

# Chapter 11

## Posting of workers before Slovenian courts<sup>1</sup>

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### Introduction

Slovenian courts have rarely had the opportunity to address the issue of posting of workers, and therefore case law on posting is underdeveloped. The labour and other courts have recently seen a slight increase in the number of cases concerning posting of workers, but the questions raised have been limited to a small number of issues in what is a broad area and refer almost exclusively to outbound posting. Minimum rates of pay valid in the host country and the entitlement of a posted worker to the reimbursement of travel and other work-related costs are issues already dealt with in the courts, and special attention has been paid to the differentiation between the posting of workers and business trips. Two additional posting of workers issues previously tackled by the Slovenian courts are the calculation of a pension base in respect of the periods of posting, and the taxation of wages and other payments received by the posted worker. However, there are still many important legal aspects of posting of workers that have not yet been addressed. For example, there is no case law on any of the collective labour rights of posted workers. Most claims involving posting of workers have been brought before the labour and social courts (payment of wages during posting and certain other individual labour rights as well as pension rights), whereas the Administrative Courts dealt with the rest of these cases (taxation issues).

Bearing in mind the fact that the number of outbound posted workers is particularly high in Slovenia, and that this number has been rising significantly over the past ten years (especially during and after the crisis), it is somewhat surprising that more cases involving posting of workers have not been brought before the courts. At the same time, it would be incorrect to assume that the absence of claims means that rights of posted workers are fully respected in practice. Examples of violations of the rights of posted workers reported in the media and in different research reports reveal complex reasons behind the fact that posted workers do not often claim their rights in legal proceedings. Many of them are in a weak position and highly dependent on their employers. They are very often not unionised, have low qualifications and poor employability prospects. They are very vulnerable and afraid of losing their jobs. It's not often that they dare to claim their rights or even have the means and knowledge to do so. Figures show that construction workers account for most outbound posted workers. Another interesting feature is that many posted workers from Slovenia are third-country nationals, usually

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1. Please refer to Annex VII for an overview of the cases analysed in this chapter.

coming from Bosnia and Herzegovina and other parts of the Balkan region. This makes the situation even more complex, not just in legal terms, but also from the cultural and social-economic perspective.

In the coming years, the growing number of posted workers will possibly prompt more court cases involving posting and consequently more detailed case law. The recent slight increase in the number of such cases brought before Slovenian courts could indicate such a trend. However, for the complex reasons mentioned, expectations in this respect should not be too high.

Despite the rather poor and fragmented case law on posting, this chapter seeks to analyse the case law that does exist, and explain its main features based on this critical analysis. Section 1 provides some basic figures on posting and the employment situation in Slovenia and puts the existing case law on posting of workers into a broader context. The relevant legal framework is then explained in section 2, with the legal rules governing posting to and from Slovenia as well as the organisation and functioning of the courts in Slovenia briefly presented. The main legal debates on posting are summarised in section 3, and section 4 gives an analysis of the most relevant judgments dealing with posting of workers. Judgments delivered by different courts (labour, social, and administrative) are grouped into three subsections dealing with labour issues, social security issues, and all other issues related to posting of workers. The Conclusion summarises the main findings and attempts to evaluate the relevance of the Slovenian case law on posting of workers from a broader EU perspective.

## **1. General background and basic statistics on posting of workers**

Slovenia has two million inhabitants, approximately 930,000 of whom represent the economically active population. In 2017, the employment rate was just above 70%, and the registered unemployment rate around 9.5% (6.6% using Eurostat and ILO methodology), GDP per capita was approximately EUR 21,000 and real GDP growth was 5% (IMAD 2018a: 21-26; IMAD 2018b: 37, 110). In 2018, the average monthly gross wage was around EUR 1,700 (EUR 1,100 net), which sets Slovenia slightly apart from other central and eastern European (CEE) countries where wages have often been significantly lower. This is even more the case for the statutory minimum wage, which was around EUR 800 per month in 2017 (gross), EUR 840 in 2018 and, from 1 January 2019, EUR 890 (approximately EUR 670 net). In 2020, the statutory minimum wage will be raised to around EUR 940 gross (approximately EUR 700 net).

Slovenia was hit hard by the financial crisis in the late 2000s, experiencing a substantial fall in GDP, a rise in unemployment and other negative economic and social consequences. However, since 2014, and especially since 2016, the economic and social indicators have shown some improvement.

It is interesting to note that over the decade since the crisis, Slovenia has experienced a dramatic increase in outbound postings of workers. The number went up from around 25,000 A1 forms (posting from Slovenia) issued in 2010, to around 164,000 in 2016,

which constituted a 572% increase in this six-year period (European Commission 2018, European Commission 2017, De Wispelaere and Pacolet 2018). This makes Slovenia the EU Member State with the highest growth of posting of workers and one of the highest shares of posted workers abroad in the total labour force: in 2016, around 5% of the Slovenian employed population was posted abroad, whereas the EU average was 0.4% and the numbers for some of the other countries as follows: Luxembourg 3.8%, Slovakia 2.2%, Croatia 1.7% and Poland 1.2%, whereas Denmark, Finland, Sweden, Greece, Malta, the UK and Iceland had a very low percentage of their employed population sent abroad, 0.1% or less (De Wispelaere and Pacolet 2018: 25, 32-33). Another study (Voss et al. 2016: 16-17) shows slightly different numbers, however, with similar trends. By contrast, posting of workers to Slovenia grew at a much slower pace during the same period: around 5,100 A1 forms were issued in 2016, 52% more than in 2010 (De Wispelaere and Pacolet 2018: 26).

