EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/40 Equal treatment of leased employees by 'false' works agreements (AU)

A 'false' works agreement, which reduces the standard weekly working hours for permanent staff, also applies to leased employees. However, the pay of leased employees remains governed by the applicable collective bargaining agreement, rather than by the 'false' works agreement. Therefore, leased (part-time) employees benefitted from the reduced working hours by the 'false' works agreement, but received full pay based on the collective bargaining agreement.

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Facts

Austrian employment law provides for various collective agreements: collective bargaining agreements (often on an industrial level) and so-called works agreements (on an establishment level). Both can be legally binding, but works agreements are only legally binding if their scope is limited to specific points set out in law. If they have broader scope, they are deemed 'false' (or 'free') works agreements. In that case, they in generally still bind employers (but not necessarily employees).

In the case at hand, five employees (the 'claimants') were employed by a personnel service provider (the 'lessor'). The applicable collective bargaining agreement for personnel service providers stipulated that the standard working time per week was 38.5 hours, but the working time per week for these employees was 36 hours under their employment contracts (the 'part-time agreements'). The collective bargaining agreement stated that a reduction of the standard weekly working hours by legal regulations, collective bargaining agreement or by "other binding general provisions" also applied to leased employees, but that the base wage would not be reduced. In fact, the wage would be even higher if the collective bargaining agreement that applied to the hiring company provided for a higher amount. The collective bargaining agreement for personnel service providers also sets out the wage entitlement of a leased full-time employee where the standard weekly working hours under that agreement exceeds the standard weekly working hours of the employing company and specifies that if the client company has longer working hours, the employees are obliged to work those longer hours.

In the case at hand, the claimants were leased to a hiring company and worked shifts. The regular staff of the hiring company had a working time of 38.5 hours per week under a collective bargaining agreement, and so did the claimants. At some point, the hiring company reduced the standard weekly working hours for all employees in shift operations by use of a 'false' works agreement from 38.5 hours to 36 hours and granted full wage compensation. The weekly working time of the claimants remained 36 hours. The weekly working time of the claimants remained 36 hours and they were paid for 36 hours at the rate they had been paid all along. By contrast, the regular employees of the company were paid as if they were continuing to work 38.5 hours, resulting in a *de facto* increase to their hourly rate.

The claimants brought proceedings against the lessor asserting that the 'false' works agreement applied to them based on section 10(3) of the Austrian Temporary Work Act (*Arbeitskräfteüberlassungsgesetz*, the 'AÜG'). Section 10(3) (which transposed Directive 2008/104) states that hired workers shall be subject to the applicable collective bargaining agreement of the hiring company, as well as to "other binding general provisions" on working time and leave. According to the claimants, they should therefore have been entitled to the full-time wage under the collective bargaining agreement applicable to the hiring company. Further, according to the claimants, their part-time agreements were "hidden full-time agreements" because of the obligation to extend the weekly working hours based on the standard weekly working hours applicable at the hiring company and were therefore void.

According to the lessor however, the claim was based on wages rather than working time or holidays, as a consequence of which, Article 10(3) of the Temporary Work Act did not apply.

Judgment

According to the Austrian Supreme Court ('OGH'), it was valid to describe the employment agreements of the claimants as part-time agreements. It reasoned that in situations where working hours needed to be extended to match the working hours of the hiring company, this was a 'proportional extension'. This situation was very likely to occur because the standard weekly working time of the lessor was 38.5 hours, but many other employers went further and applied the statutory standard working time of 40 hours. If the hiring company had applied a standard weekly working time of 40 hours, the claimants would have been contractually obliged to perform (proportionately) higher weekly working hours. Therefore, the claimants were not being asked to work full-time at 36 hours per week.

The OGH followed the doctrine which treats 'false' works agreements as "other binding general provisions" within the meaning of Article 10(3) of the Temporary Work Act. This also applied to the identical wording in the collective bargaining agreement. Consequently, works agreements, whether 'false' or not, also apply to leased employees if – and to the extent to which – those works agreements concerned standard weekly working time or holidays. An entitlement to full wages, however, results from legal regulations or a collective bargaining agreement of the hiring company. As a result, a leased full-time employee is entitled to a full-time wage, even if the hours at the hiring company are lower, based on a false works agreement.

