Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

17 March 2015*

(Reference for a preliminary ruling — Social policy — Directive 2008/104/EC — Temporary agency work — Article 4(1) — Prohibitions or restrictions on the use of temporary agency work — Justification — Grounds of general interest — Obligation to review — Scope)

In Case C-533/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the työtuomioistuin (Finland), made by decision of 4 October 2013, received at the Court on 9 October 2013, in the proceedings

Auto- ja Kuljetusalan Työntekijäliitto AKT ry

v

Öljytuote ry,

Shell Aviation Finland Oy,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Ó Caoimh (Rapporteur), C. Vajda and S. Rodin, Presidents of Chambers, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, C.G. Fernlund, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2014,

after considering the observations submitted on behalf of:

— Auto- ja Kuljetusalan Työntekijäliitto AKT ry, by A. Viljander and J. Hellsten, asianajajat,

— Öljytuote ry and Shell Aviation Finland Oy, by A. Kriikkula and M. Kärkkäinen, asianajajat,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

* Language of the case: Finnish.

— the Hungarian Government, by K. Szíjjártó and M. Fehér, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Swedish Government, by A. Falk and C. Hagerman, acting as Agents,

— the Norwegian Government, by I. Thue and D. Tønseth, acting as Agents,

— the European Commission, by J. Enegren and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

2 The request has been made in proceedings between Auto- ja Kuljetusalan Työntekijäliitto AKT ry ('AKT'), a trade union, and Öljytuote ry, an employers' association, and Shell Aviation Finland Oy ('SAF'), an undertaking which is a member of the employers' association, concerning temporary agency workers employed by SAF.

Legal context

EU law

3 Article 4 of Directive 2008/104, entitled 'Review of restrictions or prohibitions', which forms part of Chapter I, entitled 'General Provisions', states:

'1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.

3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.

4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011.'

4 In accordance with Article 11(1) of Directive 2008/104, the Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive by 5 December 2011, or to ensure that the social partners introduce the necessary provisions by way of an agreement.

Finnish law

5 Directive 2008/104 was transposed into national law through the adoption of a law amending the Law on contracts of employment (Työsopimuslaki (55/2001)) and the Law on posted workers (Lähetyistä työntekijöistä annettu laki (1146/1999)).

6 According to the documents before the Court, there is no provision under Finnish law governing prohibitions or restrictions in relation to temporary agency work such as those referred to in Article 4(1) of Directive 2008/104. The explanatory notes laid down before the parliament of the government's draft law amending the laws referred to above provide, in that regard, that 'Directive 2008/104 states that the Member States are to review any restrictions or prohibitions on the use of temporary agency work. This is a periodic administrative review requiring the Member States to re-examine all of the restrictions and prohibitions on temporary agency work and report the findings to the Commission by the deadline for the transposition of that directive. … The obligation to review laid down in Article 4 of that directive does not require the Member States to amend legislation, even if it is not possible to justify every prohibition or restriction of temporary agency work on the grounds set out in Article 4(1) of the directive.'

7 Having carried out the review required by that provision, the Finnish Government informed the Commission of its findings on 29 November 2011.

8 The general collective agreement concluded on 4 June 1997 between Teollisuuden ja Työnantajain Keskusliitto (Central federation for industry and economic activity; 'TT'), now the Elinkeinoelämän keskusliitto (Central federation for economic activity; 'EK') and the Suomen Ammattiliittojen Keskusjärjestö (Central organisation for Finnish trade unions; 'SAK') sets out, in particular, the conditions for the use of external workers.

9 Point 8(3) of that agreement states:

'Undertakings shall restrict the use of temporary agency workers to dealing with peaks of work or to the performance of other tasks of limited duration or of a specific nature which, for reasons of urgency or because of their limited duration or skill requirements or the use of special tools or other similar reasons, they cannot have performed by their own staff.

The use of temporary workers is an unfair practice if the temporary agency workers employed by undertakings using external workers carry out the undertaking's usual work alongside the undertaking's permanent workers under the same management and for a long period of time.

