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End of the Ryanair saga: a trade union victory with a bitter taste for the employees involved (BE)

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Summary

Ryanair and Crewlink have finally been found in violation of Belgian mandatory provisions following the ruling of the ECJ in cases C-168/16 and C-169/16 *(Nogueira and Others)* and ordered to pay certain amounts to the employees involved by virtue of Belgian mandatory provisions. Yet, this trade union victory has a bitter taste for those employees, who were refused their main claim, i.e. to be paid normal remuneration for on-call time at the airport.

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 *Ibis* 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 *Ibis* 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

The facts have already been detailed in a previous report published in this review (see Gautier Busschaert, 'Belgian jurisdiction and labour law apply despite contrac-

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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 January 2001, pp. 0001-0023.
2. 1980 Rome Convention on the law applicable to contractual obligations, *Official Journal C 027*, 26 January 1998, pp. 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 July 2008, pp. 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.

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tual choice for Irish law and jurisdiction' (subsequent to ECJ *Crewlink* case), **EELC 2019/32**). Therefore, we limit ourselves here to recalling the main facts and claims, and we refer you to the previous report for more details on this subject.

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. Ryanair is also based in Dublin.

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.). Moreover, on the same day, another claimant filed an action against Ryanair, for similar reasons.

The employment contracts of the claimants 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.

Previous legal proceedings

The previous legal proceedings have already been detailed in a previous report too (see Gautier Busschaert, 'Belgian jurisdiction and labour law apply despite contractual choice for Irish law and jurisdiction' (subsequent to ECJ *Crewlink* case), **EELC 2019/32**). Therefore, we limit ourselves to recalling the main steps of the various legal proceedings and we refer you to the previous report for more details on this subject.

Despite the jurisdiction clause, the claimant brought their claims before the Belgian courts and tribunals.

Ruling in appeal, the Labour Court of Mons asked a preliminary question to the ECJ about the interpretation of the concept of the "place where the employee habitually carries out his work" referred to in Article 19(2) of the Brussels I Regulation.

After having received the answer from the ECJ, in its judgment of 14 June 2019, the Labour Court of Mons decided that Belgian courts and tribunals had jurisdiction over the claims because Charleroi was to be considered as the "place from which the employee principally discharged his obligations towards his employer". Regarding the applicable national law, the Labour Court of Mons decided that the mandatory provisions of Belgian law applied to the employment contracts of the claimants, despite the choice for Irish law in the contracts themselves. It reopened proceedings with a view to determining whether the provisions of Belgian law that had been infringed were of a mandatory nature and, if yes, to assess if they granted a more favourable protection to the employee than comparable Irish law provisions.

Third judgment in appeal by the Labour Court of Mons

The claimants had several claims against Ryanair and Crewlink. They requested various amounts in respect of arrears of remuneration (in particular for on-call duty at the airport), public holidays, guaranteed salary in the event of incapacity for work, holiday pay and exit pay, and the value of meal vouchers. These claims were based on provisions of Belgian law that were more favourable to the employee than the corresponding provisions of Irish law.

Regarding the arrears of remuneration, the employee's claim against Ryanair must be distinguished from the claim of the other five employees against Crewlink.

In the former case, the Court noted that the monthly salary received by the employee was below the average minimum monthly income guaranteed under Belgian law. However, Ryanair argued that flight bonuses should also be taken into account to assess whether the average monthly minimum income was reached. The Court did not dispute this reasoning. However, it found that Ryanair did not demonstrate that it had paid these flight bonuses to the claimant, which the claimant also contested. The Court therefore ordered Ryanair to pay flight allowances for the entire duration of the employment contract.

In the latter case, the employees' salary was mainly composed of two elements: a flight premium at an hourly rate of € 16.20 and a lump sum remuneration of € 30 for each on-call day at the airport. The claimants requested the payment of on-call time at the hourly rate of € 16.20 instead of € 30 per day.

Regarding those on-call days, the Labour Court noted that neither Directive 2003/88/EU nor the Belgian Law of 16 March 1971 addressed the issue of remuneration of employees for on-call time. The Labour Court also stated that the ECJ had decided on several occasions that on-call periods were to be considered as working time when spent at the place of work, here the airport, but that EU law did not preclude Member States from providing for less remuneration for periods of on-call duty than for periods when work is actually performed. The Law of 16 March 1971 does not provide for that right either. Consequently, the Court decided that the remuneration of on-call days at € 30 per day was not contrary to the Belgian mandatory provisions.

With regard to public holidays, the Court decided that the Belgian provisions in this area were mandatory. Noting that Irish law provided for only nine public holidays per year instead of ten days per year under Belgian law, the Court ordered the employers to pay each of the applicants one additional public holiday per year. Moreover, the Court also ruled that public holidays could not be paid at a lump sum lower than the actual daily wage. Crewlink was therefore ordered to compensate the former employees for the difference.

