2019/32

Belgian jurisdiction and labour law apply despite contractual choice for Irish law and jurisdiction

CONTRIBUTOR Gautier Busschaert*

Summary

As a consequence of the ECJ's preliminary ruling, the Labour Court of Mons considered that Belgian courts and tribunals were competent and that Belgian labour law was applicable to a dispute arising between Crewlink Ltd. and certain members of its airline crew assigned to Ryanair, despite an express contractual clause providing for Irish jurisdiction and application of Irish law.

Legal background

According to Article 21 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation', applicable to the case, now replaced by Regulation (EU) No. 1215/2012 – 'Brussels I*bis* Regulation', Article 23),[1] an agreement on jurisdiction may depart from the Brussels I Regulation provisions only if it is entered into after the dispute has arisen or if it allows the employee to bring proceedings before courts other than those designated in accordance with Section 5 ('Jurisdiction over individual contracts of employment') of the same Regulation.

Article 19 of Section 5 (now Article 21 of Brussels I*bis* Regulation) states that an employer domiciled in a Member State may be sued either (1) in the courts of the Member State where it is domiciled or (2) in another Member State: (a) in the courts for the place where the employee habitually carries out their work or in the courts for the last place where they did so, or (b) if the employee does not or did not habitually carry out their work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Regarding the applicable national law, two European instruments have to be considered: for contracts concluded before 17 December 2009, the 1980 Rome Convention on the law applicable to contractual obligations ('Rome Convention')[2] settles the rules whereas those concluded after this date are governed by Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I Regulation').[3]

These instruments contain similar rules. In principle, parties are free to choose the applicable law,[4] but a choice of law made by the parties may not have the result of depriving the employee of the protection afforded to them by the mandatory rules of the law which would be applicable in the absence of choice. Consequently, in the absence of such a choice, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out their work in performance of the contract. Where the law applicable cannot be determined pursuant to this rule, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated, or, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated by the two previous criteria, by the law of that other country.[5]

Facts and claims

Crewlink Ltd. is an Irish company based in Dublin. It specialises in recruiting, training and employing airline cabin crew for Europe's leading low-fares airline companies among which is Ryanair.

* Gautier Busschaert is an Attorney at Van Olmen & Wynant.

1. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal L 012*, 16/01/2001, p. 0001–0023.
2. 1980 Rome Convention on the law applicable to contractual obligations, *Official Journal C 027*, 26/01/1998, p. 0034–0046.
3. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal L 177*, 4/7/2008, p. 6–16.
4. Article 3 of the Rome Convention and Article 8 of the Rome I Regulation.
5. Article 6 of the Rome Convention and Article 8 of the Rome I Regulation.

doi: 10.5553/EELC/187791072019004003009

On 8 December 2011, five claimants from different nationalities filed an action against Crewlink Ltd. before the Labour Tribunal of Charleroi, Belgium for various reasons related to their contracts of employment with Crewlink Ltd. (e.g. payment of wage arrears, payment of a night premium and payment of overtime hours, etc.).

Each of these contracts provided that these workers would be employed by Crewlink Ltd. and seconded as cabin crew with Ryanair for duties such as "*passenger safety, care, assistance and control, boarding and ground assistance … on-board sales, cleaning of the interior of the aircraft, safety checks and all the relevant tasks which can be … entrusted by the company*".

Written in English, these contracts also stated that their work relationship would be subject to Irish law and that the courts of that Member State had jurisdiction over all disputes relating to the performance or termination of these contracts. Similarly, their remuneration would be paid into an Irish bank account.

It was also stipulated that "*the client's planes [were] registered in Ireland, and as [the employees would] be performing the tasks on those planes, [their] employment [was] based in the Republic of Ireland*". However, Charleroi airport was designated as their "*home base*" and each of them had to reside within a one-hour journey of the base to which they would be assigned, knowing that the employer could decide to transfer them to another home base at any moment.

The claimants considered that Crewlink Ltd. had wrongly applied Irish law to their contracts of employment, which conferred less protection on them than Belgian labour law, despite the fact that none of them had ever had any link with Ireland. The claimants had not resided in Ireland nor had they worked there. Additionally, for most of them, they had not been there more than once and then only to sign their contracts and to open a bank account. As a consequence, they requested the application of Belgian law under the jurisdiction of Belgian courts and tribunals.

Judgments

Initial proceedings

By a judgment pronounced on 4 November 2013, the Labour Tribunal of Charleroi held that Belgian courts and tribunals did not have jurisdiction over the claimants' applications.

Appeal

On 28 November 2013, the claimants brought an appeal against this judgment before the Labour Court of Mons, claiming that they had no link with Ireland and that they had settled and lived in Belgium from where they would start their working day on a daily basis on board aircraft chartered by an Irish company (Ryanair) with which they were seconded by another company (Crewlink).

Therefore, Belgian law should be applied before Belgian jurisdictions as Belgium is the country from which they habitually accomplish their work, in accordance with the most recent case law of the ECJ.

