

Statement for Claimant

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2. List of sources

2.1 Legislation

2.1.1 EU legislation

- European Parliament and Council Regulation (EU) 1215/2012 of 12. December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2012] OJ L351/1 (hereinafter Brussels I). Cited on pages 9, 10, 17, 18, 20 and 21.
- Charter of Fundamental Rights of the European Union [2012] OJ C325/391 (hereinafter the Charter). Cited on pages 12, 13, 14, 15, 16, 25, 27, 28, 29, 30, 31, 32, 33 and 37.
- European Parliament and Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6 (hereinafter Rome I). Cited on pages 11, 17, 22, 23 and 24.
- European Parliament and Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1 (hereinafter PWD). Cited on page 22.
- European Parliament and Council Directive 08/104/EC on temporary agency work (hereinafter TWA). Cited on page 20.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 (hereinafter ECHR). Cited on pages 14, 25, 26, 27 and 28.
- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Official Journal C 326 , 26/10/2012 P. 0001 – 0390 (hereinafter TEU and TFEU). Cited on pages 14, 25, 30 and 31.

2.1.2 Polish legislation

The Polish Labour Code (Dz. U. tłum. Gb 1998 Nr 21, poz 94) (PL) (hereinafter PLC). Cited on pages 12, 15, 16, 17, 18, 24, 33, 34, 35, 36 and 37.

2.2 Case-law

2.2.1 EU case-law

- Case C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen OJ C 421, 24.11.2014, p. 24–25 [2016] (hereinafter Ajos). Cited on page 29.

- Case C-354/13 Fag og Arbejde v. Kommunernes Landsforening [2015], OJ C 65, 23.2.2015, p. 7–7 (hereinafter Kaltoft). Cited on page 26.
- Case C-176/12 Association de Mediation sociale v. Union locale des syndicats Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT) [2014] OJ C 85, 22.3.2014, p. 3–3 (hereinafter AMS). Cited on pages 29 and 30
- Case C-64/12 Anton Schlecker v. Melitta Josefa Boedeker [2013] OJ C 325, 9.11.2013, p. 6–7 (hereinafter Schlecker). Cited on pages 23 and 24.
- Case C-29/10 Heiko Koelzsch v. État du Grand-Duché de Luxembourg [2011] OJ C 139, 7.5.2011, p. 9-9 (hereinafter Koelzsch). Cited on page 24.
- Case C-242/09 Albron Catering BV v. FNV Bondgenoten, John Roest. [2010] ECR-I-10309 (hereinafter Albron). Cited on page 19.
- Case C-555/07 Seda Küçükdeveci v. Swedex GmbH & Co. KG [2010] OJ C 79, 29.3.2008, p. 12–12 (hereinafter Küçükdeveci). Cited on pages 25 and 29.
- Case C-341/05 Laval un Partneri Ltd mod Svenska Byggnadsarbetareförbundet [2007] ECR-I-11767 (hereinafter Laval). Cited on page 35.
- Case C-103/05 Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH [2006] ECR-I-6827 (hereinafter Reisch Montage). Cited on pages 21 and 22.
- Case C-499/04 Hans Werhof v. Freeway Traffic Systems GmbH & Co. KG [2006] ECR-I-2397 (hereinafter Werhof). Cited on page 25.
- Case C-144/04 Werner Mangold v. Rüdiger Helm [2005] ECR-I-9981 (hereinafter Mangold). Cited on page 29.
- Case C-94/04 Cipolla v. Rosaria Fazari, nee Portolese [2006] ECR-I-11421 (hereinafter Cipolla). Cited on page 35.
- Case C-451/03 Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori [2006] ECR-I-2941 (hereinafter Servizi). Cited on page 35.
- Case C-134/03 Viacom Outdoor Srl v Giotto Immobilier SARL. [2005] ECR-I-1167 (hereinafter Viacom Outdoor). Cited on page 34.
- Case C-236/98 Jämställdhetsombudsmannen v. Örebro läns Landsting [2000] ECR-I-2189 (hereinafter Jämställdhetsombudsmannen)
- Case C-281/98 Roman Angonese v. Cassa di Risparmio di Bolzano SpA [2000] ECR-I-4139 (hereinafter Angonese). Cited on page 25.
- Joined Cases C-369/96 and C-376/96 Jean-Claude Arblade, v. The Tribunal Correctionnel de Huy (Belgium) [1999] ECR-I-8453 (hereinafter Arblade). Cited on pages 35 and 36.

- Case 218/86 SAR Schotte GMBH v. Parfums Rothschild Sarl [1987] ECR-4905 (hereinafter SAR Schotte). Cited on page 21.
- Case 43/75 Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Erienne Sabena [1976] ECR-455 (hereinafter Defrenne). Cited on pages 25, 31 and 32
- Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR English Special Edition-1 (hereinafter Van Gend en Loos). Cited on pages 30 and 31.

2.2.2 ECHR case-law

- *Danilenkov and Others v. Russia* (2009) Case no 67336/01 (hereinafter Danilenkov). Cited on page 27.
- *Sigurður A. Sigurjonsson v. Iceland* (1993) 16 EHHR 462 (hereinafter *Sigurður*). Cited on pages 25 and 26.

2.3 Literature

- *Frantziou, Eleni*; The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality, *European Law Journal*, Vol. 21, No. 5, September 2015, pp. 657–679 (hereinafter Frantziou, Eleni). Cited on pages 29, 31 and 32.
- *Barnard, Cathrine*: EU employment law, 4th edition, Oxford University Press, year 2012, pp. 155 and 229-234 (hereinafter Barnard, Cathrine). Cited on pages 18 and 23.
- *Peers, Steve*: <http://eulawanalysis.blogspot.dk/2014/01/when-does-eu-Charter-of-rights-apply-to.html>, accessed 25. April 2016. (Hereinafter, Peers, Steve). Cited on page 29.
- *Sever, Saša*; Horizontal effect of the Charter, *Croatian Yearbook of European Law and Policy*, Vol 10 (2014) pp 39-66 (hereinafter Sever, Saša). Cited on page 29.
- *Póltorak, Nina* *European Union Rights in National Courts*, 1st edition, year 2015 page 40. (Hereinafter Póltorak, Nina). Cited on page 32.

