Are Welfare Beneficiaries in Workfare Programs Workers in the eyes of ILO Conventions and Human Rights?

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[1] Anne Meier is a senior researcher in the 3-year research program "Working under the conditions of social welfare" (see: www.thirdlabourmarket.ch for more information).

I. Abstract

The transformation from the traditional social welfare state to the activating welfare state often leads to policies linking welfare benefits to the obligation to take part in an occupational program, be it in "social businesses" or as public interest workfare. Such "workfare programs" raise many legal, social and philosophical questions. One aspect of workfare programs is particularly sensitive – and has been largely evaded by national and local lawmakers in Europe, as well as being mostly absent from case-law: is a person working in such a program an "employee" in the sense of national and international labour law?

In a first part (III.), the paper will describe the characteristics of workfare programs; we will look at two specific examples from the field in Switzerland. The sheer diversity of these programs (paid or unpaid work; work for the state or for a private company; type of work; work conditions, such as hours, health and safety; satisfaction of the beneficiary's wishes and ambitions; aim(s) of the programs, threat of sanctions, etc.), will highlight the difficulty to answer the question of whether or not, such programs can qualify as employment relationships and whether the participants are (or should be) considered as employees within the meaning of international law. The triangular relationship created between the beneficiary/worker, the state/welfare provider, and the employer adds one more layer of complexity. The findings of this second part will help (in a future, more elaborate version of this working paper) to set a typology of such measures, and propose a methodology in order to help legal classification in the field.

In a second part (IV.), the question of whether welfare workers are included within the scope of international labour law will be asked, and we will look at an answer by taking both the purposes of this body of laws, and the purposes of wekfare-to-work programs, into account.

The final part (V.) will discuss some of the most important consequences of the first and second part's findings on the national level, in terms of rights and duties for participants in workfare programs, their employers, and the state, and also on a policy-making level: should the lawmaker and the courts take international law into account, including the right to fair and just conditions of work, and the decent work principles? Does local employment law apply? How does the social security system take these "jobs" into account?

Key words: *welfare, workfare programs, notion of worker, work conditions, decent work*

II. Introduction

The transformation from the traditional social welfare state to the activating welfare state often leads to policies linking welfare benefits to the obligation to take part in an occupational program, be it in "social businesses" or as public interest workfare. Such "workfare programs" raise many legal, social and philosophical questions. One aspect of workfare programs is particularly sensitive – and has been largely evaded by national and local lawmakers in Europe and mostly absent from case-law: is a person working in such a program an "employee" in the sense of national and international labour law?

The present contribution will not bring a definitive answer to the research question. Indeed, we will show that there cannot be – nor should there be – a single, unique answer to this question. Indeed, the variety of "workfare programs" is such that there could not be one single analysis of the legal relationships they create. The sheer diversity of these programs (paid or unpaid work; work for the state or for a private company; type of work; work conditions, such as hours, health and safety; satisfaction of the beneficiary's wishes and ambitions; aim(s) of the programs, threat of sanctions, etc.), will highlight the difficulty to answer the question of whether or not, such programs can qualify as employment relationships and whether the participants are (or should be) considered as employees within the meaning of international law. The triangular relationship created between the beneficiary/worker, the state/welfare provider, and the employer adds one more layer of complexity.

The question itself is, nevertheless, of the utmost importance. Indeed, when a person who is in a work relationship is a employee, this qualification opens the way to access to the status of worker,

which brings with it most of the social protection for such a relationship, such as: minimum wage (when it exists), collective bargaining rights, health and safety, discrimination protection and protection of personality rights, protection against unfair dismissal, paid vacation, paid sick days, unemployment benefits, pensions, etc.

In order to determine whether these rights, or some of them, apply within the specific frame of "workfare programs" for welfare beneficiaries, one needs to better understand two key elements. The first: what are these programs? Who puts them into place? To what end? The second: is it compliant with the social aims of either labour law and social welfare to have welfare beneficiaries benefit from the status of employee?

