SUMMARY

2015/33 Court defines “employment agreement for a temporary employment agency worker” narrowly (NL)

<p>Directive 2008/104/EC on temporary agency work applies to employees of a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction. A similar definition was introduced in the Dutch Civil Code in 1999, five years before the directive was adopted. Recently, a Dutch Court of Appeal added an element to the definition. It ruled that, in order to qualify as a temporary employment agency, an employer must perform what is known as an ‘allocation function’. This means that the employer must be in the business of bringing together supply and demand of labour by assigning employees to customers. In the case reported below, the employer assigned its employees, not to customers but to another group company in order to perform transportation services there, not temporarily but permanently. The court held that this activity did not meet the ‘allocation’ requirement and that therefore the company in question was not a temporary employment agency.</p>
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Facts

Directive 2008/104/EG on temporary agency work (the 'Directive') aims to protect temporary agency workers ("temps"). According to Article 3(1)(c) of this Directive, a temporary agency worker is a worker with a contract of employment or an employment relationship with a temporary-work agency (an 'Agency') with a view to being assigned to a user undertaking to work temporarily under its supervision and direction (underlining added). Article 3(1)(b) defines 'temporary-work agency' as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction (again, underlining added).

Dutch law defines neither of these terms. However, Article 7:690 of the Dutch Civil Code ('DCC') does provide a definition of the contract of employment between an Agency and its temps ("temp contract"). This is defined as a contract of employment whereby, within the context of the employer's profession or business, the employee is placed by the employer at the disposal of a third party in order to perform work under the supervision and direction of the latter by virtue of a contract for services granted by the latter to the employer. With the exception of 'temporary', the elements in this definition are basically the same as those in the Directive, even though Article 7:690 predates the Directive. In the parliamentary history of Article 7:690 DCC, however, the legislator added that the employer should also have a so-

called allocation function, in order to qualify as a temporary-work agency. This means that it should bring together supply and demand of labour by assigning employees to customers. This, after all, was the classical role of agencies: supplying workforce in case of illness of the user undertaking's own staff or a sudden increase in its activities. The issue is whether this additional element, the 'allocation function', mentioned in the Parliamentary history, should be regarded as an additional requirement to qualify as a temporary-work agency.

In the case at hand, a company called Velocitas arranged for the transportation of goods for the benefit of its sister company, Velocitas Transportation and its clients.

SNCU is a foundation that is responsible for assuring compliance with the Dutch collective labour agreement for the temporary agency sector. SNCU took the position that Velocitas qualified as a temporarywork agency and should therefore adhere to the aforementioned collective labour agreement, including the obligation to make pension contributions on behalf of the temps and to contribute to a sector-wide training scheme.

The collective labour agreement did not define temporary-work agency, but simply referred to Article 7:690 DCC in the clause defining its scope of applicability. According to SNCU, Velocitas employed staff who were assigned to other companies (the user undertakings, primarily being Velocitas Transportation) to work temporarily under their supervision and direction. For that reason, SNCU took the position that Velocitas fell within the ambit of the collective labour agreement and should therefore observe its terms.

Velocitas challenged this position, arguing that temporary-work agencies must have the required allocation function, which it did not. Velocitas was merely involved with transportation services for the benefit of third parties that contracted out their transportation activities, in a similar way to its sister company Velocitas Transportation – and as Velocitas did not qualify as a temporary-work agency, the collective labour agreement did not apply.

The court of first instance agreed with this position and rejected SNCU's claims. SNCU appealed, arguing that Article 7:690 DCC does not require the employer to have an allocation function in order to qualify as a temporary-work agency and that therefore this element should be disregarded.

Judgment

The Court of Appeal upheld the lower court's judgment, holding that, although the allocation function is not part of the statutory definition of a temp contract, it should nevertheless be read into the definition. The Court of Appeal based its decision on the Parliamentary history of Article 7:690 DCC. As Velocitas' function did not seem to be to bring together the supply

and demand of labour in the market (though SNCU was given the chance to prove otherwise) it could not be regarded as a temporary-work agency. In consequence, the collective labour agreement for the temporary agency sector did not apply to Velocitas.

Commentary

Why is whether an employer qualifies as a temporary employment agency relevant? Under Dutch law the relevance is twofold:

an agenply with the relevant collective agreement, which bestows certain rights on temps, making them more expensive than they might otherwise be;
temps lack the dismcy must comissal protection that most regular employees have (which is one reason that The Netherlands has so many temps).

SNCU is actively pursuing companies that hire out temporary staff whilst not complying with the relevant collective agreement. Many of those companies do not regard themselves as Agencies. They attempt to avoid the obligation to comply with the relevant collective agreement by defining temporary agency work narrowly.

The outcome of this case is controversial: there is much debate about whether the allocation function matters when determining whether a company qualifies as a temporary-work agency. Although 'allocation function' describes the original role of a temporary-work agency, it is not part of the statutory definition. Moreover, it is not beyond doubt that the legislator intended to include this element in the definition. Commentators take different views on that, as do the courts.