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Regarding the meal vouchers, the Court ruled that the Belgian provisions in this area were mandatory too. However, the Court found that the cabin crew meal allowance was already included in the flight premium and therefore the claimants were not entitled to additional meal vouchers.
Regarding the guaranteed salary in the event of incapacity for work, the Court found that the protection of workers' remuneration, and thus the provisions relating to the guaranteed salary, were mandatory. However, Irish law does not provide for payment of wages in the event of incapacity, whereas Belgian law does. The Court therefore ordered the employers to pay to the claimants an amount equivalent to the salary they should have received during their period of incapacity.
Regarding the holiday pay, the Court found that the provisions relating to it were mandatory under Belgian law as well. After noting that Irish law only provided for the normal remuneration during holidays, while Belgian law provided for the double holiday pay and for an exit pay in the event of termination of the employment contract, the Court ordered the employers to pay a double holiday pay as well as an exit pay to the claimants.
Regarding the purchase of the work uniform that was imposed on the employees, the Labour Court decided that the Belgian provisions in this regard were mandatory, and the Court thus ordered Crewlink to reimburse the purchase of the work uniforms.
Finally, two employees were dismissed by Crewlink without the payment of an indemnity in lieu of notice (or with an indemnity lower than the mandatory amount under Belgian law). The Labour Court found that the Belgian provisions regarding notice in the event of dismissal were mandatory laws and therefore it ordered Crewlink to pay the indemnity in lieu of notice calculated following the Belgian rules to both claimants.

Commentary

This third judgment in appeal by the Labour Court of Mons puts an end to an ongoing legal battle between Ryanair and Belgian trade unions over the working conditions of its staff at the Brussels South Airport.
As a matter of principle, it becomes more difficult for Ryanair to claim the application of Irish law and competence of Irish jurisdictions for its staff not only in Belgium but all over Europe. The concept of 'habitual place of work' has been clarified for the aviation industry by the ECJ and the potential for abuse linked to a lack of legal certainty has been strongly curtailed. Flying staff can now clearly claim competence of the jurisdiction and application of the law of 'the place where, or from which, the employee in fact performs the essential part of their duties vis-à-vis their employer' by relying on a set of factors recognised by the ECJ, i.e.:

- the place from which the worker carries out their transport-related tasks;
- the place where they return after their tasks, receive instructions concerning their tasks and organise their work;
- the place where their work tools are to be found;
- the place where the aircraft aboard which the work is habitually performed is stationed; and
- the place where the 'home base' is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

Yet, the victory of the Belgian trade unions has a bitter taste for the employees that were actually claiming money from Crewlink and Ryanair. On the positive side, the Labour Court has confirmed that flying staff cannot be required to pay for their working uniform, which is normal according to Belgian law. On the negative side, stand-by time at the airport can still be paid at € 30 per day, which is a very low amount, without violating Belgian mandatory provisions.
This sheds light on an important aspect of European (and Belgian) working time legislation which is often ignored, which is that on-call time does not need to be remunerated in the same way as normal work. The ECJ has been clear about that (see e.g. Case C-437/05, *Vorel*, 11 January 2007, para. 35, mentioned in the judgment). The Labour Court of Mons even goes further and states that on-call time could even not be remunerated at all, which may sound surprising to say the least considering that, according to Belgian law, by signing an employment contract, employees agree to perform work *in return* for remuneration.

Comments from other jurisdictions

Germany (Niklas Stöckl, Luther Rechtsanwaltsgesellschaft mbH): A German labour court would most probably have decided in the same way as the Labour Court of Appeal of Mons, with the same line of reasoning. In particular, it would have assumed that the jurisdiction clause contained in the employment contracts with Crewlink and Ryanair was inadmissible under Article 23 of Regulation (EU) No. 1215/2012 (Brussels *Ibis* Regulation). Next, a preliminary question before the ECJ on the interpretation of the term "place where the employee habitually carries out his work" would have revealed that the German courts have jurisdiction over flight crew based at a German airport.
On the question of applicable law, a German labour court would have argued similarly to the Mons Labour Court: Any choice of law in an employment contract must not deprive the employee of the protection of the law which would be applicable if no choice of law was given.
In the absence of a choice of law, German law would be applicable to the plaintiffs' employment contracts pursuant to Article 8 para. 2 of the Rome I Regulation. This

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is as they habitually perform their work in Germany in fulfilment of their contract, provided that a German airport is their operational base. Therefore, it is decisive whether a breach of mandatory provisions of German law exists and, if so, whether those provisions are more favorable than comparable Irish law.

