of the court required. The employee is not entitled to severance pay and will forfeit all rights to unemployment benefit. Therefore, an employee will most likely ask the court to declare the termination void. This is exactly what Ms G did when she brought a claim before the Dutch court.

The other issue in this case revolves around the unilateral changes clause. Pursuant to Article 7:613 of the Dutch Civil Code, an employer can invoke such a clause if it "has such a compelling interest in the change as to outweigh, applying the standards of reasonableness and fairness, the interest of the employee that would be harmed by the change".

Judgment

The court first considered that the dispute revolved around the question of whether Ryanair could invoke the unilateral amendment clause on which it had based Ms G's reassignment to Ireland.

Competence of the court

As this dispute is connected to more than one country, the Dutch court first assessed whether it had jurisdiction over the case. In doing so, it applied the Brussels IIbis Regulation. The employment contract contained a choice of forum clause, stating that the Irish courts had jurisdiction. The Regulation leaves only limited room for party autonomy (Article 23 Brussels Ibis). Parties can make a valid choice of forum if the agreement allows the employee to bring proceedings in courts other than those which would otherwise be available to the employee under the rules of the Regulation. The clause must therefore widen the choice available to the employee. Ryanair referred to a recent judgment of the ECJ (C-168/16 en C-169/16 (Ryanair), see EELC 2017 No. 4, p. 234-239 with commentary by Anthony Kerr). The ECJ ruled that the concept of ''home base'' constituted a ''significant indicium'' for the purposes of determining the place where an employee habitually carried out his or her work.

Ms G's designated home base was Eindhoven. She always started her working day at Eindhoven airport and ended it here. Further, she received her instructions in Eindhoven. However, she spent most of her time on board aircraft and the aircraft did not fly over the territory of any one country in particular. So, in practice, the time she spent at Eindhoven only accounted for a small part of her working time. Nevertheless, the aim of the Regulation is to protect the employee as the weaker party and the court therefore accepted jurisdiction over the case.

Applicable law

Secondly, the court assessed which law was applicable: Dutch or Irish. The court first established that the Rome I Regulation applied. Article 8 of the Rome I Regulation states that in principle, an individual employment contract is governed by the law chosen by the parties. However, the choice of law may not deprive the employee of protection under provisions that cannot be derogated from by agreement and therefore would have been applicable pursuant to paragraphs 2, 3 and 4 of Article 8 if another choice had not been made.

In this case, Irish law was chosen and that was not in dispute. By default, Dutch law would have applied to Ms G if the choice of Irish law had not been made. The question was therefore whether there were any Dutch provisions that would deprive Ms G of any rights that would have been available to her under Rome I. The Court concluded that the unilateral amendment clause was not contrary to mandatory rules of Dutch law. According to the court, Article 7:613

of the Dutch Civil Code allows the employer to make a unilateral amendment clause and to use it. For that reason, the Court believed that Ms G was not protected by Article 8 of Rome I.

In terms of Irish law, the Court assessed both the validity of the termination of the employment agreement and the unilateral amendment clause under Irish law. According to Irish law, there is no case law prohibiting a unilateral amendment clause. Ms G's behaviour qualified as 'gross misconduct' in Ireland and therefore, the dismissal was justified.

This left Ms G empty-handed.

Commentary

To the author's knowledge, this is the first time that a Dutch court has had to rule on an international private law issue based on the ECJ 's ruling in the Ryanair case. The first 'Ryanair after Ryanair'. Following the ECJ ruling, Irish media reported that the ruling could cost Ryanair '€100m and swell costs by 5%'.

See, for example: https://www.irishtimes.com/business/transport-and-tourism/european-court-ruling-could-cost-ryanair-100m-and-swell-costs-5-1.3220922.

It is no surprise that the Dutch court accepted jurisdiction, given the ECJ ruling in the Ryanair case. The Brussels Ibis Regulation uses the habitual place of work as its primary connecting factor and the ECJ indicated in the Ryanair case that the "home base" of a cabin crew member constitutes a "significant indicium" in this regard. Ms G's home base was Eindhoven and thus the Dutch court had jurisdiction. Given that the habitual place of work is also the main connecting factor under Rome I, I find it remarkable that this ruling did not assist Ms G in terms of the law applicable to this dispute.

Article 8(1) Rome I limits the effect of a choice of law by providing that the choice made must not deprive the employee of the protection that would be afforded to him or her by provisions that cannot be derogated from by agreement under the law applicable in absence of this choice (the 'objectively applicable law'). According to the majority opinion in the legal literature, this means that the chosen law only applies insofar as it does not deviate from mandatory provisions of the otherwise applicable law.

Opinion of Advocate General Trstenjak in ECJ 15 December 2011, Case C-384/10, Voogsgeerd/Navimer, ECLI:EU:C:2011:842, paragraph 48; Opinion of Advocate General Wahl, ECJ 12 September 2013, Case C-64/12, Schlecker/Boedeker, ECLI:EU:C:2013:551, para 24; O. Deinert, Internationales Arbeitsrecht, (Tübingen: Mohs Siebeck, 2013), pp. 96, 102 and 128;

Merrett (2011)*, at 215. For an opposing view see inter alia L. Strikwerda, Inleiding tot het Nederlandse internationaal privaatrecht, (Kluwer: Deventer, 2012), pp. 173-175. This would mean that the chosen law only applies insofar as it does not deviate from mandatory provisions of the otherwise applicable law. The ECJ has not taken up a clear position on this issue yet, see ECJ 15 March 2011, Case C-29/10, Koelzsch, ECLI:EU:C:2011:151, para 35 and ECJ 15 December 2011, Case C-384/10, Voogsgeerd/Navimer, ECLI:EU:C:2011:842, para 28.

