Question put to the ECJ

Is the effect of an E101 certificate issued in accordance with Articles 11(1) and 12a(1a) of Regulation No 574/72 by the institution designated by the competent authority of the Member State, whose social security legislation remains applicable to an employee, binding on the courts of that Member State if the conditions under which the employee carries out his activities manifestly do not fall within the scope of the exceptions set out in Article 14(1) and (2) of Regulation No 1408/71?

ECJ's findings

As long as an E101 certificate is not withdrawn or declared invalid, the competent institution of the Member State in which an employee actually works must take account of the fact that the person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot subject the worker to its own social security system.

However, it is incumbent on the competent institution of the Member State which issued the E101 certificate to reconsider whether it was properly issued and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the employee actually works expresses doubts about the basis on which it was issued, in particular because the information it was based on does not correspond to the requirements of Article 14(2)(a) of Regulation No 1408/71.

The Court noted that if the institutions concerned do not reach agreement about how to interpret the facts, it is open to them to refer the matter to the Administrative Commission. If the Administrative Commission does not manage to reconcile the conflicting views, the Member State in which the employee actually works may bring infringement proceedings under Article 259 TFEU in order to enable the court to examine the relevant legislation and whether the information in the E101 certificate is correct.

As long as an E101 certificate has not been withdrawn or declared invalid, the certificate takes effect in the internal legal order of the Member State to which the employee goes in order to work and therefore, binds the institutions of that Member State. In addition, a person who uses the worker's services must act in reliance on the certificate. If that person doubts the validity of the certificate, he or she must inform the relevant institution.

In the case at hand, however, it seems the French authorities did not communicate their concerns sufficiently to the Swiss Social Insurance Office and did not attempt to refer the matter to the Administrative Commission. Therefore, the case did not actually reveal any deficiencies in the procedure determined by ECJ case-law, nor did it show that it is impossible to resolve instances of unfair competition or social dumping.

Ruling

The answer to the question referred is that an E101 certificate issued by the institution designated by the competent authority of a Member State pursuant to Article 14(2)(a) of Regulation No 1408/71, is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even if it is found by the courts in that Member State that the conditions under which the workers carried out their activities manifestly do not fall within the material scope of the provisions of Regulation No 1408/71.

ECJ 2 March 2017, case C-97/16 (Perez Retamero), Employment status

José María Pérez Retamero – v – TNT Express Worldwide Spain SL and Others, Spanish case

Summary

Based on a challenge to the dismissal of a transporter of goods, certain questions were referred to the ECJ under Directive 2002/15 on the organisation of working time for persons performing mobile road transport activities. However, the questions related, not to dismissal, but to how 'mobile workers' were defined in the Directive (as the worker sought to establish that he was employed and therefore entitled to full employment rights). The Court ruled that, as the Directive related to how working time is organised, rather than dismissal, the questions were inadmissible.

Facts

Mr Perez Retamero worked as a transporter of goods for TNT, with whom he had concluded a contract governing the provision of transport services. TNT entrusted him with the task of delivering goods in Catalonia, in Spain. The contract provided that TNT could unilaterally change the principles and rules applicable to transport services, either wholly or in part.

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Under his contract, Mr Perez Retamero had to take out a transport insurance policy and assume responsibility for any loss or destruction of the goods or delivery delays. The initial term of the contract was six months but could be extended for successive periods of six months. He was to be paid a lump sum for each day covered and this was paid monthly. Further, the contract stipulated that the vehicle he used had to display the colours and advertising chosen by TNT. The vehicle which Mr Perez Retamero used was his own van, for which he carried a transport licence authorising him to carry out transport services.

As from January 2014, while Mr Perez Retamero still performed the same work, he began issuing invoices for his services to Sapirod, which was a company sub-contracted by TNT to deal with transport services. Mr Perez Retamero still performed the same work.

On the 17 February 2015, Sapirod informed Mr Perez Retamero that it could no longer offer him any work. That information was later confirmed by a letter of 6 March 2015.

National proceedings

On 17 March 2015, Mr Perez Retamero brought an action before the Labour Court in Barcelona. He sought to establish that he was bound by an employment contract with Sapirod and that his dismissal was therefore unlawful. He claimed that all of the elements that characterize an employment relationship were fulfilled. In addition, he claimed against TNT for making workers available unlawfully and to that end, sought an order that the two companies were jointly and severally liable.

To support his first claim, he stated that the objective exclusion provided for by Article 1(3)(g) of the Workers' Statute is contrary to Directive 2002/15, to the effect that he could not be classified as a 'self-employed driver' within the meaning of Article 3(e) of that directive.

According to the Labour Court, although the object of Directive 2002/15 was not to define 'employed workers' and 'self-employed workers', it had become essential that these terms were defined, because of their effect on the labour market.

The referring court pointed out that if the objective of EU law in the transport sector consisted in harmonising the rules of competition, the concepts of 'mobile worker' and 'self-employed driver' in Article 3(d) and (e) of the directive, should be the same in all Member States. The Labour Court therefore decided to stay proceedings and refer two questions to the ECJ for a preliminary ruling.

Questions put to the ECJ

1. Must the definition of 'mobile worker' in Article 3(d) of Directive 2002/15 be interpreted as precluding domestic legal provisions such as Article 1.3 (g) of the Workers' Statute, which provides that *"persons providing a transport service by virtue of administrative authorisations of which they are the holders, carried out … using vehicles … of which ownership or a direct power of disposal is vested in them, cannot be regarded as 'mobile workers'"*?
2. Must the second subparagraph of Article 3(e) of Directive 2002/15 be interpreted as meaning that, if none or only one of the criteria laid down for a person to be regarded as a 'self-employed driver' is fulfilled, the person concerned must be viewed as a 'mobile worker'?

ECJ's findings

The admissibility of the questions referred for a preliminary ruling was contested by Sapirod, TNT, the Spanish Government and the European Commission, and so the Court first of all sought to rule on the admissibility of the questions.

The Court found that the referring court had sought guidance on how to interpret the concepts of 'mobile worker' and 'self-employed driver' in Article 3(d) and (e) of Directive 2002/15, but that any interpretation of these terms should not go beyond the scope of that directive. The directive concerned working time, whereas the dispute in the main proceedings was about dismissal. It related, not to the organisation of working time, but to whether the person concerned should be classified as a 'mobile worker' and therefore as an employed person for the purposes of the application of national labour law and, more particularly, the law on dismissals.

Ruling

A dispute such as that in the main proceedings does not come within the scope of Directive 2002/15 and therefore the concepts articulated in Article 3(d) and (e) of that directive cannot apply to that dispute. Article 3(d) and (e) of Directive 2002/15 is therefore not necessary to resolve the dispute and the questions referred for a preliminary ruling by the Labour Court of Barcelona are inadmissible.

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