To answer the first question, I will present, in chapter III, a few of the first field research we have conducted within our research program on workfare programs in Switzerland[2]. To answer the second question, it is necessary to analyse both the aims of international and national labour law and those of "workfare programs". Whether they are or can be compatible, and whether workfare workers should benefit from the social protection offered by labour law, will then become more apparent.

I will discuss some of the most important consequences of the first and second part's findings on the national level, in terms of rights and duties for participants in workfare programs, their employers, and the state, and also on a policy-making level: should the lawmaker and the courts take international law into account, including the right to fair and just conditions of work, and the decent work principles? Does local employment law (including collective bargaining agreements, when they exist) apply? How does the social security system take these "jobs" into account? Are beneficiaries of the programs entitled to benefits, like "regular" workers? However, many of the proposed answers in part III of the article are in fact opening new questions for more in-depth research, which we will address within the frame of our research program.

[2] Our 3-year research program is funded by the Swiss national science foundation. It is entitled "Working under the conditions of social welfare: legal framework, prevalence and regulatory gaps" and is led by Prof. Kurt Pärli from the University of Basel. Political scientist PD Dr. Gesine Fuchs has led the work on the survey, which was launched in April 2017. The first results came in mid-June 2017 and we are expecting a full response rate by the end of July, 2017. Melanie Studer is writing her Ph.D. within this research program on the topic of the notion of „reasonable work" in welfare-to-work measures in Switzerland. For more information on this program, see: https://thirdlabourmarket.ius.unibas.ch/en/.

III. "Welfare workers" and workfare programs

1. Main characteristics of workfare programs

It would make no sense to try to offer an exhaustive typology of workfare programs in this working paper. Indeed, such programs can take many a form and serve various purposes. Within our 3-year research program, we have conducted a survey which will allow us to form a more precise picture of welfare-to-work programs in Switzerland. The first results have just started coming in, therefore we cannot provide any substantial analysis at this stage.

The survey was addressed to the 26 cantons (States) of Switzerland. Switzerland is a federal state and the social welfare policies fall within the jurisdiction of the States. No doubt that the picture which will emerge from this field research will reveal an extremely diverse image.

We have oriented our survey around the following directions:

- Density of regulation
- Aims of programs
- Type of programs
- Link with sanctions within social welfare: type and characteristics of sanctions.
- Organisation and management of the programs.
- Evaluation of the programs.

The items "density of regulation" and "type and characteristics of sanctions" are directly linked. They are of the utmost importance when researching and analysing welfare-to-work programs. A recent decision of the Swiss Supreme Court has, indeed, confirmed the right of a social welfare authority to reduce the welfare benefits to the bare minimum (set by the Federal Constitution of the Swiss Confederation for the right to assistance and care, and to the financial means required for a decent standard of living for persons in need and unable to provide for themselves[3]), when a welfare beneficiary refused to participate in an unpaid welfare-to-program he was assigned to. Strikingly, the Supreme Court has not expressed the slightest interest into questions such as: what kind of program it was (type of work, correspondence with the beneficiary's skills and interests, etc.), the purpose of the program (would it help the beneficiary to return to the first labour market?), and has not at all frowned upon the fact that this program was unpaid… but reminded the beneficiary that he was "uncooperative". This topic is, however, not central in the present paper. It will not be addressed further but will make for a later publication.

