CUATRECASAS

Employment

Newsletter | Portugal

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II. National Case-Law

Ruling by the Évora Court of Appeal, of February 14, 2019

Portuguese courts have jurisdiction over proceedings brought to challenge an Irish airline pilot's dismissal

An Irish airline pilot brought proceedings in Faro County Court to challenge the lawfulness of his dismissal, whilst his employer claimed that the Court did not hold jurisdiction.

The pilot in question used to fly to several different airports around Europe; his employment contract, drafted in English, set out that it was subject to Irish law and that Irish courts had sole and exclusive jurisdiction over all disputes concerning the performance and termination of the contract.

Notwithstanding, the Évora Court of Appeal pointed out that Regulation EC no. 593/2008 of the European Parliament and Council, of June 17, 2008, on the law applicable to contractual obligations (Rome I), is applicable in this case.

Whilst said Regulation enables the parties to select the law applicable, it also stipulates that such a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.

The Évora Court of Appeal based its judgment on the ruling of the European Court of Justice of September 14, 2017, which stated that the parties' freedom to conclude an agreement on jurisdiction cannot be interpreted as meaning that, even if a jurisdiction clause is used, it could apply exclusively and thus prohibit the employee from bringing proceedings before the courts which have jurisdiction under the general terms of the Regulation.

In the case under review, even though a jurisdiction clause had conferred jurisdiction on the courts of the Republic of Ireland for hearing disputes, the Court of Appeal judged that such jurisdiction could not be applied *solely and exclusively*.

Jurisdiction was also analysed in light of the Regulation's general rules on conferring jurisdiction, i.e. pursuant to Article 21 (1) of the Rome I Regulation. That article sets out, *inter alia*, that jurisdiction shall be held by the Court *"of the place where the employee habitually carries out his work, or in which he most recently performed his work".*

Moreover, the concept of *"the place where the employee habitually carries out his work"* should, in line with the guidance provided by said European Court of Justice ruling, be interpreted broadly and refer to a set of indicia, including determining in which Member State are situated: (i) the place from which the employee carries out his transport-related tasks; (ii) the place where he returns after his tasks; (iii) the place where he receives instructions

concerning his tasks and organises his work, and (iv) the place where his work tools are to be found, i.e. the place where the aircraft aboard which the work is habitually performed are stationed.

The Court found that, despite the employee flying to several European countries; his remuneration being paid through an Irish company into his Irish bank account; his social security contributions being paid by the same Irish company, Portugal was his habitual place of work. Thus, the indicia connected to his personal and family life were more relevant for determining his habitual place of work, and as a result, the Court with jurisdiction.

In conclusion, in view of the fact that the *ratio* of the rules for conferring jurisdiction regarding employment contracts is to protect the employee, the Court of Appeal ruled that Portuguese Courts, and in this particular case, the Court of Faro, have jurisdiction to hear the proceedings brought by a pilot of an Irish airline to challenge his dismissal.

Ruling by the Évora Court of Appeal, of March 28, 2019

Messages sent by an employee in a closed WhatsApp group cannot be used in disciplinary proceedings

This case raised the issue as to whether or not an employer could use messages sent by an employee - in this case, a pilot of an Irish airline - in a closed WhatsApp group as evidence and the justification for imposing the sanction of dismissing him.

The employer attached a photograph of the messages sent by the employee in a closed WhatsApp group, to which only pilots based in Faro belonged, to the Notice of Misconduct in a disciplinary proceeding.

The employer has a social networks policy, which sets out that *"users thereof must use social networks responsibly and sensibly and which prohibits the disclosure of confidential or private information and the publication of declarations about the defendant or work colleagues which could bring the company into disrepute. Furthermore, it prohibits derogatory comments, including rebukes or personal insults directed at any of the defendant's employees or services provider and sets out that any infringement of the social networks policy will be investigated and could lead to disciplinary sanctions, including dismissal."*

The Court of First Instance found that conversation held in a closed WhatsApp group could not be used as a justification or as evidence in disciplinary proceedings. Even though the employer must substantiate the facts underlying the charges and the decision to dismiss, Irish law, upon which the parties had conferred jurisdiction over the employment contract, sets out that interference is only possible in the enjoyment *of the right to private and family life, domicile and correspondence, if foreseen in law and is necessary in a democratic society for safeguarding national security; public safety; the country's economic well-being; public order;*

preventing crime; protecting health or morals, or for protecting the rights and freedoms of third parties.

Portuguese law also foresees citizens and foreign residents' right to privacy in communications.

The Court of First Instance stated that *"the kind of communication at issue in these proceedings (a message in a WhatsApp group – the description of privacy that appears on the platform speaks volumes, in that it states that all communications posted are private, encrypted and that not even the operating company can read them) is similar to mobile phone text messages and the "Messenger" service: it is private given that it is unlikely (unlike other more compact services such as "Facebook; Twitter or Instagram) that the messages will be seen by anyone other than their addressees".*

In the appeal proceedings, the Évora Court of Appeal stated that, given that the WhatsApp group was a closed group, there was a legitimate expectation to privacy within the group. Nevertheless, the Court also pointed out that *"there can never be an expectation of absolute privacy on social networks"*. The Évora Court of Appeal paid particular attention to the application's own description of message encryption, i.e., that all messages sent and received through the application are encrypted in such a way as to prevent their being read by WhatsApp or third parties, leading it to conclude that *"WhatsApp is an application on which messages are intended to be read only by their addressees."*

The Évora Court of Appeal therefore rejected the appeal, since the messages had been sent in a closed environment and were addressed to a limited group and were, thus, personal and private in nature, and were included in the realm of private life, which encompasses what is shared among a small group of people.

The Court of Appeal therefore ruled that the employer could not use the contents of messages sent by the employee to a WhatsApp group in disciplinary proceedings and, as a result, judged the dismissal to be unlawful.

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