

# Anonymised version

Translation

C-428/19 — 1

Case C-428/19

## Request for a preliminary ruling

### Date lodged:

4 June 2019

### Referring court:

Gyulai Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Gyula, Hungary)

### Date of the decision to refer:

20 May 2019

### Applicants:

OL

PM

RO

### Defendant:

Rapidsped Fuvarozási és Szállítmányozási Zrt.

[...]

In the outstanding wage claim proceedings initiated by OL [...], first applicant, PM [...], second applicant, and RO [...], third applicant, against Rapidsped Fuvarozási és Szállítmányozási Zrt. [...], defendant, the Gyulai Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Gyula, Hungary) has made the following

**ORDER**

This court stays the proceedings and refers the following questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union:

- 1) Must Article 1(1) of Directive 96/71/EC, in conjunction with Articles 3 and 5 thereof and Articles 285 and 299 of the [Hungarian] Labour Code, be interpreted as meaning that an infringement of that directive and of the French minimum wage legislation can be relied upon by Hungarian workers as against their Hungarian employers in proceedings instituted before the Hungarian courts?
- 2) Must per diems intended to cover the costs incurred during the posting of a worker abroad be regarded as forming part of the worker's wage?
- 3) Is the practice whereby, in the event of a given economy based on the distance travelled and the fuel consumed, the employer uses a formula to pay the driver of a transport vehicle an allowance which does not form part of the wage provided for in his employment contract and on which no taxes or social security contributions are payable, contrary to Article 10 of Regulation No 561/2006/EC?

Notwithstanding that the fuel economy [allowance] encourages drivers of transport vehicles to drive in such a way as might endanger road safety (for example, by freewheeling for as long as possible when going downhill)?

- 4) Is Directive 96/71/EC applicable to the international transport of goods, account being taken in particular of the fact that the European Commission has initiated infringement proceedings against France and Germany for applying minimum wage legislation to the road transport sector?
- 5) If it has not been transposed into national law, can a directive in itself create obligations incumbent on an individual and, therefore, constitute by itself the basis for an action against an individual in a dispute brought before a national court?

[...] [matters of domestic procedural law]

## Grounds

### Relevant facts:

On 7 July 2016, the **first applicant** concluded with the defendant employer a contract of employment as an international transport vehicle driver. That contract was of indefinite duration and subject to a three-month probationary period. The applicant's basic wage was HUF 129 000 gross per month, plus HUF 20 000 gross provided for as 'other payments' made by way of remuneration for non-contracted work and on-call duty. His working time was calculated on the basis of a

reference framework of three months' full-time work. His wage was paid no later than on the tenth day of the month following the month to which the wage related, after deduction of statutory charges, while allowances were paid no later than on the twentieth day of the month following the end of the relevant reference framework, in cases where the information necessary for their payment was not available. The indicative work schedule was set out in writing in a separate information document issued by the company, and took into account the provisions of the a Munka törvénykönyvéről szóló 2012. évi I. törvény (Law I of 2012 approving the Labour Code), the a közúti közlekedésről szóló 1998. évi I. törvény (Law I of 1998 on road transport) and the az AETR Megállapodás a nemzetközi közúti fuvarozást végző járművek személyzetének munkájáról szóló 2001.évi IX. törvény (Law IX of 2001 on the AETR Agreement concerning the work of crews of vehicles engaged in international road transport).

In addition to wages, the employer undertook to pay the following allowances [under the following conditions]:

- A flat-rate amount would be payable for overtime.
- The employer would calculate night work on a monthly basis by reference to the data on the worker's driver card.
- Payment would be made no later than on the tenth day of the month following the month to which the payment related.
- The work schedule would normally be based on a predetermined shift rotation:
  - = Four weeks' work in *national territory*. \*
  - = One week's work in Hungary.
  - First two days (Monday–Tuesday), rest.
  - Days three and four (Wednesday–Thursday), on-call and standby duty, payable by way of a flat-rate allowance.

The aforementioned employment contract was amended on 28 December 2016, but only in relation to 'other payments'. The previous flat-rate sum of HUF 20 000 per month was broken down as follows:

- Allowance for non-contracted work (overtime): HUF 10 000.
- Standby duty allowance: HUF: 10 000.
- Shift allowance: HUF 5 500.

\* Translator's Note: This should probably read 'four weeks' work *abroad*'.

- Allowance for working on a public holiday: HUF 2 500.
- Allowance for working on Easter Sunday, Pentecost Sunday or on a public holiday falling on a Sunday: HUF 1 000.

