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Collective dismissal – an endless story

Are temporary workers included in the threshold as per § 17 para. 1 of the German Protection Against Dismissal Act (Kündigungsschutzgesetz; KSchG)? (German Federal Labour Court, order for reference dated 16.11.2017 – 2 AZR 90/17 (A))

The theatre stage, which has been on the agenda for years under the title of legally effective collective dismissal in many labour courts, is now being entered by a new extra: the temporary worker. This concerns the following:

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The defendant ran vocational colleges. The plaintiff was initially employed by the defendant until she was dismissed on 24.11.2014. In the time between 24.11.2014 and 24.12.2014, the defendant declared eleven further dismissals. Collective dismissal was not filed. However, in the context of a wrongful termination suit, the plaintiff asserted that there had been a collective dismissal subject to reporting requirements as per § 17 para. 1 sent. 1 no. 2 of the German Protection Against Dismissal Act (Kündigungsschutzgesetz; KSchG). Four temporary agency workers employed at that time could not be taken into account when calculating the number of regular employees. As a result, the defendant regularly employed fewer than 120 employees in the school year in question. By declaring the twelve dismissals within one month, the defendant dismissed at least 10% of the employees normally employed in the company.

The Essen Labour Court initially ruled in favour of the defendant and included temporary workers for the calculation of the number of employees. The Higher Labour Court of Düsseldorf, on the contrary, assumed that temporary workers were not to be taken into account in the regular number of employees. The Higher Labour Court only briefly mentioned the EU directive 98/59/EC on collective redundancies. In this respect, the court merely stated that the purpose of the directive was, inter alia, to protect the

individual rights of workers. However, since the collective dismissal would not necessarily terminate the employment contract of the temporary agency workers with the hirer, the protective purpose of the individual rights does not apply in this case. The directive also does not preclude non-compliance with temporary agency workers on the grounds of protection under works constitution law.

The Federal Labour Court then decided to refer the matter to the European Court of Justice (ECJ) following article 267 of the Treaty of the Functioning of the European Union (TFEU). The first question to be asked was whether the regular number of employees should be determined based on the date of dismissal. It was also enquired whether temporary agency workers were to be included in the calculation of the number of regular employees as well as any conditions under which temporary agency workers should be taken into account in this respect.

Recommendations for practice:

Despite numerous rulings of the Federal Labour Court, collective dismissal notifications and consultation procedures as per § 17 KSchG are still very uncertain and risky for companies. Errors can in fact quickly lead to the voidness of all the termination notices that were given (§ 134 German Civil Code; Bürgerliches Gesetzbuch; BGB). The Federal Labour Court's order for reference does not make this any better.
It has not yet been clarified whether temporary workers should be taken into account when determining the thresholds. However, this is crucial for the question of whether or not companies have to file a collective dismissal notification in restructuring situations. The Federal Labour Court has recently decided that temporary workers are to be included in the determination of the size of the company as per § 23 para. 1 sent. 3 of the KSchG (Federal Labour Court, ruling dated 24.01.2013 – 2 AZR 140/12). This was justified by the consideration that in calculating the threshold value in accordance with § 23 para. 1 sent. 3 of the KSchG, all employees employed by the owner of the company, bound by instructions, and who have been integrated into the company are to be counted, insofar as they cover a regular employment requirement. Whether this case law is to be applied to § 17 KSchG seems questionable – especially against the European background.

The ECJ has also not yet answered the question. However, ECJ has already stated that, for example, employees with a contract concluded for a certain period of time or activity are those who, within the meaning of this provision, are "normally" employed in the company concerned. In addition, the nature of the employment relationship is irrelevant for the calculation of the number of employees of a company. The terms defining the scope of the directive 98/59/EC should also not be interpreted strictly. The European Union legislator did not want to impose an excessive burden on employers with relation to the size of their operations. The inclusion of temporary agency workers in the calculation of the regular number of employees is therefore relatively obvious under European law. Nevertheless, the legal situation remains completely open until a decision is reached by the ECJ.

In case of doubt, well-advised companies will therefore file a collective dismissal notification, because a superfluous notification can never endanger the dismissals.

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