2.4 Other international instruments

- ILO: R198 Recommendation concerning the employment relationship, 2006 (No. 198) (hereinafter ILO Employment Relationship Recommendation). Cited on page 19.

2.5 Reports

- European Court of Human Rights Factsheet – Trade union rights, April 2014 (hereinafter factsheet).
- Report Expert Group Transposition of Directive 2008/104/EC on Temporary agency work August 2011 (hereinafter EG TWA Report). Cited on page 19.

3. Statement of relevant facts

3.1 The employment relationship

The claimant is a Polish national. The claimant was recruited in Poland by Max Staff Partners (defendant 1), a company with its registered office in Warsaw, Poland. Mr. Kazimierz Nowak, presented himself as acting on behalf of Max Job (defendant 2), a company registered in Nicosia, Cyprus when signing the employment contract. The contract and formalities were concluded in Poland. This could have lead the claimant to believe that his actual employer was the Polish company, Max Staff Partners.

Upon termination of the work in Cyprus, Max Staff Partners promised the claimant work provided he received a positive opinion from Max Job. Max Staff Partners had employed such practices before. This work was either in Poland or another EU country. This saved them time and money in the recruitment process.

3.2 Company structure

Max Staff Partners and Max Job are independent and do not form a concern, but they are members of a group of a companies, who use the same umbrella-name "Max". The Board of Directors in Max Job and Max Staff Partners are the same. Mr Nowak sits on the Board of Directors of both companies.

3.3 Colleague

The claimant's colleague, who was recruited by the same Polish company, Max Staff Partners to work in Cyprus the previous year had an A1 certificate signed by Max Staff Partners.

3.4 Payment of wages

Max Staff Partners paid travel allowances in PLZ and the claimant's ticket to Cyprus. The claimant received remuneration from Max Staff Partners, and later from a bank account of Max Job and sometimes even directly from saving account of Mr. Nowak.

3.5 Term of contract

Expired after 2 years of work.

3.6 Posting to Cyprus

The claimant was posted to Nicosia to work for the Cypriot entity. Before being dispatched to Nicosia, Jan was an employee or self-employee of different entities in Poland. He had never concluded any contract whatsoever with a company labeled as „Max”. In Poland small firms or natural persons have contracted the claimant.

3.7 Overtime work

The claimant carried out his duties in accordance with the contract as a carpenter in the territory of Cyprus for 2 years. During the time of employment the claimant regularly worked over 8 hours per day. For this he never received extra wages.

3.8 Difference in pay

The claimant worked as a carpenter at different building sites in the territory of Cyprus. The claimant was paid 10% less than a number of other carpenters performing similar tasks. The claimant communicated his concerns about this wage disparity.

The official answer given by Kazimierz Nowak on behalf of Max Staff Partners stated that organized workers were paid adequately more than unorganized workers, and this was in accordance with EU anti-discrimination law.

3.9 Work certificate

The claimant applied for a work certificate. According to Polish Law the employer has a duty to issue a work certificate upon termination of the employment relationship. The claimant gave Max Job a translated work certificate form, which was filled in wrongly as regards the calculation of holiday entitlement. Max Job refused to rectify.

4. Description of relevant legislation

4.1. Jurisdiction

The question of jurisdiction in individual employment contracts is regulated by Brussels I. Brussels I contains the following provisions which are relevant for determining if the Polish court has jurisdiction to hear the case.

When determining jurisdiction in matters relating to individual contracts of employment, section 5 of Brussels I apply.

Brussels 1, Article 20(1)

In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8

Article 21(1)(a) determines where an employer may be sued:

Brussels 1, Article 21 (1) (a)

1. *An employer domiciled in a Member State may be sued:*

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 8 (1) is relevant, because this provision deals with jurisdiction in cases with a number of defendants.

Brussels 1, Article 8 (1)

A person domiciled in a Member State may also be sued:

Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings;

A branch, agency or other establishment may be sued according to Article 7(5).

Brussels 1, Article 7 (5)

*A person domiciled in a Member State may be sued in another Member State:
(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;*

4.2 Applicable law

Rome I lays down the general rules governing applicable law in contractual obligations. The general rules are supplemented by the Posted Workers Directive, which governs the applicable law in cases concerning posted workers.

The Posting Workers Directive regulates the applicable law when it comes to certain subjects, e.g. when it comes to overtime pay, Article 3 (1) (c):

The Posting Workers Directive Article 3 (1)(c)

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

The provision which governs individual employment contracts in Rome I is article 8:

Rome I, Article 8

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply

4.3 Ad claim 1

PLC article 151, § 1 states the definition over overtime work:

The Polish Labour Code Article 151, § 1

Work performed in excess of the standard working time binding an employee, as well as work performed in excess of an extended daily working time resulting from the system and schedule of working time binding the employee, is overtime work.

Compensation for overtime work is regulated in The Polish Labour Code in art 151¹, §1 which states that in addition to the regular remuneration, a bonus is due for overtime. The amount of the bonus depends on when the overtime work is performed.

4.4 Ad claim 2

The Charter states a number of fundamental rights and principles in the EU.

The Charter art 12 states the right to freedom of association:

The Charter art 12:

“Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.”

On the issue of non-discrimination, the Charter art 21 states:

The Charter art 21:

“Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”

Article 52,7 states the importance of the Charter explanations.

The Charter art 52,7

“The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

Article 52,3 state the relationship between the rights found both in the ECHR and The Charter.

The Charter art 52,3

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

The ECHR art 11 which art 12 in the Charter are modelled on, also contains a negative to freedom of association.

ECHR art 11

“– Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

In TEU art 6 it is stated that the Charter has the same legal value as the Treaties

TEU art 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The addressees of the Charter can be read from art 51,1 in the Charter:

The Charter art 51,1

“1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

4.5 Ad claim 3

4.5.1 National law

PLC art 97 regulates work certificates:

“Upon termination or expiry of an employment relationship, the employer is obliged to issue a work certificate to the employee immediately. The issue of the work certificate may not be depend on the previous settlement of accounts between the employee and the employer.

