HR NEWS

Legal foundation for HR Managers

In co-operation with Association of Management and Development of Human Resources

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Dear HR specialist,

By issue 2/2008 we are starting a new series on employing of foreigners in HR NEWS. We believe it will bring you a lot of useful information for your everyday practice. In December 2007, after several years, a Latvian company Laval won its dispute against Swedish trade unions at the Court of Justice. The judgement shall affect employees' rights through the whole European Union. Finally, we are bringing you a funny, but enlightening real case.

With best regards

JUDr. Dagmar Zukalová

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Have you known... ?

On 17th March the Republic Union of Employers (RÚZ) has presented a new project called "Payroll" during their press conference. The aim of the project is to inform the employees how much of their remuneration is transferred to the state.

Almost one half of the total remuneration of the employee is transferred to the state in form of statutory taxes and insurance. "Salaries in Slovakia are one of the lowest in the European Union, however, the statutory payments are one of the highest in the world," says Jozef Špirko, vice-president of RÚZ. Slovakia is amongst world's 10 countries with the highest statutory payments. "Our project has two aims: To initiate a debate on transfer payments is Slovakia and to discuss on possible savings in public finance in order to decrease statutory payments."

More information to be found on the website **www.ruzsr.sk** .

The judgement of the Supreme Court of Slovakia of 28th September 2006, file No. 1 Cdo 72/2006 has ruled that the employer has fulfilled its duty to negotiate notice with the employees' representatives pursuant to Article 74 of the Labour Code (LC) only if the employer's request for negotiation concerning termination of an employment relationship by giving a notice or a notice draft, attached to such request, contain notice essentials pursuant to Article 61 Sec. 2 LC.

The reason for giving notice must be defined in the notice in terms of fact such that it may not be confused with a different reason, as this reason cannot be amended subsequently. If the employer has requested the employees' representatives to negotiate the notice without stating notice essentials pursuant to Article 61 Sec. 1 LC in request or document attached, it does not fulfil the legal requirements for the notice validity pursuant to Article 74 Sec. 1 LC, resulting into nullity of such legal action. Similar applies for negotiation on immediate termination of employment relationship (Article 68 LC).

TOP topic

Employment of foreigners (1)

Usually, when Slovak employers employ foreigners, they agree to **govern their employment relationship, including employment contract, by law of the place where the employee carries out his work in performance of the contract, i.e. the Slovak Labour Code**. Such rule of "place of performance" (lex loci laboris) is stipulated also in Article 16 of the Act No. 97/1963 Coll. on Private International Law and Proceedings as amended (the "PIL Act") and it applies "ex lege" in case if the parties have not agreed on other applicable law to govern their relationship. Sometimes, the parties or one of them does not agree with the Slovak law as the applicable one for the employment contract. A question arises, whether is possible to conclude an employment contract in Slovakia, with a foreigner, in accordance with law of country other than country of employee's permanent residence or country of work performance.

Pursuant to Article 16 of the PIL Act, relationships arising of an employment contract shall be governed by law of place where the employee carries out his work unless agreed otherwise. It means that **the parties may agree within their contractual freedom that the employment contract shall be governed by other law.** Such manifestation of the parties' will is called "choice of law". Rules of application of the PIL Act attach importance to principle of public order exception pursuant to Article 36 of the PIL Act: Law of other country cannot be applied if it is contrary to principles of law and order of Slovak Republic and its political system that are subject of no reservation. Some examples: agreement of parties to restrict/exclude social rights stipulated in the Constitution or rights stipulated in international treaties on labour law and human right protection. **If the chosen law (or certain provision in the employment contract) is contrary to Article 36 of the PIL Act, i.e. principle of public order exception, the legal relationship or the certain provision of the employment contract shall be governed by Slovak law.** It is a

restriction that cannot be forgotten by the parties when choosing or applying the foreign law.

The parties may also **enter into valid employment contract, but they do not choose the applicable law** to govern the contract either jurisdiction of a court in case of dispute. The collision occurs if the law of the place of work performance and the place of employee's residence provides for different procedures to set applicable law. It is important to differ between relationships with party (mostly employer or employee) under the EU law or law of the third country (non-EU) as it sets **European legislation or Slovak PIL Act** to determine the applicable law.

1. If the law applicable to the contract has not been chosen and the employee resides **outside the EU**, the applicable law shall be determined by the Slovak PIL Act and the Slovak Labour Code shall be used subsidiarilly. In accordance with the PIL Act, if the foreigner carries out his work for the employer having seat in another country, the contract of employment shall be governed by the law of the country where the employer has its seat, except when the employee carries out work in the country of his residence. Pursuant to the PIL Act, if the foreigner employee performs work for employer having seat in other country, the law applicable for the contract shall be the law of the employer's seat unless the employee resides in a country in which he habitually carries out his work. Employment relationships at railway and road transport companies are governed by the law of the company seat; at river and airline operators they are governed by the law of country of registration and at navy transport they are governed by law of state of flag under which the transport is carried out.

