

Case C-948/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date of receipt:

31 December 2019

Referring court:

Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)

Date of the decision to refer:

30 December 2019

Appellant on a point of law (applicant):

UAB ‘Manpower Lit’

Other parties to the proceedings (defendants):

E. S.

M. L.

M. P.

V. V.

R. V.

Subject matter of the action in the main proceedings

An appeal on a point of law concerning an examination as to the interpretation and application of the rules of substantive law governing the payment of equal pay to temporary workers and to permanent workers of a user undertaking.

Subject matter and legal basis of the request for a preliminary ruling

The request has been submitted pursuant to the third paragraph of Article 267 TFEU and seeks an interpretation of Article 1(2) and (3) and of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of

19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9) ('Directive 2008/104').

Questions referred

1. What content should be given to the term 'public undertaking' in Article 1(2) of Directive 2008/104? Are European Union agencies such as [the European Institute for Gender Equality (EIGE)] to be regarded as 'public undertakings' within the meaning of Directive 2008/104?
2. Which entities (temporary-work agency, user undertaking, at least one of them, or possibly both) are subject, according to Article 1(2) of Directive 2008/104, to the criterion of being engaged in economic activities? Are the areas of activity and functions of EIGE, as defined in Articles 3 and 4 of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006, to be regarded as economic activities as that term is defined (understood) within the meaning of Article 1(2) of Directive 2008/104?
3. Can Article 1(2) and (3) of Directive 2008/104 be interpreted as being capable of excluding from the application of the Directive those public and private temporary-work agencies or user undertakings which are not involved in the relations referred to in Article 1(3) of the Directive and are not engaged in the economic activities mentioned in Article 1(2) of the Directive?
4. Should the provisions of Article 5(1) of Directive 2008/104 concerning the rights of temporary agency workers to basic working and employment conditions, in particular as regards pay, apply in full to European Union agencies, which are subject to special EU labour-law rules and to Articles 335 and 336 TFEU?
5. Does the law of a Member State (Article 75 of the Lithuanian Labour Code) transposing the provisions of Article 5(1) of Directive 2008/104 for all undertakings using temporary workers (including EU institutions) infringe the principle of administrative autonomy of an EU institution established in Articles 335 and 336 TFEU, and the rules governing the calculation and payment of wages laid down in the Staff Regulations of Officials of the European Union?
6. In view of the fact that all posts (job functions) to which workers are directly recruited by EIGE include tasks which can be performed exclusively by those workers who work under the Staff Regulations of Officials of the European Union, can the respective posts (job functions) of temporary agency workers be regarded as being 'the same job[s]' within the meaning of Article 5(1) of Directive 2008/104?

Provisions of EU law cited

Articles 335 and 336 TFEU

Recital 12, Article 1(1), (2) and (3), Article 2 and Article 5(1) of Directive 2008/104

Articles 3 and 4 of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (OJ 2006 L 403, p. 9)

Provisions of national law cited

Points 3 and 5 of Article 2 ('Basic Terms of this Law') and Article 3 ('Conclusion of a Temporary Work Contract, its Content and Expiry') of the Law on Employment by Temporary Work Agencies of the Republic of Lithuania of 1 May 2013, which was in force until 1 July 2017.

Article 75(2) of the Labour Code of the Republic of Lithuania ('the Labour Code') that entered into force on 1 July 2017, which provides: 'A temporary-work agency must ensure that a temporary worker's remuneration for work carried out for a user undertaking is at least as much as the remuneration that would be paid if the user undertaking had hired the temporary worker under an employment contract for the same job, except in cases where temporary workers employed under open-ended temporary agency employment contracts receive remuneration from the temporary-work agency between assignments to work and the level of this remuneration between assignments to work is the same as that received during assignments to work. The user undertaking shall bear subsidiary responsibility for fulfilling the duty to pay the temporary worker for work carried out for the user undertaking at least as much as the remuneration that would be paid if the user undertaking had hired the temporary worker under an employment contract for the same job. In fulfilling this duty, the user undertaking must, should the temporary-work agency so request, provide information concerning the remuneration paid to the corresponding category of workers employed by the user undertaking.'

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant on a point of law (applicant) in the main proceedings is the Lithuania-registered private limited company (UAB) 'Manpower Lit' (hereinafter referred to as 'Manpower Lit'), a provider of temporary-work services. EIGE, a user undertaking, is a third party in this case.
- 2 'Manpower Lit' was a successful tenderer in a public tendering procedure for the provision of temporary personnel services announced by EIGE in 2012 and it concluded with EIGE a contract, the technical specifications of which defined, in general terms, the cases in which EIGE faces the need to have recourse to temporary personnel services. Those specifications also provided for the types and categories of the profiles of the personnel needed and also defined other desirable requirements and working conditions. Acting pursuant to the conditions specified

in the public procurement procedure, ‘Manpower Lit’ announced competitions for jobs corresponding to the needs of EIGE.