§ 2 The work certificate provides information on the period and type of the work performed, job positions held, the manner of the termination or the circumstances of the expiry of the employment relationship as well as other information necessary to establish the employee's entitlements and social insurance entitlements [...]"

Compensation for failure of the employer to issue a work certificate is regulated in PLC art 99 §§ 1 and 2:

*“An employee has the right to claim for the redress of damage caused to him by through the failure of the employer to issue a work certificate in due time, or a failure to issue an accurate work certificate,
§ 2 The compensation referred to in § 1 amounts to the remuneration for the period of being out of work for this reason, but for not longer than 6 weeks”*

5. Questions

5.1 Jurisdiction and applicable law

Does the Polish court have jurisdiction in this case?

Which national law is applicable?

Which EU-law is applicable on the employment relationship?

5.2 Claim 1

Is there a right to overtime pay according to EU-law?

Is there a right to overtime pay according to national law?

5.3 Claim 2

Is there an EU right of equal pay for equal work in EU-law?

Does art 12 and art 21 in the Charter read in conjunction entails a prohibition of non-discrimination on grounds of trade union membership?

Can art 12 and art 21 in the Charter read in conjunction be applied directly in a case between private parties?

Is the 10 % difference in pay a breach of art 21 in the Charter?

Are there any objective justifications for the discrimination?

5.4 Claim 3

Is there a right to compensation in the applicable national law?

Does Art 97 of the PLC constitute a restriction to the right to free movement?

If yes, are there any grounds that legalise the restriction?

6. Summary of arguments

6.1 Jurisdiction

It will be argued that the claimant is a posted temporary agency worker. The claimant will argue, that the Polish court has jurisdiction under Brussels I art 21(1)(a) and 8(1), see art 20(1) to hear the case for both defendants because Max Staff Partners is the employer and Max Job can be sued as co-defendant. Subsidiary it will be argued that because the claimant can rely on the appearance of Max Staff Partners as being an affiliation of Max Job, both defendants can be sued in Poland see Brussels I 7 (5) and 8 (1).

6.2 Applicable law

The claimant will argue, that applicable law is Polish Law, because there is a close connection to Poland, see Rome I art 8 (4). This close connection is evident by these facts: Max Staff Partners is a legal person governed by Polish law, the contract was concluded in Poland, the parties intended to find new work for the claimant in Poland or in another EU-country, when the claimant returns to Poland and the claimant is subject to Polish social security legislation.

6.3 Ad claim 1

The claimant will argue, that the Polish Court has jurisdiction to hear the case and as Polish Law is applicable the PLC applies. Art 151 § 1 of the PLC entitles the claimant to bonus for overtime work and for that reason the claimant is entitled to pay for overtime work.

6.4 Ad claim 2

The claimant will argue that the discrimination against him is in breach of a right to negative freedom of association, protected by EU-law.

It is argued that art 12 of the ECFR cover a right to negative freedom of association.

It is further argued, that breach of this right through discrimination on grounds of trade union membership is prohibited in ECFR art 21. It will finally be argued that this provision can be directly applicable between private parties, horizontal applicability.

The claimant argues that being paid 10% less than unionized workers performing the same job as him, is discrimination in violation of ECFR art 21 see art 12 of the EU Charter of Fundamental Rights.

6.5 Ad claim 3

The claimant will argue that he is entitled to compensation pursuant to art 97 in the PLC.

It is argued that the provision might be seen as a restriction to the free movement of services, but in that case the provision can be objectively justified. It is argued that the provision protects the Polish employee's entitlements and social security entitlements, in an appropriate and proportional manner to achieve this legitimate public interest.

7. Arguments

7.1. Jurisdiction

The claimant is a posted temporary agency worker. Therefore, the Polish court has jurisdiction under Brussels I art 21(1)(a) and 8(1), see art 20(1) to hear the case for both defendants because Max Staff Partners is the employer and Max Job can be sued as co-defendant.

The relevant regulation to establish the jurisdiction is Brussels I art 21(1)(a) which states that the employer may be sued in the Member State in which he is domiciled. The two essential parts of the provision to be argued, is who is the employer in this case and where is the employer domiciled.

Subsidiary it will be argued that because the claimant can rely on the appearance of Max Staff Partners as being an affiliation of Max Job, both defendants can be sued in Poland see Brussels I 7 (5) and 8 (1).

7.1.1. Who is the employer?

Max Staff Partners is the employer of the claimant and the claimant is a posted temporary agency worker, who is posted to work for Max Job in Cyprus. This is argued from the circumstances surrounding the contract. When determining who the employer is it is essential to look at the reality of the situation.¹ This means looking at: The recruitment process, the fact that his colleague is subject to Polish social security, the fact that Max Staff Partners paid the ticket and travel allowances to Cyprus, the promise of work after the claimant's return from Cyprus and finally – and probably the most indicative factor - the fact that Max Staff Partners replies the claimant, when he is concerned about his wages, are all facts that leads to the conclusion that Max Staff Partners is the employer.

¹ Barnard, Cathrine, page 155.

7.1.1.1 The recruitment process

The employment relationship regarding a posted temporary agency worker is meant to encompass the situations where the distinctive features of an employment relationship are present, but no formal contract of employment has been concluded.² The claimant's employment contract is signed by Kazimierz Nowak, who is on the Board of Directors of both Max Job and Max Staff Partners. This leaves some doubt as to which undertaking is party to the contract. Mr. Nowak says that he presented himself as acting on behalf of Max Job and we will not dispute that he did in fact introduce himself in this manner. However the claimant is of the impression that the contract of employment was concluded between himself and Max Staff Partners. What led the claimant to believe this was first and foremost that the contract was signed in Poland and that the claimant prior to this had only been in contact with Max Staff Partners, who were the ones to recruit him. In caselaw it is established that there can be an employment relationship, even though there are no contractual relations.³ This means that the facts surrounding the contract can have higher importance than the fact that Max Job look like the employer on the formal employment contract.

