EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/24 Does Finnish law restrict the use of ‘temps’ further than allowed under the Temporary Agency Work Directive? (FI)

<p>The Finnish Labour Court has issued a request for a preliminary ruling to the Court of Justice of the European Union regarding the interpretation of the Directive on Temporary Agency Work (2008/104/EC) (the “Directive”). The Labour Court requests whether the provisions of a national collective bargaining agreement prohibiting the use of temporary agency workers in certain situations are compliant with the Directive, and how the Directive’s provisions regard-ing the obligation to review national prohibitions and restrictions should be evaluated. Further, the Labour Court requests what measures a national court can take to implement the objec-tives of the Directive</p>

Summary

The Finnish Labour Court has issued a request for a preliminary ruling to the Court of Justice of the European Union regarding the interpretation of the Directive on Temporary Agency Work (2008/104/EC) (the "Directive"). The Labour Court requests whether the provisions of a national collective bargaining agreement prohibiting the use of temporary agency workers in certain situations are compliant with the Directive, and how the Directive's provisions regard-ing the obligation to review national prohibitions and restrictions should be evaluated. Further, the Labour Court requests what measures a national court can take to implement the

objec-tives of the Directive.

Facts

Shell Aviation Finland (the 'Company') delivers fuel to airplanes at 18 Finnish airports. At the time of the events, the Company had 28 employees, and in addition to this an agreement regarding the lease of employees from another company. The purpose of the agreement was to provide that employees should be leased to work in the Company during, for example, sick leaves and times of peak workload, and that the Company's staff should be offered additional hours prior to offering these to the leased employees.

The Company is bound by the collective bargaining agreement for the tanker-truck and oil product sector (the 'CBA'). Paragraph 29 of the CBA provides that the companies bound to the CBA must restrict the use of temporary agency workers to peak times and to other duties that cannot be performed by the company's own employees, for example, due to urgency, duration, skills or special equipment requirements of the duties. Further, the use of temporary agency workers is "unhealthy" if the temporary agency workers work under the company's supervision in parallel with the company's own employees for a longer period of time, doing the company's regular duties. Corresponding provisions are included in a federation-level agreement that applies to various sectors, or have been incorporated to some other sector-specific collective bargaining agreements.

The Transport Workers' Union, 'AKT', as plaintiff, claimed that the Company had breached the collective bargaining agreement from 2008 onwards, as it had used leased employees continuously without interruption in parallel with the Company's own employees, performing exactly the same routine duties as the Company's employees, namely, work relating to the fueling of airplanes. By using leased employees, the plaintiff claimed that the Company had breached paragraph 29 of the CBA.

The defendants, the Oil Product Association and the Company as its member, claimed firstly that the provisions of the collective bargaining agreement had not been breached. In the alternative, the defendants claimed that the provisions of the CBA were not applicable, as they restricted the use of temporary agency workers more than permitted by Article 4(1) of the Directive, which provides that "prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented". The defendants further claimed that, although the Directive does not provide explicitly[1] that unfounded prohibitions and restrictions must be removed, but merely requires review and

reporting, the starting point is that such prohibitions and restrictions are not allowed. Therefore the restrictions in the CBA were, according to the defendants, void.

Judgment

The Labour Court considered that it must first resolve what kind of obligation had been imposed on Member States under Article 4 of the Directive. The Labour Court noted that the obligation set out in Article 4 is subject to different interpretations. According to the first of these, the restrictions in section 1 of Article 4 are significant only in connection with the obligation to review national prohibitions and restrictions. For example, the Finnish government has been of the view that the obligation to review the restrictions and prohibitions is only a one-time administrative review duty. After this review has been fulfilled, prohibitions or restrictions that are not in accordance with Section 1 of the Article can be applied. The Labour Court considered that this is supported by the fact that the Directive does not separately obligate Member States to remove restrictions and prohibitions of temporary agency work that are in breach of section 1, whereas such an obligation has been included in, for example, the directives relating to equality and discrimination (2006/54/EC and 2000/78/EC). Also, the draft for the Directive was clearer in this regard.

