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The right to equal pay for temporary agency workers includes travel time allowances (NO)

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Summary

Directive 2008/104/EC (Temporary Agency Work Directive) is implemented by means of the Norwegian Working Environment Act and provides for equal pay between regular workers and temporary agency workers. The Supreme Court has held that, in domestic law, the concept of 'pay' includes allowances for travel time and therefore a temporary agency worker was entitled to the same allowance as his permanent colleagues.

Legal background

Directive 2008/104/EC (Temporary Agency Work Directive, the 'Directive') has been implemented by means of the Norwegian Working Environment Act. However, in some places, the wording is more extensive than that of the Directive. For example, as regards 'pay', which is addressed in Article 3(1)(f) of the Directive, the corresponding Section 14-12(a) first paragraph, f, of the Working Environment Act, refers to "pay and the reimbursement of expenses" (*lønn og utgitfsdekning*). While the case at hand technically was ruled on the now-repealed Act on State Civil Servants, the provisions of the current Working Environment Act are relevant, as the wording is the same.

Facts

The case concerned a temporary agency worker, Mr Venås, employed by Manpower, who was assigned to the Norwegian Public Roads Administration (*Statens vegvesen*), a user undertaking of Manpower. His place of work was Tønsberg. However, like his 'permanent' colleagues, from time to time he had to work in Larvik, a city located 40 minutes from Tønsberg by car. Like permanent employees, his travel costs between his home and the work location in Larvik were reimbursed, but unlike his permanent colleagues, he received no allowance for the time he spent travelling on the days he worked in Larvik.

Mr Venås brought an action against Manpower for payment of this allowance, arguing that it fell within the scope of 'pay' within the meaning of the Directive and the Working Environment Act. On appeal, the District Court's judgment in Mr Venås' favour was upheld in a split decision by the Agder Court of Appeal, and subsequently upheld unanimously by the Supreme Court.

Judgment

First, the Supreme Court noted that the concept of 'pay' is not defined in the Directive and, in fact, Article 3(2) leaves the matter to Member States to address in their domestic legislation. The concept of pay is also not defined in section 14-12 a of the Working Environment Act, nor in the then parallel section 3 B of the Act on State Civil Servants. Furthermore, there is no uniform concept (or definition) of 'pay' otherwise, for example in other legislation. Consequently, the wording of the statutory provisions did not provide much guidance on the interpretation. On the other hand, the wording did not *preclude* an interpretation that included travel time allowance within the ambit of 'pay'.

The Court looked at the preparatory work to the Working Environment Act as the key source to build on. In the Bill to Stortinget (Parliament), the Ministry had emphasized that all compensation for work should fall within the scope of 'pay'. This would include, *inter alia*, overtime supplements and "unsocial hours allowances", along with benefits relating to special tasks or working conditions, such as high risk work. Considering the preparatory work in detail, the Supreme Court took the view that the legislator's intention was to enact a broad-ranging concept of 'pay'. The Court noted, moreover, that the "reimbursement of expenses" was explicitly

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included in the text of the Bill, for the very purpose of achieving equal pay in practical terms. Adding "reimbursement of expenses" to the wording of the provision was intended to further clarify this. Further, the Bill stated that the Directive was not an obstacle to adopting rules that provide better protection for workers than that required by the Directive.
However, travel time allowance was not specifically considered in the legislative history. Nevertheless, among all the benefits mentioned in the preparatory work, the only one that intentionally was left out was pension. This was to avoid the practical difficulties that would occur if this were subject to equal treatment. Consequently, even though the legislative history discussed various benefits in quite some detail, the Court's view was that the list was not intended to be exhaustive. Moreover, in the Court's view, travel time allowance would have been explicitly included if it had been discussed. In addition, there were no practical difficulties with granting temporary agency workers the same travel time allowance as employees of the user undertaking. Consequently, Mr Venås' claim was granted.

Commentary

The travel time allowance at issue in this case is a flat rate allowance. It does not compensate actual travelling costs to and from the fixed place of work. Therefore, it needed to be assimilated with 'pay' within the scope of the Working Environment Act. There is no reason to consider this a problem in EU/EEA law. In fact, it is of a similar nature as the compensation for daily travelling time accepted by the ECJ in *Sähköalojen ammattiliitto* (C-396/13), as a component of pay in the context of Article 3(7) of Directive 96/71/EC (the former Posting of Workers Directive). Both directives leave the concept of pay to national law.
The Supreme Court relied heavily on the emphasis given in the preparatory work to the objective of equal treatment, taking that to indicate that its scope was "relatively wide" (paragraph 41). By extension, that mode of reasoning could accommodate further types of compensation, such as supplementary benefits during sick leave or parental leave, along with bonus schemes. So far, whether this is the case remains an open question, as these specific issues have not yet been settled in either EU or domestic case law.
And the fact remains that the "reimbursement of expenses" referred to in the Working Environment Act is not included in the catalogue of "basic working and employment conditions" in Article 3(1)(f) of the Directive. This does not put the decision in domestic law in doubt but EU/EEA law is a different matter. In *Sähköalojen ammattiliitto* the ECJ rejected the inclusion of reimbursement of expenses as elements of the minimum wage and this casts doubt on whether Article 3(2), first subparagraph of the Directive can be interpreted as having wider scope, or whether a requirement to reimburse expenses amounts to an impermissible restriction on the freedom to provide services. This question remains open.

Comments from other jurisdictions

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): Reimbursements of expenses, for example for travel costs of a professional nature, does not fall within the usual concept of wages in the Belgian Act on Employment Contracts of 1978. If an employee is travelling for work in a private car, s/he should be reimbursed by the employer (unless the employer provides a company car). Whether the employee is temporary or permanent does not matter.

Germany (Martina Ziffels, Luther Rechtsanwaltsgesellschaft mbH): The decision is in line with German law. The principle of equal treatment for temporary workers is set out in Section 8 of the Act on the Regulation of Temporary Employment (*Arbeitnehmerüberlassungsgesetz*, the 'AÜG'). According to Section 8 paragraph 1, first sentence of the AÜG, the hirer must grant temporary workers the same essential working conditions, including pay, as apply to comparable employees for the period of their assignment.
According to the case law of the Federal Labour Court, pay should be understood to mean the pay that the temporary worker would have received if s/he had been employed by the hirer for the same activity. The Court has also held that the concept of pay should be determined nationally and interpreted broadly (BAG, judgment of 24 September 2014, 5 *AZR* 254/13). It includes not only current pay, but any pay granted when the employment relationship was formed, including any allowances, capital benefits and the taxable non-cash benefits of a company car provided for private use. The common view is that all gross remuneration components, including holiday pay, sick pay, special pay and allowances along with capital payments, are relevant. There is therefore a wide interpretation of the term 'pay'.
A travel time allowance, as discussed in the Norwegian case, also qualifies as pay. In the absence of specific rules, the employer must remunerate travel time falling within regular working hours in the same was as working hours. This follows directly from Section 611 of the German Civil Code and the applicable remuneration regulation. However, under German law, a collective agreement can stipulate that employers can pay less for travel time than for ordinary activities. The employer may also deviate from the law by company agreement ('*Betriebsvereinbarung*'). Compensation for travel time can also be paid as a lump sum and this can also apply to temporary workers.
German law does not explicitly mention the reimbursement of expenses as an aspect of equal treatment. If,

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however, the employer has a travel expenses policy, it should ensure to apply these rules equally to temporary agency workers, under the principle of equal treatment.

Subject: Temporary agency work, other forms of discrimination

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