SUMMARY

2016/41 Employers must observe collective bargaining agreement-based restrictions on temporary agency work even if they are not justified (FI)

<p>A company had leased some employees from a temporary work agency between 2008 and 2012 to work alongside its own employees on a continuous basis. The collective bargaining agreement that the company was bound by restricted the use of temporary agency workers to situations in which the work could not be performed by the company's own staff. The trade union brought an action before the Labour Court claiming that the company had used temporary agency workers continuously to a greater extent than permitted by the collective bargaining agreement and that the employers' association, of which the company was a member, had breached its supervisory duty. In a preliminary ruling, the ECJ held that the Temporary Agency Work Directive (2008/104/EC) does not oblige national courts to refuse to apply national law containing prohibitions or restrictions, even if those restrictions were not justified. Having confirmed that national restrictions may be applied, the Labour Court imposed a compensatory fine of € 3,000 on the company and € 4,000 on the employers' association.</p>

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Facts

The respondents in this case were Shell Aviation Finland Oy ('Shell'), a company that supplies fuel to airports in Finland, and Öljykivi ry, the relevant employers' association. Between 2008 and 2012 Shell had contracts with two different temporary work agencies. During that time, temporary agency workers worked regularly alongside Shell's own employees. According to the testimonies given in the case, the number of temporary agency workers increased between 2010 and 2012 and as a result, there were almost as many agency workers as Shell's own employees. The number of its own employees did not increase in line with the workload. The temporary agency workers performed the usual duties of aviation servicemen and did not have special skills beyond the skills of Shell's own employees. There was no evidence of work peaks causing a need for temporary agency workers.

Shell was bound by the collective bargaining agreement for the tanker-truck and oil product sector in Finland. Section 29(1) of the collective bargaining agreement provides that temporary agency workers can only be used in situations where the work cannot be performed by the employer's own staff, for example during work peaks, urgent situations or for work demanding special skills or tools. If agency workers work alongside the employer's own workers for a longer period, the leasing is considered inappropriate and thus forbidden.

In accordance with section 7 of the Collective Bargaining Agreements Act (436/1946), a compensatory fine of up to € 30,900 (at the time of the case up to € 29,500) may be imposed on a company that breaches a collective bargaining agreement. Section 8 of the Act provides that an association bound by a collective bargaining agreement must ensure that its member employers do not contravene the provisions of the collective bargaining agreement. According to Section 9 of the Act, a compensatory fine of up to € 30,900 (at the time of the case up to €

29,500) can also be imposed on an employers' association that breaches its supervisory duty.

The plaintiff, the Finnish Transport Workers' Union AKT ('AKT'), brought an action before the Labour Court, claiming that Shell had breached the collective bargaining agreement, as it had used temporary agency workers continuously between 2008 and 2012 to a greater extent than permitted by the collective bargaining agreement. AKT further claimed that Öljykivi ry had breached its supervisory duty, since it had not asked Shell to rectify its practice.

Shell and Öljykivi ry rejected AKT's claims, arguing that there were valid grounds for leasing temporary agency workers, such as to substitute employees during sick leave. Shell also noted that the extra work had first been offered to its own employees. Shell further argued that the restrictions in the collective bargaining agreement did not comply with Article 4 of the Temporary Agency Work Directive. Article 4 provides that prohibitions or restrictions on the use of temporary agency work are justified only on certain grounds, such as a general interest in protecting temporary agency workers. In addition, Article 4 imposes an obligation on Member States to review whether the restrictions and prohibitions on the use of temporary agency work are justified. Article 4 also provides that if collective bargaining agreements contain such restrictions, the parties to them may also perform a review. Shell and Öljykivi ry further argued that, in any event, the provisions of the collective bargaining agreement needed to be assessed in accordance with the wording and meaning of the Directive.

Preliminary ruling

The Labour Court sought a preliminary ruling from the ECJ on 4 October 2013. In its ruling, under case reference C-533/13 of 17 March 2015, the ECJ stated that when considered in its context, Article 4(1) of the Directive must be understood as limiting the scope of the legislative framework open to Member States in relation to prohibitions or restrictions on the use of temporary agency workers and not as requiring any specific legislation to be adopted in that regard. The ECJ found that Article 4 of the Directive was addressed only to the competent authorities of the Member States. The authorities must review all potential prohibitions or restrictions on the use of temporary agency work to ensure that they are justified. The obligation to review this cannot be performed by the national courts. The ECJ further held that the Directive does not oblige national courts to refuse to apply national law containing prohibitions or restrictions, such as in the collective bargaining agreement in this case, even if the restrictions were not justified.

The Labour Court's request for a preliminary ruling also included a second question, on the national legal framework Article 4 may preclude and a third question about the powers of the courts in cases where the national legal framework is contrary to the Directive. However, given

the answer to the first question, the ECJ considered it unnecessary to answer the second and third.

Judgment

The Labour Court found that Section 29(1) of the applicable collective bargaining agreement did not, as such, prohibit the use of temporary agency workers as substitutes during sick leave and annual leave. However, it also found it was not justifiable to use agency workers continuously if the employer had a permanent need for a larger workforce. After examining the evidence presented by both parties and having confirmed that the national restrictions on temporary agency work may be applied, the Labour Court held that Shell had knowingly breached the collective bargaining agreement by continuously using temporary agency workers to perform the same duties as its own employees. In addition, Öljykivi ry had breached its supervisory obligation. The Labour Court imposed a compensatory fine of € 3,000 on Shell and € 4,000 on the employers' association. This is a fairly commonplace fine for breach of elements of a collective bargaining agreement. Both fines were ordered to be paid to AKT.

Commentary

The Labour Court's ruling seems to confirm that employers in Finland are obliged to observe the prohibitions and restrictions on temporary agency work stipulated in the applicable collective bargaining agreement regardless of whether or not they are justified under the Directive. In light of the judgment, it seems that since the Directive is already implemented, there is no longer any means of examining whether the restrictions in current collective bargaining agreements are justifiable in accordance with the Directive.

What is also curious about the judgment is that the Court did not take a position on whether it would have been open to it not to apply the provisions of the collective bargaining agreement. The ECJ seems only to have stated that the national courts are permitted to apply the restrictions provided in collective bargaining agreements – not that they are obliged to apply them. It remains to be seen whether the Labour Court will later consider this as an option.

From an international perspective, it will be interesting to see how this case influences the EU goal of creating jobs by encouraging non-standard forms of work, such as agency or fixed-term work.

Subject: Dismissal, (un)justified restrictions

Parties: Transport Workers' Union AKT – v – Öljytuote ry and Shell Aviation Finland Oy

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