The share of the issued A1 forms in Slovenia when compared to total employment was 17.9% in 2016, the highest in the EU. (In Luxembourg, it was 16.4%, in Slovakia 4.5%, in Poland 3.2%; with the EU average at 1.0%). However, more than one A1 form can be issued to the same posted worker within a year; and, indeed, the average duration of an individual posting from Slovenia in 2016 was 67 days (De Wispelaere and Pacolet 2018: 17-18, 31-33).

Construction is the main employment sector for workers posted from Slovenia, with approximately 53% of all issued A1 forms (European Commission 2018a). In this sector, the share of posted workers in national employment was 49% in 2016; which means that almost five out of ten employed persons in the Slovenian construction sector are posted abroad (De Wispelaere and Pacolet 2018: 28, 33-34, 46). The high number of construction workers being posted abroad from Slovenia can to a certain extent be explained by the fact that the Slovenian construction sector was heavily hit by the crisis, during which construction activity in Slovenia shrank significantly, with many large construction companies even closing down.

There are no official statistics on the nationalities of the posted workers. However, different studies indicate that many posted workers from Slovenia, especially in the construction sector, are third-country nationals. The main destinations for workers posted from Slovenia are Germany (44.3%) and Austria (30%), followed by Belgium (6.1%), Italy (4.8%) and Croatia (4%) (European Commission 2018a). These characteristics are to a certain extent reflected in the existing case law on posting, with many judgments concerning construction workers posted to Germany or Austria.

## 2. Legal framework for posting of workers

The Posted Workers Directive 96/71/EC and the Posted Workers Enforcement Directive 2014/67/EU were transposed into the Slovenian law primarily by the Employment Relationships Act from 2002 and the Employment Relationships Act from 2013, as later amended (*Zakon o delovnih razmerjih* 2013), and by the Cross-border Provision of Services Act from 2017 (*Zakon o čezmejnem opravljanju storitev* 2017). The new

Posted Workers Directive (2018/957) has not yet been transposed into Slovenian law. However, the transposition period has not yet expired.

Other statutes relevant for the topic of this study include the Minimum Wage Act 2010, as later amended (*Zakon o minimalni plači* 2010), the Collective Agreements Act 2006, as later amended (*Zakon o kolektivnih pogodbah* 2006), the Employment, Self-employment and Work of Foreigners Act 2015, as later amended (*Zakon o zaposlovanju, samozaposlovanju in delu tujcev* 2015), and the Labour and Social Courts Act 2004, as later amended (*Zakon o delovnih in socialnih sodiščih* 2004).

The main features of the legislative framework relevant for analysing the existing case law on posting are explained below.

## 2.1. Workers posted to Slovenia

*Sedes materiae* is contained in Article 210 of the Employment Relationships Act, according to which a posted worker is entitled to the minimum level of rights (concerning wages, working time, breaks and rest periods, minimum annual leave, and so on) as regulated by Slovenian labour legislation and sectoral collective agreements, if this is more favourable to the worker. Exceptions to this rule are temporary initial work not exceeding eight working days and temporary work not exceeding one month in a calendar year, although these exceptions are not valid for the construction sector.

In Slovenia, the minimum wage regulation has a long history (see Poje 2019). It is regulated by a statute and is the same for all workers. It is adjusted regularly. As noted above, it amounts to around EUR 890 gross and EUR 670 net (in 2019), which is between 50–60% of the average wage in the country. In addition, Slovenia has a well-functioning system of collective bargaining with an important sectoral level collective bargaining and a fairly high coverage rate of around 65% (Visser 2016). This sets Slovenia apart from most CEE countries; however, the coverage rate has been steadily declining in recent years.

According to the Collective Agreements Act, a collective agreement concluded with representative trade unions (the predominant practice in Slovenia) applies to all employees of the employers bound by it, irrespective of whether an employee is a trade union member or not. The validity of collective agreements may, under prescribed conditions, be extended, that is, declared universally applicable to all undertakings in the sector concerned. In practice, many of the sectoral collective agreements concluded by the representative trade unions are extended, including in important sectors such as construction.<sup>2</sup> The extended collective agreement applies to all employers and employees within the relevant sector of activity. Provisions of the normative part of

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2. Register of sectoral collective agreements valid in Slovenia, available at [http://www.mddsz.gov.si/si/delovna\\_podrocja/delovna\\_razmerja\\_in\\_pravice\\_iz\\_dela/socialno\\_partnerstvo/evidenca\\_kolektivnih\\_pogodb/](http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/socialno_partnerstvo/evidenca_kolektivnih_pogodb/) (in Slovene language only). In this register, there is also an indication (*razširjena veljavnost*) of which collective agreements have been extended and are universally applicable to all undertakings within the specific sector.

collective agreements (which regulate working conditions and terms of employment) have direct and binding normative effect. Provisions of the contract of employment that are contrary to the minimum rights laid down by collective agreements are null and void, and the provisions of the relevant collective agreements apply as the constituent part of the employment contract instead.

To legally provide services in Slovenia using posted workers, a statement must be submitted in electronic form to the Employment Service of Slovenia. It has to include the following information:

1. number of posted workers
2. type of service
3. location and duration of the provision of services
4. name and surname of the posted worker who acts as a contact person with the competent Slovenian supervisory authorities.

Documents regarding occupational health and safety and evidence of the working hours of posted workers must be available to supervisory authorities at the place where services are provided. At any time during their stay in Slovenia, posted workers must be able to present the A1 form to the authorities that proves they are covered by their home social security system whilst abroad.

## 2.2. Workers posted from Slovenia

Posting of workers from Slovenia is regulated by Articles 208 and 209 of the Employment Relationships Act. An employer may temporarily post a worker abroad, but such a posting has to be agreed upon either in the employment contract or in a specially concluded annex. A worker may refuse to be posted abroad provided that justified reasons exist, for example pregnancy or the need to care for a child under the age of seven, and so on.<sup>3</sup> There is also an explicit provision in the Act that after the termination of the posting period the employer must ensure the worker's return to Slovenia.

