# Factors Impairing the Principle of Equal Treatment in Temporary Agency Work

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## Introduction

One of the key issues of employment in the framework of temporary agency work continues to be in these days temporary agency workers' right to equal treatment. The question is if it is an indispensible advantage or unacceptable discrimination in the competitiveness of temporary-work agencies' services, if temporary agency workers may lawfully receive less pay for work of the same value than the user undertaking's own employees, or, in addition, the (welfare) services provided by the employer are occasionally not available to them, as opposed to the user undertaking's employees, and/or their professional progress is not ensured either.

The adoption of the requirements of *Directive 2008/104/EC on Temporary Agency Work of the European Parliament and the Council* (hereinafter referred to as Directive) and the framing of the *Hungarian Labour Code*, Act I of 2012 (hereinafter referred to as 'Mt.') urged, forced the legislator to revise this issue. I think it is still necessary to highlight the aspects of this issue the regulation of which is based, in my judgement, on opinions, or which expressly need specific regulations.

## Experience following the period of harmonization of legislations

The principle of equal treatment to be applied from the very first day of temporary agency workers' assignment is currently impaired by two restrictions. First, the Directive only provides for equal treatment in relation to basic working and employment conditions also specified in 'Mt'. Second, the above general rule may be supplemented by several exemptions worded in a flexible manner regarding the introduction of which the Member States are free to decide upon (e.g. the bases of comparison – the circle of comparable employees).

Thus according to the Directive, temporary agency workers are only entitled to equal treatment from the viewpoints listed by it as 'basic working and employment conditions'. According to the Directive, basic working and employment conditions include those specified by laws, regulations, administrative provisions, collective agreements and/or other binding general provisions in force at the user undertaking, in relation to the following: the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay (wage, remuneration, etc.).[1] It is obvious that according to the Directive, only basic employment and working conditions specified in binding general provisions shall be taken into account.

From the listing in 'Mt.', however, working conditions associated with working time are apparently missing. The reason for that may lie with the Act providing elsewhere that during temporary assignments, the employer's rights and obligations related to working time and rest

[1] Based on the provisions of Article 3, para. (1) point f) of the Directive.

periods and keeping records of the same are exercised and met by the user undertaking.[2] In my opinion, however, this does not mean that in these fields temporary agency workers would automatically be covered by the effect of the general provisions in force at the user undertaking. For instance, it follows unambigously from this rule that holidays to temporary agency workers are given by the user undertaking. At the same time, if the user undertaking's collective agreement ensures more holidays than specified in statutory provisions, why should this rule be applied to a temporary agency worker too? The effect of a collective agreement only covers the employees being in employment relationship with the employer, and temporary agency workers do not belong to that category.[3] The rule referred to above only regulates employer's powers, and does not specify the effect of a collective agreement.

A Directive-conform interpretation may be resolved by the 'Mt.' listing the elements belonging to the scope of basic working and employment conditions, adding the word 'especially'. Thus the list is open, so following from the Directive, the issues associated with working time should also be implied. At the same time, not only from the viewpoint of compliance with the Directive, but also that of practice it would be desirable for the 'Mt.' to unambiguously specify: matters associated with working time are also considered basic working and employment conditions.[4]

As far as the above mentioned comparison bases are concerned, it is essential that the comparability of temporary agency workers and employees recruited directly by the user undertaking is made possible by law. In temporary agency work this is especially important in relation to the application of the principle of equal pay. This principle should be applied considering the following two viewpoints.

On the one hand, for temporary agency workers it will only mean actual protection if the basis of comparison is the user undertaking's own employees performing work of equal value. Thus for a temporary-work agency, various pays may exist in parallel if temporary agency workers, who otherwise perform work of equal value, work for various user undertakings. On the other hand, following from the single source test, there is no opportunity to compare temporary agency workers performing work of equal value and assigned to the same user undertaking, but assigned by various temporary-work agencies.

Several tests performed at the same time at an employer (may) give distorted results, but tests performed at several employers in various sectors confirm that the principle of equal pay is not fully implemented in sectors for the time being.

### 1.1. Remuneration and services in practice

According to 'Mt.', basic working and employment conditions to be ensured for temporary agency workers are provisions especially related to pregnant women and nursing mothers as well as to young employees' protection, the amount and protection of pay and other benefits, and, finally, to the requirement of equal treatment.[5]

As regards pays, the regulation of equal treatment is given practical significance by the fact that according to statistics, temporary agency workers' pays have recently considerably lacked behind the gross national average pay, although have been nearly double the minimum wage as varied from time to time. The earnings data of the past several years are summarized in the following table.

