



30.11.2018

NOTICE TO MEMBERS

Subject: Petition No 0110/2018 by J.A.A.G. (Spanish) on the temporary nature of the labour market

1. Summary of petition

The petitioner brings up the temporary nature of the labour market, and criticises the employment arrangements model and the tolerance towards temporary employment agencies which, under the guise of service companies, circumvent worker protection legislation. This abuse of the system makes the labour market more temporary and precarious, causes a decline in future public benefits and pensions, removes legal rights and creates legal uncertainty, and divides citizens into two classes: those in stable employment and those in temporary employment with pitiful wages. He calls on the European Parliament to monitor the EU Pilot 8918/16/EMP procedure, which is currently closed.

2. Admissibility

Declared admissible on 19 June 2018. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 30 November 2018

Procedural issues

The petitioner refers to his own complaint to the Commission with regard to the application of Union law by a Member State. This complaint has been formally registered by the Commission and has since been transferred to EU Pilot. Its summary is presented below.

An official letter announcing to the complainant that the Commission was considering closing his complaint (so-called 'pre-closure' letter) was transmitted to the petitioner on 22 November 2017 as an attachment to an email sent to the email address of the complainant. This is fully

in line with the administrative procedures for handling relations with the complainant¹ and data provided by the complainant in his complaint form addressed to the Commission.

The pre-closure letter provided the detailed reasoning behind the decision to close the case. The petitioner was informed that, after careful examination of the information provided by him and by the Spanish authorities, the Commission services could not conclude that there was a problem of inadequate transposition of the Directives into the Spanish law.

At the same time, the complainant was informed in the pre-closure letter of the Commission's intention to close the case and he was given four weeks to submit any information which he considered could lead to a different decision.

As the petitioner acknowledges, he provided additional information on 9 January 2018.

After having examined this new information, a letter of confirmation of the closure of the complaint was sent to the petitioner on 18 June 2018. In its letter, the Commission services informed the petitioner that there were no new elements presented in the correspondence of 9 January 2018 that could lead to a modification of the position expressed in the letter of the Commission services of 22 November 2017.

Substantive issues

The petitioner claims that EU law is not being correctly applied by the Spanish enforcement authorities (labour inspectorates and courts).

Even though the petitioner refers to four EU Directives (Directive 1999/70/EC on fixed-term work, Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of undertakings, Directive 2008/104/EC on temporary agency work and Directive 2014/23/EU on the award of concession contracts), his main claim refers to alleged fraudulent multiservice companies used by the Spanish Public Administration that should be considered as Temporary Work Agencies (TWA) within the scope of Directive 2008/104/EC on temporary agency work² and the Spanish law on TWA.

These allegations were also referred to in the above-mentioned complaint to which the Commission already gave a reply both in the pre-closure letter of 22 November 2017 and the closure letter of 18 June 2018 as indicated above.

The petitioner worked as a services assistant for a subcontractor of the Spanish Ministry of Defence. He claimed that his former employer in fact carried out temporary work agency activities without meeting the legal requirements thereof.

In this regard, it should be recalled that the activity of TWA is different from subcontracting. It follows from Article 3(1)(b) and (d) of Directive 2008/104/EC that temporary-agency workers are assigned to user undertakings to work there temporarily under their supervision

¹ Annex to the communication from the Commission – EU law: Better results through better application, OJ C 18 of 19 January 2017, pp.18-20.

² Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14

and direction.

On the other hand, under subcontracting or outsourcing, two companies are linked by a commercial contract of provision of services under which a company provides services ("subcontractor") to another company ("client") using its own staff. In cases of genuine subcontracting, the workers that provide services for the "client" remain under the supervision and direction of their employer (the "subcontractor"). They are genuinely employed by the services provider and not by the client. Given that they work under the supervision and direction of the subcontractor, these workers cannot be considered as temporary-agency workers nor can their employers be considered as TWA for the purposes of Directive 2008/104/EC.

However, there might be cases of non-genuine subcontracting where workers are in reality under the supervision and direction of the client. In cases where the work is provided on a temporary basis, the service providers, regardless of their legal form, are acting in reality as TWA and their workers are therefore protected by Directive 2008/104/EC. It is a matter for the national authorities to enforce the national measures transposing the Directive. As regards the particular case of the petitioner, in the preclosure letter of 22 November 2017 the Commission services informed him that, in their view, the Spanish legislation (Law 14/1994 of 1 June regulating TWA) was in line with Directive 2008/104/EC.

In addition, it should be noted that Article 43 of the Law of the Workers' Statute approved by Royal Legislative Decree 2/2015 forbids the illegal assignment of workers and establishes that in those cases the worker will have the possibility to be requalified as a worker employed by the client. The Spanish courts have developed a set of criteria to determine when a worker can be considered as illegally assigned.

The Commission's correspondence with the petitioner recalled that it is for the national courts to correctly ensure the application of the relevant national provisions in individual labour disputes. This is because only they are in a position to assess, after a detailed investigation of the individual case, which entity effectively exercised the supervision and direction over the worker. In this particular case, the national courts, both at first instance and at appeal level, concluded that the complainant was working under the supervision and direction of his former employer (the subcontractor) and, as a consequence, this company could not be regarded as a TWA. The Commission services therefore concluded in the pre-closure letter that the situation of the petitioner did not fall under the scope of Directive 2008/104/EC.

As regards the allegations on breaches to Directive 2014/23/EU¹, it needs to be stressed that EU Public Procurement Directives do not in any way encourage contracting authorities to buy based on the lowest price. On the contrary, they give them tools and flexibility in order to take into account social considerations in tender procedures, e.g. in the implementation of the contract or in criteria for the award of the contract. However, the weight of price and quality elements in the award of the tender is left to contracting authorities, who are better placed to judge, given the specificities of a concrete procurement procedure. The Directives also oblige Member States to take appropriate measures to ensure that in the performance of public contracts and concessions, economic operators (both the main contractor and the

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1-64

subcontractor) comply with the applicable obligations in the fields of social and labour law at national, EU and international level.

The Commission is a strong supporter of contracting authorities using quality considerations in tenders and, as highlighted in its 2017 Communication¹, it considers that lowest-price awards are not always a convenient, efficient and satisfactory solution for public authorities. As a matter of fact, the Commission is launching a series of initiatives to encourage the use of quality elements in tenders, in particular in the field of sustainability and socially responsible considerations.

Conclusions

The Commission has already analysed the situation of the petitioner in the framework of his complaint which was subsequently transferred to EU Pilot. The Commission provided detailed reasons for the closure of the case in the pre-closure letter of 22 November 2017. After having examined the additional information provided by the complainant, the Commission confirmed its intention to close the complaint in its letter of 18 June 2018.

The Commission concluded that the Spanish legislation (Law 14/1994 of 1 June regulating TWA) was in line with Directive 2008/104/EC. It recalled that it was for the national courts to correctly ensure the application of national law implementing EU law in individual labour disputes. In this particular case, the Spanish courts concluded that the complainant was working under the supervision and direction of his former employer (the subcontractor) and, as a consequence, this company could not be regarded as a TWA and therefore did not fall under the scope of Directive 2008/104/EC.

While the Commission acknowledges that subcontracting is a legal form of provision of services when it is genuine, it also condemns non-genuine cases. In the latter cases, it is a matter for the Spanish authorities to enforce national law including, where relevant, the legislation transposing Directive 2008/104/EC. It is also a matter for the Spanish authorities to enforce the Workers' Statute which establishes more favourable provisions than the Directive to protect workers who might be illegally assigned to a client.

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making Public Procurement work in and for Europe, COM (2017) 572, 3.10.2017