SUMMARY

# 2014/16 “Temps” entitled to same benefits as user undertaking’s own staff, even where not derived from statute (CR)

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**Facts**

On 1 January 2010 the Labour Act was amended. One of the aims of the amendment was to transpose Directive 2008/104/EC on temporary agency work. Article 5(1) of this directive provides that:

*"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) defines "basic working and employment conditions" as:

*"Working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force at the user undertaking relating to:*

the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
pay."

The Labour Act as it stood before 1 January 2010 (the '2004 Act') entitled temporary agency workers ('temps') to at least the same salary as that of comparable staff in the employment of the user undertaking ('user staff'), but not to other terms and conditions of employment. The Labour Act as amended on 1 January 2010 (the '2009 Act') entitles temps to no less favourable treatment than comparable user staff with respect to all terms and conditions of employment.

The plaintiff in this case was a temp. He was employed by two successive temporary employment agencies, which assigned him to one and the same user undertaking from 1 July 2009 to 30 September 2010. The user undertaking was bound by, and applied to its own staff, a collective agreement for workers in the telecoms industry. This collective agreement provided for a number of fringe benefits, such as a Christmas bonus, an Easter bonus and a tax-free vacation bonus. The plaintiff was not paid these benefits. He brought proceedings against his former employers (the temporary agencies) before the local court, seeking payment of Christmas, Easter and vacation bonuses.

The court of first instance denied the claim. It reasoned that the defendants were not a party to the collective agreement applied by the user undertaking and that Christmas, Easter and vacation bonuses are not included in the definition of "basic working and employment conditions" in Directive 2008/104. The plaintiff appealed.

**Judgment**

The Court of Appeal upheld the lower court's judgment inasmuch as it related to the period before

1 January 2010, when the 2004 Act was in force. As for the period from 1 January 2010, the Court of Appeal held that the 2009 Act went beyond the minimum required by Directive

2008/104. This is in line with Article 9(1) of the Directive:

*"This directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers."*

The intention of the Croatian legislator when adopting the 2009 Act was clearly to make use of this possibility. Therefore, the plaintiff was eligible for Christmas, Easter and vacation bonuses for the period 1 January – 30 September 2010.

**Commentary**

This is the first such judgment passed by Croatian courts. There are, however, several more cases on similar facts currently pending before the Croatian courts. The judgment has received significant attention in the media, has attracted considerable debate and has influenced an ongoing legislative effort to introduce a new Labour Act. To explain the judgment, some explanation needs to be given about the Croatian labour market.

Croatia was a communist country until 1989. The lifting of the iron curtain was followed by a devastating war (1991-1995). The transformation from a war-torn socialist economy into a market-driven economy based on private property and an open market has not come easily. It is being achieved in the face of ignorance by employers and employees of their rights and obligations, not to mention fraud and corruption. The transformation was difficult enough before the 2008 financial crisis struck, but is even harder now that unemployment has skyrocketed from under 10% in the first quarter of 2009 to 22.4% in January 2014, the highest since Croatia became independent.

Croatian law in the area of employment protection for permanent employees is amongst the strictest in Europe. This is often perceived as a reason for the lack of competitiveness of the Croatian economy and for its low level of job creation. Both the IMF and the World Bank have advised the government to consider measures to make labour regulations more flexible, for example by removing legal restrictions on fixed-term contracts, making the procedures for lay-offs less complicated and encouraging part-time and temporary agency work. Currently, a new Labour Act is being debated in the National Assembly aimed at enhancing flexibility and reducing the cost of workforce restructuring. The proposed new law includes provisions on exemption from the principle of equal treatment of temporary employment agency employees so as to encourage temporary agency work by reducing temporary agency costs.

Although temporary agency work has existed in Croatia since 1989, it was not regulated by law

until 2003. Since that time, the phenomenon has gradually become more common. Nevertheless, temporary agency work is still comparatively rare, presumably because of negative ideas about temporary labour ("dumping"), lack of knowledge of the legal options, a large informal sector and "envelope payment". According to an unofficial assessment of the temporary agency sector, at present there are 56 agencies in Croatia, employing approximately 8,000 temps.

