SUMMARY

2015/45 Parental part-time employment: no entitlement to lump sum overtime compensation (AT)

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Facts

The claimant, a museum manager, entered into an employment relationship with the defendant in November 2005. In 2008, the parties agreed on an annual lump sum for overtime work, regardless of the overtime hours actually worked (as long as they did not exceed a certain annual amount). They also agreed on the right of the defendant to revoke this arrangement at any time without stating reasons.

On 12th March 2013 the defendant returned to work from maternity leave and started to work part-time pursuant to §15h Maternity Protection Act 1979. Paragraph 19d (8) of the Working

Time Act provides that employees on parental part-time work are not obliged to work extra hours or overtime, even if they have agreed to do so. Since then, the claimant had not been working overtime at all. The defendant continued paying the agreed lump sum until September 2013 and never explicitly revoked the overtime arrangement[1].

The claimant required payment of the lump sum compensation for the period from October 2013 to January 2014 (when the lawsuit was filed). The Landesgericht Klagenfurt as court of first instance decided in favour of the claimant but the Oberlandesgericht Graz, as court of appeal, rejected the claim. Subsequently, the claimant appealed to the Supreme Court (Oberster Gerichtshof).

Judgment

The Supreme Court rejected the appeal and upheld the decision of the Oberlandesgericht Graz. It found that the entitlement to lump sum overtime compensation was suspended for as long as the employee was on parental part-time work pursuant to the Maternity Protection Act (or the Paternity Leave Act).

The Supreme Court decided first of all, that the defendant had not implicitly revoked the lump sum arrangement when it stopped paying. The mere cessation of payment does not fulfil the strict requirements set out in § 863 Austrian Civil Code (ABGB) for implied declarations (i.e. that there must be no sound reason to doubt that an action or omission could be a specific implied declaration). In a second step, the Supreme Court noted that the arrangement between the parties was incomplete. They had not agreed on how to deal with what happens where an employee who is entitled to lump sum compensation for overtime will almost certainly not do any overtime, as a result of changed circumstances. In general and according to existing case law (e.g. Supreme Court of 1 July 1987, Ref. Nr. 9 ObA 36/87), an employee is still entitled to the full lump sum compensation provided for, even if the actual number of overtime hours does not reach the level the parties may have had in mind when concluding the agreement - or even if the employee does not do any overtime at all. However, this does not apply – and this is the main new development from this decision – when the parties are facing circumstances that are essentially different from those that existed when they made the arrangement.

According to the Supreme Court, when the parties agreed on the lump sum they assumed that the claimant would regularly work overtime. The agreement does not state what should happen when the claimant does not perform any overtime for a long period of time. The Supreme Court could fill this gap in the contract by means of supplementary interpretation, but to do so needed to answer the following question: what would the parties have agreed if

they had wanted to provide for what happens if the employee goes onto a parental part-time working arrangement?

The Supreme Court referred to a similar case of a pregnant employee who had been denied lump sum overtime compensation because pregnant women are prohibited to work overtime under Austrian labour law (Supreme Court of 18 August 1995, Ref. Nr. 8 ObA 233/95, § 8 Maternity Protection Act). In terms of the present case however, by § 19d (8) Working Time Act, parents on parental part-time work are not obliged to work overtime even if they have agreed to do so. Therefore, the claimant is not forbidden from working overtime, but simply not obliged to do so. The Court also deduced from the fact that the claimant had not worked overtime since going on maternity leave that she would also not work overtime whilst on a parental part-time working arrangement.

The Supreme Court ruled that, had the parties considered this, they would have agreed that the lump sum compensation should be suspended whilst the claimant was on parental part-time work, but if the claimant did in fact work overtime, she should be entitled to overtime compensation.

Commentary

Overtime compensation arrangements such as the one at issue are commonly used in Austria. The parties usually agree that the employee is expected to put in a certain (maximum) number of overtime hours per annum. The overtime compensation for that amount is paid constantly throughout the year regardless of the amount of overtime work actually done by the employee.

The Supreme Court's line of reasoning is consistent and methodically sound, as the question at issue was not dealt with in the contractual arrangement and the solution presented by the Court reflects the parties' original intentions. The Court's decision deserves to be endorsed because parties acting in good faith would never agree that overtime compensation should be paid for periods during which no overtime work is done.

Problems could occur where payments declared as overtime compensation are actually hidden pay rises. If it is clear from the circumstances that the payments are not really being made as overtime pay, it would be excessive for the court to cancel payment of the full lump sum. In such cases, the court would have to look at the facts to determine the amount that the employee should be entitled to whilst doing parental part-time work.

