Case C-311/21

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

Date lodged:

18 May 2021

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

16 December 2020

Applicant, appellant in first appeal and appellant on a point of law:

CM

Defendant, respondent in first appeal and respondent in the appeal on a point of law:

TimePartner Personalmanagement GmbH

Subject matter of the main proceedings

Temporary agency work, collective agreements, principle of equal treatment

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

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. How is the concept of ‘overall protection of temporary agency workers’ in Article 5(3) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work to be defined, and, in particular, does it encompass more than what is provided for in the mandatory provisions on protection for all workers under national and EU law?

2. What conditions and criteria must be met for the presumption that arrangements concerning the working and employment conditions of temporary agency workers in a collective agreement which derogate from the principle of equal treatment laid down in Article 5(1) of Directive 2008/104/EC have been established while respecting the overall protection of temporary agency workers?

(a) Is the assessment of respect for overall protection to be based – in the abstract – on the collectively agreed working conditions of the temporary agency workers covered by such a collective agreement or is it necessary to carry out an evaluative analysis comparing the collectively agreed working conditions with the working conditions existing in the undertaking to which the temporary agency workers are assigned (user undertaking)?

(b) In the case of a derogation from the principle of equal treatment with regard to pay, does the respect for overall protection prescribed in Article 5(3) of Directive 2008/104/EC require the existence of an employment relationship of indefinite duration between the temporary employment agency and the temporary worker?

3. Must the national legislature prescribe the conditions and criteria under which the social partners must respect the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104/EC where the national legislature gives the social partners the option of concluding collective agreements which establish arrangements concerning the working and employment conditions of temporary agency workers which derogate from the principle of equal treatment, and the national collective bargaining system provides for requirements which can be presumed to ensure an appropriate balance of interests between the parties to collective agreements (‘presumption of fairness of collective agreements’)?

4. If the third question is answered in the affirmative:

(a) Is respect for the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104/EC ensured by statutory rules which, like the version of the Arbeitnehmerüberlassungsgesetz (Law on the supply of temporary workers) in force since 1 April 2017, provide for a minimum wage floor for temporary workers, for a maximum duration of assignment to the same user undertaking, for a time limit on the derogation from the principle of equal treatment with regard to pay, for the non-application of a collectively agreed arrangement derogating from the principle of equal treatment to temporary workers who, in the six months preceding the assignment to the user undertaking, left the employ of that user undertaking or an employer forming a group with that user undertaking within the meaning of Paragraph 18 of the Aktiengesetz (Law on public limited companies) and for an obligation of the user undertaking to grant temporary workers access to collective facilities or services (such as, in particular, childcare facilities, collective catering and transport) in principle under the same conditions as those applicable to permanent workers?

(b) If that question is answered in the affirmative:

Does this also apply if the relevant statutory rules, such as those in the version of the Law on the supply of temporary workers in force until 31 March 2017, do not provide for a time limit on derogations from the principle of equal treatment with regard to pay or a specific time frame for the requirement that the assignment may only be 'temporary'?

5. If the third question is answered in the negative:

In the case of arrangements concerning the working and employment conditions of temporary agency workers which derogate from the principle of equal treatment through collective agreements in accordance with Article 5(3) of Directive 2008/104/EC, may the national courts review such collective agreements without restriction with a view to determining whether the derogations have been established while respecting the overall protection of temporary agency workers, or does Article 28 of the Charter and/or the reference to the 'autonomy of the social partners' in recital 19 of Directive 2008/104/EC grant the parties to collective agreements a margin of assessment with regard to respect for the overall protection of temporary agency workers that is subject to only limited judicial review and – if so – how far does that margin extend?

Provisions of EU law relied on

Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, in particular Article 5

Charter of Fundamental Rights of the European Union, in particular Article 28

Provisions of national law relied on

Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany; 'the GG'), in particular Article 9

Gesetz zur Regelung der Arbeitnehmerüberlassung (Law regulating the supply of temporary workers; 'the AÜG'), in particular Paragraphs 3a, 8, 9 and 10 in the version in force until 31 March 2017 and Paragraph 8 in the version in force since 1 April 2017

Tarifvertragsgesetz (Law on collective agreements), in particular Paragraphs 3, 4 and 4a

Gesetz zur Regelung eines allgemeinen Mindestlohns (Law regulating a general minimum wage), in particular Paragraph 1

