Summary

Remit

The Inquiry Chair was tasked with presenting proposals on how Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work[1] (hereinafter referred to as 'the Agency Workers Directive') is to be implemented in Swedish national law. Within the framework of the remit, the Inquiry Chair was also to review, in accordance with Article 4 of the Directive, whether there were any prohibitions or restrictions on the use of temporary agency work in national legislation or practice, and, if found, to verify whether such prohibitions or restrictions are compatible with the provisions of the Directive.

Proposals of the Inquiry

Implementation of the Agency Workers Directive

It could be said that the overall aim of the Directive is to ensure good working conditions for temporary agency workers. The Directive includes a principle of equal treatment, whereby temporary agency workers are to be guaranteed the same basic working and employment conditions as those employed directly by the user undertaking to do the same work.

Part of the inquiry remit is to implement the Directive with the least possible interference in the Swedish model. The Inquiry Chair therefore first considered leaving it to the social partners to implement the Directive through collective agreements. However, this form of implementation would mean that workers not covered by collective agreements would not enjoy the rights afforded by the

[1] OJ L 327, 5.12.2008, p. 9 (Celex 32008L0104).

Directive. In the view of the Inquiry Chair, it is therefore impossible to implement the Directive solely through the Swedish model of collective agreements. Implementation with the least possible interference in the Swedish model also precludes a regulation requiring collective agreements to be declared universally applicable. In the current circumstances, the Inquiry Chair considers that the Directive must be implemented through legislation. This can best be done via the creation of a new Act on Temporary Agency Work (hereinafter referred to as 'the Agency Work Act').

Although the implementation of the Directive requires legislation, it is important to uphold the basic labour market principle that the primary responsibility for settling salary and employment conditions lies with the social partners. The new Agency Work Act should therefore take the form of a regulatory framework. Accordingly, the Act should only set out which rights a temporary agency worker can claim under the Directive. It is then up to the social partners to settle between themselves what measures should be taken to guarantee the worker these rights.

The scope of application of the Agency Work Act should be the same as the scope of the Agency Workers Directive. It should therefore be made clear that the Act only applies to temporary agency work and not, for example, to contract activities and labour lending. In the view of the Inquiry Chair, the Agency Work Act should also apply to both the private and public sectors. However, it should not apply to workers who are employed through special employment support, in sheltered employment or in development employment.

Article 5(1) of the Agency Workers Directive contains a principle of equal treatment. This means that temporary agency workers are to be entitled to the same basic working and employment conditions as if they had been recruited directly by the user undertaking to occupy the same job. However, the equal treatment requirement is not absolute. Member States may allow exceptions to the principle of equal treatment in accordance with Articles 5(2)–5(4) of the Directive. The Inquiry Chair considers that exceptions to the principle of equal treatment should be allowed with regard to pay in accordance with Article 5(2), on the condition that the temporary agency worker is permanently employed by the temporary work agency and is paid between assignments. This should be expressed in the Agency Work Act. Furthermore, the Agency Work Act should contain a provision to the effect that the social partners may, in

accordance with Article 5(3), enter into collective agreements concerning working and employment conditions that deviate from the principle of equal treatment provided that the overall protection for workers from temporary work agencies is respected.

Article 5(5) of the Agency Workers Directive states that the Member States are to take appropriate measures with a view to preventing misuse in the application of Article 5 and, in particular, to preventing successive assignments designed to circumvent the provisions of the Directive. However, the Inquiry Chair's proposal means that the right to equal treatment arises on a temporary agency worker's very first day. In the current circumstances there is, in the view of the Inquiry Chair, no reason to take measures to prevent misuse in the application of Article 5 or to prevent successive short assignments.

The Agency Work Act should also contain provisions on the right of temporary agency workers to access certain amenities at the user undertaking (cf. Article 6(4) of the Agency Workers Directive), and rules to the effect that temporary agency workers must be informed of vacant permanent positions at the user undertaking (cf. Article 6(1) of the Agency Workers Directive).

Section 6 of the current Private Employment Agencies and Temporary Labour Act (1993:440) states that anyone who runs employment agency services may not request, agree or receive payment from employees to assign them work. There is no direct equivalent to this provision in the Agency Workers Directive, but it is very much in line with the Directive's approach. Article 9 of the Agency Workers Directive states that Member States may adopt more favourable conditions for temporary agency workers than those laid down in the Directive. The Inquiry Chair therefore considers that the above-mentioned provision should remain in place. It should, however, be transferred to the new Agency Work Act.

