Restatement of Labour Law in Europe

Volume II

Edited by
Bernd Waas and Guus Heerma van Voss

Assisted by Hendric Stolzenberg

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

ISBN: HB: 978-1-50991-247-6
ePDF: 978-1-50991-245-2
ePub: 978-1-50991-246-9

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

With financial support from the European Union

20

Atypical Employment Relationships: The Position in Luxembourg

JEAN-LUC PUTZ

I. INTRODUCTION

ATYPICAL FORMS OF employment are restricted in Luxembourg. The classic forms of atypical employment, such as fixed-term contracts or temporary agency work, are strictly regulated. Newer forms of atypical employment barely exist. Protection against unfair dismissal is also quite substantial. There is a strong political will to retain contracts of indefinite duration as the standard form of employment. The legislator aims to simplify the regulations for part-time work because this type of employment meets employees' needs or wishes in many cases.

The Labour Code (*Code du Travail*—'CT') establishes the legal framework. Collective agreements only play a secondary role in relation to atypical employment.

II. FIXED-TERM WORK

In comparison with most other European countries, Luxembourg's labour law is quite restrictive when it comes to fixed-term contracts (*contrat à durée déterminée*).[1] The standard type of contract is a contract of indefinite duration (*contrat à durée indéterminée*),[2] which represents more than 90 per cent of all employment contracts. This restrictive legislation was introduced in 1989[3] and since then, only minor changes have been implemented.

The general form of fixed-term employment contracts will be evaluated in this report. Within the context of employment policy and labour market

[1] HAAG Antoine, *Mesure empirique de la flexibilité du marché du travail luxembourgeois*, Les Cahiers du CEPS/Instead, Population & Emploi, Cahier No 2010-28, décembre 2010.

[2] Art L 121-2 para 1 CT.

[3] Loi du 24 mai 1989 sur le contrat de travail.

integration, different types of temporary contracts and traineeships do exist, but they are not considered employment contracts.[4]

A. Legal Definitions/Formal Requirements

All types of employment contracts must be concluded in writing; an employment contract must be signed at the latest on the date the employee starts working.[5] The employee can prove the existence of an employment relationship by any means. However, the law specifically provides that a contract of employment is irrefutably deemed to be a contract of indefinite duration if there is no written clause that specifies that it is a fixed-term contract.[6] Thus, if no such written clause is included, the contract will be deemed to be permanent. Oral agreements are of no validity.

A written clause on the fixed term must exist before the employee starts working.[7] Thus, in theory, a written fixed-term contract that is signed after the employee has started working will also have to be reclassified as indefinite. In practice, this is rarely the case, both because it is difficult to prove the date of signature and because such cases are not frequently brought before the courts.

Fixed-term contracts must include all mandatory clauses of general employment contracts,[8] as well as some additional information:[9]

— The objective reason why a fixed-term contract is being concluded. According to case law, this clause cannot be generalised, it must be specific and precise.[10] The court must, only by reading the clause, be able to determine whether the use of a fixed-term contract was justified and—if no specific duration is specified—determine when the contract ends. The specific and temporary character of the task must be clearly described in the clause. Judges do not accept general clauses (such as 'exceptional workload' or 'specific task'), but require the employer to be very explicit and individualised. The employer cannot at a later date, especially if the case is brought before the court, complete this clause or enter additional details.
— If the task has a specific duration, the date of expiry represents the date of termination; otherwise a minimum duration is applicable to the contract.

[4] CSJ, 8e, 24 May 2012, No 37257.
[5] Art L 121-4(1) CT.
[6] Art L 122-2(2) CT.
[7] Art L 122-2(2) and L 121-4(1) CT.
[8] Art L 131-4 CT.
[9] Art L 122-2 CT.
[10] CSJ, 3e, 5 February 2015, No 38506; CSJ, 8e, 30 November 2015, No 41438; CSJ, 3e, 20 March 2008, No 32462; CSJ, 3e, 28 June 2007, No 31669; CSJ, 3e, 30 March 2006, No 29881.

— If the purpose is to replace an absent employee, the name of this particular employee must be mentioned.
— A renewal clause can be included.

It is possible to include a probation period in any fixed-term employment contract. The probation period must be included in writing, at the latest when the employee starts working; it is also sufficient if the relevant collective agreement stipulates that every new contract shall include a probation period. With some exceptions, the rules on the probation period are the same as for indefinite contracts.[11] Thus, in most cases, it is admissible to set a probation period of six months or even 12 months if the monthly salary exceeds a legal threshold. The entire fixed-term contract could thus be probationary; it has not yet been determined whether such a clause, though formally valid, could be considered abusive.

If the fixed-term contract is extended or if a successive contract is concluded, it may not include another probation period.[12] A new probation period may be permissible if there has been a real and effective interruption between two fixed-term contracts with the same employee.

B. Lawful Stipulation of the Contractual Terms

As already mentioned, although certain categories of workers are subject to exceptions, the conclusion of fixed-term contracts is restricted in Luxembourg. All three anti-abuse mechanisms proposed in Directive 1999/70/EC have been transposed.

First, a fixed-term employment contract may only be concluded when it is justified for objective reasons, ie when it is concluded for a specific and temporary task. The purpose of concluding such a contract may not be for the performance of the company's normal and permanent activity.[13] This restriction is applicable to all fixed-term contracts. There is no exception allowing conclusions of fixed-term contracts without reasonable grounds, as is the case, for example, in Germany (*Befristung ohne Sachgrund*).

The Labour Code lists specific cases, which are only exemplary.[14]

Contracts of employment with a predetermined end date are the standard type of fixed-term contracts; they can be signed in the following cases:[15]

— For the execution of an occasional and selective task that is not part of the employer's ordinary activity.

[11] Art L 121-5 CT.
[12] Art L 122-8 CT.
[13] Art L 122-1(1) CT.
[14] This list is introduced with the term 'notamment' = 'inter alia'/'amongst others'; Art L 122-1(2) CT, 'Sont notamment considérés comme tâche precise et non durable'.
[15] Art L 122-3(1) CT.

— A specific and temporary task in the event of a momentary and exceptional increase in activity, or in case of a start-up or expansion of the company.
— Urgent work necessary to prevent accidents, carry out repairs, or organise rescue operations for the facilities and premises to avoid any prejudice for the company and staff.
— Certain types of contracts offered to registered jobseekers to ensure their integration or reintegration into the labour market.
— Certain types of contracts the purpose of which is to hire specific types of jobseekers.
— Contracts signed with the teaching and research staff of the University of Luxemburg.
— Certain contracts signed with students or researchers.