Succinct presentation of the facts and procedure in the main proceedings

1 The parties are in dispute over additional remuneration from the viewpoint of equal treatment of temporary agency workers with regard to pay (‘equal pay’) for the months of January to April 2017. During that period, the appellant on a point of law (‘the appellant’) was employed as a temporary agency worker on the basis of a fixed-term employment contract with the respondent in the appeal on a point of law (‘the respondent’), which operates as a temporary employment agency on a commercial basis. She was employed by a retail company and most recently received an hourly wage of EUR 9.23 gross. The appellant is a member of the Vereinten Dienstleistungsgewerkschaft (United Service Sector Trade Union; ‘ver.di’), and the respondent is a member of Interessenverband Deutscher Zeitarbeitsunternehmen e. V. (Association representing the interests of German temporary employment agencies; ‘iGZ e. V.’). iGZ e. V. has concluded framework collective agreements on employment conditions, framework collective agreements on pay and collective agreements on pay with several trade unions of the Deutscher Gewerkschaftsbund (German Confederation of Trade Unions; ‘DGB’) – including ver.di – which provide for a derogation from the principle of equality enshrined in Paragraph 8(1) of the AÜG and the first sentence of Paragraph 10(4) of the AÜG, old version, in particular a lower rate of remuneration than that received by comparable permanent employees of the user undertaking. The Arbeitsgericht (Labour Court) dismissed the action. The Landesarbeitsgericht (Higher Labour Court) dismissed the appeal on the merits initially brought by the appellant. By her appeal on a point of law, the appellant continues to pursue her action, while the respondent seeks the dismissal of the appeal on a point of law.

Essential arguments of the parties in the main proceedings

2 By her action, the appellant seeks payment of EUR 1 296.72 from the respondent as the difference between her remuneration and that paid to comparable permanent employees of the user undertaking. The appellant takes the view that the flexibilisation of collective bargaining in the AÜG and the collective agreements applicable to her employment relationship are not compatible with Article 5 of Directive 2008/104. She submits that comparable permanent employees of the user undertaking are paid according to the collective wage agreement for commercial workers in the retail trade and received an hourly wage of EUR 13.64 gross during the period in dispute. The respondent requests that the action be dismissed and takes the view that, due to the fact that both parties are bound by the collective agreement, it owed only the collectively agreed remuneration provided for in respect of temporary workers.

Succinct presentation of the reasoning in the request for a preliminary ruling

3 The AÜG obliges the temporary employment agency, in principle, to pay temporary workers the same wage as that paid to comparable permanent

employees by the user undertaking. The AÜG allows a derogation from that requirement of equality through a collective agreement, provided that the latter does not fall short of the minimum hourly wage rates laid down in a regulation pursuant to Paragraph 3a(2) of the AÜG (first sentence of Paragraph 8(2) of the AÜG, second clause of point 2 of Paragraph 9 of the AÜG, old version). Consequently, the temporary employment agency need grant only the pay provided for in the collective agreement to temporary workers (second sentence of Paragraph 8(2) of the AÜG, second sentence of Paragraph 10(4) of the AÜG, old version). It is only if that pay is lower than the minimum wage laid down in a regulation pursuant to Paragraph 3a(2) of the AÜG that the temporary employment agency must grant the temporary agency worker the wage to be paid in the user undertaking for a comparable employee of that user undertaking for each hour worked (fourth sentence of Paragraph 8(2) of the AÜG, third sentence of Paragraph 10(4) of the AÜG, old version).

4 On that basis, the appellant could not claim any further remuneration for the duration of her assignment to the user undertaking from the viewpoint of equal pay. Her action would be unfounded and her appeal on a point of law would have to be dismissed. Under German collective bargaining law, due to their membership of the associations that are parties to the collective agreements, the appellant and the respondent are bound, with direct and mandatory effect, by the collective agreements concluded by those associations in respect of the temporary employment sector (Paragraph 3(1) and Paragraph 4(1) of the Tarifvertragsgesetz (Law on collective agreements; the 'TVG')). Those collective agreements, which derogate from the principle of equality, are effective – at least in so far as they were concluded by ver.di on the employee side.

5 The parties to the collective agreements for the temporary employment sector that are applicable to the employment relationship, namely iGZ e. V. and the trade unions of the DGB, including ver.di, have collective bargaining capacity. iGZ e. V. and ver.di have collective bargaining competence in respect of the temporary employment sector. In the present case, it is sufficient that the collective agreements between iGZ e. V. and ver.di that are relevant to the temporary employment relationship between the parties are effective, because ver.di has collective bargaining competence in respect of the supply of temporary workers on a commercial basis.

6 The collective agreements derogating from the principle of equality do not fall short of the minimum hourly wage rates laid down in a regulation pursuant to Paragraph 3a(2) of the AÜG (see first sentence of Paragraph 8(1) of the AÜG, second clause of point 2 of Paragraph 9 of the AÜG, old version). Such rates did not exist during the period in dispute. The Zweite Verordnung über eine Lohnuntergrenze in der Arbeitnehmerüberlassung (Second Regulation on a minimum wage in the temporary employment sector), which ceased to have effect on 31 December 2016, most recently provided for a minimum hourly wage of EUR 9.00 gross. The Dritte Verordnung über eine Lohnuntergrenze in der Arbeitnehmerüberlassung (Third Regulation on a minimum wage in the temporary

employment sector), which entered into force on 1 June 2017, set a minimum hourly wage of EUR 9.23 gross, with effect from that date. The collective agreement on pay for temporary employment in the version of 30 November 2016, which is relevant to the temporary employment relationship and the period in dispute, did not fall short of either limit.