[2] Mt., Article 218, para. (4) point c).
[3] *Ibid*. Article 279, para. (3).
[4] Kártyás Gábor: Csorba kiegyenlítés: a kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után [Chipped Equality: the Right to Equal Treatment for Temporary Agency Workers in the New Labour Code Era]. *Esély 2013/3*. 37.
[5] Mt., Article 219 (1)-(2).

| **Year** | **Monthly minimum wage** | **Temporary agency workers' monthly average pay** | ***National monthly average income*[6]** |
|---|---|---|---|
| 2009 | HUF 71,500 | HUF 128,668 | *HUF 199,837* |
| 2010 | HUF 73,500 | HUF 123,412 | *HUF 202,525* |
| 2011 | HUF 78,000 | HUF 137,038 | *HUF 213,094* |
| 2012 | HUF 93,000 | HUF 141,693 | *HUF 223,060* |
| 2013 | HUF 98,000 | HUF 145,162 | *HUF 230,664* |

So temporary agency workers received and continue to receive considerably lower wages than the average wage, but if it is considered that three fourths of them are manual workers, approximately half of them doing semi-skilled work, the pay data do not seem strikingly low. The difference is less if comparison is made to the average pays achievable in sectors where temporary agency workers work in the greatest numbers.[7]

| **Sectors**[8] | **Monthly gross average pay (2009)** | **Monthly gross average pay (2010)** | **Monthly gross average pay (2011)** | **Monthly gross average pay (2012)** | **Monthly gross average pay (2013)** |
|---|---|---|---|---|---|
| *National level* | *HUF 199,837* | *HUF 202,525* | *HUF 213,094* | *HUF 223,060* | *HUF 230,714* |
| Processing industry | HUF 190,331 | HUF 200,672 | HUF 213,281 | HUF 230,877 | HUF 241,787 |
| Commerce | HUF 175,207 | HUF 185,812 | HUF 196,942 | HUF 212,521 | HUF 217,483 |
| Building industry | HUF 152,204 | HUF 153,130 | HUF 156,682 | HUF 163,649 | HUF 177,680 |

It is obvious from the above data that there is a difference between temporary agency workers' average pay and employees' average pay in various sectors. So the requirement of equal treatment related to the amount of wage is not fully implemented yet in practice.

However, according to judicial practice, in the case of the violation of that requirement the injury must be remedied, which may not bring about any violation of or prejudice to other employees' rights. It will not be deemed a violation of regulations related to equal treatment if the employer does not increase, in the case of general pay rise, workers' wage with regard to forthcoming termination of employment relationship (MD I/324.). In my opinion, however, this practice gives rise to concerns. In cases, *inter alia*, for instance, when that amount of pay is the wage of that particular employee's last employment, this may affect him/her adversely when the amount of his/her pension is specified.

Temporary agency workers' remuneration usually consist of not only wage, but cafeteria and other benefits also represent a considerable part. This may cause problem between the temporary-work agency and the user company. The question arises how the user company will compensate the temporary-work agency for the difference occured? The principle of equal treatment also involves equal remuneration which should, constituent by constituent, comply with comparable own employees' remuneration who fill similar posts.

However, a loophole of escape may occur in this case too. If temporary agency workers form a job group nonexistent within the user undertaking, they may be given a custom

[6] https://www.ksh.hu/docs/hun/xstadat/xstadat_hosszu/h_qli001.html (22 February 2015).
[7] Kártyás Gábor: A munkaerő-kölcsönzés változásai az új munka törvénykönyve alapján – III. rész [Changes in Temporary Agency Work Based on the New Labour Code – Part III.]. *HR & Munkajog*, (2013) 2.
[8] http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html (22 February 2015).

package of their own, which will obviously be more disadvantageous for them or contain less fringe benefits.

So, the temporary agency workers are entitled to every benefit, constituent of remuneration to which comparable, directly recruited employees are also entitled, including benefits in kind and the constituents of cafeteria. In practice, this will assume exchange of information on a wide scale between the user company and the temporary-work agency,[9] which is expressly required by 'Mt'.[10] Naturally, it may be a delicate matter in practice for an undertaking to share data in connection with its own wage system with a temporary-work agency entering into contract with it. Therefore, in my opinion, it would be absolutely necessary to have statutory provisions related to the transfer of information.