Fixed-term contracts of employment limited by a specific purpose can only be signed in the limited cases mentioned by the law:[16]

— To replace an employee who is absent or whose employment contract is suspended.[17] A suspension is usually given in case of sick leave (*incapacité de travail*), maternity leave (*congé de maternité*) or parental leave (*congé parental*).
— To temporarily replace an employee whose position has become vacant, before his/her successor starts working.
— Seasonal contracts. Fixed-term seasonal contracts may be concluded on grounds established by a grand-ducal decree.[18] They include jobs in agriculture, viniculture and in the tourist industry. There is no possibility to conclude similar 'seasonal' contracts in other sectors. Case law[19] confirms that it is not possible to agree with an employee that his/her contract will be suspended for a certain period and that s/he will not be offered any work and no wages will be paid. Some employers working as service contractors for schools (cleaning, canteen, etc) tried to implement such clauses for the school holiday period, but these were declared invalid.
— Jobs for which contracts of indefinite duration are not generally concluded due to the type of activity or the temporary nature of the activity. The types of jobs that fall under this exception are exhaustively listed in a grand-ducal decree.[20]

[16] Art L 122-3(1) CT.
[17] With the exception of employees on strike.
[18] Art 1 of the Règlement grand-ducal du 11 juillet 1989 portant application des dispositions 5, 8, 34 et 41 de la loi du 24 mai 1989 sur le contrat de travail.
[19] CSJ, 3e, 27 January 2011, No 34516; CSJ, 3e, 24 April 2014, No 39509.
[20] Art 2 of the Règlement grand-ducal du 11 juillet 1989 portant application des dispositions 5, 8, 34 et 41 de la loi du 24 mai 1989 sur le contrat de travail.

Secondly, there is a maximum total duration of successive fixed-term contracts that may not be exceeded. The ordinary maximum total duration is **24 months** (renewals included).[21] The Minister of Labour can authorise an extension of the maximum duration for highly specialised employees.

Thirdly, fixed-term contracts have to meet certain requirements in connection with renewals and succession.[22] A distinction is made between a succession of contracts (*succession de contrats*) and an extension of an existing contract (*renouvellement*).

As regards the conclusion of successive contracts, any fixed-term employment contract must be based on objective reasons. That is, any new contract concluded must be based on objective reasons, regardless of whether the contract succeeds a previous fixed-term contract or not.

Furthermore, once a fixed-term contract has come to an end, the employer cannot conclude another fixed-term contract (or hire a temporary agency worker) for the same position before the expiration of a **waiting period**, regardless of whether this contract is concluded with the same or a different employee. The waiting period corresponds to one-third of the duration of the previous contract (renewals included). For example, if the previous contract lasted three months, the employer has to wait one month before a new fixed-term contract for the same position can be concluded. The waiting period does not apply:

— if a replaced employee is absent again,
— in case of urgent works,
— to seasonal contracts,
— to jobs for which contracts of indefinite duration are generally not concluded,
— if the contract was prematurely terminated upon the employee's initiative,
— if the contract contains a renewal clause and the employee refuses to renew it,
— for specific types of contracts mentioned above, in favour of jobseekers.

Anti-abuse measures apply to any extension/prolongation of an expiring fixed-term contract. Renewing a contract means that the same contract (with the same employee) is immediately extended. The following rules apply:[23]

— Renewing a contract is only possible if the initial contract contains a renewal clause (*clause de renouvellement*). In practice, this is only a formal condition with no practical effect, both because all model contracts contain such a clause and because if the clause is missing, it can be inserted into the contract by means of an amendment agreement.

[21] Art L 122-4 (1) CT.
[22] Art L 122-5ff. CT.
[23] Art L 122-7 CT.

— A contract cannot be renewed more than twice. More than two renewals are only permitted for specific types of contracts (certain researchers, '*intermittents du spectacle*', teachers of religion, athletes and coaches, etc).
— The overall total duration of the contract, all renewals included, may not exceed the permissible duration (generally two years—see above).
— Finally, one of the reasons mentioned above allowing recourse to fixed-term contracts must be given (basically, the duration of the initial objective reason for concluding a fixed-term contract must last longer than initially expected).

In practice, these rules are not always respected and the 'objective reasons' given by the employer are often questionable. However, only very few employees file claims, and even if they do, the outcome rarely dissuades employers.

Unlike for temporary agency work, the employer is not liable to any criminal penalties/fines if he/she breaches the rules on fixed-term contracts. The penalty for not observing the regulations on fixed-term contracts is the reclassification of the contract as one of indefinite duration.[24] In other words, the employee can request the continuation of the employment relationship. In practice, the contract will often be considered as having been terminated by the employer and it takes quite some time for the court to issue its decision.

Case law is not entirely clear regarding the consequences of a reclassification of the contract. The decision of the court is usually issued months or years after the contract has ended, and the employee will have typically entered a new employment relationship by then. Reintegration into the company is therefore hardly ever a suitable solution; it is even unclear whether a court could impose a requirement on an employer to reinstate the worker.

The employee is not necessarily entitled to claim his/her salary after the contract has ended or between two unlawfully concluded fixed-term contracts.[25] Wages are only due if the employee has explicitly stated and informed the employer that s/he considers the contract to be ongoing and that s/he is willing to continue working.[26]

The fact that the contract has ended does not automatically mean that the employer has dismissed the employee, which could be challenged in court. A dismissal only occurs if the employer explicitly states the wish to end

[24] Art L 122-9 CT.

[25] CSJ, 8e, 12 January 2012, No 34648 & 34649: 'A. ne saurait dès lors prétendre, du seul fait de la requalification des relations de travail, au paiement des salaires pour les périodes comprises entre les deux contrats à durée déterminée. Le contrat de travail étant un contrat synallagmatique, il faut pour que le salaire soit dû que la prestation de travail ait été accomplie ou du moins que le salarié ait été à la disposition de l'employeur'.

[26] CSJ, 8e, 17 March 2011, No 35617.

the contract.[27] This would be the case, for example, if the employee argued that the fixed-term contract was not valid and that s/he wishes the contract to continue, but the employer rejects the employee's request. Since express statements are often missing, the employee will in many cases not be entitled to damages for unfair dismissal.[28]

C. Termination/End of Fixed-Term Contracts

A fixed-term contract automatically ends (depending on the type of limitation), if the calendar date has been reached or the purpose for which it was concluded has been achieved.[29] To avoid any misunderstandings about whether this purpose has been met, courts require the purpose for the conclusion of the fixed-term contract to be expressly indicated in the contract.

The employer does not need to give notice, as the contract ends automatically. In practice, the employer may inform the employee that the contract is ending, but such information has no specific legal effect.

A fixed-term contract can be terminated in accordance with the general regulations on:

— cancellation agreements between the employer and employee to voluntarily end the employment relationship,
— automatic contract termination as provided by law (including on the employee's death, disability, reaching retirement age, etc), or
— without giving any grounds during the probation period, if such a probation period has been agreed upon.

A fixed-term contract cannot be **ordinarily terminated**, ie terminated with a notice period (dismissal/lay-off), either by the employer (*licenciement avec préavis*), or by the employee (*démission avec préavis*).[30]

In practice, however, the indemnity the employer has to pay in case of unfair dismissal is limited by law[31] and can thus not be higher than the costs the employer has to bear if s/he ordinarily terminates the contract of a permanent employee and releases him/her from work during the notice period.

