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Damages for overtime work exceeding rules of the Working Time Directive can be subject to preclusive periods (GE)

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Summary

The Federal Labour Court of Germany (Bundesarbeitsgericht – BAG) had to decide on a case in which an employee asserted a claim for damages against his public employer on account of an overtime regulation which infringed European law. However, because he had failed to comply with the time limits, his lawsuit was unsuccessful in the final instance.

Legal background

In Germany, working time for employees of the federal state of Brandenburg is regulated in the *Brandenburgische Arbeitszeitverordnung Polizei, Feuerwehr, Justizvollzug* (Working time regulation for the police service, fire-fighting service and correctional service of the federal state of Brandenburg – WTR). Section 21(4) of this Act was amended in July 2014 due to EU law provisions. Basically, the previous version stated that officers of the fire service could extend voluntarily regular working hours from 48 hours up to 56 hours. This was called the 'opt-out regulation'. In 2014, the statutory provision was revised to the effect that the regular working time of 48 hours per week must be achieved on average for six months and that officials who do not benefit from the 'opt-out regulation' would not be disadvantaged as a result.

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Since this shift work was partly on-call duty, it could have been questionable if parts of the overtime work were subject to the applicable Directive at all. The ECJ stressed in an important decision in 2018 that there is only the difference between 'working time' and 'rest' – *tertium non datur* (ECJ 21 February 2018, C-519/15, (*Matzak*)). As far as on-call time is concerned, the ECJ noted that the personal presence and availability of the worker is part of their professional performance and represents working time, even if the actual work done depends on the circumstances. This decision was based on the guarantee of the safety and health of the employees. The ECJ already underlined the same in its comparable judgment from 2000 (ECJ 3 October 2000, C-303/98 (*Simap*)). In the case at hand, this European law perspective had obviously not been discussed between the parties.

Nevertheless, Section 21(4) WTR in its version until 2014 was actually not compatible with Article 22(1)(b) of the Working Time Directive 2003/88/EC. Although it is possible to increase the normal weekly working time beyond 48 hours, as had been laid out in Section 21(4) WTR until 2014, it must be guaranteed that no worker may be subjected to any detriment by their employer because they are not willing to give their agreement to perform such work.

In the case at hand, the "BAG" had to decide whether a state liability claim had arisen due to inadmissible overtime and whether it fell under the preclusive period of the applicable collective agreement.

Facts

The claimant had been employed since July 1991 as an employee of Potsdam, which is located in Brandenburg (the capital of the federal state of Brandenburg), and had been working there in the fire technology service. He was a public service employee but not a civil servant. The plaintiff took the view that the version in force of Section 21(4) WTR until 2014 was contrary to Directive 2003/88/EC, as it did not indicate that officials would not experience any disadvantage from the failure to use the 'opt-out regulation'. Accordingly, the claimant filed a claim for damages against the State. As a matter of fact, in a separate case a civil servant had filed a lawsuit with the administrative courts in Brandenburg prior to the case in hand. The Administrative Court of Cottbus (*Verwaltungsgericht Cottbus* – VG Cottbus) decided in favour of the claimant in that case and the Higher Administrative Court of Brandenburg (*Oberverwaltungs-*

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gericht Brandenburg) confirmed the decision. Both Courts awarded the plaintiff damages in the form of monetary compensation in terms of a European State liability claim. Shortly after the VG Cottbus adjudicated on the case, the defendant informed all employees of the fire service that those employees who do not use the 'opt-out regulation' would not be subjected to any detriment as a result. Nevertheless, all employees continued to opt for overtime.

After the decision by the VG Cottbus the claimant in the case at hand also filed a claim for damages against his employer with the industrial tribunal. This was the competent court for claims by employees who are not civil servants, and the court rejected this claim. The Court of Appeal (*Landesarbeitsgericht* Berlin-Brandenburg) confirmed the judgment. The case then came before the BAG.

Judgment

The BAG dismissed the revision.

Notwithstanding the question whether the plaintiff could have been entitled to damages due to a European State liability claim, he did not succeed because he had missed the preclusive period for bringing proceedings in accordance with Section 37 of the collective bargaining agreement for the public service (*Tarifvertrag für den öffentlichen Dienst* – TVöD-V). Section 37 TVöD-V stipulates a period of six months to bring a claim after it becomes due.

The fact that the provision is intended to restrict European law raised the question of applicability. Pursuant to Section 2 of the collective bargaining agreement, the TVöD-V applies to all claims arising from the employment contract. According to the BAG, the close link between life processes and the employment relationship is decisive, so that claims arising from any provisions which are closely linked to the employment relationship shall, basically, also be subject to Section 37 TVöD-V. Therefore, Section 37 TVöD-V applies also to liability claims for overtime. In order to ensure that Section 37 does not conflict with European law in terms of content, the principle of equivalence must be respected on the one hand, and the principle of effectiveness must be respected on the other hand. Therefore, the corresponding right to infringements of EU law and to infringements of national law must be applied equally. In order to comply with the principle of effectiveness, it is necessary to examine whether national legal principles, such as legal certainty and due process, are affected within the time limit. The period begins with the due date of the claim. That is the time when the employee becomes aware of the facts of the claim. In particular, as regards the duration of the claim, Section 37 TVöD-V is not unreasonable and does not make the action excessively difficult or impossible. Thus, the principle of effectiveness is respected and furthermore respect for equivalence can also be confirmed, since the preclusive period for bringing an action also applies to actions for payment against the employer and vice versa.

Although it is fundamentally not necessary to clearly state the claim, the plaintiff had to make it clear that he insisted on fulfilling his claim. In the case at hand, the plaintiff failed to comply with this legal prerequisite. The ramifications were clear, then. His claim had to be dismissed albeit he could have been entitled for damages in the same way as the civil servant had been in the case law cited above.

Commentary

The BAG's decision is interesting in two respects. On the one hand, with reference to the administrative court decision, the Court dealt with the possibility, in principle, of a citizen asserting a European State liability claim against the State on an action-by-action basis if the Member State violates European secondary law. On the other hand, it confirmed that the exclusive periods which are widespread and customary in Germany both in collective agreements and in employment agreements are likely to be compatible with EU law at least if they are long enough to give the claimant sufficient time to assert their claim. The period of six months, as provided for in the TVöD-V, is then sufficiently long.

With regard to the latter statement, the Court should be followed. The period of six months provides a reasonable time for the claimant to assert their claim. The ECJ has also accepted a shorter period of two months as appropriate in comparable cases (e.g. ECJ 8 July 2010, C-246/09 (*Bulicke*), paragraph 39). Furthermore, both the Court of Appeal and the BAG have correctly stated that the out-of-court assertion of the claim has to be substantiated in a sufficiently clear manner, unlike the case at hand. This follows the long-established case law. If the defendant is not aware that increased payments are to be expected, it will not be able to form any reserves. Bearing this in mind, the employee should inform the defendant in plain language about the potential claim. If they fail to do so then any claim for damages under a European State liability claim should also be null and void.

In summary, the judgment of the BAG regarding the preclusive period and its compliance with European law is correct.

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