Under Croatian law, "temps" are seen as employees of the temporary employment agency. When the assignment to a user undertaking of a temp who is a permanent employee of the agency ends, the agency must pay him or her, for the time during which he or she is not assigned to any user undertaking. The amount due to the employee is salary compensation equal to the average salary paid in the previous three months. To avoid paying this compensation, many agencies hire temps only for the duration of their assignment, i.e. they synchronise the employment contract with their contract with the user undertaking.

The main aim of the government is to reduce the high unemployment rate and the ways it is choosing to do that include the encouragement of temporary employment as a means of creating more flexibility on the labour market. The government's idea is to provide legal incentives for temporary staffing agencies to hire temps on the basis of permanent rather than fixed-term contracts, thus providing them with income security between assignments. This might be seen as an attempt to improve the position of temps, but behind this lies a government proposal that the salary payable between assignments could be agreed by the agency and the temp (with no minimum number of hours for which the temp should be paid). However, this could result in temps being paid less than they would have been entitled to if unemployed. Moreover, the proposed Labour Act introduces an additional exception to the general rules on equal treatment. This concerns the possibility for the trade unions and temporary agencies to conclude collective agreements that provide for less favourable working conditions for temps, provided these are within the bounds of the applicable special regulations.

**Comments from other jurisdictions**

*Germany (Dagmar Hellenkemper)*: In Germany, the use of temporary workers has become increasingly popular over the last ten years, their numbers rising from approximately 250,000 in 2003 to approximately 820,000 by the end of 2013 and therefore, the whole issue has continued to be well-debated since the transposition of Directive 2004/108 into the German Temporary Work Act (*Arbeitnehmerüberlassungsgesetz*).

A temporary worker in Germany is an employee of the temporary work agency, not the user

undertaking. The employment contract is solely between the worker and the agency and does not involve the user undertaking. The agency is considered to be the employer, is responsible for meeting all legal requirements and deals with making the necessary deductions for social benefits (retirement, unemployment, health insurance etc.) and income tax. Wages are paid by the employer. In general, the Temporary Work Act provides that temps must be treated equally with the employees of the user undertaking concerning all work conditions – equal pay for equal work.

The Croatian judgment is therefore not surprising from a German point of view. In reality, collective agreements that bind the temporary workers' agency (not the user undertaking), allow them to pay their employees as agreed upon in the collective agreement, therefore undermining the equal pay rule which – incidentally - would include Christmas bonuses, holiday payments or other bonuses that the user undertaking pays to its own employees.

As in Croatia, the expectation was that the transposition of Directive 2004/108 would make it possible for a greater number of unemployed individuals to secure employment in the labour market. The steep decline in temporary agency work during the economic crisis, the replacement of full-time staff with lower-paid temporary agency workers and the permanent discrepancies in pay between full-time staff and temporary agency workers in long-term client placements have contributed to a change in public perceptions concerning temporary agency work.

In order to reverse the wide discrepancies in pay, several German trade unions and staffing industry confederations have agreed to so-called "*Branchenzuschlagstarifverträge*" – or, roughly, sector-specific surcharge collective labour agreements. These agreements, which will be effective until 2017, provide for the gradual equalisation of wage differences between agency workers and permanent staff in the most important sectors served by temporary work agencies. Whether or not these collective agreements will help to create wider equality between temps and core workers remains to be seen. It does not seem unlikely that – as in Croatia – the legislature or judiciary will step in at some point.

Ireland (Orla O'Leary): In Ireland the Protection of Workers (Temporary Agency Work) Act 2012 (the 'Irish Act') implemented the terms of the Directive on Temporary Agency Work 2008/104. The Irish Act entitles agency workers to the same "basic working and employment conditions" enjoyed by employees employed directly by the end-user.