The Supreme Court's decision is also important for the related issue of employees with so-called 'all-in' contracts doing parental part-time work. Such employees are paid a fixed salary

above the minimum wage set by law or collective agreements. It is often agreed that the salary covers all services provided by the employee – overtime work as well as any special services that would usually entitle the employee to a specific bonus or allowance. With regard to the present judgment, it seems that in cases of parental part-time work, employers are entitled to cut back the salary of 'all-in employees' by the amount that is intended for overtime compensation. However, it is often not clear from the contract what that amount should be. In legal literature we find different suggestions about how to calculate the deduction. Meanwhile, some argue that no deduction is permissible if the contract does not say what proportion of the salary serves as overtime compensation. A more equitable solution may be to take the number of overtime hours that the employee agreed to provide before starting parental part-time work and multiply that by the minimum wage for one working hour. If the employment contract does not specify the amount of compulsory overtime work, the employer could look at the average number of overtime hours provided during the last twelve months.

From a European point of view the present case is covered by the Parental Leave Directive (2010/18/EU) and thus by the European social partners' Framework Agreement on Parental Leave. The Framework Agreement does not contain provisions concerning the remuneration of employees who take their parental leave on a part-time basis and so the salary decrease can be seen as an indirect result of national legislation, in this case, § 19d (8) Working Time Act. This means the judgment is in line with the applicable secondary law (cf. Clause 5 Nr 2 Framework Agreement). It is worth noting that the Austrian Maternity Protection Act and its § 15h, regulating parental part-time work, predate the Parental Leave Directive and have been deemed sufficient by the Austrian government with respect to the Directive and annexed Framework Agreement.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): Parental part-time in Germany is possible but limited to 30 hours per work week. Within this frame, overtime is – in theory – possible. If the parties for example agree on a 20-hour-work-week, overtime up to 10 hours per week is legal. If the agreed working time is 30 hours per week, the employee on parental leave cannot work overtime without the risk of losing entitlement to statutory parental allowance.

However, an agreement on a lump-sum payment would only be valid if the employee knew in advance how many hours of overtime were possible under the agreement. This does not seem to be the case here, so a German court would probably have come to the conclusion that the clause was invalid. The employee would therefore have to be compensated for overtime worked. However, as she did not work overtime, there would have been no payment.

Hungary (Gabriella Ormai): This case is very interesting from a Hungarian point of view. Based on the Hungarian Labour Code, the parties may agree that, instead of an overtime allowance based on the actual overtime performed, the employee receives a fixed, agreed monthly lump sum compensation, the amount of which does not depend on the actual hours spent with overtime. However, the Labour Code lists several circumstances in which the employee may not be instructed to put in overtime; for example during pregnancy until the child reaches the age of three.

It is uncertain how a Hungarian court would decide in a similar case, i.e. where the parties have agreed a lump sum compensation instead of overtime allowance, but where, due to changed circumstances, it is prohibited by law to instruct the employee to perform overtime. Since the contractual allowance is also payable, in principle in cases where the employee does not carry out overtime, unless a condition subsequent is provided, we expect that the employer would have to continue to pay the contractual allowance in this case.

The Labour Code also allows incorporating certain allowances (e.g. for night work) in base salary. Since there are circumstances where the employee cannot work at night (e.g. during pregnancy until the child reaches the age of three), it is uncertain what impact it may have on this type of base salary, i.e. whether the employer can unilaterally decide to decrease it. In such a case, the amount of base salary can only be decreased with the parties' mutual consent, unless it was clearly stipulated by the parties originally that in case the employee is not allowed to work at night, the base salary decreases by a certain amount.

These are good examples of how carefully contractual terms and conditions must be phrased to provide flexibility in case of changed circumstances.

Slovenia (Petra Smolnikar): As a general rule, employment relationships in Slovenia should be concluded for an indefinite term, for full-time working hours. Conversely, part-time employment should represent an exception, to be concluded only in a limited number of cases where there is no need to engage the employee full-time. Overtime work in cases of part-time employment is therefore contrary to the purpose and objectives of part-time work. Nonetheless, Slovenian employment law exceptionally allows for the possibility of overtime by part-timers. However, note that the employer may not impose work exceeding the agreed working hours on part-time employees unless otherwise provided in the employment agreement or in cases of natural or other disasters. As elaborated in case law, such overtime work should not be of permanent nature as it would otherwise constitute an abuse of the principle of part-time work.

Any overtime hours (including hours over and above agreed part-time work) must be

explicitly requested and paid for in accordance with applicable law and sector-specific collective bargaining agreements. Under Slovenian law, overtime pay is considered an integral part of salary and the rate of pay is set out in sectoral collective bargaining agreements. This would raise the question of how much an employer should pay if not bound by a collective agreement. As overtime is a constituent part of salary, the rate should be set out in the employment agreement. Note that Slovenian employment law does not provide for lump sum payments for overtime.

Subject: part-time work, lump sum overtime compensation

*Parties: Mag. C***** S***** - v - L*****

Court: Oberster Gerichtshof (Supreme Court)

Date: 24June 2015

Case number: 9 Ob A 30/15z

Internet publication: http://ris.bka.gv.at/Jus | *Geschäftszahl*|*case number*

Footnotes

1 The defendant mistakenly continued to pay the overtime compensation between 12 March and September 2013. It did not demand repayment of the sum mistakenly paid, probably because under Austrian law an employer cannot reclaim sums mistakenly paid to an employee who has received and spent the money in good faith.

Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2015-06-24

Case number: 9 Ob A 30/15z