SUMMARY

2014/8 Permanent “temp” not employed by user undertaking (GE)

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Facts

This case arose from a dispute between a 'temporary' agency worker and the hospital in which he worked. The hospital in question was publicly owned and it owned the entire share capital of a temporary employment agency (the 'Agency'). Most of the Agency's employees were assigned to work in the hospital, i.e. in the Agency's own parent company. One of those employees was the initial plaintiff in this case, whom we shall call the "temp".

German law requires a commercial temporary employment agency to have a permit. This is provided in the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, the 'AÜG'), which is the German transposition of Directive 2008/104 on temporary agency work. Section

9(1) of the AÜG provides that an employment contract between an unlicensed agency and a temporary agency worker is unlawful. The consequence is that the temporary agency worker would be deemed by law (Section 10(1) AÜG) to be an employee of the user undertaking to which the agency has assigned him.

Section 1(1) (second sentence) of the AÜG provides, following a 2011 amendment, that temporary workers may only be assigned temporarily ('*vorübergehend*'). See the case reported in EELC 2012/60. What 'temporarily' means is unclear. Moreover, the AÜG is silent on the legal consequence of using temporary agency workers on a permanent basis.

The temp in this case was hired on 1 March 2008. He was assigned to the hospital, where he worked in the IT department. In 2012, he brought proceedings before the local *Arbeitsgericht*. The proceedings were directed against both the agency and the hospital. The temp argued that they had breached the AÜG by letting him work permanently in the hospital and that, by analogy to Section 10(1) AÜG, his employment contract with the agency had converted into a contract with the user undertaking, in this case the hospital. He sought a declaration that the hospital had become his employer.

The *Arbeitsgericht* dismissed the claim. The temp appealed to the *Landesarbeitsgericht*. It overturned the lower court's judgment and ruled in his favour. The hospital appealed to the *Bundesarbeitsgericht* ('BAG').

Judgment

The BAG began by noting that the agency was fully licensed and that its licence had remained valid for the entire period that the temp had worked in the hospital. Therefore, his contract of employment with the agency was valid. Given that the only provision in the AÜG allowing an employment contract to be constructed with the user undertaking is Section 10(1), and given that the AÜG is silent on the consequences of violating the 'temporary' requirement, the courts lack the authority to declare a temporary agency worker to have converted into an employee of the user undertaking on any grounds other than that provided in Section 10(1). In addition, Directive 2008/104 itself contains no penalty.

Admittedly, the directive defines a 'temporary agency worker' as "a worker with a contract of employment with a temporary work agency with a view to being assigned to a user undertaking to work **temporarily** under its supervision and direction". However, the directive lacks any provision explaining what the consequences would be in the event a temporary agency worker was assigned to a user undertaking to work there permanently. Moreover, there are so many possible ways to sanction the permanent use of temporary agency workers that

only the legislator can determine what the correct sanction should be, not the courts.

Thus, the temp in this case, finally lost his case.

Commentary

The BAG's decision deserves approval, but it is not likely to be relevant for long, for the following reason. In September 2013 federal elections were held in Germany. They resulted in a "grand coalition" between the Christian Democrats and the Social Democrats, who entered into a coalition agreement. One of the elements of that agreement is that legislation will be introduced aimed at (i) clarifying the concept of 'temporary' assignment and (ii) making clear what the sanction for permanent assignment is. The agreement calls for an 18-month cap on assignments. Any assignment exceeding this limit will not longer be considered to be 'temporary'. It will be interesting to see what the sanction for exceeding this limit will be.

Comments from other jurisdictions

Austria (Daniela Krömer): The term "temporary" and the consequences of "non-temporary" agency work have not been explicitly decided upon by the Austrian courts. In 2003, the Austrian Supreme Court (OGH) in 9 ObA 113/03p came to the conclusion that a temporary agency worker who was assigned to the user undertaking for nine years was "atypical" and it awarded him severance pay in accordance with the collective agreement that applied to "permanent" workers. The Supreme Court was criticised for this decision, as it was seen as lacking a sound legal basis. In its later judgments, the Supreme Court has not used the term "atypical", even though it was asked to rule on assignments lasting five years (9 ObA 158/07m) and six years (8 ObA 54/11s).

The Austrian legislator accepts long term assignments: in a recent amendment to the Act on Temporary Agency Work (Arbeitskräfteüberlassungsgesetz, the 'AÜG'),of 2012/13, a provision is included (§ 10 Abs 1a AÜG) that entitles temporary agency workers to the same company pensions as their regularly employed colleagues once they have been assigned for over four years. This indicates that assignments for more than four years are accepted.

The Czech Republic (Nataša Randlová): Under Czech law, an employment agency may temporarily assign an employee to the same company for no more than 12 consecutive months. However, there are two exceptions to this rule:

(i) where the employee is assigned to perform work in a particular job as a substitute for an employee who is temporarily unable to perform work either because the employee is on maternity leave or parental leave;

(ii) the employee asks the employment agency to be assigned to the company for more than 12 months.

