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Translation (not authorised) of selected parts of

The Industrial Court's ruling on 1 July 2015

LO vs. Ryanair Ltd.

The Industrial Court's premises and conclusions

Introduction

The dispute concerns, whether a by The Danish Federation of Salaried Employees in Service Trades issued notice of principal conflict against Ryanair Ltd. by way of industrial dispute and secondary action supporting a demand for collective agreement coverage for pilots and cabin crew at Ryanair's bases in Denmark (Billund and Copenhagen) is lawful.

During the case, it is a main question, whether the work performed by pilots and cabin crew stationed in Ryanair's bases in Denmark, have such a connection to Denmark that Danish laws legitimates The Danish Federation of Salaried Employees in Service Trades' demand for collective agreement with the necessary strength and current relevance. In this connection it is also a question, whether the justification of the negotiation demands and the legitimacy of the notice of dispute are to, at all, be determined according to Danish law (choice of applicable law).

In assessing if the noticed conflict is legitimate, among other things it must be decided whether The Danish Federation of Salaried Employees in Service Trades' demand for a collective agreement and, hence, the submitted notice of dispute are compatible with EU law, including the regulations of free movement of labour and services within the Common Market.

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Determination of the issues of fact

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The employees are tied to the bases for several years (i.e. 3 years) at a time. Ryanair has the managerial prerogative, also towards those employees, who are not employed directly by Ryanair. Every month, the employees are submitted to an obligation to have a number of standby days, on which they are to be available and be able to meet at the base within an hour, should their presence be requested. This standby obligation can be required in the form of presence in the airport. It is stipulated in the employment contract, that the conditions of employment are according to Irish law and that the Irish Courts are legal venues for all disputes regarding the contractual relations. With respect to wage and working conditions it applies that the wage for the cabin crew is 17 Euro per hour, while

for pilots the wages are not specified. Wage is only paid for the hours in which the plane is moving, there are no additional payment for standby duties, unless the employee in question is to be present in the airport, there is no sick pay, the employees must buy their uniforms themselves, and the employees can be ordered to at least 4 weeks unpaid leave of absence during winter months. The daily work begins and ends at the base in Copenhagen/Billund. Pilots and cabin crew are obliged to meet 45 minutes before departure, and before departure the flight is planned. For pilots, the planning includes preparation, briefing, calculation of fuel consumption and investigation into route and weather conditions. For the cabin crew it includes, among other things, boarding and ground duties. The vast majority of the preparation work takes place on board the airplane. During the flight, the cabin crew's tasks are for example sale of goods. Upon return there will be final reporting etc.

Choice of applicable law

There is no existing contractual relationship between The Danish Federation of Salaried Employees in Service Trades and Ryanair, and the fact that it is agreed in the contracts that the employees are placed under Irish law and venue is not directing which country's law is to be applicable in determining the conflict between The Danish Federation of Salaried Employees in Service Trades and Ryanair.

A potential conflict in the form of industrial dispute and secondary action will be implemented in Denmark, and it will, primarily, be directed towards Ryanair's activities here. The potentially tortuous acts will, therefore, be carried out in Denmark and have immediate effect here. Furthermore, the notice of principal conflict has as its purpose to cover with a collective agreement the work, carried out by pilots and cabin crew, who are employed at Ryanair's bases in Denmark. The Danish Federation of Salaried Employees in Service Trades is not seeking to obtain collective agreements for staff employed at Ryanair's bases in other countries.

Against this background, the Industrial Court finds that the question of the lawfulness of a demand for a collective agreement and the notice of principal conflict is to be determined according to Danish law. This is in accordance with Article 9 in Regulation no 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation), according to which a lawsuit on the legitimacy of an industrial dispute is to be determined according to the law of the country, in which the industrial dispute or secondary action will be conducted or has been conducted. The regulation is not applicable in Denmark, but it is in all other member countries, including Ireland, cf. Whereas no. 39 and 40 in the preamble of the Regulation and the Regulation's article 1, 4. If the question of the legitimacy of the principal conflict, for which The Danish Federation of Salaried Employees in Service Trades has given notice, were brought before an Irish court, the court were to rule on the basis of Danish law.

The collective agreement demand's strength and current relevance

It has been informed that The Danish Federation of Salaried Employees in Service Trades, at present, has collective agreements with other airline companies with bases in Denmark, and it is undisputed that pilot's and cabin crew's fields of activity falls under the natural scope of the union's activities. The dispute concerns whether The Danish Federation of Salaried Employees in Service Trades' interest in concluding a collective agreement with Ryanair for pilots and cabin crew at Ryanair's bases in Denmark contains the current strength and relevance.

