Who Am I – and, If so, How Many? Temporary Employees and Thresholds of Employment Law

INTRODUCTION

Hardly any topic of employment law has drawn as much attention in recent years as the use of temporary employees. Disputes have involved, among other things, participation rights of the works council, the validity of provisions in collective bargaining agreements deviating from the equal treatment/equal pay requirement, as well as the use of employees who were originally regular employees of the temporary employer and whose employment agreements were transferred to a third-party employer (in some cases a group affiliate). After the last amendment to the German Temporary Employment Act (*AÜG*), attention again focused on the question of what meaning should be assigned to the term "temporary" in § 1 para. 1 sent. 3 of the Temporary Employment Act for purposes of determining the length of temporary employment. Lower court decisions are very differentiated on this point, raising hopes that the issue will soon be settled by the Federal Labor Court (*BAG*).

Another issue that frequently arises in connection with the use of temporary employees is whether temporary employees should be taken into consideration for purposes of thresholds that appear in various code sections and are based on the number of employees working in an operation or a company. Already in October 2011 the Federal Labor Court had addressed the issue of whether temporary employees should be regarded as employees within the meaning of § 111 of the German Works Constitution Act (*BetrVG*). The court had decided then that this is the case at least if temporary employees work in the operation of the temporary employer for more than three months (decision dated October 18, 2011, case no. 1 AZR 335/10; see also our Client Newsletter 7/11). In a decision dated January 24, 2013 (case no. 2 AZR 140/12) the Federal Labor Court has now addressed the issue of whether temporary employees must be counted when determining the number of employees that are "generally" employed within the meaning of § 23 para. 1 of the German Dismissal Protection Act (*KSchG*). These thresholds determine whether an employment agreement is subject to the Dismissal Protection Act.

FACTS AND PROCEDURAL HISTORY LOCAL LABOR COURT OF NUREMBERG, JUDGMENT DATED AUGUST 24, 2010 – CASE NO. 14 CA 9688/09 REGIONAL LABOR COURT OF NUREMBERG, JUDGMENT DATED JULY 27, 2011 – CASE NO. 4 SA 713/10

The plaintiff had worked for the defendant as a non-skilled worker since July 2007. It was undisputed that the employer had 10 employees of its own, including the plaintiff. With respect to another person who worked in the operation of the employer, it was unclear whether that person was an employee of the defendant employer or provided services to the defendant employer on the basis of a contract for services. With respect to yet another person, there was a question whether this person was a regular employee or a temporary employee. The employer terminated the employment of the plaintiff in November 2009. The plaintiff then filed a wrongful termination action, alleging that his termination was invalid because there were no grounds for termination within the meaning of the Dismissal Protection Act. The plaintiff argued that the Dismissal Protection Act applied to his employment agreement because temporary employees of the defendant employer had to be added to the employer's own 10 employees.

The Local Labor Court, and subsequently the Regional Labor Court of Nuremberg (the "Regional Labor Court"), each denied the complaint seeking protection from wrongful termination. In support of its decision the Regional Labor Court stated that the plaintiff had not met his burden of pleading and proving the number of employees working in the employer's operation. The court found that the employer had sufficiently pleaded that one of the individuals at issue worked on the basis of a contract for services and that the other individual was a temporary employee. Citing the prevailing opinion among secondary authorities and prior case law of the Federal Labor Court on the issue of whether temporary employees should be considered for purposes of determining the size of an operation within the meaning of § 9 of the Works Constitution Act (determination of size of elected works council), the Regional Labor Court held that temporary employees did not count. The Regional Labor Court argued that when the legislature last amended § 23 para. 1 of the Dismissal Protection Act, it refrained from expressly including temporary employees for purposes of determining the number of employees who "generally" work for an employer. In the view of the Regional Labor Court, this showed that even small operations that employ temporary employees in addition to their own employees were intended to be privileged when it comes to application of the Dismissal Protection Act.

DECISION OF THE FEDERAL LABOR COURT JUDGMENT DATED JANUARY 24, 2013 – CASE NO. 2 AZR 140/12 (PRESS RELEASE)

The plaintiff successfully appealed from the decision of the Regional Labor Court. By judgment dated January

24, 2013, which is currently available only as a press release, the Federal Labor Court held that temporary employees may be taken into consideration for purposes of determining the number of employees who "generally" work for an employer. According to the Federal Labor Court, counting temporary employees is not inconsistent with the fact that temporary employees have no employment agreements with the owner of the operation. The Federal Labor Court went on to explain that exempting small operations from the Dismissal Protection Act was intended to account for the facts that small operations frequently involve close personal cooperation, in most cases lack financial strength, and typically are more burdened by the administrative expense associated with a wrongful termination action. Nonetheless, the Federal Labor Court found, this did not justify a distinction based on whether the general workforce of an operation includes only the employer's own employees or also temporary employees. To determine the relevant size of an operation, the Federal Labor Court concluded, it must therefore be determined whether temporary employees working for the operation are employed on a regular basis or for reasons that "generally" are not typical of the employer's business.

PRACTICAL SIGNIFICANCE OF DECISION

The relatively widespread use of temporary employees provides employers with greater flexibility for planning the deployment of human resources. If temporary employees are used on a more regular basis and this is done not only to accommodate peaks in the workload, but rather to prepare for negative scenarios, this places more pressure on regular employment relationships. The present decision, as well as the decision of the Federal Labor Court from October 2011, suggests that courts seek to prevent such "side effects" associated with the use of temporary employees.

The rationale provided in the press release furthermore makes clear that the Federal Labor Court interprets relevant statutory provisions according to their express language and according to their intent and purpose, which can result in different outcomes. The upcoming works council elections in the coming year therefore are one reason to await with keen interest the hearing before the Federal Labor Court scheduled for March 13, 2013 (case no. 7 ABR 69/11), which will deal with the issue of whether temporary employees count for purposes of determining the number of employees (with voting rights) of an operation in accordance with § 9 of the Works Constitution Act. In prior decisions (decision dated April 16, 2003, case no. 7 ABR 53/02; decision dated March 10, 2004, case no. 7 ABR 49/03) the Federal Labor Court had held that temporary employees did not count for purposes of § 9 of the Works Constitution Act. The Federal Labor Court had reasoned that the intent and purpose of the provision required not only that an employee actually worked at and was integrated into the operation, but, in addition, that there was an actual employment agreement between the employee and the employer at whose operation the employee worked. The present decision of the Federal Labor Court, as well as the Federal Labor Court's decision of October 18, 2011, deliberately stepped around this line of reasoning, relying instead on the intent and purpose of the statutory provision relevant for purposes of each decision. It remains to be seen whether Division 7 of the Federal Labor Court will now decide differently in light of the preliminary work done by its colleagues.

Last, but not least, we would like to note the news alert published by the law firm of CM Murray LLP, in which we discussed the decision of the Federal Labor Court as a guest contributor. This news alert also should be of general interest to anyone who works in the area of employment law in an international context.

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