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Z orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej

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The missing fundamental rights protection in the CJEU's case C-948/19 UAB "Manpower Lit"

Zagubiona ochrona praw podstawowych w wyroku TSUE w sprawie C-948/19 UAB „Manpower Lit"

Abstract
This case deals with two legal issues concerning Directive 2008/104/EC. The first issue concerns the interpretation of the scope of the Directive in relation to an EU agency, i.e. the European Institute for Gender Equality (EIGE). Thereto the Court of Justice of the EU (CJEU) had to establish whether such an agency fulfils the three requirements of Article 1(2) Directive 2008/104/EC: EIGE must fall within the definition of "public undertaking"; be a "user undertaking"; and must be engaged with "economic activities." Following the EU's autonomous interpretations of these three requirements, the Court concluded positive on all three of them. The second legal issue deals with the question whether the principle of administrative autonomy of an EU agency as laid down in Article 335 of the Treaty on the Functioning of the European Union (TFEU) will be hindered when temporary agency workers are treated equally in terms of their basic working and employment conditions (Article 5(1) Directive 2008/104/EC) as those workers who are directly employed by the EU agency. The CJEU's conclusion is that such is not the case, since 1) the comparison is to be made at the level of the tasks of the job, and 2) the workers did not claim full equal treatment, but equal treatment on wages which is covered as a basic working condition by Directive 2008/104/EC).

Keywords
basic working and employment conditions; EU agency; EIGE; equal treatment of temporary agency workers

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Streszczenie
Sprawa, o której mowa w artykule, dotyczy dwóch zagadnień prawnych związanych ze stosowaniem dyrektywy 2008/104/WE. Pierwsza kwestia dotyczy interpretacji zakresu jej zastosowania w odniesieniu do agencji unijnej — Europejskiego Instytutu ds. Równości Płci (EIGE). Trybunał Sprawiedliwości Unii Europejskiej (TSUE) musiał ustalić, czy taka agencja spełnia trzy wymogi określone w art. 1 ust. 2 dyrektywy 2008/104/WE, a mianowicie, czy mieści się w definicji „przedsiębiorstwa publicznego", czy jest „przedsiębiorstwem użytkownikiem" i czy jest zaangażowana w „działalność gospodarczą". Z uwagi na autonomiczną interpretacją tych trzech wymogów, Trybunał stwierdził spełnianie każdego z nich. Drugie zagadnienie prawne sprowadza się do pytania, czy zasada autonomii administracyjnej agencji UE, o której mowa w art. 335 Traktatu o funkcjonowaniu Unii Europejskiej, dozna uszczerbku w przypadku, gdy pracownicy tymczasowi wykonujący w niej pracę będą traktowani, w zakresie podstawowych warunków pracy i zatrudnienia (art. 5 ust. 1 dyrektywy 2008/104/WE), na równi z pracownikami zatrudnionymi bezpośrednio przez tę agencję. TSUE sformułował w tym zakresie odpowiedź przeczącą, wskazując, że: 1) porównania należy dokonać na poziomie zadań wykonywanych na danym stanowisku, 2) pracownicy nie domagali się pełnego równego traktowania, ale równego traktowania w zakresie wynagrodzeń, które mieszczą się w pojęciu podstawowego warunku pracy zgodnie z dyrektywą 2008/104/WE.

Słowa kluczowe
podstawowe warunki pracy i zatrudnienia, agencja UE, EIGE, równe traktowanie pracowników tymczasowych

Introduction

This case is interesting because it deals with the scope of Directive 2008/104/EC on Temporary-Work Agency (TWA) in relation to an EU agency which, under the principle of administrative autonomy (Article 235 TFEU) and Staff Regulations of Officials of the European Union and Conditions of Employment of Other Servants of the European Union (Article 236 TFEU), may be exempted from national legislation

when such hinders its autonomy. The case is also interesting because it confirms that the comparator to establish equal treatment is not at the level of actual or hypothetical individual workers, but at the level of tasks.

