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LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Freedom from instructions regarding scope and location of working hours is no reason for a lower hourly rate for part-time employees

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If part-time employees are allowed to not accept being assigned certain shifts by their employer and are allowed to express their wishes to their employer regarding when they work, this does not justify a lower hourly rate compared to full-time colleagues who must follow their employer's instructions regarding the scope and location of working hours.

The German Federal Labour Court (Bundesarbeitsgericht, BAG) ruled on this issue in its judgement dated 18 January 2023 (case no.: 5 AZR 108/22), which previously had only been available as a press release.

I. Facts of the matter and decision

The claimant was a marginal employee employed by his employer, the respondent, as a paramedic. The employer organised their employed paramedics into primary and secondary paramedics. Primary paramedics worked full-time or part-time for the employer. They received a gross hourly rate of EUR 17.00 at the time the case was decided. The secondary paramedics, which included the claimant, generally worked part-time as marginal employees. They only received a gross hourly rate of EUR 12.00.

The fundamental difference between the primary and secondary paramedics here was that the primary paramedics had their shifts bindingly assigned by the employer, whereas the secondary paramedics could decline to be assigned to a particular shift. In addition, they were also permitted to express their wishes to be assigned to certain shifts. The employer attempted to comply with these wishes but did not have to do so.

The claimant asserted that the stated difference did not justify his work only being paid at a gross hourly rate of EUR 12.00 rather than EUR 17.00. He was at a disadvantage in respect of his full-time colleagues because he worked part-time. He requested that his employer grant him back payments for the difference in remuneration.

The claimant lost at the Labour Court (Arbeitsgericht, AG), but the Regional Labour Court (Landesarbeitsgericht, LAG) and finally the Federal Labour Court (Bundesarbeitsgericht, BAG) held in his favour. According to the press release, the BAG justified its ruling in that the primary and secondary paramedics had the same qualifications and carried out the same work. The lower hourly rate of

secondary paramedics was not justified by the allegedly higher administrative burden caused by the secondary paramedics and the increased uncertainties inherent in scheduling shifts. The difference between planning administration and planning certainty would in any case not exist to any relevant extent. It was also irrelevant that the secondary paramedics had more freedom to arrange their working hours. Their requests to be assigned certain shifts could be ignored. The right to decline being assigned certain shifts did not justify a lower hourly rate of pay taking the overall circumstances into account.

II. Practical significance

Disadvantaging part-time employees, in particular with lower pay, is only justified in rare exceptional cases. The employer in this case did have reasons worth considering to account for the difference in pay between primary and secondary paramedics in the field. The secondary paramedics have significant independence with regard to their time, which allows them to combine their job as paramedics with another job, studying or being a carer if needed. Nevertheless, the employer had to have it confirmed by the court that it was disadvantaging their part-time employees without an objective reason. The reasoning behind the decision of the BAG was not a great surprise, especially as the difference in pay (EUR 12 instead of EUR 17) is significant. The case law has always applied a very strict standard when it comes to justifying disadvantaging part-time employees. Employers who pay their part-time employees disproportionately less than their full-time employees will have to take considerable back payments into account in certain circumstances.

This applies above all, if, as in the case in question, the exclusion clause/lapse of claims clause used is invalid (here this also covered claims to statutory minimum wage, which is not permitted). Some claims to back payments are then entirely time-barred. Where the remuneration is at least approximately 40% higher, as in the case in question, this may result in severe back payments, depending how many employees are affected. This demonstrates how important it is to carefully and precisely draft and use exclusion clauses/lapse of claims clauses, taking into account the newest case law.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Hagen Strippelmann on +49 221 33660-504 or by email to hstrippelmann@goerg.de. For further information about the author visit our website www.goerg.com.

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