Article 6(2) of the Agency Workers Directive states that Member States must ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment between the temporary agency worker and the user undertaking may be declared null and void. There are no legislative provisions in Swedish national law that prohibit or have the effect of preventing temporary agency workers from taking employment with a user undertaking. On the other hand, it is possible that individual employment contracts may contain provisions to that effect. However, Section 4, first paragraph, point 1 of the Private Employment

Agencies and Temporary Labour Act already states that employers may not, through contractual terms and conditions or in any other way, prevent workers from taking employment with a client to which they have been hired out. Given the regulations contained in the Agency Workers Directive, this provision should remain, but be moved over to the new Agency Work Act. However, Section 4, first paragraph of the Private Employment Agencies and Temporary Labour Act does not explicitly make any agreement through which a worker is prohibited or prevented from taking employment with a user undertaking for which they have worked null and void. This is nonetheless considered to be the case in practice in Sweden, but it is doubtful whether EU legislation can be implemented on the basis of legal principles. The Inquiry Chair therefore considers that an explicit provision on invalidity should now be incorporated into the Agency Work Act.

However, in the Inquiry Chair's view, the possibility of declaring agreements null and void should not be limited to agreements that prevent a temporary agency worker from taking employment with a user undertaking. Instead, it should be prescribed generally that the relevant parts of any agreement that restricts the rights of a temporary agency worker under the Agency Work Act are to be null and void. This should, of course, also be stated in the new Act.

Article 6(3) of the Agency Workers Directive states that temporary work agencies may not charge workers any compensation for taking employment with a user undertaking. This should also be laid down in the new Act.

Article 6(5) of the Agency Workers Directive states that Member States are to take suitable measures or promote dialogue between the social partners in order to improve temporary agency workers' access to training and to childcare facilities in temporary work agencies, and to improve temporary agency workers' access to training for user undertakings' workers. The Inquiry Chair notes that in Sweden, childcare is only provided by companies in exceptional cases. With regard to training for temporary agency workers, the Inquiry Chair considers that it would be appropriate for the social partners to regulate this matter through various kinds of agreements. No proposals are therefore made for legislation in these areas.

With regard to employee representation for temporary agency workers under Article 7 of the Directive, the Inquiry Chair has decided that national legislation already fulfils the requirements laid down in Article 7(1). No proposals are therefore made for legisla-

tion in this area. The same applies to the information requirement for temporary agency workers laid down in Article 8 of the Agency Workers Directive.

The Directive contains requirements for the Member States to provide for appropriate measures in the event of non-compliance with the Directive by temporary work agencies or user undertakings. Under the terms of the Directive, these sanctions must be "effective, proportionate and dissuasive". The Inquiry Chair has found that it is most appropriate for non-compliance with the Agency Work Act to result in damages, which is the customary sanction under labour legislation. It should be possible for damages to be awarded both for losses incurred (financial damages) and as compensation for the violation implied by the legal infringement (general damages).

Since an infringement of the Agency Work Act may also constitute an infringement of other legislation, the Inquiry Chair has considered whether double punishment should be allowed. The Inquiry Chair has found that this should not be the case. If a temporary work agency or user undertaking infringes the Agency Work Act in such a way as to also infringe another Act that includes liability for sanctions, the provisions of the latter Act will accordingly apply.

If a temporary work agency infringes the Agency Work Act in any other way, sanctions should apply in the form of damages. The Inquiry Chair has also determined that temporary work agencies should be responsible for ensuring that temporary agency workers are afforded the rights due under the Agency Work Act. If a temporary agency worker suffers damage as a result of a user undertaking infringing the Agency Work Act or a collective agreement replacing the principle of equal treatment in the Act, it is therefore the temporary work agency that is primarily responsible for remedying this by paying damages. In both cases mentioned above, damages may be adjusted or cancelled if there is reason to do so.

If a temporary work agency infringes a collective agreement replacing the principle of equal treatment, this is to be dealt with as a regular breach of a collective agreement under the Employment (Co-determination in the Workplace) Act (1976:580).

