

Legal consequence of concealed temporary personnel leasing

A sham contract for work between lender and hirer does not necessarily lead to an invalid temporary personnel leasing.

On July 12, 2016 the Federal Labour Court decided (9 AZR 352/15) that in the presence of a temporary personnel leasing license of the lender no employment relationship between the leased employee and the borrower arises even in the case of a sham contract for work between lender and borrower.

Facts of the case

The plaintiff is a technical draftsman; the defendant is an automobile company, the plaintiff worked for from 2004 until the end of 2013.

The plaintiff was not employed by the defendant, but by a contractual partner of the defendant. The plaintiff worked for the defendant's company on the basis of agreements entered into between the contractual employer and the defendant and referred to as contracts for work. The contractual employer as lender of the plaintiff owned a temporary personnel leasing license. The plaintiff is of the opinion that these agreements are to be regarded as sham agreements entered into in order to conceal the temporary personnel leasing. According to the plaintiff, the defendant could therefore not rely on the temporary personnel leasing license granted to the plaintiff's contractual employer.

The BAG agreed with the decision of the courts of lower instance that no employment relationship between the plaintiff and the defendant existed and therefore dismissed the complaint.

Judgement of the BAG

The BAG stated in its decision, which, so far is only available as a press release, that – even if the plaintiff had been entrusted as temporary employee to the borrower on the basis of a sham contract for work – no working relationship would have been established between plaintiff and defendant. Decisive was that the plaintiff's contractual employer, the lender, possessed a temporary personnel leasing license. The fiction of para. 10 sec. 1 sentence 1 employee lending law (AÜG) in conjunction with para. 9 no. 1 AÜG, according to which in the case of the invalidity of the employee leasing agreement an employment relationship comes into being, applies only in cases where the temporary personnel leasing license of the lender is missing. However, for a respective application of this provision with respect to concealed temporary personnel leasing, an unintended regulatory gap would be required. According to the BAG, the legislator had deliberately not arranged the legal consequence of an employment relationship with the borrower for such concealed temporary personnel leasing. Thus, no unintentional regulatory gap existed.

Practical advice

According to the decision described herein, an existing personnel leasing license, possibly only gathered as precautionary measure, protects against the fiction of an employment relationship between the de facto leased person posted to work and the hiring company even if an agreement referred to as contract for work is considered to be a sham contract for work. However, the decision described herein refers to the currently valid version of the AÜG. Pursuant to para. 1 AÜG-E of the new draft law agreed upon by the cabinet on June 1, 2016, in future the temporary lease of personnel will have to be mentioned explicitly as temporary personnel leasing in the contract between borrower and lender (sentence 5) and the concrete person who will be leased will have to be made concrete before its dedication (sentence 6). Consequently, para. 9 sec. 1 no. 1a AÜG-E will be amended such that the contract is invalid in case the explicit reference on temporary leased personnel or the concretization of the person who will be leased is missing, and therefore the fiction of para. 10 sec. 1 sentence 1 AÜG in conjunction with para. 9 AÜG applies. However, the temporary leased person shall be provided with the opportunity to object. If the temporary leased person exercises this right, the employment relationship will not come into being. As the new regulation shall come into force on January 1, 2017, the above described should be

taken into consideration when relying on the BAG decision in future.

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