In the practice of the Industrial Court, determining the question on collective agreements' strength and current relevance is based on the fact that securing decent wage and working conditions in Denmark are regulated by collective agreements and not by law. Employee organisations' right to industrial action to obtain collective agreements is, consequently, decisive for the progress in wage setting and acquiring other central working conditions in Denmark, cf. e.g. The Industrial Court's ruling of 29 November 2012, case no. 2012.0341 (Arbejdsretligt Tidsskrift 2012, page 43) "Restaurant Vejlegården". The extent of a employees organization's collective agreement interest is stipulated in the light hereof, and, basically, there is a right to industrial action to support collective agreement demands for all fields of work, carried out on Danish ground. There is, however, established certain, further framework for the right to industrial action when it is a question of work carried out by posted workers according to the Law on Posted Workers paragraph 6a, but this is not relevant in the present dispute. The right to industrial action prevail in principle, irrespective of whether the work is carried out by a Danish or foreign employer and by Danish or foreign employees. The union is not required to have members employed in the company or the part of the company with whom the union seek to negotiate a collective agreement. The general union interest in obtaining a collective agreement with such a company is substantiated in the employees organisation's interest in the fact that members, who might be employed in the company, would be employed on wage and working conditions, which the union finds decent, and in the employees organisation's interest in avoiding that companies without collective agreements can distort the competition compared to companies, which have entered into the collective agreement ("social dumping").

However, the above mentioned is not implying, that unions can demand collective agreement with foreign companies in all instances, where companies' work is in touch with Danish territory. In cases regarding international transport by train or lorry The Industrial Court has, thus, concluded that, generally, there cannot be a claim on foreign companies, if the place of work is situated in a foreign country, and if the work in this country is a natural and secondary part of the performance of the transport, cf. The Industrial Court's ruling of 20 June 2000, case no. 2000.455 (Arbejdsretligt Tidsskrift 2000, page 79), "Mitropa" and The Industrial Court's ruling of 9 April 2014, case no. 2014.0028, "Kim Johansen Transport".

The question is how the circumstances in the present dispute must be assessed in the light of the labour law practice mentioned.

The Industrial Court finds, that the aspect that pilots and cabin crew are employed at bases in Denmark constitute an important difference with regard to the above mentioned cases on international transport, in which the employees in question were not connected to a

department, base or similar in Denmark. Ryanair's bases in Denmark are the permanent muster and deployment place. It is where the work begins and ends. The employee is expected to find his or her own way to and from the airport and acquire residence within a distance from the airport that makes him or her able to get there with an hour's notice. This means in practice that employees with base in Billund will have to live in Denmark, while those, who have their base in Copenhagen Airport, can live in Denmark or Malmoe area [Sweden].

There are base facilities in the airport, including staff room, and before departure a series of duties have to be completed. This also implies for after return. Most of the preparatory work and finishing operations takes place on board the airplane, and in that connection, Ryanair has, referring to Article 17 in the Convention on Civil Aviation (The Chicago Convention), stated, that the work, carried out in the airplanes before departure or after arrival, while the airplane is grounded in the airports of Copenhagen or Billund, is not carried out on Danish territory, but on Irish territory, since the airplanes are registered in Ireland.

This view cannot be adopted.

According to Article 17 in the Chicago Convention, aircrafts have the nationality of the state in which they are registered. This regulation does not, however, imply a deviation from what the International Law usually understand by territory. The Chicago Convention, thus, contains a regulation in Article 2, in which by a state's territory is understood the land area with belonging territorial waters under the protection of the state in question's sovereignty, rule or mandate. The regulations on the Danish right of punishment according to the territorial principle in the Criminal Law, paragraph 6, are building on the same understanding of the relationship between the territory and an aircraft's flag state. Actions, including work, carried out on board an airplane registered in Ireland, while the airplane is grounded in a Danish airport, are, therefore, carried out on Danish territory. The same applies as long as the airplane is located in Danish air territory; cf. The Chicago Convention's Article 1 and 6. To assess the question of which country the work is taking place in, it is, therefore, without significance if the work is carried out in a building in the airport or onboard the airplane, while it is grounded in the airport or flying in Danish air territory.

Irrespective of whether both the work carried out outside the airplane in a Danish airport and the work taking place onboard the airplane, while it is grounded in a Danish airport or is located in Danish air territory, is carried out on Danish territory, there is no doubt that the majority of the work connected to international flights out of Copenhagen and Billund is not performed on Danish territory. This, however, does not imply that the employees and the work they perform thereby get a stronger, actual and genuine affiliation to a certain other country, including the airplane's registration country, than to the base country. It is the airport in which the employees have their base, which is the centre for the pilot's and cabin crew's trade. This is where the employees report for work. It is where the flight preparation work takes place. This is the place, the employees return to after every trip. This is where the final reporting is carried out. And it is here the employees dismiss at the end of the working day and go home to their private homes, which are their natural social reference both in connection with work and leisure time.