The items "organisation and management of the programs" and "evaluation" are not directly relevant within the frame of this paper. However, it appears of interest for the present paper to provide details regarding the other items of the survey:

a. Density of regulation

Although the survey did not ask specific questions regarding the normative density of the workfare programs, this density will be inferred from the responses we will receive. Indeed, some regions have been able to provide information regarding the regulation of workfare programs from the level of the constitution all the way down to the individual contract between the beneficiary, the state,

[3] Article 12 of the Constitution. The court decision (ATF 142 I 1) was commented by Melanie Studer / Kurt Pärli: *BGE 142 I 1: Sozialhilferechtliche Beschäftigungsprogramme zwischen Existenzsicherung, Subsidiarität, Zumutbarkeit und Sanktion,* Aktuelle juristische Praxis 2016, 10, 1385-1394, and by Anne Meier / Melanie Studer, *Commentaire de l'ATF 142 I 1*, Jusletter, 14 novembre 2016, 1-18.

and the social firm. Other cantons are unable to provide some information, notably on the regulatory level (executive) and/or on the individual contract level.

b. Aims and purpose of programs

We were interested in knowing whether there was a constitutional and/or legal framework regulating the aim(s) of workfare programs within a canton.

c. Types of programs

We asked for an estimation of the number of available programs/available slots within those programs, and the number of welfare beneficiaries who can/must participate within such programs. We provided four types of programs and asked whether the programs offered by the canton fall into such categories: evaluation; integration within the first labour market; qualification/preparation for an integration within the first labour market; participation within work outside of the first labour market. We also asked about whether specific categories of welfare beneficiaries are targeted by such programs (young adults under 25 years, older people without income, single parents, disabled persons, refugees).

2. Two examples from the field in Switzerland

To offer concrete examples of welfare-to-work programs and in order to provide evidence for their huge diversity, I have chosen to present here two contrasting examples from the very first results of our field survey.

a. Canton of Neuchâtel

In the canton of Neuchâtel, about 10% of the total number of welfare beneficiaries participate in one of the offered programs every year. In their reply to the survey, the canton of Neuchâtel has also provided a list of the 23 welfare-to-work programs available to welfare beneficiaries and subsidized by the service for social welfare of the state, excepting the programs designed specifically for refugees, which are regulated and managed by another section of the public administration[4].

The cantonal law on social welfare[5] provides a frame for welfare-to-work programs that can be said to be quite dense. The law contains 8 provisions regulating the following topics:

- Aims of the programs: The state elaborates occupational and training programs as well as internships and other actions which can help social welfare beneficiaries to retrieve or develop their work capacity and their social autonomy (article 53).
- Contents of the contract (art 54).
- Types of programs: activities of public interest; work or internships within privately owned firms; training internships; programs aiming to help beneficiaries to retrieve or develop their capacity to work and their social autonomy; possibility to take into account particular projects submitted by the beneficiaries themselves (art. 55).
- Benefits/remuneration: for the duration of the contract, the state pays benefits that are at least equivalent to the maximum welfare benefits for one particular beneficiary (art. 56).
- Obligations/sanctions: the beneficiary is not, by law, entitled to participate in any given program; however, her participation can be mandatory. In case the beneficiary refuses to participate within a project, her benefits may be reduced to the legal minimum (art. 57).

[4] As is always the case in Switzerland, this competence falling within the jurisdiction of the Federal State (Confederation).

[5] See (in French), Loi sur l'action sociale: http://rsn.ne.ch/DATA/program/books/rsne/htm/8310.htm.

- The social welfare authority regularly supervises the program and the beneficiary's situation (art. 58).
- End of the contract: if the beneficiary does not or is unable to fill her duties, and if it is impossible to amend the situation or the contract, the authority terminates the contract (art. 59).
- Disputes: the beneficiary who disagrees either with the principle of the work assignment, the contents of the contract or with its termination, she can work with the authority to resolve the dispute. The authority will examine the file and then make a new decision, which the beneficiary can appeal and bring to the courts (art. 60).

The implementing regulation[6] contains provisions regarding the contractual requirements for such integration programs (articles 10 to 17), and regarding their financing (articles 18 and 19). It is worth noting that, contrary to what article 57 of the law seems to provide, article 10 of the implementing regulation specifies that a contract is proposed to the welfare beneficiary, provided that a workfare program corresponds to her needs and aptitudes. She can also ask to participate to a program of her choice, or present her own project. The workfare project is defined in collaboration with the beneficiary, taking into account her family situation, her professional training, her age and her health, and – if possible – her wishes.

