Bird & Bird

EU Employment Law Report

Keeping you up-to-date on the most significant developments of employment law at EU level

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Case law

Coordination of Social Security

Decision of the ECJ in case AFMB and Others v. Raad van bestuur van de Sociale verzekeringsbank, 16 July 2020, nr. C-610/18

Abstract

The court finally delivered a judgment in this case, which we had already followed in a previous report in which we analysed the conclusions from the Advocate General.

The judgment on the question of the concept of 'employer' within the meaning of EU Regulation No 883/2004, which is particularly sensitive in the international road transport sector, is available here.

Facts

A Cypriot company applied the Cypriot social security scheme (considerably less onerous compared to the Dutch social security scheme) to Dutch resident drivers employed in the Netherlands ("AFMB") and made it available to Dutch transport companies.

The Dutch social security authorities maintained that, since the Dutch transport undertakings recruited the drivers, exercised effective control over them for an indefinite period and actually paid wages, the Dutch undertakings must be regarded as the lorry drivers' actual "employer" within the meaning of Regulation (EC) No 883/2004 on the coordination of social security systems. The Dutch social security law should therefore apply to these drivers.

The Cypriot company, on the other hand, claimed that the Cypriot social security scheme applies since the Cypriot undertaking enacted the employment contracts with the Dutch drivers and made the drivers available to the Dutch transport undertakings with which it entered into fleet management agreements.

Confronted with this question, the Centrale Raad van Beroep (the Higher Netherlands' Social Security and Civil Service Court) asked the ECJ for clarification as to who is the "employer" of drivers within the meaning of the European Regulation: the transport undertakings established in the Netherlands or the Cypriot one? The Advocate General pleaded for the first solution.

Legal context

In order to ensure that EU resident workers moving within the EU are always protected and subject to the social security scheme of only one Member State, the abovementioned EU regulation regulates such situations as follows: the connection factor for determining the applicable national legislation is the registered office of the employer (Article 13, 1., b), i)). Since the EU regulation does not define the concept of "employer" itself nor refers expressly to the law of the Member States to define it, reference must be made to the criteria developed by ECJ case-law (e.g. the effective link of authority, who engaged the employee, paid his/her salary, sanctioned and dismissed him/her, etc.).

Judgment

As we anticipated in our previous report, the Court followed the opinion of the Advocate General by deciding that the employer within the meaning of the abovementioned Regulation was in this case the transport undertaking established in the Netherlands.

The court started by recalling that the question of the existence of an employment relationship between an 'employer' and the 'personnel' depends on *factual circumstances* going beyond what has formally been agreed upon. Indeed, the objective pursued by EU legislation, and particularly by Regulation No 883/2004, is not to make it easier for employers to make use of purely artificial arrangements with the sole aim of obtaining a (financial) benefit from the differences that exist among the national rules.

Therefore, it found that the employer of drivers of heavy goods vehicles employed in international long-distance transport is the transport undertaking that:

1 **has actual authority over those drivers**: the Court held that the drivers appear (*a*) to have been members of the personnel of the Dutch entity whose social security regime seems to apply , (*b*) to have been chosen by said Dutch entity (although these points should be determined by the referring court);

2 **bears, in reality, the cost of their wages**: in the case at hand the Dutch entity ultimately supported these wages by paying commissions to the Cypriot entity (formally compensating the employees in question under the fleet management agreement); and

3 **has actual power to dismiss them**: in case the Dutch entity no longer required the services of a long-distance lorry driver, it ultimately had the possibility to dismiss him/her with immediate effect; not to mention that number of drivers had, prior to the conclusion of their contract with the Cypriot entity, previously been employed by the Dutch entity.

Consequences and next steps

Although it is ultimately now up to the Dutch referring court to render its final decision by interpreting the factual objective circumstances, this judgment of the ECJ is, in our view, a significant step forward in the combat against the widespread practice of social dumping in the international transport sector which consists in using a letter box company (in a lower cost member state) to dodge the application of a Member State's stricter social security system.

Statutory paid holidays

Decision of the ECJ in joined cases QH v. Bulgaria and CV v. Iccrea Banca SpA, 25 June 2020, nr. C-662/18 and C-37/19

Abstract

The court delivered a unique judgment in these joint cases recalling that statutory annual paid holidays due under EU Directive 2003/88 continue accruing during workers' absences due to unforeseeable causes going beyond their control; in this case an unlawful dismissal (decision available here).