The European Institute for Gender Equality (EIGE), a European Union agency established in Vilnius (Lithuania), made use of the services of Manpower Lit, a Lithuanian temporary-work agency. Manpower Lit assigned five workers to EIGE of which four worked as assistants and one as an IT support worker. When in 2018 EIGE no longer wished to make use of these workers and the employment relationship with these workers was terminated by Manpower Lit, the workers made a claim that back wages were owned for a period of six months. The claim was based on unequal treatment, since Manpower Lit paid these workers wages that were lower than what they would have received when they would have been employed directly by EIGE. While in three preceding judicial procedures the claim of the workers was awarded, the Lithuanian Court in last instance (cassation) decided to address preliminary questions to the CJEU since the organization making use of Manpower Lit's services, EIGE, is an EU Agency. The in total six preliminary questions are summarized by the CJEU in two main questions:

1. Whether Article 1 of Directive 2008/104/EC is to be interpretated in such a way that when a temporary-work agency assigns workers with whom it has concluded employment contracts to EIGE in order to perform work at this agency, such falls within the scope of this directive;[1] and

2. Whether Article 5 of Directive 2008/104/EC is to be interpretated in such a way that the post occupied by an interim worker made available to EIGE can be regarded as "the same job" within the meaning of that provision, even if it is considered that all posts for which EIGE directly recruits include tasks which can only be carried out by persons covered by the Staff Regulations of Officials of the European Union, or that such an interpretation would be contrary to Article 335 TFEU — which enshrines the principle of the administrative autonomy of the institutions of the Union — to Article 336 TFEU or to those Staff Regulations.[2]

CJEU findings

To answer the first question the CJEU first states that there is no discussion whether the workers fall within the scope of Directive 2008/104/EC, they are workers that have an employment contract with Manpower Lit.[3] There is also no doubt that Manpower Lit falls under the scope of the directive.[4] The question is whether EIGE, as an agency of the EU, falls within the scope of the Directive. To assess this, the CJEU breaks this question down in the three conditions of Article 1(2) Directive 2008/104/EC that need to be fulfilled: EIGE must fall within the definition of "public undertaking"; be a "user undertaking"; and must be engaged with "economic activities". The Court starts with the condition that EIGE must be a "user undertaking". According to Article 3(1)(d) Directive 2008/104/EC a user undertaking is "any entity that any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily." It is clear for the Court that the workers have worked under the direction of EIGE and based on Regulation nr. 1922/2006 EIGE has legal personality.[5]

Establishing the fulfilment of the other two conditions is less easy, since "public undertaking" and "economic activity" are not defined in the Directive, nor refers the Directive to national legislation. Therefore, the Court refers to its own, autonomous interpretations in its case law on competition law. This means that "undertaking" covers "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed",[6] and that "economic activity" means "any activity consisting in offering goods and services on a given market",[7] which excludes activities that concern the exercise of public powers.[8] Furthermore, services which are carried out in the public interest, without a profit motive, and that are in competition with those offered by operators pursuing a profit motive, are to be classified as economic activities.[9] That such services may be less competitive than comparable services offered by for profit operators does not prevent the activities in question from being regarded as economic activities.[10] Following these interpretations, the Court establishes that the activities of EIGE do not qualify as the exercise of public powers,[11] and, although EIGE operates without a profit motive, it operates on a competitive market with providers that do operate for profit.[12] The fact that EIGE is being paid for its services by those making use of its services further confirms that EIGE's activities are economic activities.[13] Combined with the fact that the Directive holds no indications that agencies of the EU, like EIGE, should be excluded from its scope, the Court finds the fact that EIGE is an EU agency irrelevant.[14] Ergo, the situation of the case in the main proceedings fall within the scope of the Directive.[15]

With regard to the second question the considerations of the Court are in particularly interesting in response to the position of the Commission which argued that the working conditions of the temporary agency workers cannot be compared to "those applicable to staff recruited on the basis of the Staff Regulations of Officials of the European Union, […] since such an interpretation of Article 5(1) of Directive 2008/104 would infringe Articles 335 and 336 TFEU and would effectively confer on the defendants in the main proceedings the status of officials of the Union."[16]