A fixed-term contract can be terminated on **important grounds** either by the employer (*licenciement avec effet immédiat*) or by the employee (*démission avec effet immédiat*). Important grounds include serious misconduct (*faute grave*) by either party, making it impossible to maintain the employment relationship. The breach must be quite severe for the courts to rule

[27] For example: CSJ, ordonnance, 16 March 2006; CSJ, 3e, 31 March 2011, No 35289.
[28] CSJ, 3e, 21 February 2013, No 37966.
[29] Art L 122-12 CT.
[30] Art L 122-13 CT.
[31] In general, two months' salary.

that either party has engaged in 'serious misconduct'. The rules applicable for this form of termination are the same as for contracts of indefinite duration. Serious misconduct, for example, may be unjustified absence, verbal or physical violence, theft, embezzlement, etc.

The conditions of accessing unemployment benefits do not differ for jobseekers who worked under a fixed-term contract and those who worked under a permanent contract.[32]

D. Rights and Status of Fixed-Term Worker

(i) Equal Treatment

The Labour Code only provides that all legal or contractual rules applicable to permanent employees are also applicable to fixed-term workers.[33] Unfortunately, the principle of equal treatment is not as explicitly elaborated as might be required by European law.[34] Due to the specificities of fixed-term contracts, the legislator deemed that absolute equality in treatment cannot be imposed.[35] A first instance decision has also stated that no principle of equal treatment applies.[36] There is no case law of the Court of Appeal on this issue.

(ii) Employment Opportunities

Upon the European Commission's recommendation to fully comply with European law, the legislator added the requirement in 2013[37] that the employer must inform fixed-term workers about vacancies that become available in the undertaking.[38] There is no case law on what the penalty is if the employer violates this obligation.

(iii) Other Matters

N/A

[32] Art L 521-3 CT.
[33] Art L 122-10 CT.
[34] Clause 4 of the Framework Agreement on Fixed-term Work, Council Directive 1999/70/EC.
[35] Projet de loi No 3222 sur le contrat de travail, Commentaire des articles, p 18: '*Mais cet alignement ne peut être total compte tenu de la spécificité du contrat à durée limitée*'.
[36] Luxembourg Labour Tribunal (*Tribunal du Travail de Luxembourg*), 10 May 2005, No 2170/2005.
[37] Loi du 23 décembre 2013 portant modification de l'article L 122-10 du Code du travail.
[38] Art L 122-10 CT.

E. Information and Consultation

In Luxemburg, employee delegates (*délégués du personnel*) have to be elected in every undertaking employing 15 employees or more.[39] To calculate the total workforce, fixed-term employees are counted proportionally (*pro rata temporis*) to their presence during the last 12 months, except for those hired to replace an absent (permanent) employee.[40]

If they meet the legal seniority requirements, fixed-term employees can take part in elections and can even be candidates and be elected as employee representatives. However, the special dismissal protection for employee representatives will not prevent the fixed-term contract from ending once the term is reached. Fixed-term workers have the right to turn to employee representatives for assistance and advice.

Unlike for other atypical contracts, the employer is not required to inform or consult the employee representatives if new fixed-term posts are established. Co-determination (workers' participation in negotiating contractual terms) applies in undertakings employing 150 employees or more;[41] it does not, however, apply to the employer's decision to offer fixed-term contracts or not.

F. Specific Provisions

Special provisions exist for different categories of employees,[42] including:

— **Seasonal workers** in agriculture, tourism and viniculture[43] can be hired for a maximum duration of 10 months per season. Their contracts can be renewed every season. Depending on the formulation of the contract, seasonal employment can transform into a 'globally indefinite relationship' (*relation à durée global indeterminée*) after a number of years, a concept that is not clearly defined legally.
— **Researchers** can be subject to specific rules. Employment contracts for academic researchers/staff at the University of Luxembourg do not require objective reasons and their duration can be up to 60 months.[44] The Constitutional Court has confirmed that this exception complies with the principle of equal treatment;[45] national courts have also ruled that this

[39] Art L 411-1(1) CT.
[40] Art L 411-1(2) paras 4 and 5 CT.
[41] Art L 414-9 CT.
[42] Art L 122-1(3) CT.
[43] Art 1 du Règlement grand-ducal du 11 juillet 1989 portant application des dispositions des articles 5, 8, 34 et 41 de la loi du 24 mai 1989 sur le contrat de travail.
[44] Art L 122-4(4) CT.
[45] Cour Constitutionnelle, 12 April 2013, No 97.

practice does not violate the European rules on non-discrimination.[46] Similar exceptions exist for some other research institutes.

— **Teachers.** Legislation has also introduced exceptions to the maximum number of contract extensions for replacement teachers in secondary schools (*chargé de cours*). The Constitutional Court has, however, ruled that this practice violates the principle of equal treatment.[47]

— **Artists** are generally listed among the professions for which it is 'not of general use to conclude a contract of indefinite duration' and for whom fixed-term contracts are thus admissible, but must abide by the general restrictions mentioned above. For occasional workers in the entertainment industry (*intermittents du spectacle*), the Labour Code not only stated that the conclusion of fixed-term contracts was always permitted, but also that the contract could be renewed indefinitely.[48] The idea behind this exception was that the fixed-term contract provided for more flexibility for the '*intermittents du spectacle*' because they used to be hired as (more or less bogus) independent contractors. This regime was supposed to give them better access to the social benefits afforded by labour law. However, the CJEU determined that Luxembourg failed to comply with the Framework Agreement on Fixed-Term Work.[49] A Law has now been passed[50] to restrict the use of fixed-term contracts; an 'intermittent du spectacle' will now only be hired for specific projects of limited duration, and the total duration of successive fixed-term contracts may not exceed 24 months. However, within this period, the number of renewals will be unlimited.

— **Students.** For students, fixed-term contracts are permitted within the context of their training programme, but may not exceed an average of 15 hours per week, except during holidays. Furthermore, holiday jobs for academics and students (*emploi des élèves et étudiants pendant les vacances scolaires*) can be formalised by a specific type of employment contract that may not, however, exceed two months per year[51] and must be performed during school holidays.

G. Collective Bargaining Agreements Deviating from Statutory Provisions

In theory, collective bargaining agreements can modify the statutory provisions above if they are more favourable for the employee.[52] It is thus

[46] CSJ, 8e, 13 March 2014, No 38046.
[47] Cour constitutionnelle, 20 Octobre 2006, No 36.
[48] Art L 122-5(3) CT.
[49] CJEU, 26 February 2015, C-238/14 *European Commission v Grand Duchy of Luxembourg*, ECLI:EU:C:2015:128.
[50] Projet de loi No 6979, deposited on 1 April 2016.
[51] Art L 151-1 CT.
[52] Art L 162-12(6) CT: 'Toute stipulation [d'une convention collective] contraire aux lois et règlements est nulle, à moins qu'elle ne soit plus favorable pour les salariés'.

possible to restrict the cases in which fixed-term contracts are permitted, to restrict their maximum duration or to introduce stricter rules for renewals and successive contracts. It is also possible to define specific indemnities such as a fixed-term bonus (*prime de précarité*). In practice, however, collective agreements do not contain such clauses.

