



Temporary Agency Work 2017.09.22

Ronnie Eklund

DESIGN

- Short Introduction
- International legal background
- EU agenda – a long story
- 2008 Directive – the essence of it
- Implementation in the Member States
- Case law of ECJ
- Swedish cases as an addendum



Adopted in 2008

As hollow as Swiss cheese

ILO Employment Service Convention 1948

Bypassed by private agencies

Frustrated the objectives of the state monopoly

ILO Conventions 1949 (revised another Convention 1933)

Now:

ILO Convention of Private Employment Agencies 1997

Not so many ratifications

ILO bypassed the adoption of similar instruments in the EU

The tripartite relationship is complicated

Considering the three parties involved, the employment contract between the agency worker and the temporary agency is a contract to the benefit of a third party

EU start, already in 1974

The first draft in 1980

All early efforts failed

Negotiations between the social partners took place in 2000-2001, but failed

Commission launched a proposal in 2002

It also failed due to the resistance of “The Gang of Four”.

In 2004 there were rumours about a trade-off since UK wanted amendments in the Working Time Directive

UK failed to achieve this.

UK law is complicated for common law reasons...

A political agreement on a Directive was, however, reached in 2008.

The Directive was adopted to promote “flexicurity”.

Transactions costs must have been tremendous to reach a Directive, covering such a small number of workers on the labour market

GOAL OF THE DIRECTIVE

To ensure protection of temporary agency workers

Relates to basic working and employment conditions, Article 3

Review of restrictions and prohibitions on the use of temporary agency work is provided for in Article 4.

They must be justified on “grounds of general interest” (whatever that is?)

The principle of equal treatment is laid down in Article 6. It is pivotal.

However, derogations are provided for in the same Article – that is where the Swiss cheese is to be found.


There is practically one solution for each of the following Member States:

Germany (with respect to pay),

Sweden (with respect to collective agreements in force)

and UK (with respect to basically a qualifying period).

but the UK derogation is a thorny piece of legislation.



Member States are also admonished to take appropriate measures to combat misuse of Article 5.

In recital 29 it is stated that national legislation may prohibit workers on strike to be replaced by temporary agency workers.

IMPLEMENTATION?

In a 2014 report from the Commission it is held that the Directive has been implemented in all Member States.

The Commission will monitor in particular the equal treatment principle as laid down in Article 5.

In a thorough scrutiny of the Article 4 and what could be considered as “grounds of general interest” – the Member States had brought forward a plethora of such interests - it is apparent that the Commission is of no certain opinion, or rather bewildered.

My view is that that it is not politically correct to submit strict benchmarks in the area.

WHAT ABOUT CASE LAW?

Not much.

In the past, cases relate to the freedom to provide services in the Treaty, such as Webb (1980) and Van Wesemael (1978)

The only case relating to the Directive is a Finnish case, C-533/13, AKT), regarding the interpretation of Article 4.

The case involved a Finnish collective agreement which restricted the use of temporary agency workers, for various reasons.


The Court showed restraint and said, inter alia, that the courts should have no role to play in this area.

THE SWEDISH ADDENDUM

The labour market for temporary agency workers are covered by basically two collective agreements
They are of different types.

The one applying to blue-collar workers includes an equal treatment principle (of a type that is similar to Article 5.1 of the Directive), and who can be a “comparable worker”.

In three cases - so far – this agreement has been interpreted by the Swedish Labour Court, filling in the gaps of the pertinent agreement.



I stop there – thank you!