SUMMARY

ECJ 14 September 2017, case C-168/16 and C-169/16 (Ryanair), Private international law

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Facts

Case C-169/16

From 21 April 2008, Mr. Moreno Osacar worked as a steward (later, he was promoted to 'supervisor') for Ryanair. Ryanair is an airline with its head office in Ireland. The employment contract with Mr. Moreno Osacar was concluded in Spain. According to this contract, drafted in English, the Irish courts had jurisdiction over possible disputes, and Irish law governed the work relationship between Mr. Moreno Osacar and Ryanair. The contract also stipulated that Mr. Moreno Osacar's work was regarded as being carried out in Ireland, given that Mr. Moreno Osacar's duties were carried out on board aircraft registered in that country.

However, that same contract nominated Charleroi airport (Belgium) as his 'home base'. The contract required Mr. Moreno Osacar to live within an hour's journey of the base that he was assigned to. For this reason, Mr. Moreno Osacar moved to Belgium. Mr. Moreno Osacar always started his working day at Charleroi airport and ended it there. Similarly, he sometimes had to stay there on standby to replace absent members of staff.

Mr. Moreno Osacar resigned on 16 June 2011. He took the view that Belgian law applied and requested his former employer to pay various types of compensation under Belgian law. When Ryanair refused, Mr. Moreno Osacar decided to bring an action before the Belgian courts.

Ryanair challenged the jurisdiction of the Belgian courts, claiming that there was a close and real connection between the dispute and the Irish courts. Not only had parties chosen Irish law to apply and the Irish courts to have jurisdiction over the contract, but Mr. Moreno Osacar was subject to Irish law for tax and social security. Further, he worked on board aircraft registered in Ireland and even though he had signed his contract in Spain, it only came into effect once Ryanair had signed it at the head office in Ireland.

C-169/16

In the course of 2009 and 2010, Ms Nogueira and others (of Portuguese, Spanish or Belgian nationality) concluded contracts of employment with Crewlink. Crewlink is a legal person established in Ireland. The contracts provided that Ms. Nogueira and others would be employed by Crewlink, and seconded as cabin crew with Ryanair, for tasks comparable to those of Mr Moreno Osacar.

The contracts Ms. Nogueira and her colleagues signed were drafted in English and specified that Irish law governed the working relationship and that the Irish courts had jurisdiction over any disputes. The contracts also stated that they would be paid into an Irish bank account.

In the course of 2011, the working relationships ended, variously, as a result of resignation or dismissal. For the same reasons as Mr. Moreno Osacar, Ms Nogueira and her colleagues brought proceedings before the Charleroi Labour Court with a view to obtaining payment of compensation.

National proceedings

In both cases, the tribunal du travail de Charleroi (Charleroi Labour Court) by judgment delivered on 4 November 2013, held that the Belgian courts did not have jurisdiction. The appellants lodged appeals against those judgments, claiming, in particular, that the Belgian courts had jurisdiction pursuant to Articles 18 to 21 of Regulation No 44/2001 and that Belgian law governed the employment relationship pursuant to Article 6 of the Rome I Convention. The Labour Court of Mons decided to refer the case for a preliminary ruling to the ECJ, basically asking it if the concept of the “place where the employee habitually carries out his work” referred to in Article 19(2) of Regulation No 44/2001 must be interpreted as being comparable to the concept of “home base” defined in Annex III to Regulation No 3922/91.

Questions put to the ECJ

In the event of proceedings brought by an employee who is a member of the air crew of an airline, or is assigned to it, and in order to establish the jurisdiction of the court in which proceedings were brought, can the concept of 'place where the employee habitually carries out his work', as provided for in Article 19(2)(a) of the Brussels I Regulation, be equated with that of 'home base', as provided for in Annex III to Regulation No 3922/91?

ECJ's findings

As regards the determination of the concept of 'place where the employee habitually carries out his work' the Court referred to its settled case-law, in which it repeatedly held that the concept must be interpreted broadly. When an employment contract is performed in several countries and there is no effective centre for the activities, the 'place where the employee habitually carries out his work' covers the place where, or from which, the employee in fact performs the essential part of his duties. The Court found that that meant that the referring court must identify 'the place from which' the aircrew principally discharged his obligations towards his employer.

To determine that place, the national court must refer to a set of criteria. In the transport sector, it is necessary in particular to establish: (i) the place from where the employee carries out his or her transport-related tasks; (ii) the place where he or she returns after performing the tasks and from where he or she receives instructions concerning the tasks and how it should be organised; and (iii) the place where his or her work tools are located (Koelzsch, C-29/10 and Voogsgeerd, C-384/10).

