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# A worker assigned to the same workplace for three years and eight months was covered by the Temporary Agency Workers Act (DK)

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## Summary

The Danish Maritime and Commercial Court has ruled that a worker was covered by the Temporary Agency Workers Act even though they were assigned to the same workplace for three years and eight months.

## Legal background

Directive 2008/104/EC on temporary agency work (the 'Directive') is implemented into Danish law through the Temporary Agency Workers Act.

This Act applies only to temporary agency workers who have a contract of employment or employment relationship with a temporary work agency and are assigned by the temporary work agency to user undertakings to carry out work on a temporary basis.

With regard to employment relationships covered by the Temporary Agency Workers Act, it follows from Section 3(4) of that Act – implementing Article 5(5) of the Directive – that a temporary work agency may not successively assign a temporary agency worker unless this is justified by an objective reason.

However, according to Section 3(5) of the Temporary Agency Workers Act – implementing Article 5(3) of the Directive – the prohibition of successive assignments without justification in Section 3(4) does not apply if the temporary work agency is covered by or is a party to a collective agreement that has been concluded by the most representative social partners in Denmark and is applicable throughout the country, by which the general protection of temporary agency workers is respected.

In the case at hand, the Danish Maritime and Commercial Court had to decide whether an employee in relation to their employment with a temporary work agency was covered by the Temporary Agency Workers Act even though the employee due to four successive assignments was assigned to the same workplace for three years and eight months and, thus, whether the nature of the assignment could be considered temporary within the meaning om the Temporary Agency Workers Act and the underlying Directive.

## Facts

The case concerned a supply chain analyst who was assigned to an aircraft manufacturer by a temporary work agency. The employment with the temporary work agency was covered by the Salaried Employees' Collective Agreement for Trade, Knowledge and Service.

Initially, the duration of the contract was one year, beginning 1 December 2016, however the contract was subsequently extended four times, for which reason the analyst's assignment ended up lasting until 31 July 2020, i.e., three years and eight months. At that point, the aircraft manufacturer did not wish to further extend the assignment.

The analyst's trade union commenced legal proceedings in the Maritime and Commercial Court claiming, among other things, that the analyst should be awarded status as a salaried employee and, accordingly, be awarded notices and entitlement to pay during sickness. The trade union argued, for instance, that the employment was not covered by the Temporary Agency Workers Act, as work of such duration could not be considered temporary within the meaning of the Act and the underlying Directive when there was no justification as to why the position was a temporary one.

In this regard, the temporary work agency submitted that the employment was covered by the Temporary Agency Workers Act, as the analyst was employed as a temporary agency worker by a temporary work agency to be assigned to the aircraft manufacturer to carry out temporary work, and that neither the Temporary Agency Workers Act nor the underlying Directive provides for any limitations on the duration of a temporary assignment. Further, the temporary work agency sub-

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mitted that the employment was regulated by a collective agreement and, for this reason, successive assignments were not prohibited.