…'

10 Paragraph 29(1) of the collective agreement for the tanker and oil products sector ('the applicable collective agreement'), to which Öljytuote ry and AKT are signatories, contains a provision whose wording is comparable to that of Point 8(3) of the general collective agreement.

11 In accordance with Article 7 of the Law on collective agreements (työehtosopimuslaki (436/1946)), a financial penalty of up to EUR 29 500 may be imposed on an undertaking which uses temporary agency workers in breach of a collective agreement.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 SAG is an undertaking which supplies fuel to several airports in Finland. Its employees fuel aircraft and conduct quality controls and other auxiliary tasks in relation to the aircraft in those airports.

13 In accordance with a contract concluded in 2010 with the temporary-work agency Ametro Oy, SAF was required to use temporary agency workers provided by Ametro Oy to replace permanent workers on sick leave or to deal with peaks of work. Before 2010, SAF used the services of another temporary-work agency for the same purposes.

14 AKT brought an action before the Työtuomioistuin (Employment Tribunal) seeking that Öljytuote ry and SAF be ordered to pay a financial penalty in accordance with Article 7 of the Law on collective agreements for having contravened Paragraph 29(1) of the applicable collective agreement. AKT submits that, since 2008, SAF has employed temporary agency workers permanently and continuously to perform the exact same tasks as performed by its own workers, which is an improper use of temporary agency workers for the purposes of that provision. Those temporary agency workers are used to perform the undertaking's normal activities alongside, and under the same management as, its permanent employees despite the fact that they do not have any specific technical expertise. It further submits that those temporary agency workers represent a significant number of the undertaking's workforce in terms of years of work per worker.

15 The defendants in the main proceedings contend that the use of temporary agency workers is justified by legitimate reasons, since they are used essentially to replace workers during periods of annual leave and sick leave. They further contend that Paragraph 29(1) of the applicable collective agreement is not in conformity with Article 4(1) of Directive 2008/104. Paragraph 29(1) concerns neither the protection of temporary agency workers, nor requirements of their health and safety. Neither does it ensure that the labour market functions properly, nor that abuses are prevented. In any event, Paragraph 29(1) of the applicable collective agreement contains prohibitions and restrictions of agency work which prevent employers from choosing the forms of employment best suited to their business and limit the opportunities of temporary-work agencies to offer their services to undertakings. Even if the directive does not expressly so provide, the national courts should disapply prohibitions and restrictions of temporary agency work which are at odds with the aims of the directive.

16 Before ruling on the dispute before it, the työtuomioistuin seeks clarification from the Court of the scope of the obligation set out in Article 4(1) of Directive 2008/104.

17 The national court considers that it cannot, admittedly, be excluded that that provision, when read in conjunction with the obligation to review laid down in the other paragraphs of the article, does nothing more than impose a mere procedural obligation to conduct a one-time review. However, it would appear from the wording of Article 4(1) that it precludes restrictions or prohibitions of temporary agency work unless they are justified on the grounds of general interest referred to in that provision. As an autonomous provision, Article 4(1) of Directive 2008/104 would therefore require the Member States to ensure that their legal systems do not contain such prohibitions or restrictions.

18 According to the national court, if Article 4(1) of Directive 2008/104 were not to have that meaning, it might not be possible to achieve the objective laid down in Article 2 of the directive, namely recognising temporary-work agencies as employers whilst taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working. Furthermore, in accordance with recital 22 in its preamble, Directive 2008/104 should be read in conjunction with Articles 49 TFEU and 56 TFEU on the freedom of establishment and the freedom to provide services. However, the restrictions laid down in Paragraph 29(1) of the applicable collective agreement, which concern the supply of temporary agency workers both by an undertaking established in Finland and an undertaking established in another Member State, appear to run counter to those provisions.