In the cases at hand, the place where the aircraft in which the work is habitually performed is stationed must also be taken into account. As regard, whether the concept of 'place where, or from which, the employee habitually performs his work' can be equated to the 'home base', the Court pointed out that, owing to the circumstantial method and in order to thwart strategies to circumvent the rules, that concept cannot be treated in the same way as any concept referred to in another act of EU law, including that of 'home base', within the meaning of an EU regulation in the field of civil aviation.

Nevertheless, where an employee's 'home base' is goes a long way to determining the place from which the employee habitually carries out his work. Thus, it is only in cases where on the facts it seems that the employer has closer connections with somewhere other than the 'home base' that the connection between the two concepts is undermined.

Finally, the Court stated that the fact that the 'place where, or from which, the employee

habitually performs his work' should not be equated with any other concept also holds true for the 'nationality' of the aircraft.

Ruling

Article 19(2)(a) of the Brussels I Regulation must be interpreted as meaning that, in the event of proceedings being brought by a member of the aircrew assigned to or employed by an airline, and in order to establish the jurisdiction of the court seised, the concept of 'place where the employee habitually carries out his work', within the meaning of that provision, cannot be equated with that of 'home base', within the meaning of Annex III to Regulation No 3922/91. The concept of 'home base' constitutes nevertheless a significant indicator for the purposes of determining the 'place where the employee habitually carries out his work'.

Commentary: Jurisdiction and choice of law issues in transnational employment rights disputes

Anthony Kerr*

Introduction

The Irish airline Ryanair is estimated to employ, either directly or through companies such as Crewlink or Brookfield Aviation, some 12,000 pilots, cabin crew and other workers operating from 87 bases throughout Europe. Cabin crew supplied by Crewlink are invariably employed under three year fixed-term contracts with a 12 month probationary period.

Clause 6 of the contracts typically provides:

"As the Client's aircraft are registered in the Republic of Ireland and as you will perform your duties on these aircraft your employment is based in the Republic of Ireland."

Clause 37 then typically provides:

"The employment relationship between the Company and you shall at all times be governed by the laws in effect and as amended from time to time in the Republic of Ireland. The Irish courts have jurisdiction in all matters relating to the execution and termination of this contract."

That clause, it should be noted, goes on to provide:

"In the event that this clause becomes inoperable due to legislative changes, legal directive or

any other change that the Company determines as material, then this contract will become null and void and your employment with the company will cease and you will be paid the statutory amount in lieu of notice."

The applicability of these two clauses has been considered in recent times by courts in Belgium, Germany, Italy and Norway. In Beyer – v – Ryanair (8 Ca 8031/09), the Bremen Labour Court ruled, on 1 April 2009, in a case brought by a cabin director based at Bremen airport, that the German courts did not have jurisdiction. This decision was followed by the Wesel Labour Court on 2 February 2010 in Dominguez – v – Crewlink (1 Ca 2253/09), a case brought by a flight attendant based at Weeze airport. Similar decisions were made by the Courts of Velletri and Bergamo in Iaccarino – v – Ryanair (985/2013) – flight attendant based at Naples airport – and de Blasio – v – Ryanair (920/2014) – pilot based at Bergamo airport – on 19 February 2015 and 12 March 2015 respectively. The decision of the Bergamo court was appealed to the Labour Section of the Brescia Court of Appeal which, by decision of 23 March 2016, dismissed the appeal (Order no. 21/2016). It should be noted that the Italian Supreme Court, in a case relating to a flight attendant employed by a Belgian company on Belgian aircraft operating out of Fiumicino airport, had previously ruled that the Italian courts did not have jurisdiction in such cases (Cass. Joint Sections, Order no. 18509 of 20 August 2009).

This article will focus on the litigation in Belgium and in Norway.

The Belgian case

In December 2011, five former cabin crew employees of Crewlink and one former cabin services agent employed by Ryanair, all based at Charleroi airport, brought claims before the Tribunal du Travail de Charleroi (the Charleroi Labour Court) seeking orders pursuant to Belgian law that they be paid a sum, provisionally estimated for each claimant at € 20,000, representing inter alia unpaid wages and expenses. The claimants were of Belgian, Portuguese and Spanish nationality. Four of the claimants had resigned from their employment but the two who had been dismissed also sought compensation in lieu of notice corresponding to three months' remuneration.

