Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 November 2016*

(Reference for a preliminary ruling — Directive 2008/104/EC — Temporary agency work — Scope — Concept of 'worker' — Concept of 'economic activities' — Nursing staff who do not have a contract of employment assigned to a health care institution by a not-for-profit association)

In Case C-216/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 17 March 2015, received at the Court on 12 May 2015, in the proceedings

Betriebsrat der Ruhrlandklinik gGmbH

v

Ruhrlandklinik gGmbH

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, M. Berger, A. Borg Barthet and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 20 April 2016,

after considering the observations submitted on behalf of:

— the Betriebsrat der Ruhrlandklinik gGmbH, by G. Herget, Rechtsanwalt,

— Ruhrlandklinik gGmbH, by C.-M. Althaus and S. Schröder, Rechtsanwälte,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the European Commission, by M. van Beek, G. Braun and E. Schmidt, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2016,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 the Betriebsrat der Ruhrlandklinik gGmbH (works council of Ruhrlandklinik, 'the works council') and Ruhrlandklinik gGmbH concerning the secondment of Ms K., a member of the DRK-Schwesternschaft Essen eV (the German Red Cross association of nurses of Essen, Germany, 'the association'), to Ruhrlandklinik.

Legal context

EU law

3 Recitals 10 and 12 of Directive 2008/104 state:

'(10)

There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

…

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.'

4 Article 1(1) and (2) of that directive provides:

'1. This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.

2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.'

5 Article 2 of Directive 2008/104 provides:

'The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while 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.'

6 Under Article 3 of that directive:

'1. For the purposes of this Directive:

(a) "worker" means any person who, in the Member State concerned, is protected as a worker under national employment law;

…

(c) “temporary agency worker” means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

…

2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

…’

7 The first subparagraph of Article 5(1) of Directive 2008/104, which article is entitled ‘The principle of equal treatment’, provides:

‘The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.’

German law

8 Paragraph 99 of the Betriebsverfassungsgesetz (Law on industrial relations), as most recently amended by the Law of 20 April 2013 (BGBl. 2013 I, p. 868), in the version in force at the material time in the main proceedings, provides:

‘1. In undertakings normally employing more than 20 employees with voting rights the employer shall notify the works council in advance of any recruitment …, submit to it the appropriate recruitment documents and supply information on the persons concerned; it shall inform the works council of the implications of the measure envisaged, supply it with the necessary supporting documentation and obtain its consent to the measure envisaged. …

2. The works council may refuse its consent if:

(1) the staff measure would constitute a breach of any law …

…’

9 Paragraph 1(1) of the Arbeitnehmerüberlassungsgesetz (Law on the supply of temporary staff), as amended by the Law of 28 April 2011 (BGBl. 2011 I, p. 642) which came into force on 1 December 2011, provides:

‘Employers who wish, as suppliers of labour, to contract out workers (temporary workers) to third parties (user undertakings) within the context of their economic activity for the performance of work shall require authorisation. The assignment of workers to the user undertaking shall be of a temporary nature …’

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

10 Ruhrlandklinik operates an in-patient clinic in Essen (Germany). In 2010, it concluded an agreement with the association for the secondment of staff, under which the association undertook to supply nursing staff to that clinic, in return for financial compensation covering personnel costs plus a 3% flat-rate administrative charge. The nursing staff in question is comprised of members of the association who are qualified to work in the medical and health care sector.

11 The association is a registered not-for-profit association affiliated to the Verband der Schwesternschaften vom Deutschen Roten Kreuz eV (Federation of associations of nurses of the German Red Cross). Its members exercise their professional activity as their main occupation either within the association, or in medical and health care institutions under secondment agreements. In the latter case, the members are subject to the functional and organisational instructions of the institution in question.

12 Under the association's membership rules, the association pays its members monthly remuneration calculated according to standard practices in the field of activity concerned, together with, inter alia, reimbursement of certain travel and relocation expenses, additional retirement pension entitlements and paid leave entitlements, in accordance with the rules in force in that field of activity. The members are also entitled to continued payment of their remuneration in the event of incapacity for work caused by illness or accident.

13 The relationship between the association and its members is, however, not governed by a contract of employment. Consequently, the legal basis of the obligation on members to carry out work lies in their membership of the association and the commitment resulting therefrom to contribute to that association by performing work in a relationship of personal dependency.

14 Ms K. is a nurse and a member of the association. She was due to be assigned to the nursing service of Ruhrlandklinik, with effect from 1 January 2012, on the basis of the secondment agreement concluded by Ruhrlandklinik and the association.

