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Gloss on the Judgment of the German Federal Labor Court (Bundesarbeitsgericht) of 24 October 2018, Case 10 AZR 69/18, Previous Instance Regional Labor Court (Landesarbeitsgericht) Hamburg, Judgment of 30 August 2017, Case 5 Sa 21/17

Abstract. On 24 October 2018, the Federal Labor Court ruled that a "legal protection secretary" employed by a trade union who advised trade union members on labor law issues could not be admitted to the bar. He lacked the professional independence required by the Federal Lawyers' Act because, according to his employment contract, he had to respect the ideals of the trade unions. Although the employer had never given the legal protection secretary any instructions as to how he was to advise clients, the employer was also not obliged to confirm to the bar association that the legal protection secretary was carrying out his advisory work independently.

The ruling, which is much discussed in Germany, raises the fundamental and still unresolved question of under what circumstances a legal advisor is "professionally independent." This not only concerns the German legal landscape, but is particularly difficult to answer under German law because the legal situation is paradoxical: the German legislator itself allows employees access to the legal profession. The fact that a legal advisor is hired as an employee therefore does not automatically eliminate their professional independence. But what else? This gloss aims to contribute to this discussion.

Keywords: Employed lawyer – admission to the bar – professional independence – employer's duty of consideration.

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Thesis

An employed legal professional who, according to his employment contract, is obliged to observe the "basic values and objectives" of his employer, lacks the professional independence required for admission to the bar. The employer is therefore not obliged to support the employee's efforts to gain admission.

1. Facts

Can an employee who is obliged to follow instructions also be an independent organ of the judiciary? This question is too general to be answered with a simple "yes" or "no," and it is precisely for this reason that both the labor courts and the lawyers' courts have repeatedly had to address it. This was also the case in the judgment commented on here:

The plaintiff had been employed for several years by DGB Rechtsschutz GmbH, a subsidiary of the German Trade Union Confederation (Deutscher Gewerkschaftsbund, DGB) as a "legal protection secretary." According to his employment contract, it was his task to advise trade union members in labor and social law disputes and to represent their interests in and out of court. Over the many years of his professional life, the employer had never laid down any rules as to how he was to advise and represent clients. However, the plaintiff could not refuse any mandate falling within the scope of his responsibility. According to point no. 5 of his employment contract, he was also "obliged to observe the political principles and objectives of the DGB as expressed in the statutes and resolutions of the organs of the DGB." A further provision of the employment contract stated: "The employee undertakes to fulfill his contractual obligations in the offices of DGB Rechtsschutz GmbH (…) as instructed by the employer" (no. 1 para. 2 of the employment contract).

The plaintiff applied for admission as an in-house lawyer. However, the employer refused to certify the plaintiff's professional independence because of its decision not to support the admission of "legal protection secretaries" to the bar. Without this certificate, the Bar Association did not admit the plaintiff to the bar, referring to Section 46 (4) BRAO.[1]

[1] German Federal Lawyers' Act (Bundesrechtsanwaltsordnung), BGBl. III/1959, no. 303-8.

With his lawsuit, the plaintiff wanted to force his employer to provide the certification and invoked the duty of loyalty under labor law: The employer, in the plaintiff's opinion, was required to pay attention to the interests of its employees and therefore had to support the admission to the bar, as this admission would be associated with considerable financial advantages for the plaintiff.

The Federal Labor Court dismissed the claim, as had the previous instances.[2] It stated that the employer was obliged to show consideration. In principle, the employer could also be required on this basis to actively safeguard the interests of the employee *vis-à-vis* third parties – in this case, towards the Bar Association, which decides on admission to the bar.

However, in the opinion of the court, this does not oblige the employer to prioritize the employee's interests over their own. Accordingly, the employer has an interest in denying its employees access to the bar. If the plaintiff were admitted to the bar, the employer would be obliged to provide the plaintiff with the necessary technical infrastructure to enable him to communicate electronically with authorities and courts ('special electronic lawyer's mailbox'). This would create an additional expense for the employer, which the employer could not be forced to bear.

Secondly, according to the court, the employer is also not obliged to certify the professional independence of the plaintiff in exercising his advisory activities by virtue of his duty of consideration, as such a certificate would be incorrect. Finally, the plaintiff was not professionally independent in the performance of his duties due to the provisions no. 1 (2) and no. 5 in his employment contract, but was required to adhere to the political ideas of the DGB. Moreover, the submission of an incorrect declaration fell outside the scope of what the plaintiff could expect in terms of consideration.

