Legal Update Labour and Employment

Federal Labour Court: Distinction between Employment Contracts, Agreements with Independent Contractors and Works Contracts

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Cologne, 19.12.2013

Headnote

A works contract involves an agreement to create or modify a physical object or to achieve specific results through work or the performance of a service (§ 631(2) of the German Civil Code (Bürgerliches Gesetzbuch – BGB). A works contract can hardly be considered to exist in the absence of a contractually defined work that can be attributed to a "contractor" as the product of his efforts and is amenable to formal reception since the "principal" would then first have to define the product of the service to be performed by the "contractor" by providing further instructions and thereby organise the work and the deployment of resources in a binding manner.

Facts

The Federal Labour Court again had to rule on the distinction between an employment relationship, a relationship with an independent contractor and a works contract. The plaintiff had been working for the Bavarian State Office for Historic Preservation (Bayerische Landesamt for Denkmalpflege – BLfD) with brief interruptions since 2005 under 10 contracts that were referred to as works contracts, the most recent of which dated from 1 April 2009 and called for completion of the agreed services on 30 November 2009. Under that contract, the plaintiff was responsible for the preparatory work required to expand and revise the official list of historic monuments in the State of Bavaria. This included but was not limited to registration of ongoing activities (excavations, etc.), assessment of the results of such activities and submission of suggestions for additions to or revision of the list of historic monuments. The plain-

tiff carried out these activities exclusively on the premises of the Bavarian State Office for Historic Preservation irrespective of the locations of the sites covered by the records. The plaintiff was not in possession of a key to the various premises. The plaintiff carried out his work on a regular basis during usual office hours between 07:30 and 17:00 CET at a PC workstation that was made available to him. After the last "works contract" expired as planned, the plaintiff asked the court to rule that no such works contract had existed and that the legal relationship existing between the parties qualified as employment and remained in effect beyond 30 November 2009.

Decision

As had the lower courts, the Federal Labour Court concurred with the opinion of the plaintiff. Despite the fact that the agreement between the parties was designated as a works contract, no such contract existed. Given the actual nature of the agreement, the plaintiff and the defendant were parties to an employment relationship. Since the plaintiff had already commenced work prior to the execution of the most recent written agreement of 1 April 2009, the employment relationship also continued beyond 30 November 2009. The court found that any understanding as regards a limited term would constitute a formal error and therefore be invalid. According to the court, the nature of the legal relationship between the parties must be determined on the basis of an assessment of all relevant circumstances involved in the individual case. In cases in which the name given to a contract differs from the concrete situation, the latter is determinative. If two parties explicitly define work to be performed and its scope, a works contract can be assumed to exist. The court reasoned that a works contract will regularly not be considered to exist in the absence of a definition of the work that can be attributed to the contractor and is amenable to formal reception since the "principal" must in such cases then first organise the work to be performed in a binding manner through further instructions.

In the present case, according to the court, the underlying contractual documents show that the agreement did not call for the work to yield any specific results or outcome. It reasoned that a works contract could cover the creation of a complete inventory of monuments, but only part of the work required for the creation of such an inventory was covered by the contract at issue in the present case, and the contract also specified the means to be employed to carry out the work. After the court rejected application of the provisions of law governing works contracts in the present case, it went on to address the issue as to whether the relationship with the principal was in actual practice that of an employee or an independent contractor. In this connection, the Federal Labour Court relied primarily on the organisational integration of the activity into the operational organisation of the Bavarian State Office for Historic Preservation.

Due to this integration into an organisational structure and the duty to follow instructions, the activity must be considered to have been carried out in the context of an employment relationship and not in the capacity of an independent contractor.

Comments

The deployment of personnel under "works contracts" is a popular construction occasionally resorted to by employers to reduce costs. However, it can be difficult to distinguish between traditional employment relationships and agreements with independent contractors or works contracts or temporary employment in certain

cases. In addition, the legal implications of misclassification of activities are often underestimated by the parties involved. This can result not only in significant back payments of compensation but also entail consequences for violation of regulatory provisions and criminal law, in particular when the services of temporary employees are illegally provided under feigned works contracts (§ 16 of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG); §§ 15, 15a of the Temporary Employment Act, § 266a of the Criminal Code (Strafgesetzbuch – StGB) and § 370 of the Fiscal Code (Abgabenordnung – AO)). The results of damage to the image of a company due to the use of feigned works contracts should also not be taken lightly in such situations, as the Daimler group recently found (Baden-Württemberg Higher Labour Court, judgment of 1 August 2013 - 2 Sa 6/13).

The judgment of the Federal Labour Court clearly enunciates the pitfalls associated with the use of works contracts in the area of employment. The nature of a works contract is such that it requires that the work performed under the contract yield a concrete "result" and not consist exclusively of an "effort". In such cases, the contractor operates its own undertaking within another undertaking and assumes commensurate responsibility.

It is first necessary in such situations to determine whether the activity is of such a nature as to be amenable to achievement of self-contained results. As in the present case, this vital criterion is in practice often not met, and self-contained results that can be attributed to the contractor are found to be lacking. In such cases, other contractual understandings that are basically indicative of the existence of a works contract such as the extension of warranties or, in particular, the exercise of warranty rights will then regularly no longer suffice to buttress the assumption of the existence of a works contract.

The problem complex entailed by feigned works contracts will not become less relevant. The issues involved here not only occupy the labour courts at regular intervals, but also rank very high on the list of political priorities. This is also underscored by the coalition agreement adopted by the Grand Coalition for the 18th legislative period. Prevention of abuse of works contracts (and temporary employment) is even called for in the preamble to the agreement. In concrete terms, measures to increase the frequency and efficiency of controls by regulatory authorities are considered necessary. This is to be achieved not only through organizational and personnel measures, but also by anchoring in law the criteria that are considered significant and have been elaborated in the case law for distinguishing between the legitimate use of external personnel and abusive use. In particular as regards the latter point, it is at the very least doubtful whether this will actually come to pass in view of many legislative initiatives that have been announced but have never materialised in the past.

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 on +49 221 33660-524 or cmueller@goerg.de. For further information about the author visit our website www.goerg.com.

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