EU doctrine on 'temporary-work agencies' applied to non-agency undertakings that 'assign' workers

A European court decision seems to force a change, as on other occasions, in the interpretation of legislation and case law on unlawful 'assignment' of workers. In this respect, it takes the view that EU legislation on 'temporary-work agencies' must be applied when a worker is assigned even when such assignment is carried out by an undertaking that lacks administrative authorisation to do so, a conclusion that, in a way, our legal system already covers with joint and several liability for unlawful assignment.

LOURDES LÓPEZ CUMBRE
Professor of Employment and Social Security Law, University of Cantabria
Academic Counsel, Gómez-Acebo & Pombo

1. Apart from the solution to the specific case, which may not be very unusual in employment law, the fact is that the decision adopted in the Judgment of the Court of Justice of the European Union (CJEU) of 24 October 2024, *LM*, C-441/23, in a reference for a preliminary ruling from a Spanish court, warrants reflection.

The case raises the question of the interpretation of, among others, Directive 2008/104/EC of 19 November (*Official Journal of the European Union* of 23 December) on temporary agency work. Note that, by virtue of this and apart from other definitions, *worker* means any person who, in the Member State concerned, is protected

as a worker under national employment law; *temporary-work agency* (i.e., an employment business) means any natural or legal person who enters into contracts of employment or establishes employment relationships with workers, under national law, with a view to assigning them (i.e., hiring them out) to user undertakings to work temporarily under their supervision and direction; temporary agency worker means a worker with a contract of employment or an employment relationship with a *temporary-work agency* with a view to being assigned to a *user undertaking* to work temporarily under its supervision and direction; user undertaking means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily; and, finally, *assignment* means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.

2. The conflict arises in Spain in relation to a worker completing an occupational traineeship in a well-known large undertaking (hereinafter, 'the large undertaking') and successive employment contracts with three other undertakings. Those three undertakings had concluded successive contracts for the provision of services (i.e., work-for-hire agreements) with the large undertaking, under which the worker was responsible for performing the contractually agreed services. Under the contract of employment between one of these undertakings (hereinafter, 'the undertaking') and the worker, the worker is employed as a sales consultant for one of the departments of the large undertaking, performing marketing services not provided by any of its employees. While the worker is pregnant, the large undertaking, citing budgetary reasons, informs the undertaking that the contract for the provision of services between these two is terminated, with no possibility of extension. A few days before the termination, the worker begins a period of temporary disability, giving birth months later and starting her maternity leave, which was later joined by time off for breastfeeding and the taking of annual holiday leave. When the worker was to return to work, the company informed her that her employment contract had been terminated 'for objective reasons' (i.e., by reason of redundancy) based on a reduction in demand due to a number of planned projects being dropped.

   The worker brought an action seeking a declaration that her dismissal was 'invalid' (i.e., unlawful) or, in the alternative, unfair and that both the large undertaking - for which she had last worked - and the undertaking - which managed her contract – were jointly and severally liable for the attendant consequences. The employment court held the worker's dismissal by the undertaking unlawful, but found the large undertaking not liable because it understood that not only had the undertaking not assigned the worker to that large undertaking, but it was also the one that organised the worker's working week and hours, paid her salary, provided her with training, authorised her leave and managed her maternity leave. Neither did the court uphold the claim for damages in respect of maternity-related discrimination, concluding that the real reason for the dismissal was based exclusively on budgetary grounds, even though the dismissal had taken place during a period of annual leave following a period of

European law does not require authorisation for assignment

maternity leave and parental leave to care for a minor, but did order the undertaking to pay the worker back wages, as well as compensation for untaken holiday leave. The worker lodged an appeal for review with the Madrid High Court of Justice stating that her situation should be regarded as one of assignment agreed between the two undertakings, with the result that both should be held jointly and severally liable for the unlawful dismissal, including the worker's reinstatement to her post.

In a reference for a preliminary ruling, this High Court enquires about the applicability of Directive 2008/104 to the dispute and, specifically, wishes to know, among other matters, the following:

a) Whether this directive applies to an undertaking which, without being recognised under national law as a *temporary-work agency*, assigns a worker to another undertaking. It points out in that regard that, under Spanish law, a *temporary-work agency* must hold a prior administrative authorisation in order to engage in that activity, something which that directive does not, however, appear to require;