15 However, by letter of 2 December 2011, the works council refused to give its consent to that secondment on the ground that the assignment was not designed to be temporary and was, consequently, contrary to Paragraph 1(1) of the Law on the supply of temporary staff, which prohibits the non-temporary supply of workers to user undertakings.

16 Taking the view that that refusal was unfounded on the ground that Paragraph 1 was not applicable in the circumstances, Ruhrlandklinik hired Ms K. on a temporary basis and applied to the court for a judicial decision authorising her secondment on a definitive basis. The lower courts granted that application and the works council brought an appeal before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany).

17 According to the referring court, the prohibition on the non-temporary supply of staff laid down in Paragraph 1(1) of the Law on the supply of temporary staff applies only to employees of a temporary-work agency.

18 The members of the association, including Ms K., do not have the status of workers under German law since they do not have a contract of employment with that association, even though they carry out work for another person and under that person's direction, for remuneration. According to the case-law of the Bundesarbeitsgericht (Federal Labour Court), a worker under German law is a person who is required, on the basis of a private-law contract, to perform, in the service of another, heteronomous work bound by instructions in a relationship of personal dependency.

19 However, the referring court is uncertain as to whether, although she does not have the status of worker under German law, Ms K. could nonetheless be regarded as having such status under EU law and, more specifically, for the purposes of Article 1(1) of Directive 2008/104.

20 In that context, the referring court is also uncertain as to whether the assignment of Ms K. to Ruhrlandklinik by the association constitutes an economic activity within the meaning of Article 1(2) of that directive, which defines the scope of that directive in that way.

21 In those circumstances, the Bundesarbeitsgerichts (Federal Labour Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 1(1) and (2) of Directive 2008/104 apply to the assignment of a member of an association to another undertaking for the performance of work under that undertaking's functional and organisational instructions if, upon joining the association, the member undertook to make his full working capacity available also to third parties, for which he receives a monthly remuneration from the association, the calculation of which is determined by the usual criteria for the particular activity, and the association receives, in return for the assignment, compensation for the personnel costs of the association member and a flat-rate administrative charge?'

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Article 1(1) and (2) of Directive 2008/104 must be interpreted as meaning that the scope of that directive covers the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, where that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.

23 Under Article 1, the application of Directive 2008/104 presupposes, inter alia, that the person in question is a 'worker', within the meaning of Article 1(1), and that the temporary-work agency which assigns that person to a user undertaking is engaged in 'economic activities', within the meaning of Article 1(2).

24 Consequently, in order to reply to the question referred, it is necessary to determine whether those two conditions are satisfied in circumstances such as those set out in paragraph 22 of this judgment.

The concept of 'worker'

25 In interpreting the concept of 'worker' as referred to in Directive 2008/104, it should be noted that, under Article 3(1)(a) of that directive, that concept covers 'any person who, in the Member State concerned, is protected as a worker under national employment law'.

26 Accordingly, it follows from the wording of that provision that the concept of 'worker' for the purposes of that directive covers any person who carries out work and who is protected on that basis in the Member State concerned.

27 In accordance with the settled case-law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation

under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard (see, to that effect, judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraphs 39 and 40 and the case-law cited).

28 It follows, moreover, from Article 1(1) of Directive 2008/104, and from Article 3(1)(c) thereof which defines the concept of 'temporary agency worker', that that directive applies not only to workers who have concluded a contract of employment with a temporary-work agency, but also to those who have an 'employment relationship' with such an undertaking.

29 Therefore, neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a 'worker' within the meaning of Directive 2008/104. Accordingly, in particular, contrary to what Ruhrlandklinik contends in its observations, a person, such as Ms K., cannot be excluded from the concept of 'worker' within the meaning of that Directive, and thus from the scope of that directive, on the sole ground that she does not have a contract of employment with the temporary-work agency and that she therefore does not have the status of worker under German law.

30 That conclusion cannot be called into question by the fact that, under Article 3(2) of Directive 2008/104, that directive is to be without prejudice to national law as regards the definition of worker.

31 As the Advocate General has observed in point 29 of his Opinion, that provision means only that the EU legislature intended to preserve the power of the Member States to determine the persons falling within the scope of the concept of 'worker' for the purposes of national law and who must be protected under their domestic legislation, an aspect that Directive 2008/104 does not aim to harmonise.

32 On the other hand, that provision cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104, and accordingly the scope *rationae personae* of that directive. As follows from paragraphs 25 and 26 of this judgment, the EU legislature did not leave it to the Member States to define that concept unilaterally, but specified itself the contours thereof in Article 3(1)(a) of that directive, as, moreover, it also specified the contours of the definition of 'temporary agency worker' in Article 3(1)(c) of that directive.