Facts

In case C-762/18, a former employee of a Bulgarian school reinstated after a court judgment declared her dismissal unlawful was dismissed again. The employee then brought an action against the school, among other, to obtain payment of compensation in lieu of leave not taken for the period between her unlawful dismissal and her reinstatement. After the regional, and then the district courts of Raynonen (Bulgaria), the Bulgarian Supreme Court of Cassation did not uphold her claim, because the employee did not work during this period. Consequently, she brought another action before the District Court of Haskovo (Bulgaria), but this time against the Bulgarian courts to seek compensation for the losses allegedly suffered as a result of that court's infringement of EU law.

In Case-37-19, a former employee of an Italian credit institution (Iccrea Banca) was also dismissed after having been reinstated because of an earlier dismissal declared unlawful by the court. As the employee's claim for compensation in lieu of leave for the period of unlawful dismissal had been rejected, the case ended up before the Italian Court of Cassation.

Legal context

Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

Decision

Article 7 of the EU Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (*OJ L299, 18 November 2002, 9-19*) provides that:

> "*1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.*
>
> *2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.*"

Both Bulgarian and Italian courts decided to refer questions for a preliminary ruling to the ECJ to know whether based on this article, a worker unlawfully dismissed is entitled to (i) paid annual leave for the period between his / her unlawful dismissal and reinstatement, even though he/she has not actually worked for the employer during that period; and (ii) financial compensation in lieu if he/she could not take such paid leave days during this same period.

Judgment

In a judgment rendered on 25 June 2020, the ECJ answered "Yes" to both questions:

1. the period between a worker's unlawful dismissal and the subsequent reinstatement must be assimilated to a period of effective work for the purpose of determining the entitlement to paid annual leave. Indeed, during this period, the worker was deprived of his/her opportunity to work because of an unforeseeable cause beyond his / her control. This is similar to what the Court already decided in its recent case-law Curtea de Apel Cluj v. Romania following which sick workers (also unable to perform their tasks because of an unforeseeable event) continue to build up holiday rights as normal;

2. if for some reasons such workers would leave their employer after their reinstatement without having been able to take these paid leave days, these must be compensated in lieu by said former employer (except when he/she worked for a new employer during that period).

Consequences

This decision of the ECJ reminds us once more that the four-week statutory paid leave to which workers are entitled per annum keeps accruing during absences beyond their control such as unlawful dismissal and sickness, and this regardless of whether they actually perform work or not.

Privacy Shield Invalidation

Decision of the ECJ in case Data Protection Commissioner v. Facebook v. Schrems ("Schrems II"), C-311/18

Abstract

The ECJ has ruled that international personal data flows under the EU GDPR can continue to be based on EU Standard Contractual Clauses if properly monitored, while the EU–U.S. Privacy Shield has been declared invalid. This directly impacts all companies that used to rely on the Privacy Shield to export EU personal data to the US who must promptly implement alternative safeguard mechanisms (the "Schrems II" judgment is available here).

Facts

Like other European users, part if not all the personal data of Maximillian Schrems, an Austrian activist, is transferred by Facebook Ireland to Facebook Inc.'s servers located in the U.S. These data transfers were initially protected by the EU Commission's Adequacy Decision "Safe Harbour Privacy Principles", a self-certification mechanism developed namely by the US Department of Commerce and the European Union, allowing private organisations adhering to the principles it sets forth to offer an adequate level of protection of personal data transferred to third countries. In its famous judgment of 6 October 2015 rendered in the first case brought in court by Mr Schrems ("Schrems I"), the ECJ invalidated these principles by holding that they insufficiently protected non-U.S. Citizens' personal data that were regularly accessed by the NSA through PRISM. This judgment forced the EU Commission and the United States to establish a new framework of transatlantic data flows known as "EU-US Privacy Shield", which was broadly used by many organisations and embodied in the EU Commission's Adequacy Decision 2016/1250, replacing the Safe Harbour Privacy Principles.