In the opinion of the court, in order for the plaintiff to be able to prove the professional independence required for admission to the bar, his employment contract would therefore first have to be amended by deleting provisions no. 1 (2) and no. 5. However, the plaintiff was not entitled to this either.

[2] Judgment of Hamburg State Labor Court (Landesarbeitsgericht Hamburg) of 30 VIII 2017, Case 5 Sa 21/17; Judgment of Hamburg Regional Labor Court (Arbeitsgericht Hamburg) of 21 XII 2016, Case 15 Ca 260/16.

2. Assessment of the court's opinion

Some background is required: A lawyer is an "independent organ of the judiciary" (Section 1 BRAO). Accordingly, anyone who "engages in activities that are incompatible with the lawyer's profession, in particular, their position as an independent organ of the administration of justice, or that may jeopardize confidence in their independence" (Section 7 no. 8 BRAO), may not be admitted as a lawyer. This ensures that the lawyer does not fully adopt the client's interests as their own. In this way, they achieve the credibility required to be able to act as a respectable representative for the interests of their client.[3]

On the foundation of these basic legal decisions, the superior courts long advocated the 'dual profession theory', which required an employed legal professional only to be admitted as a lawyer if they had their own law firm in addition to their dependent activity.[4] This dichotomy was based on a professional concept that did not meet the requirements for the work of company counsels. Based on this realization, the BRAO was amended in 2016 to include provisions on "in-house lawyers" ("Syndikusrechtsanwälte"), abandoning the dual-profession theory:[5] since then, Section 46 (2) BRAO has defined in-house lawyers as follows: "Employees […] practice their profession as lawyers insofar as they act as lawyers for their employer within the scope of their employment relationship (in-house lawyers)". Anyone admitted as an in-house lawyer may provide legal advice and representation to the employer and its members in the same way as a regular (independent) lawyer (Section 46 (5) BRAO).

Section 46 (3) BRAO specifies that only those who act in an "independent and autonomous" advisory function may perform the profession

[3] C. Knauer, *Zur Wahrheitspflicht des (Revisions-)Verteidigers*, in: *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften. Festschrift für Gunter Widmaier zum 70. Geburtstag*, ed. H. Schöch et al., Hürth 2008, p. 305.

[4] Judgment of German Federal Constitutional Court (Bundesverfassungsgericht) of 4 XI 1992, Cases 1 BvR 79/85 et al.; Judgment of German Federal Court of Justice (Bundesgerichtshof) of 7 XI 1960, Case AnwZ (B) 4/60; Judgment of German Federal Social Court (Bundessozialgericht) of 3 IV 2014, Cases B 5 RE 3/14 R, B 5 RE 9/14 R, and B 5 RE 13/14 R. The Court of Justice of the European Union (CJEU) also seems to approve of the dual-occupation theory, cf. Judgment of CJEU of 14 IX 2010, Case C-550/07 (*Akzo Nobel Chemicals Ltd.*).

[5] German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 27.

of lawyer. Finally, Section 46 (4) BRAO states: "A professionally independent activity within the meaning of paragraph 3 is not exercised by anyone who has to adhere to instructions that exclude an independent analysis of the legal situation and case-by-case legal advice. The professional independence of the in-house lawyer must be contractually and actually guaranteed".

Legal professionals who are employed by companies or associations such as trade unions, political parties or consumer protection associations operate in this area of conflict. But why do they seek to be admitted to the bar in the first place? Firstly, admission to the bar opens up the possibility of appearing at higher courts, where lawyers are required. However, in most cases, social security considerations are the primary factor: as the bar association runs its own pension scheme, lawyers are exempt from contributing to the state pension scheme (see Section 46a (4) BRAO). Since it is generally the case that the retirement benefits from the lawyers' pension scheme significantly exceed the state pension, in-house legal professionals therefore have not only an idealistic, but above all, a financial interest in being admitted to the bar.

As described above, the prerequisite for admitting an employed legal professional to the bar is that they act "autonomously and independently" as legal advisors. In order to prove this, as part of the procedure for granting admission, the employer usually issues a declaration stating which activities the in-house legal professional performs and confirming their independence from instructions in this respect.[6]

The decision of the Federal Labor Court is neither dogmatically consistent nor convincing on the merits.