As such, the Irish Act provides narrower protection than the expansive protections implemented by the amendments to the Labour Act 2010 in Croatia which provide that all terms and conditions of employment are covered.

Three recent cases interpreting the Irish Act are worth consideration:

In one case in November 2013 before a Rights Commissioner (the first-instance adjudicator under the Irish Act) a lorry driver sought to claim bonus payments that he said were 'pay' for the purposes of the Irish Act. Similar to the Croatian case of M.M. - v - Centar Poslova Ltd and Electus DGS Ltd the Rights Commissioner held that the right to equal pay under the Irish Act does not entitle an agency worker to bonuses that an employee of the end user is paid.

A recent case before the Irish Labour Court, Stafford – v - Isaacson and ors (Labour Court Determination AWD142), provides useful guidance to employment agencies and hirers in relation to agency workers' rights to equal pay under the Irish Act.

In this case agency workers working for a removals and storage company argued that the agency was in breach of the equal pay provision as they were not being paid the same rate of pay as directly-hired employees of the end-user.

The agency, in their defence, submitted that the agency workers should only be entitled to a lower, notional rate of pay that would apply if the end-user was to directly hire employees at that moment in time, to factor in the end-user's weakened financial circumstances. However, the Labour Court ruled that the correct entitlement is simply the "going rate" of pay that "applies generally" to current employees, rather than a "notional rate that would be paid to workers" on the particular date suggested by the agency.

Another recent case, Team Obair Limited v Mr Robert Costello (Labour Court Determination AWD134), provides useful guidelines on the use of comparators in such claims, and the obligations end-users to inform agencies on what the correct rate of pay should be. The case concerned an agency worker who worked as a forklift driver.

On the issue of establishing comparisons to employees of the end-user, the Labour Court said that although the agency worker is not required to point to an actual comparator employed directly by the end-user, such a comparator was an "important evidentiary tool".

On the issue of determining the correct rate of pay, the Labour Court said that the end-user was obliged to provide sufficient, up-to-date information on basic pay and employment conditions to the agency. The Labour Court made a significant award of € 20,000 to retrospectively satisfy the equal payment entitlements of the claimant.

Luxembourg (Michel Molitor): The ruling of the Croatian Court of Appeal regarding temporary workers' benefits would most likely be similar under Luxemburg law. Directive 2008/104/EC did not need to be specifically implemented, as there was already a provision in the Labour Code protecting the status of temporary workers. Article L.131-13(1) of the Luxemburg Labour Code provides that temporary workers' salary paid by temporary work agencies cannot be lower than the amount that might be granted to an employee with the same or equivalent qualifications hired on the same conditions as a permanent employee of the user company, after any trial period.

A judgment issued on 11 October 2012 by the Luxembourg Court of Appeal clarified the status of temporary employees' benefits, especially bonuses. The Court pointed out that Article L.131-13(1) of the Labour Code establishes equal pay and equal treatment between temporary workers and permanent employees of the user company. It also recalls what needs to be understood as "salary", by application of Article L.221-1 of the Labour Code, as follows:

*"the total compensation of the employee, including, not only basic pay, but, other benefits and possible additional compensation, such as ex gratia payments, product discounts, bonuses, free accommodation and others benefits of a similar kind."*

This means that temporary workers are eligible for all types of payment that could be granted to an employee with similar or equivalent qualifications hired on the same conditions as a permanent employee of the user company and not only specific bonuses linked to the qualifications of the temporary worker. Therefore, whenever the collective agreement applicable to the employees of a company entitles them to receive Christmas or Easter bonuses, the Luxemburg courts would rule that the same benefit should be given to all temporary workers as well.

Romania (Andreea Suciu): In Romania, as with Croatia, temporary agency work has traditionally not been significant. This has tended to be because of the existing inflexible regulations, even though temporary agency work is actually very interesting for companies, as it enables them to provide short-term coverage of workplace shortages, for example to handle temporary increased workloads or to fill temporary requirements for specialised workers.