7 If the national rules governing derogations from the principle of equality through collective agreements were not compatible with EU law – as the appellant claims – the appellant could be entitled, in the light of the principle of equal pay, to further remuneration for the duration of her assignment to the user undertaking – provided that a possible claim for the months of January and February 2017 has not lapsed pursuant to a time limit clause in the employment contract – with the result that her action would be well founded at least in part and her appeal would have to be upheld in that regard.

8 In the absence of a valid derogation from the principle of equality, the respondent would be obliged to grant the appellant, for the duration of the assignment, the remuneration received by a comparable permanent employee of the user undertaking during the period in dispute. According to the national understanding of the rules in question, the temporary worker's entitlement to equal pay is a statutory entitlement to remuneration which corrects the contractual agreement on remuneration and arises with each assignment and exists for the duration of the assignment in each case.

9 With regard to the amount of the entitlement to equal pay, the appellant submitted that comparable permanent employees received an hourly wage of EUR 13.64 gross for the same work during the period in dispute. If the respondent was not permitted to derogate from the principle of equality, it would be obliged under the first sentence of Paragraph 8(1) of the AÜG and the first and fourth sentences of Paragraph 10(4) of the AÜG, old version, to pay the appellant the corresponding difference for the hours that she worked for the user undertaking.

10 Should the appellant not be permitted to derogate from the principle of equality, evidence would have to be taken in a new appeal on the merits. However, this only concerns the amount of any further remuneration. The validity of the basis of the claim asserted depends crucially on questions that can be clarified only by the Court of Justice, especially in relation to the interpretation of Article 5(3) of Directive 2008/104. They are therefore relevant to the decision to be given.

Clarification of the questions referred for a preliminary ruling

Question 1

11 Article 5(3) of Directive 2008/104, of which the national legislature availed itself in its national legislation governing derogations from the principle of equality through collective agreements, allows the social partners to derogate from the

basic working and employment conditions referred to in Article 5(1) of the directive 'while respecting the overall protection of temporary agency workers'. The basic working and employment conditions are defined in Article 3(1)(f) of Directive 2008/104. The conditions under which the overall protection of temporary agency workers in terms of working and employment conditions can be considered to be sufficiently respected are not apparent from the directive. In particular, the question arises as to whether the 'overall protection of temporary agency workers' is to be equated with the mandatory protection provided for, in principle, by national law and EU law for all workers irrespective of whether they are permanent or temporary agency workers (for example, protection against dismissal, maternity protection, minimum wage, continued payment of wages in certain cases, protection of working hours, special requirements for fixed-term contracts, protection for severely disabled persons, and so forth), or whether the directive encompasses more than that by way of its 'overall protection of temporary agency workers', and aims, for example, to provide special protection specifically for temporary agency workers.

Question 2

12 If the social partners conclude collective agreements containing provisions which derogate from the principle of equal treatment with regard to the basic working and employment conditions of temporary agency workers within the meaning of Article 5(1) of Directive 2008/104, clarification is required as to what conditions and criteria must be met for the assumption that derogations from the principle of equal treatment have been established while respecting the overall protection of temporary agency workers.

13 On the one hand, this raises the question of criteria: is it necessary to take into account solely the working conditions of temporary agency workers governed by a collective agreement and to assess whether those conditions respect overall protection – of whatever kind – of temporary agency workers? Or, in order to assess whether a derogation from the principle of equal treatment through a collective agreement has been established while respecting the overall protection of temporary agency workers, must the (basic) working conditions which apply to the permanent workers in the user undertaking, that is to say, the workers recruited directly by that undertaking to occupy the same job, be included in an evaluative analysis?

14 Recital 15 of Directive 2008/104 states that employment contracts of an indefinite duration are the general form of employment relationship and offer 'special protection'. Therefore, the question arises as to whether respect for the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104 also requires – similarly to what is provided for in Article 5(2) of the directive – that a derogation from the principle of equal treatment with regard to pay is possible only where there is a permanent contract of employment between the temporary employment agency and the temporary agency worker, or

whether a derogation is also possible in employment contracts of an indefinite duration. The latter possibility could be supported by the fact that, unlike Article 5(2) of Directive 2008/104, Article 5(3) thereof does not contain a restriction to employment relationships of an indefinite duration and provides for respect for overall protection as an additional regulatory requirement.