b) If the view is taken that the directive applies to the dispute, whether the worker was in fact assigned. For these purposes, it recalls the concepts of the directive on the premises that the worker hired by the *temporary-work agency* provides his or her services 'under [the] supervision and direction' of the user undertaking. Because, in the present case, it is apparent from all the factors characterising the work carried out by the worker that responsibility for the supervision and direction of her activities lay with the large undertaking, which had supplied her with the computer that she used to provide, from her home, remote assistance to customers of a number of products of the large undertaking, with whose managers she was in regular contact and to whose headquarters she travelled once a week, having an access card for that purpose. It also makes clear that, every month, the undertaking's director received a report on the worker's activities, approved her leave and set her hours, so that the question arose as to whether the undertaking had to be regarded as having retained the supervision and direction of the worker's occupational activities;

c) Whether it would be possible for the worker to return to the post she held before her unlawful dismissal given that the duties she performed no longer exist within the undertaking, in which case her reinstatement could only occur within the large undertaking. It makes clear that the obligation to reinstate workers who have been dismissed after returning to work at the end of periods of suspension of the contract on account of childbirth, adoption, placement with a view to adoption or fostering, referred to in Article 45 of the Workers' Statute Act, applies to the user undertaking and the assigning undertaking alike. In the present case, the question arises as to whether, owing to the fact

that the worker was recruited directly not by the large undertaking but by the undertaking, her right to return to work at the large undertaking is lost, or whether, on the contrary, the application of Directive 2008/104 means that the reinstatement obligation and the consequences of the dismissal being unlawful are also enforceable against the user undertaking, namely the large undertaking.

3. Well, with regard to the first question, the Court of Justice of the European Union assumes that Article 3(1) of Directive 2008/104 contains no details regarding the status of the *temporary-work agency*, merely stating that it must be a natural or legal person. What it does do is make clear is that only undertakings which conclude contracts of employment or employment relationships with temporary agency workers, in compliance with national law, with the intention of assigning those workers to a user undertaking, are covered by that concept (*ALB FILS Kliniken*, C-427/21, EU:C:2023:505): 'It is apparent from the wording of that provision that the requirement of compliance with national law refers to the procedure for concluding contracts of employment or the manner of concluding employment relationships' (para. 33). It should also be noted that Directive 2008/104 does not make the status of '*temporary-work agency*' subject to the condition that an undertaking must assign a certain number or percentage of workers to another undertaking in order to be regarded as a *temporary-work agency* within the meaning of Article 3(1)(b) of that directive, nor is there any element in its definition that requires prior administrative authorisation to carry out that activity in the Member State in which it operates.

Interpreting the scope of Directive 2008/104 as 'covering only undertakings which, under their domestic law, hold a prior administrative authorisation to operate as a *temporary-work agency* (i) would mean that the protection of workers would vary between Member States, depending on whether or not national law requires such authorisation, and within the same Member State, depending on whether or not the undertaking in question holds such authorisation, and would risk undermining the objectives of that directive, which are to protect temporary agency workers, and (ii) would undermine the effectiveness of that directive by inordinately and unjustifiably restricting its scope' (para. 41). Because such a limitation would allow any undertaking that, without being in possession of such authorisation, assigns to other undertakings workers who have concluded a contract of employment with it 'to escape the application of Directive 2008/104 and, therefore, would impede workers from receiving the protection afforded by that directive, even though the employment relationship between those persons and the undertaking assigning them is not substantially different from the relationship they would have with an undertaking that had obtained prior

European law will apply to any case in which there is an assignment

administrative authorisation as required under national law' (para. 42).

Consequently, the CJEU concludes that Directive 2008/104 applies to any natural or legal person who enters into a contract of employment or an employment relationship with a worker in order to assign him or her to a user undertaking to work there temporarily under that undertaking's supervision and direction, and who assigns that worker to that undertaking, even though that person is not recognised by domestic legislation as a *temporary-work agency* because the person does not have the relevant administrative authorisation.

4. In answer to the second question raised, the CJEU understands that, if the referring court were to find that the worker's employer is an undertaking whose activity – whether or not its main activity – is to conclude contracts of employment or employment relationships with workers in order to assign them temporarily to user undertakings to work there under their supervision and direction, it would have to take the view that Directive 2008/104 applies to the main proceedings.

   It recalls that, according to the court's established case law, the assignment of temporary agency workers is a complex situation which is specific to labour law, involving a twofold employment relationship between, on the one hand, the *temporary-work agency* and the temporary agency worker and, on the other, the temporary agency worker and the user undertaking, as well as a relationship of assignment between the *temporary-work agency* and the user undertaking (*Della Rocca*, C290/12, EU:C:2013:235). Consequently, the relationship and degree of subordination to the user undertaking on the part of the worker must be assessed in each particular case in the light of all the factors and circumstances characterising the relationship between the parties, an assessment which it will be for the referring court to carry out. It is true that, in order to establish that a user undertaking exercises a power of direction and supervision over temporary agency workers, it is not sufficient for that undertaking to verify the work carried out or merely to give general instructions to those workers, but rather the worker must be under the supervision and direction of the user undertaking and provided that that undertaking, first, imposes on the worker the services to be performed, the manner of their performance and the requirement to comply with its instructions and internal rules, and, secondly, monitors and supervises the way in which the worker performs his or her duties.