- 3 The defendants in the main proceedings entered into temporary work contracts with ‘Manpower Lit’. ‘Manpower Lit’ undertook to pay them a corresponding hourly wage, which was adjusted during the period of the work relationship.
- 4 The temporary work contracts provided that the defendants would perform work functions for the benefit of the user undertaking designated by the employer. To the temporary work contracts were attached annexes stating that EIGE was the user undertaking.
- 5 The defendants’ temporary work contracts provided that the contracts would remain in force until the termination of the order of the user undertaking EIGE for the respective post. The defendants performed a variety of duties at EIGE under those contracts. By 1 January 2019, ‘Manpower Lit’ had terminated the work contracts with all of the defendants
- 6 The defendants, taking the view that they were owed arrears of wages, applied to the Darbo ginčų komisija (Labour Disputes Commission) seeking recovery of those arrears.
- 7 By decision of 20 June 2018, the Labour Disputes Commission, basing itself on Directive 2008/104 and on Article 75(2) of the Labour Code, found that ‘Manpower Lit’ had discriminated against the defendants on the ground that they had been paid wages lower than those that they would have received if they had been engaged directly by EIGE. The Labour Disputes Commission adopted a decision favourable to the defendants.
- 8 ‘Manpower Lit’ appealed against the decision of the Labour Disputes Commission to the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius). By decision of 20 February 2019, that court dismissed the applicant’s action.
- 9 ‘Manpower Lit’ appealed against the decision of the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius) to the Vilniaus apygardos teismas (Regional Court, Vilnius). By order of 20 June 2019, that court dismissed the appeal.
- 10 ‘Manpower Lit’ has brought an appeal on a point of law before the referring court.

Principal arguments of the parties in the main proceedings

Submissions of the appellant on a point of law

- 11 It is submitted that the appellate court misinterpreted and misapplied Directive 2008/104 and Article 75(2) of the Labour Code. Those provisions seek to harmonise the conditions of pay, not for all temporary workers and permanent

workers of user undertakings, but specifically for those who occupy the same job (perform identical work). The term ‘the same job’ cannot, it is argued, be equated with, or treated as identical to, the terms ‘similar job’ or ‘similar duties’.

- 12 Not only did the defendants not perform for EIGE functions similar to those carried out by permanent staff of EIGE, but the qualification requirements set for them were considerably lower than those applying to permanent staff. In addition, the legal status of EU servants and that of the defendants was essentially different, as also was the procedure governing their recruitment for working for the user undertaking.
- 13 EIGE is not engaged in economic activities within the meaning of Article 1(2) of Directive 2008/104, and EIGE is therefore not subject to that directive.
- 14 The European Union’s Conditions of Employment of Other Servants and the Staff Regulations of Officials of the European Union (hereinafter referred to as ‘the Staff Regulations’) cannot be applied to the defendants (as temporary agency workers) because they are not EU officials or other servants. The jobs occupied by the defendants cannot be compared to those of the permanent staff of EIGE.

Arguments of EIGE, the third party in the main proceedings

- 15 When applying Article 5 of Directive 2008/104 and the corresponding national law, courts should assess whether the application of Directive 2008/104 in regard to non-discriminatory pay does not infringe other provisions of EU law. The Court of Justice has observed on a number of occasions that it is the national courts that must determine whether a particular employer is a public authority and how the provisions of EU labour law can be applied to that employer.
- 16 An interpretation by courts of non-discrimination in relation to pay and its application to an EU agency, even with a view to broadening the application of non-discrimination in the market, is incompatible with the provisions of EU law.
- 17 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, prohibits the transfer of the performance of functions to persons who do not work under the Staff Regulations. EIGE is a public employer which has special rights and obligations established by the FEU Treaty and the Staff Regulations, and the rules governing its income and expenditure are laid down in the aforementioned Regulation 2018/1046.

Arguments of the defendants

- 18 The position taken by the appellant on a point of law with regard to the meaning of Article 75(2) of the Labour Code is unfounded because, according to that provision, the level of a temporary worker's remuneration is linked to the remuneration which would be paid to a specific temporary worker if he or she worked as a permanent worker, and not to the remuneration paid to other specific temporary workers working for the user undertaking. Therefore, in the determination of what constitutes adequate remuneration for temporary workers, such workers should not be compared to other (permanent) workers who are directly employed in the same posts, but rather it is necessary to assess the level of the remuneration that a particular temporary worker should receive for the same work that he or she performs as a temporary worker if he or she were employed directly.
- 19 The guarantees for the protection of the rights of temporary workers established in Article 75(2) of the Labour Code are uniformly regulated in the European Union. The practice of the EU institutions confirms that the remuneration of temporary workers in the institutions established by the European Union is determined in accordance with the rule set out in Article 5(1) of Directive 2008/104, which corresponds to Article 75(2) of the Labour Code.
- 20 In the case here under consideration, the subject matter of the dispute is not governed by EU law. The dispute is governed by national law, and for that reason there is no need to interpret EU legislation.