However, the OGH further stated that if the reduced working hours of a hiring company are set out in the part-time agreement between the leased employee and the lessor, this will serve to prevent the leased employee from benefitting from any difference between the standard weekly hours of the lessor and the hiring company. To avoid this, the working hours quoted in the part-time agreement must then be reduced *pro rata*.

According to the OGH, part-time agreements are generally lawful, provided employers comply with the non-discrimination principles that protect part-time employees. Article 19d(6) of the Austrian Working Hours Act (AZG) prohibits any less favourable treatment of part-time employees. To avoid this, the lessor must grant any reduction to working hours *pro rata* to its part-time workers. Provided it meets this condition, a part-time agreement is not considered to breach the provisions of the applicable CBA.

It follows from the above that the claimants were not – in relation to this particular assignment – obliged to work the 36 hours a week stipulated in the part-time agreement. Their working hours needed to be reduced *pro rata* to match the 'false' works agreement.

Because the leased employees would then still in fact work for 36 hours, they would be entitled to overtime pay for the difference.

Commentary

The centrepiece of this judgment is that the OGH treated 'false' works agreements as 'other binding general provisions' and applied this to the CBA for personnel service providers and Article 10(3) of the Temporary Work Act. While the OGH has not defined what is meant by a 'false' works agreement, it is clear that it must bind an employer and set general rules for staff, but not set out individual provisions for specific employees.

It is expected that any group policies, company practices or contract templates of the employing company may in future also qualify as other binding general provisions. Such provisions become part of the individual employment agreement and are therefore binding on an individual. Nevertheless, they still have a general character (although the binding effect operates at the individual level), such that the provisions apply to all employees or certain groups in the same way. As a result, there may be no difference any more between leasing and directly hiring an employee. This would corresponds to recital 14 of the Directive on temporary workers (2008/104/EC) and chimes with one of Schindler's key arguments in this regard, in his Commentary on the CBA for personnel service providers (2013, p. 39).

The judgment is broadly employee-friendly because it grants leased employees higher standards and makes it less favourable to replace permanent staff with leased employees. However, the effects of this will be limited, because the provision only applies to working hours and holidays.

But as Schrank quite rightly points out, this (rather extensive) interpretation of 'other binding general provisions' bears a risk for lessors. It may be difficult for a lessor to calculate which benefits of the hiring company need to be granted to leased employees and, because of the connection between working hours and wages, there is a risk of underpaying employees and thereby committing an administrative offence – possibly with dramatic consequences.

Another interesting aspect of this judgment is that the OGH treated the part-time agreement as valid and not unlawful (which would have resulted in the conversion of the agreements into full-time ones). The OGH treated the 'false' works agreement as applicable to the claimants because of the principle of non-discrimination against part-time employees. This principle entitles the claimants to *pro rata* reduced working hours and – if those are exceeded – to overtime pay. This approach is also helpful in relation to the burden of proof, because the

claimants now did not have to prove that the law was evaded on purpose.

However, from the point of view of the lessor, in some ways, if the part-time agreements had been treated as invalid, it would have been economically more favourable, because in that case, the lessor would only have been obliged to pay the full-time wage, instead of overtime plus surcharges. Had the part time agreements been found unlawful and converted into full-time ones, the lessor would have had to pay the full-time wage but no surcharges, provided, of course, the full-time working hours were not exceeded (cf. *Schrank*, ZAS 2018, 194).

Subject: temporary agency work, other forms of discrimination

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1 However, Article 11(2) AÜG lists certain provisions/clauses that are considered unlawful.

2 See *Schörghofer, Verbot der Diskriminierung überlassener Teilzeitbeschäftigter*, in DRdA 2018, p. 242 and 245.

3 See *Arbeitskräfteüberlassung: Entgeltauswirkungen "betriebsvereinbarter" Arbeitszeitverkürzung im Beschäftigerbetrieb*, in ZAS 2018, p. 194.

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