Employment law in hungary problem question

The difficulties that Andreas and Luka face in this circumstance relate to the fact that where Treaty Articles[1]and Regulations[2]are directly applicable in national courts. Directives are only binding as to the result to be achieved, with it being necessary for the Member State to adopt the national law in such a way as to implement the Directive's terms.[3]This means that whilst Andreas and Luka would have been able to rely directly on a Treaty Article or Regulations to enforce their EU rights in the Hungarian courts, they must rely on some alternative method of enforcement in respect of the Directive. It is these alternative methods of enforcement that lie at the crux of the issues here.

Although the direct effect for Treaty Articles was not instant, it was developed over a period of time, and Van Gend was the first judgment to expressly state that Treaty Articles could be directly effective.[4]On the other hand, *Article 288 TFEU* [5]specifically says that Regulations are directly effective. This was confirmed in *Leonesio* [6]and held that Directives are only directly effective in respect of the aims to be achieved and that the Member States are given discretion as to how these aims are introduced into national law.

On the face of it, it could be suggested that because Directives are not directly enforceable in the national courts, Member States would be able to disregard the requirements of the Directive. If as it has happened in this circumstance, it does not suit the current national requirements. This would, of course, make Directives largely irrelevant. This was the view that was taken by the European Court of Justice (ECJ) in *Van Duyn v Home Office* .[7]In this judgment, it would be held that, if the Directive was clear, precise and

unconditional (the same requirements as exist for the direct effect of Treaty Articles and Regulations)[8], and had a direct effect on the relations between individuals and the Member States. Therefore, the Directive ought to be given direct effect in the national courts.

The above position was further clarified in *Pubblico Ministero v Ratti .* [9]Mr. Ratti was a manufacturer of solvents in Italy, was charged failure to comply with the stricter Italian law. The ECJ made clear that the proper purpose of direct effect for Directives was to prevent a Member State from gaining an advantage by ignoring the requirements of a Directive. In essence, a Member State is estopped from denying an individual's rights based on the contents of a Directive once the period for implementing the Directive has passed.

Based on the above, it seems that Andreas and Luka's position is a relatively strong one, but unfortunately, the issue is slightly more complicated. These complications are initially lie in the fact that a failure to implement a Directive into national law is entirely caused by the fault of a Member State. In *Marshal ,* [10]it was recognized that allowing an individual to rely on the provisions of a Directive directly against another individual could have unfair results. This is because the individual expected to comply with the Directives may have no idea of its existence. On this basis, it was further held in *Faccini Dori v Recreb* [11]that the Directives could only have a direct effect on the Member State itself. This is known as a vertical direct effect. This is clearly a limiting factor and therefore it is essential that it is possible to identify what kind of organization fits within this requirement.

The issue of identifying against whom the direct of a Directive could be relied upon was addressed in *Foster v British Gas* . [12]Here, it was held that an organization would be part of the Member State if it was subject to the authority or control of the State, or had powers that went beyond those that ordinarily exist between individuals. There are two separate approaches that are followed in this respect. In *Sozialhifeverband ,* [13]it was held that private companies owned by a local authority would be considered sufficiently linked to the State purely based on the nature of their ownership. In *Vassallo* ,[14]it was stated that the nature of the role of the organization could also impact on whether it was considered part of the State. In this case, a privately-run hospital was considered part of the State. This is because some of its activities were publicly funded and partly also because it was serving a public function.

It can be seen from the above, the fact that Directives can only have a vertical direct effect will have a significant impact upon Andreas and Luka's ability to rely on the Directive. It seems probable that even though Andreas's employer receives some of its funding from private contributions, the fact that it is partly funded by the State, and it will be considered to serve a public function. It will mean that it will be considered part of the State and that, Andreas will be able to rely on the provisions of the Directive directly against it. The effect of this will ensure that prior to his dismissal, Andreas will be considered to have held a permanent contract. Therefore, he will presumably be able to rely on Hungarian employment law, at the very least, attempt to assert that he should receive some compensation for his dismissal. However, Andreas will not be able to assert that the Directive

means that he should not have been dismissed. This is because the only relevant purpose of the Directive is to ensure that a permanent contract is granted after two temporary ones have elapsed.

The position is very different for Luka. This is because the company for which she is working with is purely privately owned and funded. This is unlikely to be considered to serve as a public function. Therefore, she will not be able to rely on the direct effect of the Directive. However, this is not the end of the matter, because there are further possibilities that may assist her.

