Anonymised version

Case C-804/19

Request for a preliminary ruling

Date lodged:

31 October 2019

Referring court:

Landesgericht Salzburg (Austria)

Date of the decision to refer:

23 October 2019

Applicant:

BU

Defendant:

Markt24 GmbH

[…]

REPUBLIC OF AUSTRIA

LANDESGERICHT SALZBURG (REGIONAL COURT, SALZBURG, AUSTRIA) […]

SITTING AS A LABOUR AND SOCIAL COURT […]

[…]

ORDER

CASE:

Applicant […]

BU […]

[…]

[AUSTRIA]

[…]

Defendant […]

Markt24 GmbH […]

[…]

85716 Unterschleißheim […]

GERMANY […]

Concerning:

EUR 2 962.80 plus associated amounts and interest (regular pay)

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

1. Is Article 21 of Regulation (EU) No 1215/2012 applicable to an employment relationship in which, although an employment contract was entered into in Austria for the performance of work in Germany, the female employee, who remained in Austria and was prepared for several months to work, did not perform any work?

In the event that the first question is answered in the affirmative

2. Is Article 21 of Regulation (EU) No 1215/2012 to be interpreted as meaning that it is possible to apply a national provision which enables an employee to bring an action in the place where she was resident during the employment relationship or at the time when the employment relationship ended (thus facilitating the process of bringing an action), as is the case with Paragraph 4(1)(a) **[Or. 2]** of the Arbeits- und Sozialgerichtsgesetz (Law on the labour and social courts; 'the ASGG')?

3. Is Article 21 of Regulation (EU) No 1215/2012 to be interpreted as meaning that it is possible to apply a national provision which enables an employee to bring an action in the place where the remuneration is to be paid or was to be paid upon termination of his employment relationship (thus facilitating the process of bringing an action), as is the case with Paragraph 4(1)(d) of the ASGG?

4. In the event that Questions 2 and 3 are answered in the negative:

4.1. Is Article 21 of Regulation (EU) No 1215/2012 to be interpreted as meaning that, in the case of an employment relationship in which the female employee has not performed any work, the action must be brought in the Member State in which the employee remained prepared to work?

4.2. Is Article 21 of Regulation (EU) No 1215/2012 to be interpreted as meaning that, in the case of an employment relationship in which the female employee has not performed any work, the action must be brought in the Member State in which the employment contract was initiated and entered into, even if the performance of work in another Member State had been agreed or envisaged in that employment contract?

In the event that the first question is answered in the negative

5. Is Article 7(1) of Regulation (EU) No 1215/2012 applicable to an employment relationship in which, although an employment contract was entered into in Austria for the performance of work in Germany, the female employee, who remained in Austria and was prepared for several months to work, did not perform any work, if it is possible to apply a national provision which enables an employee to bring an action in the place where she was resident during the employment relationship or at the time when the employment relationship ended (thus facilitating the process of bringing an action), as is the case with Paragraph 4(1)(a) of the ASGG, or if it is possible to apply a national provision which enables an employee to bring an action in the place where the remuneration is to be paid or was to be paid upon termination of the employment relationship (thus facilitating the process of bringing an action), as is the case with Paragraph 4(1)(d) of the ASGG?

II. The proceedings are stayed pending the ruling the Court of Justice (Paragraph 90a of the Gerichtsorganisationsgesetz (Law on the organisation of the courts; 'the GOG').

Grounds:

1. Arguments and facts

By an action of 27 April 2018, the applicant sought to recover from the defendant outstanding wage payments, aliquot special payments, and annual leave payments in the total amount of EUR 2 962.80 gross for the period from 6 September 2017 to 15 December 2017. In terms of the substance of the action, she argued that the defendant had employed her as a cleaner in the period from 6 September 2017 to 15 December 2017 **[Or. 3]**. It had been agreed that she would receive remuneration of EUR 753.42 gross per month, being EUR 639.15 net per month, in respect of part-time employment. The defendant ended the employment relationship by terminating the employment contract. The court seised, the

applicant argued, had jurisdiction, as the defendant had had an office in Salzburg at the beginning of the employment relationship. The applicant also produced three pay slips for the months of September to November 2017. The defendant is specified in those pay slips as the employer, and they contain a gross sum of EUR 626.40 (EUR 531.69 net) for September, a gross sum of EUR 753.42 (EUR 639.50 net) for October, and a gross sum of EUR 753.42 (EUR 628.15 net) for November.

