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Applicable law and the impact of a long-term secondment: no clarity yet (LU)

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Summary

In its decision rendered on 19 May 2022, the Luxembourg Court of Cassation (*Cour de Cassation de Luxembourg*) ruled on the applicable law to the employment contract of an employee of a Luxembourg company who was on long-term secondment in France, most notably regarding the provisions applicable to determining retirement age and its consequence on the employment contract. The employee was hired at the age of 62 by a Luxembourg company pursuant to an employment contract governed by Luxembourg law and a few months later was seconded to France (to work at the head office of the group) for a period of five years. However, when the employee reached the age of 65, his employer informed him by means of a letter that, in accordance with the provisions of Luxembourg law, he was entitled to an old-age pension with the consequence that his employment contract was automatically terminated.
The Court of Cassation overturned the decision of the Court of Appeal on the ground of insufficient reasoning as it considered that the Court of Appeal did not respond to the arguments put forward by the employee, who had challenged the validity of his secondment (considering that France was the country in which the employee habitually carried out his work).

Facts

At the age of 62, an employee was hired by a Luxembourg company belonging to a French group as an alternative investment fund manager pursuant to an employment contract of indefinite duration governed by Luxembourg law and effective as of 1 June 2015.
By way of an amendment to his employment contract signed several months later, also governed by Luxembourg law, the employee was seconded to France to work at the head office of the group for a period of five years starting on 1 January 2016.
On 19 October 2017, the employer informed the employee by way of a registered letter that as he would reach the age of 65 on 5 November 2017, his employment contract was going to automatically terminate on the same date in accordance with the provisions of Article L.125-3 of the Luxembourg Labour Code, the employee being eligible to an old-age pension on that date.
The employee did not share the views of the employer on the basis that not Luxembourg but French law was applicable and that consequently his employment contract had not been automatically terminated by the effect of the law under Luxembourg law but had been in fact unilaterally terminated by his employer under French law. He then filed a claim for damages with the Labour Tribunal of Luxembourg (*Tribunal du travail de Luxembourg*) for unfair dismissal.
On 2 May 2019, the Tribunal decided that Luxembourg law, and more specifically Article L.125-3 of the Luxembourg Labour Code, was applicable to the employment contract, which was lawfully automatically terminated when the employee reached the age of 65. The Tribunal considered therefore that there was no dismissal (and *a fortiori* no unfair dismissal) as the letter sent by the employer to the employee was not a dismissal letter but merely informed him of an automatic termination, and as a result rejected all damages claims made by the employee.
The employee lodged an appeal against this decision. He asserted that (i) even though his employment contract provided that it was governed by Luxembourg law, mandatory provisions of French law were in fact applicable pursuant to Article 8 of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) (the 'Rome I Regulation')[1] as the country in which he habitually carried out his work was France, and (ii) it arose from such mandatory provisions

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1. Article 8 of 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) provides that the choice of the applicable law by the parties should not have the effect of depriving the employee of the protection afforded by the mandatory provisions of the law of the country in which the employee habitually carries out their work or where the employment contract is more closely connected.

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of French law, and more specifically Articles L.1237-4 and L.1237-5 of the French Labour Code, that (a) the provisions of an employment contract providing for automatic termination of this contract due to the age of the employee were null and void, and (b) an employee who has not yet reached the age of 70 has the right to refuse retirement.

The employer argued that the employee was employed by the Luxembourg company and then seconded to France at his request as he wished to continue to be registered with the Luxembourg pension scheme. The employment contract provided that it was governed by Luxembourg law and, pursuant to the Rome I Regulation, the choice of applicable law cannot prevent the employee from being afforded the protection provided by the overriding mandatory provisions (*lois de police*) of the law of the country in which he performed his work. In this framework, the employer did not dispute the fact that the country in which the employee habitually carried out his work was France, but asserted that the provisions of French law on retirement were not part of the matters to be mandatorily complied with by foreign employers seconding employees in France as per Article L.1262-4 of the French Labour Code,[2] nor provisions to be considered as overriding mandatory provisions (*lois de police*) within the meaning of Article 9 of the Rome I Regulation. As a result, Articles L.1237-4 and L.1237-5 of the French Labour Code were not applicable here, unlike Article L.125-3 of the Luxembourg Labour Code.

