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Theoretical and Practical Aspects Related to Work of Temporary Employees for Users from Other European Union States. Work Through Temporary Employment Agency and Secondment

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Abstract: *The work of employees through a temporary employment agency is a form of atypical work that involves more discussions. In this material, I propose to compare the institution of temporary work through a temporary work agency with that of posting. I will also highlight the particularities of the temporary employee's work within the provision of transnational services, highlighting internal and community legislative aspects as well as the problems that the two institutions bring to the practice of national courts and the Court of Justice of the European Union.*

Keywords: *temporary work agent, transnational detachment, work accident, daylight.*

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The institution of posting and the institution of temporary work through a temporary work agent - delimitation and similarities

There is, both in doctrine (Țiclea, 2014:22) and in the practice of relations between temporary employment agencies and temporary employees, a tendency to put a sign of equality between posting and temporary work since both have in common the fact that the employee is made available to another beneficiary by his employer and the duration of the service is temporary.

Some authors (Beligrădeanu, 2015:89) with judicial practice considered this interpretation to be erroneous because "the legal institution (of labor law) of the temporary employment contract is distinct from posting, despite some non-essential, therefore insignificant, similarities; it is indubitable that the employee employed by a temporary employment contract is not entitled to the rights established by art. 46 paragraph 4 and art. 47 of the Labor Code". It was opined that no text of art. 88-102 of the code contains any provision meaning that the provisions of art. 46 paragraphs 4 and 47 of the Labor Code regarding the payment of transportation expenses, accommodation, secondment allowance would apply to temporary employees (daily). As provided by art. 47 of the Code, these rights should be granted by the employer for whom the work is done, in our case by the user, or the obligation to pay the salary falls to the temporary work agent who has the capacity of employer.

Therefore, the two legal institutions are regulated separately and entail different rights and obligations. The fact that the employee concludes an employment contract with an employer and during the execution of the contract performs the activity in the interest of another employer, without a thorough analysis and appropriate information, there may be confusion which, in turn, may cause damage to the employee (Năstase, 2021).

In a file, the Bucharest Court of Appeal found that from the moment the individual employment contract was concluded, the legal provisions regarding the correct framing of the employment relationship were not respected and the plaintiff employee did not obtain a favorable solution. This requested the annulment of the dismissal decision, which was based on the termination of the job, the reintegration into the previously held position and the payment of the wages that he would have benefited from, but the aspects related to the type of employment relationship were not taken into account. In reality, by concluding the contract, the employer sought to make the employee available to a user with who he was in commercial relations, but without

complying with the provisions of Title II, Chapter. VII of the Labor Code (Parliament of Romania, 2003), masking this situation in the form of secondment. The courts found that the position to which the employee was assigned was never found in the employer's organization chart and, after signing the employment contract, she was seconded to another employer, she signed the individual employment contract knowing that she would perform the activity for the benefit of another employer, but without noting that in the case of secondment, as the documents were drawn up, the salary had to be paid by the employer to whom she was seconded and only in the event that he did not fulfill his obligation could he be directed against the employer from whom she was seconded. If the legal provisions had been fully respected, the employment contract would have taken the form of a temporary employment contract, and her employer had to be authorized under the law and the employee had to be informed about the duration of the mission for which she concluded the contract. These elements are directly related to the rights enjoyed by the employees, and in the case of the temporary employment contract, they are limited, being an atypical employment contract, which can end even before the end of the term for which it was concluded. Under these conditions, it is it is mandatory to inform the employee about the type of employment contract he is about to sign.

The differences refer to the fact that secondment involves a temporary change of job, from the employer's disposal to another employer in order to perform some work in the interest of the latter, to whom he is responsible and who is responsible for granting the rights enjoyed by the employee. Instead, the temporary employee is placed at the disposal of the user, he is responsible to the temporary work agent and the temporary worker's rights will always be ensured by the temporary work agent based on the service contract concluded with the user.

Other differences between the two institutions are:

- Both posting and making to the user are temporary;
- Both situations involve the performance of an activity for the benefit of another person who, in the case of secondment, is the employer, and in the case of temporary work , is the user;
- The conclusion of an employment contract requires the existence of a vacant job in the employer's organizational chart, while this condition is not provided for the temporary employment contract;
- in the case of secondment, the salary is paid by the employer to whom the secondment was ordered, and in the case of a temporary employment contract, this obligation rests with the temporary employment agent;

- the temporary work contract may also terminate before the end of the assignment if the user renounces the services under the conditions established by the provision contract.

