HUNGARIAN LABOUR LAW
E - J O U R N A L

Flexible separation

Termination of the employment contract in agency work

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The regulation on the termination of the employment relationship is always debated. An essential guarantee for employees' job security might appear to be a disproportionate burden on the employers' side. In Hungary the major part of employment disputes is about termination. Thus the rules on termination deserve high attention also in case of agency work. This paper examines the possible reasons of special regulation on agency work which differ from the general rules and criticizes in details some provisions which cannot be underpinned by the special structure or function of agency work. The paper's aim is to show what caveats might appear if an atypical form of employment falls under special rules solely for the sake of flexible employment.

The possible reasons of the more flexible rules

The 1992 Labour Code[1] contained radically different rules on the cessation and termination of the employment relationship of agency workers than in the case of ordinary employees.[2] The legislator aimed to reach flexibility through deregulation, meaning that it demolished some general rules which it found to be stringent.[3] The most important specialities are the following:

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[1] Act XXII of 1992.
[2] Berke Gyula, Kiss György (2012): Kommentár a munka törvénykönyvéhez. A munka törvénykönyve magyarázata. Budapest, Complex Kiadó, p. 625.
[3] Gyulavári Tamás (2010): Szürke állomány. A munkaviszony és az önfoglalkoztatás közötti jogviszonyok Európában és Magyarországon. Habilitációs értekezés, kézirat. Budapest, p. 76.

agency workers were not eligible for severance pay, the notice period was shorter, the rules of collective dismissals were not applicable and also the protections against dismissal were put aside until 19 June 2009. Besides, the agency's liability for unfair termination was slighter than the liability of a typical employer. [4] Many problems ensued from the application of these provisions, for the special prescriptions were unfounded and inconsistent in many cases.[5]

The ministerial reasoning of Act XVI of 2001 – the law which introduced agency work into Hungarian labour law – contained the following reasons for more flexible rules on termination. Temporary work agencies can only operate economically if they employ the number and types of employees which are demanded on the market. In the agency industry sudden increase in workforce or unexpected downturns are both common which calls for flexibility in managing the number of personnel. It would mean a serious financial burden if in such cases the agencies had to respect the traditional employment relationship's rules on termination. The legislator found the more flexible rules valid also from the employee's aspect, as such rules guarantee that agencies employ continuously different employee groups who can escape long term employment this way and get at least temporary jobs. All in all, the legislator reasoned flexible termination by the nature of the agency's business and the possible 'springboard effect' agency work might play in helping unemployed people to get back to the labour market.

The Constitutional Court gave a detailed assessment of the rules on termination in agency work in its decision no. 67/2009. (VI. 19.). The Constitutional Court described agency work as a form of temporary transfer of labour force, a three-way employment relationship where the two basic employer's obligations stemming from employment – that is to pay the wage for work and to provide work for the employee – were placed to two different employers. Thus the agency pays wage for a work which was not performed for it but for a third entity, chosen by the agency. This means that in agency work it is less predictable to provide work and continuous employment for the worker, as it depends on factors which fall outside the agency's own operation. Such condition is also known by agency workers as they chose agency work by free will, even if this choice is influenced by their employability and position in the labour market. The Constitutional Court found the special construction of employment a crucial difference from the standard form of employment relationship, thus ruled that the more flexible rules on termination (except the exclusion of protections against dismissal) were valid.

[4] 1992 Labour Code Article 193/P (1), 193/J (4), 193/M. The exclusion of protections against dismissal was found to be unconstitutional, see Constitutional Court decision no. 69/2009. (VI. 19.).

[5] For a similar opinion, see: Kenderes György (2006): A munkajogviszony kényszerű létrejövetelének vitatható kérdései a munkaerő-kölcsönzés körében. *Munkaügyi Szemle,* 2006/6. p. 168.

The importance of the above decision is that it traced out the framework for the regulation of atypical employment relationships. Searching for flexibility shall not harm the fundamental rights of employees and the principle of equal treatment shall always be respected. Differentiation without reasonable causes is prohibited. If the nature or function of the special employment form does not underpin the more flexible rules, it is contrary to the constitutional prohibition of discrimination.

