Case C-232/20

Request for a preliminary ruling

Date lodged:

3 June 2020

Referring court:

Landesarbeitsgericht Berlin-Brandenburg (Germany)

Date of the decision to refer:

13 May 2020

Applicant and appellant:

NP

Defendant and respondent:

Daimler AG, Mercedes-Benz Werk Berlin

[…] C-232/20 — 1

Landesarbeitsgericht Berlin-Brandenburg Delivered on 13 May 2020

[…]

Order

In the case of

N P

– applicant and appellant –

[…]

v

Daimler AG, Mercedes-Benz Werk Berlin,

– defendant and respondent –

[…]

the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin-Brandenburg, Germany), […] has made the following order:

I. The proceedings are stayed pending a ruling by the European Court of Justice.

II. The following questions are referred to the European Court of Justice for a preliminary ruling on the interpretation of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (the Temporary Agency Work Directive): **[Or. 2]**

1.

Is the assignment of a temporary agency worker to a user undertaking no longer to be regarded as 'temporary' for the purposes of Article 1 of the Temporary Agency Work Directive as soon as the employment takes place in a job which is permanent and not performed as cover?

2.

Is the assignment of a temporary agency worker for a period of less than 55 months no longer to be regarded as 'temporary' for the purposes of Article 1 of the Temporary Agency Work Directive?

3.

If the answer to Question 1 and/or Question 2 is in the affirmative, the following additional questions arise:

3.1.

Does the temporary agency worker have an entitlement to the establishment of an employment relationship with the user undertaking even if the national law does not provide for such a penalty before 1 April 2017?

3.2.

Does a national provision such as Paragraph 19(2) of the Gesetz zur Regelung der Arbeitnehmerüberlassung (Law regulating temporary agency work) infringe Article 1 of the Temporary Agency Work Directive where it prescribes an individual maximum assignment period of 18 months for the first time as from 1 April 2017, but expressly excludes the taking into account of prior periods of assignment, although the assignment could no longer be classified as temporary if the prior periods of assignment were taken into account?

3.3.

Can the extension of the individual maximum assignment period be left to the discretion of the parties to a collective agreement? If so, does this also apply to parties to a collective agreement who exercise competence not over the employment relationship of the temporary agency worker concerned, but over the sector in which the user undertaking is active?

Grounds

I. Facts and relevant national law

1. The applicant had been employed by the temporary work agency I. since 1 September 2014. At the outset, the employment relationship had twice been limited to a period of one year each time and, thereafter, proceeded on an open-ended basis. In an agreement supplementing the employment contract, it had been agreed that the applicant was to work as a metal worker for D., the defendant in the present proceedings, at the latter's plant in Berlin. D. is a large undertaking in the automotive industry. The tasks to be performed on the engine production line there had been described in detail in the supplementary agreement. In accordance with the applicant's employment contract, his employment relationship is subject to certain collective agreements applicable to the temporary agency work sector.

2. From 1 September 2014 to 31 May 2019, the applicant had been exclusively assigned to the defendant in its capacity as the user undertaking. He worked continuously on the engine production line. He was not providing cover. That period was interrupted for only two months (from 21 April 2016 to 20 June 2016), during which the applicant was released from work on parental leave.

3. The second sentence of Paragraph 1(1) of the German Gesetz zur Regelung der Arbeitnehmerüberlassung (Law regulating temporary agency work, 'the AÜG'), in the version in force from 1 December 2011 to 31 March 2017, provided:

'The assignment of workers to user undertakings shall be temporary'.

[Or. 3]

4. There was no penalty for infringing that provision. On the other hand, Paragraph 9 of the AÜG declared contracts concluded between temporary work agencies and user undertakings and between temporary work agencies and temporary agency workers, among others, to be invalid if the temporary work agency did not possess the authorisation required under that Law. Paragraph 10 of the AÜG provided in this regard that, in that event, an employment relationship is deemed to have come into being between the user undertaking and the temporary agency worker.

