Legal Update
Labour and Employment

“Money for Nothing?”

Dr. Frank Wilke
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Headnote

Even if an employment contract omits express mention of working hours, an employer can regularly expect employees to work during an undertaking’s usual working hours [Federal Labour Court judgment of 15 May 2013, 10 AZR 325/12].

Facts

The plaintiff was employed by the defendant as a “*salaried employee*” (i.e. not covered by a pay award) with an annual salary of € 95,000.00. The written employment contract contained no express understanding as regards working hours. The only stipulation in this regard was one to the effect that the employee also had to work “*outside normal working hours*” if necessary. Flexitime accounts based on a normal work week of 38 hours were kept for the defendant's employees. After the plaintiff had accrued a negative balance of approximately 700 hours, the employer requested that she at least adhere to the normal 38-hour work week.

The plaintiff was, however, of the opinion that – in the absence of any understanding to the contrary – she was not bound to any specific working time. She argued that she only had to complete the work assigned to her, regardless of how much time it took. After the plaintiff worked 19.8 and 5.5 hours respectively in two consecutive months, the defendant reduced the plaintiff’s monthly salary payments accordingly.

The plaintiff brought an action for payment of the difference and at the same time petitioned the court to rule that she was under no obligation to work 38 hours per week in the future.

Decision

Like the lower courts, the Federal Labour Court dismissed the action and instructed the plaintiff that her employment contract could be reasonably construed to require her to be at work during the company's normal working hours. The court opined that working time need not necessarily be expressly defined in the form of a concrete agreement if the contract otherwise contains nothing to indicate any exception to normal working hours.

The lower courts had found that "*company working hours are in principle considered to have been agreed*" in the absence of any express understanding to the contrary. Finally, the courts stated that any employee would be sufficiently aware of the fact that an employment contract entails an obligation to perform work and not an obligation to produce results regardless of the time invested. Since the plaintiff had failed to fulfil her obligations as an employee, her employer was justified in reducing her compensation accordingly.

Comments

Careless contract drafting came together with a good portion of chutzpa here, and these ingredients combined to create a curious situation, but one that was ultimately properly assessed by all instances. With welcome clarity, the court of first instance, the Düsseldorf Higher Labour Court, had already found that employees cannot reasonably assume that they will be paid for doing nothing in the absence of a concrete agreement governing working time.

Although the employer did in this case ultimately not suffer any serious repercussions, employment contracts should be formulated to avoid such pitfalls due to carelessness. In any case, the Notification Act (*Nachweisgesetz* – NachwG) requires that employers define working time in the form of a written employment contract or – if no agreement is made in writing – notify the employee of the working time in writing.

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 himself: Dr. Frank Wilke on +49 123 221 33660-534 or by email to fwilke@goerg.de. For further information about the author visit our website www.goerg.com.

Our office

GÖRG Partnerschaft von Rechtsanwälten

BERLIN
Klingelhöferstraße 5, 10785 Berlin
Tel +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Köln
Tel +49 221 33660-0, Fax +49 221 33660-80

ESSEN
Alfredstraße 220, 45131 Essen
Tel +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Tel +49 69 170000-17, Fax +49 69 170000-27

HAMBURG
Dammtorstraße 12, 20354 Hamburg
Tel +49 40 500360-0, Fax +49 40 500360-99

MUNICH
Prinzregentenstraße 22, 80538 München
Tel +49 89 3090667-0, Fax +49 89 3090667-90