Crewlink Ltd. contended that Irish law should be applied before Irish jurisdictions considering that Irish law and jurisdictions were designated by the contracts, Irish social security law had been applied during the whole duration of the contract, the salaries were paid into an Irish bank account and subject to Irish tax law, the claimants were never working on domestic flights but on international flights chartered by an Irish company, and Crewlink Ltd. did not possess any office in Belgium from which work was organised.

In its first judgment, the Labour Court of Mons stated that the appeal brought by the claimants was admissible. Notably, it decided that a jurisdiction clause, such as that agreed in the contracts in the main proceedings, did not meet either of the requirements set out in Article 21 of the Brussels I Regulation (Article 23 of Brussels I*bis* Regulation) and that, consequently, that clause was not enforceable against the appellants in the main proceedings.

Staying the proceedings, the Labour Court of Mons nonetheless decided to refer a question to the ECJ for a preliminary ruling (under Article 267 of the Treaty on the Functioning of the European Union) in order to help it determine whether Belgian courts and tribunals were competent or not under Article 19(2) of the Brussels I Regulation (Article 21(1) of Brussels I*bis* Regulation).

The Labour Court of Mons asked the ECJ the following question:

> may the concept of the 'place where the employee habitually carries out his work' referred to in Article 19(2) of the [Brussels I Regulation] be interpreted as being comparable to that of 'home base' (…) for the purpose of determining the Contracting State (and thus the jurisdiction) on whose territory an employee habitually carries out his work where the employee is employed as a member of the air crew of an airline, subject to the laws of a Member State of the European Union, that transports passengers internationally by air throughout the territory of the European Union, since that criterion of connection, based on the 'home base', in the sense of 'the effective centre of the work relationship', inasmuch as the employee systematically begins and ends his working day at that place, organises his daily work there and, throughout the period of his contractual relationship maintains his residence there, is the criterion which both indicates the closest connection with a Contracting State and ensures the most satisfactory protection of the weaker party in the contractual relationship?

Preliminary questions to the ECJ (C-168/16 & C-169/16)

Answering this question, the ECJ held on 14 September 2017 that Article 19(2)(a) of Brussels I Regulation (Arti-

cle 21(1) of Brussels I*bis* Regulation) had to be interpreted as meaning that, in the event of proceedings being brought by a member of the air crew, "the concept of 'place where the employee habitually carries out his work', within the meaning of that provision, [could not] be equated with that of 'home base', (…)". Also, importantly it added: "[t]he concept of 'home base' constitutes nevertheless a significant indicium for the purposes of determining the 'place where the employee habitually carries out his work'"[6] unless closer connections were to be displayed with a place other than the 'home base'.[7]
However, for the ECJ, this is not the only indicator to be taken into consideration to determine "*the place from which*" an employee active in the international transport sector principally discharges their obligations towards their employer. National jurisdictions should also ascertain (i) the place from which the employee carries out their transport-related tasks, (ii) the place where they return after their tasks, receive instructions concerning their tasks and organise their work, and (iii) the place where their work tools are to be found. In circumstances such as those at issue in the main proceedings, the place where the aircraft aboard which the work is habitually performed is stationed must also be taken into account.[8]
However, the habitual place of work cannot be equated with the territory of the Member State of nationality of the aircraft of the company.[9]

Second judgment in appeal by the Labour Court of Mons (14 June 2019)

As regards the jurisdiction of the Belgian courts and tribunals, the Labour Court of Mons first stated that the ECJ had agreed on the point that the jurisdiction clause could not be relied on against the claimants in application of Article 21 of Brussels I Regulation (Article 23 of Brussels I*bis* Regulation).
In addition, for the Labour Court of Mons, the ECJ had confirmed its jurisprudence concerning "*the place where the employee habitually carries out his work*". Indeed, when a court of a Member State is not able to determine with certainty the "*place where the employee habitually carries out his work*", it must, in order to assess whether it has jurisdiction, identify "*the place from which*" that employee principally discharged their obligations towards their employer. The national court must therefore refer to a set of indicia among those mentioned by the ECJ in its judgment.
As a result, the Labour Court of Mons estimated that Charleroi was to be identified as the place from which the employee principally discharged their obligations towards their employer. Indeed, the claimants were organising their work and received instructions from there. It was also the place from where they started their mission and the place where they returned after its completion. The planes on which they were working were stationed in Charleroi which was also their home base. The planes were sometimes in transit in another airport and were not always returning straight to Charleroi. This was not important for the Court so long as Charleroi was one of those places where passengers were (dis)embarking.
Also, the Labour Court reiterated that the home base was a significant indicator and that the nationality of the plane upon which the airline crew spent most of their time was not relevant. Nor was the place from where instructions were sent to the crew so long as they were received in Belgium. Consequently, the Labour Court ruled that the Belgian courts and tribunals had jurisdiction over the claims introduced by the airline crew.
As for the applicable national law, according to the Rome Convention and the Rome I Regulation, a choice of law made by the parties may not have the result of depriving the employee of the protection afforded to them by the mandatory rules of the law which would have been applicable in the absence of choice.
In this context, the Court had to identify whether the law of the place where the employees habitually carried out their work, i.e. Belgium, could be overruled by the law of a country with which the contract would be more closely connected. On this last point, the Court noted that none of the claimants had Irish nationality or resided in Ireland or had gone to Ireland except for signing the contract and opening a bank account, while Irish social security law was imposed on them at a time when the 'home base' was not yet the exclusive factor for determining the competent Member State.
The Labour Court of Mons hence decided that the applicable national law was Belgian law, in its mandatory content. It reopened proceedings with a view to determining if the provisions of Belgian law that had been infringed were of a mandatory nature and, if yes, to check if they granted a more favourable protection to the employee than comparable Irish law provisions.