5. The Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze (Law amending the Law regulating temporary agency work and other

laws) of 21 February 2017 […] amended the AÜG with effect from 1 April 2017. A new subparagraph 1b was inserted into Paragraph 1 of the AÜG. That subparagraph is now worded as follows:

> ‘The temporary work agency may not assign the same temporary agency worker to the same user undertaking for more than 18 consecutive months; the user undertaking may not employ the same temporary agency worker for longer than 18 consecutive months. Any previous assignments by the same or another temporary work agency to the same user undertaking shall be counted as a single period where any two such assignments are separated by no more than 3 months. A collective agreement entered into by parties from the sector in which the assignment takes place may prescribe a maximum assignment period different from that laid down in the first sentence hereof. … A private- or public-sector works council agreement concluded with the employer on the basis of a collective agreement entered into by parties from the sector in which the assignment takes place may prescribe a maximum assignment period different from that laid down in the first sentence hereof. …’

6. A point 1b was inserted into Paragraph 9(1) of the AÜG. Point 1b reads:

> ‘The following shall be invalid:
>
> 1b. employment contracts between temporary work agencies and temporary agency workers which exceed the maximum permissible assignment period laid down in Paragraph 1(1b), unless the temporary agency worker informs the temporary work agency or the user undertaking in writing, no later than one month after the maximum permissible assignment period has been exceeded, that he is maintaining his employment contract with the temporary work agency,
>
> …’

7. In the first sentence of Paragraph 10(1) of the AÜG, the legal consequence of invalidity is now provided for in more general terms:

> ‘Where the contract concluded between a temporary work agency and a temporary agency worker is invalid under Paragraph 9, an employment relationship between the user undertaking and the temporary agency worker shall be deemed to have come into being on the date of commencement of employment agreed between the user undertaking and the temporary work agency; where that contract does not become invalid until after the commencement of employment with the user undertaking, the employment relationship between the user undertaking and the temporary agency worker shall be deemed to have come into being at the time when the contract became invalid …’

8. Paragraph 19(2) of the AÜG contains a transitional provision:

‘Assignment periods predating 1 April 2017 shall not be taken into account in the calculation of the maximum assignment period laid down in Paragraph 1(1b) …’.

9. The ‘Tarifvertrag zur Leih-/Zeitarbeit in der Metall- und Elektroindustrie in Berlin und Brandenburg vom 23.05.2012’ (Collective agreement of 23 May 2012 on temporary agency work in the metal and electrical industries in Berlin and Brandenburg), which is applicable, inter alia, to the automotive industry […] and was concluded between the Verband der Metall- und Elektroindustrie in Berlin und Brandenburg e. V. and Industriegewerkschaft Metall (IGM), stipulates, in particular, that the temporary use of temporary agency workers is permissible provided that further conditions are satisfied. It provides, for example, that the use of temporary agency workers is permissible if it is for a limited period. Point 3 **[Or. 4]** of that collective agreement grants the employer and the works council the option of laying down more detailed provisions in this regard in a voluntary works agreement. These may prescribe, inter alia, the maximum period of assignment and rules governing recruitment. In the absence of such a works agreement, Point 4 of that collective agreement states that, when the temporary agency worker has completed 18 months of his assignment, the user undertaking must consider whether it is able to offer him an employment contract of unlimited duration. On his completion of 24 months of the assignment, the user undertaking must offer the temporary agency worker an employment contract of unlimited duration. If interrupted by breaks of less than 3 months, periods of assignment in the same undertaking are to be cumulated. The collective agreement did not expressly specify whether the voluntary works agreement had to be concluded with the local works council or with the central works council.

10. The subsequent ‘Tarifvertrag zur Leih-/Zeitarbeit in der Metall- und Elektroindustrie in Berlin und Brandenburg vom 01.06.2017’ (Collective agreement of 1 June 2017 on temporary agency work in the metal and electrical industries in Berlin and Brandenburg) […], which was concluded between the same parties, contains similar provisions. In addition, it makes express reference to the derogation clause of Paragraph 1(1b) of the AÜG. The parties to the collective agreement further agree therein that, under that collective agreement, the maximum period of any assignment may not exceed 48 months. Derogations are to apply to assignments that take place for objective reasons. In the case of undertakings without a works agreement, the review and offer of employment contracts of unlimited duration are to be subject to the same rules as those laid down in the previous collective agreement. Point 8 of the collective agreement contains a transitional provision. Under that provision, the employer and the works council must agree on a maximum assignment period. Where no such agreement has been reached, a maximum assignment period of 36 months is to apply as from 1 June 2017.

11. The defendant’s plant in Berlin does not have a works agreement with the body representing its local employees (works council). At company level, a central works council agreement (concluded between the defendant and the central works

council) of 16 September 2019 governs, inter alia, the assignment of temporary agency workers, although the term used in that agreement is ‘temporary worker’ […]. Under point 4.5 of the central works council agreement, a temporary worker may enter the employ of the defendant’s undertaking where that worker’s superiors make a request to that effect, provided that certain further conditions are met. Such requests must be made within three years. […]

12. Another central works council agreement of 20 September 2017 […] supplements the previous central works council agreement. In manufacturing, the assignment of temporary workers is not to exceed a maximum period of 36 months. In the case of temporary workers who were already employed on 1 April 2017, only periods postdating 1 April 2017 are to count towards the maximum assignment period of 36 months.

