

SUMMARY

2012/60 Works council may withhold approval to hire temps for permanent positions (GE)

<p>Since the revised version of the German Temporary Employment Code (Arbeitnehmerüberlassungsgesetz, the ‘AÜG’) came into effect on 20 December 2011, the permanent use of borrowed workers for commercial activities has become unlawful. The AÜG was revised based on Direc- tive 2008/104 and now includes in Section 1 the following sentence: “The use of borrowed workers is temporary”.</p>

Summary

Since the revised version of the German Temporary Employment Code (Arbeitnehmerüberlassungsgesetz, the 'AÜG') came into effect on 20 December 2011, the permanent use of borrowed workers for commercial activities has become unlawful. The AÜG was revised based on Direc- tive 2008/104 and now includes in Section 1 the following sentence: "The use of borrowed workers is temporary".

Facts

The employer in this case was a newspaper publishing company. In 2006, it entered into an agreement with a temporary employment agency (the 'Agency'). In this contract, the employer agreed to fill all future vacancies exclusively with staff hired from the Agency. The advantage of hiring temps rather than regular employees was that when- ever there was no longer a need for a temp, he or she could be returned to the Agency, pursuant to a "return clause" in the contract, without formality or cost.

Five years later, in 2011, the employer asked its works council, pursuant to Article 99 of the Works Constitution Act (Betriebsverfassungsgesetz), for permission to fill a permanent vacancy in the HR department with a temp hired from the Agency. The works council withheld the requested permission, arguing that the use of a temp to fill a permanent position was contrary to the AÜG.

The employer applied to the local Labour Court for permission to carry out its intention to fill the HR vacancy with a temp. The court granted permission. The works council appealed to the Landesarbeitsgericht (Court of Appeal).

Judgment

The Court of Appeal overturned the Labour Court's judgment and ruled in favour of the appellant. It held that hiring a temporary worker for a permanent position violates the AÜG and that therefore the works council was within its rights to withhold permission for the proposed recruitment. The court based its decision on four arguments.

The court's first argument rested on the literal meaning of the word "temporary". In relation to the use of hired labour, this word can only be understood as meaning "during a certain period of time". Therefore it is unlawful for an employer to enter into an indefinite term contract in respect of a temporary worker.

Secondly, the court stated that the "return clause", on which the employer and the Agency had agreed, was not relevant in the case at hand. The fact that a position may disappear at some unpredictable future time does not make the use of a temporary worker "temporary" within the meaning of the AÜG. Even within a regular employment relationship the need for a certain position may disappear one day.

Thirdly, the Court of Appeal held that, although the AÜG does not explicitly prohibit employing a temporary worker permanently, national law must be construed in the light of European Directive 2008/104. The rationale of this Directive is not to squeeze out regular employees by using agency workers. Having said that, the works council's right to oppose hiring agency personnel is a proper and lawful punitive instrument aimed at avoiding the hiring temporary of workers permanently. Without the benefit of specific rules preventing such recruitment, this is the only way to follow the Directive's rationale.

Last but not least, the court commented that the employer, by hiring temporary workers for all vacant positions in the firm, had breached the law. One of the main purposes of Directive 2008/104 is to protect temporary workers and to give them the opportunity to obtain regular employment. This opportunity does not exist where a temporary worker is used in a

company permanently. The only way to avoid contradicting the Directive's purpose is to prohibit the permanent recruitment of temporary workers.

Commentary

The sticking point in this case was the courts' understanding of the word "temporary", especially in light of Parliament's intention when it enacted the AÜG.

Going back in time, we can see that the German lawmaker was concerned to impose a time limit for the deployment of agency workers under the AÜG. When the first version of the AÜG came into effect in 1972, a three month time limit was imposed on the recruitment of temporary workers. Later on, the German legislator increased this time limit to six months, then to nine months, after that to 12 months and finally to 24 months. Eventually, in 2002, the legislature abandoned time limits under the AÜG.

When the 24-month time limit was removed from the AÜG in 2002, many cases came up in which the issue was whether or not a temporary worker could be recruited permanently. In a fundamental decision in 2005, the BAG held that "from now on a temporary worker can be hired permanently." Apparently, before the revision of the AÜG in December 2011, the legal situation was perfectly clear. There was no doubt that an employer could hire a temporary worker permanently.

Therefore, the question arose - and has yet to be answered by the BAG - as to whether today the use of borrowed workers for an unlimited period of time remains lawful.

The lawmaker stated in the recitals to the Act revising the AÜG that the incorporation of the word "temporary" was no more than a clarification to ensure that the AÜG complied with Directive 2008/104. Therefore, the word "temporary" needs to be considered flexibly, not as a fixed restriction in time.

The federal government confirmed this in Parliament when the "Die Linke" party asked the Government about the meaning of the word "temporary". The Parliamentary State Secretary of the German Federal Ministry of Labour and Social Affairs, Dr Ralf Brauksiepe, replied in Parliament as follows: "The word temporary must be considered as a flexible element, without determining an exact time limit." This clarification indicates that it was not the legislature's intention to change the existing legal situation. Therefore - from the lawmaker's perspective - it is still possible "to hire a temporary worker without setting a fixed time limit from the start."

It seems that the decision of the Court of Appeal deviates from the intention of the lawmakers. Nevertheless, precisely how the permanent lease of employees should be treated

and whether the works council really does have the right to oppose the permanent use of agency workers is still in dispute. Quite recently a different chamber of the Hannover Court of Appeal held that there was no right of the works council to oppose the permanent use of borrowed workers.

From our point of view, the decision of the Court of Appeal that the permanent use of borrowed workforce was unlawful should not be followed, given that the lawmaker appears to have had a different intention when enacting the AÜG.

Indeed, even if one were to take it that the permanent use of agency workers is in breach of the AÜG, the fact that the meaning of “temporary” is unclear would still cause difficulties. The use of an agency worker until retirement could theoretically be a form of temporary use of agency personnel, on the basis that there is a beginning and an end to the employment. However, this could not be what the Court of Appeal had in mind in interpreting the AÜG. It surely cannot be correct that the works council should have an open-ended right to oppose the employment of agency workers – which is exercisable whenever it believes that the employment has ceased to be temporary.

Subject: Temporary agency work

Parties: Newspaper publishing company - v - Works Council

Court: Landesarbeitsgericht Niedersachsen (Regional Labour Court of Niedersachsen)

Date: 19 September 2012

Case number: 17 TaBV 124/11

Publication: -

Creator: Landesarbeitsgericht Niedersachsen (State Labour Court)

Verdict at: 2012-09-19

Case number: 17 TaBV 124/11