The current Hungarian regulations do not guarantee the availability of the user companies' services (first of all welfare services, access to canteen, child care facilities and transport services), but it follows from *Act CXXV of 2003 on equal treatment and the promotion of equal chances* that, in the absence of objective reasons, temporary agency workers may not be excluded from canteen, child care, etc. services of the user company. On the basis of 'Mt.', there were interpretations[11] classifying such services (e.g. sports day) under widely construed remuneration; in my opinion, however, they are 'only' services and may not be interpreted as benefits. With regard to the domestic attitude, I would deem it necessary to list in the Act the objective circumstances mentioned in the Directive,[12] in order to avoid situations when judicial practice have to give directions to law appliers.

### 1.2. Derogations from equal treatment and problems of regulation thereof

Beyond a concrete analysis of services and wages, in connection with the application of the above mentioned general rule related to basic working and employment conditions according to 'Mt.' article 219 (1) to (2), there are further particular rules which give rise to concern from the viewpoint of translating the Directive into practice.

According to general rule, from the very first day of his/her assignment and regarding every wage constituent, a temporary agency worker is entitled to the same remuneration as his/her counterpart directly recruited by the user company and doing work of equal value. This, however, cannot be implemented in practice in every case, although equal treatment should be ensured in every case according to the relevant regulation.

The 'Mt.' mentions three exceptional cases when the principle of equal pay is to be applied from the 184th day of temporary agency work (after the first six months):

- *permanent employment* (employment relationship of indefinite duration established for the purposes of temporary agency work, and remuneration ensured even in the absence of assignment to a user company);
- *exceptions* related to temporary agency workers or user companies;[13]
- *in a collective agreement*, the parties may derogate from the principle of equal pay, even unfavourably to workers.[14]

[9] Berke Gyula et al.: *A Munka Törvénykönyvéről szóló 1992. évi XXII. Törvény magyarázata I-II* [Commentary I-II of Act XXII of 1992 on the Labour Code]. Magyar Közlöny Lap- és Könyvkiadó Kft., Budapest, 2006. 264.
[10] Mt., Article 217, para. (3) and (5).
[11] Kozma Anna et al.: *Az új Munka Törvénykönyvének magyarázata* [The Commentary of the New Labour Code]. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012. 400.
[12] Directive, Article 6, para. (4).
[13] Mt., Article 219, para. (3)-(4).
[14] *Ibid*. Article 222.

*to 1. The derogation of permanent employment*[15]

The conditions of permanent employment relationship established for the purposes of temporary agency work and remuneration ensured even in the absence of assignment to a user company (idle time) must exist. The Directive deems the simultaneous existence of these two conditions such an advantage which will compensate a temporary agency worker for not being entitled to equal pay.[16] In the absence of a separate agreement, however, the temporary agency worker is not entitled to remuneration for periods between assignments. According to 'Mt.', such periods will not be considered idle time as in this case there is no scheduled working time.[17] As regards the extent of remuneration that can be paid for periods between assignments, no statutory minimum is specified.

It should be noted that the comparative advantage of permanent employment relationship and remuneration due for the periods between assignments may easily be lost. Cases to the point when an employee is dismissed in short time in spite of having a contract of indefinite duration, or if he/she is only given symbolic remuneration between assignments, or if there are not at all 'idle times' during his/her employment relationship, because assignments follow each other without interruptions. Unfortunately, 'Mt.' does not provide for some subsequent compensation in such cases for temporary agency workers. The Directive itself would also expressly insist on this, as it requires the Member States applying derogations to take appropriate measures to prevent abuses.[18] It should be added that the situation of temporary agency workers excluded from equal remuneration without compensation also raises the constitutional problem of arbitrary discrimination.

It should be mentioned that it is also objectionable on the basis of prohibition of the misuse of law[19] if a temporary agency worker is given less pay than his/her directly recruited counterpart otherwise performing work of equal value, merely because of a promise of permanent employment never coming true, or of a promise or insignificant amount of remuneration between assignments. With regard to the concerns enumerated, it means at least uncertain legal situation if the temporary-work agency avails itself of this derogation.

Finally, it should be mentioned that because of an error made in the translation of Article 5 (2) of the Directive, the principle of equal treatment is stricter in the Hungarian regulation than expected by the EU, which, in my judgement, considerably reduces the efficiency of manpower leasing, and, as a result, has an unfavourable influence on the labour market processes and unemployment rate.

In the matter of equal treatment regarding wages, the original English wording of the Directive provides exemption in the case of workers with permanent contracts if they are paid between assignments as well. The Hungarian translation of the Directive, however, mentions temporary agency workers with long-term work contracts which is difficult to construe in law. As the notion of long-term work contract is unknown in Hungarian law, 'Mt.' does not contain the favour permitted above.