After the end of the secondment, the employee returns to the position he was hired on, and in the case of temporary employees, the salary is set and paid by the temporary work agent (employer) for each assignment, a salary that cannot be lower than that received by the user's employee, who performs the same or similar work as the temporary employee. The Court of Appeal, by *Civil Decision no. 6177/2017*, rules that since in the case it was not proved by the appellant that he benefited from a salary lower than that of comparable employees from PETROM/OMV PETROM-as a user, respectively, that they finally, *by fully applying* the provisions of the salary scale negotiated on the basis of the collective labor agreement applicable within PETROM/OMV PETROM would have benefited from a more advantageous salary, it will be noted that there was no violation of the principle of equal treatment regarding the employee plaintiff.

The secondment of the temporary employees within transnational services

Another aspect that involves problems in practice and is frequently encountered in national and community jurisprudence is that regarding the rights of temporary employees resulting from the posting of temporary employees in transnational services, especially the right to daily allowances and the right to social insurance during the period between assignments in within the framework of transnational postings (CJEU in case C-784/19, CJEU C-713/20/2022, Judgment no. 2657/2021 of the Vâlcea Court, Decision no. 824/2020 of the Târgu Mureş Court of Appeal, Judgment no. 279/ 2021 of the Cluj Court of Appeal, Judgment No. 166/2021 of the Oradea Court of Appeal, Civil Judgment No. 8608/2021 of the Timişoara Court, Civil Judgment No. 60/2021 of the Braşov Court of Appeal, Judgment No. 471/2019 of the Tribunal Mures).

In addition to the provisions of Framework Directive 2008/104/EC (European Parliament, European Council, 2008) the provisions of Directive 2014/67/EU on the implementation of Directive 96/71/EC (European Parliament, Council European, 2014) also apply to the temporary work agent, regarding the posting of workers in the provision of transnational services, amended by Directive 2018/957/EU (European Parliament, European Council, 2008). The transposition at the national level was made by the adoption of Law no. 16/2017.

Directive 2018/957/EC recalls the principle of equality regulated by Directive 2008/104/EC (European Parliament, European Council, 2018) according to which the basic working and employment conditions applicable to temporary agency workers should be at least identical with those that would apply to those workers if they were recruited by the user enterprise to fill the same position. According to Directive 2018/957/EC, the principle of equality (European Parliament, European Council, 2018) should also apply to temporary agency workers posted on the territory of another member state. If this principle applies, the user enterprise should inform the temporary agency about the working and remuneration conditions that apply to its employees. The responsibility for posting these workers rests with the temporary agency.

It is also provided that Member States may, under certain conditions, grant derogations from the principle of equal treatment and equal remuneration stipulated by Article 5 paragraphs (2) and (3) of Directive 2008/104/EC (Parliament European, European Council, 2008). If such derogation applies, the temporary worker does not need the information regarding the working conditions of the user enterprise and, consequently, the information obligation should not apply.

Experience shows that workers who have been made available to a user enterprise by a temporary employment agency are sometimes sent to the territory of another Member State in the context of *the provision of transnational services*. The Directive states that *the protection of these workers should be ensured*. Member States should ensure that the user undertaking informs the temporary agency about posted workers who are temporarily working in the territory of a Member State other than the Member State in which they normally work for the temporary agency or the undertaking users, to allow the employer to apply, as the case may be, *working and employment conditions more favorable to the posted worker*.

Art. 5, paragraph 1, lit. c) from Law no. 16/2017 on the secondment of employees in the framework of the provision of transnational services (Parliament of Romania, 2017) applies in the case of the provision of an employee, by a temporary work agent, to a user enterprise established or carrying out its activity on the territory of Romania, if there is an employment relationship, during the secondment, between the employee and the temporary work agent. Paragraph 2 letter c also applies in the case of the provision of an employee, by a temporary work agent, to a user enterprise established or that carries out its activity on the territory of a member state, other than Romania, or on the territory of the Confederation Swiss, if there is an employment relationship, during the secondment, between the employee and the temporary work agent.

Art. 8. of Law no. 16/2017 (Parliament of Romania, 2017) provides that employees posted from the territory of Romania in the framework of the provision of transnational services benefit, regardless of the law applicable to the employment relationship, from the working conditions established by legislative acts, administrative acts, by collective agreements or arbitral awards of general application, valid in the member state, other than Romania, or in the Swiss Confederation, on the territory of which the services are provided, regarding:

a) the maxim duration of working time and the minimum duration of the periodic rest;

b) the minimum uration of paid annual leave;

c) the defined minimum wage , including compensation or payment of overtime work; siv compensarea sau plata muncii suplimentare; (ie: the minimum salary applicable on the territory of a member state or on the territory of the Swiss Confederation, for the employee posted from the territory of Romania is the one defined by the legislation and/or practice of the member state, other than Romania, or of the Swiss Confederation, on whose territory he/she is seconded employee);

d) the conditions for making employees available by temporary employment agency;

e) health and safety at work;

f) protective measures applicable to working conditions for pregnant women or those who have recently given birth, as well as for children and young people;

g) equal treatment between men and women, as well as other non-discrimination provisions.