On 11 March 2021, the Court of Appeal, after recalling that:

- the employer agreed to the fact that, during his secondment, the employee's habitual place of work was France;
- pursuant to Article 8(1) of the Rome I Regulation, the choice of applicable law cannot have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice, i.e. here French law;
- the French legal provisions on retirement (Articles L.1237-4 and L.1237-5 of the French Labour Code) were not listed in Article L.1262-4 of the French Labour Code as a matter to be mandatorily complied with by foreign employers seconding employees in France and do not constitute overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation,

confirmed the judgment of the court of first instance, i.e. that the French legal provisions on retirement (Articles L.1237-4 and L.1237-5 of the French Labour Code) did not apply to an employee temporarily seconded to France so that the express choice of Luxembourg law to govern the employment contract did not have the result of depriving the employee of the protection afforded to him by mandatory provisions of French law. As a result, Article L.125-3 of the Luxembourg Labour Code applied and, as the employee reached the age of 65 and was eligible to an old-age pension, his employment contract terminated automatically and there was no unlawful termination by the employer.

The employee filed a petition before the Court of Cassation to challenge the legality of the decision of the Court of Appeal.

Decision of the Luxembourg Court of Cassation

The Court of Cassation had to rule on whether or not the Court of Appeal complied with the provisions of Article 8 of the Rome I Regulation.

According to the employee, the Court of Appeal should have sought to clarify:

- in which country the employee, in execution of his employment contract, habitually carried out his work,[3] it being noted that:
  - such country shall not be deemed to have changed if the employee is *temporarily* employed in another country;[4] and
  - where this usual place of work is located in a country, the choice of an applicable law cannot deprive the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law of this country;
- whether France was the country in which the employee habitually carried out his work regardless of the question of his secondment, as such *secondment was not temporary* within the meaning of Article 8(2) of the Rome I Regulation, but permanent;
- in the event France was the usual place of work, whether the provisions of French law on termination due to the reaching of retirement age[5] must be considered as protective provisions that cannot be derogated from by agreement pursuant to French national law (and not French international private law[6]).

The Court of Cassation overturned the decision of the Court of Appeal but did not take a position on the above. Indeed, the Court of Cassation grounded its decision on a lack of sufficient reasoning by the Court of

2. Article L.1262-4 of the French Labour Code provides a list of the mandatory provisions that must be applied to the seconded worker in the French territory, which does not include the conditions for the retirement of employees.
3. Article 8(1) of the Rome I Regulation.
4. Article 8(2) of the Rome I Regulation.
5. Articles L.1237-5 and D.1237-2 of the French Labour Code provide that retirement before the age of 70 cannot be imposed on an employee but requires prior agreement.
6. I.e. Article L.1262-4 of the French Labour Code listing the mandatory provisions that must be applied to the worker seconded in the French territory, which is a French international private law provision applicable only in the event of a cross-border secondment in France.

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Appeal in reaching its decision, as it arose from the appeal proceedings that:

– in his various briefs filed with the Court of Appeal, the employee challenged the existence of a temporary secondment to France within the meaning of Article 8(2) of the Rome I Regulation; and
– the Court of Appeal decided that France was the country in which the employment contract was executed during the secondment, while Luxembourg was the country in which the employee habitually carried out his work, on the sole basis of an acknowledgment of the employer that during the secondment the employee habitually carried out his work in France; and
– therefore the Court of Appeal did not answer the employee's arguments disputing the temporary nature of his secondment, and therefore the application of Article 8(2) of the Rome I Regulation.

Commentary

The fact that the Court of Cassation overturned the decision of the Court of Appeal on the basis of a lack of reasoning and consideration by the latter as to certain arguments put forward by the employee during the appeal proceedings renders the contribution that can be drawn from this decision questionable.

Indeed, notwithstanding the fact that the Court of Cassation rejected the employee's argument regarding an alleged ambiguous position of the Court of Appeal[7] to decide that the Court of Appeal's judgment must be interpreted in the sense that the usual place of work during the secondment was France, while the country in which he habitually carried out his work was Luxembourg, the Court of Cassation did not actually decide on the merits of such position, notably regarding the existence or absence of a genuine secondment situation.

According to the conclusions of the General Prosecutor, which were followed by the Court of Cassation in reaching its decision, the starting (and most important) point of the analysis was *not* to determine the usual place of performance of the work, *but the existence or absence of a genuine secondment situation*, as according to Article 8(2) of the Rome I Regulation, the usual place of performance of the work is not deemed to change from a legal standpoint if the employee temporarily carries out work in another country.

Further, in the event of a genuine secondment situation, the usual place of work must be Luxembourg in accordance with Article 8(2) of the Rome I Regulation; whilst, in the absence of a secondment, the judges must determine the usual place of work to check whether the employee was or not deprived from the protective rules that cannot be derogated from by agreement according to the laws of the country of such usual place of work in accordance with Article 8(1) of the Rome I Regulation.