7.1.1.2 The colleague

The claimant had been talking to one of his colleagues, who was recruited by Max Staff Partners the previous year. This colleague had been subject to Polish social security legislation while working in Cyprus, which was confirmed by an A1 certificate issued by ZUS to Max Staff Partners. An A1 certificate is applied for by the employer, who wishes to post employees to another EU country. This proves that the claimant's colleague was in fact employed by Max Staff Partners during his work in Cyprus, and while this does not in itself mean that the claimant was also employed by Max Staff Partners, this does mean that such practices had been used before, not making it unlikely that this is the case in the present situation also. This then, supports the claimant's perception of being employed by the Polish company.

7.1.1.3 Travel allowances and remuneration

Before going abroad the claimant received a ticket for Cyprus and cash for his trip from Max Staff Partners. The travel allowances to the claimant, which were paid out in PLZ, indicate that Max Staff Partners is the employer of the claimant.

The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. Therefore remuneration is a factor that can be taken into account when determining who the employer is⁴. In the beginning of the em-

² EG TWA report p 12.

³ Albron, para 28.

⁴ ILO Employment Relationship Recommendation, point 9.

ployment relationship the remuneration was paid by Max Staff Partners and in PLZ, later it was paid by Mr. Novak and also from the bank account of Max Job. When the remuneration is paid from different bank accounts this factor cannot stand alone when determining who the employer is.

7.1.1.4 The promise of work after the posting

Max Staff Partners promises the claimant work upon his return with a positive opinion from Cyprus. The work is to be performed in Poland or in another EU country, but not necessarily work with any connection to Cyprus. These facts clearly indicate that there is a continuing relationship between Max Staff Partners and the claimant. Further this is a practice we know that Max Staff Partners employs with all their workers, as it saves them time and money when recruiting staff. This practice leads to the conclusion that Max Staff Partners is a temporary workers agency operating with the purpose of recruiting temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction.⁵

7.1.1.5 Concerns about pay

Finally, when the claimant was concerned about his wages, he brought this complaint to Kazimierz Nowak. The official answer was issued by Max Staff Partners in Poland, not by Max Job in Cyprus. If the contract was in fact concluded between the claimant and Max Job, this question regarding wages paid due to performance of the work in accordance with the contract, would be of no concern to Max Staff Partners. This indicates, that the perception of Max Staff Partners as well as Mr. Nowak was, that the claimant was in an employment relationship with Max Staff.

7.1.2 Domicile

The employer Max Staff Partners is domiciled in Warsaw, Poland. Applying Brussels I art 21 (1) (a) Max Staff Partners can be sued in Poland since this is where the company is domiciled.

7.1.3 Affiliation of Max Job

Even if the court finds that Max Staff Partners is not the employer, and that Max Job is, the Polish court still has jurisdiction to hear the case. Max Staff Partners appears to be an other establishment to Max Job and therefore Max Job can be sued in Poland, where Max Staff Partners is situated, see Brussels I 7 (5).

There is no doubt that Max Staff Partners and Max Job are two independent companies. The two companies are members of a group of companies with the same umbrella name, Max. Also there is an identical

⁵ TWA, art 3(1)b.

management in the companies, because Kazimierz Nowak and two other persons sit on the Board of Directors in both companies. According to *SAR Schotte* the fact that the companies have identical names and management is essential when demonstrating that art 7 (5) in Brussels I applies, see para 17. The claimant must be able to rely on the appearance of Max Staff Partners, which seems to be an extension of Max Job even though the two companies are independent according to company law. This also follows from *SAR Schotte* para 15:

“In such case, third parties doing business with the establishment acting as an extension of another company must be able to rely on the appearance thus created and regard that establishment as an establishment of the other company even if, from the point of view of company law, the two companies are independent of each other”.

Because of the identical name and management the claimant has a legitimate expectation that there is some sort of company connection between Max Staff Partners and Max Job. The expectation of the claimant is protected and give grounds to applying the rule in Brussels I 7(5) which is seen in *SAR Schotte*. Therefore the Polish Court has jurisdiction to hear the case regarding Max Staff Partners.

7.1.4 Max Job as co-defendant

It has now been established that Max Staff Partners can be sued in Poland, principally because the company is the employer of the claimant, subsidiary because there is an establishment between Max Staff Partners and Max Job.

Now the question is whether Max Job can be sued in Poland as well.

Brussels I art 8 (1) determines when a person can be sued, when there are a number of defendants. In order to apply the jurisdiction rule in Brussels I 8 (1) there must be two persons domiciled in different Member States. In this case we are dealing with a Polish company, Max Staff Partners and a Cypriot company, Max Job. The essential question in the article is whether the claims against both defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

The *Reisch Montage* shows that it is possible to bring an action in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member state. The requirement of a con-

nection is based on two reasons. The first is that it reduces the risk of contradictory judicial decisions; the second is that it prevents one of the persons from being unlawfully removed from the jurisdiction of the courts of the State where he resides⁶. There fact that there is a tripartite relationship between the claimant and the defendants, because the claimant is a posted temporary agency worker who works for the user undertaking, Max Job and is employed by the temporary worker agency, Max Staff Partners points to a close connection because it is the same employment relationship. The purpose of the close connection is to prevent that the employer, Max Staff Partners is removed from Poland, where the company resides.

Therefore the defendant Max Job can be sued jointly in the Polish Courts because the claims against them arise from the same contract and are based on the same facts and it is important to hear the two cases together since allowing two separate proceedings easily could result in irreconcilable judgements.

In conclusion: the Polish Labour Court has jurisdiction to hear the case against Max Staff Partners and Max Job.

7.2 The applicable law

7.2.1 The Posted Workers Directive

The claimant is a posted worker, because he carries out work in another Member State than the State in which he normally works for a limited period of 2 years⁷.

In this case the Posting of Workers Directive applies. The Posting of Workers Directive is a directive about the applicable law. It follows from art 3, paragraph 1 (c) that Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering minimum rates of pay including overtime rates in the Member State where the work is carried out, if the terms are laid down by law, regulation or administrative provision and/or by collective agreements or arbitration award which have been declared universally applicable.

The claimant is posted to Cyprus, but there are no laws or universally applicable collective agreements that govern overtime rates in Cyprus, therefore the PWD appoints no applicable law in this case. We must then consider whether to fall back on Rome I in order to find the applicable law. Therefore the question is what the relationship between the Directive and the Rome I regulation is. The Directive and the Rome I regula-

⁶ General Advocate Opinion to *Reisch Montage*, paras 27 and 28.