Commentary

This judgment is in line with the preliminary ruling of the ECJ. It relies on well-settled case law of the ECJ as to the notion of habitual place of work in the international transport sector defined as the place from which an employee principally discharges their obligations towards their employer and applies the circumstantial method suggested by the ECJ for determining such a place, having regard to the factors highlighted by the Court including the home base as a significant indicium.
However, the Labour Court of Mons goes further in saying that the nationality of the plane has no bearing on the determination of the competent jurisdiction, whereas the ECJ held that the nationality of the plane cannot be equated with the habitual place of work, which is not the same thing.
This judgment is also important for its findings on applicable law. The Labour Court applied the case law

6. ECJ 14 September 2019, C-168/16 & C-169/16 (*Nogueira and Others*), § 78.
7. Ibid., § 73.
8. Ibid., § 63 and 64.
9. Ibid., § 76.

doi: 10.5553/EELC/187791072019004003009

of the ECJ by analogy, which is in line with what the ECJ itself does when it rules that corresponding provisions in the Rome I and Brussels I*bis* Regulations should take each other into account.[10] However, there is an important limit to that exercise since Article 8(4) of the Rome I Regulation provides that the law of the habitual place of work can be overruled when there is a closer connection with the law of another country. This does not raise any problem in this case as the claimants had no link with Ireland. This is something highlighted by the Labour Court itself. But what would happen if the claimants had been Irish or if their contracts were to be partly executed in Ireland through, e.g., on-site training? Would this be enough to change the habitual place of work?

A more complex situation would arise if the claimants were to be assigned several home bases or one home base after the other for a short period of time. Could we still claim that there is an habitual place of work? From a jurisdiction perspective, Article 21 of the Brussels I*bis* Regulation takes the last habitual place of employment into account. So a change of home base would not seem too problematic so long as the last home base is permanent and not temporary. Several home bases at the same time would be a trickier matter as one should examine where the employee works most of the time. The same kind of issues would arise from a conflict of law perspective.

The situation would become even more intricate if the home base did not (entirely) correspond to (i) the place from which the employee carries out their transport-related tasks, (ii) the place where they return after their tasks, receive instructions concerning their tasks and organise their work, and (iii) the place where their work tools are to be found.

In view of the above, the *Crewlink* case may be considered as a simple one, leaving many difficult legal issues unsettled to the benefit of some airline companies which could be tempted to exploit this regulatory gap for imposing the place of engagement, rather than the habitual place of work, as the main connecting criterion in the aviation sector, both from a jurisdictional and a conflict of law perspective.

Comments from other jurisdiction

Italy (Caterina Rucci, Katariina's Gild): This case shows us the application by a Belgian court and additionally an ECJ preliminary ruling of the most recent case law and related principles both on jurisdiction and applicable law, which led to recognizing Belgian courts' jurisdiction and duty to apply Belgian law, despite different clauses providing for the application of Irish law by Irish courts. No doubt that a similar case in Italy would have led to the same conclusion.

The impression is however that in Italy the Irish company Ryanair to whom the personnel were seconded by Crewlink has adopted a different method as a result of decisions like this one: Ryanair has in fact recently signed a collective bargaining agreement with Italian Unions, subject to Italian law, for personnel on its planes starting their work from Italy. This decision comes however after a number of Italian cases in which Ryanair had been condemned for anti-union behaviour. The most recent Italian cases by the way concerning the new hand baggage policy of Ryanair are under review, after two different decisions, due to alleged unfair competition.

Subject: Private International Law

Parties: Sandra Nogueira, Victor Perez-Ortega, Virginie Mauguit, Maria Sanchez-Odogherty, José Sanchez-Navarro – v – Crewlink Ireland Ltd

Court: Labour Court of Mons

Date: 14 June 2019

Case number: 2013/AM/441

Internet publication: http://www.terralaboris.be/IMG/pdf/ctm_2019_06_14_2013_am_441.pdf

10. Ibid., § 55.

doi: 10.5553/EELC/187791072019004003009