13. By the action brought before the Arbeitsgericht Berlin (Labour Court, Berlin, Germany) on 27 June 2019, the applicant now seeks a declaration that an employment relationship has existed between the parties since 1 September 2015, in the alternative, since 1 March 2016, in the further alternative, since 1 November 2016, in the further alternative, since 1 October 2018 and, in the final alternative, since 1 May 2019.

14. At first instance, the applicant claimed that the assignment to the defendant could no longer be classified as ‘temporary’ because it had lasted for more than a year. In his submission, this and, in particular, the cut-off date laid down in Paragraph 19(2) of the AÜG, are contrary to EU law. A temporary requirement cannot under any circumstances last longer than the maximum permissible duration of fixed-term employment without objective justification. This (under the German rules) is no more than 24 months. Account must also be taken of the fact that he performed continuous tasks. There is therefore an employment relationship with the defendant. **[Or. 5]**

15. The defendant took the view that a clarification by the legislature of the ‘temporary’ criterion had been in place since 1 April 2017. After that date, derogations from the maximum assignment period of 18 months are permissible under a collective agreement in the sector in which the assignment takes place. Under the legislation, the parties to a collective agreement are permitted to make further provision in this regard by means of a works agreement. The central works council agreement of 20 September 2017 does make such provision. The maximum assignment period of 36 months laid down in that agreement was not exceeded, since only periods after 1 April 2017 are to be taken into account.

16. In its judgment of 8 October 2019, the Arbeitsgericht Berlin (Labour Court, Berlin) concurred with the view taken by the defendant and dismissed the action. In the interests of expediting the procedure, the court left open the question of whether there had been an infringement of EU law.

17. The appeal lodged with the Landesarbeitsgericht (Higher Labour Court) on 22 November 2019, for which a statement of grounds was submitted on 30 January 2020, is directed against that judgment. The parties maintain on appeal the positions they expressed at first instance. The defendant further maintains that it consulted the works council at its Berlin plant every quarter on temporary agency worker assignments. Planned assignments were limited in duration to the end of the quarter in question. This was also true of the applicant's assignments. The applicant disputes this and considers 18 extensions within a period of 56 months to be a circumvention of the law.

II. Legal assessment based on national law alone

18. Before 2017, there was no collective agreement or works agreement in the sector in which the temporary work agency and the user undertaking at issue here are active that contained special provisions on the maximum assignment period.

19. Before 1 April 2017, there was no express statutory penalty applicable to situations where the assignment to the user undertaking could no longer be regarded as temporary. The Bundesarbeitsgericht (Federal Labour Court, Germany) therefore assumes that an employment relationship between a temporary agency worker and a user undertaking does not come into being even where the assignment of the temporary agency worker is not merely temporary […].

20. Since 1 April 2017, the maximum assignment period under the AÜG is 18 months, whereby, pursuant to the transitional provision contained therein, only periods starting from that date are to be taken into account. On that basis, an employment relationship with the defendant would have come into being on 1 October 2018.

21. Under that legislation, however, derogations from that rule can be created by a collective agreement concluded by parties from the sector in which the user undertaking is active. […] It being assumed that that legislation is valid, the collective agreement for the metal and electrical industries of 1 June 2017 stipulated, in its transitional provision for undertakings with a works council (which the Berlin plant possessed), that a maximum assignment period of 36 months starting from 1 June 2017 would apply in cases where no works agreement had been concluded. That period would have come to an end on 1 June 2020. However, the applicant's assignment had already finished by that date.

22. The collective agreement of 1 June 2017 also allowed for derogations by way of a works agreement. The voluntary central works council agreement of 20 September 2017 provided for a maximum assignment period of 36 months starting from 1 April 2017. On that basis, the applicant could have worked until 1 April 2020. On that date too, the applicant was no longer on assignment. […] **[Or. 6]**

III. Relevance of the interpretation of the Temporary Agency Work Directive

23. Since the applicant seeks a declaration that an employment relationship with the defendant existed well before 1 October 2018, his claim can succeed in full only if EU law requires this.