The second exception especially, is very often used in practice and it breaks the maximum temporary-assignment rule fundamentally, as there are no other limits or requirements that apply. In much the same way as the German rules described above, Czech law also remains silent on the legal consequences of using temporarily assigned employees on a permanent basis. Effectively, the scope of temporary assignments can only be limited by the collective agreement of a particular company.

Employment agencies and temporarily assigned employees really deserve a better and more detailed regulatory framework – as planned in Germany. The most problematic issues include the termination of temporary assignments and the special nature of temporary assignment contracts - which do not fall squarely either into employment or civil law.

Hungary (Gabriella Ormai): On 1 July 2012 a new Labour Code (Act I of 2012) came into force in Hungary. The previous Labour Code had been amended with an effective date of 1 December 2011 to incorporate a maximum of five years for temporary agency services. The new Act has retained this approach by stipulating that a temporary agency worker may not be assigned for more than five years to the same 'user' employer. This five-year period also includes any extension and any new assignments to the same employer within six months of the expiry of the previous assignment, even if a different temporary agency service provider assigns the same temporary agency worker.

In terms of the consequences of this, the Act only states that a breach of the five-year maximum duration is unlawful and therefore prohibited. The relevant commentary states that this means that a temporary agency worker can reject a further assignment. In addition in the case of a labour inspection the competent labour authority may impose sanctions, for example, a fine or the revocation of the temporary agency service provider's permit.

Another deviation from the German practice described above is that under Hungarian law there can be no valid agreement on the assignment of temporary agency workers between two employers within the same group if, for example, one is fully or partially the owner of the other. This rule prevents similar cases from the one at hand arising in Hungary.

The Netherlands (Peter Vas Nunes): Temporary employment agencies have been in the legal spotlight for decades. Until 1998, a permit was required to operate a temporary employment agency and up until the early 1980s the unions were wary of the phenomenon of agency work. Over the course of time, the unions gave up their resistance and decided that negotiating with the agency industry is better than fighting it (in fact, as early as 1971, one union entered into a

collective agreement for certain 'temps').

Gradually, the industry has become more respectable - at least most of it - and it has been deregulated. The focus has shifted to combatting what is known as *malafide* employment agencies, which exploit (mainly foreign) workers or evade taxes and social insurance legislation. The government, the unions and the associations of employment agencies are doing all they can to distinguish between respectable and shady agencies. One of the many ways this is being done is certification and co-liability for unpaid taxes and social insurance contributions.

A recent development relates to so-called *payrolling*. The distinction between a regular employment agency and a payroll company is not always clear. Basically, an employment agency is in the business of 'labour market allocation', whereas a payroll company is essentially an extension of the user undertaking. The latter searches and selects its staff and then asks the payroll company to employ those staff on its behalf. Recently, several courts have held that these staff are actually in the employment of the user undertaking, despite explicit contractual wording to the contrary. The Supreme Court has yet to pronounce on this issue.

Norway (Hans Jørgen Bender): In Norway, the Working Environment Act section 14-9 has regulations on when temporary employment is considered legal. The possibility of entering into a temporary employment contract (either directly between the worker and the user undertaking or indirectly through a temporary employment agency) is limited and can only be agreed upon:

a) when warranted by the nature of the work and the work differs from that which is ordinarily performed in the undertaking,

b) for work as a temporary replacement for another person or persons,

c) for work as a trainee,

d) for participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service,

e) for athletes, trainers, referees and other leaders within organised sports.

A temporary employment shall, if demanded by the employee, be converted into an indefinite-term employment if the conditions for temporary employment described above are not fulfilled.

A temporary employment pursuant to a) and b) above is automatically converted into an indefinite-term employment if the employee has been temporarily employed for more than four consecutive years.

Slovakia (Beáta Kartíková): In Slovakia a temporary employment agency can be penalised if it has no licence to operate, but a temporary employee would not in that case be considered to be an employee of the user undertaking.

However, if a user undertaking 'repeatedly' agrees (i.e. within six months of the end of a previous temporary employment arrangement) to take the same temporary assignee from an employment agency more than five times within 24 consecutive months in circumstances where there is no substantive reason under the Slovak Labour Code to do so (e.g. for maternity/parental leave cover or seasonal work), the employment between the temporary employment agency and the employee and will cease and the employee will be employed for an indefinite period with the user undertaking.

Similarly to German law neither the Slovak Labour Code nor any other Slovak laws explicitly define 'temporary employment'. The fact that temporary employment should not cover permanent work for the user undertaking can be deduced from the provisions of the Slovak Labour Code. These state that a temporary assignment agreement between the employer and the employee or an employment agreement between a temporary employment agency and the employee shall include the duration for which the temporary assignment is agreed and that temporary assignment shall end on the expiry of the period for which it was agreed.

Nevertheless, the legal consequences of using temporary assignment on a permanent basis are not regulated. We are not aware of any similar cases in Slovakia and question how the Slovak courts might rule on such a matter.

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