However in my view the Constitutional Court did not follow this reasoning all along the road as it could have been grounds to declare even further rules unconstitutional. For example, the Constitutional Court accepted that the agency's liability for unfair termination was slighter than the liability of a typical employer. The decision ruled that the distinction was necessary as agency work demands more flexibility. Nonetheless, the Constitutional Court also pointed out that the legislator cannot define sanctions for breaching a contract which are obviously too severe or discriminative. In my understanding this standard could easily led to declaring the mentioned rule unconstitutional. Moreover, there is nothing in the special structure of agency work that would justify agencies falling under a more favourable regime than other employers in cases of unfair termination.

The ministerial reasoning and the arguments in the Constitutional Court's decision need one more comment: both documents presuppose that the assignment at the user company is temporary, which was not evident in the Hungarian regulation. Probably the most important effect of harmonising directive 2008/104/EC on temporary agency work was limiting the time of assignments,[6] even if the maximum was defined as unprecedentedly broad as five years.[7] The longer tenure the agency worker has at the user company, the closer we get to traditional employment and the less we can argue for more flexible rules on termination.

One of the merits of the new Labour Code[8] – coming into force in 2012, three years after the Constitutional Court's decision – is that it eliminated most of the redundant, unfounded discrepancies, unjustified by the specialties of temporary agency work.[9] Nevertheless, the legislator still seems to consider agency work as a flexible form of employment and the regulation contains provisions which cannot be explained by the special nature of agency work. First I examine the rules on the termination of the agency worker's employment which stem

[6] Bankó Zoltán (2013): Atipikus munkaviszonyokra vonatkozó EU irányelvek harmonizációja Magyarországon. HR-Munkajog, November 2013 p. 17.

[7] Horváth István (2014): Így harmonizálunk mi. Az új Munka Törvénykönyve munkaerő-kölcsönzésre vonatkozó – az EU-követelményekre is figyelemmel – megállapított szabályairól. Magyar Munkajog E-Folyóirat 2014/1. p. 154–156.

[8] Act I of 2012.

[9] Besides the regulation became less detailed. Bankó (2013) ibid p. 18.

from the nature of this legal institution, thus which shall be upheld. Then I turn to those provisions which lack such theoretical support.

Special rules stemming from the nature of agency work

The proposed text of the new Labour Code would have prescribed the application of the rules on collective dismissals in the case of temporary agency work, but this was eventually left out from the final version.[10] I cannot but agree with this correction. It is quite common in the practice of agencies that they lay off a large number of employees at the same time. For example, a user company terminates the assignment of 300 agency workers sending them back to the agency, which will probably dismiss most of them. These layoffs are not extraordinary but are much rather part of the ordinary course of agencies' business. Hence, applying the administrative obligations of collective dismissals would cause significant burdens. Moreover, since the user company can immediately send back a high number of employees, it would be impossible to inform the effected workers in advance about the planned dismissal. Nonetheless the scope of directive 98/59/EC on collective redundancies also embraces temporary work agencies, thus in my view the otherwise reasonable Hungarian rule is incompatible with EU law.[11]

The following special rules are also based on the divided employer's position. Splitting the employer's rights and obligations among the agency and the user company is never an easy issue. As an American author pointed out, some obligations necessarily 'disappear in the haze'.[12] Turning to termination, such haze is apparent as the employment relationship stands with the agency who exercises the right to terminate, however it is the user who is aware of the basis of such action (e.g. employee's performance, behaviour). As usually the user can monitor and prove the employee's breach of contract, it should also bear some responsibility for termination. Thus it is the nature of agency work which calls for special rules on termination.[13] While it is the untransferable right of the agency to terminate the employment relationship – and accordingly, the employee shall address its own dismissal to the agency[14] –, the Labour Code refers to the user company's role at one point. The law requires the user to notify the

