Newsletter
Labour and Employment

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PREFACE

The first issue of our 2014 Newsletter starts off by considering the Swiss referendum on the employment of foreigners in Switzerland. The referendum has attracted a great deal of attention in the press. We would like to describe it briefly and outline its consequences for the free movement of persons to Switzerland as well as the free movement of Swiss to EU countries. In addition, we closely examine a decision by the Federal Labor Court (Bundesarbeitsgericht - BAG) on the hiring out of employees, which was also widely discussed in the media at the end of last year. According to the Federal Labor Court, if a temporary work agency hires out an employee not just temporarily but so to speak permanently to a client of the agency, this will not - initially - be in line with the Temporary Employment Act (Arbeitnehmerüberlassungsgesetzes - AÜG). Nonetheless, this breach of the Temporary Employment Act will not lead to the establishment of an employment relationship between the client of the agency and the employee.

Another contribution looks at the issue of possible discrimination against an applicant whose résumé was returned with the handwritten note: "married, one child". Finally, we discuss a judgment of the Federal Labor Court on fixed-term employment based on a court settlement. Its effect is to significantly facilitate the conclusion of legally valid fixed-term employment contracts.

"Against mass immigration" Swiss Referendum Limits the Free Movement of Persons

In a much-discussed referendum in February of this year, the Swiss population decided to limit the influx of foreigners to Switzerland, thereby also excluding EU citizens. The referendum obliges the Swiss government to introduce annual immigration quotas within the next three years. It is currently unclear how the EU will react to the introduction of quotas of such kind.

Background to the Referendum

The basis for the vote was the popular initiative "Against mass immigration", which was proposed by the conservative-nationalist Swiss People's Party (SVP) with the aim of limiting the numbers of immigrants to Switzerland. This included, among other things, a demand to renegotiate and restrict the terms of the free movement of persons agreed with the EU.

Consequences of the Referendum

The existing free movement of workers between Switzerland and the EU is based on the Agreement on the Free Movement of Persons, which entered into force in 2002. Under the Agreement, the respective labor markets of the EU Member States and Switzerland are open to EU and Swiss citizens on a reciprocal basis. As a consequence, EU and Swiss employees and independent contractors may live and work in each other's respective sovereign territory. Since the Agreement on the Free Movement of Persons does not contain any limits on numbers, an unlimited number of EU citizens are permitted to work in Switzerland.

The implementation of the referendum calling for the introduction of limits on the maximum number of EU citizens permitted to move to Switzerland will necessarily bring with it a violation of this Agreement. From the Swiss perspective, there is thus a need to renegotiate the Agreement on the Free Movement of Persons with the EU. There are, however, clear signals coming from Brussels that the EU is not prepared to enter into new negotiations. This means that Switzerland will have to weigh up whether it wishes to terminate the Agreement or violate it and thereby risk termination or suspension of the Agreement by the EU. A possible compromise solution is already being discussed. This would involve the EU accepting the introduction of large quotas by Switzerland which de facto did not limit the free movement of workers. If, however, it comes to the termination or suspension of the Agreement, the legality of employing Swiss citizens in Germany would come under scrutiny. In an extreme – however politically very unlikely – case, employing Swiss citizens in Germany would be illegal. It is currently impossible to predict what effect the referendum will ultimately have in practice on free movement and thus the employment of Swiss citizens in the EU and EU citizens in Switzerland. In any event, the results of the referendum constitute a severe test of the relationship between Switzerland and the EU.

Free Movement within the EU

The free movement of workers is guaranteed between EU Member States, which is why citizens of Member States have free access to employment in the other Member States. Following the Eastern enlargements of the European Union in 2004, the Federal Republic of Germany exercised its right to temporarily restrict access to its employment market for citizens of acceding countries. As a result, the right to complete freedom of movement for them first took effect in Germany on 1st May 2011, and in the case of Romanian and Bulgarian citizens, it did not take effect until 1 January 2014.

Dr. Frank Wilke

> If you want to learn more about the free movement of employees in Europe please click on the links for more information summarized by UK law firm Gateley and French law firm Lexcase.