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HUF 29 000

On 1 April, the employment contract was the subject of the following amendment, which left unchanged the basic wage of HUF 129 000 gross and determined that the applicant was entitled to a flat-rate sum of HUF 1 500 gross per month by way of a night work allowance. As regards the minimum wage, the parties have stated that the conditions of entitlement to the minimum wage expressed in euros per hour under Article 18 of the Austrian sub-sectoral collective agreement for the carriage of goods by road, in force in the Federal Republic of Austria, are met. The Austrian minimum wage applies:

- if the place of loading or unloading is in Austria, or
- if the transport operations are to be carried out in Austrian territory. It does not apply to in-transit transport.

The employer also issued a document containing information on per diem rates, which were as follows:

- EUR 34 per day spent abroad, for a minimum period of 8 hours a day abroad between border crossings, where an international transport vehicle driver driving a sheeted vehicle works a shift changeover pattern of up to three weeks (no more than 21 days).

An international transport vehicle driver engaged in the transport of goods in bulk (in tanks) will receive an extra EUR 3 per day spent abroad.

- EUR 38 per day spent abroad, for a minimum period of 8 hours a day abroad between border crossings, where an international transport vehicle driver driving a sheeted vehicle works a shift changeover pattern of four weeks (no more than 28 days).

An international transport vehicle driver engaged in the transport of goods in bulk (in tanks) will receive an extra EUR 5 per day spent abroad.

- EUR 42 per day spent abroad, for a minimum period of 8 hours a day abroad between crossings, where an international transport vehicle driver driving a sheeted vehicle works a shift changeover pattern of five weeks (no fewer than 29 days).

An international transport vehicle driver engaged in the transport of goods in bulk (in tanks) will receive an extra EUR 7 per day spent abroad.

— EUR 60 per day spent abroad, irrespective of the length of the shift changeover pattern, for a minimum period of 8 hours a day abroad between border crossings, for each day of work immediately before or after a day for which a national-territory per diem is payable.

An international transport vehicle driver will receive a national-territory per diem to cover costs incurred in that territory up to a total of HUF 3 000 per day for at least 6 hours' work. One day's work will attract only one type of per diem, either a national-territory per diem or a non-national-territory per diem.

On 12 June 2015, the **second applicant** concluded an employment contract with the defendant employer. That employment relationship ended on 3 April 2017. The content of that contract is identical in every respect to that of the first applicant's contract.

On 26 July 2017, the second applicant entered into a new employment relationship with the defendant employer which ended at the employer's request on 20 September 2017, during the probationary period. The content of that employment contract is identical to the content of the amendment made to the first applicant's employment contract on 28 December 2016. The second applicant also received the document entitled 'Information from your employer', concerning per diem rates.

On 26 August 2016, the **third applicant** concluded an employment contract with the defendant employer. This employment relationship was amended on 28 December 2017<sup>\*</sup> and, later, on 1 April 2017. The content of the employment contract concluded with the third [applicant] and the two amendments thereto is identical to that of the first applicant's employment contract and the amendments thereto. The third applicant also received the document entitled 'Information from your employer', concerning per diem rates. The three applicants' employment contracts provide as follows in relation to places of work:

'The worker shall carry out his work, so far as the employer's head office (establishment) is concerned, on the basis that, although he will receive the instructions or orders and the commission for the transport operation to be carried out from that head office (establishment), the place of actual performance of the services provided by the worker will be Hungary and the foreign countries, as required by his job, where the transport operations are to be conducted, where the places of loading and unloading are located and where the head office, establishment or branch of the customers with which the employer has a contractual relationship is situated. By this contract, the worker therefore declares that he has been informed that, on account of the nature of the work, he will usually perform that work and the duties connected with his job away from [his employer's] head office (establishment), in places which will be dictated by the transport operations in question, and that these places will often be abroad.'

<sup>\*</sup> Translator's Note: This should probably read 2016.

Point III/7 of the employment contract provides that, ‘in addition to international transport, the worker’s job will also include the transport of goods in national territory. Consequently, the worker undertakes to carry out any type of transport (regional, national or international) required by the service, using a suitable available vehicle’.

In practice, the applicants’ work takes (or took) the form of travelling by minibus to France. Owing to the rules on cabotage, the applicants crossed borders on several occasions.

At the start of each posting abroad, the defendant gives transport vehicle drivers a declaration authenticated by a Hungarian notary, together with an *attestation de détachement* [posting certificate] drawn up by the French Minister for Labour, stating that the workers’ wage is EUR 10.40 an hour. The French authorities duly verify this and accept it as proof that the Hungarian workers posted abroad will receive the sectoral minimum wage for the time that they are working in France.

The applicant workers brought an action against the defendant alleging that their wage during the time they work in France is not equal to the French minimum wage. The workers’ basic wage under their employment contract, including allowances, was approximately EUR 3 in 2016, while, in 2018, it was approximately EUR 3.50 (depending on the euro exchange rate). The defendant pays its workers per diems to cover the costs they incur while working abroad.

