



C/2023/1432

18.12.2023

**Request for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain) lodged on  
12 July 2023 — LM v Omnitel Comunicaciones and Others**

**(Case C-441/23, Omnitel Comunicaciones and Others)**

(C/2023/1432)

*Language of the case: Spanish*

**Referring court**

Tribunal Superior de Justicia de Madrid

**Parties to the main proceedings**

*Applicant:* LM

*Defendants:* Omnitel Comunicaciones, S. L., Microsoft Ibérica, S.RL. Fondo de Garantía Salarial (FOGASA), Indi Marketers, S. L., Leadmarket, S. L., Fiscalía

**Questions referred**

- A) Whether Directive 2008/104/EC <sup>(1)</sup> is applicable to an undertaking which assigns a worker to another undertaking, even if the first undertaking is not recognised by domestic legislation as a temporary-work agency on account of the fact that it does not have the relevant administrative authorisation;
- B) Where Directive 2008/104/EC is applicable to undertakings which, without being recognised under domestic law as temporary-work agencies, assign workers [to other undertakings], if, in a situation such as that described above, the worker must be regarded as a temporary agency worker within the meaning of Article 3(1)(c) of Directive 2008/104/EC, must the undertaking Leadmarket S. L. be regarded as a temporary-work agency within the meaning of Article 3(1)(b) of that directive and must the undertaking Microsoft Ibérica be regarded as a user undertaking within the meaning of Article 3(1)(d) of the same directive; in particular, whether it may be understood that the undertaking Leadmarket retained the supervision and direction of the work (thereby precluding the existence of an assignment of the worker), on account of the fact that the director of that undertaking received a monthly activity report from the worker and also signed off the worker's leave, holiday and hours, even if the day-to-day provision of the worker's services consisted in attending to Microsoft customers, resolving incidents by frequently contacting Microsoft managers, and working from her home with a computer made available to the worker by Microsoft and attending the Microsoft workplace once a week;
- C) If it is the case that Directive 2008/104/EC is applicable and we find ourselves dealing with an assignment of the worker, whether, as a consequence of the application of Article 5(1) of Directive 2008/104/EC, the salary of the worker must be at least the same as she would be entitled to if she had been recruited by Microsoft Ibérica directly;
- D) Whether, in the circumstances of the case, the right of the worker, under Article 15 of Directive 2006/54/EC <sup>(2)</sup> of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, to return to her job or another equivalent position following maternity leave is applicable. And whether, even though the contract between Microsoft Ibérica and Leadmarket had ended, since there is no equivalent position at Leadmarket, the worker's return to work must take place at Microsoft Ibérica.
- E) Where Directive 2008/104/EC is applicable on account of the fact that we are dealing with an assignment, whether, as a consequence of the application of Article 5(1) of Directive 2008/104/EC, the Spanish legal provisions which establish the nullity of dismissal in the case of pregnant workers and nursing mothers must lead to the temporary-work agency and the user undertaking being declared jointly and severally liable for the consequences laid down by law for a dismissal that is null and void, specifically: reinstatement of the worker to her job, payment of the salary not received from dismissal to reinstatement, and the obligation to pay the appropriate compensation arising from the unlawfulness of the dismissal.

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<sup>(1)</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

<sup>(2)</sup> OJ 2006 L 204, p. 23.