33 Accordingly, for the purposes of interpreting that directive, that concept covers any person who has an employment relationship in the sense set out in paragraph 27 of this judgment and who is protected, in the Member State concerned, by virtue of the work that person carries out.

34 The foregoing interpretation is supported by the objectives pursued by Directive 2008/104.

35 Thus, recitals 10 and 12 of Directive 2008/104 state that there are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union, and that the directive is intended to establish a protective framework for those workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. Accordingly, Article 2 of that directive provides that the purpose of that directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

36 To restrict the concept of 'worker' as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law, in particular, to those who have a contract of employment with the temporary-work agency, is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.

37 Indeed, such a restriction would permit the Member States or temporary-work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that directive, in particular, from the application of the principle of equal treatment of temporary agency workers and staff employed directly by the user undertaking laid down in Article 5 of that directive, even though the employment relationship between those persons and the temporary-work agency is not substantially different to the employment relationship between employees having the status of workers under national law and their employer.

38 In the present case, the referring court states that the association wishes to second Ms K. to Ruhrlandklinik for the purposes of her performing services in her capacity as a nurse, as her main occupation and under the direction of Ruhrlandklinik, in return for a monthly remuneration calculated in accordance with the usual criteria in the medical and health care sector. Accordingly, in the light of the considerations set out in the order for reference, the relationship between Ms K. and the association does not appear to be substantially different to the relationship between salaried employees of a temporary-work agency and that agency.

39 Furthermore, it is apparent from the documents before the Court that the members of the association, including Ms K., have a certain number of rights, which are in part identical or equivalent to those enjoyed by persons characterised as workers under German law.

40 Thus, the referring court has itself noted that those members benefited from the mandatory employment law protection provisions. In addition, as stated by Ruhrlandklinik and the German Government in response to a question posed by the Court under Article 61(1) of the Rules of Procedure of the Court, those members are subject to the Sozialgesetzbuch (Social Security code) in the same way as persons characterised as workers under German law.

41 Furthermore, according to Ruhrlandklinik, those members benefit from the legislative rules applicable to workers as regards paid leave, sick leave, maternity and parental leave, and continued payment of remuneration in the event of incapacity for work caused by illness or accident. They enjoy, moreover, the same protection as Ruhrlandklinik's own employees as far as concerns participation in decision-making within Ruhrlandklinik, and they receive the same remuneration as, and are subject to working conditions identical to those of, those employees. Lastly, they may be excluded from the association only on serious grounds.

42 In the light of those factors, it appears, therefore, that the members of the association are protected in Germany by virtue of the work they carry out, this being, however, a matter for the referring court to determine.

43 In the light of all the foregoing considerations, the concept of 'worker' as referred to in Directive 2008/104 must be interpreted as covering any person who carries out work, that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration, and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of legal relationship between those two persons and the form of that relationship. It is for the referring court to determine whether those conditions are satisfied in the present case and whether Ms K. must, therefore, be considered to be a 'worker' within the meaning of that directive.

The concept of 'economic activities'

44 As regards the interpretation of the concept of 'economic activities' as referred to in Article 1(2) of Directive 2008/104, it should be noted that, in accordance with the settled case-law of the Court, any activity consisting in offering goods or services on a given market is economic in nature (see, inter alia, judgments of 18 June 1998, *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 36; 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 43; and 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 149).

45 In the present case, the association offers services on the market for the supply of nursing staff to medical and health care institutions in Germany, in return for financial compensation covering personnel costs and administrative costs.

46 Contrary to what Ruhrlandklinik contends, the fact that the association does not operate for gain is, under the express wording of Article 1(2) of Directive 2008/104 and in accordance with the settled case-law of the Court (see, inter alia, judgment of 3 December 2015, *Pfotenhilfe-Ungarn*, C-301/14, EU:C:2015:793, paragraph 30 and the case-law cited), not relevant in that regard. The legal form of that association, constituted as an association, is likewise not relevant since it has no bearing on the economic nature of the activities pursued.

47 Consequently, it must be held that an association, such as the association in question, which assigns nursing staff to medical and health care institutions in return for financial compensation covering personnel costs and administrative costs, is engaged in economic activities within the meaning of Article 1(2) of that directive.

48 In the light of all the foregoing considerations, the answer to the question referred is that Article 1(1) and (2) of Directive 2008/104 must be interpreted as meaning that the scope of that directive covers the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, where that member is protected on that basis in the Member State concerned, this being a matter for the referring court to determine, even if that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.

Costs

49 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 (Fifth Chamber) hereby rules:

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 must be interpreted as meaning that the scope of that directive covers the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, where that member is protected on that basis in the Member State concerned, this being a matter for the referring court to determine, even if that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.

[Signatures]