## Judgment

The Maritime and Commercial Court noted initially that in answering the question of whether the analyst's assignment could be considered temporary within the meaning of the Temporary Agency Workers Act and the underlying Directive, it is relevant to take into consideration the relevant provisions of the Temporary Agency Workers Act implementing the prohibition against misuse of successive assignments in Article 5(5) of the Directive (Section 3(4), (5) of the Act).
The Court then referred to ECJ case law on the matter and noted, among other things, by citing directly from the decisions of the ECJ in cases C-681/18 and C-232/20, that the Directive does not provide for a period of time above which an assignment can no longer be considered to be 'temporary', just as the Directive does not require the Member States to limit the number of successive assignments of the same worker to the same workplace; however, the Directive does require the Member States to take appropriate measures to prevent successive assignments which aim to circumvent the provisions of the Directive.
Further, the Court noted, by citing ECJ case C-232/20, paragraph 63, that the ECJ has concluded that the Directive must be interpreted in such a way that it constitutes misuse of successive assignments to successively renew assignments of the same temporary agency worker to the same user undertaking for a longer period of time if the successive assignments lead to a period of service in that user undertaking which is longer than what can reasonably be considered 'temporary' – taking into account all relevant circumstances, including in particular the special characteristics of the sector – and where no objective explanation has been given as to why the user undertaking in question resorts to successive temporary work contracts.
Against this background, the Maritime and Commercial Court found that the protection of the analyst, as a temporary agency worker, in relation to the successive assignments totalling three years and eight months must be found in the Danish implementation of the prohibition against misuse of successive assignments. The Court then noted that the requirement of justification for successively renewing a temporary employment contract has been derogated from in Denmark, as the relevant provision of the Temporary Agency Workers Act does not apply if the temporary work agency is covered by or is a party to a collective agreement that is concluded by the most representative social partners in Denmark and is applicable throughout the country.
By virtue of the fact that the temporary work agency in this specific case was covered by the Salaried Employees' Collective Agreement for Trade, Knowledge and Service, the Maritime and Commercial Court found that the analyst had to seek protection against the consequences of successive assignments in this collective agreement which, undisputedly, had not been breached in this case.
Accordingly, the Court found that the employment was covered by the Temporary Agency Workers Act and ruled in favour of the temporary work agency.
The judgment has been appealed to the High Court.

## Commentary

Although the Maritime and Commercial Court did not take a specific position on the concept of 'temporary', the judgment is highly interesting with regard to the question of how the concept is interpreted from a Danish perspective in relation to the justification of successive assignments.
The judgment confirms that the Temporary Agency Workers Act and the underlying Directive do not provide for a specific period of time above which an assignment can no longer be considered 'temporary'. Further, according to the Temporary Agency Workers Act, temporary work agencies may successively assign a temporary agency worker if the successive assignments are justified by an objective reason. Thus, according to the Maritime and Commercial Court's decision, if the use of successive assignments leads to a period of service at the workplace which is longer than what can reasonably be considered temporary, the protection against the consequence of this must be found in the prohibition against misuse of successive assignments, not in the scope of application of the Temporary Agency Workers Act as such.
Further, the judgment confirms that due to the Danish implementation of Article 5(3) of the Directive, the requirement of justification for successively renewing a temporary employment contract does not apply when the temporary work agency is covered by or is a party to a collective agreement that is concluded by the most representative social partners in Denmark applicable throughout the country. Consequently, in such cases, the temporary agency worker is required to seek protection against the consequences of successive assignments in the collective agreement.

## Comments from other jurisdictions

*Austria (Patricia Burgstaller, Burgstaller & Preyer Rechtsanwälte GmbH)*: In a similar case, Austrian courts could come to the same conclusion as in the Danish case with somewhat different reasoning – but also by examining the prohibition against abuse respectively misuse of successive assignments. In Austria, too, the national courts would have to determine on a case-by-case basis




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whether the assignment can be considered 'temporary'. If national law does not specify a duration beyond which an assignment can no longer be considered 'temporary', the ECJ sees it as the duty of the national courts to determine such a duration on a case-by-case basis, taking into account all relevant circumstances (EJC C-232/20, *Daimler*). The Austrian legislator has not specifically regulated on a maximum limit or number of assignments in the Austrian Act on Temporary Agency Work ('AÜG'), but explicitly recognizes assignments with a duration of more than four years. The Austrian Supreme Court has also not yet directly ruled when an assignment is no longer 'temporary'. However, in connection with other employee assignment issues, it has described transfers of up to six years as not yet 'permanent', and those with a duration of more than nine years as 'atypical'.

