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Special Report

Indemnification verdict with consequences

Duty of care for international activities

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In November 2015 a case received considerable international attention: A court in Norway sentenced the "Norwegian Refugee Council (NRC)", a Norwegian NGO, to a payment of 500,000 € to a former aid worker for grossly negligent violation of duty of care before and after a kidnapping in Kenya. The case is not only interesting given that the indemnity payment is high according to European standards but also because of the enormous reputational damage. It shows that the hardships of employees develop their own particular dynamics when they are not taken seriously. A situation that could also be encountered by globally active companies in Europe and the United States.

The incident

On June 29, 2012, Elisabeth Rasmusson, the General Secretary of NRC, visited the refugee camp at Dadaab, located in a high risk zone in the north of Kenya, near the Somali border. Because it involved a top-ranking delegation details of the visit leaked out. Three vehicles with NRC aid workers were ambushed by a group of armed men on the campgrounds, a Kenyan driver was shot and four employees wounded. The four NRC employees were kidnapped and abducted to Somalia. The Secretary General had left the camp shortly before the incident occurred. Four days after the kidnapping, Somali pro-government militia were able to free the hostages after an intensive exchange of gunfire.

The (immediate) consequences

After the hostages were rescued all of those involved were initially relieved: the victims, the relatives and the NRC. The aftercare of the victims ensued in cooperation with the insurer. Later, Steve Dennis, a Canadian hostage, was diagnosed with a post-traumatic stress disorder (PTSD). Today, over three years after being kidnapped, he is still not able to participate in humanitarian overseas missions. In addition, a gunshot injury has resulted in a chronic muscle weakness in his leg.

Steve Dennis became increasingly disgruntled by how he was being treated. The NRC insurance did not even cover the costs of the treatments required. He therefore requested an independent investigation and a public statement on behalf of NRC in so far as the investigations revealed gross negligence. He was not primarily interested in money; his aim was justice and improving the safety of staff on aid missions. Speaking to a Norwegian newspaper he explained that it was an injury incurred in connection with his work and that his employer therefore had a responsibility. However, NRC was not even willing to meet with him to discuss the matter, as he stated. The positions hardened and Dennis publicly lodged a complaint in Norway against his former employer for the financial and non-financial damages incurred, including the loss of his ability to work as a result of his employer's negligent or grossly negligent measures. After running out of money for the lawsuit he fell back on crowdsourcing as a means of funding. He set up a website and uploaded a Youtube video in which he addressed his concern and the accusations online. His parents also gave press

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interviews. They publicly compared the relatively high standards of an NGO their son used to work for and expressed their surprise about the insufficient measures at NRC. The parents also commented on the arrogance with which NRC evaded the request for an independent investigation.

Another kidnap victim also publicly criticized NRC. Despite the fact that they were well informed about an actual risk of abduction, NRC management ignored the security recommendations, did not safeguard relevant information and refrained from using the customary armed escorts. Moreover, the management did not take an active interest in the security issue and delegated the issue to local personnel. In this case the local security manager was also deployed as a translator and tour guide. Recommendations on the part of employees to avoid the camp or at the very least, shorten the stay there were ignored. Existing recommendations for a kidnap response plan and pursuant exercises were overlooked.

The verdict

In a fifty-page report, the Court criticized the gross culpability and insufficient awareness of the legal duty of care for the safety of the employees during the stay at the camp, and in particular the following items:

- NRC incorrectly estimated the nature and extent of the risks involved for the staff on-site.
- The inadequate investigations on behalf of NRC to clarify the incident, despite the fact that the internal investigation by NRC security department recommended 130 improvements. In the Court's opinion, NRC should have assigned external specialists to examine the circumstances that led to the kidnapping.
- Existing security guidelines were not implemented. Unlike other visits, this time there was no armed escort.
- Contrary to NRC's opinion, NGOs are subject to the same employee care as commercial companies.
- NRC's insurance protection for employees was not adequate in view of their occupation and risks.
- In the Court's opinion, NRC was therefore responsible for the physical and mental injuries the claimant suffered.

Relevance for companies in Europe

Despite the fact that the verdict was made by a Norwegian court, lawyers attribute Europe wide relevance to the case since the legal duty of care is similar within Europe. The case at hand also shows that individuals can assert themselves against large institutions with thousands of employees, company lawyers, communications department and a large external law firm.