If a worker is temporarily posted abroad, the contract of employment must contain provisions on a number of issues including the duration of work abroad, holidays and work-free days, minimum annual leave, the conditions of return to Slovenia, the amount of salary and the currency in which it is to be paid, additional health insurance, other benefits in cash or kind, and the manner of ensuring and exercising rights related to wages and other benefits under the regulations of the host country. This must be within the minimum requirements provided by Slovenian legislation or more favourable to the worker.

In 2017, the Cross-border Provision of Services Act was enacted (applicable since 1 January 2018), which implements the EU Enforcement Directive 2014/67/EU and introduces additional conditions for employers posting workers to and from Slovenia.

3. A worker's refusal to temporarily work abroad in such cases, if a justified reason exists, does not constitute a breach of his or her obligations under the contract of employment (Belopavlovič et al. 2016: 1097).

It contains stricter rules, especially as regards formalities, supervision/monitoring and sanctions. It regulates subcontracting and subsidiary liability, posting of temporary agency workers, as well as the co-operation with controlling authorities of other EU Member States. One of the main objectives of this Act was to prevent abuses, for example, so-called letterbox companies. This Act is relevant only for the posting of workers within the EU,<sup>4</sup> and it remains to be seen whether its objectives will be met in practice. The A1 form is issued to employers who fulfil all prescribed conditions by the Health Insurance Institute of Slovenia.

### 2.3. Slovenian court system

As mentioned in the Introduction, most judgments concerning the posting of workers have been delivered by labour and social courts (payment of wages during posting and certain other individual labour rights as well as pension rights), whereas the remaining ones were issued by the Administrative Courts (taxation issues).

In Slovenia, labour and social disputes are dealt with by specialised labour and social courts. Labour Courts have jurisdiction to decide on individual and collective labour disputes, whereas social courts deal with social security issues (rights and obligations relating to pension, health and other social insurance schemes and similar). Labour and social courts of first instance<sup>5</sup> decide in a panel comprising a judge (as president of the panel) and two lay judges (as members), representing both sides of the industry. If the value of the subject matter in individual labour disputes and social disputes does not exceed the prescribed amount, and in certain other specific cases, a single judge decides the case. The Higher Labour and Social Court<sup>6</sup> decides on appeals against decisions of the first instance labour and social courts (in a panel of three judges), while appeals against and reviews of decisions of the Higher Labour and Social Court are heard by the Supreme Court of the Republic of Slovenia,<sup>7</sup> which has a specialised Labour and Social Division (the Supreme Court decides in a panel of three or five judges).

The Administrative Court has jurisdiction to decide in administrative disputes in the first instance and has the status of a higher court.<sup>8</sup> It decides in a panel of three judges, except in certain cases provided for by law and in which a single judge rules. Complaints against its decisions and revisions are decided by the Supreme Court. Judgments of the Administrative Court in taxation disputes are relevant for the analysis of the case law on posting of workers (types of taxable income, distinction between payment of wages and reimbursement of costs which are not taxable up to a prescribed amount, and distinction between posting of workers and a business trip).

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4. Whereas the relevant provisions of the Employment Relationships Act apply to any posting of workers, not just from and to other EU Member States.

5. The structure of first instance labour and social courts ('delovno sodišče', 'socialno sodišče') available at [http://www.sodisce.si/sodisca/sodni\\_sistem/delovna\\_sodisca/](http://www.sodisce.si/sodisca/sodni_sistem/delovna_sodisca/)). There is only one social court of first instance for the entire territory of Slovenia and four Labour Courts of first instance.

6. 'Višje delovno in socialno sodišče', available at <http://www.sodisce.si/vdss/predstavitev/>

7. 'Vrhovno sodišče Republike Slovenije', available at <http://www.sodisce.si/vsrs/>

8. 'Upravno sodišče Republike Slovenije', available at <http://www.sodisce.si/usrs/predstavitev/>

If human rights have been violated in an individual case (relevant in all types of disputes, either labour, social or administrative), a constitutional complaint may be lodged before the Constitutional Court of the Republic of Slovenia.<sup>9</sup> There is no case law of the Slovenian Constitutional Court on posting of workers.

### 3. National legal debates on posting

In Slovenia, legal debates on posting of workers have mainly focused on the problems associated with the abuses and the risks of social dumping, on critical analysis of the CJEU case law on posting and the need to amend the EU rules in this area, and on the problems of effective supervision of compliance in practice (Kresal Šoltes 2009, Kresal Šoltes 2013, Kresal 2016, Senčur Peček 2016, Tičar 2017). The CJEU case law on posting of workers (*Viking* C-438/05, *Laval* C-341/05, *Rüffert* C-346/06, *Commission v Luxembourg* C-319/06, *Sähköalojen ammattiliitto* C-396/13, and so on), and its broader consequences on labour rights, has attracted a lot of attention and well-argued critical debates. Special attention in the legal literature has been paid to the situation of posted temporary agency workers (Kresal Šoltes 2016).

It seems quite odd that in Slovenia, despite the quite impressive volume of Slovenian academic literature on posting and the well-developed and elaborated discussions around it, no specific attention is paid to the judicial decisions in posting of workers' matters delivered by the Slovenian courts. To a certain extent this could be explained by the fact that until recently there has been almost no relevant national case law on posting. Even now, most of the national case law on the subject deals with rather narrow, specific questions and is not very challenging from the legal point of view, whereas fundamental issues concerning the posting of workers have not yet been dealt with by the Slovenian courts. The Slovenian case law on posting has not been perceived as a source of problematic decisions and existing problems in practice; the problem has rather been its non-existence. This has changed recently, and further academic legal debates focused on posting of workers' cases coming and pending before the Slovenian courts can be expected in the future.