News regarding hiring of employees from temp agencies – Legal consequences of hiring temps on a permanent basis

Headnote

If an employer (temp agency) is authorized to hire out employees, no employment relationship results between the clients of the temp agency and the personnel provided by the agency – despite § 1(1) sent. 2 of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG) – even if such employment is not only temporary.

Facts

The defendant is the operator of several hospitals that use the services of such personnel. It outsources its services, e.g., IT services, to a wholly owned subsidiary. The plaintiff, an IT clerk, was employed by this subsidiary, which is authorized to hire out temporary employees. The plaintiff was assigned by the service company, i.e., the agency, to work for the hospital, i.e., the defendant and the agency's client, from 2008 to August 2012 without interruption.

This assignment was arranged for an indefinite period. The plaintiff was hired by the service company exclusively for the purposes of being assigned to the defendant on a permanent basis. The plaintiff's action is based on a change in the law in the year 2011 that made it illegal to hire out manpower on an other than temporary basis (§ 1(1) sent. 2 of the Temporary Employment Act). Relying on § 10(1) sent. 2 of the Temporary Employment Act, the plaintiff argued that this therefore meant that an employment relationship had been established with the defendant, i.e., the hospital, which was the client of the temp agency.

Decision

In its judgment of 10 December 2013 (9 AZR 51/13), the Federal Labor Court dismissed the IT worker's action, finding that no employment relationship had come into being between the plaintiff and the client of the temp agency. The court ruled that the plaintiff's employment relationship did not fall under § 10(1) sent. 1 of the Temporary Employment Act, arguing that this provision, according to which an employment relationship exists between the temporary employee, applies only if the previous employer, i.e., the temporary agency, is not authorized to hire out personnel. In the present case, however, the service company did have such authorization, and the court found that the agreement between the hospital and the service company was therefore not invalid under § 9 no. 1 of the Temporary Employment Act.

In its decision, the Federal Labor Court provided an exhaustive explanation of the fact that § 10(1) sent. 1 of the Temporary Employment Act also cannot be applied by analogy. The court reasoned that the legislature deliberately avoided inferring a constructive employment relationship in the case of employees hired out on a non-temporary basis. and that no unintentional legislative omission was involved here. As a result, the Federal Labor Court concluded, it was therefore also not possible to infer a constructive employment relationship not intended by the legislature, adding also that no other conclusion would suggest itself under European law. The court also pointed out that it would be constitutionally objectionable to allow another company, i.e., the client of the temp agency, to assume the role of employer with no legal basis. The court pointed out that such a change

of employers could also be disadvantageous for employees in many cases, and concluded that the IT clerk did not therefore have a new employer. Finally, it is, according to the court, up to the legislature to decide whether to adopt any sanctions for violation of § 1(1) sent. 2 of the Temporary Employment Act, and the courts cannot preempt this.

Comments

After the liberalization of legislation governing companies that hire out temporary employees, which occurred in connection with "Agenda 2010", it even became possible to hire out employees on a permanent basis, and somewhat less was heard from the courts on the subject of the hiring out employees. This changed in the fall of 2011 with what is referred to as the "lex Schlecker". According to the amended Temporary Employment Act, employees still may be hired out only on a temporary basis. Since then, it has also been illegal to engage personnel within corporations exclusively for the purposes of hiring them out. This "revolving door effect" had existed earlier – as also in the case described above – in the case of Schlecker. According to § 1(1) sent. 2 of the Temporary Employment Act, it is now, as it was up to the year 2002, again necessary to ensure that it is agreed from the very beginning that employment is temporary.

It does indeed follow from the law and the judgment discussed above that it is at least not possible to infer a constructive employment relationship between an employee and a company to which that employee is hired out by an agency if the agency is in possession of the required official authorization. This obviously encouraging judgment should, however, not tempt companies to blindly use the services of employees hired out by agencies on a permanent basis, for the Federal Labor Court has already referred to the consequences at the level of collective bargaining law in its decision of 10 July 2013 (7 ABR 91/11). The court made it clear that a works council can contest the deployment of an employee hired out by another company if such employment is not only temporary. Pursuant to § 99(2) no. 1 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG), a works council can refuse to give its consent to such employment. As a result, it is advisable to stipulate and document that the deployment of personnel supplied by agencies is only temporary from the very beginning.

