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NEWSITEM

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The endless temporality

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In the Netherlands, over 40% of the labour market consists of flexible workers: agency workers, payroll workers, fixed-term workers, on call workers and self-employed. The Flexicurity Act of 1999 enabled (and regulated) agency work and implemented Directive 1999/70/EC (fixed-term work directive); the Act allowed for a maximum of three fixed-term contracts during a maximum period of three years. Exceeding these limitations would converse a fixed-term contract in a permanent contract. The anticipated job security didn't occur. Instead, the number of agency workers and employees with fixed-term contracts increased. In 2015, the Work Security Act tried to turn the ever-increasing number of flexible workers, by limiting the maximum period of fixed-term contracts from three to two years. Work agencies however were (and still are) allowed to offer employees fixed term contracts up to 5.5 years and, during the first 74 weeks, an unlimited number of fixed term contracts. The most recent reform act (Labour Market Balance Act 2020) altered the duration of fixed term contracts back into in a maximum of three years. At the same time, strong regulation of payrolling was introduced, as well as a complex set of rules for on-call work.

At this moment, the Dutch are struggling with the question how long temporality should be in employment law cases, when it comes down to the maximum duration of fixed term contracts and maximum duration

of agency work. EU law leaves this question to be answered by the Member States. Both fixed-term work directive (1999/70/EC) and temporary agency work directive (2008/104/EC), however stipulate that Member States shall take necessary actions to prevent abuse of these forms of flexible work.

In *JH/KG* (ECJ 14 October 2020, C-681/18), the applicant argued that the case law concerning the interpretation of Clause 5 of the framework agreement on fixed-term work could be transposed to the case of successive assignments to the same user undertaking. The Court ruled otherwise, but brought in mind that Article 5(5) of the temporary agency work directive also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking. Therefore, Article 5(5) had to be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole. The Court stated that '[i]f successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is longer than what can reasonably be regarded as 'temporary', that could be indicative of misuse'.

So... there are limitations to temporality. But both Directive 1999/70 as 2008/104 leave it up to Member States to examine whether or not these limitations are met in a certain case. When it comes down to posting of workers (freedom of services) undertakings have the right to provide services in the territory of another Member State and to post their own workers temporarily to the territory. In PWD 'temporality' is limited to 12 up to 18 months. Of course, the background of PWD differs from directives 1999/70 and 2008/104, but wouldn't it make sense to interpret 'temporality' from a certain EU-level point of view and therefore as a starting point 12 to 18 months, unless objective reasons legitimate a

longer period? This would not only help the Dutch to reform (again) their employment regulations (which have shown to be as flexible as the matter itself), but it would help strengthening workers in obtaining their 'security' while undertakings are still able to enjoy 'flexibility' all across Europe. Of course, there is also a downside. Workers could be replaced by other workers. The limitation of temporality would then be counterproductive. This risk could be prevented by a legal presumption of permanent work if flexible workers are replaced by flexible workers (and therefore in a certain way a breach of clause 6 of Directive 1999/70/EG (Information and employment opportunities)), leaving the first worker with a claim for a permanent contract.

But until that time, I am afraid 'temporality' will give us endless food for court. And by the way, recent governmental recommendations suggest the temporarily of fixed term contracts should drop back from three to two years again. Yes, we Dutch are flexible... in minds and regulation.