However, in 2011, some interesting changes were made in relation to temporary agency work. These were enacted in accordance with Directive 2008/104 on temporary agency work and may simultaneously promote the employment of temporary agency workers ("temps"). What is new is that temporary work agencies can now sign permanent contracts of employment with temps. In addition, temps can now be freely assigned for both specified tasks and temporary activity, whereas under previous rules, temporary agency work was only

permissible in certain cases. Further, the new legislation has also altered the maximum duration of assignments from 12 to 24 months or – in the case of an extension – to 36 months.

Also, pursuant to the 2011 amendments of the Labour Code, temps are free to negotiate their salary directly with the temporary work agency, provided that it is not lower than the statutory minimum of (currently) 900 Lei (approximately € 200) per month. This means that temps are no longer entitled to at least the same salary as that of comparable employees of the user undertaking. This, in our opinion, grossly neglects the principle of equal treatment provided in Article 5(1) of the Directive ("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"). Admittedly, Article 5(2) of the Directive provides: "As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments." However, this provision was intended as a way to vary the terms of compensation in specific cases, not as a general rule of law.

Nevertheless, almost all other working and employment conditions laid down by legislation, regulation, collective agreements and other binding general provisions in force at the user undertaking relating to the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, also apply to temporary agency workers.

Interestingly, statistics show that in 2013, the average monthly net salary of temporary workers varied between 1,153 Lei and 2,441 Lei (depending on the industry and area). By comparison, last year's recorded average monthly net salary for the economy as a whole was 1,622 Lei.

The market for temporary agency work exceeds € 200 million per year, consisting of salaries paid by temporary work agencies and the commissions received by them from user undertakings.

Slovakia (Beata Kartiková): Slovakia introduced a licensing system for temporary agency work in 2004. Following the enactment of Directive 2008/104 on temporary agency work, the Slovakian legislator implemented it into the Labour Code. The implementation was based on the principle of equal treatment and that temps should enjoy the same employment conditions as workers recruited by the user undertaking.

Although Directive 2008/104 allows Member States to regulate temporary agency work in order to avoid abusing temporary workers, our legislator has failed to take the necessary measures. We consider taking legal action in this field an efficient way of preventing abusive

temporary work. From our point of view it would be appropriate, for example, to limit the maximum number of temporary workers in each company and to tighten up conditions for obtaining a temporary work agency licence (because nowadays it is sufficient to have simply a full secondary education in any specialisation and no criminal record).

The only notable restriction in connection with the temporary assigment of staff is contained in section 29(2) of the Employment Services Act, effective from 1 May 2013. It provides that in certain situations a contract of employment between a temporary work agency and a temp automatically converts into a permanent employment contract between the temp and the user undertaking. This situation occurs under the following conditions, stipulated by the Employment Services Act:

Where, after the first temporary assignment of the employee, his or her temporary assignment to the same user employer is repeated more than five times (the number of repeated temporary assignments is monitored for a period of 24 consecutive months and 24 months starts to run after the end of first temporary assignment);
Where there is no break between two temporary assignments of more than six months;
There is no interruption between the original temporary assignment and next five temporary re-assignments to a single user employer (e.g. by temporary assignment to another user employer).

These restructions were made with the purpose of preventing chains of temporary assignments by user employers.

Unfortunately, to our knowledge there is no case in Slovakia that is similar to the one reported. The unwillingness of temporary employees to enforce their legal right to equal treatment is most likely caused by the high unemployment rate in Slovakia, as well as the excessive duration of lawsuits.

*Subject: temporary agency work – equal treatment*

*Parties: M.M. – v – Centar poslova Ltd. and Electus DGS Ltd.*

*Court: Zupanijski sud u Zagrebu (Court of Appeal in Zagreb)*

*Date: 17 December 2013*

*Case number: Gžr-1357/13-2*

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

*Internet publication: www.iusinfo.hr/|?|case number*

**Creator**: Zupanijski sud u Zagrebu (Court of Appeal in Zagreb)
**Verdict at**: 2013-12-17
**Case number**: Gžr-1357/13-2