⁷ PWD, art 2(1).

tion are co-extensive⁸, which means that even though the Directive leads us nowhere in determining the applicable law in this case, the Rome I regulation can be used to answer the question about applicable law. In this case Rome I is applicable.

7.2.2 Rome I

When applying the Rome I regulation to determine the applicable law, Rome I art 8 applies to individual employment contracts and since no choice of law was made between the parties, the default rule is that the law applicable is the law of the country where the employer habitually carries out his work see art 8(2). However this rule does not apply if the circumstances as a whole suggest a closer connection to another country, in which case the law applicable is the law of that country see Rome I art 8 (4).

7.2.2.1 *Habitual workplace and closest connection*

The relationship between paragraph 2 (habitual workplace) and paragraph 4 (close connection) is established by case-law. Paragraph 4 is not an exception clause. Even if the employee not only carries out his work habitually in one Member State, but also for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out if it appears from the circumstances as a whole that the contract is more closely connected⁹. In other words paragraph 4 in Rome I art 8 must always be taken into consideration when determining the applicable law.

There is no doubt that the claimant carries out his work habitually in Cyprus, which leads us to applying Cypriot law under art 8 (2). However the court cannot rely solely on the place of performance in the contract, it must take into account all relevant factors under paragraph 4.

In this case there is a closer connection to Poland, see Rome I, art 8 (4)

First of all there is not a closer connection to Cyprus, in fact the only connection this contract has to Cyprus, is that this is where the work takes place for two years. As explained above, during the claimant's time working in Cyprus, the employment relationship between the Claimant and Max Staff Partners remains in force and the common denominator between the two is that they are both based in Poland.

⁸ Barnard, Cathrine, page 231.

⁹ *Schlecker*, paras 17 and 42.

Secondly the employer, Max Staff Partners is a legal person governed by Polish law, which supports a closer connection to Poland see *Schlecker* pr. 29. The closer connection is also evident by the fact that the contract was concluded in Poland, and by the fact that it was the intention of the parties to find new work for the claimant either in Poland or in another EU country, upon the claimants return. Thus the claimant does not establish a permanent base of living in Cyprus. As such under the contract Poland would continue to be the base to which the claimant was to return after completing different work tasks within the EU, which is a factor that should be taking into the consideration of art 8(4) see *Koelzsch* para 49.

Additionally it must be assumed that the claimant is subject to Polish social security legislation during his work in Cyprus, since this was the case for the claimant's colleague who was employed by Max Staff Partners and send to work in Cyprus the previous year. This particularly indicates a closer connection to Poland see *Schlecker* para 41.

When bearing in mind that the purpose of the Rome I regulation about individual employment contracts is to make it easier for the employee to protect his rights by the courts, it is clear that the employment contract in the case has a closer connection to Poland.

As a result of the closer connection established above to Poland, Polish Law applies to this case.

7.3 Claim 1

As established above, the Polish court has jurisdiction to hear the case and Polish Law applies.

7.3.1 Remuneration for unpaid overtime

There is no rule about overtime in EU-regulation.

In Polish Law there is a Polish Labour Code, which states that the working time standard in Poland is eight hours a day see PLC art 151¹, § 1. The PLC art 151¹, § 1 entitles the employee to a bonus for overtime work. As the claimant has been working for more than 8 hours a day and therefore meets the definition of overtime, he is entitled to remuneration for unpaid overtime.

7.4 Arguments claim 2

7.4.1 Fundamental rights in EU-law

EU-law is applicable because the case has a transboundary element. This because the case involves a Polish national and a Cypriot company.

When establishing that the claimant is entitled to compensation for the discrimination by EU-law, the first thing we look at is whether there in EU-law is a principle of equal pay for equal work.

It is prohibited in EU-law to pay unequal pay on the basis of specific criteria. Among the specific criteria it is well-established on Treaty level that there is a protection if unequal pay is due to discrimination because of a worker's nationality TEU art 45¹⁰, or if there is a discrepancy in equal pay for equal work between men and women in TEU art 157¹¹. However, there is not yet in EU-law a universal principle of equal pay. The question then becomes, if there is a specific criterion on Treaty level that applies in this case protecting the claimant from discrimination. The claimant is paid 10 % less because he chooses not to join a trade union. In other words, he is exercising a right to negative freedom of association by not joining a union, but being discriminated against, because he exercises this right.

In EU-law there is a fundamental right to freedom of association in the European Charter of Fundamental Rights art 12, an article that is on Treaty level, see The Charter art 6 and *Kücükdeveci*

Art 12 in Charter does not only protect the positive right to freedom of association, but also the right to negative freedom of association.¹² This because rights found both in The ECHR and The Charter share the same meaning and scope see the Charter art 52,3. Art 12 is modelled on ECHR art 11. Therefore the case-law by the European Court of Human Rights is of relevance. According to that case-law ECHR art 11 encompasses a negative right of association, as is also stated in the official fact sheet on trade union rights:

*“Article 11 [encompasses] a negative right of association” (§ 35).*¹³

And in the case *Sigurður*:

¹⁰ *Angonese*.

¹¹ *Defrenne*.

¹² In *Werhoff* para 33 it was stated that protection of the Freedom of association, which also includes the right not to join an association or union is one of the fundamental rights which are protected in the union.

¹³ Factsheet.

“Accordingly, Article 11 (art 11) must be viewed as encompassing a negative right of association.¹⁴”

Since negative right of association is thus guaranteed in the ECHR art 11, it is also guaranteed in art 12 due to the Charter art 52,3.

7.4.2 Discrimination of fundamental rights in the Charter

It is the claimant’s argument that discrimination based on the fundamental right to negative freedom of association is prohibited, see the Charter art 12 read in conjunction with art 21.

Art 12 in the Charter protects the right to negative freedom of association. Art 21 prohibits discrimination on numerous grounds.

