EELC EUROPEAN EMPLOYMENT LAW CASES

SUMMARY

2017/45 No overtime premiums under collective bargaining agreements for individually agreed part-time employment (GE)

A clause in a collective bargaining agreement stipulating that overtime premiums for part time employees are only payable if their monthly working hours exceed those of a full-time employee is not discriminatory.

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The employee worked part time as a shop assistant for the defendant. Her employment contract stipulated monthly working time of 97.6 hours and an hourly rate of € 9,49. A full-time job would have been 173.5 hours per month. Her employment contract was regulated by the collective bargaining agreement for the catering industry.

Between April and September 2014, the plaintiff worked overtime, i.e. more than the contractually agreed 97.6 hours. In September 2014, the employee claimed overtime payment for the period from April to September 2014. Overtime rates are 25% above the regular hourly rate.

However, the employer paid the employee the regular hourly rate for these additional hours, rather than overtime rate. Only the working hours which exceeded the working time of a full-time employee (as occurred in September) where paid at the overtime rate.

The parties disputed the number of hours the employee had to work to receive the overtime rate. The employee argued that she was owed the overtime rate for any work that exceeded the contractually agreed 97.6 hours. However, the defendant argued that only work that exceeded the hours of a full-time employee (173.5) constituted overtime.

The applicable collective agreement states the following in section 4(1):

"Overtime work must be avoided (where possible). Worktime which exceeds the regular and quarterly working time and is not compensated by leave is defined as overtime work. Overtime working must be compensated by a premium in the amount of 25% in the addition to the average payment stated in the collective agreement." [Brackets added in the first sentence of the quote, Contributor]

The court dismissed the employee's claim, stating that the overtime rate was only payable if the working hours of a full-time employee were exceeded.

The court held that collective agreement clauses must be interpreted in the same way as the law. There are four methods of interpretation in Germany: the wording of the clause; the system within the law; the history or origin of the law; and its aim.

The collective bargaining agreement did not provide a clear answer to the question in dispute. Note also that the term 'overtime work' has different meanings in law and collective bargaining agreements. The court found the employer's understanding of the clause in the collective bargaining agreement to be accurate.Overtime was only mentioned in the provisions regarding full-time employment, but not part-time employment. This indicated that overtime work was not part of the agreement for part-time employees.

The rationale of the collective agreement confirms the interpretation that overtime rates are supposed to compensate employees for overtime working and special workload. Therefore, they must be paid where the hours of a full-time employee are exceeded.

Therefore, the court held that part-time employees are only entitled to overtime rates if their monthly workload exceeds 173.5 hours.

The Court's judgment is in line with both German and European law. For example, it accords with section 4(1) of the German Act on Part Time Work and Fixed Term Employment, which states that employees who work fulltime and part time must not be treated differently unless there is an objective reason as there is no different treatment between full-time and part-time workers. The same number of hours is paid at the same rate.

This case demonstrates that it can be unclear what an employers' association and a trade union have actually agreed.

Nevertheless, the judgment is in line with European law, as shown in ECJ case C-399/92. In that case, the ECJ looked at whether a similar rule was in line with Articles 119 and 141 ECC. It concluded that it did not violate the principle of equal treatment of women and men regarding their pay.

The German court in the case at hand has extended the precedent from this decision to the prohibition of discrimination against part-time workers. It has provided that there is no discrimination as long as full-time and part-time employees are paid at the same hourly rate. If a special benefit is tied to a situation which requires particular effort on the part of employees, this can be paid in a way that reflects that situation.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): According to the Finnish Working Hours Act (605/1996, as amended), the normal working hours are eight hours a day, 40 hours a week. However, an employer and employee are entitled to agree on part-time employment, where the working hours are shorter. Under the Finnish working hour legislation and in practice, overtime refers to work carried out in addition to the normal working hours, whereas additional work refers to work which does exceed the agreed working hours but not the statutory normal working hours. Thus, when a part-time employee exceeds the working hours agreed in his or her employment contract, the additional hours are regarded as additional work until the statutory working hours limit is reached. Therefore in practice, overtime is rare for part-time employment relationships.

The concepts of additional work and overtime are clear and settled in Finland. In addition, the rules for pay for additional work are explicit. Under the Working Hours Act, pay for additional work must be at least as much as the rate paid for the agreed working hours. A part-time employee is not entitled to receive overtime premiums for additional work unless otherwise agreed in a collective bargaining agreement or employment contract. By agreement, wages

payable for additional work can also be partly or completely converted into free time instead.

Hungary (György Bálint and Gabriella Ormai, CMS Legal): In Hungary, when premium rates or other benefits are set and when assessing employee performance, the principle of equal treatment must be taken into account, as well as the principles of good faith, fairness and the intended use of the benefit (i.e. the performance or achievement regarding which the benefit is granted).

When the courts assess whether the exclusion of an employee from an incentive is discriminatory, they will only compare other employees in comparable positions. The policies of the employer and the employment agreement play a key role in this respect. We recommend not including benefits or incentives in the employment agreement (though, the agreement can say that they might be introduced, amended or withdrawn by the employer unilaterally, if necessary) and setting clear requirements in the internal regulations.

In the case of a collective agreement, the preconditions for incentive pay should be set clearly (with possible milestones) for each employee group – in accordance with what has been agreed with the trade union. If the employer complies with the applicable collective agreement, no discrimination claim may be lodged against it.

The Netherlands (Peter Vas Nunes, BarentsKrans): The German BAG referenced the ECJ's judgment in the Helming case (C-399/92). This judgment does indeed explain that there is no (indirect) sex discrimination where a part-time employee earns the same hourly wage as a full-time employee, as is the case where "moretime" does not attract overtime rates. "Moretime" is a Dutch expression denoting time worked in excess of contractual working hours but not in excess of full time. However, the fact that hourly wages are identical need not be the end of the story. Did the full-time employees in this German case accrue benefits other than salary in respect of time they worked between 97.6 and 173.5 hours per month? Pension perhaps, or paid leave? If so, their total compensation per hour worked was greater than that of their part-time colleagues.

Italy (Caterina Rucci, Bird & Bird): Under Italian law, the basis position is that part-time employees cannot work overtime. This is to avoid situations in which employees hired on a part-time basis actually work full time, as that would prevent them from finding another part-time job and getting a full rate of pay. However, recently, flexible clauses are starting to be introduced. These normally require the consent of the trade union.

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