[10] Labour Code Article 222 (4).
[11] Berke, Kiss (2012) ibid p. 626.
[12] Gonos, George (1997): The Contest over „Employer" Status in the Postwar United States: The Case of Temporary Help Firms. Law and Society Review, Vol. 31. No. 1, 1997 p. 86.
[13] Rodríguez, Miguel C.; Royo, Pinero (2004): Spain. In: Blanpain Roger (editor): Temporary Agency Work and the Informational Society. (Bulletin of Comparative Labour Relations). Kluwer Law International, p. 176.
[14] Labour Code Article 220 (6).

agency in writing concerning any infringement on the employee's part within five working days from the time of gaining knowledge. In this case the time limit to dismiss the employee without notice commences upon the delivery of this information.[15]

It has to be pointed out that this rule focuses only on the time frame for delivering legal acts,[16] but it does not mean that the user is obliged to give information.[17] No surprise that in practice user companies only send back the unnecessary agency worker to the agency and ask for substitution, but do not give details reasons. Otherwise the user would be responsible for the authenticity and substantiality of the reasons if the agency dismisses the employee on those grounds.[18] Nonetheless, this brings the agency into an insolvable situation as it cannot be aware of the circumstances even in the case of the gravest employee's infringement to issue a dismissal without notice and escape its legal risks. This problem might be avoided if the user agrees in its contract with the agency to support it with the necessary information if the employee's dismissal might be necessary and takes legal responsibility for the content of such information.

The following rules also stem from the three-way structure of agency work. The agency shall not employ the agency worker directly, thus unless otherwise agreed, the employee shall be exempted from work during the entire notice period if the agency dismisses him/her.[19] The employee may terminate the employment relationship without notice if the infringement is committed by the user enterprise (e.g. the user breaches the basic obligations concerning workplace health and safety).[20]

There are always examples for obligations 'vanishing in the haze'. An illustration may be the protection against dismissal for parents with a young child and for workers facing retirement. The employment relationship of these protected groups may be terminated in connection with workers' ability or for reasons in connection with the employer's operations only if the employer has no vacant position available at the workplace suitable for the worker affected or

[15] Labour Code Article 220 (5).

[16] The interpretation of these time limits is also debated in the literature. Gyulavári Tamás, Hős Nikolett, Kártyás Gábor, Takács Gábor (2012): A Munka Törvénykönyve 2012. Egységes szerkezetben állásfoglalásokkal és magyarázatokkal. Kompkonzult Kiadó, Budapest p. 307–308.; Kardovács Kolos (editor) (2012): A Munka Törvénykönyvének magyarázata. Budapest, HVG-ORAC, p. 405.

[17] Also in general, the temporary agency work contract between the agency and the user means no legal basis to transfer the employee's personal data. Kovács Szabolcs, Takács Gábor (2014): A munkaerő-kölcsönzési szerződés tartalma és a kölcsönzött munkavállalók személyes adatainak kezelése. HR-Munkajog, May 2014 p. 10.

[18] Kártyás Gábor; Takács Gábor (2008): Munkajogi problémák kölcsönbe. Avagy jogértelmezési és jogalkalmazási nehézségek a munkaerő-kölcsönzés hatályos szabályozásában. Munkajog Kérdések és Válaszok, Vol. 4. No. 10.

[19] Labour Code Article 220 (3). The general rule prescribes exemption only for the half of the notice period.

[20] Labour Code Article 220 (4).

if the worker refuses the offer made for his/her employment in that job.[21] The question is how to interpret the term 'workplace' in the agency work scenario. Is it the actual (or the last) place of assignment or the agency's whole sphere of operation?[22] The two different answers lead to two very different level of protection. In my view the dilemma needs to be solved by the legislator.

Differing rules raising concerns

Dismissal – without substantive reasoning

The consequences of the assignment's termination changed dramatically. The 1992 Labour Code prescribed that the employer may dismiss the employee based on the lack of assignments only in case its attempts to hire out the worker remained unsuccessful for a consecutive 30 days.[23] This rule was in fact a very important guarantee for the employee. Accordingly, the agency was not allowed to dismiss the employee based on the mere fact that he had not been assigned to any users for 30 days calculated from the end of the last assignment. These 30 days had to be covered with basic wage.