The prohibition of discrimination in art 21 is universal, as it states that it protects from “*..any discrimination based on any ground.*” It lists a great number of protected rights: “*..such as sex, race, colour..*” and 13 other rights. The wording in art 21 is both universal and non-exhaustive. Applying a literal interpretation, art 21 should prohibit discrimination on the basis of anything including the right to negative freedom of association which is protected in art 12. However, the ECJ has established that discrimination on some grounds are not restricted within EU-law, and as a consequence, that the extent of the discrimination grounds though numerous are not all-encompassing.¹⁵

One ground not encompassed is obesity, as is plainly stated in *Kaltoft*. But obesity is not mentioned as a right anywhere else in the EU legal acts. However, the Charter has a whole section dedicated to fundamental freedom rights. It makes sense that obesity is not protected from discrimination by art 21, it is not mentioned anywhere else in union law. By the same logic, it makes sense that the fundamental freedom rights put forth in the Charter itself, are protected from being discriminated against by the anti-discrimination article in the exact same charter. The law-makers has in the preamble to the Charter put an emphasis on strengthening fundamental rights:

¹⁴ *Sigurður*.

¹⁵ One instance of ECJ limiting the extent of art 21 is in the *Kaltoft* ruling. The ruling clearly stated that, “*EU-law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.*”

"[I]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."¹⁶

Fundamental rights which according to the preamble are:

"indivisible, universal values of human dignity, freedom, equality and solidarity"

If the fact that the article is phrased as not being exhaustive bears any meaning, it must be to have the article encompass protection from discrimination on grounds other than those listed in the article. If anything in EU-law other than the grounds listed in art 21 should be protected by the provision, it certainly should be the *indivisible, universal values of human dignity, freedom, equality and solidarity* listed in the same charter, which was made because it was found *necessary to strengthen the protection of fundamental rights*. To this end, protection from discrimination on the basis of trade union membership must be protected, as this is a fundamental right protected in art 21 of the Charter.

The explanatory notes to art 21 state that Paragraph 1 draws art 14 of the ECHR. Art 14 is the anti discrimination provision in the ECHR. This is important since in the European Court of Human Rights case *Danilenkov* it was found that art 14 of the ECHR taken together with art 11 of ECHR contains a protection against discrimination on the grounds of trade union membership. Art 12 and 21 of the Charter are the equivalent to ECHR art 11 and 14. Rights found both in The ECHR and the Charter share the same meaning and scope see the Charter art 52,3. This means that the Charter art 12 read in conjunction with art 21 must encompass a protection against discrimination on grounds of trade union membership, as it does when the equivalent articles are read in conjunction in *Danilenkov*.

It is for these established reasons that the claimant argues, that the Charter art 21 entails a prohibition of non-discrimination on grounds of trade union membership.

7.4.3 What is the extent of the protection?

After substantiating that art 12 and art 21 in the Charter entails a protection, it must be assessed if a 10 % disparity is protected in the article.

¹⁶ The Charter, the preamble.

Art 21 is not materially restricted. The article prohibits discrimination as a whole, and not a certain type of discrimination. It is irrelevant whether the discrimination occurs in the form of a difference in pay, a refusal to hire or something else, the article protects from

“any discrimination”.¹⁷

Since the article protects from any discrimination, a difference in pay is covered. This is regardless of whether this would be covered by the provision in ECHR. The protection in the article extends beyond the practice of ECHR art 11 on which art 12 is modelled due to art 52,3, which states that

“[the practice of the ECHR] shall not prevent Union law providing more extensive protection.”

From this it follows that the protection from discrimination in the Charter is not a 1:1 application of the ECHR case-law, but a completely separate EU legal instrument, modelled on the ECHR, but not limited to the same scope or practice.

The material protection is thus not limited by the interpretation art 11 is given in the case-law, as it is a whole other regime, upon which the protection given in the Charter is modelled, but not materially restricted to.

The content of the protection in art 12 read in conjunction with art 21 in the Charter is therefore any type of discrimination at any point in an employment relationship. The discrimination the claimant suffered is therefore prohibited by art 12 and 21 in the Charter.

7.4.3.4 Is the Charter art 21 applicable between private parties?

Since a 10% wage disparity falls under any type of discrimination at any point in a relationship, the next question is, whether the Charter art 21 and art 12 are applicable in a case between private parties. The claimant argues in this regard, that the Charter is directly horizontally applicable according to both case-law and academic literature.

¹⁷ The Charter, art 21.

The *AMS*¹⁸ case gave reason to believe, that some articles in the Charter can be directly horizontally applicable¹⁹. In *AMS* the workers' right to information and consultation within the undertaking was not horizontally applicable, since it in art 27 of ECFR is laid down that:

“Workers must be guaranteed information and consultation in good time under the conditions provided for by Union law and national laws and practices.”

As such, the conditions were subject to implementation by the member states, which could differ accordingly.

In the case this resulted in the article not being:

*“sufficient in itself to confer on individuals an individual right which they may invoke as such”*²⁰

This leaves room for some articles to be sufficient in themselves confer on individuals rights which they may invoke as such. This argument is also broached in academic literature for example Steve Peers:

*“The old argument that the Charter can never apply to private parties at all, since Article 51 of the Charter (which sets out its scope) states that it is addressed to EU institutions and other EU bodies, plus the Member States only when they implement EU-law - and so implicitly not to private parties - has surely been rejected by the Court here. While the Court does not reject this argument expressly, its judgment obviously assumes that the Charter can apply to private parties in some cases, otherwise why distinguish between Articles 21(1) and 27 of the Charter”*²¹²²

¹⁸ *AMS*.

¹⁹ The general principle regarding age which is horizontally applicable in *Mangold* is also enshrined in the Charter and can be used horizontally see *Kücükdeveci* and *Ajos* .

²⁰ *AMS* para 47.

²¹ Peers, Steve.

²² Other academic writers have broached this interpretation including *Frantziou, Eleni*: *“The Court has not discussed this issue in its recent case-law. However, it has indicated that certain provisions may be capable of being applied horizontally, suggesting that horizontal effect does fall within the Charter’s scope. See AMS, n 4 supra. “ p. 659 and Sever, Saša*: *“Association de médiation sociale is the rst case which gives minimum criteria for distinguishing the provisions of the Charter which have horizontal effect from those which do not have such effect. The distinguishing criteria which can be deduced from that case are whether or not a provision of the Charter is ‘sufficient in itself to confer individual rights on individuals’”* p. 63.

