European Parliament
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Committee on Petitions

24.11.2016

NOTICE TO MEMBERS

Subject: **Petition No 0020/2016 by Yvan De Jonge (Belgian) on behalf of ABBV Horval, on working conditions in Belgian restaurants, particularly in McDonald's**

1. Summary of petition

The petitioner, a trade union representative, believes that employers in the restaurant business abuse their ability to employ staff on a part-time basis and use it to avoid complaints about working conditions. He is particularly concerned about flaws in the legislation on flexible jobs in this sector, which make it possible for employers – particularly McDonald's and its network of franchised restaurants – to sidestep the legal framework. He believes that such hiring practices and the use of flexible job contracts violate certain fundamental rights and do not comply with EU law, particularly Article 3 TEU, Articles 153 and 156 TFEU, Article 31 of the EU Charter of Fundamental Rights and Directive 91/533/EEC. He therefore calls on the Union to encourage Member States to put safeguards in place in their legislation so that workers can be represented and defend themselves against repercussions on their working conditions.

2. Admissibility

Declared admissible on 1 June 2016. Information requested from Commission under Rule 216(6).

3. **Commission reply**, received on 24 November 2016

The petitioner, a trade union representative, believes that employers in the restaurant business abuse their ability to employ staff on a part-time basis and use it to avoid complaints. The petitioner also criticizes a new Belgian law (of 16.11.2015) that created the so-called "flexi-jobs" in the hotels, restaurants and catering (Horeca) sector. These "flexi-jobs" would have many disadvantages, for the society in general and for the workers in particular. Under Belgian "flexi-jobs" contracts, employers only have to sign a framework contract with employees, but do not have to specify a number of hours or a time schedule. The subsequent

employment contract does not need to be in writing, this would put the workers in a very weak position. Also, flexi-jobs have always to be fixed-term contracts. The petitioner refers to several pieces of international and EU law and in particular the Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

A. Regarding the fact that part-time workers under a flexi-job contract, as opposed to full-time workers, do not benefit from a right to minimum pay and a fixed working time and salary, the Commission recalls that clause 4 of the Framework Agreement annexed to the Part-Time Directive[1] provides that:

> *In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.*

In the O'Brien case[2] which concerned English judges, the Court of Justice of the European Union (CJEU) stated as a point of departure for its assessment of the comparability that "*it must be examined whether the failure to grant a retirement pension to part-time judges remunerated on a daily fee-paid basis means that they are treated in a less favourable manner than full-time workers in a comparable situation".* Regarding the criteria laid down in the definition of comparable worker the court stated that *"It must be held that those criteria are based on the content of the activity of the persons concerned."*

In the Wippel case[3] a part-timer worker claimed that she should, under the non-discrimination principle, be entitled to a specified number of hours, a time schedule and a predetermined salary like her full-time colleagues in the establishment. The CJEU however ruled that the employment relationship of a part-time worker who works under such a contract, but leaves the worker the choice of whether to accept or refuse the work offered by the employer, is not a comparable situation to that of full-time workers who are obliged to work for the whole working time without the possibility of refusing work.

As regards fixed-term work, the CJEU has stated that the concept of objective reasons requires the unequal treatment at issue to be justified by the existence of *"precise and concrete factors, characterizing the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose"*[4].

"Those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State"[5]. Similar considerations must, by analogy, be applied as regards the non-discrimination principle of the part-time directive.

Part-time workers on flexi-job contracts performing the same or similar work as full-time workers may, for example as regards the right to minimum pay, be considered to be in an comparable situation to workers on ordinary full-time contracts. Such a difference in treatment would then only be permissible if justified by objective reasons.

B. Regarding the Belgian law of 16.11.2015 that created the so-called "flexi-jobs" in the

[1] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ L 014, 20/01/1998 p. 9 – 14).
[2] Case C-393/10, O'Brien, EU:C:2012:110
[3] Case C-313/02 Wippel
[4] Case C-307/05, *Del Cerro Alonso,* EU:C:2007:509, para. 58.
[5] Joined cases C-302/11 to C-305/11, *Valenza*,, ECLI:EU:C:2012:646

Horeca sector, the Commission observes that, according to the terms of the law, the framework contract shall only mention the identities of the parties, the modalities (method and notice) according to which the flexi-job is proposed to the employee by the employer, a short description of the work and the basic salary. The subsequent genuine employment contract can be in writing or verbal.
Therefore, in the case of a verbal employment contract, it appears that the employee at stake, on the basis of the law of 16.11.2015 only, might not receive in writing all the information he/she should receive as listed by Article 2 of the Directive 91/533/EEC[1]. However, the Commission is aware that in Belgium most of the information prescribed by this Directive is given to the employees by the periodic salary slip, the 'personal count' and the 'work rules' to be displayed at the workplace.
Nevertheless, the fact that flexi-jobs (which are necessarily fixed-term contracts) are not necessarily in writing, contrary to the general Belgian regime for fixed-term contracts, raises an issue. The Commission will contact the Belgian authorities in order to obtain clarifications on how the employees at stake are informed in writing of "the expected duration" of their employment relationship.
On the issue of working time, the Directive 91/533/EEC mentions that employees must be notified of "the length of the employee's normal working day or week". This legal obligation cannot be implemented as such where working time is flexible as there is, in this hypothesis, no normal working day or week. Nevertheless, the Commission is of the opinion that, where flexible working time is concerned, the written information given to the employees should at least confirm that the working time is flexible and also specify the modalities according to which the working time schedule will be transmitted to them. As mentioned above, the Belgian law of 16.11.2015 requires this information to be included in the framework contract.

Conclusion

[1] Article 2 of Directive 91/533/EEC:
Article 2 - Obligation to provide information
1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.
2. The information referred to in paragraph 1 shall cover at least the following:
(a) the identities of the parties;
(b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;
(c) (i) the title, grade, nature or category of the work for which the employee is employed; or
(ii) a brief specification or description of the work;
(d) the date of commencement of the contract or employment relationship;
(e) in the case of a temporary contract or employment relationship, the expected duration thereof;
(f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;
(g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;
(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;
(i) the length of the employee's normal working day or week;
(j) where appropriate;
(i) the collective agreements governing the employee's conditions of work;
or
(ii) in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.
[…]"

The Commission will contact the Belgian authorities in order to ascertain that employees under flexi-jobs contracts receive in writing a confirmation of the expected duration of their employment relationship and that workers on flexi-contracts are not discriminated as regards their employment conditions, in particular with regard to pay.