   Finally, the CJEU does not consider whether or not there is joint and several liability in the event of a ruling of unlawful dismissal, as it considers that it has not been established that the employer of the worker at issue in the main proceedings is a *temporary-work agency* and it is in no way apparent from the file submitted to the CJEU that an employment relationship still existed between the large undertaking and the worker when the latter was dismissed. Indeed, with effect from the beginning of the worker's maternity leave, the undertaking no longer assigned the worker to the large undertaking and, according to the referring court, the contractual relationship between the large undertaking and the undertaking had come to an end several months before the undertaking dismissed the worker, rendering the two questions referred hypothetical (para. 75).

5. Regardless of the specific case, the facts, the reference by the referring court and the details provided by the latter in this case, the truth is that the CJEU's judgment contains statements that are worth highlighting:

   — The first is that, in order to apply Directive 2008/104, it is not necessary to have obtained administrative authorisation as a *temporary-work agency*, which seems to qualify the requirement that the Spanish legal system imposes in this sense, which is more protective, moreover, than the European provision.

   — The second, that, nevertheless, the protection of this directive should be extended to the workers who fall under the definitions contained in it, that is, an assignment, supervision, etc.

   — The third, that, precisely for these purposes, the directive will apply to any undertaking whose activity is to conclude contracts of employment or employment relationships with workers with a view to assigning them to a user undertaking to work there temporarily under the direction and supervision of the latter, even if the assigning undertaking does not have the relevant administrative authorisation.

   — The fourth, that, in an assignment, the degree of subordination to the user undertaking must be taken into account, something that must be elucidated in each specific case and that will be based on the imposition on the worker of the services to be performed, the manner of their performance and the requirement to comply with its instructions and internal rules, and, secondly, monitors and supervises the way in which the worker performs his or her duties.

   — And finally, among others, the fifth, that if the commercial business-to-business relationship between the undertakings is not in force when the worker is dismissed, there can be no joint and several liability between the two undertakings.

Does this decision affect the provisions of the Spanish legal system and the already established legal doctrine? Only relatively. It should be borne in mind that, since this decision cancels out the function of administrative authorisation in determining the employment relationship and its consequences, Spanish law already assumes the same result. Because, if you think about it, Article 43 of the Workers' Statute Act regulates the unlawful hiring out of workers and stipulates that joint and several liability determines that the worker can decide which company to return to, in the event that such a right exists; the consequences are even more protective than those recognised in the directive because *a*) any hiring out for temporary assignment outside the authorised *temporary-work agency* is considered *unlawful assignment*; *b*) in addition, it will be considered unlawful in all cases where there is a mere assignment or where the assigning undertaking lacks its own organisation; *c*) both undertakings - assignor and assignee - will be jointly and severally liable for the obligations contracted; and *d*) the worker will have the right to acquire permanent status, at his or her choice, in either of the two undertakings.

If the intention in this case was to extend the liability of the undertakings when it is not clear that the unlawful assignment can be applied - because, otherwise, it would be enough to resort to employment law - it should not have been the application of the directive that was questioned, but the very concept of unlawful assignment that seems to require the validity of the relationship in the face of joint and several liability, unlike other cases in which the legislator sees liability in both past relationships and future consequences (for example, in transfers of undertakings under Article 44 of the Workers' Statute Act). Because, in this case, what leads the court to exempt the user (the large undertaking) from liability is that the commercial business-to-business relationship had ceased, and with it the assignment, before the worker was dismissed. Therefore, the dismissal and its consequences fall solely on the undertaking and not on the large undertaking. It is a different matter if it is argued that the worker's first temporary disability is assessed while the relationship between the undertakings is still in existence and also the worker's assignment to the large undertaking, in which case there could be a causal relationship between the leave, the pregnancy, the termination of the commercial contract, the maternity leave, the holidays and the dismissal. An entire sequence in the exercise of employment rights that begins, of course, with a disability, providing active service for the large undertaking ('user'). But such a sequence is not considered if such a connection is pursued, and therefore it is the general doctrine that should be analysed - application of the directive even when there is no administrative authorisation - and therefore it is the final result that should be considered - there is not joint but sole responsibility when the assignment has ended before the termination of the contract.

An assignment requires a high degree of subordination, with supervision and direction by the user