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Supreme Court rules on social security legislation applicable to temps posted abroad (PL)

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Summary

Temporary agency workers employed by a Polish agency and posted temporarily to France to work there under the direction of a French client are entitled to A1 certificates and, therefore, to remain governed by exclusively Polish social security legislation while working in France.

Facts

The plaintiff in this case was the Polish temporary employment agency 'P'. Early in 2012, it entered into a contract with a French company under which it agreed to send over three Polish temps to perform electrical work for that company in France for a limited period of time. P applied to the Polish social security authority ZUS (*Zakład Ubezpieczeń społecznych*) for A1 certificates on behalf of the three temps. These are certificates that provide evidence that the worker in question remains subject to the social security legislation of his or her home country and is therefore not subject to the social security legislation of the country where the worker performs his or her work (the 'host' country). An A1 certificate is issued by the social security authorities of the worker's home country pursuant to Article 12(1) of Regulation 883/2004 on the coordination of social security systems (the 'Basic Regulation'), which says:

> "A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person".

Article 12 is an exception to the main rule (in Article 11(3)) that a worker is governed by the social security law of the country in which he or she works (*lex loci laboris*).

Article 12 of the Basic Regulation is explained in more detail in Articles 14 and 19 of implementing Regulation 987/2009. Article 14(2) provides that:

> "For the purpose of the application of Article 12(1) of the basic Regulation, the words 'which normally carries out its activities there' shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out".

Article 19(2) provides that:

> "At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable […] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions".

Pursuant to Article 71 of the Basic Regulation an 'Administrative Commission' should be empowered to provide operational rules. It has designed an electronic document, known as an A1 certificate, which the social security authorities must use when issuing an attestation within the meaning of Article 19(2). The authorities of the host country must accept such a certificate. In other words, they may not claim applicability of their domestic social security legislation, even if they believe that the authority that issued the certificate should not have done so. Thus, where ZUS has issued A1 certificates to Polish workers, the French authorities have no right apply French social security law to those workers.

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However, ZUS turned down the applications for A1 certificates for the plaintiff's three employees.[1] ZUS argued that P was not "an employer which normally carries out its activities" in Poland as provided in Article 12(1) of the Basic Regulation, given the insignificant percentage of P's turnover within the territory of Poland (12%) and the fact that it employed a larger number of employees abroad (160) than in Poland (113). P appealed against this decision to a regional court. The court ruled in favour of ZUS, upholding its decision. P lodged an appeal against the first instance judgment.

The Court of Appeal upheld the appeal. It recognised that the findings on the facts of the case made during the first instance proceedings were correct. However, it held that the regional court had failed to apply EU law correctly to those facts. The Court found that the employees posted by P to France had satisfied the requirements of Article 12(1) of the Basic Regulation and, consequently, should continue to be covered by the Polish social insurance system whilst on assignment in France. ZUS lodged an appeal to the Supreme Court, arguing that the Court of Appeal had erred in holding that the employees sent by P to France had satisfied the requirements of Article 12(1) of the Basic Regulation and therefore that they should be covered by the Polish social insurance system whilst in France.

Judgment

The Supreme Court dismissed the appeal. It found the Court of Appeal's approach to be sound, confirming that the employees sent by P to France should be assessed according to Article 12(1) of the Basic Regulation. The Supreme Court pointed out that the primary factor was the existence of a relationship between the posting employer and the Member State in which it has its registered office. Where such a relationship exists, the exception to the ususal *lex loci laboris* rule applies, provided the carries out a substantial part of its activities (other than administrative and management operations) within the Member State in which it has its registered office.

To assess whether a substantial part of activities is carried out in the home State of the employer, ZUS needed to conduct a comprehensive audit of the employer. Examples of the criteria to be used are: the place in which the posting enterprise has its registered office and administration; the number of administrative working in the posting state and in the state of employment; the place where the posted employees were recruited; the place where most of the posting company's contracts with customers are concluded; the law governing contracts concluded by the posting company with employees and customers; the number of contracts performed in the posting state and in the state of employment; turnover generated by the posting company in the posting state and in the state of employment over a typical reference period; the period over which the enterprise had had a registered office in the posting Member State. The Supreme Court did not set out these criteria in any particular order and so even if one or more of them is particularly prominent, that should not necessarily be decisive.

In general terms, apart from considering the criteria, the assessment should look at the nature of the posting company and its activities. The Supreme Court did not specify how "the specific nature of a given entity" should affect the overall assessment in any given situation.

The Supreme Court emphasised that, in order for Article 12(1) of the Basic Regulation to apply, there also needed to be an employee relationship binding the posting employer and the posted employee. In particular, the posted employee must be subject to the supervision of the employer that posted him or her. To establish that, a number of factors need to be considered, including who had responsibility for recruitment, what it says about the identity of the employer in the employment contract, who pays the employee, and who defines the nature of work.

Note that an employment relationship would not exist or would cease to exist in the following circumstances: where an enterprise to which an employee has been posted makes the employee available to another employer in a Member State in which it is located; when the employee posted to a given Member State is made available to an enterprise located in a third Member State; or when the employee is recruited in a given Member State for the purpose of being sent by an enterprise located in a second Member State to an enterprise in a third Member State.