With regard to the claim against Ryanair for payment of back pay, the following can be said: The difference between the wage actually paid and the collectively agreed minimum wage or, in the absence of such agreement, the statutory minimum wage independent of the industry, can also be claimed under German law. Under German law, supplements, allowances and bonuses are in principle taken into account when calculating the minimum wage. This does not apply only if the bonus or payment has a special statutory purpose that prohibits its counting towards the minimum wage. This is the case, for example, with night bonuses under Section 6 para. 5 of the Working Time Act (*Arbeitszeitgesetz*, 'ArbZG'). In the case of pure flight bonuses, it would be difficult to justify a special statutory purpose. In this respect, a German labour court would have made the same decision as the Mons labour court. So it is likely that it would have decided that Ryanair must pay the flight bonuses if no proof of payment could be provided, but otherwise it would have dismissed the claim.

Regarding the claim brought by the five remaining workers against Crewlink, the employees claimed that they should be paid € 16.20 per hour for on-call duty instead of € 30 per day of on-call duty. Under German law, it is in principle recognized that on-call time has to be compensated. However, a full compensation is not necessarily required. That said, it needs to be noted that German law differs between on-call duty as on-call service ('*Rufbereitschaft*') and service times ('*Bereitschaftsdienst*'). Considering that Crewlink's employees remain on the airport premises during on-call times, it can be assumed that they are not just on-call service, but are on service times. Service time is work that has to be remunerated with the minimum wage according to Section 611(1a) of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). However, the entitlement to minimum wage is fulfilled if the minimum wage per hour is achieved through the remuneration of full-time work and on-call time. In other words, German law requires that, on average, every hour of work, whether on-call or on a regular basis, has to be remunerated at the statutory minimum wage. If this is not the case, employees are entitled to a top-up under German law. In this respect, a German labour court could decide differently than the Court in Mons with regard to a flat-rate daily remuneration of € 30 for on-call work.

The decision on holiday work by a German labour court would read as follows: There is no statutory right to wage supplements for work on public holidays in Germany. However, according to Section 9 para. 1 of the Working Time Act, in Germany it is prohibited to work on public holidays. If employees are employed on a weekday that is a public holiday, they are entitled to an alternative day of rest, according to Section 11 para. 3, sentence 2 ArbZG. Depending on the federal state, there are between nine and 13 public holidays per year in Germany. Hence, it is impossible to make a generally binding statement on the extent to which German labour law offers greater protection for workers than Irish law with its nine public holidays per year. However, in any case, a German labour court would not oblige Crewlink to pay for the public holiday work in arrears, but would instead require Crewlink to provide a corresponding number of rest days within the meaning of Section 11 ArbZG.

Regarding the claim for payment of meal allowances, according to German law, the employer is only obliged to pay meal allowances if it has promised them in the employment agreement, in an overall commitment, a standard company regulation, by company agreement or by company practice. In some cases, these can also be found in collective agreements. Without such stipulation/commitment, the flying personnel are not entitled to the payment of an allowance. Here, too, German law does not offer any more extensive protection than Irish law.

With regard to the wage guarantee in the event of incapacity for work, German labour law provides more extensive protection than Irish labour law. Pursuant to Section 3 para. 1 of the Continued Remuneration Act (*Entgeltfortzahlungsgesetz*, 'EFZG'), the employee is entitled to continued payment of wages against his employer for six weeks, whereas Irish law does not provide for continued payment of wages in the event of incapacity for work.

In accordance with the case law of the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), the employer has to bear the costs of work equipment. It is likely that this also includes the flight attendants' work clothes, as they are obliged to wear it at work. In this respect, a German labour court would have decided like the Labour Court in Mons.

The German law on protection against unlawful dismissal has a different approach than Belgian law. In principle, the aim is to continue employment in the event of (socially) unjustified termination. In Belgian law, on the other hand, dismissal always leads to termination of the employment relationship in return for severance pay, which may be higher or lower depending on the individual case. In this respect, German and Belgian labour law are simply not comparable. It is therefore not possible to determine how a German labour court would have dealt with the dismissals in question.

Overall, it can be stated that German labour law has much more in common with Belgian labour law than with Irish labour law and that a similar decision from a German labour court would not be surprising.

The Netherlands (Jan-Pieter Vos, Erasmus School of Law): This summer, the ECJ's *Crewlink* judgment was pivotal in a series of Dutch judgments (ECLI:NL:GHAMS:2021:2319 is mostly cited). In particular, lower and higher courts interpreted the importance of the concept of 'home base' differently.

