Federal Labour Court: Temporary employment does not count towards waiting period pursuant to § 1(1) of the Employment Protection Act (*Kündigungsschutzgesetz* – KSchG)

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Cologne, 19 January 2015

Headnote

Employment as a temporary agency employee will regularly not count towards the waiting period pursuant to § 1(1) of the Employment Protection Act in the case of a subsequent employment relationship between the employee and the client of the temporary agency.

(Federal Labour Court, judgment of 20 February 2014 – 2 AZR 859/11)

Facts

This decision of the Federal Labour Court concerned the validity of a termination of employment with appropriate notice. The plaintiff had been employed as store manager/head salesperson in a retail outlet of Anton Schlecker, a sole proprietor, from 1 September 1997 up to 31 October 2009. Since this outlet was closed on 31 October 2009, the plaintiff and Anton Schlecker entered into a severance agreement under which it was agreed that the employee would be transferred to Schlecker XL-GmbH and also be able to have her rights to annual leave that had not yet been taken transferred to this company. Schlecker XL-GmbH was, at least up to the time insolvency proceedings were initiated against it, legally intertwined with Anton Schlecker in his capacity as an insolvent sole proprietor. The plaintiff was employed in a branch outlet of Schlecker XL-GmbH on a temporary basis from November 2009 to 31 January 2010 under a temporary agency employment contract with M GmbH. With effect as of 1 February 2010, the plaintiff then entered into an employment contract with Schlecker XL-GmbH. She also continued to work in the same XL market of Schlecker XL-GmbH. However, Schlecker XL-GmbH served notice of termination of the contract with effect as of 31 August 2010 in a letter dated 7 July 2010.

The plaintiff then brought an action for protection against dismissal on the grounds that the dismissal was unfair on social grounds, arguing that the Employment Protection Act was applicable since the required waiting period contained in § 1(1) of the Employment Protection Act had been met on the basis of previous employment. The lower courts dismissed the action.

Decision

The Federal Labour Court could not issue a conclusive decision since the case was not ready for decision and therefore vacated the appellate judgment, remanding it to the Higher Labor Court for reconsideration.

In its decision, the Federal Labour Court ruled that previous periods of temporary employment with a client of a temporary agency do not count for the purposes of calculating the waiting period pursuant to § 1(1) of the Employment Protection Act, reasoning that this construction is first of all supported by the very wording of § 1(1) of the Employment Protection Act. The court argued that this provision of law was based on the existence of a legal employment relationship with the employer as the owner of the business and not on employment by any specific business operation or company. According to the court, this interpretation is also supported by the intent and purpose of the waiting period – which the court saw as an opportunity to enter into a long-term contractual relationship on a trial basis. The purpose of the provision, as the court saw it, can be achieved only if an employer can assess on the basis of his own experience the performance of the employee as well as the employee's conduct insofar as it may also affect the proper fulfillment of the contractual agreement between the parties. The court went on to say that this is not, however, possible in the case of temporary agency

employees since the client of a temporary employment agency acts only partially in the capacity of an employer and cannot therefore determine whether a temporary agency employee fulfills his duty to cooperate with the employer and accessory obligations involved in connection with the payment of wages, the continuation of payment of wages in the case of illness and paid leave.

The Federal Labour Court remanded the appeal on the grounds that it was not yet possible to conclusively assess the non-applicability of general protection against dismissal under § 1 et seq. of the Employment Protection Act, adding that the Higher Labour Court had not yet determined whether periods of employment should be taken into account on the basis of an implied contractual agreement. The court reasoned that if this is not the case, then it would also be necessary to determine whether the defendant's reliance on the waiting period represents an abuse of the law.

Comments

Seen from the perspective of employers, the judgment is very encouraging. It gives employers a sufficient trial period that enables them to assess the performance of employees who have already worked for them as intended by § 1(1) of the Employment Protection Act.

It is nevertheless necessary to keep in mind that the Federal Labour Court did not generally prohibit taking into account temporary agency employment for the purposes of determining the waiting period pursuant to § 1(1) of the Employment Protection Act. In fact, the Federal Labour Court expressly made it clear that it is possible to take such employment into account in the case of an implied agreement. In that regard caution – on the part of employers – is advisable. According to the court, there must be reason to assume the existence of such an implied agreement, and the transfer of an employee to an affiliated undertaking exclusively at the initiative of the employer and further employment of the employee under virtually the same working conditions without a probationary period could indeed constitute good reason to assume the existence of such an agreement.

Note

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