

Question referred

Does Article 15(1) of the Convention to prevent double taxation between Belgium and the Grand Duchy of Luxembourg signed on 17 September 1970, interpreted as allowing a restriction on the power of taxation of the source State in respect of the remuneration of an employee residing in Belgium and performing his activity for a Luxembourgish employer in proportion to the activity performed on Luxembourgish territory, interpreted as allowing a power of taxation to be attributed to the State of residence in respect of the amount of remuneration relating to the activity performed outside Luxembourgish territory, interpreted as requiring the employee to be permanently and every day physically present at the seat of his employer when it is not disputed that he regularly travels there as the result of a judicial assessment, conducted with flexibility, on the basis of objective and verifiable evidence and interpreted as requiring courts and tribunals to evaluate the existence and relevance of the services provided there and elsewhere, day by day, with a view to establishing a proportion over 220 business days, infringe Article 45 of the Treaty on the Functioning of the European Union in that it constitutes a tax hindrance which discourages activities across borders and breaches the general principle of legal certainty in that it does not provide for a stable and secure regime of exemption of the entirety of the remuneration received by a Belgian resident employed by an employer whose actual seat is situated in the Grand Duchy of Luxembourg and places him at risk of double taxation of all or part of his income and subjects him to an unpredictable legally uncertain regime?

Reference for a preliminary ruling from the Supreme Court of the United Kingdom made on 20 October 2017 — Peter Bosworth, Colin Hurley v Arcadia Petroleum Limited and others

(Case C-603/17)

(2017/C 437/29)

Language of the case: English

Referring court

Supreme Court of the United Kingdom

Parties to the main proceedings

Applicants: Peter Bosworth, Colin Hurley

Defendants: Arcadia Petroleum Limited and others

Questions referred

1. What is the correct test for determining whether a claim advanced by an employer against an employee or former employee ('an employee') constitutes a 'matter relating to' an individual contract of employment within the meaning of Section 5 to Title II (Articles 18-21) of the Lugano Convention?

(1) Is it sufficient for a claim advanced by an employer against an employee to fall within Articles 18-21 that the conduct complained of could also have been pleaded by the employer as a breach of the employee's individual contract of employment — even if the claim actually advanced by the employer does not rely on, complain of, or plead any breach of that contract, but is (for example) advanced on one or more of the different bases indicated in paragraphs 26 and 27 of the Statement of Facts and Issues?

(2) Alternatively, is the correct test that a claim advanced by an employer against an employee falls within Articles 18-21 only if the obligation on which the claim is actually based is an obligation in the contract of employment? If this is the correct test, does it follow that a claim which is based only on breach of an obligation which arose independently of the contract of employment (and, if relevant, is not an obligation which was 'freely consented to' by the employee) does not fall within Section 5?

(3) If neither of the above is the correct test, what is the correct test?

2. If a company and an individual enter into a 'contract' (within the meaning of article 5(1) of the Convention), to what extent is it necessary for there to be a relationship of subordination between the company and the individual for that contract to constitute an 'individual contract of employment' for the purposes of Section 5? Can such a relationship exist where the individual is able to determine (and does determine) the terms of his contract with the company and has control and autonomy over the day-to-day operation of the company's business and the performance of his own duties, but the shareholder(s) of the company have the power to procure the termination of the relationship?
 3. If Section 5 to Title II of the Lugano Convention only applies to claims which, but for Section 5, would fall within Article 5(1) of the Lugano Convention, what is the correct test to determine whether a claim falls within Article 5(1)?
 - (1) Is the correct test that a claim falls within Article 5(1) if the conduct complained of could be pleaded as a breach of contract, even if the claim actually pleaded by the employer does not rely on, complain of, or plead any breach of that contract?
 - (2) Alternatively, is the correct test that a claim falls within article 5(1) only if the obligation on which it is actually based is a contractual obligation? If that is the correct test, does it follow that a claim which is based only on breach of an obligation which arose independently of the contract (and, if relevant, is not an obligation which was 'freely consented to' by the defendant) does not fall within article 5(1)?
 - (3) If neither of the above is the correct test, what is the correct test?
 4. In circumstances in which:
 - (1) companies A and B both form part of a group of companies;
 - (2) defendant X performs, de facto, the role of CEO of that group of companies (as Mr Bosworth did for the Arcadia Group of companies: Statement of Facts and Issues, paragraph 14); X is employed by one group company, company A (and so is an employee of company A) (as Mr Bosworth was from time to time in circumstances set out in the Statement of Facts and Issues, paragraph 15); and is not, as a matter of domestic law, employed by company B;
 - (3) company A brings claims against X, and those claims fall within Articles 18-21; and
 - (4) the other group company, company B, also bring claims against X in respect of like conduct to that which forms the basis of company A's claims against X;what is the correct test for determining whether company B's claim falls within Section 5? In particular:
 - (1) Does the answer depend on whether there was, as between X and company B, an 'individual contract of employment' within the meaning of Section 5 and, if so, what is the correct test for determining whether there was such a contract?
 - (2) Is company B to be treated as the 'employer' of X for the purposes of Section 5 to Title II of the Convention, and/or do company B's claims against X (in paragraph 4(4) above) fall within Articles 18-21 in the same way that company A's claims against X fall within Articles 18-21? In particular:
 - (a) Does company B's claim fall within article 18 only if the obligation on which it is actually based is an obligation in the contract of employment between company B and X?
 - (b) Alternatively, does the claim fall within article 18 if the conduct complained of in the claim would have constituted a breach of an obligation in the contract of employment between company A and X?
 - (3) If neither of the foregoing is the correct test, what is the correct test?
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