SUMMARY

# 2014/6 Equal pay for "temps" and the exemption from directive 2008/104 for publicly supported integration and (re-)training programs (AT)

***<p>For public or publicly supported vocational training, integration or retraining programs to be excluded from the scope of Directive 2008/104 on temporary agency work and national law transposing it, they must provide specific strategies and measures for workers who are difficult to place.</p>***

**Summary**

For public or publicly supported vocational training, integration or retraining programs to be excluded from the scope of Directive 2008/104 on temporary agency work and national law transposing it, they must provide specific strategies and measures for workers who are difficult to place.

**Facts**

The plaintiff was a qualified lawyer who was also qualified to become a judge. In 2007, he applied for a job with the Austrian judicial authorities that deal with asylum applications, the *Bundesasylsenat* [1]. He was informed that the *Bundesasylsenat* could not employ him directly on account of budgetary headcount restrictions, but that he could be employed through a temporary employment agency. There was a significant likelihood that at a later stage he would be offered employment directly with the *Bundesasylsenat*, but there was no

guarantee.

The plaintiff agreed to work for the *Bundesasylsenat* through a temporary employment agency. Accordingly, he entered into the employment of the defendant *Verein J*, a publicly funded non-profit association. This association was established with a view to helping unemployed adolescents and young adults gain relevant work experience while working in organisations that would normally not hire them.

Although the plaintiff performed the same work as the *Bundesasylsenat's* own employees, he was paid less. Until about late 2012 or early 2013, he did nothing about this, but then he brought legal proceedings against the defendant, seeking payment of the balance between what he earned and what employees of the *Bundesasylsenat* earned for the same work. His claim was based on the Temporary Agency Work Act, as amended, from 1 May 2011. The Temporary Agency Work Act is the transposition of Directive 2008/104 on temporary agency work. Article 10 of the Act is similar to Article 5 of the Directive, which provides that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment to a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

The defendant based its defence on Article 1(4)(1) of the Temporary Agency Work Act, which implements Article 1(3) of the Directive. This provision allows Member States to:

*"... provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining program".*

Additionally, the defendant argued that the plaintiff knew and accepted the terms of his employment and was aware that he would not have been able to work for the *Bundesasylsenat* other than through the defendant. The only other way for him to gain work experience at the *Bundesasylsenat* would have been in the form of an administrative internship, in which case he would have earned even less.

In May 2013, the *Landesgericht Linz* rejected the plaintiff's claim. On appeal, the *Oberlandesgericht Linz* overturned the judgment and upheld the claim. The defendant appealed to the *Oberste Gerichtshof* (Supreme Court).

**Judgment**

Article 1/4 Z1 of the Temporary Agency Work Act explicitly states that the terms of the Directive do not apply to temporary agency work that is part of a public or publicly supported vocational training, integration or retraining program. The provision transposes Article 1 (3) of Directive 2008/104 more or less verbatim.

The Austrian Supreme Court decided that Article 1/4 Z1 of the Temporary Agency Work Act did not apply in the case at hand, as the essential feature of an integration or retraining program is that the participants are difficult to place and their placement goes beyond the simple provision of temporary agency workers. Such programs must include plans and strategies to provide opportunities for the participants, which they did not have before.

In the case under consideration, the claimant worked for the asylum authorities as a temporary agency worker simply because they could not afford to employ more workers directly and yet needed additional staff. As the claimant was not subject to any support concerning (re-)training or integration the reason for choosing to employ him by this mechanism was clearly to provide the authority with cheap labour. Further, the claimant was a qualified lawyer with many years of professional experience and therefore not at all difficult to place. As he undertook the same work as directly employed legal staff without any accompanying integration or training measures he was entitled to equal pay under the Temporary Agency Work Act.

**Commentary**

This case demonstrates what can happen when a public authority tries to make savings whilst at the same time creating new institutions or enlarging existing functions. Even though it was clear that the judges of the asylum authorities required certain auxiliary legal services because of lack of funding for direct employment, the authority tried to use this legal mechanism, The aim of employing the claimant as a temporary agency worker was therefore to enable of the provision of those services more cheaply – and not in order to integrate an otherwise excluded worker. The Supreme Court correctly interpreted the exemption provision in the Act restrictively, in line with Directive 2008/104, and did not find that it applied to mere cost-saving measures.

Footnotes

[1] The plaintiff initially worked for the Bundesasylsenat. After a certain time he transferred to the Asylgerichtshof. For ease of reference, both institutions are referred to in this case report as the Budesasylsenat.

*Subject: Temporary agency work, equal pay, exemptions from the scope of application*

*Parties: Mag. G. W. – v - Verein J*

*Court: Oberster Gerichtshof (Supreme Court)*

*Date: 19 December 2013*

*Case number: 9ObA124/13w*

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**Creator**: Oberster Gerichtshof (Supreme Court)
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