In November 2013, the Charleroi Labour Court held that it did not have jurisdiction to hear and determine any of their claims. The claimants all lodged appeals with the Cour du Travail de Mons (the Mons Higher Labour Court) contending that, in light of Articles 18 to 21 of Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation), the Belgian courts did have jurisdiction.

In March 2016, the Mons Higher Labour Court made an Article 267 TFEU reference asking the

Court of Justice of the European Union (ECJ) whether, in order to establish jurisdiction, the concept of the "place where the employee habitually carries out his work", as provided for in Article 19(2)(c) of the Brussels I Regulation, could be equated with that of the "home base" as provided for in Annex III to Regulation No. 3922/91 (as amended by Regulation Nos. 1899/2016, 8/2008 and 859/2008) on harmonisation of technical requirements and administrative procedures in the field of aviation safety.

An oral hearing took place before the ECJ on 2 February 2017 with Belgium, France, Ireland, the Netherlands, Sweden and the European Commission intervening. Advocate General Saugmandsgaard Øe delivered his opinion on 27 April 2017 proposing that the Court should rule that, in the case of persons such as the claimants, jurisdiction resided in the country where or from which they principally discharged their obligations towards the employer: ECLI:EU:C:2017:312. He rejected as "unfounded" the submission that the claimants' working time on board, owing to the Irish nationality of the aircraft, should be regarded as being spent on Irish territory. The concept of nationality of an aircraft had neither the object nor the effect of assimilating the space inside the aircraft to the territory of the State whose nationality that aircraft has. This contradicts the ruling of the Court of Velletri that Ryanair's aircraft were to be treated as Irish territory.

The ECJ in its decision in Joined Cases C-168/16 and C-169/16, Nogueira and others – v – Crewlink and Osacar – v – Ryanair
ECLI:EU:C:2017:688 (16 September 2017) adopted a more nuanced approach and 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.

The claims have now been remitted to the Mons Higher Labour Court. If as expected, given that Charleroi was their designated "home base", that court decides that it does have jurisdiction (and neither Crewlink nor Ryanair appeal to the Cour de Cassation), it will then have to decide the issue as to whether Belgian or Irish law should be applied. An indication of the approach the Mons Higher Labour Court might take can be gleaned from the outcome of the Norwegian proceedings.

The Norwegian case

Alessandra Cocca was an Italian national employed by Crewlink as a cabin services agent and was hired out to Ryanair in April 2012. She was stationed at Moss Lufthaven Rygge and was dismissed in January 2013.

Ms Cocca instituted dismissal proceedings against Ryanair in April 2013 before Moss District Court pursuant to the Norwegian Working Environment Act 2005, which inter alia provides

that a probationary period cannot exceed six months. Ryanair contended that the case should be dismissed, because the Norwegian courts had no jurisdiction in the matter having regard to the 2007 Convention on jurisdiction in civil and commercial matters (the Lugano Convention) which mirrors the Brussels 1 Regulation for the EEA. The Moss District Court agreed that the case had insufficient links with Norway and, on 21 June 2013, dismissed the proceedings (TMOSS-2013-58182-1). Ms Cocca appealed to the Borgarting Court of Appeal where the Norwegian Confederation of Trade Unions, the Norwegian Union of Commercial and Office Employees, and the Norwegian Confederation of Vocational Unions intervened in support.

On 16 August 2013, the Borgarting Court of Appeal upheld the appeal and ruled that the Norwegian courts did have jurisdiction (LB-2013-123040). Ryanair then appealed to the Norwegian Supreme Court, whose Appeals Selection Committee set aside that decision on 5 December 2013 because of a procedural error which could have had an impact on the decision (HR-2013-2522-U-Tr-2013-1589).

On remittal, the Borgarting Court of Appeal, on 5 March 2014, held by more extensive reasoning that the Norwegian courts had jurisdiction (LB-2013-202882). The court noted that Ms Cocca performed most of her work during flights and that the work she performed on the ground in Norway was limited and closely linked to the imminent flight. Considerable weight, however, was given to the fact that, under her contract, she had a duty to reside within one hour's journey from the airport. That residence duty required her to live permanently close to the airport for the duration of the employment relationship. This factual connection meant that Rygge and the area in which she lived "became her natural social point of connection in connection with both work and leisure".

Ryanair again appealed to the Norwegian Supreme Court but the appeal was summarily dismissed on 17 June 2014 on the grounds that it "clearly could not succeed" (HR-2014-1273-U).