On the background stated, and based upon an overall assessment, The Industrial Court finds that the work carried out by pilots and cabin crew, stationed at Ryanair's bases in Denmark, have such a relation to Denmark that The Danish Federation of Salaried Employees in Service Trades' interest in collective agreement covering of the work has the necessary strength and relevance.

The relation to EU law

The right to negotiate collective agreements and enter into industrial disputes and secondary actions to support those collective agreements is a fundamental right in EU law; cf. Article 28 in the European Charter on Fundamental Rights. The right to free movement for workers and free exchange of services constitute fundamental freedoms in the EU law.

In a number of rulings, The European Court of Justice has decided on how these fundamental rights and freedoms are balanced towards each other, and upon which criteria the balancing is based; cf. the Court's ruling of 11 December 2007, case C-438/05, Viking, and the Court's ruling of 18 December 2007, case C-241/05, Laval.

It appears from the rulings that industrial dispute and secondary actions can constitute a restriction on the free movement, included the free movement of services, and that such a restriction only is permitted if it pursues a legitimate goal compatible with the Treaty and motivated in absolutely necessary general interest objectives. Additionally, it demands that the restriction is suited to secure the implementation of the goal in question, and that it does not go further than what is required to obtain the goal, cf. The Viking Ruling, Reason 75 and the Laval ruling, Reason 101.

It comes within the competence of the national courts to judge on the basis of these criteria, cf. The Viking ruling, Reason 80, 84, 85 and 86.

Hence, and since there is no basis for assuming that the Regulations, which Ryanair has referred to, have any independent significance for the balancing of the fundamental rights and freedoms, which the national court has to undertake based on the criteria the European Court of Justice has put in place, The Industrial Court finds that there is no such doubt about the understanding of the EU legal regulations, that there is a demand for a preliminary question in the European Court of Justice.

Following the relation, which pilots and cabin crew at Ryanair's bases in Denmark and the work, they carry out, have to Denmark, cf. the above passage on the collective agreement demand's strength and current relevance, The Industrial Court finds that The Danish Federation of Salaried Employees in Service Trades' demand for collective agreements and their notice of industrial dispute and secondary action in support hereof cannot be contrary to EU law. The purpose of The Danish Federation of Salaried Employees in Service Trades' industrial dispute and secondary actions is to secure decent wage and working conditions for the union's members in relation to work, having the mentioned relation to Denmark, and to prevent social dumping. The notice of industrial dispute and secondary action must be regarded as suitable means to secure the implementation of these goals, and it does not go further than what is necessary to obtain the goals.

This result is found to be in best accordance with The European Convention of Human Rights' Article 11 on Freedom of Association and with The European Court of Human

Rights recent practice in the area. The European Court of Human Rights have, thus, in their ruling of 12 November 2008 in the case of Demir and Baykara vs. Turkey changed its former practice and has now determined that the right to negotiate and enter into collective agreements are protected by The Convention's Article 11, cf. the ruling's Reasons 153 and 154. In the ruling of 21 April 2009 in the case Enerji Yapi-Yol Sen vs. Turkey and in the ruling of 27 November 2014 in the case Hrvatski liječnički sindikat vs. Croatia the Court has determined that the right to strike is protected in Article 11.

Formal conditions for the lawfulness of the notice of principal conflict

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Overall conclusion

Hereafter, it is the overall conclusion of The Industrial Court that The Danish Federation of Salaried Employees in Service Trades' interest in demanding a collective agreement for pilots and cabin crew at Ryanair's bases in Denmark has the necessary strength and relevance, and that the by The Danish Federation of Salaried Employees in Service Trades noticed principal conflict in support of the demand for a collective agreement is not violating EU law, but that the notice, due to formal shortcomings, is unlawful.

The Industrial Court, therefore, sustain the complainant's subsidiary claim, hence, Ryanair must acknowledge that The Danish Federation of Salaried Employees in Service Trades legitimately can give notice of and organize a principal conflict in support of a demand for a collective agreement covering crew members (pilots and cabin crew) at Ryanair's bases in Denmark.

IT IS HELD that

Ryanair Ltd. must acknowledge that The Danish Federation of Salaried Employees in Service Trades, legitimately, can give notice of and organize a principal conflict in support of a demand for a collective agreement covering crew members (pilots and cabin crew) at Ryanair's bases in Denmark.