The beneficiary who participates to one of these programs signs a contract, which is between herself, the social welfare authority, and the entity responsible for the program. The contract specifies that the duration of the occupational program is of 3 months (renewable up to one year; it can be renewed for a longer period according to the needs of the program) and the percentage of the activity, and its objectives. The duties of the participant are:

- To attend the program according to the specifications of the contract;
- To respect the schedules;
- To abstain from drug or alcohol consumption during the program hours;
- To call in advance when absent, and to explain why;
- To not interfere with the smooth running of the program, and to not disturb other participants;
- To respect the prescriptions and regulations, and to follow the instructions of the organizer of the program.

Under the section of the contract regarding the remuneration, one finds out that the beneficiary is entitled to an additional payment to her social welfare benefits (additional integration payment), provided that she participated in the program at least half of the time.

The contract also specifies that the beneficiary must have her own medical insurance[7], including coverage for accident insurance. This provision is not usual in Switzerland, as professional and non professional accidents are insured, by law, by the employer, provided that the employee works for her at least 8 hours per week. In case the participant is unable to attend the program for health reasons (illness or accident) for more than 14 days in a row, the program may be suspended or terminated, and the additional integration payment is stopped.

[6] Règlement d'exécution de la loi sur l'action sociale (file:///Users/AnneMeier/switchdrive/Arbeitsverhältnisse%20unter%20sozialrechtlichen%20Bedingungen/08_Befragungen/Ergebnisse/NE/Règlement%20d'exécution%20de%20la%20loi%20sur%20l'action%20sociale.htm).

[7] This is usual in Switzerland, where the medical insurance is mandatory and is almost never paid by the employer.

The beneficiary is entitled to vacation days and to the usual holidays. Whenever possible, medical consultations and appointments must be made outside of the scheduled hours of presence and group meetings.

The contract specifies that the participant is personally responsible for any damage she intentionally (or by gross or repeated acts of negligence) caused to the facilities or material. The damages can be paid for by the additional integration payments the beneficiary is entitled to.

The contract specifies that it must be revised and adapted at least every 3 months. It can be terminated by each party with a notice period of 14 days; an immediate termination is possible, provided there are serious grounds for it. The additional integration payment is due to the participant if she has worked within the program for at least 14 days during the month. If the participant "makes the continuation of the contract impossible because of her faulty behavior, her social welfare payments will be reduced to the legal minimum. Finally, if the beneficiary can prove that she has found paid employment elsewhere, she is allowed to terminate the program at the most suitable moment for herself.

The contract itself, as well as the decisions related to it, can be brought to a court within 20 days.

In parallel to this contract, the authority signs a financing agreement with the organization offering the program. This document will not be analyzed here.

b. Canton of Obwald

Much smaller than the canton of Neuchâtel, the canton of Obwald indicated that they do not know how many people benefit from workfare programs, but that they think it must be very few people. About 7 programs or organizations were said to offer such programs. The survey, in this case, did not reveal any typical contract nor did it specify the remuneration for welfare beneficiaries who participate in the programs. Social insurance and work conditions are not mentioned either. Sanctions are not explicit.

3. Intermediary observations

Given the first findings of our field survey, one obvious observation can be made: a legal analysis of occupational programs within welfare policies must be made case by case. There can be no general assumptions nor any definite answer to the question of whether welfare workers are workers in the sense of international and domestic labour law. This is due to the sheer variety of the structures, of the density of regulation, and of the aims of such programs. In the following part of this working paper, I will try to set a guiding frame for such analysis.

IV. The "welfare worker" and the scope of international labour law

1. Purpose and scope of international and domestic worker protection

As sources of international labour law are, first, the ILO-Conventions; for each country, it is necessary to check whether a specific convention has been ratified. Other sources are the Universal Declaration of Human Rights and the ICESCR.