24. Question 1: The present appeal court assumes that the assignment of a temporary agency worker within the meaning of Article 1 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (the Temporary Agency Work Directive; OJ 2008 L 327, p. 9) is permissible only in the case where it is temporary. The Bundesarbeitsgericht (Federal Labour Court), too, takes the view that 'temporary' is not merely a description or a non-binding statement of intent […]. However, the Temporary Agency Work Directive does not contain a more precise definition. The European Court of Justice has not as yet given any rulings on the interpretation of that criterion.

25. The 'temporary' criterion may be understood as being governed exclusively by the temporary agency worker's individual assignment period.

26. It is also conceivable, however, that that criterion refers to the jobs to be filled and is to be understood as meaning that temporary agency workers in the user undertaking must not be deployed to permanent jobs unless there is a need for such jobs to be covered. This Chamber assumes that the applicant had from the start of his assignment been deployed to a job for which the defendant had a continuous need. Support for a job-based interpretation might be found in the aim defined in Article 2 of the Temporary Agency Work Directive. That aim is to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working. However, the use of temporary agency workers to perform permanent jobs in the user undertaking does not create any additional jobs, but replaces permanent workers with temporary agency workers. Neither is such a situation indicative, in this regard, of a need to be more flexible. What is more, Article 6 of the Temporary Agency Work Directive shows that a transition to a permanent employment relationship is desirable. In Germany, the replacement of permanent workers with temporary agency workers is an attractive proposition for many undertakings, not least because the obligation to treat temporary agency workers in the same way as their permanent workforce has in practice been significantly delayed on account of the national legislation. Furthermore, in difficult economic circumstances, it is easier for a user undertaking to terminate assignments of temporary agency workers. There are not normally any financial repercussions and any that do arise are significantly reduced.

27. […]

28. Question 2: In any event, this Chamber considers that an assignment period of 55 months is no longer a temporary assignment. Not least for reasons of legal clarity and legal certainty, it would be desirable for the European Court of Justice to set a clear time limit in this regard. In so doing, the Court might also draw a distinction according to whether or not an objective reason for such an assignment (a need for cover, temporary peaks in demand or such like) is present.

29. Question 3.1: Article 10(1) of the Temporary Agency Work Directive provides for the imposition of penalties in the event of infringement. At the Bundestag sitting of 24 March 2011, the German Government stated that it was its intention to implement the directive 'in full, letter for letter'. **[Or. 7] [**…] Up until 31 March 2017, however, no penalty had been laid down for cases where an assignment can no longer be considered temporary. This raises the question as to whether the emergence of an employment relationship with the user undertaking may be inferred as a penalty from EU law itself. If national law already provides that an employment relationship with the user undertaking comes into being if the temporary work agency does not have the official authorisation necessary to assign workers, must the same penalty not apply, in accordance with the principle of effectiveness ('effet utile'), in the case where the assignment is no longer 'temporary'?

30. Question 3.2: This question concerns the German rule which limits the maximum assignment period to 18 months in principle for the first time on 1 April 2017. The transitional provision contained in Paragraph 19(2) of the AÜG gives 1 April 2017 as the starting point for that period. However, Article 11 of the Temporary Agency Work Directive required the Member States to transpose that directive by 5 December 2011 at the latest. In Germany, therefore, penalties could not be imposed until almost 7 years later. The consequence of an interpretation of the Temporary Agency Work Directive as meaning that the limit applicable to the temporary assignment of workers was exceeded before 1 April 2017 or within a period of 18 months thereafter might be that the transitional provision must be disregarded in whole or in part.

31. Question 3.3: The question here is whether the national legislature is entitled to prescribe a maximum assignment period from which the parties to a collective agreement may nonetheless derogate. Even if this question is answered in the affirmative, there remains the issue of whether the legislature may confer such a right on parties to a collective agreement who exercise no competence over the employment relationships of temporary agency workers. The latter's employment relationships are governed technically by the collective agreements applicable to the temporary work agency sector. However, the derogation permitted by the legislature in the present case relates to collective agreements applicable in the sector in which the user undertakings are active. Article 5 of the Temporary Agency Work Directive provides that derogating provisions may also be adopted by the parties to a collective agreement. This, however, refers only to derogations from the principle of equal treatment within the meaning of Article 5 of that directive. Moreover, there is nothing to indicate that the parties to collective

agreements have been given any competence to determine the length of assignment periods. In that event, the third sentence of Paragraph 1(1b) of the AÜG, in the version in force since 1 April 2017, would be contrary to Article 1 of the Temporary Agency Work Directive.

…