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Initially, the Haarlem Subdistrict Court (Subdistrict Court) had to decide on its competency to hear claims connected with the dismissal of pilots of Netjets, a UK-based private flight airline. The pilots' employment contracts stipulated that they had no formal place of work. They were free to select a 'gateway airport'/home base, to be agreed upon by Netjets, which was Schiphol Airport (Amsterdam) in these cases. The pilots received instructions at home by email and/or an iPad app from Netjets staff in Portugal. A pilot would work for six days (a 'tour') followed by five days off. Each tour would start and end at the gateway airport but could lead anywhere during the tour. A tour would start either by a flight from the gateway airport or a transportation by scheduled flight paid for by Netjets to an airport from where they would operate a Netjets aircraft. During the tour, Netjets provided for transport and housing. The location of the aircrafts varied. Also, the pilot had to live within one hour of their gateway airport.

Deciding on the court's competency, the Subdistrict Court had found that, while Schiphol Airport was the home base, this was not relevant as the pilot had been free to make this choice themselves. As it found that a habitual place of work could not be distinguished from the other factors, the Subdistrict Court found that the place where the business which engaged the employee is or was situated (Article 21(1)(b)(ii) of Regulation 1215/2012) was decisive, i.e. London, UK.

However, the Amsterdam Court of Appeal overturned these judgments. It stressed that the ECJ held that the principle of 'home base' can be an important factor in determining the competent court; in fact, only if the claims were more closely connected to another place than the home base, the latter would be irrelevant in determining the habitual place of work. The Court of Appeal also found it important that the definition of home base in Netjets' Operations Manual was almost identical to the definition of home base in Regulation 3922/91. Schiphol Airport was the home base; the Court of Appeal found it irrelevant that 'in theory' this can be changed. The Subdistrict Court's decision on the competence was therefore annulled, so that it has to decide on the claims now.

While the approach of the Court of Appeal makes sense to me, the different initial judgment shows that there is always room for debate and surprise, even when we think that all is clear!

Romania (Andreea Suciu and Andreea Oprea, Suciu | The Employment Law Firm): Determining the usual place of work encounters difficulties especially in the hypothesis in which the element of extraneousness results from the multiple places of execution of the work, as is the case of the employee who works simultaneously in several states or of the employee who is successively assigned to an activity in different states.

In this respect, in the various judgments, the ECJ stated that the rule of special competence in the matter of the employment contract is justified by the idea of proximity. Further, the ECJ stated that in order to ensure adequate protection of the employee, the jurisdiction of the court to which the latter pays their obligations to the employer and where the employee can go to court or defend themselves, as the case may be, with the lowest costs must be admitted.

Therefore, we salute this judgment as in the European practice there have also been unfortunate cases in which different judgments have been handed down in identical situations. Edifying are the cases involving professional cyclists in which employees hired in Charleroi (Belgium) were domiciled in France where they trained in the period between international competitions. For these identical cases, either the French courts ruled in favour of the courts at the place of employment (Belgium) or the courts at the usual place of performance (France).

In addition, this case reminds us of a well discussed case handed down by the French Court of Cassation. In this case, a sailor, domiciled in Luxembourg, was hired by a Luxembourg company to sail aboard the Luxembourg-flagged *Ontario* ship between France, Italy, Croatia, Greece, Tunisia, Spain, Gibraltar and Portugal. After his dismissal in 2005, the sailor applied to the Cannes Labour Council for various benefits, as he had been working in the port of Cannes since September 2004 up until his dismissal (five months). In this case, based on ECJ case law, the French Court of Cassation took a step further and formulated its own definition of the notion of 'ordinary place of performance': the place where the employee devotes the largest part of his working time to his employer, taking into account the full period in case of stable periods of work in different and successive places, the last place of activity will have to be retained when, according to the clear will of the parties, it has been established that this will be the place where it will take place, in a manner stable and sustainable, the work of the employee.

Therefore, the Court of Cassation considered that the five months of activity in Cannes was sufficient to characterize, according to the Brussels I Regulation, the last place where the employee habitually carried out his activity, so that it ruled in the sense of admitting the jurisdiction of the French courts.

Starting from this French case, the Romanian doctrine gave distinct interpretations to the notion of 'ordinary place of performance', interpretations which obviously led to contradictory solutions in the Romanian case law. Moreover, there are certain Romanian specialized authors who consider (obviously by reference to the concrete data of the case) the fact that in situations where the element of extraneousness results from the multiple places of performance of the activity, without being able to identify a common place of execution of work (especially in the case of the personnel of a seagoing ship, of an airship, as well as in the case of telework), the jurisdiction of the court from the employer's headquarters shall be applicable.

In the light of the above, we once again applaud the ECJ reasoning behind the Ryanair saga which we appreciate adds clarity to the jurisprudence of each Member State

regarding the conflicts of international competence in the field of labour law.

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