Since the [documents initiating the] action could not be served on the defendant — notwithstanding several attempts at service at different addresses by post and via the Amtsgericht (local court) — and the place of residence of the defendant's representatives is unknown, a temporary representative for purposes of service (procedural representative *in absentia*) was appointed for the defendant pursuant to Paragraph 116 of the Zivilprozessordnung (Code of Civil Procedure; 'the ZPO') by order of 26 December 2018 […]. By written submission of 7 January 2019 […], the representative contested both national justiciability and national jurisdiction.

According to an extract from the commercial register HRB 233607 of the Amtsgericht München (local court, Munich), the defendant's registered office is located in Unterschleißheim, Landkreis München (administrative district of Munich) […]. The applicant's place of residence is in [Austria]. The applicant was approached by a man who claimed that he knew of a good company that was looking for workers. The applicant subsequently signed the employment contract for carrying out cleaning work. The contract was not signed at the offices on the premises of the defendant, but in a bakery located at 5020 Salzburg. It was agreed that she would start working on 6 September 2017, but she was not allocated any work by the defendant. However, she could be contacted by telephone and was prepared to work. She did not in fact carry out any cleaning work or any other work for the defendant. It was agreed that the applicant was to perform her work in Munich. The applicant did not have a telephone number for the employee of the defendant with whom she had entered into the employment contract. An Austrian telephone number and a German address are specified in the defendant's stamp on the employment contract. The applicant received neither remuneration nor a pay slip during the employment relationship. She was registered with the Austrian social security institution as an employee with a salary of EUR 753.42 up until 15 December 2017, as were three other employees of the defendant.

A total of three sets of labour-law proceedings are/were (together with the proceedings **[Or. 4]** brought by the applicant) pending against the defendant before the Landesgericht Salzburg, sitting as a labour and social court. The other proceedings ended with a judgment in which it was found, inter alia, that at least one other employee of the defendant worked in the construction industry in the Province of Salzburg.

3. National law

'Paragraph 4 (1) [of the Arbeits- und Sozialgerichtsgesetz] For the disputes referred to in Paragraph 50(1), territorial jurisdiction also lies with, at the choice of the applicant

1. in the cases in points 1 to 3, the court within the area of jurisdiction of which

(a) the employee has his place of residence or usual abode during the employment relationship or where he had his place of residence or usual abode at the time when the employment relationship ended,

…

(d) the remuneration is to be paid, or, if the employment relationship has ended, was to be paid when the relationship was last in effect, or

…'

4. Grounds for the order for reference

The provisions of the Arbeits- und Sozialgerichtsgesetz (Law on the labour and social courts; 'the ASGG') must be interpreted in accordance with [EU law].

4.1. The first question

Firstly, the general question arises as to whether Article 21 of Regulation (EU) No 1215/2012 is also applicable to employment relationships in which, although an employment contract was entered into in Austria, the female employee, who remained prepared to work, did not subsequently perform any work in either Austria or Germany.