This rule clearly demonstrates the speciality of agency work: the employment relationship may embrace more assignments spent in various user companies. The agency worker is obliged to work for the user company selected (contracted) by the agency, but from the agency's aspect this right is also an obligation. During the employment relationship the agency shall ensure that the employee is employed by user companies. This way, agency work provides a wide range of opportunities for the employee to gain experience in different organisations. The '30 days rule' ensured that agency work covered more assignments – at least the agency was motivated to manage further assignments –, thus the worker could fully exploit these advantages.[24]

Nonetheless, despite the theoretical reasonability of the 30 days rule, it also raised many practical problems. This is due to the fact that the regulation was very laconic, failing to provide for the necessary details. For example, it was not clear what sort of assignments had to be offered to the agency worker (e.g. as regards pay, place of work) and the calculation of the 30

[21] Labour Code Article 66 (4–6).
[22] Kovács Szabolcs (2013): Az 1992. évi Mt. bírói gyakorlatának továbbélése – a munkaerő-kölcsönzés szabályai. HR-Munkajog, March 2013 p. 20–21.
[23] 1992 Labour Code Article 193/J (3).
[24] Mária Burik called this the 'illusion of security' in contemporary labour markets. Burik Mária (2013): Milyen irányba halad a munkaerő-kölcsönzés? Eredeti célok és újfajta utak a közszférában is. HR-Munkajog, March 2013 p. 23.

days was also blurry (e.g. whether periods when the employee cannot be obliged to work – such as sick-leave, paid holiday – needed to be taken into account or not). [25]

In my view the 30 days rule was – despite the lack of details – an exemplary provision of temporary agency work in Hungary. By lengthening the period of employment by 30 days following the end of the last assignment, it significantly raised the chances of a new assignment, ensuring that the possible advantages of agency work may also be realized on the employee's side. This is why it is unfortunate that the new regulation eliminates this prescription replacing it by a solution which serves the sole interest of the employer and may be objected also from a constitutional perspective.

According to the new Labour Code, the termination of the assignment is to be considered as a reason related to the operation of the agency and as such a valid reason for the dismissal.[26] Hence, turning the former regulation the other way round, the agency can immediately dismiss the employee after the assignment ends by simply referring to this fact. Therefore, in practice the end of the assignment also means the end of the employment relationship, which is very unfavourable for agency workers.

It must be pointed out that in such a situation the reason for the dismissal will be that the hiring out (the assignment) of the employee has ended.[27] The dismissal itself does not have to include the reason why the assignment came to an end (for example, the user company needed fewer employees or the employee performed badly or violated its obligations, etc.). This way, the employee will not be able to question the legality of the dismissal, as the termination of the assignment by law is a valid reason in itself for the termination of the employment relationship and it is not required that the reasoning include why the assignment ended. Moreover, the termination of the assignment is a circumstance which may be caused by the agency itself (for example, by calling back the employee and replacing him by another worker or through the termination of the contract concluded with the user company). The user and the agency are not even required to inform the employee on which of them terminated the assignment.[28]

As for an example for the first scenario, in a recent case the labour court rejected the agency worker's claim of unlawful dismissal. The employee's assignment was terminated because his

[25] See in details: Kártyás, Takács (2008) ibid p. 30.; Takács Gábor (2010): Mit tehet a kölcsönbeadó, ha a kölcsönvevő visszaküldi a munkavállalót? Avagy mennyire is rugalmas a munkaerő-kölcsönzés? Humán Szaldó, March 2010.

[26] Labour Code Article 220 (1). It is debated in literature whether this rule also applies in fixed term employment relationships or not. Kardkovács (2012) ibid p. 403.

[27] Which also means that this reasoning may not be applied if the assignment ends only after the dismissal (e.g. at the end of the notice period). Kardkovács (2012) ibid p. 402–403.

