Öberg & Associés

LEGAL OPINION

(EXCERPT FOR TRANSLATION PURPOSES ONLY)

PRECARIOUS WORK AND EUROPEAN UNION LAW

UNDER TENDER SPECIFICATION "EUROPE: END PRECARIOUS WORK NOW! DECENT WORK AND EQUAL TREATMENT FOR ALL"
BUDGET HEADING 04.03.01.05; INFORMATION AND TRAINING MEASURES FOR WORKERS' ORGANISATIONS; GRANT AGREEMENT VS/2014/0554

APRIL 2016

I – INTRODUCTION AND EXECUTIVE SUMMARY

The trend away from the standard employment relationship of fixed, full time work has presented both risks and opportunities for workers. When arranged with care and consent, non-standard work practices can generate flexibility for a diversifying workforce wishing to balance other professional and/or personal obligations. However, non-standard work can also have a detrimental impact on individual worker's lives and is tangibly linked to poverty, social exclusion, and inequality. It also undermines the efficacy of collective bargaining and union representation as a way of protecting fundamental rights of all workers.

Precarious work can encompass a variety of arrangements that undermine the certainty, security, and vitality of work. Often precarious work involves casual and/or fragmented working hours; diminished or no protection against dismissal and/or illness; and exclusion from the protections and privileges of union membership. Widespread concern, both within Europe and internationally, has pointed to the increasing deliberate application of casualized work arrangements to circumvent labour regulations and other obligations to provide certain conditions, pay, and protection to large sections of the workforce.

In light of these concerning trends, the project partners - EFFAT, EFBWW, EPSU, ETF, IndustriAll, UNI Europa and ETUC - have asked Advokatfirman Öberg & Associés AB to give the current legal opinion, which should serve as a basis for a systematic review of how labour regulation and union strategy can be coordinated at the European and national level to combat the precarisation of work, and ensure better working conditions and social cohesion across the continent.

Our findings are in summary the following:

- The definitional challenges as to what constitutes "precarious work", "precarious working conditions", "atypical work", "standard" or "non-standard forms of employment", or for that matter "good jobs", should not be overestimated. While the researchers involved in the 2004 ESOPE study, conducted for the European Commission on precarious work, were confronted with definitional questions so important as to eventually make the very question of 'what is employment precariousness' one of the key research questions in the project, this definitional conundrum should not deter the European trade union movement to push for stronger protection against precarious work and precarious working conditions, both at a European, national, sectorial and local level.
- The definition of "precarious jobs" by the founding members of industriAll European Trade Union (EMF, EMCEF and ETUF-TCL) in its 2012 *Common demand for Collective Bargaining, For More Secure Employment, Against Precarious Work* could serve as a basis for a common definition of the concept "precarious work" and "precarious working conditions" by the project partners.

Advokatfirman Öberg & Associés AB
Box 2098, SE-103 13 Stockholm, Sweden
Visiting address: Skeppsbron 26, SE-111 30 Stockholm
Phone: +46 8 545 12 550
info@obergassocies.eu
www.obergassocies.eu
Organisation Number: 556707-2557
VAT Number: SE556707255701
Registered for Corp. Tax (F-skatt)
IBAN: SE78 6000 0000 0005 1124 5882
SWIFT: HANDSESS
Bankgiro: 5957-4665

