Case C-427/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

14 July 2021

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

16 June 2021

Applicant:

LD

Defendant:

ALB FILS KLINIKEN GmbH

Subject matter of the main proceedings

The parties are in dispute as to the applicant's obligation to carry out his contractually agreed work for a third party on a permanent basis, after his area of responsibility was assigned to that third party.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Do Articles 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 apply if – as specified in Paragraph 4(3) of the Tarifvertrag für den Öffentlichen Dienst (collective agreement for the public service, 'the TVöD') – an employee's duties are assigned to a third party and this employee must, at the request of his or her current employer while the

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existing employment relationship with the latter continues, perform his or her contractually agreed work for said third party on a permanent basis and accept technical and organisational instructions from the third party?

2. If Question 1 is answered in the affirmative:

Is it consistent with the protective purpose of Directive 2008/104/EC to exclude 'supply of staff' within the meaning of Paragraph 4(3) of the TVöD from the scope of the national protective provisions for personnel leasing, as point 2b of Paragraph 1(3) of the Gesetz zur Regelung der Arbeitnehmerüberlassung (Law on personnel leasing, 'the AÜG') does, meaning that these protective provisions are not applicable to cases involving supply of staff?

Provisions of EU law relied on

Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, in particular Article 1(1) and (2), Article 2 and Article 3(1)(a) to (e).

Provisions of national law relied on

Tarifvertrag für den Öffentlichen Dienst (collective agreement for the public service, 'the TVöD') applicable to the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Municipal Employers' Associations, 'the VKA') – General Section – of 13 September 2005, in particular Paragraph 4(3) and the explanatory notes to this provision.

The first sentence of Paragraph 4(3) of the TVöD reads:

'Where the duties of employees are assigned to a third party, the contractually agreed work shall be performed for the third party at the employer's request while the existing employment relationship continues (supply of staff)'.

The explanatory notes to that provision read as follows:

'Supply of staff shall – while the existing employment relationship continues – involve permanent employment with a third party. […]'

Gesetz zur Regelung der Arbeitnehmerüberlassung (Law on personnel leasing, 'the AÜG') of 7 August 1972 in the version published on 3 February 1995 (BGBI, p. 158), last amended by the Law of 13 March 2020 (BGBI, p. 493), in particular point 2b of Paragraph 1(3), which provides:

'This law shall not apply to personnel leasing

[…]

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2b. between employers where an employee's duties are transferred from their current employer to another employer and, on the basis of a collective agreement for the public service,

a) the employment relationship with the current employer continues; and

b) the work is now to be performed for the other employer,

[…]'

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant has been employed by the defendant since April 2000. The defendant, a company organised under private law, runs a hospital. Its legally responsible body and sole shareholder is Landkreis G, a legal person governed by public law. The defendant does not possess the authorisation required under national law for personnel leasing. The employment relationship between the parties is governed by the collective agreement for the public service, in the version applicable to municipal employers ('the TVöD').

2 In June 2018, the defendant outsourced several divisions, including that in which the applicant works, to the newly founded company A Service GmbH. This company is a wholly owned subsidiary of the defendant. The applicant availed himself of the possibility granted under national law to oppose the transfer of his employment relationship to A Service GmbH.

3 As a result of his opposition, the employment relationship agreed between the applicant and the defendant is still in place, with the same content as before. However, since June 2018, the applicant has carried out his contractually agreed work for A Service GmbH, which has provided him with technical and organisational instructions. The legal basis for this is supply of staff within the meaning of Paragraph 4(3) of the TVöD. The applicant's assignment to A Service GmbH is permanent.

4 The applicant is seeking a judgment finding that he is not obliged to provide his contractually agreed work to A Service GmbH under a supply of staff arrangement within the meaning of Paragraph 4(3) of the TVöD. He claims that his assignment to A Service GmbH infringed EU law and that that supply of staff within the meaning of Paragraph 4(3) of the TVöD involved a permanent – and thus unlawful under Directive 2008/104 – leasing of personnel.

5 The previous instances dismissed the action. The referring court is called on to rule on the appeal on a point of law.

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Succinct presentation of the reasoning in the request for a preliminary ruling

6 Supply of staff is permitted under national law. Point 2b of Paragraph 1(3) of the AÜG excludes it from the scope of the Law on personnel leasing, which transposes Directive 2008/104. The outcome of the dispute therefore depends essentially on whether supply of staff within the meaning of Paragraph 4(3) of the TVöD does indeed constitute personnel leasing for the purposes of Directive 2008/104 and, if the Court of Justice should answer this question in the affirmative, whether excluding supply of staff from the scope of the Law on personnel leasing through point 2b of Paragraph 1(3) of the AÜG is compatible with Article 1(1) and (2) and Article 2 of the directive.

The first question

7 Regarding the question whether Directive 2008/104 applies in the present case, the referring court first notes that, according to the requirements of Directive 2008/104, supply of staff within the meaning of Paragraph 4(3) of the TVöD could by definition constitute personnel leasing. However, it is also conceivable that supply of staff, on account of its particularities and the objective it pursues, namely guaranteeing that an employee whose duties have been permanently assigned to a third party can retain his or her existing employment relationship, including his or her current contractual arrangements and collective labour agreements, differs so markedly from the model of temporary agency work on which Directive 2008/104 is based that it does not fall within the scope of that directive.