Furthermore, Article L 122-1(2) CT of the Labour Code provides a list of cases in which fixed-term work is allowed (see above) and states that this list can be supplemented by a collective agreement. From a legal point of view, this provision seems futile, since this list is only illustrative and the general requirements (for a specific and temporary task) must always be fulfilled. No collective agreement containing such a clause is known.

III. PART-TIME WORK

Part-time employment has been regulated since 1993,[53] following 10 years of animated parliamentary debates.[54] The initial legal framework was very rigid but was softened five years later, when the 1998 Action Plan introduced more flexibility in working time.[55]

A. Legal Definitions/Formal Requirements

A part-time worker is defined as an 'employee who is engaged in a regular activity, and has arranged a weekly working time with the employer, which is lower than the standard working time applicable in the establishment in accordance with the law or a collective agreement'.[56] As the legal weekly working time is 40 hours and almost no collective agreement stipulates fewer weekly working hours, a part-time worker can in practice be defined as any worker hired for 39 hours per week or less.

Part-time employment is deemed 'voluntary' (*travail à temps partiel volontaire*), which does not necessarily mean that the employee chooses or wishes to work part-time, but that the employer and employee have to agree on it. The law provides for a specific procedure which the employer can follow to unilaterally change the contractual working conditions (*révision unilatérale*

[53] Loi du 26 février 1993 concernant le travail volontaire à temps partiel.

[54] Projet de loi No 2671, Rapport de la Commission du Travail et de l'Emploi du 26 janvier 1993, p 3.

[55] Loi du 12 février 1999 concernant la mise en œuvre du plan d'action national en faveur de l'emploi 1998.

[56] Art L 123-1(1) CT: 'Est considéré comme salarié à temps partiel le salarié qui convient avec un employeur, dans le cadre d'une activité régulière, un horaire de travail dont la durée hebdomadaire est inférieure à la durée normale de travail applicable dans l'établissement en vertu de la loi ou de la convention collective de travail sur cette même période'.

du contrat).[57] Whereas some older decisions[58] stated that an employer could not implement this procedure to force an employee to work either part-time or full-time (or to change the employee's weekly working hours), more recent decisions assert that such modification is possible (for example, a reduction of working time by one-third[59] or even by 50 per cent[60]). The employer must have good reasons (*motif reel et sérieux*) to do so. The employee can object by rejecting the contractual change and leaving the company; s/he is consequently deemed to have been dismissed by the employer and can file a claim for unfair dismissal.[61]

Some fairly isolated court decisions[62] have ruled in favour of flexible part-time work, ie recognised the employer's right to unilaterally change the employee's weekly working time. An employee could thus, for example, be hired for 30 to 35 hours a week. More recent decisions stated that such changes are not admissible; a clause stating a variable working time (*la durée de travail est variable*) is not admissible.[63] In one case, for example, a worker was hired for 'approximately 20 hours a week'. The judges ruled that any hours exceeding 20 had to be considered overtime.[64]

The law provides for some flexibility. If the parties agree on a part-time clause, the working time may vary by up to 20 per cent from week to week (ie if they agree on a 20-hour work week, the ordinary working time can range from 16 to 24 hours);[65] this limit can even be overridden by a simple contractual clause (for example, to vary hours by 40 or 50 per cent).

The use of such flexibility implies that the employer respects the constraints of a 'work schedule' (*plan d'organisation du travail*), which has recently been reformed.[66] The work schedule must clearly differentiate between full-time and part-time employees[67] to ensure that the specific restrictions for the latter are respected.

[57] Art L 121-7 CT.
[58] CSJ, 5 June 2003, No 26527; CSJ, 12 December 2002, No 26147.
[59] CSJ, 13 January 2005, No 29133.
[60] CSJ, 3e, 29 March 2007, No 30057 & 30400.
[61] Art L 121-7 CT.
[62] See eg CSJ, 20 January 2000, No 22497.
[63] CSJ, 8e, 30 May 2016, No 39962.
[64] CSJ, 26 June 2008, No 33313: 'X. rappelle qu'il a été engagé sur base d'une durée de travail qui avait été fixée dans son contrat du 23 avril 1994 à "plus ou moins 20 heures de travail par semaine" … Un consentement éventuel du salarié quant à la fixation aléatoire du temps du travail est inopérant à ce sujet et l'offre de preuve de l'employeur tendant à établir un tel consentement est à rejeter … Par application des articles L.123-5 et L.123-1 (3) susvisés, toute prestation dépassant de 20 pour cent la tâche à mi-temps est à considérer comme heures supplémentaires'.
[65] Art L 123-1(3) CT.
[66] Loi du 23 décembre 2016 concernant l'organisation du temps de travail et portant modification du Code du travail.
[67] Art L 123-1(4) CT.

— If no collective agreement specifies a reference period, any undertaking can opt for a period of reference of up to four months. If the selected period exceeds one month, the employer must grant additional annual leave (from 1.5 to 3.5 days per year, depending on the duration of the reference period). The work schedule must be distributed to the employees at least five days before it takes effect and cover at least the upcoming month.
— In a collective agreement (*convention collective*) or a national agreement (*accord en matière de dialogue social interprofessionnel*), social partners can agree on a reference period of up to 12 months. The modalities for establishing and distributing the work plan, as well as the compensation relating to the increase in flexibility by additional annual leave or other means, can be freely negotiated.

A work schedule should in principle be respected. According to the new legislation, the employer can modify the plan by giving notice of at least three days. If only the work schedule but not the duration of work is modified, no compensation is due for the first two hours; beyond those first two hours, the worker is entitled to 1.2 hours of rest time. If the notice period of three days is not respected, the employee under certain circumstances can refuse to comply with the updated schedule.

Overtime is defined as any work exceeding the limitations set by the rules mentioned above.[68] Usually, overtime is only possible by common agreement; the employer cannot require a part-time worker to work extra hours. However, the employment contract can define the limitations and conditions in advance under which the part-time worker can be requested to work overtime.[69] Overtime is compensated or remunerated in accordance with the rules applicable to all employees. This means that the employee is entitled to 1.5 hours of rest for each hour of overtime;[70] according to the law, compensation in the form of a wage increase of 40 per cent should only be used in exceptional circumstances, but in practice, financial compensation is common.

The rules on flexibility and overtime do not permit working time to exceed the company's regular working time.