Ö&A

- Although the European Commission has emphasised, for its part, that 'precarious work' is not a legal concept in European union law, the concept of "precariousness" or *précarité* has already evolved into hard law in the labour law of some Member States, such as the French Code du Travail.
- In recent EU policy papers on employment policy, there has been increasing emphasis not just on "more jobs" but on "quality jobs", as well as a discussion of "labour force segmentation". According to the European Commission, for instance, in order to tackle the issue of segmentation, employment protection legislation should be reformed to reduce overprotection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market. This is also the case in the context of the European Semester reports within the framework of the Europe 2020 strategy.
- As late as in 2013, the European Commission concluded that precarious work could be remedied through existing legislative measures. However, in its latest Annual Growth Survey 2016, the European Commission stated that the more general move towards more flexible labour markets should facilitate employment creation, but should also enable transitions towards more permanent contracts. To our knowledge, this is the first time the Commission has expressly set out the political and economic goal that this development should not result in more precarious jobs.
- In the light of Commission President Juncker's recent announcement of a legislative package for spring 2016, designed to "offer a foundation of minimum social rights" based on the principle of equal pay for equal work at the same workplace, it seems that President Juncker's Commission has in fact operated an unsuspected change of paradigm, and has departed from the previous President Barroso Commission's insistence on regulatory competition in favour of regulatory neutrality. This may in fact be a turning point in a new general political direction and new priorities on employment, in particular regarding the transitions towards more permanent contracts and how to stop precarious work. The Conclusions of the Essen European Council on Employment from 1994, which has been relied upon by the European Court of Justice to promote atypical work, in particular in relation to part-time work, could be replaced with a new political agenda focussing on ending poverty, and on fighting inequality and injustice, in particular by ensuring the principle of equal pay for equal work or work of equal value.
- In its latest resolutions on respect for fundamental rights within the EU, the European Parliament has stressed the link between the current economic and financial crisis, the measures implemented to address it in some Member States, the impact of which is negatively affecting the living conditions of EU citizens. According to the European Parliament, the EU is undergoing a period of serious economic and financial crisis, the impact of which, in combination with certain measures, including drastic budget cuts, implemented to address it in some Member States, is negatively affecting the living conditions of EU citizens – increasing unemployment, poverty levels, inequalities and precarious working conditions, and limiting access to and quality of services – and the wellbeing of citizens. In its resolution, the European Parliament underlined that the EU institutions, as well as Member States which implement structural reforms in their social and economic systems, are always under an obligation to observe the Charter and their international obligations, and are therefore accountable for the decisions taken.
- At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the new 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. During the UN General Assembly in September 2015, decent work and the four pillars of ILO's Decent Work Agenda – employment creation, social protection, rights at work, and social dialogue – became integral elements of the 2030 Agenda. Goal 8 of the 2030 Agenda calls i.a. for the promotion of sustained, inclusive and sustainable economic growth, full and productive employment, and decent work. The goal is to achieve by 2030 full and productive

and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value and to protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.

- On 27 September 2011 the United Nations Human Rights Council adopted, by consensus, the *Guiding Principles on extreme poverty and human rights* in resolution 21/11. The Human Rights Council encouraged Governments, relevant United Nations bodies, specialized agencies, funds and programmes, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations and non-State actors, including the private sector, to consider the guiding principles in the formulation and implementation of their policies and measures concerning persons affected by extreme poverty. On 20 December 2012, the UN General Assembly adopted a resolution on human rights and extreme poverty where it "[t]akes note with appreciation of the guiding principles on extreme poverty and human rights, adopted by the Human Rights Council in its resolution 21/11 as a useful tool for States in the formulation and implementation of poverty reduction and eradication policies, as appropriate".
- According to paragraph 84 of those Guiding Principles, which were co-sponsored by the European Union, States should:

  (a) Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to ensure enjoyment of the right to decent working conditions;

  (b) Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living;

  (c) Ensure that legal standards regarding just and favourable conditions of work are extended to and respected in the informal economy, and collect disaggregated data assessing the dimensions of informal work;

  (d) Take positive measures to ensure the elimination of all forms of forced and bonded labour and harmful and hazardous forms of child labour, in addition to measures that ensure the social and economic reintegration of those affected and avoid reoccurrence;

  (e) Ensure that caregivers are adequately protected and supported by social programmes and services, including access to affordable childcare;

  (f) Put in place specific measures to expand opportunities for persons living in poverty to find decent work in the formal labour market, including through vocational guidance and training and skills development opportunities;

  (g) Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to poverty and unemployment, including women, migrants and persons with disabilities, and tailored to their needs;

  (h) Respect, promote and realize freedom of association so that the identities, voices and representation of workers living in poverty can be strengthened in social and political dialogue about labour reforms.
- These *Guiding Principles on extreme poverty and human rights* co-sponsored by the European Union could serve as a minimum basis for the European trade union movement's forthcoming strategy to combat precarious work and precarious working conditions. In any case, European trade union movement should frame the debate on precarious work within the framework of this debate on the protection of fundamental rights.
- The legislative action of the European Union in the area of employment law today is still based on the fundamental premise that contracts of indefinite duration are the general form of employment

relationship, even though the Court has recognised that atypical employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities. In the light of the profound structural modifications of the EU Member States' respective labour markets, "typical work" is increasingly becoming a normative reference point, infused within both regulation and social conception. While available statistics on fixed-term work, part-time work, temporary agency work and posting of workers – in particular regarding youth employment and the creation of new jobs – seem to challenge the fundamental theoretical premise that contracts of indefinite duration are the general form of employment relationship, it is still useful to maintain the 'comparable permanent worker' as the relevant comparison of precarious or atypical workers, when assessing whether the requirements of equal treatment have been met.