It is clear from *AMS*, that for an article to be “sufficient in itself to confer on individuals an individual right which they may invoke as such”, it must not require “*more specific expression in European Union or national law.*”²³. How this is determined the case does not specify.

Art 21 contains a negative obligation not to discriminate, it is clear, precise and does not have any reservations requiring further implementation by Member States to be implemented. This fits with the test we have to determine whether a provision on Treaty level is capable of having direct effect.

In *Van Gend en Loos*²⁴ the test for direct effect for Treaty provisions was first established. In it then art 12 of TEU was given direct effect, because

“it was a clear and unconditional prohibition with not a positive but a negative obligation. The obligation, moreover, was not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law”.

Each of the deciding factors from the case are fulfilled by to art 21. It is a clear, unconditional, negative obligation which requires no further implementation in national law to be effective. The application of the only test we have thus far, means that art 21 is sufficient to confer on individuals an individual right which they make invoke as such.

Next up it must be assessed if this right can be invoked horizontally, between two private parties.

Against the Charter having horizontal effect, the wording of who the addressees of the Charter is could be alleged. Art 51,1 states regarding the field of application that:

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”

²³ *AMS*, para 45.

Nonetheless, the fact that the Charter art 51 points to Member States only when they are implementing Union law as addressees is not completely excluding horizontal effect. Firstly, the wording does not expressly preclude this, since there is no mentioning in the text that horizontal effect can not be given to articles in the Charter. Secondly, the court has circumvented this kind of language before, opting to maximizing individual rights in favor of restrictive interpretation.²⁵

In *Defrenne* where concerning Treaty provisions addressed to Member States it was established, that:

“Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down²⁶.”

The claimant has as an individual and a clear interest in having the court uphold his charter given right, and so the exact same consideration that was present in *Defrenne* is present with regard to the Charter right. It is a Treaty level individually conferred right, which should not be limited by a formalistic interpretation.

It is sound legal reasoning that the Charter art 21 in this particular case should be given direct horizontal effect. The Charter is on Treaty level see TEU art 6, and the article meets the criteria set out in *Van Gend en Loos* for articles conferring rights onto individuals on Treaty level. It covers a clear and precise negative obligation not to discriminate. It is clear because it creates a specific unambiguous obligation when it comes to the extension of the internal law in a matter that directly affects the nationals. Art 21 in the Charter is not affected or qualified by any other provision of the Treaty. It is also a complete and self-sufficient provision since it does not require any new measure to give concrete form to the obligation on a Community level. The Charter is on Treaty level, and confers rights onto individuals, rights which would otherwise be hollow if not enforceable. These rights, which the Charter was made to, strengthen the protection of, according to the preamble.

It must further be mentioned that it is stated in the preamble that: *“enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations”*. Therefore, the preamble presupposes some form of obligation on private actors.

²⁵ Inspired by Frantziou, Eleni p. 659.

²⁶ *Defrenne*, para 32.

A necessity for rights to be effective for individuals, is the main argument used by the court to give Treaty level rights horizontal applicability in case-law:

“The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.”²⁷

And it is the exact same reasoning the claimant argues in this case.

A formalistic literal interpretation of the provision should not limit the effectiveness of a fundamental right to freedom. The principle of effectiveness, *effet utile*, has been part of the ECJ case-law since the early 60's of the last century,²⁸ and has been essential in the protection of fundamental freedoms for individuals. It has thus far been clear that *“equal treatment and working conditions have been traditional forums for the application of horizontal effect”²⁹* in EU case-law.

Claiming that an article protecting the fundamental right to equal treatment should be given horizontal effect is very much in trend with the courts reasoning regarding horizontality. It is the logical next step in the evolution of the union, building on a tradition started more than 50 years ago.

For all these reasons combined, art 12 read in conjunction with art 21 is applicable in cases between privates.

7.4.4 No objective reason for discrimination

It has been established, that art 21 in the Charter prohibits discrimination on the basis of union membership and non-union membership. Any type of discrimination based on non-union membership is then a breach of art 12 and art 21 in the Charter.

In this case, the differences in wages is differential treatment based on union-membership, and constitutes a discrimination. A 10 % difference in wages is discrimination in breach of the negative freedom of association. This occurs when the remuneration is in breach with the principle of equal treatment for equals. The claimant is being paid 10% less because he is not a member of a trade union. This can be read from the fact

²⁷ *Defrenne*, para 33.

²⁸ Pótorak, Nina page 40.

²⁹ Frantziou, Eleni p. 676.

that all employees associated in trade unions earn adequately more than those employees who do not belong to a trade union.

A breach of the equal treatment principle may be justified by reasons unrelated to the ground of discrimination. In *Jämställdhetsombudsmannen* it was clear, that when discrimination on grounds of sex had been found in breach of the EU-law, it would remain in breach:

“unless the measure in point [the discrimination] is justified by objective factors unrelated to any discrimination based on sex”³⁰

Transferring the reasoning to the case at hand, the only way to objectively justify the discrimination, would be by objective factors unrelated to any discrimination based on union membership.

The objective justification for the discrimination provided by the defendant is, that somehow trade union membership merits a 10% increase in pay just because. There is given no other justification than the statement that unionized members earn “adequately more”.

The discrimination is not justified by objective factors unrelated to any discrimination based on union membership. If a justification was given, the objective justification would have been subject to an analysis of whether the discrimination was proportional to the intended purpose. However, since there is not given an objective justification, there is no need for a proportionality test.

To sum up, the discrimination on basis of trade union membership is in breach of the Charter art 12 and art 21, since no objective justification is given.

7.5 Arguments Claim 3

7.5.1 The claimant has a right to compensation

As stated in paragraph 7.1 and 7.2 above, the claimant is a posted temporary agency worker, the Polish court has jurisdiction to hear this case and Polish Law applies.