This paper does not focus on the prohibition of forced labour. Indeed, this subject is important within the wider scope of the legal analysis of "welfare to work" programs. However, our concern here is essentially to determine whether such programs create an employment relationship.

Interestingly, most international labour law treaties and instruments do not offer a definition of their scope, most of the time simply excluding "atypical workers"[8] from their scope – and limitating it to "*dependent work*". "Dependent work" is usually not defined in international labour law instruments and left to the States' discretion[9]. Most international instruments apply to *all workers* (as distinguished from independent contractors), regardless of their job or profession.

In Switzerland, like in most Western countries, the work contract is usually characterized by two defining elements, which are the dependence of the worker (manifested by her subordination and the right of the employer to give orders regarding the performance of work), and the payment of wages or a salary in exchange for the performed work.

Certainly, "workfare" is a form of dependent work; even more so than traditional employment relationships: in the instances where the "workfare" program is organised by a "social firm", the welfare beneficiary finds herself under a double subordination: she is dependent on the welfare payments and the authority of the welfare administration; and she is integrated within the "social firm" organisation, a third-party of sorts in this construction.

Is this "double subordination" enough to earn the beneficiary the status of employee under local, national, and international law? As the status of employee is, in principle, mandatory, one could think it is. Indeed, it is not because the worker is not paid for her work that the quality of worker is automatically eluded; on the contrary, if it appears that dependent work has been performed, a salary has to be paid.

2. Purpose and legal architecture of workfare programs within the frame of social welfare policies

International labour law does not define its own scope explicitly, leaving it to the States to define it. Therefore, the question seems to be about whether the frame within which work is performed (in our case, under the conditions of welfare) can (or should?) influence its legal qualification. In particular, can (or should?) the fact that welfare-to-work programs are designed for people who are not (anymore or not yet) able to work in the first labour market because of their lower performance and their greater need for a support frame, justify that regular labour law and social security rules do not apply to them?

As we can see from the early results of our field research, the aims of welfare-to-work programs are, usually, is to "help social welfare beneficiaries to retrieve or develop their work capacity and their social autonomy". The primary goal is, therefore, not directly to set a social and economic frame for productive work, as is the case with labour market regulations and individual workers rights for the first labour market. Moreover, the rights and duties for participants in workfare programs, their employers, and the state, seems to be very strongly influenced by the legal and contractual frame of each canton (region) and even each individual occupational program.

[8] See for example ILO convention n. 183.
[9] See ILO Recommendation R 198 (Employment RelationshipRecommendation), 2006.

V. Conclusive thoughts: do "welfare workers" benefit from labour law's social protection… and should they?

Our research, so far, has not revealed case law or literature about this specific question, which could mean that the question itself is irrelevant. Swiss case law on occupational programs reveals that the judges systematically avoid asking the question of the applicability of labour law – taking it for granted that it does not[10]. However, welfare workers do perform work and there can be no discussion on the fact that it is dependent work – and therefore, the question is, in itself, relevant.

At this stage of our research, there cannot be any definite answer to this question. The usual criteria used to determine whether labour law should apply can only be used to a certain extent. In our opinion, duration, intensity, and stability of the job should play a role. Indeed, in the light of the regulation in the canton of Neuchâtel, presented above, one should take into account the fact that the initial contract is made for a limited duration of 3 months. However, it is renewable for a duration up to one year – and can even be renewed again after that. Obviously, the longer one person stays in one "job", the more stable her position becomes, the more difficult it will become to refuse her the qualification of employee. One should not forget, either, to take into account the existing risk that the welfare beneficiary may be blocked, or trapped, in this workfare position, defeating its initial purpose of allowing reintegration into the first labour market.