As a result of the dismissal of the appeal lodged by ZUS, the judgment of the Court of Appeal dated 23 January 2014 remains effective. Consequently, ZUS is required to issue certificates confirming that the employees of P were subject to Polish social insurance while performing work France.

Commentary

The judgement of the Supreme Court does not change the position completely. Similar views have been voiced before, but this is the first time the Supreme Court has set out so comprehensively the factors to be used to determine whether Article 12(1) of the Basic Regulation applies.

What is valuable here is the attention drawn to the need for a comprehensive assessment of the factors determining the relationship of Polish employers with Poland – but that no one factor should be systematically favoured.

1. The three employees went to France anyway.

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Equally valuable is that ZUS should not forget that the outcome of the assessment may depend on the nature of the activities carried out by the employer. Consequently, the judgment should help protect employers against any short-sightedness on the part of insurance authorities and should help increase legal awareness of the relevant EU regulations amongst both those authorities and the courts. The position taken not only by ZUS but by the court of first instance in this case shows that the current level of awareness leaves something to be desired.

Comments from other jurisdictions

France (Claire Toumieux and Norbert Thomas, Allen & Overy): After having made a number of rulings challenging the enforceability of A1 certificates issued by the social security bodies of Member States for workers seconded to France (e.g. French Supreme Court, criminal chamber, 11 March 2014; and French Supreme Court, social chamber, 10 June 2015), the French Supreme Court finally decided to lodge a request for a preliminary ruling before the ECJ on 23 November 2015. The ECJ will be required to determine whether the effect of an A1 certificate is binding first, on the institutions and authorities of the host Member State and second, on the courts of that Member State, where it is found that the conditions under which the employee carries out his or her activities do no fall within the exceptions set out in Article 14(1) and (2) of Regulation 1408/71. In the case that prompted this response, an A1 certificate issued in Portugal was challenged by the French social security authorities and the French Supreme Court has suspended its decision until the ECJ rules on this question. This at least demonstrates the new willingness of the French Supreme Court to ensure it acts in line with EU law.

Greece (Panagiota Tsinouli, KG Law Firm): In Greece, the social security fund (i.e. the 'IKA' for salaried employees), is quite familiar with the procedure and the criteria set out in EU law for the coordination of social security systems and the issuance of A1 documents. In practice, when a company applies for an A1 it must provide substantial evidence that it normally carries out its activities in Greece where its registered office is located and that it has been registered in the IKA's registry of employers. The nature of the contractual relationship between the employer and the employee is also examined. If an employment agreement of an indefinite term exists, it is almost certain that the IKA will issue an A1.

Luxembourg (Anke Geppert-Luciani, MOLITOR): The application of Article 12(1) of Regulation 883/2004 on the coordination of social security systems in the context of the posting of workers by temporary employment agencies has been discussed at length in Luxembourg and neighbouring countries.

Luxembourgish-based temporary employment agencies have in fact been at the centre of criticism for several years. Neighbouring countries, in particular France, criticise them for hiring French residents living close to the Luxembourg border in order to post them soon after their recruitment to France.

The French argument is that, because of Luxembourg's lower social security contributions, by posting workers from Luxembourg to France, employers save money to the detriment of the French social security system. While some French politicians are critical of this "social dumping", the Luxembourg authorities point out that the temporary employment agencies are nevertheless respecting European rules on posted workers.

Quite apart from these issues, Luxembourg – in proportion to its population – posts a significant number of workers to other EU countries. According to figures collected by the European Commission, in 2014 while the population amounted to approximately 550,000, Luxembourg received around 21,800 posted workers. During the same period it posted around 62,000 workers to other European countries, mostly to its neighbours.

Currently Luxembourg, France and certain other countries support the Commission's proposal to revise Directive 96/71 on posted workers. In this way, both Luxembourg and France are committed to working against social dumping linked to differences in the remuneration of local workers and posted workers. However, the issue of differences in the social security contributions amongst Member States is not addressed by this revision.

The Netherlands (Peter Vas Nunes, BarentsKrans): Was Zus' decision not to issue A1 certificates taken wholly independently, or was it under political pressure? There is considerable pressure within the EU, mainly by countries such as Germany, France and Benelux, to amend not only Posting Directive 95/46 but also Regulation 883/2004 so as to reduce the flow of cheap Eastern European labour to their labour markets by limiting the 'unfair' competitive advantages that Eastern European employers are said to have, one of which is said to be that those employers can continue paying their domestic social security contributions (which in fact, I am told, tend to be quite high as a percentage of gross salary). There seems to be a worrying trend, particularly in France, to refuse to accept the validity of A1 certificates, in violation of EU law: see, as an example, the French Supreme Court's judgment reported in EELC 2014/2 nr. 26.

This Polish judgment is certainly in line with EU law. In fact, it almost literally repeats the Administrative Commission's Decision A2 of 12 June 2009 (OJ 24.4.2010 No C 106 page 5).

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