Under PLC art 97 the employer is obliged to issue a work certificate to the employee immediately upon expiry of the employment relationship. This provision has no effect if it does not express an

³⁰ *Jämställdhetsombudsmannen*.

obligation to issue a correct work certificate. Therefore Max Job was obliged to issue a correctly filled out work certificate, which they did not.

As a consequence the claimant has a right to be compensated according to PLC art 99.

7.5.2 Not a matter of EU-law

This is not a matter of EU-law because the Polish provision aims to protect Polish employee's entitlements and social security entitlements.

The defendants may argue that the national law about work certificate is a restriction to the free movement of services and workers. It could be argued that it is a hindrance for the employer to have to present a certificate after termination of employment. But the obligation is not targeted at non-Polish employers. The obligation requires both Polish, Cypriot and any other employer to provide the certificate. This means that the rule is not directly discriminating on grounds of nationality, restricting the free movement of services and workers.

However, another way to argue the certificate being a hindrance is to argue that it indirectly hinders Polish temporary agencies' ability to provide services to companies outside of Poland. A Polish temporary agency will be dependent on the user undertaking providing the information, but bearing the full risk of the compensation as employer. Furthermore, it would, all things being equal, be harder to pursue legal action against a reluctant non-Polish user undertaking hesitant with providing the information than it would be to pursue a Polish user undertaking. This constitutes an indirect hindrance for Polish undertakings discouraging them to provide services to non-Polish undertakings.

The provision could also be thought of as a hindrance from a prospective user undertaking's point of view. It is a hindrance for a user undertaking to have to provide the information to the Polish temporary agency at the termination of a temporary agency worker's posting. The provision constitutes an administrative burden on the user undertaking, which might indirectly affect prospective user undertaking's willingness to have Polish undertakings provide services.

The above hindrance is not of material significance and is not liable to prohibit, impede or otherwise make the supply of services less attractive. It is established in case-law³¹ that there is a lower limit for restrictions and in this case the restriction is non-essential.

³¹ *Viacom Outdoor*, para 38.

7.5.3 Justification of restrictions

Even if the court should find that the national law is indeed a restriction to the free movement, the restriction can be justified. EU case-law has made it clear, that for a restriction to be justified, the restriction must pursue a legitimate objective compatible with the Treaty and must be justified by overriding reasons of public interest. The restriction must be suitable for securing the attainment of the objective which it pursues, and must not go beyond what is necessary in order to attain it, meaning it must be proportionally appropriate.³²

The objective of the certificate is a protection of employee's entitlements and social insurance entitlements. This can be read from the provision in The PLC art 97,2, as the work certificate

"provides information on the period and type of the work performed, job positions held, the manner of the termination or the circumstances of the expiry of the employment relationship as well as other information necessary to establish the employee's entitlements and social insurance entitlements."

The first question is, whether the protection of employee's entitlements and social security entitlements are pursuits of legitimate public interests compatible with EU aims.

In *Arblade* it was settled that a protection of workers and social security interest are legitimate public interests compatible with EU aims. This means, that the restriction is a legitimate public interest, as it concerns the protection of workers.³³

It is then necessary to establish whether the protection of workers is already protected by the rules of the Member State in which the service provider is established.³⁴ Art 97 is the provision in Polish law which protects the legitimate public interest of employee's entitlements and social security insurance entitlements. This means that there is not already a protection of workers in the national Polish Law apart from the Labour code art 97.

In order to establish whether the provision is appropriate in achieving its aim it must next be considered whether the restriction confers a genuine benefit on the workers concerned, which significantly adds to their social protection.

³² *Laval*, para 21; *Servizi*, para 37, and *Cipolla*, para 61.

³³ *Arblade*, para 36 "The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers".

³⁴ *Arblade*, para 39.

Art 97 in the PLC provides an increased protection of the employee's entitlements and social security entitlements, which is a genuine benefit. This is because the regulation guarantees compensation if not all information necessary to establish the employee's entitlements and social insurance entitlements are provided by the employer immediately after termination of employment. Without art 97, the employee would be exposed at the end of an employment relationship. The employee is completely dependent on the employer to quickly provide the information necessary to establish the employee's entitlements and social insurance.

The provision is made to protect the employee at the time when he is most vulnerable because he is without a job. At the time of termination of the employment relationship, the employer feels no obligation towards the employee, and might not be inclined to expedite the information immediately. The employee's right to compensation, which is a penalty to the employer, gives the employer an incentive to provide the information immediately.

This protects the worker very well after termination no matter the cause of the termination. The worker is with the protection in the provision not in a vulnerable situation after a bad ending to a employment relationship.

As such, the restriction is suitable to achieve its aim, which is an increased protection of the worker's right to all necessary information regarding entitlements and social security entitlements at termination of the employment relationship.

Finally, it must also be examined if the same result can be achieved by less restrictive rules, if it is proportionally appropriate. The national court should balance the administrative and economic burdens that the rules impose on providers of services against the increased social protection that they confer on employers.³⁵

As argued, the provision is made to protect the employee at the time when he is most vulnerable. The information on the work certificate is necessary for the employee to collect his social insurance and entitlements; it is information necessary for an employee's livelihood. Therefore it is necessary for the provision to oblige the employer to deliver the information right after the termination of the employment relationship, since it is naturally needed at the time of the termination. It cannot be postponed in any way without significant loss for the employee. It can be discussed if the compensation for not providing the information is disproportionately high. However, it is limited to six weeks' remuneration, which can be limited under the employer's discretion. The compensation is easily limited by the employer, since the information needed

³⁵ Arblade, para 35.

for the employer to live up to his obligation is insignificant and readily available to him. It is not new information, but information that is readily available for the employer.

On these grounds it is argued that the restriction protecting the worker's social security is not disproportionate to its objective.

Finally, the restriction must also respect fundamental rights in the EU community. Not only is the restriction not an infringing of fundamental rights, it follows the same aim as the fundamental right guaranteed in the Charter art 34.

In summation, the restriction is objectively justified, and therefore it is not an infringement of EU-law.

8 Pleading

The claimant is entitled to remuneration for unpaid overtime, see the PLC art 151¹, 1.

The claimant is also entitled to 10% of his pay, since his lower wage was in direct violation of The Charter art 21.