However, the second consideration presented by the court is, of course, correct, i.e. that the employer cannot be forced to make false statements to third parties, due to its duty to take the employee's interests into consideration (Section 241 (2) BGB[7]). This must apply all the more because the submission of the declaration by the employer leads to the employee's admission to the bar, which automatically results in their exemption from the obligation to contribute to the state pension scheme and obliges the employer to report the relevant pension-scheme-related

[6] The bar associations request this certificate on the basis of Section 46a (3) BRAO, C. Wolf, *§ 46a BRAO*, in: *Anwaltliches Berufsrecht*, ed. R. Gaier et al., 3rd ed., Cologne 2020, para. 33. Cf. also German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 27.

[7] German Civil Law Code (Bürgerliches Gesetzbuch), BGBl. I/2002, pp. 42, 2909.

circumstances on their own initiative (Section 28a SGB IV[8]). Put simply, the submission of an incorrect declaration by the employer ultimately leads to a reduction in the social security contributions to be paid and is therefore subject to a fine (Section 111 SGB IV)[9]. Against this background, it is immediately obvious that a duty of consideration under civil law cannot compel the employer to commit administrative offenses.

However, this assertion should not have been presented as the second point, but should have formed the starting point for further considerations. If it were true that the plaintiff was not professionally independent, any kind of obligation on the part of the employer to certify the plaintiff's independence would be out of the question. It would then simply be irrelevant whether the plaintiff's admission to the bar could generate a burden for the employer that would have to be weighed against the plaintiff's primarily financial interest in being admitted to the bar. The court nevertheless undertook this balancing exercise, even though it could have dispensed with it. This is because the employer who issues a false certificate faces a fine, and this penalty cannot outweigh the employee's interests, regardless of how understandable they may be.

It would therefore have been logical to carry out an examination in a different order, in which the initial question, on which the further examination program depends, should have been expressed thus: Would an employer's certification of the plaintiff's independence actually be incorrect? Or to put it more precisely: Do the stipulations in the employment contract actually compromise the plaintiff's professional independence? This leads to a fundamental question of the in-house lawyer's profession: an in-house lawyer is by definition employed by an employer that is not a professional practice company, otherwise said lawyer would be an "employed lawyer" ("angestellter Rechtsanwalt") within the meaning of Section 46 (1) BRAO. The employer's business model is therefore necessarily geared towards not only offering legal advice as such, but also pursuing other purposes, whether of an entrepreneurial or non-material nature.

Therefore, the purpose of the advisory service is not to generate profits with the advice itself, but rather, the in-house lawyer is integrated into an overarching unit, which as a whole is intended to generate profits or

[8] German Forth Social Security Code (Viertes Buch Sozialgesetzbuch), BGBl. I/2009, pp. 3710, 3973.

[9] Cf. in detail C. Wolf, *§ 46 BRAO*, in: *Anwaltliches Berufsrecht*, op. cit., para. 72.

promote a non-material purpose. The employer bears the operational and economic risk. This means that the employer must continue to pay the in-house lawyer even if the lawyer's work cannot be used in a meaningful way, for example, because there is currently no work for the in-house lawyer. It would therefore be, *prima facie*, less risky for the employer not to hire legal advisors as employees, but instead to obtain legal advice from external (self-employed, i.e. personally and economically independent) lawyers. This would even have the advantage of the employer not always having to rely on legal advice from the same in-house lawyer, but could always consult an expert for the respective legal issue.

Nevertheless, if the employer decides to hire a legal professional on the basis of an employment relationship, other advantages must be expected from this, primarily related to planning security: the employee is always available to the employer and can provide better assessment than an external legal advisor, thanks to their ongoing cooperation. For similar reasons, some legal professionals prefer to work as dependent employees rather than opening their own law firm: they are entitled to a fixed salary regardless of the market situation, which also gives them planning security. In return, they accept not to be free to choose their clients.

This in itself gives rise to a certain dependency on the part of the employed legal professional: unlike an independent lawyer, who can turn down work, they cannot simply refuse to work on a particular case. In doing so, they would be in breach of their contractual obligations and therefore risk losing their job, i.e. their sole source of income. This alone results in a certain dependency on the part of the employed legal professional, which is further amplified by the fact that employers usually find ways to dismiss employees. At the very least, an employer who does not agree with particular legal opinions offered by a hired legal professional can only assign him cases to work on where such controversial legal opinions are not important.