B. Opportunities for/Right to Part-Time Work

Employees of the company who have expressed a wish to change their working time from full-time to part-time work or vice versa should be given

[68] Art L 123-5 CT.
[69] Art L 123-4 CT.
[70] Art L 211-27 CT.

priority if they have the required professional qualifications or experience.[71] The employees have the right to be informed about any vacancies. There is no case law on the penalty that would apply if the employer violates this obligation.

The Minister of Labour has announced plans to implement a right to part-time work. The social partners have been given one year to arrive at an agreement; if no agreement is reached, the government might act on its own initiative.

C. Opportunities for/Right to an Extension of Working Time

As already mentioned, the employer must first offer any vacancies to part-time workers who have expressed a wish to work full-time. If the law is interpreted strictly, this rule does not apply to part-time workers who want to extend their working time without becoming full-time workers. Furthermore, it can be assumed that if the government implements the right for part-time work, a solution for returning to full-time work or to extend working time will also be introduced.

D. Rights and Status of Part-Time Worker

(i) Equal Treatment

The principle of non-discrimination is enshrined in Articles L 123-6 to 123-6 of the Labour Code:

— **Same rights.** Part-time employees benefit from the same rights as those applicable to full-time employees by law or by collective agreement. Collective agreements can, however, include specific rules for part-time workers.[72]
— **Wages.** Based on their working time and their seniority in the undertaking, part-time workers must be paid proportionally to those equally qualified full-time employees working in an equivalent position in the undertaking or establishment. The concept of wages is defined very broadly and covers all payments to employees, particularly their main salary as well as all supplemental payments and benefits such as bonuses, allowances, free accommodation etc.[73]

[71] Art L 123-3 CT.
[72] These specific rules must, however, themselves be non-discriminatory.
[73] Art L 221-1 CT.

— **Seniority.** To determine the employee's rights related to seniority, they must be calculated for part-time employees as if they had been working in a full-time position.
— **Severance payment.** Severance payments (*indemnité de depart*) for employees who have worked in the same undertaking both in full-time and in part-time posts are calculated proportionally to their periods of full-time and part-time employment since the commencement of employment in the undertaking.
— **Probation period.** The duration of the probation period for part-time employees may not exceed (in calendar days) the limits applicable to full-time employees. In other words, the employer cannot argue that an additional number of months is necessary to test the employee because s/he is present for fewer hours than a full-time worker.

More generally, the courts deem that the principle of *pro rata temporis* is applicable to part-time workers.

Though no case law exists, it is certain (in light of the European Court of Justice's case law) that any unfavourable treatment of part-time worker would be considered indirect discrimination based on gender.

The principle of non-discrimination is often difficult to enforce in practice. There is generally very little case law on the provisions for part-time employment.

As regards parental leave (*congé parental*), the laws have recently been amended.[74] The opportunities for part-time parental leave have been expanded and access to parental leave for part-time employees has been facilitated. Legislation now differentiates according to the number of weekly working hours and the number of employees:

— Part-time employees who work less than 10 hours per week are not entitled to any parental leave.
— All other employees are entitled to parental leave of four or six months.
— Part-time employees, who work 20 hours or more per week for a single employer, as well as full-time employees can opt for part-time (50 per cent) parental leave, the duration of which is thus doubled to eight or 12 months.
— Full-time employees can apply for one of two more flexible schemes of parental leave, ie either one day off per week for 20 months (80 per cent of their working time) or four months of parental leave distributed over a maximum period of 20 months.

The employer must agree or at least submit a written counter-offer. If no agreement is reached, full-time parental leave must be taken.

[74] Loi du 3 novembre 2016 portant réforme du congé parental.

(ii) Dismissal Protection

Dismissal protection does not distinguish between full-time and part-time employees. Once the probation period has ended, the employer can only dismiss him/her for serious misconduct (*faute grave*) and—if the employee has a contract of indefinite duration—only for serious grounds (*cause réelle et sérieuse*); the employer must state the grounds for dismissal and provide evidence.[75] The employee, in turn, can file a claim for wrongful dismissal, which cannot result in reintegration in the company, but s/he can claim damages.

Employment benefits are not paid to jobseekers who worked for less than 16 hours a week.[76]

(iii) Other Matters

N/A

E. Information and Consultation

Employee representatives (*delegation du personnel*) must be consulted if the employer intends to establish part-time posts within the company.[77] The dedicated 'equal rights representative' (*délégation à l'égalité*) must also be informed.[78] There is no case law on this subject, but the most reasonable interpretation of this provision is that the employer has the duty to inform the representatives each time a new part-time post is established, but not every time the employee occupying such a post changes or every time the weekly working time of a given position changes.

To calculate the total number of the undertaking's staff to determine if and how many employee representatives need to be elected, part-time employees working 16 hours or more per week are counted as full-time employees; if they work less than 16 hours a week, they are only counted in proportion to their working time. Part-time employees are fully entitled to assistance and consultation by the representatives.[79]

Part-time employees can also be elected as employee representatives. However, if they are employed by more than one company, they are only eligible to be elected in the company where they work the highest number of hours or, if the hours worked at the companies are identical, then

[75] In case of dismissal with notice, grounds need only be provided if the employee requests them, which is mostly the case in practice.
[76] Art L 521-1(2) CT.
[77] Art L 123-2 CT.
[78] Art L 414-15(2) para 2 point 11 CT.
[79] Art L 411-1(2) CT.

the employee may be elected as a representative in the company at which they have the highest seniority.[80] No specific provision exists, but it can be assumed that they are entitled to the same number of representation hours (*heures de délégation*) as full-time employees. A certain number of representatives may be fully exempt from work (*délégués-libérés*); problems may arise for part-time employees, as the legislation is designed for full-time employees.

F. Other Part-Time Arrangements

A situation in which an employee works part-time may also be related to one of the following cases:

— ***Part-time sick leave*** (*mi-temps thérapeutique*) is not (yet) codified in the Labour Code, but is recognised by the social security institutions. The aim is a progressive return to work, in line with the employee's physical recovery. Employers generally accept this form of part-time work, primarily because it generally has no financial repercussions (part-time sickness allowance is paid by social security).[81] Moreover, if the employer refused to accept this form of part-time work, the employee's doctor could assert that his/her patient is fully unfit for work.
— ***Part-time parental leave*** (*congé parental à mi-temps*) is an option offered by the law (see III.D.(i) above).
— Part-time work may also be the consequence of **short-time work** (*chômage partiel*) due to a detrimental economic situation in the given sector (*chômage conjoncturel*), structural problems affecting a specific undertaking (*chômage structurel*), weather conditions making certain types of work impossible, especially in the building and construction industry (*chômage-intempéries*) or accidental breakdowns of the undertaking's facilities *(chômage accidentel*). In such cases, the costs are shared between the employer (obligation to bear the initial losses), the employees (indemnities that are slightly lower than their regular wage) and public funds (bearing the additional costs).
— Finally, under certain conditions, it is possible to request a **progressive early retirement** scheme (*préretraite progressive*) from the age of 57.