Brief summary of the grounds for the request for a preliminary ruling

- 21 The referring court states that the dispute in the main proceedings has arisen essentially in regard to the question whether the provisions on the equal treatment of temporary agency workers and of workers directly recruited by the user undertaking, which are laid down in Article 5 of Directive 2008/104 and transposed into national law, are applicable to the situation in the main proceedings, regard being had to the fact that the user undertaking was EIGE, an agency of the European Union.
- 22 The referring court must address the question as to the application of the criteria laid down in Article 1(2) of Directive 2008/104. This provision states that the Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities, whether or not they are operating for gain. The national court seeks clarification of two aspects of this provision: the precise meaning of the term 'public undertaking' and the entity (entities) which is (are) subject to the criterion of being engaged in economic activities set out in that provision. The clarification of these aspects will determine the answer to the question of whether EIGE comes within the scope of Directive 2008/104.

- 23 So far as the term ‘public undertaking’ is concerned, the referring court notes that an examination of certain language versions of Directive 2008/104 (English, French and Polish) shows that the term used in the Lithuanian version of the Directive [‘valstybinė įmonė’] differs in its meaning from that in the other abovementioned languages, in which it is broader and corresponds more closely to the term ‘public entity’.
- 24 As regards the criterion of being ‘engaged in economic activities’, it is not entirely clear to which entities this applies, that is to say, (i) whether it applies solely to the user undertaking; (ii) whether it applies to public and private undertakings which are temporary-work agencies or user undertakings, at least one of which is ‘engaged in economic activities’; or (iii) whether this provision is to be understood as meaning that both the temporary-work agency and the user undertaking must be ‘engaged in economic activities’.
- 25 The referring court indicates that it seems that Directive 2008/104 should not be interpreted as imposing a mandatory requirement that the user undertaking must be ‘engaged in economic activities’, and that this issue is left to the discretion of the Member States themselves. However, an interpretation of this criterion by the Court of Justice is required.
- 26 In view of the facts that: (a) the Directive also applies to public undertakings (public entities); (b) Lithuanian law, in the exercise of the discretion granted to Member States, does not provide for an exception from application of the Directive for entities that are not engaged in economic activities; (c) there can be no doubt that the temporary-work agency was ‘engaged in economic activities’; (d) Directive 2008/104 does not contain any exceptions that would make it possible to exclude from its scope situations in which user undertakings are public sector entities, including EU agencies; and (e) Directive 2018/104 does not contain any exceptions that would permit non-application of the principle of equal treatment of temporary workers working in such entities, the referring court finds that, *prima facie*, there appear to be no reasons to exclude the situation that has arisen in the main proceedings from the scope of Directive 2008/104 and of the national legislation giving effect to it and no reasons not to apply the protection guaranteed by those legal acts to temporary agency workers.
- 27 Referring to the conclusions drawn in paragraph 46 of the judgment of 17 November 2016 in Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH*, EU:C:2016:883, and the clarifications set out in paragraph 40 of the judgment of 11 November 2010 in Case C-232/09, *Danosa*, EU:C:2010:674 cited in that first judgment, the national court is inclined to take the view that EU agencies should not be subject to exceptions.
- 28 In view of the content and substance of Directive 2008/104, the principle of good administration would require that the possibility for Member States implementing the Directive to make exceptions extending to the non-application of the Directive or to the corresponding provision of equal treatment to such entities as EIGE

should be provided for explicitly. As an example of a specific exception, the national court cites Article 1(3) of the Directive but concludes that neither the wording of the Directive nor national law provides any grounds to link that exception to the criterion of engagement in economic activities. Furthermore, exceptions are in general not interpreted broadly.

- 29 It seems reasonable to take the view that Directive 2008/104 was also adopted with such user undertakings as EIGE in mind, and also having regard to the specific features of their financing and harmonising the provisions of the Directive with other provisions of EU law.
- 30 More sophisticated procedures for recruitment and dismissal in the public sector partially reinforce the stability and independence of the activities of public entities, which are especially important for the functioning of the public sector. At the same time, the aforementioned formalities can also entail undesirable consequences, such as a shortage of labour in a situation of a sudden increase in workload. Temporary work is a useful tool contributing to the solution of this problem. In the light of these considerations, the non-application of equal treatment to entities such as EIGE could lead to a reduction in the competitiveness of the entities in question on the labour market in comparison with employers in the private sector.