Jens Völksen

According to the amended Temporary Employment Act, employees still may be hired out only on a temporary basis.

Discrimination documented by handwritten comments on a résumé

Headnote

If an employer notes the age of the child (7 years old) next to the information "married, one child" on a résumé submitted with an application for employment and underlines this information, this can be taken as evidence of indirect discrimination against the candidate (Hamm Higher Labor Court, judgment of 6th June 2013, 11 Sa 335/13).

Facts

The employer, the operator of a local radio station, ran an employment ad in a newspaper to recruit a "bookkeeper m/f" with a completed clerical apprenticeship. The plaintiff applied for the position and submitted a résumé, which included among other things the information "Married, one child". The employer then added by hand: "7 years old!". The entire resulting sequence of words "one child, 7 years old!" was underlined. The employer informed the plaintiff that another candidate had been chosen and returned the plaintiff's résumé, including the handwritten notes. The plaintiff brought an action for compensation in the amount of Euro 3,000.00 for gender-based discrimination.

Decision

The Labor Court had dismissed the plaintiff's claim for compensation on the grounds that there had been no discrimination, either directly or indirectly, on the basis of gender. The Hamm Higher Labor Court reversed the decision of the lower court and awarded the employee

Euro 3,000.00. by way of compensation for discriminatory treatment in violation of § 7 of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). According to the court, the discrimination lay in the rejection of the application without inviting the candidate to a personal interview and it could also be assumed that the discrimination was based on gender.

The Hamm Higher Labour Court found the handwritten remark "7 years old!" and the fact that the entire resultant sequence of words "one child, 7 years old!" was underlined were indicative of discrimination within the meaning of § 22 of the General Equal Treatment Act. The court did to be sure find that there was no direct discrimination involved since parenthood is not in itself a gender-specific characteristic.

Nevertheless, the Hamm Higher Labour Court did find evidence of indirect discrimination on the basis of gender within the meaning of § 3(2) of the General Equal Treatment Act since the issues subsumed under "compatibility of family (with minor children) and employment" did in the context of social reality in the Federal Republic very predominantly affect women. Especially since the percentage of employed fathers is significantly higher than that of employed mothers, the court assumed that a man in a comparable situation (father of a seven-year-old child) would have been afforded better treatment than the plaintiff.

The court found that the use of "one child, 7 years old!" as a decision-making criterion could not be legally justified and constituted evidence of indirect discrimination pursuant to § 22 of the General Equal Treatment Act.

The employer was also not able to refute this evidence by arguing that the successful candidate actually was better qualified. Instead, it would have been necessary to prove that the hiring decision was free of bias by providing positive proof of the fact that the use of improper criteria had been excluded. Accordingly, the Hamm Higher Labour Court ruled that the handwritten remark and the underlining sufficed to prove the existence of indirect discrimination on the basis of gender. The court also considered the compensation in the amount of Euro 3,000.00 to be appropriate.

Comments

The decision of the Hamm Higher Labour Court is yet another clear example of the pitfalls and obstacles that employers must navigate in practice to ensure that hiring processes are free from discrimination. The court's assessment of the case was based solely on the triggering circumstance – and ultimately the determinative criterion – i.e., the handwritten remark on the résumé and the underlining. The plaintiff did not submit further evidence detrimental to the defendant. By returning the candidate's résumé, the defendant created the actual basis for a negative outcome.

There exists a certain potential for conflict in this case between the (legitimate) need of employers to document the hiring process and the specifics of each candidate to a sufficient extent on the one hand and their objective interest in revealing few practical aspects of the decision-making process involved in the recruitment process to the world outside on the other hand. Although it is

still advisable to keep internal records to document hiring decisions, handwritten notes on résumés are to be avoided, especially if they are returned to applicants. In less "obvious" cases, there would otherwise also be the danger that such notes might be viewed as evidence of a discriminatory selection procedure since résumés do contain considerable data and information that fall under one of the "forms of discrimination" contained in § 1 of the General Equal Treatment Act.

Felix R. W. Pott

The court's assessment of the case was based solely on the triggering circumstance – and ultimately the determinative criterion – i.e., the handwritten remark on the résumé and the underlining.