Part-time solutions may also be the result of a '**time account**' (*compte épargne-temps*), where additional hours or overtime can be 'saved' as a

[80] Art L 413-5 CT.

[81] Sickness allowance (*indemnité pécuniaire*) will be paid during the employee's first weeks of sick leave at 80 per cent by the employer's insurance (*Mutualité des employeurs*); the remaining 20 per cent is paid by the employer. After the initial weeks of sick leave, health insurance (*Caisse Nationale de Santé*) will take over 100 per cent of the costs.

time-credit for the future. The Labour Code only mentions the possibility for collective agreements to implement such time accounts.[82] Some collective agreements, for example in the banking sector, provide detailed regulations. Discussions between the social partners on the legal provisions for time accounts are ongoing, but no clear direction seems to be emerging; an initial Bill was deposited, but withdrawn before it was discussed in Parliament.[83]

Shared workplaces (job sharing) as such do not exist in Luxembourg, as the employment relationship is individual and personal. An employer can of course hire several employees to perform a specific task. However, individual contracts must be signed. The liabilities remain personal and individual, both on the employer's side (wage payments, health and safety, etc) and on the employee's side (performing the required work). Contract termination (dismissal) must also be individual. An employer cannot sign a contract with two or more employees and then be free to decide who should work; such a contract would be considered an independent contract of service.

On-call work is not mentioned in the Labour Code and would probably be considered illegal. The same applies to zero-hours contracts. The rules mentioned above offer some flexibility to conclude part-time contracts; an on-call clause would circumvent this legal protection. Furthermore, it has been decided that an employee cannot be hired for, say, 'at least 100 hours per year'; such a flexible working scheme is not allowed.[84]

G. Collective Bargaining Agreements Deviating from Statutory Provisions

Collective bargaining agreements may deviate from statutory provisions, but only if they contain more favourable conditions for the employees.[85] It is thus possible, for example, to define the conditions under which employees have the right to work part-time. It is also possible to make working time less flexible for employers than stipulated by law. However, such clauses have not been introduced to date.

As mentioned above, it is also possible for employment contracts to increase flexibility by raising the percentage of permissible fluctuations of weekly working time.[86] Although the law only refers to clauses in individual employment contracts, the courts consider such clauses to also be valid if they are agreed in collective agreements—meaning that employees' individual consent is not required. As regards the collective agreement in the

[82] Art L 211-27(1) CT.

[83] Projet de loi No 6234 portant introduction d'un compte épargne-temps pour les salariés de droit privé.

[84] CSJ, 3e, 10 June 2010, No 34261.

[85] Art L 162-12(6) CT.

[86] This is an exception to the principle that deviations in collective agreements are only possible if they are more favourable for the employees.

cleaning industry, the Court of Appeal accepted a clause on fluctuations in working time of up to 50 per cent;[87] changes in working time between 95 and 142 hours per month are thus possible.

IV. TEMPORARY AGENCY WORK

Temporary agency work first appeared in Luxembourg in 1968.[88] Only 25 years later, in 1994, was a legal framework established.[89] Temporary workers represent no more than two per cent of Luxembourg's total workforce. Seasonal and economic fluctuations have a very strong impact on the number of temporary agency workers.[90] Whereas cross-border commuters represent around half of the workforce in Luxembourg, they also represent two-thirds of temporary work agency staff.[91]

A. Legal Definitions/Formal Requirements

In many regards, temporary employment is subject to the same rules as fixed-term employment.

The definitions provided in the Labour Code are:[92]

— 'Temporary work agency' (*entrepreneur de travail intérimaire*): any physical or legal person, whose commercial activity consists of hiring and remunerating employed workers to temporarily place them at the disposal of a user undertaking for the accomplishment of a specific and temporary task.[93]
— 'Work assignment contract' (*contrat de mission*): the contract by which the temporary worker obliges him-/herself to be tied to a temporary work agency in exchange for remuneration, and to perform specific and temporary tasks for a user undertaking.

[87] CSJ, 3e, 6 December 2007, No 31624.

[88] Projet de loi No 3346 portant réglementation du travail intérimaire et du prêt temporaire de main-d'œuvre, Rapport de la Commission du Travail et de l'Emploi, 12 April 1994, p 1; Projet de loi No 3222, Rapport de la Commission du Travail, de la Sécurité Sociale, de la Santé et de la Famille du 20 avril 1989, p 1.

[89] Loi du 19 mai 1994 portant réglementation du travail intérimaire et du prêt temporaire de main-d'oeuvre.

[90] RETEL/Observatoire de l'Emploi, *Tableau de bord du marché de l'emploi* No 3, juin 2015.

[91] Chambre des Salariés Luxembourg (CSL), *Panorama Social 2015* No 1 (April 2015), p 103.

[92] Art L 131-1 CT.

[93] 'Toute personne, physique ou morale, dont l'activité commerciale consiste à embaucher et à rémunérer des travailleurs salariés en vue de les mettre à la disposition provisoire d'utilisateurs pour l'accomplissement d'une tâche précise et non durable, dénommée ci-après "mission".'

— 'Temporary worker' (*travailleur intérimaire*): the employed worker who signs a task type contract and is temporarily placed at the disposal of one or more user undertakings to perform specific and temporary tasks.

A user undertaking/employer can only hire a temporary worker to perform a specific and temporary task; the temporary work may not be provided on a long-term basis for a post that is part of the regular and permanent activity of the company.[94] The situations in which temporary work is admissible are the same as for fixed-term contracts.

Two types of contracts must be signed for temporary work: the labour supply contract (*contrat de mise à disposition*) signed by the user undertaking and the temporary work agency, and the work assignment contract (*contrat de mission*) between the temporary agency worker and the agency.[95] The assignment contract is deemed to be an employment contract. It must be signed within two working days from the commencement of the task to be performed and must contain the same clauses as the labour supply contract, as well as:

— the end date or (if this date is not fixed by a calendar date) a minimum duration;
— if its purpose is to replace an absent employee, the name of that employee;
— a probation period, which cannot be renewed for the same task; and
— a renewal clause, where applicable.

The maximum duration of the probation period is far more limited than for fixed-term contracts.[96]

Seniority is calculated by adding all of the temporary assignments the worker has carried out for the same user undertaking.[97]

Clauses preventing the temporary agency worker from being hired directly by the user undertaking,[98] as well as clauses preventing the user undertaking from hiring him/her[99] are not valid. The employee must be explicitly informed about his/her right to be hired.

[94] Art L 131-4(1) CT.
[95] Art L 131-6 and following CT.
[96] Fixed-term contracts: three, six or 12 months according to qualifications and revenue. Temporary work:

Duration of assignment	Maximum probation period
≤ 1 month	3 days
> 1 month	5 days
> 2 months	8 days

[97] Art L 131-14 CT.
[98] Art L 131-6(1) para 4 CT.
[99] Art L 131-4(3) CT.