Question 3

15 In the AÜG, the German legislature has made use of the possibility to derogate from the principle of equal treatment provided for in Article 5(3) of Directive 2008/104. Even taking into account recital 19 of the directive, according to which the autonomy of the social partners is not to be affected, it is not apparent from the directive itself whether, in such a case, the national legislature must prescribe the conditions and criteria under which the social partners must respect the overall protection of temporary agency workers when derogating from the principle of equal treatment or whether it is for the social partners to ensure respect for such protection when concluding collective agreements for the temporary employment sector.

16 The latter alternative would take account of recital 19 of Directive 2008/104, according to which the directive is not to affect the autonomy of the social partners or relations between them, including the right to negotiate and conclude collective agreements in accordance with national law and practices, while respecting prevailing Community law. That right is also protected by Article 28 of the Charter. Such an understanding would be in line with German constitutional law and collective bargaining law. Under that law, parties to collective agreements, as independent holders of fundamental rights, are granted a wide margin of discretion in their rule-making by virtue of the autonomy in collective bargaining protected by Article 9(3) of the Basic Law. They also have a prerogative to determine how the actual circumstances, the interests involved and the consequences of the rules and arrangements are to be assessed. In addition, they have a margin of discretion in determining the content of the rules and arrangements. Under German labour law, collective agreements enjoy, in principle, a presumption of fairness.

17 The Federal Labour Court sets stringent requirements for the collective bargaining capacity of workers' associations and has prevented potential abuse of derogations from the principle of equality in collective agreements concluded with the assistance of employer-affiliated workers' associations. Accordingly, it is in fact essentially only the trade unions organised within the framework of the German Confederation of Trade Unions that can currently be considered as parties to collective agreements in the temporary employment sector. Nor is their effectiveness impaired by the low level of organisation of temporary agency workers; on the contrary, temporary employment agencies are virtually dependent on them for derogations from the principle of equality.

Question 4

18 If the Court of Justice answers the third question in the affirmative, the question arises as to whether, by means of the rules put in place by the AÜG in the version in force since 1 April 2017 in order to restrict derogations from the principle of equal treatment through collective agreements, the German legislature has sufficiently ensured respect for the overall protection of temporary agency workers. In the current version of the AÜG, Paragraph 1(1b) (maximum period of 18 months for assignment to the same user undertaking), first sentence of Paragraph 8(2) (minimum wage floor based on a regulation on minimum hourly wage rates), Paragraph 8(3) (exclusion of less favourable treatment of temporary agency workers who, in the six months preceding the assignment to the user undertaking, left the employ of that user undertaking or an employer forming a group with that user undertaking, referred to as a 'revolving door clause'), Paragraph 8(4) (time limit on derogations from the requirement of equal treatment as regards pay) and Paragraph 13b (access of temporary agency workers to collective facilities or services of the user undertaking) provide for the statutory restrictions on unequal treatment of temporary and permanent workers, as described in Question 4(a). The overall protection of temporary agency workers is therefore sufficiently safeguarded – as is often assumed in the legal literature – especially since they are entitled to the statutory minimum wage under Paragraph 1(1) and (3) of the Mindestlohngesetz if that wage is higher than the minimum hourly wage set by the AÜG. Question 4(b) reflects the version of the AÜG that was valid until 31 March 2017, which did not provide for a time limit on derogations from the principle of equal treatment with regard to pay or a specific time frame for the requirement of 'temporary' assignment.

Question 5

19 If the Court of Justice answers the third question in the negative, and it is (solely) the social partners that are obliged to respect the overall protection of temporary agency workers within the meaning of Article 5(3) of Directive 2008/104 when concluding collective agreements which derogate from the principle of equal treatment, clarification is required as to the extent to which national courts may review whether collective agreements sufficiently respect the overall protection of temporary agency workers. By virtue of the presumption of fairness of collective agreements, national law grants the parties to collective agreements a wide margin of assessment and discretion with regard to the determination of the content of an arrangement, and that margin can be reviewed by the courts to only a limited extent. In particular, the parties to collective agreements are not obliged to choose the most expedient, most reasonable or fairest solution in each case.

20 Under EU law, the reference to the 'autonomy of the social partners' in recital 19 of Directive 2008/104 and the autonomy in collective bargaining protected in Article 28 of the Charter could militate in favour of a considerable margin of appreciation for the social partners at national level, especially given that, in

accordance with recital 16 of Directive 2008/104, their right to determine the working and employment conditions of temporary agency workers serves to enable them to cope with the diversity of labour markets and industrial relations. Having regard to recitals 16 and 19 of Directive 2008/104 and Article 28 of the Charter, the legal literature advocates a very limited possibility of judicial review, at best, even of collective agreements that derogate from the principle of equal treatment. It is not sufficiently clear from Directive 2008/104, nor has it been clarified, how far such a margin of assessment should extend, whether it also exists in relation to respect for the overall protection of temporary agency workers and – if it does – to what extent it is specifically exempt from judicial review.