The request addressed to the national court (Vâlcea Court, 2021) the plaintiff- former temporary employee of a temporary work agent from Romania, who was made available to a user and who carried out the activity only on the territory of Germany (according to the temporary work contract) requested payment by the temporary work agent of the following amounts: *per diem* for the period 3.11.2019 - 3.12.2019, *in the amount of 80 euros/day*; *monetary rights for additional work* over 8 hours per day for the period 1.10.2018 - 3.12.2019; *payment of the monetary rights corresponding to night work* for the entire contractual period; *payment of the monetary rights corresponding to work during the weekly rest periods and work on legal holidays*; payment for the entire contract period of *the minimum wage in Germany*, of 9.19 Euros/hour considering that during this period he worked exclusively in Germany; the payment of 600 Euros updated, representing *the employee's expenses for returning to Romania* after the untimely termination of the temporary employment

contract, as well as *moral damages* in the amount of 100,000 Euros, for the harm caused by the fact that, after the termination of the employment contract, he was put in a situation to stay a period of time in the public space, without money, with all the baggage violating the principle of good faith of the employer in relations with the employee and his diligence and involvement in limiting the psychological and emotional effects of the application of any measures within the employment relationship. In this case, the court requested information from the Bucharest Trade Registry regarding the state of the defendant company and invoked and pronounced the exception of the defendant's lack of procedural capacity to use the temporary employment agent on the grounds that it ceased to exist from a legal point of view as of the date of its dissolution and deletion respectively (24.12.2020) and as such it no longer has procedural capacity for use, i.e. it does not have the use of civil rights required by art.32 and 56 of the New Code of Civil Procedure (Judgment no. 2657/2021, Vâlcea Court).

As the place of work is stipulated in the temporary work contract as being with a user abroad, the provision of the Fiscal Code is known that amounts entitled per diem are exempt from taxation and social contributions. The jurisprudence is uniform in this sense, appreciating that temporary employees know from the moment of concluding the temporary employment contract that the place of work is with beneficiaries located abroad and *they are not entitled to daily allowance because according to law 16/2017 they have the right to the minimum wage applicable in that territory state, i.e. at least the salary that would be given to workers if they were recruited directly by the user company.*

In one case (Târgu Mureş Court of Appeal, 2020), the temporary employment agent temporarily hired drivers, paid the minimum wage for the economy, who carried out activities exclusively on the territory of Germany. These employees benefited from the per diem, registered in the accounting, but for which income tax and social contributions were not paid. Following an audit, the tax authorities established the obligation to pay the payroll tax and social contributions. Reported to the conclusion that the plaintiff's employees did not carry out the activity temporarily in Germany, but normally, there being the normal place of work as temporary work agents, illegally the amounts granted to them were qualified and treated fiscally by the company as external per diem instead of income from wages or wages assimilated to wages, the latter being subject to taxation and taking into account the payment of mandatory social security contributions, according to art. 76 paragraphs 2 letter s and art. 139 – 140 according to Civil Decision no. 824 (Târgu Mureş Court of Appeal, 2020).

We find the same solution in the content of Civil Sentence no. 60/2021 (Cutea de Apel Braşov, 2021) which held that the fiscal body correctly found that the work performed in the EU by the employees of the temporary work agent cannot be considered "posting" or "delegation" according to the Labor Code (Parliament of Romania).The status of the temporary employee during the transnational secondment is not that of delegate or seconded in order to be stipulated and per diem in addition to the basic salary, for the entire duration of the mission he benefits from the salary paid by the temporary work agent and the per diem must be included in salary not separated as non-taxable amount.

With regard to the salary to which the temporary employee is entitled as long as *he is on the transnational secondment, it is considered that the applicant was entitled to the payment of the minimum wage*, according to German law, as it otherwise results from the staff leasing contract and not at the level the minimum wage per economy in Romania plus secondment allowance. Moreover, the clause established in the leasing contract is also in accordance with the provisions of art. 5 para. 1 of Directive no. 2008/104/EC (European Parliament, European Council, 2008), according to which "The basic conditions of employment and work applicable to temporary workers are, during the temporary work assignment within a user enterprise, at least those that would apply to workers in case they were recruited directly by the respective user company to occupy the same job" (Mures Court, 2019). Some foreign authors, who addressed the issue of the working conditions of the workers of cross-border temporary agencies in the EU but also the challenges related to the circumvention and application of the legislation regarding the cross-border activity of temporary agencies, believe that it would be useful to reconsider, at the level of EU and national legislation, the the rights of temporary employees posted transnationally, especially regarding the regulated minimum wage and the right to union representation (Houwerzijl, 2024).