The total duration of a temporary task may not exceed 12 months (renewals included), ie only half of the admissible duration for fixed-term contracts.[100] Exceptions exist for seasonal contracts. Moreover, the Minister of Labour may extend the limitation for certain categories of highly specialised employees.

This limitation for each worker only applies if the assignments are performed at the same user undertaking and with the same temporary work agency. In one case, the Court of Appeal[101] noted that the temporary worker had worked nearly continuously for the same user undertaking for more than 12 months; however, no penalty was incurred, because the contracts had been concluded with two different temporary work agencies.

The term must usually be set for a specific calendar date and can be set for the same purposes as for fixed-term contracts.[102]

The work assignment contract can be renewed twice.[103] However, it must contain a renewal clause.

Once a temporary task has been completed, the employer cannot use a temporary worker again under a temporary agency work contract (nor under a fixed-term contract) for the same post prior to the expiration of a waiting period.[104] The waiting period corresponds to one-third of the duration of the previous task (renewals included). Exceptions to the waiting period are the same as for fixed-term contracts.

If the rules mentioned above are violated, criminal sanctions may apply. However, the fine of up to EUR 10,000 stipulated by Article L 134-3 CT of the Labour Code is rarely applied, because no lawsuits have been filed.

From a civil law perspective, the penalty is a reclassification of the contract,[105] but only if certain restrictions are violated. If the term or total duration of the contract is not respected, the work assignment contract is deemed to be a contract of indefinite duration. Unlike for fixed-term employment contracts (and for no obvious reasons), the law does not provide for reclassification for other types of infringements (such as missing clauses, excessive number of renewals, etc); it is unclear what civil law sanction would apply in this case.

A reclassification would lead to an indefinite contract between the temporary agency worker and the agency; the user undertaking is not involved.[106] There have been a few court cases on the matter, though very few resulted in a reclassification; this might be attributable to a broad interpretation of the law by the courts.

[100] Art L 131-8(2) CT.
[101] CSJ, ordonnance, 27 avril 2006.
[102] Art L 131-8(1) CT.
[103] Art L 131-9 CT.
[104] Art L 131-11 CT.
[105] Art L 131-8(3) CT.
[106] CSJ, 3e, 21 March 2013, No 37491; CSJ, 3e, 21 March 2013, No 38017.

For example, in one case, a temporary agency worker was able to prove that he had signed 50 contracts for the same user undertaking and the same activity as a technical operator over a two-year period. However, after analysing all documents, the judges came to the conclusion that although certain legal provisions had been violated, none that would legally imply a reclassification of the contract.[107] In another case, the judges noted that the temporary worker had continuously worked for the same undertaking as a driver for nearly two years; the waiting time between successive contracts had not been respected, but none of the successive contracts had exceeded the maximum duration of 12 months; the claim for reclassification of the contract was therefore rejected.[108]

B. Registrations, Licensing, Financial Guarantees, etc

Temporary work agencies must obtain special authorisation from the Ministry of Labour and must provide a financial guarantee.[109] This guarantee has to cover the payment of all salaries and supplements, as well as indemnities, taxes and social security contributions. The professional integrity and qualifications of the managers is also checked. Only temporary authorisations are initially issued.

C. Relationship between Temporary Agency Worker and Temporary Work Agency

(i) Fixed-Term and Part-Time Contracts

While the contract between the temporary agency worker and the temporary work agency could theoretically be of indefinite duration, only fixed-term contracts for the duration of each assignment are concluded in practice.

The contract can be a full- or part-time contract.

(ii) Rights and Obligations/Liability

The temporary work agency pays the salary of the temporary worker as well as the social security contributions and taxes. The social minimum wage (*salaire social minimum*) as well as the principle of non-discrimination must

[107] CSJ, 3e, 10 May 2007, No 30950: 'Ni une éventuelle violation de l'obligation concernant l'indication du nom du salarié remplacé, ni encore une violation de la règle imposant à l'entrepreneur de travail intérimaire de respecter une période de carence à l'expiration du contrat de mission égale au tiers de la durée de ce contrat, ne sauraient être sanctionnées par la requalification du contrat de mission en contrat de travail à durée indéterminée'.

[108] CSJ, 8e, 13 February 2014, No 38846.

[109] Art L 131-2 and L 131-3 CT.

be respected (see below under IV.E.(i)). The user undertaking cannot be held liable for unpaid wages. As the official employer, the temporary work agency is also responsible for all administrative obligations.

(iii) Dismissal Protection

The work assignment contract can be terminated with immediate effect (*résiliation avec effet immédiat*) either by the temporary work agency or by the temporary worker, if very serious grounds (*motif grave*) arise, ie for serious misconduct by either party.

The possibility to ordinarily (ie with a period of notice; *résiliation avec préavis*) terminate a work assignment contract is not given. It is a fixed-term agreement that both parties must respect until it expires. If one of the parties decides to cancel the contract (without the existence of very serious grounds), it is liable to the other party:

— The temporary work agency would have to pay the wages due until the agreed date for the completion of the task, but (generally) limited to two months' salary.[110]
— The temporary worker would have to pay the actual and proven loss caused to the temporary work agency, but (generally) limited to one month's salary.[111]

D. Relationship between Temporary Agency Worker and User Undertaking

(i) Legal Type of Relationship

No contract is signed between the worker and the user undertaking. There is no legal provision nor any case law or doctrine on how this factual relationship might be legally classified.

(ii) Rights and Obligations/Liability

The user undertaking must guarantee fair and decent working conditions for the temporary worker, especially with reference to occupational health

[110] Art L 131-16 CT; Art 13.1. of the collective agreement for temporary workers: Règlement grand-ducal du 10 juin 2014 portant déclaration d'obligation générale de la convention collective de travail du 28 mars 2014 applicable aux travailleurs intérimaires des entreprises de travail intérimaire, conclue entre la Fedil Employment Services (FES), d'une part et les syndicats OGB-L et LCGB, d'autre part.

[111] Art L 131-17 CT.

and safety;[112] the agency cannot be held responsible in this respect. The user undertaking has no payment obligation towards the temporary worker.

The issue of civil liability towards the user undertaking is more complex. A permanent employee is only responsible towards the employer in case of gross negligence or wilful misconduct,[113] whereas s/he remains fully responsible towards third parties.[114] Article 14.4 of the collective agreement is applicable to temporary work and extends this limitation of civil liability to temporary workers; even if the user undertaking is a 'third party' from a legal point of view, the employee can only be held responsible in case of gross or wilful misconduct.

(iii) Health and Safety

During the assignment, the user undertaking is responsible for the worker's occupational health, hygiene and security, as well as all other (legal, contractual, administrative) regulations on employment conditions and employee protection.

Article 8 of the collective agreement for temporary workers asserts that temporary workers are entitled to the same safety equipment as the user undertaking's permanent staff. The user undertaking has to provide adequate equipment. If the temporary worker uses his/her own tools or equipment, compensation must be paid.

