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Invalidity of exclusion clauses in employment contracts in case of intentional damage (GE)

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Summary

The wording of a global exclusion clause in an employment contract also covered claims asserted on the grounds of intentional damage. However, such a clause was invalid in the case at hand because it resulted in a shortening of the statutory limitation periods. Both parties to the employment contract could not therefore refer to such a contractual exclusion clause. The consequence was that the statutory limitation periods applied. The employer can also invoke the invalidity of the exclusion clause, even if it drafted the clause itself. The judgment may also have important consequences for collective agreements.

Background

Exclusion clauses in employment contracts are frequently found in German labour law. These stipulate that a claim in connection with the employment relationship must be asserted within a certain period of time – usually a period of a few months – otherwise the claim expires. This is intended to create legal certainty for both parties. It also has the result, however, that claims often lapse, even though it is actually in one's best interest to realize them. There are therefore numerous court decisions on the effectiveness of exclusion clauses and the respective requirements.

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Facts

The plaintiff worked in the employer's accounting department. The employer terminated the employment relationship because the plaintiff took advantage of her position in the accounting department to pay her own bills with the employer's money. The plaintiff filed a lawsuit against this termination. In the course of the lawsuit, the employer sued the plaintiff for repayment of approximately €110,000, which the plaintiff had used for her own purposes.

Decisive for the decision on the employer's claim for repayment was a clause in the plaintiff's employment contract which stated:

> All claims arising from the employment relationship must be asserted in writing within a preclusion period of two months after the due date and, in the event of rejection by the other party, must be sued for within a preclusion period of one month.

The German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') had to decide whether any claims of the employer had expired due to the exclusion clause in the employment contract or whether the exclusion clause was not applicable at all in the case at hand. The background to the case was that the plaintiff had intentionally caused damage to the employer. It had to be clarified whether claims based on intentional damage are covered by such exclusion clauses.

Judgment

The BAG held that the exclusion clause, which was formulated in a very general manner in this case, also covered claims that arise due to intentional damage. The Court derived this from the wording of the exclusion clause. The wording "all claims arising from the employment relationship" also included claims arising from intentional damage. Nothing else would result from the assumption that an intentional damage within the scope of the employment relationship was such an unusual circumstance that one can assume that the parties did not intend to regulate this situation at the time of the conclusion of the contract. Instead, it could be foreseen that intentional damage in the employment relationship could occur from time to time.

Despite all this, the exclusion clause was not applicable in the present case. The BAG further held that the

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exclusion clause was not applicable due to a violation of the statutory limitation provisions of Section 202 of the German Civil Code ('BGB'). Pursuant to Section 202 BGB, the statutory limitation in the case of liability due to intent cannot be agreed upon in advance by legal agreement/contract. Exclusion clauses that refer to intentional damage liability are also covered by this prohibition. Due to the violation of Section 202 BGB, the clause was invalid. As a result, the statutory provisions on limitation periods applied.

In addition, the ruling of the BAG contained another important decision. In principle, the employer cannot refer to the invalidity of a clause if it has created it unilaterally. This is the so-called principle on the personal partial invalidity of general terms and conditions. According to this, the person who introduced a clause is not protected from this. However, the BAG decided that these principles were not applicable in the present case, as the clause was invalid due to a violation of Section 202 BGB. The BAG justified this by the fact that Section 202 BGB is intended to provide comprehensive protection for both parties to a contract, regardless of who created the clause that affects this scope of protection. In the opinion of the BAG, this represents a divergence from provisions in labour law, which often only serve to unilaterally protect the employee, as the employee is generally the weaker party in the employment relationship. The consequence of this decision is that the employer itself can refer to the invalidity of the exclusion clause, so that it can assert its claims against the plaintiff within the limitation period.

Commentary

This ruling is of high importance. Even though it only refers to exclusion clauses that the parties agree on in the employment contract, it also brings up an old discussion.

In Germany, it is also possible to include exclusion clauses in collective agreements. Previously, German Supreme Court case law held that such exclusion clauses in collective agreements are also applicable to claims for intentional damage. The existing case law on exclusion clauses in collective agreements is therefore the exact opposite of the present decision. The BAG justified this by stating that the wording of Section 202 BGB only prohibits a reduction of the statute of limitations in the case of intentional damage 'by legal transaction'. However, a collective agreement is not affected by this. This is because collective agreements are mandatory and apply directly pursuant to Section 4(1) of the Collective Agreement Act ('TVG').Therefore, they are comparable to law rather than merely an agreement. The case law of the BAG in this regard therefore applies in any case to collective agreements that are mandatorily applicable to an employment relationship, through the mutual collective agreement bond (the employer is a member of the respective employers' association, the employee is a member of the relevant trade union) or general applicability of the collective agreement.

Moreover, as a precaution, one should assume that this also applies if a collective agreement is referred to in its entirety in the employment contract.

When drafting exclusion clauses in employment contracts careful attention must be paid to ensure that they are not too broad in scope. In addition to intentional dame claims, claims for minimum wages, for example, must not be covered.

Furthermore, according to established case law of the BAG, each deadline provided for in an exclusion clause must be at least three months. If the time limit for asserting the claim is too short, the employer cannot invoke this if it has incorporated the stipulation in the contract.

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