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New ruling affects social security of seconded employees

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On November 14 2013 the Supreme Court issued an important ruling concerning the secondment of an employee to another EU member state, in view of the legal characteristics of a business trip. The ruling materially affects social security obligations with respect to the remuneration of employees posted abroad.

Facts

Between 2007 and 2009, the employer seconded its employees (including the employee in question) to work in Belgium for several fixed periods. While working in Belgium, the employee was seconded within the meaning of Article 14(1)(a) of former EU Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the European Community. The Polish Social Security Agency issued E101 certificates in respect of this employee confirming that social security contributions were to be paid in Poland.

The dispute between the employer and the agency pertained to:

- whether the employee had been seconded to perform work in Belgium in accordance with the provisions of the Labour Code concerning business trips (the employer's position); or
- whether he performed permanent work in Belgium during these periods, and therefore was not on a business trip (the agency's position).

The matter centred on the fact that the social security treatment of benefits paid for the duration of a business trip is generally more beneficial to the employee and the employer than the treatment of benefits paid on account of a secondment abroad.

Decision

The Supreme Court ruled that obtaining an E101 certificate (now an A1 form) for a seconded employee (ie, a decision in which the agency states that an employee is subject to the Polish social security system) excludes a business trip.

Nevertheless, in its ruling the court emphasised that the secondment of an employee can be classified as a business trip provided that such secondment has the following features, which are characteristic of a business trip:

- Infrequency – the employee's tasks performed during secondment are unusual, atypical and performed occasionally in comparison to his or her standard employee's duties.
- Temporary duration – tasks performed during a secondment do not fall within the standard employee's duties.
- Specific task – the basis for a business trip is the employer's order to complete a particular task (ie, if the parties to the employment contract conclude an agreement on secondment, such secondment cannot be classified as a business trip).

In light of the above features of a business trip, pursuant to the Supreme Court position an employee performing permanent work for his or her employer during a secondment in another EU member state should be deemed to be not on a business trip, but rather working under a separate institution regulated in Article 14(1)(a) of EU Regulation 1408/71 (equivalent to Article 12 of existing EU Regulation 883/2004 on the coordination of social security systems).

In addition to the above, the court explained how to calculate the base for social security charges relating to the remuneration of an employee seconded abroad who is not on a business trip. According to the applicable regulations, such a base is equal to the employee's revenue minus the cost per day that would be payable if the secondment was a business trip. However, the base cannot be lower than the national average monthly salary. The court ruled that for a secondment that is not a business trip, the agency is not authorised to increase the aforementioned base up to the amount of the average monthly salary, if the salary received by such employee was in fact lower than the average salary. Thus, if the employee's salary is higher than the amount of the average salary, the agency is authorised only to reduce the social security base to the amount of the average salary. On the other hand, if the salary is lower than the average salary, the agency cannot use the average salary as the social security base.

Comment

The ruling confirms and strengthens the general position of the Supreme Court concerning the narrow understanding of the term 'business trip'. In its previous rulings, the court emphasised that the secondment of a given employee to another EU member state for a fixed period based on an agreement between the parties to the employment contract cannot be classified as a business trip, as such secondment lacks the significant features characteristic of a business trip – infrequency, temporary duration and performance of a specific task.(1) Furthermore, the Supreme Court clarified its position for cases in which the agency issues a decision stating that an employee is subject to the Polish social security system when working abroad. According to the Supreme Court, the courts are bound by such a decision. Therefore, as long as the decision has not been validly challenged, the courts may not assume that an employee had been on a business trip in the period covered by the decision.

The social security issue mentioned in the ruling is also significant for those seconded employees whose remuneration paid in particular months is lower than the national average monthly salary. The court excluded the interpretation that the social security base in such instances should be equal to the average monthly salary.

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Endnotes

(1) For example, the Supreme Court rulings of November 8 2012 (II UK 87/12), October 2 2013 (II UK 78/13), October 30 2013 (II UK 111/13), January 11 2013 (II UK 157/12) and January 11 2013 (II UK 156/12).

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