The employee representatives in charge of occupational health and safety must be informed about every temporary agency worker hired.[115]

E. Relationship between Temporary Work Agency and User Undertaking

The relationship between the temporary work agency and the user undertaking is regulated by the labour supply contract (*contrat de mise à disposition*).[116] This is a commercial contract between the user undertaking and the temporary work agency. Litigation relating to this contract must be brought before the commercial court.

The contract must be concluded in writing at the latest within three working days after the commencement of the temporary worker's assignment. It must contain certain clauses, such as the reason why a temporary worker is needed, the required professional qualifications, the date and location of the assignment and the salary paid by the user undertaking to its employees with

[112] Art L 131-12 CT.
[113] Art L 121-9 CT.
[114] The national courts decided to not follow French case law on the limitation of civil liability between an employee and third parties; CSJ, 24 February 2010, No 33995.
[115] Art L 312-3(7) CT.
[116] Art L 131-4 CT.

the same or an equivalent qualification. Moreover, the principle of freedom of contract applies. The remuneration paid to the temporary work agency by the user undertaking can be freely agreed upon; there are no rules or limitations.

F. Rights and Status of Temporary Agency Worker

(i) Equal Treatment

As regards **remuneration**, temporary workers must be paid at least the wages due to the permanent employees of the user undertaking, after completing their probation period, if they have the same or equivalent qualifications, and must be hired under the same conditions as permanent workers by the user undertaking.[117] If there is no comparable employee, the comparison shall be based on the collective agreement or on the wages being paid for the same type of work in other companies in the relevant industry.

Article 10.1. of the collective agreement for temporary workers specifies that the temporary worker's salary must include all wage components paid in the user undertaking, including occasional wages such as bonuses and supplementary payments such as lunch vouchers (*chèque-repas*) or travel reimbursements (*frais de déplacement*) under the same conditions as those applicable in the user undertaking. Article 10.4. states that the temporary work agency must be notified of any salary increases at the user undertaking that take place during the temporary worker's assignment and applied immediately to the temporary worker; this also applies to changes in premiums for overtime, night work, work on Sundays or public holidays, etc.

Case law states that the principle of equal pay must be interpreted broadly and that it applies to all forms of remuneration.[118] However, in practice, only very few cases involving temporary agency work have been heard, and most of the claims did not succeed. As the claimant bears the burden of proof, s/he has to provide information on the wages paid at the user undertaking—information that is nearly impossible to obtain. A first challenge is thus to identify comparable employees and to collect information on their level of remuneration. Furthermore, in the few cases that have been brought before the court, the Court of Appeal adopted a restrictive approach. For example, it was decided that the payment of a bonus in the user undertaking would only be due to the temporary worker if s/he was working on the day the bonus was paid out.[119] The same was decided for a one-off premium granted by a collective agreement.[120]

[117] Art L 131-13 CT.

[118] CSJ, 3e, 11 October 2012, No 37187; CSJ, 8e, 16 February 2012, No 36749; CSJ, 8e, 9 June 2011, No 35901; CSJ, 3e, 12 December 2013, No 38684; CSJ, 3e, 12 December 2013, No 37685.

[119] CSJ, 8e, 8 March 2012, No 36504; CSJ, 8e, 9 June 2011, No 35901.

[120] CSJ, 3e, 14 March 2013, No 38706; CSJ, 3e, 2 May 2013, No 36926.

Luxembourg's law does not cover any salary increase or extra payment for temporary or precarious contracts, such as the French '*prime de précarité*'; the social security contributions are the same as for all other types of contracts.

Temporary workers must have access to **collective facilities** under the same conditions (especially to the canteen facilities and transport, but also to showers, changing rooms, breakrooms or company-owned libraries[121]) as the employees employed by the user undertaking.[122]

(ii) Other Matters

N/A

G. Information and Consultation/Representation of Temporary Agency Worker

Temporary agency workers are taken into account when calculating the user undertaking's total staff, by calculating the average number over 12 months, unless they have been hired for replacement purposes.[123] They are not eligible and do not vote in elections for representatives within the user undertaking.[124] However, they have the right to address and consult the representatives in the same way as any other permanent employee.[125]

The representatives must be consulted when the employer intends to use temporary agency workers, and the representatives have the right to review the contracts of assignment.[126]

H. Strikes

The right to strike does not differentiate between temporary agency workers and any other workers. The right to strike is strictly regulated in Luxembourg. A conciliation procedure must be implemented before any strike can take place. Furthermore, according to case law, strikes must be based on an occupational claim. The strike must always be directed against the employer, ie against the temporary work agency and not the user undertaking.

[121] Projet de loi No 3446 portant réglementation du travail intérimaire et du prêt temporaire de main-d'œuvre, Commentaire des articles, p 14.
[122] Art L 131-15 CT.
[123] Art L 411-1 (2) CT.
[124] Art L 413-6 CT.
[125] Art. 413-6 para 2 CT.
[126] Art L 134-1 CT and L 414-3(3) CT.

In practice, strikes are extremely uncommon in Luxembourg. For temporary agency workers, who work for multiple undertakings and are less unionised, the question of their right to strike seems to be very theoretical.

As for fixed-term contracts, it is prohibited to use temporary workers as substitutes in case of strikes.[127] The collective agreement also states that temporary work agencies must commit themselves to not hire out workers as substitutes in case of strikes.[128]

I. Collective Bargaining Agreements Deviating from Statutory Provisions

A collective agreement establishes the general working conditions for temporary agency workers.[129] It has been declared to be of general application to all temporary work agencies; its territorial scope is the entire territory of the Grand-Duchy.

Most of the provisions in the collective agreement have simply been copied from the Labour Code or do not go beyond the legal obligations. Some articles provide additional protection, such as the principle of equal treatment that is more precisely elaborated, some additional clauses on public holidays, and the principle that a temporary agency worker is entitled to refuse to work overtime.

An important bargaining achievement is the implementation of a separate body, financed by temporary work agencies (0.6 per cent of staff expenses) to offer professional training to temporary agency workers (*Fonds de formation sectoriel pour l'Intérim*).

[127] Art L 122-1(2) and L 131-4(1) CT: 'Sont notamment considérés comme tâche précise et non durable … le remplacement d'un salarié temporairement absent ou dont le contrat de travail est suspendu pour des motifs autres qu'un conflit collectif de travail'.

[128] Art 14.3. of the collective agreement: 'Les entreprises de travail intérimaire s'engagent à ne pas mettre des travailleurs intérimaires à la disposition d'un utilisateur pour remplacer des travailleurs grévistes'.

[129] Règlement grand-ducal du 10 juin 2014 portant déclaration d'obligation générale de la convention collective de travail du 28 mars 2014 applicable aux travailleurs intérimaires des entreprises de travail intérimaire, conclue entre la Fedil Employment Services (FES), d'une part et les syndicats OGB-L et LCGB, d'autre part.