The Court rejects the Commission's argument. On the basis of Article 335 TFEU institutions of the EU

enjoy the most extensive legal capacity accorded to legal persons under the laws of the Member States. This legal capacity is not limited when the basic working conditions of the workers directly employed by EIGE on the basis of the EU's Staff Regulations of Officials are also awarded to the temporary agency workers.[17] Furthermore, since the EU has not regulated the working conditions for temporary agency workers (not in the Statute of Article 336 TFEU nor in the regulation that is applicable for "other workers"), the principle of equal treatment of Article 5 Directive 2008/104/EC applies fully to these workers when they carry out their assignments within such an agency.[18] The Court stresses that Article 5 Directive 2008/104/EC is not about putting temporary agency workers on an equal footing with permanent staff during the period of recruitment or afterwards, indeed it is about equality of the "basic working conditions" as described under Article 3(1)(f) of the Directive.[19] For these purposes, the Court concludes that the job occupied by a temporary agency worker assigned to EIGE can be regarded as being "the same job" as those jobs for which EIGE recruits workers directly, even when those jobs include tasks that can only be performed by workers employed under the Staff Regulations of Officials of the European Union.[20]

Analysis

This case is interesting on two points. First, because the CJEU further defines the scope of the Directive. Especially on the point of "being engaged in an economic activity" when an entity like EIGE operates for non-profit on a market with entities that operate for profit. As such, the Court confirms and further extends the wide interpretation of "an economic activity."

With regard to the definition of "the same job" in order to identify a comparator for the equal treatment of temporary workers, the Court clarifies that in the situation of workers that have been assigned to an organisation by a TWA, this is not about finding an actual individual as comparator (ss was suggested in the doctrine by Schlachter, 2012, pp. 177–197) like with other areas of equal treatment such as equal pay between men and women (Fredman, 2008, pp. 193–218). Indeed, it are the factual aspects of work that are taken into account in order to determine the equal conditions that should be provided for the temporary agency workers doing roughly the same work in the same workplace, i.e. EIGE. Thus, the legal status of the workers directly employed by the user-undertaker is not decisive for the determination of the comparator. Not even when such workers are employed under the Staff Regulations of Officials of the European Union. It is not the function or legal employment relationship that is determinative, instead it are the tasks that set the comparison. In the case in the main proceedings the temporary agency workers performed partly the same tasks as the workers that were directly recruited by EIGE. For this reason, the autonomy of EIGE as an EU agency is not infringed, (Article 335 TFEU).

Two aspects are interesting in this. The first is that with this comparison on tasks rather than full jobs, little meaning is actually given to the specific requirements EU officials need to fulfil to be employed by an EU agency, like EIGE. The workers assigned by Manpower Lit to EIGE may perform certain tasks that the EU officials directly recruited by EIGE also perform, but they may not have the same qualifications. From this perspective, one may wonder how fair it is to award them equal wages when a more comprehensive comparison may explain the difference in payment. On the other hand, how else will temporary agency workers be able to make a comparison and claim equal pay? As such, the Court clearly takes a stand to protect temporary workers.

The second interesting point in this part of the case is on what is not there, namely the lack of a reference to the EU's Charter of Fundamental Rights (CFR). Since the CFR was declared equal legal status as the EU treaties (Article 6 Treaty on the European Union), almost every case dealing with equal treatment includes a reference to Article 21 CFR. While case law and doctrinal debates about the applicability of the rights, freedoms and principles of the CFR, including the right of non-discrimination (Article 21 CFR) and the right to fair and just working conditions (Article 31 CFR) is ongoing, there would have been no issue about the applicability with EIGE, as an EU agency involved. Afterall, Article 51(1) CFR stipulates that "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union." Hence, there is no limitation in its applicability. However, a closer look to the specific rights that might be relevant here, Article 21 CFR on non-discrimination and Article 31 CFR on fair and just working conditions, do not cover the situation of the case in the main proceedings. In other words, it seems that workers agency workers, but also workers employed under a fixed-term contract and a part-time contract, are not recognized in the CFR as a group that needs specific protection.[21] To formulate it more concretely, temporary or part-time work, or more general a-typical work (i.e. any form of employment relationship that is not directly with the employer for full time and permanent), are not mentioned as discrimination ground in Article 21 CFR and Article 31 CFR lacks any reference to "equal" right to working conditions or the limitation of working hours or the entitlement of paid annual leave for a-typical workers.