For these reasons, the rules expressed in Section 46 BRAO on the independence of in-house lawyers are widely described as paradoxical: the legislator is evidently aware that employees are to some extent personally dependent on their employers. Nevertheless, the employer permits the admission of employees to the bar under the premise of their professional independence, which can never be achieved in its pure form (the "labor law paradox").[10] In order to take account of the

[10] C. Wolf, *§ 46a BRAO*, op. cit., para. 27 et seq.

legislative intention to permit the in-house lawyer profession to exist at all, the concept of independence in Section 46 (4) BRAO must therefore not be understood too narrowly; that said, there is still a lack of clear demarcation criteria, although there are now a large number of court decisions.[11] The materials accompanying the Federal Lawyers' Act are relatively unhelpful in this respect: the explanatory memorandum to the law contains an indication that only "requirements regarding the manner in which certain legal issues are dealt with and assessed" call independence into question.[12] Against this background, the employment contract provision in no. 1 para. 2, according to which the plaintiff should perform his work on the employer's premises, does not conflict with his independence, because the employer has no influence on the professional handling of the mandates by determining the work location.

The question remains whether provision no. 5 of the employment contract, according to which the plaintiff must "observe the political principles and objectives of the DGB […]," eradicates the plaintiff's professional independence. The court affirms this in just one sentence. This does not do justice to the complexity of the labor law paradox. Rather, there would be good reason here to define the concept of professional independence in more detail. It is in the nature of things that an in-house lawyer can never achieve the same degree of independence as a self-employed lawyer. There is at least some reason not to expect a higher degree of independence from an employed lawyer than from a comparable self-employed lawyer with their own law firm. This idea could have formed the starting point for a clearer formulation of the requirements constituting "professional independence."

Based on this, the court could have acknowledged that even a self-employed lawyer is never entirely independent. Their perspective is inevitably shaped by various aspects, such as their political convictions and the experience they have gained in non-legal fields or

[11] See (among many other decisions), for example, Judgment of German Federal Court of Justice (Bundesgerichtshof) of 12 III 2018, Case AnwZ (Brfg) 15/17 (on a claims handler for an insurance company); Judgment of German Federal Court of Justice (Bundesgerichtshof) of 2 II 2018, Case AnwZ (Brfg) 49/17 (on a data protection officer in a large company); Judgment of Bavarian Bar Court (Anwaltsgerichtshof Bayern) of 9 IV 2018, Case III-4-8/17 (on an editor and writer for a legal news site). For a current larger collection of cases cf. I. Jähne, § 46, in: *BRAO*, ed. D. Weyland, 11th ed., München 2024, para. 28 et seq.

[12] German Federal Parliament (Deutscher Bundestag), printed matter no. 18/5201, p. 31.

during their legal training. A self-employed lawyer incorporates all of these aspects – whether consciously or unconsciously – into their professional activities.[13] Similarly, one cannot expect an in-house lawyer to completely disregard their experience and political convictions when providing legal advice. In the case in question, the plaintiff had committed to observing the "political principles and objectives" of the German Trade Union Confederation. There is some evidence to support the assumption that these convictions were his own anyway and that provision no. 5 of the employment contract therefore had no influence on his legal advisory activities.

This presumption is supported above all by the fact that the plaintiff had voluntarily made himself economically dependent on a subsidiary of the German Trade Union Confederation. It must have been clear both to him and his employer any that fruitful and trusting cooperation within the framework of an employment relationship can only be achieved if the employee identifies with their employer, at least to some extent, in terms of ideals.[14] This can also be an important motive for a legal professional to commit to an employer through an employment contract rather than running their own, economically independent law firm. This is likely to be particularly true for association lawyers: anyone who voluntarily decides to work for a trade union or an employers' association, a political party or a consumer or tenant protection association or a similar non-profit organization generally already identifies with the basic values represented there of their own accord.[15] In this case, an employment contract provision such as no. 5 of the employment contract, which requires the employee to observe these basic values, does not suffice to influence their behavior. After all, they would have heeded the values of the association even without such a provision in their employment contract for their work as a legal advisor. Things

[13] There are numerous empirical studies on such influences on the judicial decision-making behavior of judges, such as G.C. Sisk, M. Heise, A.P. Morriss, *Charting the Influences on the Judicial Mind*, "New York University Law Review" 1998, vol. 73, no. 5, p. 1377 and comprehensively and most recently B.M. Barry, *How Judges Judge*, London 2021, pp. 91–110. On theoretical considerations regarding the influence of such aspects on the work of lawyers cf., for example, M. Bauckmann, *§ 1*, in: *BRAO*, op. cit., para. 16.