Recently, a lot of academic discussion has focused on the transposition of the EU Enforcement Directive into Slovenian law (see, for example, Snoj 2017 and Miklavc 2018) and on the revision of the EU rules on posting of workers in general, and also specifically in connection with the preparation of the revised Posted Workers Directive.<sup>10</sup> Specific problems of multinational workers who have been posted or perform work in two or more EU Member States other than that of the employer have also been addressed (Hojnik 2017, Sojč 2018). Payment of taxes and social contributions for posted workers as well as the consequences for their social security rights, especially as regards the old-age pension, have also been discussed (Mišič 2018a, Mišič 2018b, Strban 2018,

9. 'Ustavno sodišče Republike Slovenije', available at <http://www.us-rs.si/en/>

10. Adopted in June 2018, available at <http://data.consilium.europa.eu/doc/document/PE-18-2018-INIT/en/pdf>. Slovenia was the only 'new' Member State that advocated and supported a revision of the existing Posted Workers Directive. See also Kiss 2018, European Commission 2018b and European Commission 2016.

Hojnik 2006). This is one of the rare issues also mirrored in the Slovenian case law (see sections 4.2. and 4.3). Strban (2018: 425) points out that social security rules on posting need to be modernised.

The high vulnerability of posted workers makes the violation of workers' rights in practice one of the most problematic issues connected with the posting of workers. Since they are afraid to lose their jobs and income, and they are often not even aware of their rights, they rarely claim their rights before courts, or notify violations to labour inspection authorities. Besides, they are usually not unionised or involved in collective actions. The existing case law on posting (see section 4) does not reflect this problem or tackles it to a very limited extent. Perhaps it would be more correct to say that this problem of high vulnerability of most posted workers is well reflected in the lack of more elaborated national case law on posting: despite quite frequent violations of their rights in practice they do not bring cases before the court and claim their rights in legal proceedings. The many problems still occurring in practice are not identified as such from a legal point of view and are therefore remaining unresolved through judicial decisions.

Many posted workers from Slovenia (mainly in the construction sector) are foreign nationals, usually from Bosnia and Herzegovina and other Balkan countries, and their vulnerability is even higher. In this regard, Slovenia is described as a 'transition country' enabling the posting of workers from Bosnia and Herzegovina to Germany, Austria and other EU countries (Rogelja et al. 2016). In this study, Rogelja et al. point out that the problems are related particularly to the non-selective issuing of the A1 forms, sometimes to the letterbox companies whose bank accounts are blocked or closed in Slovenia, and to the poor supervision and ineffective remedies in cases of violations. Even if workers report the non-payment of wages and/or social contributions or other violations of their rights to the Slovenian Labour Inspectorate or bring an action before the Labour Court, such procedures often turn out to be too lengthy and inefficient (for example, the plaintiff may remain without compensation despite the judgement being legally effective, because the sending company no longer exists). This situation has not yet been mirrored in the national case law on posting of workers, however.

Construction has been exposed as the most problematic sector. The extremely poor working and living conditions of posted construction workers have been reported in certain cases.<sup>11</sup> There have been civil society initiatives as well as trade union actions in this regard to protect posted workers' rights, particularly foreign workers in the construction sector (see, for example, Lukić 2017a, Lukić 2017b).<sup>12</sup> Civil society initiatives and trade unions also co-operate at the EU level (see, for example, Renar 2014). The issue of letterbox companies in connection with posting of workers from

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11. Such cases have also been reported in the media. See, for example, radio news (Val202 2017): '...In Slovenia, there are dozens, if not hundreds of companies that have been exporting workers. But unlike other European countries, Slovenian companies don't send citizens of their own country. No; they have mostly exported foreign workers from the Balkans.' In another contribution (Raičević 2013) exploitation of workers and modern slavery are mentioned in relation to posting of workers. There are other examples as well.

12. Delavska svetovalnica (Counselling Office for Workers) is very active in this area in supporting foreign posted workers and helping them to protect their rights, whereby their activities are not limited to the posted workers, available at <http://www.delavskasvetovalnica.si/napoteni-delavci/>

Slovenia to other EU Member States has been especially problematic, since it is very easy to establish a company in Slovenia and the supervision has been poor. On the basis of studies and media reports, it can be assumed that authorities were issuing A1 forms very easily and without putting enough effort into supervising the actual situation and checking whether all conditions have been met. Another problem within the framework of posting abroad is bogus self-employment, which is becoming more and more widespread.

Trade unions in Slovenia recognise posting of workers as an important issue and have been organising, for example, information points for foreign and posted workers. They have also been very active in the preparation of the new legislation transposing the EU Enforcement Directive and have strongly influenced its content. Slovenian trade unions accept third-country workers as their members, although there is no reliable data on how many of them in reality decide to join trade unions. Initiatives to more actively support foreign workers, including third-country posted workers, by the Counselling Office for Workers (*Delavska svetovalnica*) and the Counselling Office for Migrants (*Svetovalnica za migrante*) and their day-to-day fieldwork in practice deserve particular attention. These support foreign posted workers and foreign workers in general, report cases of violation to law enforcement bodies, including the Labour Inspectorate, and assist migrants in obtaining evidence and information about these violations (Samaluk 2017: 204). Samaluk (2017: 202-206) describes their activities in more detail: the Counselling Office for Migrants prepared various multilingual publications tailored to specific migrant groups, such as migrant workers, posted workers, refugees and asylum seekers; it also organised information workshops and various linguistic groups. Counselling, empowering, awareness raising, reporting in the media, negotiating, pressure through public opinion campaigns, and co-operation with inspection are all used. By contrast, direct involvement of trade unions and civil society initiatives in legal proceedings concerning posting of workers, where they are bringing cases before courts and representing posted workers in the court's proceedings, is lacking. All in all, it seems that trade unions and civil society initiatives do not perceive judicial proceedings as a preferable - or effective - tool to protect the rights of the posted workers.