If a temporary work agency infringes those provisions in the Agency Work Act that state that

a) a temporary work agency may not prevent a temporary agency worker from taking employment with a user undertaking (Section 7), or
b) a temporary work agency may not charge temporary agency workers any compensation for taking employment with a user undertaking (Section 7), or
c) a temporary work agency may not request, agree or receive payment from workers to assign them work (Section 8),

the temporary work agency may be liable to pay both financial and general damages.

If a user undertaking

a) does not allow a temporary agency worker access to the amenities or facilities enjoyed by directly employed workers and there are no objective reasons to justify differential treatment (Section 9), or
b) does not inform temporary agency workers of vacant permanent positions at the user undertaking (Section 10),

the undertaking may be liable to pay both general and financial damages.

Damages for infringements of Sections 7–10 may be reduced or cancelled if there is reason to do so.

Finally, the Agency Work Act should stipulate that if an employer applies a collective agreement that conflicts with the Agency Work Act, they may be liable to pay both financial and general damages. If there is reason to do so, the damages may be reduced or cancelled.

In order to prevent temporary work agencies from being ultimately responsible for damage caused to workers by user undertakings, provisions on the right of recourse have been included in the Agency Work Act. A temporary work agency that has paid compensation to a worker for a user undertaking's breach of the Agency Work Act will therefore have the right to demand repayment from the user undertaking. There should also be a right of recourse if a user undertaking has submitted incorrect information to a temporary work agency concerning the basic working and employment conditions at the user undertaking, and has thereby caused the tempo-

rary work agency to be liable for damages. However, the user undertaking will never have to repay more than it would have been liable to pay under the provisions of the Agency Work Act. The stipulated recourse provision is only to be applied, however, if the user undertaking and the temporary work agency have not agreed any other division of responsibilities.

The Inquiry Chair has also considered whether there is a need for provisions in the new Agency Work Act concerning statutory limitation. In the main, the Inquiry Chair considers that the current statutory limitation regulations should be applicable. For breaches of Sections 9 and 10 of the proposed Agency Work Act (see above), there is reason to ensure that the period of limitation is not unreasonably long, and new limitation regulations should therefore be introduced, using those contained in the Employment Protection Act (1974:13) as a model.

In the view of the Inquiry Chair, disputes under the Agency Work Act should be dealt with in accordance with the Labour Disputes (Judicial Procedure) Act (1974:37), unless otherwise stipulated in the references to special legislation contained in the Agency Work Act. However, the Labour Disputes (Judicial Procedure) Act is only applicable between employers and employees. To make it possible to apply this Act to disputes between user undertakings and temporary agency workers and to recourse cases between temporary work agencies and user undertakings, a provision should be introduced into the Labour Disputes (Judicial Procedure) Act stipulating that the Act is to be applicable to disputes under the Agency Work Act unless otherwise specifically prescribed.

Posting of temporary agency workers

The preamble (clause 22) to the Agency Workers Directive stipulates that the Directive should be implemented without prejudice to the Posting of Workers Directive.[2] In order to assess how the implementation should be undertaken, the Inquiry Chair must therefore take account of both the Posting of Workers Directive and certain EU case-law, primarily the Laval Judgment.[3] The Inquiry Chair has

[2] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997 p. 1, (Celex 31996L0071).
[3] Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1 (Byggettan) and Svenska Elektrikerförbundet.

made the assessment that, by virtue of Article 3(9) of the Posting of Workers Directive, the proposed Agency Work Act should also be made applicable to posted temporary agency workers. In practice, this means that posted temporary agency workers can claim more favourable terms than other posted workers.

Finally, the Inquiry Chair has also been responsible for determining the extent to which Swedish employee organisations should have the right to take industrial action to bring about Swedish collective agreements for posted temporary agency workers. The Inquiry Chair has found that this issue should be regulated in the Posting of Workers Act (1999:678). This should be done using the provisions contained in Section 5(a) of this Act as a model. Unlike in Section 5(a), however, there should be a requirement that the collective agreement that the industrial action is intended to force through is such that the overall protection of temporary agency workers is respected. However, there should not be any requirements that the collective agreement may only concern "*minimum* wages or other *minimum* conditions [our italics] in the areas referred to in Section 5" (cf. Section 5(a), first paragraph, second point), since posted temporary agency workers are to enjoy the same rights under the Agency Work Act as other temporary agency workers. Nonetheless, there should be a requirement that the conditions that the industrial action is intended to force through must be restricted to the area habitually referred to as the 'hard core' of the Posting of Workers Directive. Consequently, industrial action may only be undertaken to guarantee posted temporary agency workers pay or other conditions referred to in Section 5 of the Posting of Workers Act.

