Supreme Court rules on scope of German minimum wage legislation

February 08 2017 | Contributed by Graf & Pitkowitz

Introduction
Facts
Decisions
Comment

AUTHOR

Jakob Widner

Introduction

In a novel decision(1) the Supreme Court for the first time ruled on the thin line between the freedoms to provide services afforded under the fundamental treaties of the European Union and legislation by its member states to contain social dumping, which has become a major unintended side effect of labour migration.

National legislation on social dumping and minimum wages can be validly extended to employers of other member states when they perform their services abroad, but this extension is limited where unnecessary and inadequate to accomplish the goals of minimum wage regulations.

Facts

The plaintiff was employed as a driver for an Austrian airport taxi business located in Salzburg, which is just across the border from Germany and two-hour drive to the Bavarian capital Munich. The plaintiff usually started his daily airport shuttle tours from the Salzburg airport and then headed back and forth between the airports in Munich and Salzburg with passengers either arriving at or departing from the Munich airport. In between those shuttles, the plaintiff was allowed to spend his work breaks where he deemed appropriate. The plaintiff also worked on an on-call basis. He was paid €6.98 gross per hour.

In his suit against his employer in Austria, he claimed that he was owed a minimum wage of €8.50 gross per hour, invoking the German Minimum Wage Act, which entered into force on January 1 2015. Under the new German act, non-German employers are also subject to the minimum wage regulations if their employees perform work in Germany.

Decisions

The trial court dismissed the claim. The court of appeals confirmed the dismissal, convincingly arguing that the application of the German act to vehicles in transit or comparable transport operations such as the one at issue here would constitute an inadmissible restriction on the freedom to provide services within the meaning of Articles 56 and following of the Treaty on the Functioning of the European Union. However, it eventually provided a different, less striking rationale for upholding the dismissal of the claim. According to the court of appeals (Linz circuit),(2) although it comprises times of standby duty, the notion of 'work hour' under the German act does not cover on-call duty, as in the case of the plaintiff. Therefore, any type of working activity with a high proportion of standby duty, as in the case of a taxi driver, would fall within the meaning of 'work hour' within the German act. However, the plaintiff's situation was different from a taxi driver (who must wait for potential customers) because his passengers and their flight schedules were predetermined so that he could spend waiting times freely. In contrast, the plaintiff's times of on-call duty were paid like

normal working hours. Adding those times of on-call duty to his actual working time, the plaintiff's overall compensation far exceeded the minimum wage of €8.50 gross per hour under the German act.

The Supreme Court upheld the appeal court's decision, and gave yet another reason why the plaintiff should not be afforded the benefit of German legislation on minimum wages. The Supreme Court first confirmed the lower courts' findings that under Article 8(2) of the EU Rome I Regulation (593/2008), Austrian law would govern. The court then examined whether the German Minimum Wage Act, as a mandatory provision, overrode Austrian law. The court ultimately denied its application and opined as follows.

Although it appears settled that the German act qualifies as a mandatory rule within the meaning of Article 9 of the Rome I Regulation, when judging whether it should override the law applicable to the case at hand, the court had to assess and weigh against each other the purpose and consequences of the mandatory rule at issue. As for the German act, the minimum wage inserted therein seeks to protect the financial stability of the German system of social security. Without minimum wages, social dumping might lead to a situation where the 'welfare net' must compensate for a shortfall in living expenses, which might threaten its financial sustainability. However, this purpose also envisages employees who are permanently employed in Germany, or at least for a longer term, not a temporary basis. Only such longer-term employees are affected by the German level of living expenses and thus potential beneficiaries of the German social system. In the case at hand, the spirit and purpose of the German act had no gravitas, as the plaintiff did not participate in the German social system.

While the Supreme Court did not share in the appeal court's reasoning that, all different types of work performed by the plaintiff considered, the German minimum wage of €8.50 gross per hour was exceeded, it came to a similar result in clarifying that the collective bargaining agreement applicable in Austria would pay up to 14 employees' salaries per year and, accounting for this Austrian particularity, the gap between the German minimum wage and the actual Austrian hourly wage would shrink to a mere €0.36 per hour. That compares with the tighter framework of reporting and documentation requirements under the German Minimum Wage Act, according to which the Austrian employer had to file with German authorities exhaustive forms and documents in advance and on each day that its airport drivers would be picking passengers up from or taking them to a location in Germany. As a consequence, it would be factually impossible for the employer to conduct spontaneous activity in Germany.

Weighing the consequences of the non-application of the German Minimum Wage Act for the employer and employee against each other, the court found that the German Minimum Wage Act did not apply.

Consequently, only Austrian wage law applied, without the overriding mandatory rules of the German act.

Comment

In effect, the Supreme Court has clarified that it will avoid foreign minimum wage legislation where its application would pose an undue burden on employers and where, at the same time, it can be guaranteed that the purpose of minimum wage legislation is not undermined. While employers offering their services in border regions might be relieved, the specific circumstances of the case leave some doubt as to whether the Supreme Court meant to establish a precedent, or only sought to rectify a skewed balance of interests resulting from a literal application of German law.

For further information on this topic please contact Jakob Widner at Graf & Pitkowitz Rechtsanwälte GmbH by telephone (+431 401 17 0) or email (widner@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) OGH, November 29 2016, 9 ObA 53/16 h.

(2) OLG Linz, December 25 2016, 12 Ra 2/16 z.