When the case returned to the Moss District Court to determine the choice of law issue, that court ruled, on 9 January 2015, that Norwegian, not Irish, law applied (TMOSS-2013-58182-2). Ryanair appealed to the Borgarting Court of Appeal and the District Court's decision was upheld on 16 October 2015 (LB-2015-284-U). The Appeals Selection Committee of the Norwegian Supreme Court allowed a further appeal (HR-2016-284-U) but, before the case was heard by the Supreme Court, it was settled by the parties and was struck off the Court's register on 25 November 2016 (HR-2016-2418-U).

It is worth noting that, in addition to its own legal costs, Ryanair had been ordered to pay legal costs to Ms Cocca and the intervenors in respect of all the proceedings in a sum totalling NOK

268,085 (€ 28,127.51).

The Choice of Law issue

The Moss District Court had based its assessment on this issue by considering whether Ms Cocca's case had a stronger connection with Norway or with Ireland. In deciding that the stronger connection was with Norway, the court took into account the provisions of Regulation No. 593/2008 (the Rome I Regulation) concerning the choice of law for contractual obligations, even though this Regulation is not part of the EEA agreement. It is, however, in keeping with the private international case law of the Norwegian Supreme Court that regard be had to such Regulations.

On appeal, Ryanair submitted that this case had a stronger connection with Ireland given that:

- the work she was employed to perform took place on board Irish aircraft;

- all work organisation took place from Ireland;

- all manuals and instructions she received were based on Irish law;

- she was a member of the Irish social welfare system;

- she received her wages in EUR paid into her Irish bank account; and

- she paid Irish taxes on her wages.

The Borgarting Court of Appeal noted the comments of the Court of Justice in Case C-29/10, Kölzch [2011] E.C.R. 1-1595, that the purpose of what is now Article 8 of the Rome 1 Regulation was to ensure that employees benefit from the protection afforded by legislation in the country where they perform their "economic and social functions" and where "the business climate and the political climate" have an influence on the performance of work.

In considering the provisions of Article 8(2) of the Rome 1 Regulation, the court had little doubt that most of Ms Cocca's work was performed while the aircraft were in the air. Even if the time she served on the ground were to be combined with the time the aircraft were over Norwegian territory, it was improbable that would have accounted for more than 50% of her work time. Accordingly, the court did not think it relevant to consider "in which" country she habitually performed her work; but the court had little doubt that Norway was the country "from where" she habitually performed her work.

In considering the provisions of Article 8(4) of the Rome I Regulation, the court said that

"limited importance" should be attached to what country receives tax revenues resulting from the payment of wages. The court also said that it was "uncertain" as to what extent Ms Cocca would be entitled to social welfare benefits from what is now the Department of Employment Affairs and Social Protection.

Accordingly, the Borgarting Court of Appeal concluded that Norwegian law was applicable notwithstanding that the parties had agreed on the application of Irish law. Both the Moss District Court and the Borgarting Court of Appeal were of the view that Ms Cocca had considerably poorer rights under Irish law than under Norwegian law, in particular that the rules for assessment of compensation were substantially different.

What if Irish law were to be applicable?

Article 1(3) of the Rome I Regulation excludes in principle matters of 'evidence and procedure'. It is well established that issues characterised as substantive are governed by the lex causae (the law of the contract) whereas issues characterised as procedural are governed by the lex fori: see Dicey, Morris and Collins, The Conflict of Laws (15th ed, 2012) para. 32-033 and Cheshire, North and Fawcett, Private International Law (15th ed, 2017) pp. 73-77. As those authors all observe, where that line is to be drawn is unclear. Article 12(1)(c) of the Rome 1 Regulation resolves one important matter, namely that the assessment of damages is a matter to be determined by the law of the contract.

In the case of Ms Cocca, one issue that would have necessarily arisen is whether the one year service requirement that is normally required by the Unfair Dismissals Acts 1977 to 2015 is a matter of substance or procedure. The further issue that would have then arisen is whether the determination of that issue was to be governed by Irish or Norwegian law. In Norway, dismissal protection operates from a 'day one' basis. Another issue would have been whether the proceedings were properly instituted against Ryanair given that her contract of employment was with Crewlink. The overriding consideration, however, would have had to have been the applicability of section 2(3) of the Unfair Dismissals Act 1977. This subsection provides that the Act shall not apply to the dismissal of an employee who, under the relevant contract of employment, ordinarily worked "outside Ireland" unless either he or she was ordinarily resident in Ireland during the term of the contract or he or she was domiciled in Ireland during the term of contract and the employer had its principal place of business in Ireland.

Although Ryanair has its principal place of business in Ireland, Ms Cocca (and the claimants in the Belgian case) have never been either resident or domiciled there.

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