Courts can certainly appreciate that mistakes are made during a crisis. But they do not have much sympathy when existing procedures are not implemented and adequate care and support for the victims is not provided. The International Labour Organization Conventions on Occupational Safety and Health (1981 and 2006) obliges the signatory governments (including many European

countries) to take preventive measures for the protection of their staff on national and employer levels - expressly for international business travelers and posted workers also. This obligation includes the avoidance of foreseeable risks or the minimization thereof by taking appropriate protective measures.

Duties for care during overseas activities for German companies result from the Civil Law Code, the German Occupational Safety and Health Act, as well as sanctions from the criminal code in the form of a crime of omission.

In Great Britain the verdict prompted organizations to examine and optimize existing measures. There is at least one law firm in Great Britain that aims to file class action lawsuits for local employees affected and the bereaved. In two cases known by name to the authors, the law firm obtained out-of-court payments on behalf of its clients after incidents in East Africa and in the Middle East. The law firm hired expert witnesses to carefully examine the existing security and crisis management, to identify weak points and prove that the employer had not complied with the best practice standards customary in the sector. This also involves checking whether company headquarters regularly inspect existing security policies and their implementation on-site.

Within the EU states this is based on the Rome I and Rome II Regulations (EC). In a work contract, for example between a French employee and a German employer, there is, as a matter of principle, a free choice of applicable law. Rome II generally takes effect for family members because they do not have a work contract with the employer. Then the law of the country in which the damage occurred will take effect. In addition, depending on the specific instance, the injured parties can also file a lawsuit in other places of jurisdiction (see box).

Taking legal action - an example

A German company has a subsidiary in the United States and in France and sends its employee, a US citizen, to South Africa. His French wife is killed in a robbery in South Africa as a result of a duty of care breach on behalf of the German company. The husband (an expat) is seriously wounded.

In general, we distinguish between the country in which the injured party can file a lawsuit (international judicial competence) and the law of the country in which the court reaches a verdict. A legal dispute can normally be held at the headquarters of the German employer in Germany. In France the US expat can only file a suit according to European law if he was hired and posted by the French subsidiary (Art. 21 EU Regulation on jurisdiction). There is strong evidence that the US expat can also file a lawsuit against the German company in the United States. As a US citizen he enjoys the protection of US courts and has a work contract with a German company and, on the other hand, the German employer has a subsidiary and assets in the United States. A South African court can presumably be appointed because international jurisdiction is also valid in the country of the crime scene.

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If the German employer is convicted and found guilty of a breach of duty of care and major health damage in the United States, it would have to fear much higher punitive damages und liability in contract payments than in Europe.

The German company is well advised to stipulate the sole jurisdiction of courts according to EU jurisdiction ordinance in written contracts with any employees posted abroad; in particular for any disputes arising from or in connection with the employment relationship. In the case of a US employee who is not hired and posted by the US subsidiary this improves the chances that they will not be liable to US American jurisdiction.
Markus Eric Allner, specialist lawyer for labour law, Munich, Germany (www.allner-menges.de)

Conclusions

Until now, tort litigations by expats against their employers have usually been settled out of court. The Oslo verdict, the activities on the part of lawyers as well as the additional options available to the victims, i.e., building up pressure via social networks, or with media and financial support will mean that lapses in travel safety will become more expensive. Not only through direct indemnity payments, but also from reputational damage because these lapses attract international and cross-sector attention.

By drawing conclusions from the "NRC" case we establish that the employer's duty of care has a legal as well as a moral dimension. On a professional level duty of care therefore also demands, in addition to the identification and management of risks, the support and provision of resources, as well as information and trainings enabling employees to greatly diminish existing risks. Another important aspect is the exact documentation of the measures taken as well as the adjustment, control and verification of whether safety policies are being implemented on-site. Insurance coverage must take risk exposure into account to avoid underinsurance because in the event of culpable breach on the part of the employer it may be questionable whether the insurance covers it at all. It also makes sense to have a post-incident care program that also reduces the likelihood of conflicts between employers and employees. Furthermore it is important that the responsibility for the fulfillment of the legal duty of care is not delegated to other companies.

The Oslo verdict suggests that since the judges are not willing to accept any deductions in the safety management of NGOs they will not spare middle-sized companies with limited resources in this regard either. One must not forget that a case like this does not only damage the external reputation, it also causes damage inside the company. Negligence in safety abroad impairs the trust of the employees in company management and makes it difficult for middle-sized companies to find qualified workers for international tasks on a long-term basis.

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