[14] On this connection and its impact see, inter alia, H. Stuart, *Employee Identification with the Corporate Identity – Issues and Implications*, "International Studies of Management & Organization" 2002, vol. 32, no. 3, p. 28 et seq.

[15] For evidence see, inter alia, M. Weisberg, E. Dent, *Meaning or money? Non-profit employee satisfaction*, "Voluntary Sector Review" 2016, vol. 7, no. 3, pp. 305–306.

might have been different if the employee had been required not only to observe the basic values of the association, but also to adopt every position of the association in detail. However, the employment contract (and especially its provision no. 5) did not require the plaintiff to do so.

Despite provision no. 5 of his employment contract, there is much to suggest that the plaintiff should be considered "professionally independent" within the meaning of Section 46 (4) BRAO. An employer's attestation to this effect would therefore be in no way false, meaning that they would not have to fear being prosecuted for an administrative offense. At the second stage, this raises the question of whether the employer was also obliged to sign the certificate by virtue of their duty of consideration. In order to come to a decision here, the opposing interests must be weighed against each other in the individual case.[16] In this case, the court believes that the employer's interests prevail because it is not obliged to subordinate its own interests to those of the employee. Moreover, the employer's interest in denying the plaintiff access to the legal profession should certainly be taken into account. This may be ultimately true, but the argument put forward by the court seems somewhat artificial. Given that the employer is a company offering legal advice to trade union members on a large scale, it is reasonable to assume that the employer itself has the technical infrastructure for electronic communication with courts and authorities. In this case, it would not be a significant effort for the employer to provide the plaintiff with corresponding access. Under these circumstances, the plaintiff's considerable financial interest in being admitted to the bar, which is based on the savings in social security contributions, should clearly outweigh the resulting minimal effort on the part of the employer. Hence, an obligation on the part of the employer to cooperate by virtue of its duty of consideration (Section 241 (2) BGB) is plausible.

The employer's best reason for refusing to allow the plaintiff to participate in his admission as a lawyer could be sought in the basic political orientation of the DGB, which the plaintiff has promised to observe. The DGB has repeatedly stated that it stands up for the solidarity of all employees. It therefore rejects the idea that individual employees (especially high-earning ones) should withdraw from the community of solidarity and instead operate their own social welfare schemes.[17] If

[16] This is the established case law of the German Federal Labor Court (Bundesarbeitsgericht), cf. inter alia Judgment of 20 IV 2017, Case 3 AZR 179/16 with further references.

[17] For example, see DGB, *Bericht zur Rentenpolitik in Deutschland*, 2019, p. 27.

one recognizes a basic political conception of the DGB in this (which does not seem at all compelling[18]), it could be argued that the employer would betray its own political ideals by cooperating in admitting the plaintiff to the bar. This could justify the employer's refusal to grant the plaintiff a certificate of independence. However, if it wishes to rely on this, the employer must proceed consistently. If, on the other hand, the employer has already supported other employees in their admission to the bar and has thus expressed that their political ideals are not so important to him after all, they must therefore also support other legal professionals employed by him on their way to the bar and issue corresponding certificates of independence, as the Federal Labor Court ruled in a later decision.[19]

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[18] At least Section 2 of the statutes of the DGB, of which numerous objectives and tasks of the association are formulated, do not contain any position on pension policy (unlike on numerous other issues), cf. https://www.dgb.de/fileadmin/download_center/Satzung_des_Deutschen_Gewerkschaftsbundes-_Stand_Mai_2022.pdf. This could be taken as an indication that the DGB's positions on pensions are not among its "political principles," the observance of which the plaintiff has agreed to by signing the employment contract.

[19] Judgment of German Federal Labor Court (Bundesarbeitsgericht) of 27 IV 2021, Case 9 AZR 662/19.

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