

## **HUGO SINZHEIMER MOOT COURT COMPETITION**

### **CASE 2016 POSTING OF WORKERS**

#### **1. Preliminary note from the HS MCC Case Committee**

The facts of the case and most of the legal problems presented in the Draft of the HS MMC come from different Polish Supreme Court judgments concerning transnational employment relations, especially posting workers to provide services in other EU states. The Case Committee tried to combine those issues and present them in a logical order in one case.

Cross-border employment relationships raise many serious questions regarding the common market, the social dimension of the EU, social dumping and so on (see the well-known discussions on the Viking-Laval cases and the Posted Workers Directive).

However, the Polish (sending state's) experience is not the same as that in the "Old Member States" (hosting states). Polish workers and labour courts are often challenged with difficult questions of enforcing the labour rights of mobile workers posted to other states. The Draft of the HS MCC enables all moot court teams to pick up a challenge that normally a Polish labour court needs to deal with.

The Case Committee believes that knowledge of European Union's labour law (EU directives, CJEU case law, legal doctrine) will suffice to present possible solutions. National (Polish, Cypriot) legal regulations still remain just the background.

Warsaw, 20 January 2016

## 2. Facts of the case

On 1 February 2013 in Warsaw, a Polish company **X (Max Staff Partners)** and a Cypriot company **Y (Max Job)** entered into an **agreement to provide services**. Under the agreement, the Polish company X (Max Staff Partners) was to provide personnel recruitment, consulting, health and safety training services to the Cypriot company Y (MAX Job) in line with Cypriot requirements in this regard, namely the Polish company conducted training courses 'What you need to know before going abroad?', which included e.g. basic vocabulary of the target country; information about the labour market, healthcare system organization, information about important cultural differences, the costs of living in a certain place, as well as a presentation on international procedures in the field of combating human trafficking.

A similar agreement to provide services was concluded between the Cypriot company Y (Max Job) and a Latvian company **Z (Max Kolēģis)** based in Riga.

The Polish company X (Max Staff Partners) with its registered office in Warsaw (as well as the Latvian company Z (MaxKolēģis)) with a registered office in Riga) were members of a **group of companies** using one and the same umbrella name - Max. Moreover, **Kazimierz Nowak** sits on Board of Directors of all companies X, Y and Z. The Boards of Directors of X, Y and Z consist of three persons, including Kazimierz Nowak. Even though it was Kazimierz Nowak who had the idea to set up all three companies, invented their names and the manner of running the business, the companies do not form a concern and are independent of one another. Kazimierz Nowak holds 40% of preference shares in the Polish company and can outvote the remaining shareholders by himself. In the other companies, he only holds 30% of shares and cannot take decisions alone.

Operating under the agreement to provide services, the Polish company recruited **Jan Kowalski**. On 31 March 2013, Jan Kowalski **entered into a contract** signed by Kazimierz Nowak, who presented himself as acting on behalf of the Cypriot Company Y (Max Job), a Cypriot company with its registered office in Nicosia. All employment contracts with the recruited individuals (25 people) were signed by Kazimierz Nowak, but the formalities, which he completed in Poland, could have made him believe that his

actual employer was the Polish company X (Max Staff Partners). Moreover, the claimant's colleague, who was recruited by the same company to work in Cyprus in the previous year, learned that the Polish company had a document issued by ZUS - the Polish Social Insurance Institution (for the applicant, that is Max Staff Partners), i.e. an A1 certificate confirming that the claimant's colleague was subject to the Polish social security legislation during his work in the territory of Cyprus.

After all the formal requirements related to the recruitment process were completed, Jan Kowalski was posted to Nicosia to work for the Cypriot entity. He received a ticket to Cyprus and was provided with cash, which he considered to be travel allowance (funds to cover other costs related to the trip to Cyprus). The money was paid out by the Polish company X (Max Staff Partners).