#### 4. Analysis of the case law

This section presents an overview of the judgments on posting of workers delivered by the Slovenian courts and some basic findings from an analysis of the publicly accessible databases of the case law in Slovenia.<sup>13</sup> By using a combination of methods (typical keywords, review of judgments dealing with issues typically connected with posting, and so on), only 17 relevant judgments were identified in the publicly accessible databases.

13. Database of the case law of the Constitutional Court of the Republic of Slovenia available at <http://www.us-rs.si/odlocitve/vse-odlocitve/> (a selection of cases can also be found in English at <http://www.us-rs.si/en/case-law/search-3441/>). Database of the case law of the Supreme Court and higher (appeal) courts, including the Higher Labour and Social Court available at <http://sodnapraksa.si/>. There are no decisions of the Constitutional Court dealing with the posting of workers to date.

An in-depth analysis of these judgments reveals some common characteristics. Almost all cases concern outbound posting, that is, posting of workers from Slovenia who temporarily perform work in another country. The existing case law, however, does not reflect the fact that many of them are actually third-country nationals, mainly from Bosnia and Herzegovina, for whom Slovenia is already in a way a 'host' or 'transit' country, in other words a gateway to the EU labour market. Lack of cases concerning the inbound posting is not surprising, taking into account the low number of workers posted to Slovenia. The only inbound posting case raises issues of tax evasion and the question of the taxable income of workers posted to Slovenia. However, it concerns workers posted to Slovenia from Bosnia and Herzegovina (see section 4.3), and not intra-EU mobility of posted workers.

Another interesting feature of the Slovenian case law on posting is that in all cases brought before the Slovenian courts the plaintiff was an individual posted worker. However, in terms of who won the case, there is a significant difference between labour disputes on the one hand, and social and administrative disputes on the other. Whereas in all labour disputes except one, the court found workers' claims well founded and decided in the plaintiff's (posted worker's) favour, all social and administrative disputes were decided in the defendant's favour (against the posted worker).

It is worth noting that in labour disputes, the defendants were individual employers and they lost in all cases except one. Such case law might suggest that posted workers very rarely and with great caution decide to bring a suit before a Labour Court against their employer, and only in clear-cut cases.

In social and administrative disputes, the opposing side in the concrete analysed cases was the Pension and Disability Institute of Slovenia and the State-Ministry of Finance respectively. The posted workers have not been successful in any legal proceedings against the state or the public institution. The questions raised in those proceedings were, for example, the method of the calculation of the pension base as regards the posting periods, whether particular amounts paid to the posted worker are taxable income or not, and whether specific rules on exemptions and tax relief are applicable in the case of a posted worker. We could speculate that such outcomes of legal proceedings show that the state and public institutions have better legal support and knowledge and, consequently, do not violate rights of the posted workers, or that the public interests they represent often prevail over the interests of the individual posted workers. Or perhaps a combination of both is the case. Actually, the relatively low number of such cases up until now does not allow us to make any general conclusions, but it may be interesting and relevant to analyse developments of the case law from this perspective in the future.

The analysed cases are very much in line with the statistical data presented in section 1, which shows that Germany and Austria are the main destinations for posted workers from Slovenia and that most of them are construction workers.

As regards the substance, the questions that have been dealt with by the Slovenian courts up until now in legal proceedings do not reflect the complexity and variety of

problems connected with the posting of workers nor the elaborate legal literature on the topic. Slovenian case law on posting is mainly limited to rather specific and fragmented legal questions. Analysed cases can be divided into three main areas dealing with labour issues, social security/social insurance issues and administrative issues.

#### 4.1. Labour issues

Seven relevant judgments dealing with posting of workers delivered by the Slovenian Labour Courts in a labour dispute have been identified. Five of them concern a construction worker posted abroad, to a construction site in Germany or Austria. The following legal issues have been raised in these labour disputes:

- obligation to pay wages according to the minimum rates of pay applicable in the host country
- reimbursement of travel/subsistence costs during posting
- payment for overtime work of a posted worker
- definition of posting and the distinction between posting of workers and a business trip
- calculation of a compensation in case of unjustified dismissal during the posting of a worker
- whether actual wages received during posting were to be taken into account when calculating the amount of a severance pay.

Let's look first at the judgments of Labour Courts dealing with the minimum rates of pay and the reimbursement of travel/subsistence costs during the posting of a worker from Slovenia to another country.

In three similar cases (Higher Labour and Social Court, Nos. Pdp 991/2015, Pdp 992/2015 and Pdp 293/2017)<sup>14</sup> the posted worker brought an action before the Court claiming differences in wage actually paid and that which he should have received as a posted worker, and the reimbursement of travel and subsistence costs during the posting abroad. In the first two cases, a construction worker, employed by a Slovenian building company on a fixed-term contract, was posted to Germany for three months. No specific employment contract or annex was concluded for the period of posting. The Court emphasised that the EU Posted Workers Directive 96/71/EC is relevant and that minimum rates of pay for such work in Germany should apply, since they are higher than the Slovenian minimum wage agreed upon in the existing contract of employment. The Court awarded the worker the difference in pay, which meant in absolute numbers an additional approximately EUR 1,300 per month for work in Germany. The court also awarded the posted worker the reimbursement of travel (*prevoz*) and subsistence costs (*dnevnice*) for the period of being posted to Germany to the amount of approximately EUR 1,300 per month.

14. The first two cases concerned a construction worker posted to Germany and the third one a construction worker posted to Austria.