In his second complaint, Mr Schrems sought once more the suspension or prohibition of future transfers of his personal data from the EU to the U.S., because the U.S. allegedly did not offer sufficient protection of his personal data transferred to that country, which Facebook Ireland then used to carry out pursuant to the Standard Data Protection Clauses ("SCCs") set out in the Annex to the EU Commission's Decision 2010/87.

The case ended up before the Irish High Court who raised among other things the questions of the validity of both Decision 2010/87 (SCCs) and Decision 2016/1250 (EU-U.S. Privacy Shield) in a request for a preliminary ruling made to the ECJ. The European Court addressed both questions in its judgment rendered last 16 July ("Schrems II).

Legal context

Among the many legal provisions at stake in this complex case, aside from the EU Charter of Fundamental Rights, the main ones for addressing the aforementioned issues are the following:

- Article 45 of the EU GDPR, under the heading '**Transfers on the basis of an adequacy decision**', provides, in paragraph 1 that "a transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation".

- Article 46 of the EU GDPR, under the heading '**Transfers subject to appropriate safeguards**', provides, in paragraphs 1 that "in the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available".

Judgment

In its judgment, the ECJ followed the opinion of the Advocate General by:

- holding that the Commission's Decision 2010/87 is valid and the SCCs provide appropriate safeguards for international transfers of personal data, insofar additional safeguards are put in place and continue effectively during the contractual relationship; but

- invalidating the entire EU-U.S. Privacy Shield Adequacy Decision, which (i) does not include satisfactory limitations in order to ensure the protection of EU personal data from access and use by U.S. public authorities, which is far from meeting the requirement of proportionality enshrined in Article 52 of the EU Charter of Fundamental Rights, and (ii) fails to ensure adequate judicial redress to EU residents, which is in violation of the fundamental right to an effective remedy (as the US Ombudsperson cannot impose binding sanctions on the US authorities).

Consequences

In sum, companies that used to rely on the EU-U.S. Privacy Shield for EU-U.S. data transfers must rapidly switch to other safeguards (SCCs, Binding Corporate Rules within their group, etc.) for these data flows. Those using SCCs for transfers to data processors located in non-EEA countries can continue to do so, providing they evaluate prior to the transfer whether the receiving country guarantees an adequate protection level.

In the meantime, the EU Commission announced that it is working on alternative mechanisms for international transfers of personal data, including by reviewing the existing SCCs.

This judgment as far reaching implications for all companies and organisations transferring personal data, including on employees, to non-EEA countries who should review their data transfer policies and swiftly amend them where necessary.

For an in-depth analysis of this judgment and its implications for international organisations, we refer to the analysis made by our experts in EU Privacy back in July 2020 (available here).

Legislative development

Although outside the temporal scope of this Report, it is worthwhile mentioning a first important legislative proposal initiated by the new Commissioner for Labour (Mr Schmitt) in pursuit of an action plan (2019-2024) to fully implement the European Pillar of Social Rights (of 2017).

On 28 October 2020, the EU Commission published its proposal for *a Directive on adequate minimum wages in the European Union* (the 'Proposal'). We will discuss and analyse the proposal in the next Report in this series, but the following comments appear to be appropriate at this moment:

- The proposal is policy-wise linked to the recent Directive on transparent and predictable working conditions (Directive 2019/1152), which we analysed in a previous Report, to the amended posted workers Directive (2014/67), to the equal treatment Directive (2006/54) and to the age discrimination Directive (2000/78).

- It is intended to implement notably principle 6 of the abovementioned Pillar, i.e. to ensure adequate minimum wages to all workers in the EU.

- Although the European Union does not have any direct legislative authority in the field of wage setting or pay, the legal basis for the Directive is nevertheless stated to be the general support and complementary role of the EU on working conditions, and the setting of minimum requirements (art 153 TFEU).

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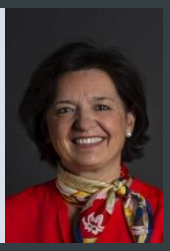

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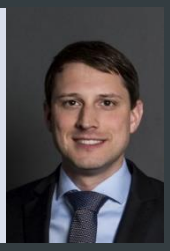

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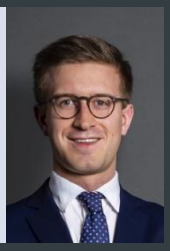

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