[28] Gyulavári, Hős, Kártyás, Takács (2012) ibid p. 306.

supervisor found a protective glove in his bag when he was about to leave the user's premises at the end of his shift. The next day the agency dismissed him on the grounds that his assignment ended. The labour court ruled that the court could assess only whether the assignment was actually terminated but it was irrelevant why the employee was no longer welcome at the user. The dismissal's legality could have been called into question only on the grounds of equal treatment or abusive exercise of rights.[29]

In my opinion, considering the termination of the assignment as a valid reason for the dismissal basically means termination without reasoning. By comparison, the former rules on the termination of civil servants' employment without reasoning were deemed unconstitutional by the Constitutional Court in 2011.[30] Among the reasons for unconstitutionality, the following deserve attention also with respect to agency workers.

The Constitutional Court declared that the legal rules on the obligation to give reasons in case of unilateral termination by the employer are guarantees of constitutional importance related to the right to work.[31] Hence, it is against the right to work, when the employment relationship concerning subordinated work may be terminated unilaterally by the employer without proper reasons. According to another argument of the Constitutional Court, there is no efficient legal protection against the employer's dismissal if the notice does not contain reasons. Even if the unreasoned dismissal can be contested in court, the failure to provide reasons restricts the worker's right for effective legal protection by court.[32] Finally, due to the lack of reasons, the mere subsistence of the worker and his family can be endangered in an unpredictable way, resulting in an absolute subordination to the employer. As the Constitutional Court ruled, considering employees as subordinated 'tools of task solving' is against human dignity.[33]

The above case with the allegedly stolen protective gloves illustrates well all these concerns. Since the termination of the assignment cannot be considered a proper reason to dismiss agency workers, the current regulation does not offer adequate protection for their right to work or human dignity and also leaves the workers without effective judicial protection. All in all, the new law replaced an exemplary rule by a solution which can be objected even on constitutional grounds.

[29] 4.M.503/2013/9. For a detailed assessment, see: Kovács Szabolcs: A kikölcsönzés megszűnése mint felmondási indok – egy bírósági ítélet tükrében. HR-Munkajog 2014/5. p. 27–28.
[30] Constitutional Court decisions No. 8/2011. (II. 18.) and 29/2011. (IV. 7.).
[31] Constitution Article M and Article XII.
[32] Constitution Article XXVIII.
[33] Constitution Article II.

Notice period and severance pay

The legislator's intend to make agency work more flexible is especially apparent in the rules on remuneration due at the end of the employment. Agency workers fall under less favourable rules than directly employed employees as regards the length of the notice period and severance pay, however such distinction may not be underpinned. What is deprival of rights on one side forms direct financial benefit on the other. For instance, an agency worker's dismissal after three years of tenure might cost one and a half months absentee pay less than in the case of a directly employed colleague.

According to the 1992 Labour Code, the notice period in case of temporary agency work was 15 days, or 30 days in case of an employment lasting longer than one year. The proposed text of the new Code foresaw the application of the general rules on notice periods to agency workers, resulting in a significant increase in its length. By comparison, according to the final text, the length of the notice period applicable to agency work is uniformly 15 days in all cases.[34] According to the 1992 Labour Code the length of the notice period (15 or 30 days) depended on the duration of the employment relationship and even if it was shorter than foreseen under the general rules, this was not objected by the Constitutional Court.[35] The Constitutional Court held that the specialities of temporary agency work justified the shorter notice period only in case of short term employment, but the more permanent the employment the less well-founded the shorter notice period is. From this aspect, the uniform 15 day notice period seems to be a step back, violating the constitutional prohibition of discrimination. There is hardly any reason to apply a shorter notice period to an agency worker than another employee in standard employment in case both employees share long term tenure. As assignments can last up to five years, even agency workers could acquire such long tenure.

