2023/34

Long-term labour intermediation is outside the scope of the Temporary Agency Work Directive (GE)

CONTRIBUTOR Emiliano Maran*

Introduction

In Case C-427/21 of 22 June 2023, *ALB FILS KLINIKEN*, the European Court of Justice (the 'CJEU') focused on the interpretation of Article 1(1) and (2) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (the 'TAW Directive'), in order to better clarify the scope of the Directive itself in relation to forms of long-term labour intermediation.

The case found its origin in Germany, where Section 613a(6) of the *Bürgerliches Gesetzbuch* (German Civil Code, the 'BGB') grants employees the right to object to the transfer of their employment relationship in the event of a transfer of undertakings.

In 2018, the company ALB FILS Kliniken GmbH ('ALB FILS') transferred several departments to its wholly-owned subsidiary, Company A. As a consequence, LD, who had been employed by ALB FILS since 2000, saw his employment relationship transferred to the latter: in order to prevent this, he exercised his right to object to the transfer of the employment relationship, which was thus maintained with ALB FILS. However, in accordance with paragraph 4(3) of the *Tarifvertrag für den öffentlichen Dienst im Bereich der Vereinigung der kommunalen Arbeitgeberverbände* (collective agreement for the public service Federation of Local Authority Employer Associations sector of 13 September 2015, the 'TVöD'), LD was still required to work for Company A, which retained the prerogative to impart technical and organizational instructions. This situation resulted in the permanent assignment of LD to Company A. Believing this to be against the TAW Directive, LD initiated legal proceedings against ALB FILS: after the initial action was dismissed at both first and second instance, LD appealed to the *Bundesarbeitsgericht* (Federal Labour Court), which in turn referred to the CJEU for a preliminary ruling.

In its decision, the CJEU held that the TAW Directive does not apply to an employee who has used their right of refusal to transfer to another group entity and is consequently permanently assigned from the transferor to the transferee. On the contrary, Article 1(1) of the TAW Directive, read in conjunction with Article 3(1)(b) to (e) thereof, must be interpreted as meaning that the Directive does not apply to a situation in which a worker is permanently transferred by their employer to perform their duties subject to the technical and organizational direction of a third party undertaking, while the employment relationship with that employer is maintained on account of the fact that that worker has exercised their right to object to the transfer of that employment relationship to that third party undertaking. In fact, in order to fall within the scope of the TAW Directive, both where the contract of employment concerned is concluded and when each of the assignments is effectively made, an employer must have the intention to assign the worker concerned, temporarily, to a user undertaking.

Analysis

The case at hand presented the CJEU with two main questions: do relationships of long-term labour intermediation fall within the scope of the TAW Directive? Would their exclusion from its national transposition be compatible with its protective purpose?

In considering these issues, the Court was once again concerned with the scope of the TAW Directive and with the notion of 'temporariness' of agency work assignments.

The CJEU had already ruled on the scope of the TAW Directive in *Ruhrlandklinik*,[1] where it had clarified the meaning of 'economic activities' (Article 1(2)), and in particular of the concept of 'worker' (Article 3(1)(a)). With regards to the latter, it had pointed out that the Directive not only applies to those who have concluded a contract of employment with a temporary work agency, but also to those who have an 'employment relation-

* Emiliano Maran is a Labour Relations Specialist at FedEx Express, Hoofddorp (Netherlands).

1. CJEU Case C-216/15, 17 November 2016, *Ruhrlandklinik*.

doi: 10.5553/EELC/187791072023008004006

ship' with such an undertaking: as a consequence, an exclusion from the protection granted by the TAW Directive on the sole ground that the status of 'worker' under national law is lacking would not be justified.

This notwithstanding, the TAW Directive does not cover the totality of relationships where the performance of work by the worker is subject to the supervision and direction of a third party undertaking. Rather, the ruling in *ALB FILS* entails that, in order to fall within the scope of the TAW Directive, both where the contract of employment concerned is concluded and when each of the assignments is effectively made, an employer must have the intention to assign the worker concerned, *temporarily*, to a user undertaking. This conclusion was reached through the literal interpretation of Article 1(1) of the TAW Directive, read in conjunction with the definitions of 'temporary-work agency', 'temporary agency worker', 'user undertaking' and 'assignment' contained in its Article 3(1). Such a restrictive interpretation, the Court noted, is justified by both the context of Article 1(1), and the objectives pursued by the Directive.

As a result of this, the ruling introduced what appears to be a test on the applicability of the TAW Directive, which only applies to the relationships that are characterized by two existing elements: the '*temporariness*' *of the assignment* plus the *intention to assign the worker*.

