SUMMARY

# 2011/50 Temps not bound by user undertaking’s collective agreement (GE)

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The employer and the employee were not bound by a collective agreement, but the company to whom the employee was loaned was bound by one. This company's collective agreement provided that claims had to be lodged within three months. The employee made a claim for underpayment. The Court of Appeal denied most of the claim on the grounds that it was lodged too late, given that the employee was bound by the company's collective agreement. Reversing this judgment, and basing its findings on, inter alia, Directive 2008/104, the Federal Labour Court held that, being a 'temp', the employee was not bound by the user company's collective agreement.

**Facts**

The plaintiff was employed by the defendant (the 'Employer'), as a consultant engineer, from October 2005 to June 2008. The Employer was not a member of an employers' association and the plaintiff was not a member of a union. Therefore, their employment agreement was not by law governed by a collective agreement. They had not agreed on the inclusion of any collective terms in their contract. Thus, they were more or less free to agree on whatever terms of employment they wished, including salary. Let us say that the plaintiff's salary, as agreed with the Employer, was 100 per month. The Employer loaned the plaintiff to one of its clients (the 'User Undertaking'). That client was a member of an employers' association and hence it was bound by certain collective agreements, which it applied to its own employees. Those collective agreements provided for a higher salary for consultant engineers than that agreed between the plaintiff and the Employer. Let us say that this salary was 110 per month. This is what the plaintiff would have earned had he been an employee of the User Undertaking.

As is common in Germany, the User Undertaking's relevant collective agreement contained what is known as a preclusion clause. This is a contractual time-bar for the submission of claims. In this case, the collective agreement provided that claims had to be lodged within three months and, in the event a claim was denied, the claimant had six more months to bring legal action.

In August 2008 the plaintiff informed his employer that he was claiming the balance between what he had been paid (100 per month) and what he ought to have been paid (110 per month) for the 33 months that he had worked in the User Undertaking, namely between October 2005 and June 2008. The court of first instance awarded (almost all of) the claim, but on appeal the Landesarbeitsgericht reversed the judgment. It turned down the claim except for the months of May and June 2008, reasoning that (i) the User Undertaking's collective agreement applied to the plaintiff and that (ii) as that agreement time-barred claims not lodged within three months, most of the plaintiff's claim had been forfeited. The plaintiff appealed to the Bundesarbeidsgericht (the 'BAG'), the highest court for employment disputes.

**Judgment**

The BAG focused on the Temporary Agency Workers Act (Arbeitnehmerüberlassungsgesetz, abbreviated AÜG). The AÜG regulates the three-party relationship between (i) a company such as the Employer, that seconds employees to another company (the 'Lessor', in German: Verleiher); (ii) a company such as the User Undertaking, that makes use of individuals who have been seconded to them by their employer (in the Directive's terminology: the 'User Undertaking'); and (iii) employees such as the plaintiff, who have been seconded by their employer to a third party ('Secondees', in German: Leiharbeitnehmer). It should be noted that it is not only temporary employment agencies that are Lessors within the meaning of the

AÜG. Any employer that lends out any of its employees commercially to a third party is a Lessor. Section 9(2) AÜG provides that terms and conditions agreed between an employer and those of its employees who have been loaned to a third party that are less favourable to those employees than the terms and conditions in force between the user undertaking and its own employees who perform similar work under similar conditions, are invalid (i.e. void). Section 10(4) AÜG goes on to provide that in the event of such invalidity, the employees in question are entitled to 'the same essential conditions, including salary, as the user undertaking grants to its own comparable employees'. The invalidity applies to each separate term of employment. A more favourable term cannot therefore balance out a less favorable term. Thus the law allows employees to cherry pick.

Accordingly, the plaintiff was entitled to the same salary as the employees of the User Undertaking and the question became whether or not the preclusion clause applied to the plaintiff's claim.

The BAG gave four reasons why a preclusion clause in a user undertaking's collective agreement could be invoked against a Secondee:

Section 10(4) AÜG refers to essential terms of employment 'granted' (gewähren) by the user undertaking. A preclusion clause is not a benefit that can be 'granted' to an employee. On the contrary, it is something that restricts his rights. Therefore, a preclusion clause in a user undertaking's collective agreement does not apply in the relationship between a temp and his own employer.

The AÜG distinguishes between 'terms of employment', which apply within a relationship between the user undertaking and its employees, and 'contractual terms', which apply in the relationship between the Lessor and its employees. A preclusion clause is not a 'term of employment'.