8 Supply of staff under Paragraph 4(3) of the TVöD gives the employee the opportunity to maintain his or her employment relationship with his or her contractual employer, with the content of the contract and the conditions of employment remaining unchanged. Supply of staff within the meaning of Paragraph 4(3) of the TVöD thus applies exclusively to employees in permanent employment relationships whose duties are transferred to a third party, and seeks to ensure the permanent continuation of his or her employment relationship and to safeguard his or her conditions of employment.

9 In the view of the referring court, the applicability of Directive 2008/104 to supply of staff within the meaning of Paragraph 4(3) of the TVöD is also countered by the fact that the employees involved in the supply of staff arrangement were originally hired to carry out duties for the employer itself and, as the applicant's case shows, may have done this work for years. The employment relationship was thus definitely not entered into, as provided for by Article 3(1)(c) of Directive 2008/104, for the purpose of assigning the employee to a user undertaking.

10 The fact that supply of staff within the meaning of Paragraph 4(3) of the TVöD is permanent by its very nature also suggests that it does not come within the scope of Directive 2008/104. It is intended to guarantee protection and security for employees whose duties are permanently abolished by their contractual employer,

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thus avoiding the risk of loss of employment or a change of employer and any potential resulting disadvantages. According to the case-law of the Court of Justice, the assignment of an employee to a user undertaking within the meaning of Directive 2008/104 is temporary by its very nature, and the Member States are obliged to ensure that temporary agency work at the same user undertaking does not become a permanent situation for a temporary agency worker (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823). The nature of a supply of staff arrangement could prevent the risk of employers circumventing the directive with successive assignments and, thus, the risk of abuse. In that regard, unlike temporary agency work within the meaning of Directive 2008/104, it cannot be necessary to limit the duration of a supply of staff arrangement in order to prevent abuse by employers to the detriment of the assigned employee. Rather, it would invalidate the protection that a supply of staff arrangement is intended to provide.

11 Lastly, it is not clear whether supply of staff within the meaning of Paragraph 4(3) of the TVöD can be classified as an ‘economic activity’ of the contractual employer as required by Article 1(2) of Directive 2008/104. According to the case-law of the Court of Justice, ‘economic activities’ within the meaning of Article 1(2) of Directive 2008/104 are any activity consisting in offering goods or services on a given market (judgments of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 44, of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 149, and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 22). According to the wording of Article 1(2) of Directive 2008/104, the fact that an assigning undertaking does not operate for gain does not preclude economic activity, which could indicate that Directive 2008/104 also extends to cover supply of staff. Furthermore, financial compensation covering at least personnel costs and administration costs is regularly paid by the third party as part of a supply of staff arrangement (on this characteristic, judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 45). However, it is not clear that supply of staff constitutes an activity of the contractual employer consisting in offering goods or services on a given market.

The second question

12 If the Court answers the first question referred for a preliminary ruling in the affirmative and supply of staff within the meaning of Paragraph 4(3) of the TVöD comes, in principle, within the scope of Directive 2008/104, in the view of the referring court, it needs to be clarified whether the exclusion of supply of staff from the scope of the Law on personnel leasing through point 2b of Paragraph 1(3) of the AÜG, in light of the objective it pursues of protecting jobs and employment, is compatible with the protective purpose of the directive.

13 The referring court notes in this regard, first, that in the view of the national legislature, excluding supply of staff within the meaning of Paragraph 4(3) of the TVöD from the scope of the AÜG is intended to take account of the fact that

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supply of staff is to be regarded as a particular form of assignment of duties and is in the interests of the employee whose duties have been assigned. The national legislature took the view that employees involved in a supply of staff arrangement do not require the protection granted by the AÜG, because their existing conditions of employment continue to apply and the typical risks of personnel leasing, in particular a high degree of job insecurity and constantly being assigned to different sites, are not present. Rather, the assigned employee remains with his or her current employer.

14 Secondly, in the opinion of the referring court, it is not clear whether point 2b of Paragraph 1(3) of the AÜG prevents the protective purpose of Directive 2008/104 from being achieved. According to recital 12 of Directive 2008/104, a protective framework should be established for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. By virtue of that protective purpose, it could be compatible with the requirements of Directive 2008/104 to exclude employees who are assigned to a third party under Paragraph 4(3) of the TVöD from the protective provisions of the AÜG, because this form of personnel assignment already protects and safeguards employment relationships and their work conditions and the strict conditions for the application of that provision preclude the risk of abuse to the detriment of employees. On the contrary, the legal consequences set out in the Law on personnel leasing to protect temporary agency workers (such as establishing an employment relationship with the leasing party) could conflict with the interests of employees assigned as part of a supply of staff arrangement. The latter need protection when their duties are assigned to a third party not as a result of a precarious employment relationship, but because their employment relationship with their contractual employer is at risk. That is why a supply of staff arrangement ensures that the employment relationship continues under the existing terms of the collective agreement and that the employee continues to work in a familiar area.

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