Pursuant to Article 37 of the PIL Act, unless provided otherwise, **jurisdiction of Slovak courts is given if a defendant resides (or has its seat) in Slovak Republic.** Jurisdiction of Slovak courts is given also in cases concerning employment contracts when the plaintiff is employee residing in Slovak Republic. Pursuant to Article 37e of the PIL Act, the disputing parties may chose a jurisdiction by agreement, if their dispute concerns contractual relationship or claim to damage compensation. In cases concerning employment contract such agreement is valid only if it does not exclude jurisdiction of country where the plaintiff resides or if it has concluded after the dispute arose. If there is sole jurisdiction of foreign court, jurisdiction of Slovak court remains kept if the foreign court refused the proceeding.

2. Rome Convention on the law applicable to contractual obligations date 1980 (hereafter referred to as "the Rome Convention") **applies to any situation involving a choice between the laws of different countries of the European Community**. In accordance with Article 4 of the Rome Convention, if the law applicable to the contract has not been chosen, the contract shall be governed by the law of the country with which it is most closely connected (to the contract). Article 6 of the Rome Convention concerns issue of employment contracts. Pursuant to this Article 6, the main principle is to guarantee the employee with such protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice. The Rome Convention differs between employees who habitually carry out their work in performance of the contract in their own country and those who do not carry out their work on their own country. A contract of employment shall, in the **absence of choice of the applicable law**, be governed:

- by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
- if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

The second principle concerns mostly employees who work in several countries, e.g. sales managers.

In order to solve disputes of cross-border claims effectively, the Member States have agreed on Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also known as Brussels I. It shall apply in all proceedings, when the disputing parties have their seat or are domiciled in different Member States. The Regulation provides for special rules of jurisdiction in relation to employment contracts to protect the weaker party. The weaker party, i.e. the employee, should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for. The Regulation sets the court the plaintiff – the employee is entitled to bring the action in case of dispute, including disputes related to employment relationship.

Case Law of the COJ

Judgment of the Court (Grand Chamber) in case 341/05 Laval un Partneri Ltd v Swedish trade unions

Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L & P Baltic Bygg AB ('Baltic'), a company incorporated under Swedish law, for the purposes of the construction of school premises in Swedish town Vaxholm. Laval, which had signed in Latvia, collective agreements with the Latvian building sector's trade union (around 65% of the Latvian workers concerned were its members), was not bound by any collective agreement entered into with Swedish trade unions Byggnads, Byggettan (building and public works) or Elektrikerna (Swedish electricians' trade union), none of whose members were employed by Laval.

In summer 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval's signing the collective agreement for the building sector. If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations and that was the reason Laval refused enter into such agreement. That is to say, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (appx. EUR 16), which is appx. SEK 25 000 per month, based on related statistics for the first quarter of 2004. Laval paid its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

Since those negotiations were not successful, Byggettan announced to take measures to initiate the collective action. Blockading of the Vaxholm building site began on 2nd November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

At the end of November 2004, Laval spoke to Arbetsmiljöverket ("the liaison office") order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. Few days later, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers.

At the mediation meeting and at the conciliation hearing held before the Arbetsdomstolen ("Labour Court") in December 2004, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

The collective action directed against Laval intensified. Elektrikerna initiated sympathy action; that measure had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question. In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State. In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 25 March 2005 the latter was declared bankrupt. Laval commenced proceedings before the Arbetsdomstolen, which decided to make a reference to the Court of Justice for a preliminary ruling. The Court of Justice hereby rules:

„Article 49 EC and Article 3 of 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 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive."

Resulting of the decision, **trade unions were not entitled to force the company Laval un Partneri to modify wages of its employees in accordance with local collective agreements**. It is supposed that the judgement shall affect employees' rights through the whole European Union. Despite that the Judgment was pronounced on 18th December 2007, there is still discussion concerning possibilities for countries with higher social standards to restrict on competition by other countries where the employees enjoy fewer rights. According to some legal opinions, this case reflects concerns of countries Western European countries of influx of cheap labour from Eastern Europe.

Real & funny cases

Lift trucks

Workers of the supply company became attracted to kind of strange activities:
They were taking pleasure rides in lift trucks. During their working time they were driving lift trucks across the hall, rising highly and lowering then, making fun, and – of course, they did not work. When the boss was informed that the hall turned into an amusement park, he warned the workers by word of mouth and ordered to hang the warnings "Riding the lift trucks prohibited" on the walls of the whole hall. Despite the warning the workers were still riding the lift trucks.

In practise, it often happens that the employer does not take any action when the problem arises and it waits for the situation to solve itself. However, this employer made quick and right decisions. It responded immediately and sought for a legal advice. **All problems should be dealt with as soon as possible, with no waiting.**

After our jointly analysis the employer decided for a simple, but effective solution. It prepared blank notices on material breach of working discipline with a possibility of immediate termination of employment relationship. The employer advised the superior employee that if he saw some worker riding the lift truck, he should have filled its name into the blank notice and deliver it to the worker right after he had been caught in the act.

After the first worker was given such notice, others never rode the lift truck anymore.

Any questions? Do not hesitate to ask!

If you are interested in any such kind of articles and would appreciate further information, please feel free in providing suggestions and ideas concerning HR NEWS content for a better future. Do not hesitate to contact us by phone or via email at hrnews@zukalova.com.

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