The first of these possibilities lies in what is known as an indirect effect. In *Von Colson & Kamann* ,[15]it was held that national courts have a duty to interpret national legislation in line with EU provisions if this was possible. The approach in *Von Colson & Kamann* [16]was quite limiting in that it only applied to national legislation that was implementing the Directive in question. This approach would not assist Luka, this is because there is no indication that the Hungarian government has taken any implementing steps at all with the regards to this Directive. The position was expanded somewhat in *Marleasing* [17], that to require national courts to interpret all national legislation in line with EU provisions where possible.

It is not possible to comment on the impact of an indirect effect on Luka’s position specifically. This is because this will entirely depend on whether there is already in existence any Hungarian legislation that could be interpreted in line with the provisions of the Directive. If this is possible, Luka will be able to rely on the existing national legislation and the Hungarian courts will be required to interpret accordingly. Clearly, if there is no relevant

Hungarian legislation exists, of if the existing legislation is written in such a way that an alternative interpretation is not possible, the indirect effect will be of no assistance to Luka.

The second possible solution for Luka can be found in the judgment in Francovich .[18]In this judgment, it was held that where a Member State has failed to implement a Directive and if certain other requirements are satisfied, an individual would be able to hold the Member State liable for their losses. In order for State liability to arise, three conditions must be met. Firstly, the Directive must grant rights to the individual. Secondly, it must be possible to identify these rights from the content of the Directive. Finally, there must a direct causal link between the Member State's failure to implement the Directive and the loss suffered by the individual.

There seems little difficulty in applying the above three conditions to Luka's position. On the fact given, it appears that the very purpose of the Directive was to grant individuals with the right to be placed on a permanent contract and the subsequent employment security that such a contract provides. It is also clear that the nature of the Directive makes its purpose clear. The position in respect of the causal link between the failure to implement the terms of the Directive and the loss sustained by Luka is an interesting one. This is because, taken at a simple level, the non-renewal of Luka's contract would not have occurred if the Directive had been properly implemented. Luka would already have been working under a permanent contract. However, the failure to implement is not necessarily the reason for Luka's loss. This is the downturn in piano manufacture and the subsequent loss of her job. In this respect, Luka may have lost her job even if she had a

permanent contract. In order to address this, it would be necessary to consider the steps taken by Kende Pianos in deciding whom to dismiss. However, it seems that even if it is possible to demonstrate that Luka would have been dismissed anyway, even if she would be on a permanent contract. Therefore, on the fact that she will not receive this payment is directly caused by the failure in implementation of the Directive and Luka should be able to claim damages from the State in order to compensate for this loss.

In conclusion, Andreas will be able to rely on the Directive directly in the Hungarian courts to ensure that he receives the same employment rights as an individual on a permanent contract. On the other hand, Luka will not be able to rely on the direct effect of the Directive, but she may be able to rely on its indirect effect, or she may be able to seek damages from the Hungarian State.

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[1] *Van Gen en Loos v Nederlandse Administratie der Belastingen* (case 26/62) [1963] ECR 1

[2]Treaty on the Functioning of the European Union (TFEU), Article 288

[3]Ibid

[4] *Van Gen (n1)*

[5]Treaty on the Functioning of the European Union (TFEU), Article 288

[6] *Leonesio v Italian Ministry of Agriculture* (case 93/71) [1972] ECR 293

[7](case 41/74) [1974] ECT 1337

[8]The van Gend Criteria (*van Gen en Loos*)

[9](case 148/78) [1979] ECT 1629

[10] *Marshall v Southampton and South-West Hampshire Area Health Authority* (case 152/84) [1986] ECR 723

[11](case 91/92) [1994] ECR I-3325

[12](case C-188/89) [1990] ECR I-3313

[13] *Sozialhifeverband Rohrbach v Arbeiterkammer Oberosterreich* (case C-297/03) [2005] ECR I-4305

[14] *Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* (case C-180/04) [2006] ECT I-7251

[15] *Von Colson & Kamann v Land Nordrhein-Westfalen* (case 14/83) [1984] ECR 1891

[16]Ibid

[17] *Marleasing SA v La Comercial Internacionale de Alimentacion SA* (case C-106/89) [1990] ECT I-4135

[18] *Francovich and Bonifaci v Italy* (joined cases C-6/90 and C-9/90) [1991] ECR I-5357