19 If the latter interpretation were adopted, it would be necessary to ascertain whether that rule of national law is contrary to Article 4(1) of Directive 2008/104 and, if so, to determine the extent to which, in the absence of any national measure transposing Article 4(1) of the directive, a private party could invoke the incompatibility of that rule of national law with that provision as against another private party.

20 In those circumstances, the työtuomioistuin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 4(1) of Directive 2008/104 be interpreted as laying down a permanent obligation on national authorities, including the courts, to ensure by the means available to them that national legislation or terms in collective agreements contrary to the directive are respectively not in force or are not applied?

(2) Must Article 4(1) of Directive 2008/104 be interpreted as precluding a national legal framework under which the use of temporary agency workers is permitted only in certain special cases in order to manage times of excessive workload or undertake those tasks which cannot be performed by its own workers? Can the use of temporary agency workers for a lengthy period to perform an undertaking’s normal work alongside the undertaking’s own employees amount to an improper use of temporary agency workers?

(3) If the national legal framework is found to be contrary to Directive 2008/104, what means does a court have at its disposition for achieving the objectives of the directive in the case of a collective agreement to be observed by private parties?’

Consideration of the questions referred

21 By its first question, the national court asks, in essence, whether Article 4(1) of Directive 2008/104 must be interpreted as laying down an obligation on the authorities of the Member States, including the national courts, not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

22 According to the defendants in the main proceedings and the Hungarian Government, the wording of Article 4(1) of Directive 2008/104, in particular the expression ‘shall be justified only’, precludes prohibitions or restrictions on the use of temporary agency work unless they are justified on grounds of general interest. The provision therefore clearly confers on temporary agency workers, temporary work agencies themselves and undertakings using their services rights which may be relied on directly before national authorities and courts.

23 Admittedly, it is apparent from the wording of that provision that national legislation containing prohibitions or restrictions on the use of temporary agency work must be justified on grounds of general interest relating, in particular, to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

24 However, in order to ascertain the exact meaning of Article 4(1) of Directive 2008/104, that article needs to be read as a whole, taking into account its context.

25 In that regard, the Court points out that Article 4, entitled ‘Review of restrictions or prohibitions’, forms part of the chapter on the general provisions of Directive 2008/104.

26 Thus, firstly, Article 4(2) and (3) of the directive provides that Member States shall, after consulting the social partners, or, if the prohibitions or restrictions on the use of temporary agency workers are laid down by collective agreements, the social partners which negotiated them, review any prohibitions or restrictions on the use of temporary agency work by 5 December 2011 'in order to verify whether they are justified on the grounds mentioned in Article 4(1)'.

27 Secondly, pursuant to Article 4(5), the Member States were required to inform the Commission of the results of the review by the same date.

28 It follows that, by imposing upon the competent authorities of the Member States the obligation to review their national legal framework, in order to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified on grounds of general interest, and the obligation to inform the Commission of the results of that review, Article 4(1), read in conjunction with the other paragraphs of that article, is addressed solely to the competent authorities of the Member States. Such obligations cannot be performed by the national courts.

29 Depending upon the result of that review, which had to be completed by the same date as that laid down in Article 11(1) of Directive 2008/104 for the transposition of the directive, the Member States, which are required to comply in full with their obligations under Article 4(1) of that directive, could have been obliged to amend their national legislation on temporary agency work.

30 However, the fact remains that the Member States are, to that end, free either to remove any prohibitions and restrictions which could not be justified under that provision or, where applicable, to adapt them in order to render them compliant, where appropriate, with that provision.

31 It follows that, when considered in its context, Article 4(1) of Directive 2008/104 must be understood as restricting the scope of the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers and not as requiring any specific legislation to be adopted in that regard.

32 Consequently, the answer to the first question is that Article 4(1) of Directive 2008/104 must be interpreted as meaning that:

— the provision is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified, and, therefore,

— the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

33 In those circumstances, there is no need to answer the second and third questions referred.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 4(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as meaning that:

— **the provision is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified, and, therefore,**

— **the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).**

[Signatures]