According to national case-law and academic writing, the following has been established (as at 2008): If an employee has entered into an employment contract but has not taken up employment duties, the relevant place, in accordance with Article 5(1) of Regulation (EU) No 1215/2012, is the place where the employment contract was to have been performed by the employee (Auer in Geimer/Schütze, Rechtsverkehr 540 Art. 18 EuGVVO, paragraph 12; Burgstaller, DRdA 1999, 470; Ganglberger, RdW 2000, 160 and 161; Kropholler, Zivilprozeßrecht[8] Art. 19 EuGWO, paragraph 9, and Corte di cassazione [I] Riv dir int priv proc 2004, 661 and 14 Ob 81/86 [concerning Paragraph 44 of the Law on international private law ('IPRG')] SZ 59/91 = Arb 10.537 = DRdA 1988, 343 [Kerschner] = ZAS 1987, 50 [Beck-Managetta/Mayer-Maly]).

According to other national case-law on the Lugano Convention, a certain element of duration and **[Or. 5]** permanence was required. Where an employee residing in Germany has entered into an employment contract with an undertaking

established in Austria but has not taken up employment duties, the second and third parts of the first sentence of Article 5(1) of the Lugano Convention are not applicable. There must be an element of duration and permanence inherent in the performance of work serving as a basis for jurisdiction pursuant to the second and third parts of the first sentence of Article 5(1) of the Lugano Convention (OGH 8 ObA 154/98z).

The referring court takes the view that the employment relationship from 6 September 2017 to 15 December 2017, which thus lasted for several months, had such duration and permanence. In addition, the employment contract was initiated and entered into in Austria. Registration for social-security purposes took place in Austria.

The aforementioned question also relates to the protection of particular groups of persons under EU law, including, for example, consumers, in respect of whom Article 18(1) of Regulation (EU) No 1215/2012 provides, in relation to consumer contracts, that a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled. It can be assumed that, as is the case with consumers, employees constitute a group of persons in need of protection, who should not be placed in a worse position by EU legislation as compared with national legislation. In this regard, reference should be made, in particular, to the financial situation resulting from the low pay of the employee, which makes it more difficult for her to assert her claims in another Member State.

4.2. The second and third questions

In the event that Article 21 of Regulation (EU) No 1215/2012 is deemed to be applicable, in principle, the questions then arise as to whether national law, which provides an employee with facilitated access to legal proceedings within national territory, may apply in the light of the European legislation, which provides for less favourable rules for employees in this regard.

In the present case, the employer would be able, by allocating work or not allocating work, in whichever Member State, to impede the national rules on jurisdiction pursuant to Paragraph 4 of the ASGG — which are more favourable to the applicant. Furthermore, a female employee who waits for work assignments for a long period of time and is unable to accept other work in the meantime would subsequently also be placed at a disadvantage from the perspective of procedural law, because, contrary to the more favourable national provisions, she would have to bring the action for the outstanding wages in another Member State. **[Or. 6]**

4.4. The fourth question

In the event that the national law, which is more favourable to the female employee, is not applicable, questions arise as to how Article 21 of Regulation (EU) No 1215/2012 can be interpreted.

4.5. The fifth question

In the event that, in principle, Article 21 of Regulation (EU) No 1215/2012 is not applicable to the present case, the other provisions of Regulation (EU) No 1215/2012 must be taken into account and the interpretation must be analysed in the context of the present circumstances. To avoid repetition, reference in this regard is made, in a comparative manner, to the considerations already set out above.

5. The interpretative jurisdiction of the Court of Justice

In the present case, there is no case-law of the Court of Justice of the European Union concerning jurisdiction in relation to Article 21 of Regulation (EU) No 1215/2012 in cases where an employment contract is entered into without any work being performed. There is a need for interpretation, particularly with regard to fundamental questions of jurisdiction pursuant to Article 21 of Regulation (EU) No 1215/2012 in comparison with the more favourable national legislation on the vindication of the female employee's legal rights.

In view of the case-law of the Court of Justice of the European Union to date, the correct application of EU law is not so obvious as to leave no scope whatsoever for reasonable doubt as to how the questions posed must be answered ('*acte clair*').

II. The staying of the labour-court proceedings until the preliminary ruling proceedings have been concluded is based on Paragraph 90a of the Gerichtsorganisationsgesetz (GOG).

[Note regarding official copies and signature] **[**…**]**