- The current legal opinion operates on the general assumption made by the International Labour Organization (ILO) that "atypical work" constitutes work that markedly deviates from the traditional standard employment relationship of full-time, indefinite, direct subordinate employment.
- The Charter of Fundamental Rights of the EU contains a number of provisions concerning the rights of the employed. However, there are some inherent limits to the applicability of the Charter which render it ineffective to provide safeguards against precarious work and precarious working conditions. The Court has for example declined jurisdiction to answer preliminary questions regarding probationary periods in atypical employment contracts as long as the EU legislature has not exercised its competence to legislate in the field. In order for a worker to be ensured protection under the Charter, it is therefore necessary, under the Court's current case law, that legislation in the field of labour law is sufficiently clear and precise so as to create rights for individuals. However, if precariousness were to be included in the definition of "dignity" under Article 31(1) of the Charter, much will have been achieved.
- From the outset of European integration and ever since the Spaak Report, it has been clear that the very foundation-stone, on which the social dimension of the European Union is built, is that structural competition on wages should be excluded, either by national legislation, or by industrial action undertaken by trade unions. As the Ohlin Report pointed out, it is consistent with the interests of the trade union movement to promote and support action to put an end to unjustified differences in labour costs for the benefit of low wage groups. At that time, it was also common ground in Europe that wages and labour conditions are the outcome of collective bargaining by the social partners. In the terms of Ohlin report, there was "widespread agreement that government interference with the freedom of collective bargaining, if it becomes necessary at all, should be kept to a minimum." This means that ultimately, the Spaak and Ohlin reports present an economic rationale governing non-discrimination.
- Without formal recognition of the principles of non-discrimination and the principle of equal pay for equal work as directly applicable legal norms which can be applied in proceedings between private parties, and in particular between, - on the one hand, precarious and non-precarious workers (and/or their trade union representatives), and , on the other hand, employers, - workers and trade unions in Europe are deprived of their primary tool for eliminating inequalities and promoting equality between European citizens and migrant workers from third countries alike.
- The definition of what actually constitutes a "worker" for the purposes of EU law is essential for understanding the scope of labour law protection available for precarious workers under EU law. While a "worker" is not defined in the EU Treaties, the Court's case law on free movement of workers under Article 45 TFEU has provided clarity on this issue. According to consistent case-law of the Court, the concept of 'worker' has a specific independent meaning under European union law and must not be interpreted narrowly. Thus, any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment

relationship is, according to that case-law, that for a certain period of time a person "performs services for and under the direction of another person in return for which he receives remuneration".

- The status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.
- Although the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary, the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of EU law. It is therefore likely that employees on so-called "zero-hours contracts" come within the scope of "workers" under European union law.
- It is also clear from the Court's well-established case-law that the concept of 'worker' in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration.
- There is an inherent tension in the case-law of the Court regarding atypical and/or precarious work, whereby the Court, at one point or the other, will need to decide if the economic aim of *promoting* atypical work in European Union law is primary or secondary to the social aim pursued by the directives in question on fixed time work, part time work, posting of workers and temporary agency work.
- As has been pointed out by Steven Peers, the principle of equal treatment of (or non-discrimination against) atypical workers forms part of the general principle of equality recognized by EU law, and borrows from aspects of the case-law of the Court of Justice relating to sex discrimination law in particular. EU legislation and Court of Justice case-law also indicate that, to a significant extent, atypical workers should be guaranteed equal treatment as regards other employment rights and non-discrimination rights protected by EU law.
- Fixed-term workers, part-time workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers should therefore not be treated less favourably than a 'comparable permanent worker', in the absence of any objective justification, irrespectively whether or not there are any 'comparable permanent workers' at the workplace at issue or not.
- Indeed, a 'comparable permanent worker' has already been defined in clause 3(2) of the framework agreement on fixed-term work as 'a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the

applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice'.

- The 'comparable permanent worker' for part-time workers in the host member state should therefore be extended to serve as the relevant comparator for fixed-term workers, temporary agency workers, posted workers and other precarious workers on non-standard working arrangements, such as workers on zero-hour contracts and similar arrangements, bogus self-employed workers, youth entering the workforce on apprenticeship and traineeship programs and domestic migrant workers.
- The European trade union movement should emphasise that the principles of equal treatment and of equal pay for equal work or work of equal value between workers *as such* – i.e. not only in respect of migrant workers within the EU or male and female workers – is not only a "principle of Community social law", or an example of 'rules of EU social law of particular importance', but constitutes the *expression of a fundamental human right*, which stems from the principles of equal treatment and non-discrimination.
- Moreover, as has already been thoroughly and convincingly argued by Valerio De Stefano, the construction of collective rights as fundamental human rights can undoubtedly have specific beneficial effects for precarious, atypical or non-standard workers that must be given adequate attention when reassessing restrictions to the right to collective bargaining and the right to strike in order to keep pace with the growth of the non-standard workforce.