Legal Update Labour and employment

Federal Labor Court: Temporary Personnel Count for the Purposes of Determination of the Size of an Undertaking!

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Construction of the third sentence of section 23(1) of the German Employment Protection Act (Kündigungsschutzgesetz – KSchG) based on its intent and purpose requires that temporary personnel be taken into account for the purposes of determination of the size of an undertaking if their deployment is based on "normal" personnel requirements (Federal Labor Court, 24 January 2013, – 2 AZR 140/12).

Facts

The plaintiff had been employed by the defendant as one of ten employees since July 2007. In November 2009, the plaintiff was served notice of dismissal by the defendant. In an action brought for protection against dismissal, the plaintiff argued that the temporary personnel deployed by the defendant should be counted as employees, which would mean that the defendant would then have had more than a total of ten employees and as a result be subject to the provisions of the Employment Protection Act (section 23(1)).

Decision

The lower courts dismissed the action for protection against dismissal, arguing that the Employment Protection Act was not applicable and that the defendant could dismiss the plaintiff "at will". The plaintiff's appeal was then granted by the Second Senate of the Federal Labor Court. The court reasoned that the possibility could not be ruled out that the defendant's undertaking had more than the ten employees required by the second sentence of section 23(1) of the Employment Protection Act and that the fact that no employment relationship existed between the temporary personnel and the owner of the undertaking did not automatically rule out the possibility of counting temporary personnel for the purposes of application of the threshold mentioned in the third sentence of section 23(1) of the Employment Protection Act. The court went on to say that the intent and purpose of exempting small enterprises from compliance with the Employment Protection Act could be found in the close collaboration at the personal level found in such enterprises, their usually modest funding and the greater

administrative burden on owners of smaller enterprises that actions to seek protection against dismissal would entail. According to the court, this negates the purpose of any distinction based on whether any assessment of the size of the enterprise's regular workforce is based on the deployment of regular employees or temporary personnel.

The Senate remanded the matter to the Higher Labor Court for reconsideration and redecision since the submission of facts did not yet make it possible to determine whether the number of temporary personnel working for the enterprise at the time of the dismissal was due to regular business or caused by a surge of business that was not "as a rule" typical for the enterprise.

Comments

Seen from the perspective of employers, the Federal Labor Court's decision is definitely not a welcome change. It represents a further step – of questionable logic – in the case law in the direction of further erosion of the difference between permanent and temporary personnel. The judgment represents a departure from the principle underlying legislation governing protection against dismissal and from the point of view of employers brings with it considerable legal uncertainty. The previous situation, in which it was possible to say – with legal certainty – when an undertaking is subject to the provisions of the Employment Protection Act, has been replaced by a constellation that necessitates assessment on the basis of the individual case at issue. Whether an enterprise has more than 10 employees or not will no longer be determined on the basis of a simply headcount (with application of factors of 1.0, 0.75 and 0.5 to take into account the number of hours worked per week), but will in the future entail answering the question as to whether and to what extent temporary personnel are to be counted as regular or irregular employees. In that respect, it will be necessary to wait and see how the courts attempt to resolve the problem inherent in this distinction in the future.

It will in the meantime be necessary to cope with the legal uncertainty resulting from the judgment due to the considerable practical ramifications of the question as to whether an enterprise is subject to the Employment Protection Act or not. The judgment will make it necessary for many smaller enterprises to effect a thorough reassessment of their previous business practices, which were based on the flexibility provided by the legal principles that previously prevailed. Otherwise, smaller enterprises, which are as a rule not financially strong to begin with, will risk incalculable (financial) burdens in the case of a dispute.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author himself: Dr. Christoph Müller +49 221 33660-524 or cmueller@goerg.de. For further information about the author visit our website www.goerg.com.

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