The third case concerned an electrician posted from Slovenia to a construction site in Austria, employed under a fixed-term contract of employment which determined the amount of the worker's wage at a lower level than the minimum rates of pay applicable in Austria for such work. Here again, the Court, referring to Article 209 of the Employment Relationships Act and the Posted Workers Directive, emphasised that for the posted worker the minimum standards valid in the host country have to be respected if they are more favourable to the worker.

All three judgments address a fundamental principle as regards the remuneration of posted workers and are relevant also within the broader EU legal perspective. The judgment in the third case is especially relevant, since its line of reasoning is very clear and well structured; it addresses the applicability of the host country's sectoral collective agreements to posted workers. Besides, it explicitly refers to the CJEU judgment C-396/13 (*Sähköalojen ammattiliitto*) when defining the concept of minimum rates of pay. By applying the relevant provisions of the Austrian sectoral collective agreement, the Court found that the posted worker was entitled to a monthly wage to the amount of EUR 1,688 for the period of posting and awarded him the difference. The worker was also awarded the reimbursement of subsistence costs (*dnevnice*); the Court emphasised that *dnevnice* do not form an integral part of the (minimum) wage and should be paid in addition to the worker's wage since they cover actual costs incurred during the posting.

The same principles as regards the obligation to guarantee the posted worker the minimum rates of pay valid in the host country were confirmed in another judgment which concerned a construction worker posted to Germany (Higher Labour and Social Court, No. Pdp 1113/2015), this time as regards the payment for overtime work of a posted worker. The argumentation of the Court was similar; it referred to the EU Posted Workers Directive, emphasised that the minimum rates of pay for such work valid in Germany apply, and also for the payment for overtime work, taking into account the increased rates for this, since these are higher than those fixed in the employment contract based on the levels of minimum pay valid in Slovenia.

The Court also explained *obiter dictum* that such regulation of payment and other rights for posted workers, guaranteeing them the same minimum level of pay valid in the host country, aims at protecting local workers against competition based on low-paid posted workers from other countries.

This case also illustrates the exploitation of workers posted to foreign construction sites who are often required to work extremely long hours, often without adequate rest periods. A substantial amount of overtime work has been done by the respective posted worker, but has not been paid for by the employer at all. Although it is not possible to go into detail, it is interesting to point out the part of the Court's reasoning in which the rules on the burden of proof were discussed: since the employer has not presented the working-time records and has not proved that the worker had worked less, the Court accepted the records of working hours that the worker himself had kept for his evidence as valid and convincing evidence of the actual working hours he completed.

In a judgment of the Supreme Court from 2008 (No. VIII Ips 215/2007), the question of the definition of posting (who is a posted worker and when the posting of a worker takes place) was raised. Without going into the detail of a concrete case which is not particularly relevant from a broader EU perspective on posting,<sup>15</sup> let's just point out the Court's argumentation that the distinction between a business trip and posting of workers has to be made and that rules on posting do not apply in the case of a business trip. The Court used the following main criteria for the distinction between a business trip and posting of workers: the scope and the length of the period of working abroad as well as the continuity of the work. The Court concluded that the employer was not obliged to follow the legal rules on posting since there was no posting of a worker in this particular case, rather a number of short business trips. This is the only judgment in the analysed case law on posting where the employer won the case.

The rest of the judgments on posting delivered in labour disputes address certain specific legal issues, more or less relevant only within the particular Slovenian situation. In one case (Higher Labour and Social Court, No. Pdp 885/2000), the Court had to decide on the amount of the compensation to be paid to a worker following the decision that his dismissal was unjustified and reintegration ordered. The worker was posted temporarily abroad and after his dismissal he returned to Slovenia and brought an action before the Labour Court for unjustified dismissal. The Court decided that the worker was entitled to a compensation in the amount of wage he would have earned as a posted worker abroad until the end of the agreed period of posting although the worker was not actually abroad after the dismissal.

The issue of the severance payment was dealt with in another case before the Supreme Court (No. VIII Ips 97/98). A posted construction worker was dismissed. According to the then valid Slovenian law, the severance payment was calculated on the basis of the amount of the last three months' pay. The employer did not take into account the higher wage received during the posting on the construction site abroad, but calculated the severance pay on the basis of the (lower) wage that the worker would have been entitled to for such work in Slovenia (which was also the basis for the payment of the social insurance contributions for the period of posting). The Court found a violation of the worker's rights and decided that a severance pay should be calculated on the basis of the actual wages received during that period.

## 4.2. Social security issues

Six judgments dealing with a specific social insurance issue in relation to the posted workers have been identified in the database of the case law of the Slovenian courts. They all concern outbound posting. In all cases, the plaintiff was a former posted worker and the defendant the Pension and Disability Insurance Institute, a public body

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15. The case concerned a summary dismissal on the grounds that a worker had failed to perform his duties under the contract of employment by refusing to go on a business trip abroad; however, the worker claimed that the posting was at stake and that a specific contract or annex should have been concluded and that he was not obliged to temporarily work abroad.

responsible for the compulsory (statutory) pension and disability insurance scheme that covers the entire territory of Slovenia. In all cases, the defendant, that is, the Pension and Disability Insurance Institute, won.

All these cases concern the same legal question which has its roots in a specific Slovenian legal regulation regarding the payment of compulsory social insurance contributions in the case of posting of workers. The issue is particularly delicate and problematic from the broader EU perspective, since it raises doubts as to whether the respective Slovenian legal rules violate the EU legal order by enabling Slovenian companies that temporarily post workers abroad to pay social insurance contributions at the reduced rate. However, this issue has not been tackled by the Slovenian courts from this perspective, but rather only within the limits of the national legal perspective. The issue of how social insurance contributions are calculated for the period of posting abroad has not been questioned by the Slovenian courts, only the issue of how, consequently, the amount of the retirement pension should be calculated in respect of the periods of posting abroad.

