SUMMARY

2014/20 Equal pay for ‘temps’ - how to substantiate a claim (GE)

<p>German law entitles ‘temps’ to equal payment unless there is a collective bargaining agreement that provides for a different salary for temps. To assert a claim regarding a difference in payment, the plaintiff needs to fulfil certain requirements. In three recent decisions, the BAG clarified how to substantiate such a claim.</p>

Summary

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Facts

The facts of each of the three cases are comparable. In each case a temp employed by a commercial temporary employment agency worked in a manufacturing company and was paid an hourly wage of € 6.40 plus certain additional payments for work during the night, on Sundays and on public holidays. This wage was agreed upon in a collective bargaining agreement. However, the agreement was declared to be invalid, because the trade union that signed it was not recognized as a union by the courts.

In the absence of a valid collective bargaining agreement, each plaintiff was entitled to equal pay in accordance with section 10(4) of the Temporary Employment Act

(*Arbeitnehmerüberlassungsgesetz, 'AÜG'*), which is the German transposition of Directive 2008/104 on temporary agency work.

Judgment

The most interesting aspect of the three cases is to be found in the requirements the court determined for validly asserting a pay discrimination claim. It concluded that a temp not only needs to show that a comparable employee of the user undertaking has a certain salary, but must also compare this salary and his own salary, and must demonstrate how the difference between the two is calculated.

Salary within the meaning of the AÜG comprises not only base salary, but every element of remuneration. This includes all bonus payments, holiday pay, sick pay and other benefits, not including the reimbursement of expenses.

In one of the cases, the plaintiff received an hourly wage while working for the temporary employment agency, whereas the employees of the user undertaking received a monthly salary. The court clarified that in such a case the plaintiff does not need to compare a notional hourly remuneration at the user undertaking with the rate paid by the temporary employment agency, but only need compare the total received per month under normal employment conditions.

If the user undertaking applies collective terms of employment (usually resulting from a collective bargaining agreement) which describe the remuneration owed to its own employees, a leased employee can substantiate his or her equal pay claim by applying the scheme to the position worked in during the lease. This is also possible where the user undertaking does not employ its own staff in a particular position.

In each of the cases the plaintiff had failed to make the necessary calculations and to integrate them into the writs of summons. To substantiate the claim it was necessary to set out the total compensation for one month received at the temporary employment agency, the hypothetic total compensation awarded for the same work at the user undertaking and the difference between both figures. In this calculation the plaintiff needs to specifically refer to sick leave and holidays, if he or she is claiming equal pay for such times.

Commentary

The decisions deserve approval, as the main arguments can be concluded directly from the law itself. However, it is worth observing that the BAG again pointed out the somewhat strict requirements for making a claim. Nevertheless, as the AÜG gives an information right to

employees regarding the salary of comparable employees at a user undertaking, plaintiffs should be in a position to meet those requirements. If the plaintiff is able to obtain all the required information, he or she must then set out the basis of the claim clearly, as required by section 130 Code of Civil Procedure.

That said, it seems that in practice these requirements can often be difficult enough to meet that they can preclude temporary agency workers from asserting valid claims, if they have no trade union or lawyer to assist them.

Subject: Miscellaneous, temporary employment, equal pay

Parties: not published

Court: Bundesarbeitsgericht (Federal Labour Court)

Dates: 19 February 2014, 20 November 2013 and 19 February 2014

Case number: 5 AZR 700/12; 5 AZR 365/13; 5 AZR 680/12

Hardcopy publication: DB 2014, 1262

Internet-publication: http://www.bundesarbeitsgericht.de -> Entscheidungen -> Suche -> case number

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Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2014-02-19
Case number: 5 AZR 700/12; 5 AZR 365/13; 5 AZR 680/12