However, an unlimited right to take industrial action in the present case would contravene EU legislation. The Inquiry Chair has therefore deemed it necessary to introduce certain limitations to the right to take industrial action. In the view of the Inquiry Chair, it is not reasonable for a temporary work agency that posts workers to protect itself against industrial action simply by demonstrating that the workers are subject to conditions that correspond to the principle of equal treatment. Instead, account must be taken of the conditions actually enjoyed by the workers. If in practice the conditions are less favourable than those required by the collective agreement that workers want to force through, it should be possible to take industrial action even if equal treatment is in fact practised. Conversely, if the workers already enjoy conditions that at least equal

the conditions that the intended collective agreement would afford, it should not be possible to take industrial action.

The Inquiry Chair was also to assess whether industrial action should be possible if the posted temporary agency workers' basic working and employment conditions do not correspond to the collective agreement that workers want to force through, but do correspond to the collective agreement applicable in the user undertaking. The Inquiry Chair considers it likely in this case that the EU would consider industrial action to bring about a Swedish collective agreement disproportionate; the posted workers already enjoy conditions that fulfil the requirements in another Swedish collective agreement and that are considered adequate for Swedish workers. In this case, therefore, it should be prohibited to take industrial action.

Obstacles to using temporary agency work

Article 4(1) of the Agency Workers Directive stipulates that prohibitions or restrictions on the use of temporary agency work are justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. Furthermore, Article 4(2) of the Directive stipulates that each Member State, after consulting the social partners, is to review any such prohibitions and restrictions found in national legislation, collective agreements and practices. Article 4(3) establishes that a Member State may leave it to the social partners to review obstacles in collective agreements between them. Under Article 4(5), the Member States are to inform the Commission of the results of the review by 5 December 2011. This applies to the reviews of obstacles both in legislation and practice, and in collective agreements.

The terms of reference for the Inquiry state that it is the Inquiry Chair's task to review whether there are any restrictions or prohibitions on the use of temporary agency work in legislation or practice. Possible restrictions and prohibitions in collective agreements therefore fall outside the Inquiry Chair's remit. Such restrictions are to be reviewed by the social partners.

In this context, it is primarily the organisations Swedish Staffing Agencies and Eurociett that have expressed views on what they consider constitute obstacles to using temporary agency work. Chapter 5

contains an account of their views and the Inquiry Chair's assessment of obstacles to the use of temporary agency work. In summary, however:

a) the Inquiry Chair does not find any grounds to change the rules concerning the obligation to negotiate and vetoes contained in Sections 38–39 of the Employment (Co-determination in the Workplace) Act (1976:580), since these are justified by the need to guarantee that the labour market functions properly (cf. Article 4(1) of the Agency Workers Directive).

b) Section 4, second paragraph of the Private Employment Agencies and Temporary Labour Act (1993:440) stipulates that a worker who has terminated their employment and takes employment with an employer who provides temporary workers may not be assigned to work for their previous employer until at least six months after their employment there ended. This regulation makes it more difficult for workers who want to take employment with a temporary work agency. In the opinion of the Inquiry Chair, this rule cannot be justified by any of the grounds cited in Article 4(1) of the Agency Workers Directive, and must therefore be repealed.

c) the Inquiry Chair has also reviewed whether individuals who have been or are employed by a temporary work agency are treated differently with regard to benefits from unemployment insurance funds, and has established that, to some extent, this would appear to be the case. According to RÅ (Yearbook of the Supreme Administrative Court) 2007 ref. 20, however, such differential treatment is not permitted with regard to several consecutive fixed-term appointments. Furthermore, the Inquiry Chair observes that part-time employees of temporary work agencies should have the right to 'top-up benefits' from unemployment insurance funds on the same conditions as other part-time workers, i.e. provided that they are at the disposal of the labour market when they are not working part-time. The Inquiry Chair does not, however, present any proposals for legislative amendments in these areas.