2021/33

Does the concept of personnel supply in the public sector violate the Temporary Agency Work Directive? (GE)

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Summary

In a decision of 16 June 2021 (6 AZR 390/20 (A)), the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') referred a question to the ECJ for a preliminary ruling that has been a controversial issue in Germany for some time. The question is whether the possibility of a permanent supply of temporary workers, which is referred to as 'personnel supply' (*Personalgestellung*) in the context of the collective agreement for the public sector, and the exemption from the scope of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, 'AÜG') pursuant to Section 1(3) No. 2b AÜG, which allows this provision in the collective agreement, violates the provisions of Directive 2008/104/EC on temporary agency work (the 'Temporary Agency Work Directive'). Depending on the outcome of the ECJ's decision, this could have a significant impact on staff leasing often practised in companies operating in the public sector.

Facts

The plaintiff had been employed since 2000 by a hospital operating in the form of a limited liability company (GmbH). The hospital applied the collective agreement for the public sector (municipal employers' version) (TVöD-K). It did not have an official permit to hire out employees.

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In June 2018, the hospital transferred various areas of work to a newly founded subsidiary by way of a partial transfer of undertakings, which also affected the plaintiff. Since he had objected to the transfer of undertakings in due form and time, the defendant hospital decided to permanently assign the plaintiff to the subsidiary to perform work in accordance with Section 4(3) of the TVöD-K (personnel supply), so that the plaintiff now performed his contractually owed work there. As in the case of regular temporary work, the employment relationship with the hospital thus remained, but the right to issue activity-related and organisational instructions had been transferred to the subsidiary.

In the German Temporary Employment Act, personnel leasing is permissible under the collective agreement for the public sector. The provisions of the Temporary Employment Act, which serve to implement the Temporary Agency Work Directive, are therefore largely inapplicable to such personnel secondment. Section 1(3) No. 2b AÜG reads:

> […] this Act shall not apply to the supply of workers between employers if tasks of an employee are transferred from the previous employer to the other employer and on the basis of a collective agreement of the public service a) the employment relationship with the previous employer continues and b) the work performance will in future be performed with the other employer.

It was not in dispute between the parties that these legal prerequisites were in principle fulfilled and that the corresponding provision in the collective agreement corresponded to this statutory exception. However, the plaintiff argued that his employment with the subsidiary was in breach of EU law, as the secondment of staff was a permanent and thus unlawful temporary employment under the Temporary Agency Work Directive. The lower courts dismissed the action. In his appeal, the plaintiff continued to pursue his goal of establishing the unlawfulness of the personnel supply regime.

Judgment

In its decision of 16 June 2021, the BAG suspended the appeal proceedings pending the decision of the ECJ and requested the ECJ to answer the question of whether the provision of personnel supply pursuant to Section 4(3) of the TVöD falls within the scope of the Temporary Agency Work Directive. If this is the case, it

doi: 10.5553/EELC/187791072021006003010

is further necessary to clarify whether the scope of the exception regulated in Section 1(3) No. 2b of the Temporary Employment Act is in line with the objectives of the Temporary Agency Work Directive due to the protective purpose of safeguarding jobs and employment pursued within that Directive and is therefore permissible.

The Federal Labour Court first stated that the provision of personnel pursuant to Section 4(3) of the TVöD could conceptually constitute a supply of temporary workers in the general sense, since here, too, an employment relationship with the contractual employer continues to exist and, at the same time, the worker is integrated into the business of the third party and is subject to its activity-related and organisational instructions. However, the BAG was of the opinion that there are reasons why the Temporary Agency Work Directive cannot be applied to this specific notion of temporary agency work. This is because the personnel supply within the meaning of the TVöD deviates from the concept of temporary agency work on which the Directive is based. Thus, the provision of personnel supply under collective agreements exclusively concerns employees in permanent employment relationships whose tasks are transferred to a third party and thus serves to secure the permanent continuation of their employment relationship and to safeguard their working conditions. Therefore, the employees retain any vested rights of the public sector, the company pension scheme of the public sector is continued and collective agreement provisions on protection against dismissal remain in place, so that the social protection of the employee is ensured. Furthermore, employees affected by personnel supply measures were originally hired to carry out the employer's own tasks and not for the purpose of hiring out employees. Moreover, the nature of a personnel supply is already permanent and not merely temporary, which is also decisive for temporary work according to the decision of the ECJ of 14 October 2020 *JH – v – KG* (C 681/18), which by its nature is temporary and may not become a permanent situation for the temporary worker. Moreover, it was not clear whether the characteristic of 'economic activity' of the contractual employer required by the Temporary Agency Work Directive was fulfilled, as it could not be clearly established that the provision of staff constituted an activity of the contractual employer to offer goods or services in a given market.

Only in the event that the ECJ should affirm the applicability of the Temporary Agency Work Directive to the provision of personnel supply in the context of the first question referred for a preliminary ruling, the BAG was then of the opinion that the Directive allows for an exemption from the scope of national law for the provision of personnel supply in the above-mentioned sense, because the previous working conditions would continue to apply and the typical risks of the provision of temporary workers were not present, so that this result was also compatible with the protective purpose of the Temporary Agency Work Directive. Finally, Section 4(3) of the TVöD served to secure employment and the permanent continuation of the employment relationship in undiminished form, so that no precarious employment relationship was created. Rather, the employee was protected from losing his or her job if a job was transferred to a third party.

