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POSTING EMPLOYEES TO ANOTHER EU MEMBER STATE – A SHORT GUIDE

It is increasingly common for employees to spend some time working for their employer abroad. This is particularly true in Europe as one of the pillars of the Treaty of Rome is the ability of workers to move freely within Europe. This short guide looks at the issues arising when trying to determine the law applicable to international employment matters and the jurisdiction of the courts to resolve disputes.

1. The EU Posting of Workers Directive

The Posting of Workers Directive (Directive 96/71EC) works in conjunction with both international conventions and the provisions of employment law in force in each Member State to protect the employment rights of workers who are temporarily posted by their employer in another Member State.

The Posting of Workers Directive requires that where a European Union Member State[1] has certain minimum terms and conditions of employment, these must also apply to workers posted temporarily by their employer to work in that State. The Directive does not prevent workers benefiting from minimum employment protection rights which are more favourable in the State from which they are posted. In other words, whilst benefiting from employment protection rights in the Member State they are posted to, posted workers do not necessarily surrender 'better' employment protection rights from their 'home' state. So for example, there might be times when it is more advantageous for a Danish employee temporarily posted to the UK to invoke the provisions of Danish employment law and others where it may be more advantageous to bring a claim in the UK.

What is a posted worker?

A posted worker is someone who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works. The Directive applies to undertakings which:

- post workers to another Member State under a contract between them and a party in the other State for whom the services are intended;
- make intra-company postings; or
- are employment businesses that post workers and maintain an employment relationship during the posting.

What terms and conditions of employment are covered by the Directive?

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;

[1] Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, Slovakia, Slovenia, Sweden and the United Kingdom.

- conditions of hiring out workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, of children and of young people;
- equal treatment between men and women and other provisions on non-discrimination.

2. Jurisdiction and Applicable Law

To determine which law will apply in the event of a dispute between an employer and employee where the employment relationship involves more than one country, it is necessary to look at the Brussels and New Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters and the Rome Convention on the Law Applicable to Contractual Obligations. The 'old' EU Member States are all signatories to the Conventions and some of the new Members are too, inclusive of Switzerland, Denmark, Norway and Iceland.

It is important to note at this stage that the jurisdiction of a court or tribunal of a particular country is determined as a separate issue under different rules (contained in the Brussels, Lugano and Rome Conventions) to those that determine the law applicable to the dispute. It does not follow that simply because the courts of a particular country have jurisdiction, the laws of that country should be applied. The applicable law is determined under the rules of the Rome Convention. If the applicable law is not that of the country whose courts have jurisdiction, expert witnesses will give evidence of that law as evidence of fact.

3. The Brussels and Lugano Conventions on Jurisdiction

The general rule – domicile of the defendant

The general rule under the Conventions is that 'defendant domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that State'.

The place of performance of the contract

In certain circumstances, a defendant domiciled in a Contracting State may also be sued elsewhere. In employment disputes, this could be:

(a) the place where the employee habitually carries out his work; or

(b) if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts of the place where the business which engaged the employee was or is now situated.

Jurisdiction clause

If the parties to the employment contract have agreed in writing to submit to the jurisdiction of the courts of a contracting state, then, then the courts of the country chosen by the parties will have jurisdiction but *only* if the employee invokes this agreement or the agreement is entered into after the dispute has arisen. If no agreement has been formulated, Art 4 of the Rome Convention then states that the contract should be governed by the laws of the state to which it is most closely connected with.

4. The Rome Convention 1980 on Applicable Law

General rule – the chosen law of the parties

The general rule under the Rome convention is that a contract is to be governed by the law chosen by the parties. If no choice of law was made in the contract, then the contract will be governed by the laws of the country to which it is most closely connected.

Mandatory rules – in the absence of choice
In employment matters, Art 6(1) provides that the choice of law of the parties shall not have the result of depriving an employee of the protection afforded to him by the mandatory rules of law *which would be applicable in the absence of choice.* This gives the employee the best of both worlds: where mandatory rules of English law give better protection, they will prevail, but if not, then the law of the contract will prevail.

Art 6.2 explains which mandatory rules will apply in the absence of contractual choice, or if their provisions are more favourable to the employee in the context of the right in dispute: it states that the contract of employment shall be governed:-

(a) by the law of the country in which the employee habitually carries out his work – even if he is temporarily in another country; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
(c) unless if appears from the circumstances that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Closely connected
'Closely connected 'means how the employee is paid, how the employee is managed, the location from which disciplinary sanctions emanate etc…At the end of the day, it will be a complex exercise to determine whether a mandatory rule of say English law offers better protection than the rule of the system of law chosen by the parties – is it better for the employee to present a claim of unfair dismissal under UK law or under Danish law?

Mandatory rules – irrespective of the law that otherwise applies to the contract
This is where Art 7(2) puts a further twist on the ball by providing that 'nothing in this Convention shall restrict the application of the rules of law of the forum in a situation where they are mandatory *irrespective of the law otherwise applicable to the contract*.' The mandatory rules that fall within Art 7(2) include those in respect of rights set out in the Posting of Workers Directive. In the UK, the provisions of the Employment Rights Act 1996 and most employment legislation are seen as mandatory rules under Art 7 (2) and similarly in other signatory countries, employment protection rights legislation will fall within the ambit of Article 7(2).

5. Protection of 'Home' State Employment Legislation

Whether or not an employee temporarily posted to another Member State can rely on its 'home' state employment protection rights will depend on the 'home' Member State's national laws as to domestic mandatory rules and jurisdiction.

Claiming Unfair Dismissal in the UK
The current position on the applicable law to a claim for unfair dismissal is that it is not enough for a worker to establish a 'sufficient connection' to Great Britain to claim: the test is whether the employment is in Great Britain.

The House of Lords recognises that there has to be a degree of flexibility in applying this test to workers who are temporarily visiting another EU jurisdiction as the Posting of Workers Directive does not exclude protection in the jurisdiction from which there is a temporary absence. Accordingly, determination of the appropriate jurisdiction for an employment claim in the UK will be done on a case by case basis. In most cases, 'it will not be difficult to determine whether the employment is in Great Britain; borderline cases will depend on an assessment of all the circumstances of the employment in the particular case'.

Unfortunately, such an assessment is not always straightforward in practice: will somebody who spends half of his time working in the UK be employed in Great Britain? What about someone who is employed under an employment contract he has signed here but then works abroad? Until further guidance is issued, either by Parliament or through the Courts, there will be considerable uncertainties about the jurisdiction of the Employment Tribunal to hear claims for unfair dismissal where employees are not located in Great Britain.

Claiming Discrimination in the UK

The jurisdiction of the UK Employment Tribunals to hear claims under the sex and race discrimination legislation is wider than for unfair dismissal claims and applies to an employee. In the recent case of Saggar (&ors) v Ministry of Defence, the Employment Appeal Tribunal, considering the application of the Race Relations Act and the Sex Discrimination Act 'unless the employee does his work wholly outside Great Britain' held that attendance at a training course in the UK for an employee normally working abroad may be work: the important factors being the contractual position, the content of the work, its duration and regularity.

Note that the new Section 8 of the Race Relations Act is now in force extending the protection of the Act in respect of discrimination on the grounds of 'race or national or ethnic origin' to employees who work wholly outside Great Britain, where they are essentially British based workers posted to work for a UK company abroad.

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