Analyzing the national jurisprudence regarding the transnational posting of temporary employees, we found that most legal claims of temporary employees refer to the granting of salary rights: per diem, payment of overtime, payment of hours worked on public holidays or non-working days as well as on on Saturday and Sunday, accommodation expenses according to Decision no. 157 (Constanţa Court of Appeal, 2020).

Also, in practice, the national courts have faced requests for payments for causes of work accidents caused to the user during the third work mission (Suceava Court, 2023). Thus, in the present case, the temporary work agent requested the payment of both the temporary work

agent based in Bucharest and the user based in France for the following amounts:

- the unrealized benefit of 1,500 Euros per month until the total repair of the state of health, respectively for the entire length of the medical leave;
- payment of the amount for recovery owed to the employee in case of a work accident;
- moral damages of 15,000 Euros as a result of the physical and mental suffering suffered as a result of the work accident;
- material damage of 3,000 euros under the title of material damage representing expenses for recovery treatments plus the amount of 8,901.83 euros unpaid bill for hospitalization and surgery in France;
- legal expenses.

Following the administered evidence, the Suceava Court obliges both the temporary employment agent and the user only to pay the temporary employee in the sense of granting the moral damage of 10,000 Euros and the amount of 1863 lei in court costs, the other claims being rejected. To motivate the decision, the court assessed that in the case the patrimonial liability of the two defendants (the agent and the user) is involved towards the plaintiff, requirements resulting from the provisions of art. 253 paragraph 1 of the Labor Code according to which "The employer is obliged, based on the rules and principles of liability contractual civil, to compensate the employee in the situation where he suffered a material or moral damage due to the fault of the employer during the performance of the service obligations or in connection with the service". The employer's guilt manifests itself in the present case through the fault of the employer's management bodies or its subordinates, the accident having occurred during the performance of the employee's duties.

The practice of the European court in case C-784/19, concluded that in order to benefit from the provisions of a European regulation that allows the application of the social security legislation of the state from which the temporary employee placed at the disposal of a user from another EU member state leaves, the temporary work that makes him available should normally carry out his activities in the Member State whose social legislation he wants applicable to that employee (Court of Justice of the European Union, 2019).

In case C-713/20/2022, the question was raised whether a person who resides in a member state and who carries out, through a temporary work agent established in another member state, temporary work assignments on the territory of this other member state *is subject in the intervals*

between the respective temporary work assignments to the national legislation of the member state of employment or in the sense that such a person is subject in the respective intervals to the national legislation of the member state of residence (Court of Justice of the European Union, 2022). The Court ruled that the legislation of the Member State of employment remains applicable as long as the person in question carries out his professional activity on the territory of this Member State; on the other hand, persons who have permanently or temporarily ceased their professional activity are subject to the legislation of the Member State in which they reside. It follows that in order to apply the legislation of the Member State of employment, the existence of a continuous employment relationship is always necessary.

Conclusion

There is a tendency to put a sign of equality between secondment and temporary work, since both have in common an employee who is made available to another beneficiary by the employer and the duration of his service is temporary. However, I found, as I presented above, that the legal institution of temporary work is distinct from posting, despite some non-essential, therefore insignificant, similarities; it is indubitable that the employee employed by a temporary employment contract is not entitled to the rights of the seconded employee.

The provisions of Directive 2014/67/EU on the implementation of Directive 96/71/EC ((European Parliament, European Council, 2014), on the posting of workers in the framework of the provision of transnational services, as amended by Directive 2018/957) also apply to the temporary work agent. /EU (European Parliament, European Council, 2018). In Romania it was transposed by the adoption of Law no. 16/2017 (Parliament of Romania, 2017). This national normative act applies both in the case of making an employee available, by a temporary work agent, to a user enterprise established or carrying out its activity on the territory of Romania, if there is an employment relationship, during the secondment, between the employee and the temporary work agent. It also applies in the case of making an employee available, by a temporary work agent, at an established user enterprise or that carries out its activity on the territory of a member state, other than Romania, or on the territory of the Swiss Confederation, if there is an employment relationship, during the secondment, between the employee and the temporary work agent. In the practice of the courts, we noticed that these normative acts were interpreted erroneously by the temporary employment agencies and the courts appreciated that the status of the temporary employee during the period of the transnational

secondment is not that of a delegate or seconded in order to stipulate a per diem in addition to the basic salary, throughout the duration of the mission, the salary paid by the temporary work agent benefits and the per diem must be included in the salary not separately as a non-taxable amount.

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