The obligation provided for in Article 5(5) of Directive 2008/104 to take the necessary measures to prevent abuse and, in particular, successive assignments intended to circumvent the provisions of the Directive has not been implemented in Austria – unlike in Denmark – by means of an explicit provision. However, Austrian courts could use the prohibition of agreements between the temporary work agency and the user undertaking to circumvent protective provisions for temporary agency workers, as provided for in Section 8(2) AÜG, as well as Austrian case law on the inadmissibility of chain fixed-term contracts without objective justification in the case of direct employment, as a starting point for an interpretation of the provisions in conformity with the Directive. So far, in the case of an 'atypical' nine-year assignment, the Austrian Supreme Court among other things referred to Section 8(2) AÜG for approximating the position of the temporary agency worker to that of the worker directly employed by the user undertaking. In this way, the Austrian courts could apply the criteria set by the ECJ in cases C-681/18 and C-232/20 on a case-by-case basis. Applying such interpretation, administrative penalties under the AÜG and the revocation of the temporary work agency's business licence could be considered as sanctions. In the case of an assignment lasting a total of only three years and eight months, however, it could be decided with reference to the four-year assignment period recognized by the AÜG that this is still considered 'temporary' and therefore – without any additional evidence – does not constitute an abuse; an examination of the obligation to state reasons for successive assignments would not be required. Whether this could be reconciled with ECJ case C-232/20, however, remains open.

*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: In Finland, Directive 2008/104 was implemented into legislation through amendments made to the Employment Contracts Act (55/2001). The Finnish legal term for temporary agency worker translates into English as 'leased worker'. Compared to the Directive, Finnish legislation does not traditionally recognize any concept of time limitation for 'workforce leasing'. Consequently, the legislation includes no provisions concerning either the maximum length for temporary assignment or the maximum number of successive work assignments one can have in the same user company.

Even though there is no specific regulation concerning successive agency work assignments, there are provisions concerning successive fixed-term employment contracts. The use of fixed-term employment contracts is limited only to situations where there are justified reasons for them. Also, the use of successive fixed-term employment contracts (in this case between the temporary agency worker and temporary work agency) is prohibited if such contracts actually indicate a permanent need for the workforce. The Finnish Supreme Court has confirmed that using successive fixed-term employment contracts in temporary agency work simply due to the temporary nature of the assignments is generally not allowed. This is because a temporary assignment does not necessarily indicate that the need for the workforce is temporary and does not exclude the possibility that there is work to offer in other assignments after a temporary assignment ends.

In summary, although temporary agency workers are protected against the misuse of fixed-term and successive fixed-term employment contracts (relationship between the temporary agency worker and the temporary work agency), the legislation is silent concerning successive temporary agency work assignments (relationship between the temporary agency worker and the user company).



*Germany (Tim Rossmann, Luther Rechtsanwaltsgesellschaft mbH):* The question about how long assignments of employees can still be considered temporary is also a central issue in Germany. The ECJ decision (C-232/20) mentioned in the Danish case report relates to a German decision of the German Regional Labour Court (*Landesarbeitsgericht*, 'LAG Berlin') of Berlin-Brandenburg (case no. 15 Sa 1991/19) when it was confronted with the question of whether a 55-month period of temporary employment with a German car manufacturer could still be considered temporary on the basis of a collective bargaining agreement (in combination with a works agreement). The LAG Berlin was of the opinion that a temporary assignment period of 55 months could no longer be considered as temporary. However, it submitted the question to the ECJ for legal clarity and hoped for the "setting [of] a precise time limit".

It is important to note that the law in Germany on personnel leasing differs from Danish law. As an example, German law does not recognize any limitation on posting an employee unless it is justified by an objective reason. Instead, the German Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, 'AÜG') sets out a statutory maximum period of 18 months for temporary employment. However, Section 1(1b) sentence 3 AÜG provides for the possibility of increasing the maximum period of temporary employment by means of a collective bargaining agreement. In this respect it is also possible to deviate from the statutory limits in German law,

similar to Danish law, by means of a collective bargaining agreement.

As far as can be seen, the LAG Berlin has not yet reached a final national decision on whether a period of 55 months can still be considered temporary. In the meantime, however, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') has also dealt with a comparable case. In its decision of 8 November 2022, 9 AZR 226/21, the BAG considered a period of 48 months to be temporary within the meaning of Directive 2008/104. It therefore remains to be seen whether the LAG Berlin will adhere to its assessment against this background.

All this shows that, as in Denmark, it has not yet been decided in Germany which duration is to be understood as temporary.

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