The objective applicable law in the case at hand is Dutch law. The chosen law is Irish law. The Dutch court, however, ruled that Dutch law could not be applied here, as concluding a clause allowing unilateral changes and invoking such a clause is also permitted under Dutch law.

But let's unpack that decision a little: even though the parties are free to decide whether they want to have a unilateral amendment clause, Dutch law sets certain safeguards before an employer can invoke such a clause. It is only possible if the employer "has such a compelling interest in the change as to outweigh, applying the standards of reasonableness and fairness, the interests of the employee that would be harmed by the change". This test is of a mandatory nature: the parties cannot deviate from this test by contract. In the case at hand, the interest of Ms G – who is raising her two-year-old baby in the Netherlands – would be harmed by the change. Based on Dutch law, the court would have to weigh these interests before deciding whether Ryanair could change Ms G's home base. Dutch law does not allow parties to derogate from this 'safeguarding' duty by agreement. The question of whether Ryanair could invoke the unilateral change clause, should be assessed based on the law which offers the best protection. In the case at hand, Dutch law offers some protection, whilst the Court (apparently) presumes that Irish law does not. The Court does not elaborate on any safeguarding duty on the Irish side, so it is not clear to me why the judges ruled the way they did. If there are no safeguarding duty's according to Irish law (for example, under Irish law the employer would not have to weigh up at the person's circumstances – in this case Ms. G's family circumstances – even if they have agreed a unilateral change clause), my view then, it looks like the Court should have applied Dutch law (assuming that Irish law is less protective). If there are any safeguarding duties, the Court should have looked into this.

But it seems that the Dutch court took the view that the provisions on unilateral amendment clauses in Dutch law did not qualify as 'mandatory' and because of that, Irish law applied. This was also the case with regard to Ms G's claim that the termination should be declared void.

In addition, I also think there is something to say about the Courts approach towards Ms G's claim for unfair termination. It is not clear whether it is open to the Court to apply one law to

one claim and another to another. Be that as it may, I find it remarkable that in the case at hand the Court decided to boil the dispute down to the question of whether Ryanair had the right to conclude a unilateral change clause, while Ms G's claim for protection under Dutch law against her termination was subordinated to that. The Court decided Ryanair could invoke the unilateral change clause under Irish law – and for that reason Irish law also governed Ms G's claim for unfair termination.

I personally do not feel for this approach. First, the Court should not, in my view, have subordinated the question of unfair termination to the unilateral change clause issue. Ms G's claim was a wrongful termination claim. The Court should have treated it as a separate claim and assessed it on its own merits. If Ryanair was allowed to invoke the clause, Ms G's refusal to obey reasonable orders could be a reason for summary dismissal, but for that to hold up, Dutch law requires more than just an urgent reason. Dutch law provides for extensive employee protection when it comes to summary dismissal and in my view, these protections are mandatory. On that basis, the court should have applied Dutch law to Ms G's claim for unfair termination, which could have led to a more employee-friendly outcome. From a purely legal perspective, it seems to me that Ms G may have grounds to appeal.

Comments from other jurisdictions

Anthony Kerr (Sutherland School of Law, University College Dublin, Ireland): From the details provided it would appear that the court's attention was not drawn to the decisions of the Norwegian courts on the choice of law issue in the Alessandra Cocca case (see EELC 4/2017 pp.236-238 for details).

More fundamentally, it would appear that the court has misunderstood the state of Irish law. Although Irish law does not prohibit unilateral amendment terms regarding the location of work, there is case law to the effect that such terms must be applied reasonably. In the leading case of Conway – v – Ulster Bank Ltd UD 474/1981, the Employment Appeals Tribunal considered a case in which the employer had sought to transfer a female employee from Sligo to Ballina – a distance of some 60 kms. Although the Tribunal ultimately found against the employee because she had not utilised the collectively agreed grievance procedure, the Tribunal did rule as follows:

"Whilst transfer was a term of the contract, that is not to say that transfer exists as a right to the employer to be exercised by him without regard to competing personal rights or contractually to be exercised by him outside the reasonable limits of that power expressly or impliedly imposed by the contract....In our view the right to transfer given in the contract of service gives no absolute power to transfer. Any concept of absolute power is an illusion and

such power as exists cannot be exercised outside the laws of this land which compels the recognition of personal fundamental rights."

Consequently I would have to disagree that Ms G's behaviour in declining to transfer to Dublin qualifies as 'gross misconduct' in Ireland. Depending on whether she had paid the appropriate social welfare contributions, Ms G would probably qualify for a statutory redundancy payment pursuant to sections 7(2)(b) and 15(1) of the Redundancy Payments Act 1967. The former provision states that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind "in the place" where she was so employed have diminished. The latter provision disentitles an employee to a redundancy payment only where the employee 'unreasonably' refuses an offer of employment in another place. This is a matter to be considered subjectively from the point of view of the employee. So, in Heavey – v – Casey Doors Ltd RP 1040/2013, the Employment Appeals Tribunal held that it was not unreasonable for the employee to decline relocating from Balbriggan in North County Dublin to Baldoyle in South County Dublin, a distance of some 30 kms.

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