In all these six judgments (Higher Labour and Social Court, Nos. Psp 42/2016, Psp 51/2014, Psp 102/2010 and Psp 539/2007 and Supreme Court, Nos. VIII Ips 314/2008 and VIII Ips 136/2014), the Court decided that for the period of the posting of a worker, the actual wage paid to the posted worker is not to be taken into account, but only the amount that was correspondingly calculated on the basis of the then valid rules and out of which the social contributions have been paid to the pension insurance. Since the contributions have been calculated on the basis of the amount of wage that would have been paid for comparable work in Slovenia, the pension base in respect of these periods is to be calculated on the basis of the same, lower amount of a comparable wage.

In one of these judgments, the Higher Labour and Social Court (No. Psp 51/2014; see in particular the penultimate paragraph) gave an elaborate explanation for such a decision, putting it also in a broader social context. The Court emphasised that this question of how the periods of posting of a worker abroad should be taken into account within the pension insurance system has always been problematic and, therefore, it has been and still is a subject of special rules in Acts regulating pension insurance. The wages of posted workers were usually higher than those of comparable workers performing the same/similar jobs in Slovenia. The Court explicitly mentioned some of the reasons: the fact that posted workers were entitled to different supplements due to separate family life; higher living costs in a host country; arduous working conditions; or the fact that the minimum rates of pay in a host country agreed upon by social partners in collective agreements are usually set at the higher level than those applicable in Slovenia, and so on. The Court further explained that over the years the legal solution has been developed, according to which not the actual wage paid to the posted worker was relevant, but the amount out of which social contributions have been paid. This amount was determined administratively in such a way that it was comparable to wages that workers performing the same/similar jobs have received for the work done in Slovenia in the same period. Therefore, it is not the actual wage paid to the posted worker but a 'comparable wage' paid for the same/similar work in Slovenia that has to be taken into account when calculating the old-age pension.

As already mentioned, when deciding on this very delicate issue, the Slovenian courts did not find it necessary to refer to and apply any of the EU legal rules. Nevertheless, the issue has also achieved the attention within the broader EU perspective. Slovenia has been accused of exporting cheap labour, especially in the construction sector. In February 2019, the European Federation of Building and Woodworkers submitted a formal complaint to the European Commission against Slovenia, alleging that it is granting illegal state aid to companies that temporarily post workers abroad and that such reduced social insurance contributions allow a significant financial competitive advantage to the Slovenian companies by lowering their labour costs, and that this amounts to the disruption of the internal market (EFBWW 2019).

Apart from the discussed issue of the calculation of the pension base in respect of the posting periods, no other social security/insurance related issues for posted workers have been addressed so far by the case law of the Slovenian courts.

#### 4.3. Other issues related to posting of workers

Apart from the judgments issued in labour and social disputes discussed in sections 4.1 and 4.2, all other judgments concerning the posting of workers were issued by the Administrative Court in administrative disputes dealing with various aspects of taxation. Four such judgments were identified in the database of the case law of the Slovenian courts. In all four cases, the case was brought before the court by the posted worker against the Ministry of Finance, challenging its decision that a certain amount paid to the posted worker is taxable. In all four cases the plaintiff, that is, the posted worker, lost the case. Three of these cases dealt with outbound and one with inbound posting, and raised the following legal questions:

1. whether the reimbursement of subsistence costs (as well as travel and other similar costs) is taxable or not in the case of a posted worker claiming that he was daily sent by the employer to a business trip from his ordinary place of stay abroad and the place of work abroad
2. the distinction between posted workers and cross-border workers as regards the taxation of their income and
3. the taxation of wages in case of incoming posted workers to Slovenia.

The cases mentioned in (2) and (3) are relevant mainly within a specific national context and do not tackle any general aspects of posting of workers. Comparatively, (1) is more interesting from a comparative legal perspective because it raises the question of a definition of posting of workers. Both the administrative and the Labour Courts discussed the problem of the definition of posting of workers, albeit one from the tax law perspective and another from the labour law perspective, and the comparisons are interesting (see below).

In two tax cases specific to the national situation (Administrative Court, Nos. II U 462/2011 and II U 493/2011), posted workers and cross-border workers (commuters who work in one country and live in another and commute to work usually on a daily/

weekly basis) were compared for taxation purposes, after the equal treatment principle was raised by the posted worker. The Court emphasised that the differentiation in the tax legal regulation between cross-border workers and posted workers is objectively justified. Since a cross-border commuter – because of his employment in another country and regular work there – has a stronger link with that other country, special rules providing for certain exemptions and tax reliefs are justified, whereas in the case of posting, work is performed abroad only on a temporary basis and no specific, stronger link exists with that other country.

The only tax law case about inbound posted workers (Administrative Court, No. I U 673/2012) concerned construction workers from Bosnia and Herzegovina, and raised complex issues of non-transparent legal structures of associated companies and tax evasion. However, the rights of posted workers were not dealt with in this case at all; only tax obligations. It is worth mentioning that the Court emphasised, among others things, that any payments received by the posted worker, which is related to his or her work while being posted to Slovenia, is taxable in Slovenia under the Slovenian tax legislation.

Let us now move to the case which raises much more interesting legal questions and might be relevant also in a broader, comparative perspective.

In a far more relevant and interesting tax dispute (Administrative Court, No. I U 1750/2015) in which the definition of posting of workers was at stake, the main question was how to distinguish between the posting of a worker and a business trip. The workers employed by the Slovenian company were temporarily posted to Germany to work there on different construction sites. They lived abroad and travelled daily to the construction site where they worked. The workers were paid their monthly wage as well as the reimbursement of subsistence costs for business trips on the basis of the so-called travel orders issued by the employer, specifying the location and duration of their work at that location. According to the Slovenian tax legislation, the reimbursement of subsistence costs (as well as travel and other costs) in the case of a business trip is not taxable up to a certain prescribed amount/ceiling.

