

Equal Treatment between the Temporary Agency Workers and the Comparable Workers of the User Undertaking

Jaroslav Stránský

Department of Labour Law and Social Security Law
Faculty of Law, Masaryk University
jaroslav.stransky@law.muni.cz

Introduction

- Equal treatment and equal pay for temporary agency workers is very broad and controversial topic.
- Main focus will lie on:
 - scope of the equal treatment
 - application of the derogations
 - Czech perspective

Equal treatment in the Directive

- Article 5.1:
 - The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.
- Article 3.1 (f):
 - basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
 - (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
 - (ii) pay.

What does „pay“ include

- Definition of the concept of pay is left to the Member States.
- Art. 157.2 TFEU:
 - ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- The Temporary Agency Work Directive does not intend to cover additional social security benefits.
- Art. 6.4: access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services.
- Questionable points:
 - bonuses (+ those performance-related ones; non-contractual)
 - benefits in kind
 - occupational pension schemes, sick pay schemes, redundancy payments ...

Regulation in the Czech Republic

- Art. 309 (5) of the Czech Labour Code:
 - The employment agency and the user undertaking shall ensure that **the working and wage conditions** of a certain temporarily assigned employee are not worse than the conditions of the user's comparable employee.
- Quite similar regulation is in Poland:
 - Ustawa o zatrudnianiu pracowników tymczasowych, Dz.U. 2003 nr 166 poz. 1608.
 - Art. 15.1: Equal treatment for temporary agency workers as regards working conditions (in general).

Regulation in the Czech Republic

- It seems as a firm legal framework for ensuring the principle of equal treatment.
- In fact, equal treatment is not (*can't be?*) respected in all that fall within 'working conditions'.
- It remains quite unclear, what does the equal treatment clause *actually* refer to (especially in terms of 'pay').
- Perhaps 'Less is more'?

Derogations from equal treatment

- Temporary Agency Work Directive offers possibilities to derogate from the equal treatment principle.
- Art. 5.2: exemption regarding pay for workers who have a permanent contract of employment and are paid in the time between assignments.
- Art. 5.3: derogation via collective agreement.
- Art. 5.4: derogation via statutory provisions.
- According to Commission Report COM (2014) 176 final, 12 member states allow derogation from the equal treatment principle.

Derogation under Art. 5.2

- The derogation only pertains to pay.
- Applied in the UK, Sweden, Hungary, Ireland and Malta.
- It is a kind of 'Quid pro quo': part of a salary is sacrificed, but a higher level of security (permanent contract, certainty about the income).
- It is applied in states with a tradition of permanent contracts of temporary agency workers.
- In other countries, the majority of temporary agency workers are usually recruited through a fixed-term contract.

Temporary (or/and) permanent worker?

- Temporary Agency Directive is supposed to contribute to job creation (Recital 11).
- From the viewpoint of the worker, the contract with the temporary agency and assignment to the user company should be a 'stepping stone' rather than a 'terminal station'.
- For example, art. 6.2 of Temporary Agency Directive corresponds to this point.
- In fact, many people work for the same temporary agency for years (are they still *temporary* workers?).

Strict temporality in Czech labour law

- Art. 309 (6) of the Czech Labour Code:
 - The employment agency may not assign the same employee for temporary work performance in the same user undertaking or establishment for a period longer than 12 consecutive calendar months. This restriction shall not apply if the employee concerned **requests the employment agency that he will (wishes to) continue temporary work** performance in such user undertaking.
- The regulation of fixed-term contract does not apply to temporary agency workers (it means there is no regulation at all).
- The vast majority of temporary agency workers have fixed-term contracts (unlimitedly repeated).

Fixed-term contract Directive and temporary agency workers

- Preamble (paragraph 4):
 - This agreement applies to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise. It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work.
- The practice is obviously different across member states:
 - tradition of permanent contracts in some states (clear link to the derogation under Art. 5.2 of the Temporary Agency Directive),
 - unlimited fixed-term contract in other states (with no derogation from equal pay principle).
- Is there a balance between unlimited fixed-term contract and the equal pay or is the 'prize too high'?

Summary

- The scope of the concept of 'pay' for the purpose of the temporary agency work remain questionable.
- A regulation which includes working conditions in general under the equal treatment principle (Czech and Polish case) doesn't seem to be a suitable solution.
- The exemption for the temporary agency workers in the Fixed-term Contract Directive results in serious disruption of the equal treatment principle.