

Collective Labour Rights for posted workers and migrants

Symposium to Stein Evju – November 2, 2016

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1. Migrant workers in the EU:

All EU-workers enjoy freedom of Movement in the EU, Art. 45 (2) TFEU:

includes a ban on discrimination against migrant workers and - according to the Court - on restrictions

→ Equal treatment for migrant and domestic workers in the EU



Which rights are concerned?

- terms and conditions of work (individual rights), (Article 7 (4) Reg. 492/ 2011)
- collective labour rights, including the right to organize and bargain collectively (Art. 8 Reg. 492/ 2011)



Who is a migrant worker?

- a person who is or has been engaged in a remunerated activity in a State of which they are not a national



Posted workers:

- a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works,
- → basically, posted workers are migrant workers which migrate internally (= in the EU) for a specified period of time



Applicability of the Equal Treatment Principle?

- General exemptions to the basic prohibition to discriminate because of nationality Art. 45 (3), (4) TFEU do not concern posted workers.
- But: according to the Court, in the situation of posting, workers do not exercise their freedom of movement but moving due to their employer's freedom to provide services ("Rush Portuguesa", para. 15)

Consequences: equal treatment principle inapplicable



Posted worker's individual labour rights:

- basic approach:
terms and conditions of working in the host country are those applied in the home country
→ Independent from the worker's length of stay in the host country, as long as posting is not the sole purpose of the employer's business
(CJEU, C-465/02 "Trojani", para. 27)
- Corrections by PWD:
→ Some minimum working conditions as defined by the host country also apply to posted workers, Article 3 PWD



Posted worker's collective labour rights:


- Article 45 TFEU is not concerned/
 - PWD does not regulate collective labour rights
- Collective Bargaining has to be justified against the employer's freedom to provide services.

Collective agreements aim at improving working conditions for posted workers; they become suspect of rendering cross-border provisions of services less attractive



Consequences:

disapplying the equal treatment principle to some migrant workers by treating them as a specialised group (= posted workers) is even more detrimental to collective rights than to individual labour rights.



Reasons for special treatment of posted workers:

CJEU: posted workers do not gain access to the labour market of the host State (Rush Portuguesa).

→ What constitutes a State's labour market: only contracts concluded with domestic employers, or also work provided for business purposes of domestic employers?



Convincing argument?

- The freedom of movement protects workers from discrimination for making cross-border movement no less attractive than internal work
- The freedom to provide services protects providers from having to pay higher wages to prevent making cross-border services less attractive.



Conclusion:

there is an in-built conflict of interests between two fundamental freedoms which cannot be overcome by stating that one of the two is not applicable.

For collective labour rights, a solution still has to be found.



International law on posted workers as migrant workers

1. Conflict of Laws, Article 8 (2) Rome I-
Regulation: temporarily working in a different country does not change the application of the law of the country where the work is habitually carried out
- Temporarily working abroad is different from migrating to another country,
if the cross-border work is indeed carried out for a limited period of time



Conclusion:

Whether or not posted workers are to be treated different from migrant workers depends on their staying abroad “temporarily”.

It does not suffice that the employer sending the worker cross border

- changes, while the worker remains abroad
- is contractually entitled to order the worker to come back while in reality, the worker remains abroad



2. The European Social Charter

migrant workers are persons engaging in remunerated work in a State of which they are not nationals → no exclusion of posted workers.


→ during their stay, the host State has to guarantee equal treatment with their own nationals, also concerning collective labour rights.

3. ILO Migration for Employment Conventions No. 97 (1949), Article 6:

Equal treatment with the State's own nationals in all perspective has to be guaranteed, but for exemptions (Article 11 (2)), including:

frontier workers/ short-term entry of members of the liberal professions and artists/ seamen

→ no general exemption for posted workers

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4. UN International Convention on the Protection of All Migrant Workers (1990), Article 2:
- basically: equal treatment has to be guaranteed.
 - specific rules for
 - “project tied workers” (Article 2 (2) f)
 - “specified employment workers” (Article 2 (2) (g)).
 - for specific groups defined by their restricted period of stay in the host country, not all aspects of equal treatment are applicable
- the right to form and join trade unions in the host State for the protection of their interests is to be guaranteed also to the special groups, Article 40.



Conclusion:

at international level, collective labour rights are not to be totally withheld from workers staying for a limited period of time in a foreign country.

- Limitations to equal treatment are justified in case of a short stay.
- Basically, also collective rights are to be equally provided.

For short term migrants, relevant comparators remain colleagues in the sending State.

For longer periods of stay, posted workers are to be compared to co-workers in the host State.