It is somewhat peculiar that the definitions set out Directive 2008/104/ EC seem not to have played a significant role in the national discussion. Although Article 7:690 DCC predates the Directive by five years, and the Directive was therefore irrelevant at the moment Article 7:690 DCC was introduced, the Government, when it presented the Bill transposing the Directive (into other legislation) in 2008, observed that the definition of a temp contract in Article 7:690 DCC accorded with Article 3(1) of the Directive.[1] Moreover, the ECJ has held that national legislation implementing a directive must be interpreted in line with that directive, even if it predates the directive.[2]

The Dutch definition of temp contract in Article 7:690 DCC should in my view therefore be interpreted in accordance with the Directive. Adding a restrictive element to this definition may very well be in violation of the Directive.[3] Even so, falling back on the Directive regrettably does not give full clarity, according to some Dutch commentators. It has been

argued by some that, although the allocation function as such is missing from the definitions of Article 3(1) of the Directive, the word 'temporarily' used in these definitions implies that the Agency must have an allocation function.

In August 2011, an Expert Group composed of national experts from all 27 Member States (plus some others) issued a report to the European Commission on the transposition of Directive 2008/104. To my knowledge the report has not been published on www.eurlex.eu, though it can be found easily via Google. The following passage from the report deals with the issue discussed above:

Does the Directive apply regardless of the duration of assignments?

Although definitions in Article 3 use the word 'temporarily', there is no limitation to the duration of assignments. Practice differs in different Member States and economic sectors as to the length of assignments, which may be, for instance, a matter of days in certain situations, while in other cases they may last a number of months. In all these situations the assignment remains of a temporary character.

Does the Directive apply to employers which are not temporary-work agencies but occasionally second staff by placing them under the supervision and direction of another undertaking?

Article 1(2) states that the Directive applies to undertakings "which are temporary-work agencies (...)" and Article 3(1)(b) contains an autonomous definition of the notion of "temporary-work agency". Consequently, the Directive may in certain situations be applicable to employers in spite of their not being qualified as temporary-work agencies under national law. However, this may only be the case when the entity under consideration fulfills the conditions laid down in Articles 1 and 3 and, thus, must be considered as a temporary-work agency in the meaning of the Directive.

For instance:

A worker employed by a company which is not a temporary-work agency may at a certain point be put at the disposal of another company belonging to the same group of undertakings, in particular to adapt to changing economic circumstances. This is a situation where the Directive would not be applicable. (...)

In brief, according to the Expert Group, the word 'temporarily' in the Directive does not give a clear indication about the duration of a secondment in any particular case. It could, for

example, describe in general terms a situation in which a temporary-work agency brings together the demand and supply of labour - often for only a limited period of time.

Nevertheless, I doubt this is the proper interpretation of the Directive. It seems to me that the expert group merely wanted to get across the idea that assignments that last for many months may very well still fall within the ambit of the Directive. I do not agree that the word 'temporarily' refers to an allocation function. Having said this, it is obviously crucial to have a proper understanding of what exactly constitutes a temp contract. The Dutch Supreme Court has been asked (in another case) to give a definitive respone as to how to interpret Article 7:690 DCC. It will be interesting to see whether the Supreme Court applies the Directive in order to give that interpretation. It may even refer questions to the ECJ for a preliminary ruling, for example, to clarify the word 'temporarily' as used in the Directive. Does this word simply refer to a time-period, or does it (also) introduce the notion of an 'allocation function'? We will have to wait and see.

Comments from other jurisdictions

Austria (Daniela Krömer): The distinction between temporary agency work and the provision of services has also been brought before the Austrian Courts. The Act on Temporary Agency Work *(Arbeitskräfteüberlassungsgesetz, 'AÜG'*) states that the hiring-out of workers consists in making workers available to a third party in order to carry out work. There is no time limit set, nor is an allocation function mentioned or required. The only mention of a time limit can be found in the so-called 'group privilege', i.e. if temporary (and if agency work is not the object of the company), agency work within a group of companies does not fall within the Act.

The Austrian understanding of what constitutes temporary agency work is very broad. The Act mentions four criteria that indicate temporary agency work. They are:

workers who do not produce any work or service attributable to the subcontractor, which differs or is distinguishable from the goods, services and products of the main contractor;
workers who do not perform their work using materials and tools belonging to the subcontractor;
workers who are, from a logistical point of view, integrated into the main contractor's company and are subject to its hierarchical and technical supervision;
where the subcontractor is not liable for the result of the work or supply of services.

Court rulings indicate that it is sufficient if only one of the four criteria has been met (e.g. the recent judgment of the Supreme Court 8 ObA 7/14h). Strictly speaking, it is not necessary to perform services under the hierarchical supervision of a user undertaking to fall within the

Act. The Austrian judiciary was criticised by the ECJ in its judgement C-586/13, Martin Meat for interpreting the criteria too broadly (though not in the context of the Directive on Temporary Agency Work but based on the Directive on Posted Workers).

Without knowing too many of the details of the *Velocitas* case, it is likely that at least one of the above-mentioned criteria would have been met – and that the workers would have fallen within the Act on Temporary Agency Work.

Footnotes

1 See *TK*, 2010–2011, 32 895, nr. 3, p. 3.

2 See ECJ 13 November 1990, case C-106/89 (*Marleasing*) at §8: "(…) *in applying national law, whether the provisions in question were adopted before* or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter (…)".

3 One may argue that taking a restrictive position about who qualifies as a temp may be beneficial to the worker concerned as, if that is the case, he will enjoy dismissal protection. Even so, according to the legislator, Article 7: 690 DCC implements the Directive and therefore potentially also the advantageous elementsof it. It should therefore, in my view, comply with the definitions set out in the Directive.

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