Commentary

Personnel supply in the public sector has long been a controversial issue in Germany and has repeatedly been the subject of court decisions in recent years. So far, however, the BAG has never been in a position to make a request for a preliminary ruling to the ECJ, because the previous legal disputes did not necessarily depend on the answer to this question but could always be decided on the basis of other arguments. However, in previous decisions, the BAG itself had expressed doubts as to whether the exemption for the public sector in the case of personnel supply was actually in line with EU law. In any case, considerable doubts were raised in the academic literature. However, with the current request for a preliminary ruling and the justification of the question posed, the BAG seems to see the possibility that this exception for the public sector would be permissible and would not violate the Temporary Agency Work Directive. The arguments of the BAG are quite weighty, although not all of them are completely convincing. After all, temporary agency workers also have a fixed employment relationship with their contractual employer and retain at least the contractual conditions agreed with it, which usually have to be improved if better working conditions apply at the hirer. The first argument of the BAG therefore does not seem to be entirely conclusive, at least the difference to the situation of classic temporary agency workers is not clearly worked out. It remains to be seen whether the ECJ will now accept this national peculiarity in Germany and the accompanying privilege it affords to the public sector, including companies controlled by public law, which can apply the collective agreement. It is interesting to note that beyond this case, however, there are indications that the BAG is now more frequently submitting questions relevant to EU law to the ECJ for preliminary rulings. The Sixth Senate of the BAG, which is involved in this case, is also considered to be particularly friendly to European law, so that it is not surprising that a corresponding order for a preliminary ruling has now been issued on this question.

Comments from other jurisdictions

Austria (Maria Schedle and Conrad Greiner, ENGELBRECHT Rechtsanwalts GmbH): Austrian labour law does not contain an exception comparable to Section 1(3) No. 2b of the German Temporary Employ-

doi: 10.5553/EELC/187791072021006003010

ment Act. This is most likely due to the fact that such an exemption is incompatible with the requirements of Union law, as has been pointed out by the relevant German academic literature.

Nevertheless, from an Austrian perspective, the decision of the German Federal Labour Court is of interest, because it seems to assume that 'personnel supply' (*Personalgestellung*) within the meaning of Section 4(3) of the collective agreement for the public sector (TVöD) is – partly due to its permanent nature – not covered by the scope of Directive 2008/104/EC on temporary agency work (the 'Temporary Agency Work Directive'). In our opinion, this view is not convincing. Although, according to the concept of temporary agency work, workers are only 'temporarily' assigned to the user undertaking (see Article 1(1) and Article 3(1)(b), (c), (d) and (e) of the Temporary Agency Work Directive), one cannot conclude from this that the Directive does not apply to permanent assignments. Otherwise, this form of temporary agency work would be left unregulated under Union law, which would contradict the harmonisation purpose of the Temporary Agency Work Directive. Rather, as can be seen from a recent decision of the ECJ (14 October 2020, C-681/18, *JH/KG*), permanent assignments are also covered and permitted by it, although the Directive is critical of them. Only when further abusive elements are added to a permanent assignment it conflicts with the requirements of Union law. Thus, a form of personnel leasing that deviates significantly from the guiding concept of temporary agency work does not fall outside the scope of the Directive but is prohibited. Therefore, from an Austrian point of view, a construction comparable to 'personnel supply' within the meaning of Section 4(3) TVöD would have to be regarded as covered by the Temporary Agency Work Directive and the Austrian Temporary Agency Act (*Arbeitskräfteüberlassungsgesetz*, 'AÜG') which implements it. An exemption of this from the scope of the (Austrian) AÜG would be incompatible with the requirements of Union law, because although the Temporary Agency Work Directive allows the Member States to exclude certain types of temporary agency work from its scope (see Article 1(3) of the Temporary Agency Work Directive), 'personnel supply' within the meaning of Section 4(3) TVöD does not correspond to any of these exemptions.

It is correct that the application of the German AÜG to cases of 'personnel supply' can lead to contradicting results, because in the case of an assignment lasting longer than 18 months the worker ends up in an employment relationship with an employer he initially did not want. However, this contradiction does not result from the Temporary Agency Work Directive itself, but from the German AÜG which implements it. The Directive does not demand a statutory maximum duration for assignments, nor does it call for a change of employer if this duration is exceeded. The application of the Austrian AÜG would also not lead to contradicting results. In accordance with the regulations of the Temporary Agency Work Directive, the Austrian AÜG – unlike German labour law – does not contain a maximum duration for assignments and consequently does not require a change of employer if a certain duration is exceeded. The Austrian Supreme Court (3 December 2003, 9 ObA 113/03p; 17 December 2008, 9 ObA 158/07m) also considers permanent assignments to be permitted.

It would therefore be advisable to adapt 'personnel supply' and the German AÜG to the requirements of Union law instead of attempting to restrict the scope of the Temporary Agency Work Directive by interpretation or to impute to it an exemption that it does not contain.

Subject: Temporary Agency Work
Parties: Unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court of Germany)
Date: 16 June 2021
Case number: 6 AZR 390/20 (A)
Internet publication: https://www.bundesarbeitsgericht.de/wp-content/uploads/2021/07/6-AZR-390-20--A.pdf When this issue was sent to the printer, the request had not yet been published at the ECJ's website.

doi: 10.5553/EELC/187791072021006003010