*to 2. Derogations related to temporary agency workers or user companies*

*According to derogation related to temporary agency workers,* temporary-work agencies are exempt from meeting the principle of equal pay during the first 183 days of assignment if the temporary agency worker is deemed a person having stayed away from the labour market for

[15] Kártyás: *Csorba kiegyenlítés…*, 40-45.
[16] Article 5, para. (2) of the Directive.
[17] Mt., Article 146, para. (1).
[18] Article 5, para. (5) of the Directive.
[19] Mt., Article 7.

a long time.[20] Among those staying away from the labour market, the Act lists, *inter alia*, persons having received child-care allowance or child-care aid, or young people starting their careers. In my opinion, making exceptions for these groups is positive from the viewpoint of the promotion of employment as this tries to favour employers employing them. From workers' viewpoint, however, I believe this may influence the employment of these groups in temporary agency work negatively as they experience difficulties in returning to the labour market even in normal cases, and if they succeed and find employment in the framework of temporary agency work, they will be given less remuneration for six months because of the derogation rule, and employers occasionally draw other grants on them. From a worker's point of view, this may result in the weakening of motivation or low level of enthusiasm.

The employment of such persons is also encouraged by various facilities in the payment of social security contributions, so in their case, state-supported integration programmes are in place with regard to which the application of the rules of the Directive may be disregarded.[21] *Derogation relates to user companies*, if the user company is a business association in majority ownership of the local government, a nonprofit organisation or registered nonprofit organization. The legislator's intention presumably was to favour nonprofit user companies, the Directive, however, provides that its scope covers user undertakings irrespective of their being profit oriented or not.[22] Moreover, the activities of these user undertakings are not linked with state-supported labour market programmes either on which derogation from the principle of equal pay could be based.[23]

*to 3. Parties' opportunities to derogate from the principle of equal pay in collective agreement*

Collective agreements may derogate from the general rule of the principle of equal pay even to workers' disadvantage.[24] In this matter, even the 184-day rule is not binding upon the parties, so equal wages may be put aside for longer periods than that.

According to the Directive, however, even in the case of such different provisions, 'temporary agency workers' general protection' must be ensured.[25] That is to say, it is only possible to disregard the application of the principle when appropriate compensation is provided. So the harmonisation of Hungarian legislation is not quite precise at this point since this provision is missing from 'Mt'. The Act does not provide either what level collective agreement is required for the derogation, so a single-employer-level agreement covering just one temporary-work agency may contain such a provision.

To sum up, there being a wide range of derogations, certain temporary agency workers may, both currently and in the future, be excluded from the scope of the principle of equal pay. This may occur frequently especially for temporary agency workers fulfilling short term assignments not exceeding six months. Unfortunately, exactly such assignments lasting several months are predominant in the domestic practice of temporary agency work, and the wages that can be earned in these assignments usually fall short of the average wages. Moreover, because of the inaccurate specification of derogations, which may be objected on the basis of both the harmonisation of legislations and the constitutional prohibition of

[20] Classification is determined by Article 1 para. (2) of the *Act CXXIII of 2004* on the promotion of the employment of career-starting young people, unemployed aged over fifty and jobseekers following child care or care of a family member, as well as on employment with scholarship.
[21] Article 1, para. (3) of the Directive.
[22] *Ibid*. para. (2).
[23] *Ibid*. para. (3).
[24] Mt., Article 222.
[25] Article 5, para. (3) of the Directive.

arbitrary discrimination, the application thereof involves legal risks for the employers too, therefore amendments would be desirable to the relevant provisions.

In addition to the above, it should be emphasized in connection with the general provisions of 'Mt' related to temporary agency work that even at the lawful application of equivalence (the determination of equal value of work) it may occur that different wages are paid to workers working in the same jobs in various parts of the country, as one among the criteria of the requirement of equal treatment is that labour market conditions may be taken into account.[26]

### 1.3. Summary of experience

Nowadays, in international labour law, experts in increasing numbers represent the attitude that the 'enjoyment' of workers' basic rights is less and less associated with a certain type of employment relationship, but instead rather with the fact itself of doing work. Accordingly, equal treatment should be ensured for everybody. Consequently, temporary agency workers are looked upon not 'only as resources', but they are also entitled to equal workers' rights in the same way.[27]

The major argument for equal treatment is that it improves the recognition of temporary agency work. This is absolutely necessary as some players in the European labour market doubt the justification of this form of employment.