It also pays international transport vehicle drivers a fuel economy allowance within the meaning of point 3 of their employment contract, which states that, ‘should the [fuel] consumption be lower than normal, the worker shall be paid the fuel economy [allowance], at the employer’s discretion’.

According to the applicants, the addressees of Directive 96/71/EC of the European Parliament and of the Council are undertakings, which is to say [that the scope *ratione personae* of that directive] also extends to the defendant undertaking. The applicants also claim that per diems do not form part of their wage, any more than amounts received on account of fuel economies do.

In its defence, the defendant contended that the action should be dismissed, since, in its opinion, directives, as EU acts, are directed at the Member States and therefore impose an obligation (to legislate) on those States themselves, and not on undertakings. The defendant also submits, in relation to the substance of the case, that a Hungarian worker cannot institute before a Hungarian court labour proceedings for failure to comply with French legislation, because the agreement between the worker and the employer does not contain any reference to the French minimum wage. It argues that the reference to the wage of EUR 10.40 per hour appears only in the documents carried by the applicants and serves as information for the French authorities. The applicants’ only recourse is to the French authorities if they feel they have a claim in this regard. As regards per diems, the defendant contended that some can be taken into account for the purposes of

determining pay and others cannot. A bonus based on a special provision adopted by an employer, on the other hand, does not form part of pay.

## **EU legislation**

### **Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services**

#### **Article 1**

##### **Scope**

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

[...]

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

- a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
- b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; [...]

#### **Article 2**

##### **Definitions**

1. For the purposes of this Directive, 'posted worker` means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

#### **Article 3**

##### **Terms and conditions of employment**

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
  - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
- a) maximum work periods and minimum rest periods;
  - b) minimum paid annual holidays;
  - c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

[...]

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

[...]

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) when the length of the posting does not exceed one month.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

[...]

6. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.

[...]

7. [...] Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually

incurred on account of the posting, such as expenditure on travel, board and lodging.

8. “Collective agreements or arbitration awards which have been declared universally applicable” means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

are required to fulfil such obligations with the same effects.

#### **Article 4**

##### **Cooperation on information**

[...]

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

[...]

#### **Article 5**

##### **Measures**

Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

## **Article 6**

### **Jurisdiction**

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

## **Article 7**

### **Implementation**

[...]

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

**Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (Text with EEA relevance)**

## **Chapter III**

### **Liability of transport undertakings**

## **Article 10**

1. A transport undertaking shall not give drivers it employs or who are put at its disposal any payment, even in the form of a bonus or wage supplement, related to distances travelled and/or the amount of goods carried if that payment is of such a kind as to endanger road safety and/or encourages infringement of this Regulation.

[...]

**Relevant national legislation****A Munka törvénykönyvéről szóló 2012. évi I. törvény****(Law I of 2012 approving the Labour Code)****Article 285:**

1. Workers and employers may bring before a court actions arising from the employment relationship or from this Law, while trade unions and works councils may bring before a court actions arising from this Law, a collective agreement or a works agreement.

[...]

4. In accordance with the provisions of Article 295, workers may also bring before the Hungarian courts actions accruing to them in connection with the period of their employment in Hungary.

**Article 295:**

1. If, on the basis of an agreement with a third party, a foreign employer employs a worker in the territory of Hungary and thereby establishes an employment relationship to which this Law is not applicable, in accordance Article 3(2) hereof, that employment relationship shall be subject, without prejudice to the provisions of paragraph 4, to Hungarian legislation and to the provisions of the relevant collective agreement, so far as concerns:

- a) maximum working time and minimum rest periods;
- b) the minimum annual paid leave entitlement;
- c) the amount of the minimum wage;
- d) the conditions laid down in Articles 214 to 222 with respect to temporary employment agencies;
- e) the conditions governing safety at work;
- f) the conditions governing the employment and occupation of pregnant women and women with young children and young workers;
- g) equal treatment obligations.

**Article 3:**

2 Unless otherwise provided for, this Law shall apply to persons who normally work in Hungary.

**Article 299:**

This Law is intended to transpose the following acts of the European Union:

[...]

f) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

In **the opinion of the referring court**, the resolution of this dispute calls for an interpretation of Directive 96/71/EC of the European Parliament and of the Council and Regulation (EC) No 561/2006 of the European Parliament and of the Council and, in that context, a comparison of the aforementioned provisions of those directives with the national legislation.

This court considers that the fact that the French authorities systematically check the declaration authenticated by the Hungarian notary and the *attestation de détachement* drawn up by the French Minister for Labour leads to the conclusion that the Hungarian employer should guarantee payment of the French minimum wage for the period of employment completed during the posting in France and that any failure to do so on its part creates a right to bring labour proceedings before the Hungarian courts.

[...] [matters of domestic procedural law] [...]

Gyula, 20 May 2019

[...]

[signature]

[...] [technical comment]