As for the first element, the Court referred to the existing case law on the notion of 'temporariness',[2] pointing out that the TAW Directive exclusively refers to employment relationships which are temporary rather than permanent, and that such a notion relates to the duration of the assignment, not to the nature of the job itself. In this regard, *ALB FILS* seems to confirm what could already be argued from the *KG* and *Daimler* rulings: situations of long-term labour intermediation where agency workers are exclusively assigned to a user undertaking are excluded from the scope of the TAW Directive, which only applies to agency workers who are assigned temporarily.

Furthermore, the CJEU noted that the objectives of the TAW Directive are irrelevant where the employment relationship of the worker whose duties have been transferred remains permanent, implying that permanent agency workers are better protected than those temporarily assigned, and would thus not need the minimum protection offered by this piece of European legislation.

As for the second element, the Court also noted how, in order for the TAW Directive to be applicable, the employer must have the intention, when the contract of employment concerned was concluded, to assign that worker to a user undertaking. In the case at hand, the subjective element was however excluded, as the employment relationship was solely maintained because LD had exercised his right to object to the transfer of his working relationship to the third party undertaking. This further excludes any risk of abuse or circumvention of the Directive, as the worker objected to the transfer of employment relationship, retaining all of the working conditions applicable prior to the transfer. On the contrary, the permanent transfer of the duties performed by a worker follows the *ratio* of ensuring their protection and security, by avoiding the risk of loss of employment: the objectives of the Directive were thus deemed to be irrelevant in this instance.

The element of intention is particularly related to the specific scenario at hand, as the right to object and consequent involuntary situation of 'supply of staff' are specifically allowed by the German legislation: this possibility was already upheld by the CJEU in *Katsikas*[3] on fundamental rights grounds, and it is up to the Member States to decide on the consequences for the employment contract of exercising that right. However, the legislation of the other European Member States appear to be usually diffident towards long-term labour intermediation, the recourse to which is generally limited: therefore, situations of long-term assignments falling outside the scope of the TAW Directive might very well entail a situation of unlawful hiring out of workers at a national level.[4]

Finally, as the situations of long-term labour intermediation are excluded from the scope of the TAW Directive, the question of whether the compatibility of their regulation with its protective scope was not considered by the Court: it therefore only seems logical that national legislation may regulate situations of supply of staff in a different way from temporary agency work.

Conclusions

The ruling in *ALB FILS* was specifically related to the particular conditions of German legislation. This because, as a result of the exercise of the right to object to a transfer of their employment relationship, situations of 'supply of staff' may be established.

It can be argued, however, that this ruling nonetheless entails implications for situations of long-term labour intermediation: in fact, the Court seems to outright exclude from the scope of application of the Directive all instances of 'outsourcing of labour' or 'supply of staff', i.e., where an intermediary (staffing agencies, recruitment agencies, payroll or multiservice companies) assigns a worker to a user undertaking on a long-term basis, with a permanent dispersion of the employer's prerogatives between the agency and the company for which services are provided.

In *Ruhrlandklinik* the Court had followed its previous expansive approach concerning the notion of 'worker', by including within the scope of the Directive persons whose working relationship is not substantially different to the employment relationship between employees having the status of workers under national law and their employer. Now, the Court unsurprisingly reiterated

2. CJEU Case C-681/18, 14 October 2020, *JH – v – KG*; CJEU Case C-232/20, 17 March 2022, *Daimler*.

3. CJEU Joined Cases C-132/91, C-138/91 and C-139/91, 16 December 1992, *Katsikas*.

4. [Please add text!!]

doi: 10.5553/EELC/187791072023008004006

how the concept of 'temporariness' is an intrinsic part of its definitions and fundamental in the demarcation of its scope: a literal interpretation of this notion entails that the Directive only applies to assignments to the user undertaking that, by their very nature, are temporary. This line of reasoning seems to be compatible with Article 5(5) of the TAW Directive, and with the approach adopted by the Court in *KG*, where the reference is made to measures preventing *successive* assignments to the user undertaking: long-term labour intermediation does not entail consecutive assignments, but a long-lasting, single assignment, which does not generate the same necessity for protection as 'regular' temporary agency work.

In practice, the ruling confirms that situations of long-term labour intermediation fall outside the scope of the Directive, as the preconditions for temporary agency work will typically not be met in these relationships. By excluding labour outsourcing from the scope of the Directive, the Court admits that this can very well be regulated autonomously by the Member States. This is, for example, already the case in the Netherlands, where companies may engage employees with the objective of permanently assigning them to a single user undertaking under the 'payrolling' regime, to which the legislation for temporary agency work is not applicable in favour of additional protections for payrolled employees.[5]

5. Nuna Zekić, 'Possible avenues for a more effective Temporary Agency Work Directive' (2023), *European Labour Law Journal* (forthcoming).

doi: 10.5553/EELC/187791072023008004006