The proposed text of the new Labour Code would have changed the rules of severance pay in favour of the employees. The proposal originally prescribed that agency workers are entitled to severance pay according to the general rules, i.e. like all other employees. This would have been an important change, as the 1992 Labour Code never made severance pay compulsory for agency workers.[36] In my opinion, this amendment would have been reasonable. The role of severance pay is to support the employee in form of a special allowance in the transitional

[34] Labour Code Article 220 (2).
[35] See decision no. 67/2009. (VI. 19.).
[36] 1992 Labour Code Article 193/P (1).

period when her employment ended after a longer time through no fault of the employee.[37] The provision of such an allowance is also reasonable in case the employee worked as an agency worker. If the law excludes agency workers, it can be considered a peremptory distinction among different employees, since the role of the legal institution is justified also in case of temporary agency work. It is unfortunate that the legislator finally restricted the agency workers' right to severance pay. The rule finally adopted was obviously orientated by employers' interests. Accordingly, severance pay is due in agency work, however, its amount does not depend on the length of the employment relationship, but is calculated on the basis of the duration of the last assignment instead.[38] Temporary work agencies argue that this solution is reasonable as in the course of his employment with the agency the employee can work for more user companies and otherwise it would be questionable who should bear the expenses of severance pay.

This explanation totally flawed. Severance pay shall obviously be paid by the employer and not by one of its clients, not even if it can be identified for which client the employee has performed tasks during the employment relationship. For example, severance pay of a logistics administrator must be paid by its employer, for whom the work of the employee generated profit and not by the three companies whose logistics tasks the employee handled. The reasoning is the same for agency work. According to the current rule, the duration of the employment relationship preceding the last assignment is irrelevant from the aspect of severance pay. For example, if the last assignment lasted four months at the end of a five year long employment relationship, the agency worker is not entitled to severance pay. It is clear that employers can easily avoid this allowance and hamper its original function. It is incomprehensible why agencies grudge severance pay and longer notice periods from the employees working and generating profit for them for years.

Summary

Special characteristics of agency work calls for specific rules also on the termination of the employment relationship. The regulation shall be based on the following specific features: the employer's position is divided, the employment relationship might encompass more assignments and the user company enjoys limited employer's rights. The Hungarian Labour

[37] The European Court of Justice defined similarly the role of severance pay in the Andersen case [C-499/08. Ingeniørforeningen i Danmark v Region Syddanmark (2010) ECR 00000 para. 27–34.]
[38] Labour Code Article 222 (5).

Code contains a full set of special rules concerning termination. Sadly, these provisions – with only few exceptions – do not stem from the specialities of agency work, but – presumably for the sake of a more flexible form of work – define the framework of a simplified employment relationship. Such flexible rules nor can be underpinned by the divided employer's position, nor by the temporary nature of the employment.

In my view the legal regulation of the termination of agency worker's employment relationship needs full review. I suggest two basic aspects for that. First, rules on agency work shall differ from the ones applicable to the traditional employment relationship only if it is required by the essence of agency work. Second, differing rules cannot be underpinned solely by the need for flexibility, if it does not stem from the different nature of employment or comes with the adequate compensation of the employee. One shall not forget that the correlation between flexible rules on termination and growing employment is unjustified, moreover, in some cases it is traversed.[39] Demolishing labour law guarantees does not flatter with certified favourable labour market effects, however its disadvantages in decreasing employees' security appear immediately.[40]

[39] Gyulavári (2010) ibid. p. 67.; Lehoczkyné Kollonay Csilla (2007): A szerződési szabadság kérdései az ezredforduló munkajogában. In: Liber Amicorum. Ünnepi előadások és tanulmányok Harmathy Attila tiszteletére. ELTE ÁJK Polgári Jogi Tanszék, Budapest, p. 63. Langille, Brian (2006): Labour Law's Back Pages. In: Davidov, Guy; Langille, Brian: Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work. Hart Publishing, Oxford and Portland, Oregon, p. 32–33.

[40] The most recent alarming development in this tendency is the 'tagi munkavégzés' in social associations, which does not fall under any labour law regulation. For a detailed assessment see Ferencz Jácint's paper in the Hungarian version of this volume or: Lóródi László (2014): A munkaviszonyon túli foglalkoztatási viszonyok. Szociális szövetkezet, tagi munkavégzési jogviszony. HR-Munkajog, November-December 2014.