Finally, it arises from the analysis of both European directives and European case law that:

– the existence of a genuine secondment situation requires *a sufficient link with the territory on which the seconded employee is sent*; and
– there is no legal provision providing for a distinction between 'temporary secondment' and 'permanent secondment' as referred to by the employee, it being noted that:
  • neither the directives nor case law provide for any time limit on a secondment, even if a secondment is necessarily for a limited period of time; and
  • a long-term secondment regime exists pursuant to which a seconded employee can benefit from almost all the laws applicable in the territory to which they are seconded, except certain matters like the formalities and conditions of termination of the employment contract.[8]

The Court of Cassation cannot be criticised for not having decided on whether there was a genuine seconding situation, as this is a matter of fact on which the Court of Cassation does not rule. However, the fact that it overturned the Court of Appeal's judgment on the basis of failure to address the employee's argument (who clearly challenged the existence of a genuine secondment situation) clearly indicates, like the General Prosecutor suggested, that this is the critical point to be addressed in this case.

The Court of Cassation referred the parties back to another Court of Appeal and, in view of the above, this forthcoming decision will certainly be of interest regarding the employee's arguments, and more generally the question of the law applicable to an employment relationship where the employee is hired and very swiftly thereafter seconded abroad for a long-term secondment.

Finally, it must be noted that the General Prosecutor referred to the criterion of the Court of Justice of the European (CJEU)[9] pursuant to which an employee can be considered as being seconded in the territory of a Member State only if the execution of their work has a sufficient link with this country, which requires a global analysis of all aspects that characterise this employee's activities. However, it is uncertain whether this case law will be of assistance to the new Court of Appeal, as there is no doubt here on the facts that the work carried out in the secondment territory was sufficient to create the necessary link, the real question being the link with the seconding territory.

In our opinion, this question should be approached on the basis of another decision regarding the question of the place of performance of work in matters of

7. The employee's main argument was that the Court of Appeal's decision was unclear on whether the employee was habitually carrying out his work (i) in France and permanently seconded to France, or (ii) in Luxembourg and temporarily seconded to France, which did not enable the Court of Cassation to check whether it complied with Article 8(2) of the Rome I Regulation.

8. Article 1 bis of Directive EC/96/71, as amended from time to time.

9. CJEU 19 December 2019, *Michael Doberberger – v – Magistrat der Stadt Wien*, C-16/18.

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jurisdiction, where the CJEU decided that the entire duration of an employment relationship must be taken into account to identify the place of performance of work, it being however noted that this decision did not take place in the context of a secondment situation.[10]

Comments from other jurisdictions

Germany (Kathy Just, Luther Rechtsanwaltsgesellschaft mbH): In a case that the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') had to decide on last year, one of the issues mentioned was whether a secondment was covered by Article 8 paragraph 2 sentence 2 of the Rome I Regulation, i.e. whether the work was carried out temporarily in another State or not. In this case, the parties were in dispute about remuneration claims after the employer hypothetically withheld taxes from remuneration due to the employee in Germany during a temporary secondment to France in a so-called hypo-tax procedure.

The secondment contract presented to the BAG in the course of this case contained in particular provisions stating that an extension of the secondment beyond the total period of five years was generally not possible. Furthermore, the contract contained regulations on the premature termination of the secondment and on the return of the employee. Among other things, it provided for the employer's right of recall and details on the employee's work after their return.

The Court affirmed the temporary nature of the secondment in this case. In this context, the BAG stated that the EU legislator had provided in recital 36 of the Rome I Regulation that the performance of work in another State should be considered temporary if the employee is expected to resume work in the State of origin after their work assignment abroad had ended. There was no maximum time limit envisaged for this. According to the BAG, the provisions of the secondment agreement in this case clearly indicated that the parties assumed that the employer would once again employ the employee in Germany (Hamburg) after the assignment abroad had ended.

With regard to the proceedings before the Luxembourg Court of Cassation, the new Court of Appeal will presumably also have to examine whether conclusions can be drawn from the secondment agreement that the parties made to determine whether a genuine secondment situation existed in this case. It will be interesting to observe which parallels and also differences to the BAG ruling can be identified.

Italy (Ornella Patané, Toffoletto De Luca Tamajo): If the worker had been seconded to Italy, the court would have reached the same decision. The reference legislation provides for the applicable legislation to the employee seconded to Italy, during the period of secondment: if more favourable, the same working and employment conditions provided for in Italy by the law and collective agreements must be applied, with particular reference to maximum work periods and minimum rest periods; minimum length of paid annual leave; and pay, etc. However, in this particular case, the employee would have exceeded the limitation period provided for by Italian law for secondment, i.e., 18 months. Regarding this, the rules of Italian law apply in addition to the aforementioned limit, thus the retirement obligation under Luxembourg law, which is not governed by Italian law, could not be applied.

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10. CJEU 27 February 2002, *Herbert Weber – v – Universal Ogden Services Ltd.*, C-37/00.

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