New developments regarding interpretation of legislation governing fixed-term employment?

Headnote

Grounds exist for recognition of fixed-term employment in the case of a court settlement within the meaning of § 14(1) sent. 2 no. 8 of the Act not only if the settlement is reached at the suggestion of the court; a court settlement within the meaning of § 278(6) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO; hereinafter the "Code") that results from a joint proposal made by the parties also suffices for this purpose.

Facts

The Lower Saxony Higher Labor Court was called upon to decide whether the term of an employment relationship can be effectively limited by a settlement proposed by the court. The plaintiff, who had already been employed previously by the defendant under several temporary contracts with various interruptions, brought an action to have employment under the most recent of these contracts declared permanent. The court suggested in the context of the conciliation hearing that the legal dispute be settled through a mutual agreement to extend the term of the employment agreement. No agreement was initially reached. Following the conciliation hearing, the plaintiff's attorney of record requested a court-ordered settlement calling for an extension of the contract by a further two years. The court adopted the settlement and the content thereof in its order pursuant to § 278(2) of the Code. The plaintiff sought a declaration to the effect that the term called for in the settlement under the court order was void.

Decision

The Lower Saxony Higher Labor Court was of the opinion that the fixed term was valid. The labor court's decision was completely in line with the most recent case law of the Federal Labor Court. In its judgment of 15 February 2012 (Federal Labor Court 7 AZR 734/10, NJW 2012, p. 3117), the Federal Labor Court decided that, unlike a settlement adopted under § 278(6) sent. 1 (second alternative) of the Code, a settlement adopted under § 278(6) sent. 1 (first alternative) of the Code was not a court-ordered settlement within the meaning of § 14(1) sent. 2 no. 8 of the Act and could therefore not validly limit an employment contract to a fixed term. According to the court, the very wording of § 14(1) sent. 2 no. 8 of the Act would suffice to prevent an agreement calling for a limited term on the basis of a non-judicial agreement from being considered such a valid reason. The court also reasoned that the intent and purpose of § 14(1) sent. 2 no. 8 of the Act weighed significantly against the possibility of considering a settlement reached under § 278(6) sent. 1 (first alternative) of the Code a sufficiently valid reason for recognition of a limited term and that the legislature recognized the court settlement as a valid ground for a limited term because the court can and is obliged to make an effort to take the legitimate interests of the employee into account in the content of the settlement. The degree of involvement of the court in the settlement is therefore of utmost importance.

The Lower Saxony Higher Labor Court did not follow the Federal Labor Court ruling since the ruling was not consistent with the wording of the provisions of law or the intent and purpose of the amended version of § 278(6) of the Code the legislature that took effect as of 1st Sep-

tember 2004, reasoning that according to § 14(1) sent. 2 no. 8 of the Act a valid reason exists if the fixed term is the result of a court settlement. According to the court, no further restriction as regards the conditions under which the court settlement must come about can be deduced from the wording of the law, which means that § 14(1) sent. 2 no. 8 of the Act refers to both alternatives contained in § 278(6) of the Code and is in particular not inconsistent with the intent and purpose of § 278 of the Code. The court was of the opinion that the legislature wanted to provide more possibilities for judicial settlements and facilitate settlements between the parties to such actions by amending § 278 of the Code, which may not be construed to mean that the area of application of § 14(1) sent. 2 no.8 of the Act is at the same time restricted without amendment.

Comments

The decision of the Lower Saxony Higher Labor Court is to be welcomed. The Lower Saxony Higher Labor Court presents convincing arguments for its departure from the current case law of the Federal Labor Court. It remains to be seen whether a settlement reached under § 278(6) sent. 1 (first alternative) of the Code (now again) constitutes a valid reason for limiting the term of an employment agreement pursuant to § 14(1) sent. 2 no. 8 of the Act. The Lower Saxony Higher Labor Court allowed an appeal on law. The appeal is pending before the Federal Labor Court. Until the appeal has been decided, employers would be well advised to accept a limited term that is not based on a valid reason under a court-ordered settlement only if the limited term is contained in a settlement proposed by the court.

Dr. Jessica Blattner

Content

Note

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