In addition, it lessens the temporary agency workers' defencelessness. Certainly, some counter-arguments can be enumerated on employers' part as well, e.g. it makes employment enhancement more expensive, and restricts freedom of agreement of the two parties to an employment relationship.

The adoption of the Directive was preceded by a decade's dispute having arisen exactly around these arguments, which hindered the introduction thereof before 2008. Although in most of the atypical employment relationships, the 'anti-discrimination directive' does not permit derogations, for temporary agency work it contains the provision that it is valid for 'only the basic' conditions.

The *Labour Code Act XXII of 1992* preceding 'Mt' also contained the principle of equal treatment, but restricted the same in relation to both time and wage constituents included. In addition to all this, temporary agency workers' different treatment was legitimized by the Constitutional Court too when it declared that it was not unconstitutional because of the different employment arrangement.[28] It is interesting that the Constitutional Court deemed the derogation justified on the grounds that this type of employement is of short, temporary nature, while the Directive deems exactly permanent employment an exception justifying different treatment under certain conditions.

'Mt.' finally provides that during temporary assignments, the standard basic working and employment conditions valid for the employees being in employment relationships with the user company must be ensured for temporary agency workers.

Consequently, pursuant to the Directive and the domestic regulation, temporary agency workers are entitled to the same conditions as other employees not only in relation to wages, but their access shall also be ensured to all services, facilities of the user company. This may include meals, accommodation, in-house applications, trainings or even corporate events.

Many people tend to think that because of the principle of equal treatment, the advantages of temporary agency work will be lost, but in practice, other advantages compensate this. For

[26] Mt., Article 12, para. (3).
[27] Kun Attila: Munkaerő-kölcsönzés: taktikák a túlélésre - A kölcsönzött munkaerő sem csak erőforrás [Tactics to Survive: the Temporary Agency Workers Are not only Resources]. *Adó Online* (2013) 3.
[28] *Resolution 67/2009 (19 June 2009)* of the Hungarian Constitutional Court.

instance, the reduction of administration loads, 'make-up at short notice', flexible headcount management, the temporary-work agencies' professional HR background are all considerations suggesting that this form of employment may remain to be more beneficial in the future, as well.

## 2. Conclusions and suggestions

In my opinion, from the viewpoint of legislative text editing, the provision calling upon the Member States to prevent abuses concerning the application of article 5, and especially successive assignments designed to circumvent the provisions of this Directive, has been included by mistake in article 5 of the Directive regulating the requirement of equal treatment.

The scope of this provision is wider than just the enforcement of the basic principle of equal treatment. The 'prevention of successive assignments' as per the text of article 5 (5) refers to temporariness specified as indispensable element of the notion of temporary agency work, and requires the Member States to prevent the evasion of this provision.[29] It is most desirable to submit a proposal at EU level to remove this calling-upon provision.

I am of the opinion that regarding the above mentioned 'derogations' of 'Mt.' related to equal treatment, in the case of derogations related to workers, it would be necessary to determine the extent of remuneration that may be paid for the periods between assignments as a regulatory minimum. If during the existence of employment relationship assignments follow one another without interruptions, subsequent remuneration should be ensured for workers in an amount specified in regulation. In the case of derogations related to user companies, the term non-profit organisation should be removed from the text of 'Mt.' on the basis of reasons to comply with the provisions of the Directive.

In my opinion, in addition to the above, compulsory compensation should be paid in the case of derogations in the collective agreement from the principle of equal pay when the application of the principle is disregarded.

Beyond amendments to the relevant regulations, I think it would also be necessary to consider establishing a trade union which could represent the circle of temporary agency workers. Not only because of potencial opportunities and conditions provided by collective agreements, but it would also be important in many respects to have a representation organisation with whom employers could enter into negotiations (e.g. regarding vocational trainings which increase the workers' value, and promotion can be ensured for them).

It remains important in the future, especially as far as our country is concerned, to bring social dialogue to the forefront; in this field too, the presence of an efficient representation organisation would mean a lot. In the temporary agency work sector in Western Europe, the usefulness thereof is demonstrated by the so-called bilateral funds created on social grounds (with the participation of social partners). The funds provide better access to vocational training, improving thereby employability and facilitating the development of manpower leasing in the labour market.

[29] Horváth István: Így harmonizálunk mi – Az új Munka Törvénykönyve munkaerő-kölcsönzésre vonatkozó – az EU-követelményekre is figyelemmel – megállapított szabályairól [So We Made the Harmonization of Legislations – About the Temporary Agency Work Rules of the New Labour Code Subject to EU Requirements]. *Magyar Munkajog*, 2014/1. 161.