The BAG referred to Directive 2008/104. Although the transposition deadline for the Directive (5 December 2011) had not expired, and in fact had not even started to run at the time the plaintiff made his claim, the BAG noted that Article 11(1) of the Directive provides that 'the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained'. Such a provision is known in Germany as a Frustrationsverbot, literally, a prohibition against frustrating the intent of, in this case, the Directive. Therefore, national law must be construed in a manner that takes account of the Directive's objectives. Article 2 describes the purpose of the Directive as being 'to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment [...] is applied to

temporary agency workers'. Article 3 (1)(f) defines 'basic working and employment conditions' as working hours (etc.) and pay. It makes no mention of preclusion periods. A preclusion period cannot be seen as an integral part of the condition 'pay'.

The plaintiff was not a member of a union, neither did his contract make any reference to a collective agreement.

For these reasons the BAG held that the plaintiff was not bound by the preclusion clause in the User Undertaking's collective agreement and that he could therefore claim from the Employer the balance between 110 and 100 per month for almost the entire period, the only time-bar being the statutory period of three years.

**Commentary**

Even though Directive 2008/104 had not yet been transposed into national law at the time the plaintiff worked for the User Undertaking, the BAG referred to the purpose of the Directive and the definitions contained therein, since on the date of the decision the Directive had already come into force.

The decision dealt with a rather unusual case in that the plaintiff was not a 'temp' but a regular employee whose employer (which was not a temporary employment agency) seconded him to a third party. However, the judgment also has an impact on temps, since German law does not distinguish between temps employed by temporary employment agencies and 'regular' employees of companies which occasionally second some of their employees for commercial reasons.

What also made this case unusual is that no preclusion period was agreed between the Lessor and the Secondee. In most cases the parties are bound to collectively agreed preclusion periods due to membership of an employers' association/labour union or based on a contractual reference to such collective agreements. In some other cases preclusion periods are contractually agreed between the Lessor and the Secondee. Nevertheless, this decision is very important because the collective bargaining agreements concluded by the CGZP, a German trade union, and an employers' association for temporary employment agencies have (separately) been declared invalid by the BAG[1]. Consequently, preclusion periods resulting from these agreements and applicable to the employment contracts of leased employees do not form part of the employment contracts. Therefore, the situation is comparable to the rather unusual case reported above.

This decision contradicts the prevailing opinion in legal handbooks and case law. Lessors had regularly argued successfully that an employee's claim to equal pay is already precluded as a

result of (collectively) agreed preclusion periods. The new decision increases the Lessor's financial risk.

From our point of view the reasoning of the BAG is conclusive, although, in fact, it leads to more favourable treatment of temporary employees, rather than equal treatment of temporary and permanent employees. Now, temporary employees may claim equal payment with permanent employees, but do not have to observe any preclusion period that applies to regular employees. Therefore, temporary employment agencies - and also employers who second employees, such as in this case - should be aware of the need to integrate preclusion periods into their employment contracts. It should be noted also that, according to current case law, a contractual preclusion period is only valid if the employee can make a claim within a minimum of three months and, if the employer declines it, the employee will have the option to bring an action within a minimum of a (further) three months.

**Comments from other jurisdictions**

*Ireland (Georgina Kabemba)*: In Ireland we have yet to transpose the EU Temporary Workers Directive (2008/104/EC). We are currently awaiting publication of the Temporary Agency Workers Bill 2011. It has been indicated by the Irish Minister for Jobs, Enterprise and Innovation that there are intentions to include a derogation similar to that of the United Kingdom's transposing legislation, the Agency Workers Regulations 2010, allowing a qualifying period before equal treatment in terms of basic working conditions (including pay) applies. In the UK, agreement was reached between unions and employers for a 12 week qualifying period. Proposals from the Minister's Office suggest a possible six month qualifying period, to which some trade unions have already signalled their opposition.

It will be interesting to see whether or not the principle of 'Verleiher' in the German legislation extending coverage of the legislation from agencies to employing companies with secondees may be considered. However, it seems unlikely.

**Footnote**

1 This occurred in another case. That decision, combined with the judgment in this case, means that the collectively agreed preclusion period in the collective agreements of the CGZP are invalid, and that, consequently, Section 10(4) AÜG applies without restriction to any preclusion period.

**Subject:** Temporary agency work

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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