Federal Constitutional Court Rules Collective-Bargaining Agreements Invalid

Dr. Piero Sansone **Cologne, 31.08.2015**

Decision

In December 2010, the Federal Labor Court ruled that the Collective Bargaining Association of Christian Trade Unions for Temporary Work and Personnel Service Agencies (*Tarifgemeinschaft Christlicher Gewerkschaften für Zeitarbeit und Personalserviceagenturen* – hereinafter referred to as "CGZP") had no collective-bargaining authority (*Decision of 14 Dec. 2010, 1 ABR 19/10*). In May of 2012, Federal Labor Court then found that such authority had already been lacking in the year 2003 and ruled retroactively that the collective agreements negotiated by the CGZP were invalid (*Decision of 22 May 2012, 1 ABN 27/12*).
Some 18 temporary employment agencies filed a constitutional complaint against this decision as well as other decisions. In their opinion, retroactive rescission of the organization's collective-bargaining authority was in violation of the principles of legitimate expectations and legal certainty anchored in Art. 20(3) of the Basic Law (*Grundgesetz* – GG).
The constitutional complaint proved unsuccessful. In its decision of 25 April 2015 (*1 BvR 2314/12*), the Federal Constitutional Court dismissed the alleged violation of Art. 20(3) of the Basic Law, arguing that the principles of legal certainty and legitimate expectations were indeed anchored in the rule of law, and that for that reason genuine ex post facto laws were not permissible. However, the question as to whether the authority to represent employees is valid in this case only involves construction of the law by the courts. The court added that this could only entail the necessity of respect for legitimate expectations in exceptional cases, for example, in the case of an unforeseeable change in the case law of the highest federal courts. In the opinion of the Federal Constitutional Court, the complainants could not rely on such case law since none existed as of the time of the challenged decisions. The Federal Labor Court initially addressed the issue of the collective-bargaining authority of the CGZP in December of 2010. The Federal Constitutional Court also pointed out the complainants could not have had any legitimate expectations since there had already been considerable doubt as to whether the CGZP had the authority to represent employees in the year 2003. Despite that fact, the court reasoned, the plaintiff companies had proceeded to apply the collective agreements with the CGZP, which called for lower rates of compensation for employees, and the decisions they challenged simply represented the occurrence of a previously identified risk.

Implications for Practice

The decision of the Federal Constitutional Court confirms the case law of the Federal Labor Court. As a result of that decision, temporary personnel whose compensation was fixed in collective agreements with the CGZP were able to sue for retroactive payment of higher compensation on the basis of the 'principle of equality'. Under § 10(4) of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz* – AÜG), temporary personnel working for a temporary agency are entitled to essentially the same conditions, including compensation, as those enjoyed by comparable employees of the agency. The claims were, however, limited by applicable limitation periods or time bars (*see Federal Labor Court, judgments of 13 March 2013, 5 AZR 954/11, 5 AZR 146/12, 5 AZR 242/12, 5 AZR 294/12 and 5 AZR 424/12*)
The financial repercussions of retroactive derecognition of the CGZP's collective-bargaining authority went beyond the issue of the claims of temporary workers to receive retroactive payment. In addition to the difference between compensation paid and that actually due on the basis of the principle of equality, it was also necessary

to pay the social-security contributions, including the contributions to accident insurance (§ 23(1) of the Social Code (*Sozialgesetzbuch*) IV and § 150(1) of the Social Code VII; see § 42d(3) of the Income Tax Act (*Einkommensteuergesetz*) in conjunction with § 44(2) sent. 2 of the Fiscal Code on the back payment of payroll taxes).
These financial repercussions can also affect the companies that obtain manpower through temporary agencies since clients of temporary agencies incur secondary liability – even in the case of insolvency on the part of the corresponding agencies – for social-security contributions, including contributions to accident insurance, under § 28e(2) sent. 1 of Social Code IV and § 150(3) sent. 1 of Social Code VII in conjunction with § 28e(2) sent. 1 of Social Code IV (see § 42d(6) of the Income Tax Act for possible liability for payroll taxes).

Note

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