Court of Justice of the European Union
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Press and Information

Judgment in Case C-610/18
AFMB and Others v Raad van bestuur van de Sociale verzekeringsbank

The employer of drivers of heavy goods vehicles employed in international long-distance transport is the transport undertaking that has actual authority over those drivers, that bears, in reality, the cost of their wages and that has actual power to dismiss them

In its judgment in AFMB and Others (C-610/18), delivered on16 July 2020, the Grand Chamber of the Court held that the employer of an international long-distance lorry driver, for the purposes of Regulations No 1408/71[1] and No 883/2004[2], is the undertaking that has actual authority over that driver, that bears, in reality, the cost of his or her wages and that has actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has entered into an employment contract and which is formally named in that contract as being his or her employer.

In the main proceedings, AFMB Ltd, a company established in Cyprus, had concluded with transport undertakings established in the Netherlands agreements whereby it undertook, in consideration of a commission, to take charge of the management of the heavy goods vehicles operated by those undertakings, on behalf of and at the risk of those undertakings. AFMB had also concluded employment contracts with international long-distance lorry drivers residing in the Netherlands, in which AFMB was named as their employer. The long-distance lorry drivers concerned were employed, on behalf of the transport undertakings, in two or more Member States, and also in one or more States of the European Free Trade Association (EFTA).

AFMB and the drivers challenged decisions of the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands; 'the Svb') whereby the Netherlands social security legislation was stated to be applicable to those drivers. In the view of the Svb, only the transport undertakings established in the Netherlands ought to be regarded as the employers of those drivers, and consequently the Netherlands legislation was applicable, while AFMB and the drivers considered that AFMB ought to be regarded as the employer and that, since its registered office is in Cyprus, Cypriot legislation was applicable.

Against that background, the referring court, emphasising the crucial importance of that issue for the purposes of determining the national social security legislation applicable, has sought from the Court clarification concerning who, either the transport undertakings or AFMB, should be considered to be the 'employer' of the drivers concerned. Under Regulations No 1408/71 and No 883/2004, persons, such as the drivers at issue, who are employed in two or more Member States but do not work principally in the territory of the Member State where they reside, are subject, for social security purposes, to the legislation of the Member State in which the employer has its registered office or place of business.

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[1] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1), and in particular Article 14(2)(a) thereof ('Regulation No 1408/71')

[2] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4), and in particular Article 13(1)(b) thereof.

The Court first observed that Regulations No 1408/71 and No 883/2004 do not, for the purposes of determining the meaning of the concepts of 'employer' and 'personnel', make any reference to national legislation or practice. Consequently, those concepts must be given an autonomous and uniform interpretation, which takes into account not only the wording of the relevant provisions but also their context and the objective pursued by the legislation in question.

As regards the terms used and the context, the Court stated that the relationship between an 'employer' and the 'personnel' employed implies the existence of a hierarchical relationship. Further, the Court stated that account must be taken of the objective situation of the employed person concerned and all the circumstances of his or her work. In that regard, while the conclusion of an employment contract may indicate the existence of a hierarchical relationship, that circumstance alone cannot permit a definitive conclusion that there exists such a relationship. It remains necessary to have regard not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertaking in question are performed in practice. Accordingly, whatever the wording of the contractual documents, it is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker.

In the view of the Court, if an interpretation were to be based solely on formal considerations, such as the conclusion of an employment contract, that would amount to allowing employers to transfer the place which is to be regarded as relevant to the determination of which national social security legislation is applicable, when such a transfer does not, in reality, contribute to the objective, pursued by Regulations No 1408/71 and No 883/2004, of guaranteeing that workers can genuinely exercise their right to freedom of movement. While noting that the aim of the system introduced by those regulations is, indeed, solely to promote the coordination of national social security legislations, the Court considers, nonetheless, that the objective pursued by those regulations would be likely to be undermined if the interpretation adopted were to make it easier for employers to make use of purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules.

In this instance, the Court held that the drivers appear to have been members of the personnel of the transport undertakings and to have had those undertakings as their employers, with the consequence that the Netherlands social security legislation seems to be applicable to them, although that is a matter to be determined by the referring court. Those drivers, before the conclusion of the employment contracts with AFMB, had been chosen by the transport undertakings themselves and were employed, after the conclusion of those contracts, on behalf of and at the risk of those undertakings. Further, the actual cost of their wages was borne, via the commission paid to AFMB, by the transport undertakings. Last, the transport undertakings seemed to have the actual power of dismissal and a number of the drivers had, prior to the conclusion of the employment contracts with AFMB, previously been employed by those undertakings.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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