Does that mean that protection at all is offered by the CFR for these workers? Maybe a detour could be taken via Article 31(1) CFR, which reads fully "Every worker has the right to working conditions which respect his or her health, safety and dignity". The word "dignity" here is of special interest, because that has a significant meaning within the CFR itself. In fact, the first chapter of the CFR is titled "dignity" and Article 1 stipulates that "Human dignity is inviolable. It must be

respected and protected." The explanatory text to the CFR indicates that "dignity" constitutes the basis of fundamental rights and within the context of the Charter it means that "the dignity of the human person is part of the substance of the rights laid down in this Charter" and that it must "be respected, even where a right is restricted."[22] The EU's concept of "dignity" builds on that of the United Nations, especially the preamble of the UN's Declaration of Human Rights which starts with the sentence "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Inherent dignity and equal rights are thus linked to each other. Therefore, one could argue that working conditions can only be fair and just when they contribute to the dignity of the worker, which should include the equal treatment of that worker. In the situation of the case in the main proceedings, this should be the equal treatment of temporary agency workers on their basic working conditions as defined in Article 3(1)(f) Directive 2008/104/EC.

But maybe this is too big a stretch … for the moment …. With case law and doctrinal debates on the CFR fully ongoing, developments in interpretations in this direction are not precluded perse.

Notes/Przypisy

[1] CJEU of 11 November 2021, Case C-948/19 UAB "Manpower Lit" v EIGE [ECLI:EU:C:2021:906], point 28.
[2] Ibid., point 51.
[3] Ibid., point 29.
[4] Ibid., point 31.
[5] Ibid., points 33-34.
[6] Ibid., point 36, with reference to: CJEU of 18 June 1998 Case C-35/96 Commission v Italy [ECLI: EU:C:1998:303], point 36; and CJEU of 6 May 2021 Case C-142/20 Analisi G. Caracciolo [ECLI:EU:C:2021:368], point 55.
[7] CJEU UAB "Manpower Lit", points 36–37, with reference to: CJEU of 25 October 2001 Case C-475/99 Ambulanz Glöckner [ECLI:EU:C:2001:577], point 19; and CJEU of 11 June 2020 Joint Cases C-262/18 P and C-271/18 P Commission and Slovak Republic v Dôvera zdravotná poist'ovòa [ECLI:EU:C:2020:450], point 29. In the context of Directive 2008/104/EC this interpretation of "economic activity" is confirmed in the judgement of the CJEU of 17 November 2016 Case C-216/15 Betriebsrat der Ruhrlandklinik [ECLI:EU:C:2016:883], point 44.
[8] CJEU UAB "Manpower Lit", point 39, following, among others, CJEU of 1 July 2008 Case C-49/07 MOTOE [ECLI:EU:C:2008:376], point 24.
[9] CJEU UAB "Manpower Lit", point 39, with reference to CJEU of 6 September 2011 Case C-108/10 Scattalon [ECLI:EU:C:2011:542], point 44.
[10] CJEU UAB "Manpower Lit", point 39, with reference to CJEU of 25 October 2001 Case C-475/99 Ambulanz Glöckner [ECLI:EU:C:2001:577], point 21.
[11] CJEU UAB "Manpower Lit", points 40-42.
[12] Ibid., points 43 and 44.
[13] Ibid., point 45, with reference to CJEU of 17 March 2011 Joint Cases C-372/09 and C-373/09 Penarroja Fa [ECLI:EU:C:2011:156], point 37.
[14] CJEU UAB "Manpower Lit", points 46–49.
[15] Ibid., point 50.
[16] Ibid., point 55.
[17] Ibid., point 57.
[18] Ibid., point 58.
[19] Ibid., point 60
[20] Ibid., point 62.
[21] Which is recognized in the Polish labour code in Articles 11^2, 11^3, and 18^{3a} to 18^{3e}.
[22] https://fra.europa.eu/en/eu-charter/article/1-human-dignity

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