The status of employee brings many social protections, such as health and safety, anti-discrimination, paid vacation, paid sick leave, overtime, protection against unfair dismissal, social security benefits, etc. Obviously, if a welfare worker were to be qualified as an employee, she would benefit from this protection. However, one cannot ignore the fact that this body of rules may not be adapted to the particular situations found within welfare-to-work programs. For example, it is true that employment contracts are usually not essentially result-oriented, in the sense that the principal obligation of the worker is to make her time available to her employer in order to perform the tasks assigned to her. The workplace is obviously designed to reach such productivity goals but it is not a legal component of dependent work. Therefore, given the principles of the free market and of contractual freedom, the employer will not employ (or at least not for a long duration) a worker who is systematically unable to reach "normal" productivity goals, such as would be expected in the first labour market. It does not make much sense to impose the rules of employment law upon welfare-to-work programs when it is well known that the beneficiaries are, in fact, not able to fully perform and would lose their job if they were working strictly within the frame of the first labour market.

The delicate question of who is the actual employer of welfare beneficiary should also be addressed. As we have seen earlier, some Swiss regions organize occupational programs by having the beneficiary sign a contract between herself, the authority, and the organization or firm in which work will be performed. The very fact that a contract is signed might appear to be in contradiction with the legal requirement to participate in the program and the sanctions imposed upon the beneficiary if she refuses. The question of the mutual obligations between the contractual parties also needs to be addressed: is this "contract" merely a formal confirmation of working hours and of the purpose of the occupational program in this particular case? Or is it creating binding and mutual legal obligations?

[10] See, among others: judgements from the Supreme Federal Court ATF 142 I 1; ATF 139 I 218; ATF 130 I 71.

At this stage of our research, we can therefore assess that the application of the full body of labour law, duties and rights, to welfare-to-work programs would not necessarily serve the protective purpose that is pursued. However, in regard of the first analysis of our field research data, one sees very clearly that protection is needed. The "double dependence" of the welfare worker, and the constant threat upon her means of survival if she disobeys needs to be taken into account. A "decent work" frame, as well as basic workers' rights protection need to exist within these "contractual", triangular relationships.

It makes sense with regard to the purpose of occupational programs to set minimum principles of protection for welfare workers, which should, in our view, include at least anti-discrimination and health and safety protection. Respect of the principle of equal treatment is, of course, a general obligation of the state, along with the principles of legality and proportionality. Such obligations should also be imposed upon the third contractual party, the "employer", who is the direct recipient of the work performance – and whom the welfare worker is, in fact, dependent from when performing her work.

Health and safety protection must also be granted to the welfare worker, and imposed, in our opinion, both on the state and on the "employer", as it is clearly their joint responsibility to protect the welfare worker. It is not satisfactory, for example, to impose the costs of accident insurance upon the worker, as is the case in the model contract of the canton of Neuchâtel, as we have seen earlier. How the social security system take these "jobs" into account is yet another complex, and important, question, which we will not discuss here[11].

Finally, the welfare worker being in a position of double dependence, she is even more vulnerable than a traditional worker in the first labour market. She should, therefore, always be granted minimum processual guarantees according to Article 6 ECHR, and in particular the right to be heard and the right to an impartial and independent tribunal for all of the issues can raise from the occupational program, whether the issues regard the welfare authority (the state) or the "employer". The particular nature of the "employment" amply justifies that these minimum rights be awarded to the beneficiary.

At a policy-making level, there is certainly much work to be done, at least in Switzerland. I have shown in this paper that the normative density of welfare-to-work programs varies dramatically depending on the canton, to the point where some cantons do not seems to have even very minimal guidelines as to these programs. There cannot be any doubt about the fact that welfare workers' protection, in those cases, is terribly incomplete. Lawmakers and courts need to take into account at least the above-mentioned minimum requirements, even if they do not always amount to the actual level that would be expected from a full application of the right to fair and just conditions of work, and the decent work principles.

[11] An article by Kurt Pärli and Anne Meier is in preparation on this topic in Swiss law.