Under the contract of 31 March 2013, **Jan Kowalski worked for Company Y (Max Job) in Cyprus as a carpenter for 2 years** (the contract ended on 31 March 2015). Jan Kowalski was promised work after return from Cyprus (as a carpenter) either in Poland or another EU country, provided he received a positive opinion from his Cypriot employer. The Polish company X had employed such practices (looking for jobs for persons who previously completed the recruitment process and were employed by foreign companies) with satisfactory results. First of all, those employees had already gained experience in their jobs and needed no additional training, while the positive opinion from the former employer made it easier to find a new one and accelerated the decision to enter into another employment contract. With the procedure in place, the Polish company X cut the costs of the recruitment process.

For the entire period of his stay in Cyprus, Jan Kowalski lived at his brother's house in Nicosia. This enabled JanKowalski to cut the costs of renting a flat, providing food for himself and commuting, because he often got to work with his brother in his car or even borrowed from him the tools necessary for his work. The claimant's brother owned a carpentry company in Cyprus. It was a small, but successful business, whose operations were in competition with the company that employed Jan Kowalski. The relationship between the brothers resulted in the claimant frequently asking his brother to replace

him at different building sites where he normally carried out his work. The brother's help enabled JanKowalski to accept more tasks and earn higher wages. Jan Kowalski never received extra wages for working over 8 hours per day (although he did so regularly).

Jan Kowalski often happened to work together with Latvian workers, employed by the Latvian company Z (MaxKolēģis), who conducted work which required similar level of knowledge and skills, responsibilities and efforts. **Jan Kowalski felt disappointed when he found out that some employees earned by 10% euro than he did.** Once he communicated his concerns to Kazimierz Nowak, he received the official answer from the Polish company X (Max Staff Partners) that all employees associated in trade unions earn adequately more than those employees who do not belong to a trade union. It was said that differential treatment on this ground was in conformity with EU anti-discrimination law. Above all, Jan Kowalski should not compare his working conditions with workers employed by a different company. Jan Kowalski is of the opinion that he has suffered the negative consequences of his choice not to join trade unions.

As the term of the contract between Jan Kowalski and the Cypriot company expired and he intended to start a job in Poland, he applied for a work certificate, which – pursuant to the Polish law – each employer has a duty to issue. Jan Kowalski presented to the Cypriot company the correct (translated) form, but it was filled in wrongly as regards the calculation of the holiday entitlement used up and remaining. The request for rectification of the work certificate was rejected.

Jan Kowalski, acting on his brother's advice, informed the president of the trade union operating in the Cypriot company Y about all irregularities concerning the contract between him and the Cypriot company Y. Even though Jan Kowalski was not a member, the trade union agreed to defend his interests before the labour court. First of all, it prepared the statement of claim, paid the preliminary court costs and acted as his attorney for the proceedings, because Jan Kowalski joined the proceedings at a later stage.

### **3. The claim**

Jan Kowalski **sued** both the Polish company X (Max Staff Partners) and the Cypriot company Y (Max Job) (under joint and several liability) for the following (three types of remedies):

1. Unpaid overtime wage,
2. Compensation for discrimination (violation of the principle of equal treatment of employees, i.e. the right to earn equal salary for equal work),
3. Compensation for the fact that he received a defective work certificate, which is issued when a contract ends. According to art. 97 § 1 of Polish Labour Code : “Upon termination or expiry of an employment relationship, the employer is obliged to issue a work certificate to the employee immediately. The issue of the work certificate may not be depend on the previous settlement of accounts between the employee and the employer. § 2 The work certificate provides information on the period and type of the work performed, job positions held, the manner of the termination or the circumstances of the expiry of the employment relationship as well as other information necessary to establish the employee’s entitlements and social insurance entitlements [...]”. Art. 99 § 1 LC states as follows: “An employee has the right to claim for the redress of damage caused to him by through the failure of the employer to issue a work certificate in due time, or a failure to issue an accurate work certificate, § 2 The compensation referred to in § 1 amounts to the remuneration for the period of being out of work for this reason, but for not longer than 6 weeks”.

### **4. Some procedural aspects**

Jan Kowalski sued the Polish company so as to make it more likely that Polish courts would acknowledge their jurisdiction to hear the case.

Proceedings were instituted before the Regional Labour Court in Poznań – place of claimant’s domicile.



## ***Moot Case 2016***

Both defendants argued that, according to Polish Labour Law, all claims were invalid, so they refused to pay overtime wage, compensation for discrimination and compensation for the defective work certificate.