On the other hand, the Labour Court noted that there is also a contradictory interpretation of Article 4. According to this interpretation, section 1 is an independent provision, setting a permanent obligation on Member States to ensure that their laws do not contain prohibitions or restrictions on temporary agency work. This is supported by the clear wording of section 1 and the objectives of the Directive. Further support can be received from the provisions concerning the free movement of people and services in the Treaty on the Functioning on the European Union.

The Labour Court noted that if the latter interpretation was correct, the Court would have to evaluate how the provisions of the CBA comply with the Directive. This would also raise questions regarding the national effect of the Directive, as Finland has not implemented a provision comparable to section 1 and it is a question of legal relationship between private parties (i.e. parties to a collective bargaining agreement).

Based on the above grounds, the Labour Court referred the following questions to the Court of Justice of the European Union for a preliminary ruling:

a) Should Section 1 of Article 4 of the Directive be interpreted so as to permanently obligate the national authorities, including courts, to ensure through the available measures that national provisions or provisions of collective bargaining agreements that are in contradiction with the Directive shall not be in force or shall not be applied?

b) Should Section 1 of Article 4 of the Directive be interpreted as precluding national regulation according to which the use of temporary agency work is allowed only in the situations specifically listed in the Directive, such as during peak times or in duties that cannot be performed by the company's own employees? Is use of temporary agency workers working alongside the company's own employees for a longer period of time, doing the company's regular duties, an abuse of temporary agency work?

3) If the national provisions are found to be in breach of the Directive, what kind of measures do the courts have to enforce the objectives of the Directive, given that it is a question of a collective bargaining agreement between private parties?

Commentary

Finnish law as such does not contain prohibitions or restrictions on the use of temporary agency workers. However, since 1969 many collective bargaining agreements, especially in the industrial sectors, have provided for or have been bound to a federal level agreement containing restrictions and prohibitions on external labour, such as subcontracting and the use of temporary agency workers.

From a Finnish labour market point of view, the question regarding the restrictions and prohibitions of external labour is a principled and political question. The trade unions' and employer associations' views about it differ deeply and there have been attempts to remove the restrictions and prohibitions before. For instance, in the 1990's the employers' association in question challenged the provisions restricting the use of external labour in the paper industry based on arguments relating to the collective parties' regulatory powers and antitrust law. The Directive appears to be the latest argument against the restrictions on the use of temporary agency workers, and this case now tests it.

The views expressed by the parties in this case summarise well the different views of the Finnish trade unions and the employer associations. The question appears to centre around the question of who should be protected – the temporary agency workers or the company's own employees? In respect of the Finnish restrictions, what should be taken into account in this assessment is that the business environment has changed markedly since the restrictions and prohibitions were adopted in the various collective bargaining agreements, and temporary agency work has become much more common than it was some decades ago. However, the number of temporary agency workers is still quite marginal (1% in 2012) compared to the total workforce.

As regards the review and reporting duty set forth in the Directive, the Directive is not clear whether this is only a one-off duty, or what should be done about possible breaches. In this

respect, clarification from the CJEU is in our view needed.

Footnote

1 Article 4(2): "By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1."

Article 4(3): "If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement"

Article 4(5): "The Member States shall inform the Commission of the results of the review referred to in para-graphs 2 and 3 by 5 December 2011."

Subject: Temporary agency work

Parties: Auto- ja Kuljetusalan Työntekijäliitto AKT r (Transport Workers' Union) - v - Öljy-tuote ry (Oil Products Association) and Shell Aviation Finland Oy

Court:Työtuomioistuin (Labour Court)

Date:4 October 2013

Case number:TT: 2013-142

Publication:www.tyotuomioistuin.fi>Ratkaisut>Etusivu>scroll down for TT number

---

Creator: Työtuomioistuin (Labour Court)
Verdict at: 2013-10-04
Case number: TT: 2013-142