The Court found that although the employer issued travel orders for business trips (and on this basis paid the workers the reimbursement of subsistence costs or *dnevnice*), the situation could not be considered a business trip. As workers were not entitled to reimbursement of subsistence costs for business trips, the amounts paid to the workers were actually wages and therefore a taxable income. The Court used a set of criteria to distinguish between the business trip and the posting of workers: among other things, it emphasised that their daily travel to the ordinary place of work during posting could not be considered as a business trip. The Court also pointed out that issuing the travel order for a business trip cannot be the decisive factor and that the actual situation and characteristics of that situation have to be taken into account when deciding whether a business trip or the posting of a worker took place in a particular case.

The comparison between the case law of Labour and Administrative Courts as regards the definition of posting reveals some inconsistencies. In particular, it is not entirely clear what the relationship is between the posting of workers and a business trip

abroad. Are they entirely distinct legal concepts, or do they overlap? A settled case law is missing: judgments of the Labour Court confirm that a posted worker is entitled to daily allowance for a business trip, whereas the Administrative Court decided (as presented here) that a posted worker cannot be considered to be on a business trip and, therefore, the daily allowance paid to him or her as being on a business trip cannot be exempted from the income tax base. It seems that this is the most problematic specific legal issue within the national legal perspective on posting of workers. Uncertainties in this respect are definitely not helpful in establishing a safe and predictable legal environment for posted workers.

## Conclusion

Slovenian case law on posting of workers can be summarised from this analysis of the findings as being poor and underdeveloped, with many gaps, and dealing with only a few relevant legal aspects. Many fundamental and delicate legal questions as regards posting of workers remain unanswered, such as, for example, the right to strike of posted workers, collective bargaining and other collective labour rights, health and safety at work, lengthy and irregular working time, the right to annual leave, access to education and training and promotion, continuity of their employment, as well as extreme cases of workers' exploitation and so on. There has not yet been any collective labour dispute on posting of workers brought before Labour Courts in Slovenia; and no cases have dealt with posted workers' collective labour rights.

Not many posted workers claim their rights before the courts and consequently the courts do not have many opportunities to decide on important issues related to posting. This is somewhat surprising, considering the high number of posted workers, especially outbound posted workers, and the steady, substantial increase of posting of workers during the past decade. At the same time, there are many reasons for this situation: posted workers are not aware of their rights; they are afraid of losing their jobs; they are usually non-unionised, and in precarious employment, often hired on a short-term basis with many interruptions and unemployment periods. The sudden increase in posting during the recent crisis, when workers were exposed to fear, uncertainty and consequently overall precariousness, has further added to their vulnerability. Consequently, Slovenian case law mainly addresses specific issues in the area of posting of workers, and it is likely that a significant number of problematic situations never get to litigation.

The existing Slovenian case law on posting mainly focuses on:

1. payment of wages to the posted worker according to the minimum standards that apply in the host country
2. posted worker's entitlement to the reimbursement of subsistence/travel costs
3. the difference between posting of workers and a business trip abroad
4. calculation of a pension base in respect of the periods of posting
5. taxation of wages and other payments received by the posted worker.

Issues on posting of workers that have been dealt with by the Slovenian courts up until now do not reflect the complexity of the phenomenon of posting of workers and the variety of problems connected with it, and do not reflect the elaborate legal literature on this topic. The relevant labour law literature in Slovenia<sup>16</sup> addresses all main aspects of posting of workers and critically analyses the Slovenian as well as the EU level legal regulation, the CJEU case law and developments in practice, presents the main dilemmas and offers many relevant and well-argued solutions.

By contrast, the Slovenian case law on posting is still at the beginning. Some additional observations can be made about it, however. First, almost all cases refer to outbound posting of workers from Slovenia temporarily to another country. In addition, in all cases on posting brought before the Slovenian Labour Courts the plaintiff was an individual posted worker, and the court found their claims well founded and decided in the plaintiff's (worker's) favour except in one case. Finally, most cases concern the posting of workers in the construction sector and the posting to Germany or Austria.<sup>17</sup>

Slovenia has many characteristics that differentiate it from other CEE countries: a developed labour legislation; a co-ordinated system of (sectoral) collective bargaining and a high coverage rate; relatively strong trade unions; a statutory minimum wage at a relatively high level that constitutes between 50-60% of the average wage in the country. In addition, even though Slovenia is predominantly the sending and not the receiving country as regards posting of workers, it was the only 'new' EU Member State that advocated and supported a revision of the existing EU Posted Workers Directive in line with the 'same wage for the same job in the same place' principle.

From a broader EU perspective, however, the Slovenian case law on posting seems to be of minor importance and with no significant influence on developments in this area at the EU level or in other EU Member States. This may change if Slovenia remains one of the countries with a high share of posting and if that continues to grow. Besides, it seems that at least one of the existing problematic legal aspects of the Slovenian regulation of posting - the calculation of social insurance contributions at the reduced rate for the posted workers - has already attracted wider attention at the EU level. It remains to be seen whether these developments and possible procedures at the EU level against Slovenia will be reflected in the Slovenian courts' case law on posting of workers in the future.

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16. Especially articles in the specialist labour law and social security journal *Delavci in delodajalci*, as well as in the journals *Podjetje in delo*, *Pravna praksa* and others (see section 3).

17. This is somehow parallel with the statistics (see section 1) which show very high numbers of posting from Slovenia to other EU countries (i.e. posting out) and especially a very high share of posting in the construction sector and also that Germany and Austria are the two main destinations for posted workers from Slovenia.

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For the list of cases please refer to Annex VII.