

Pitfalls of altering working conditions when extending an employment contract beyond retirement age

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If the end of an employment contract is imminent due to the employee reaching statutory retirement age and the parties to the employment contract provided for a valid termination agreement in this case, they are often faced with the question of under which circumstances the employment contract could be continued, possibly on a fixed-term basis, beyond standard retirement age. In this respect, [section 41 sentence 3 German Social Code Book 6 \(SGB VI\)](#) provides the contracting parties with the option to enter into an agreement during the term of employment on postponing the termination date once – or if necessary several times – beyond the time when the employee reaches the statutory retirement age. Although this provision is fairly clear, there has been and are legal disputes over whether, when the contracting parties are “postponing” the termination date of the contract, they are restricted to only postponing the date or they are also permitted to alter other contractual content at the same time. The background to this dispute is the fact that regarding fixed-term employment contracts without justification on objective grounds, in accordance with the [case law of the highest level of the judiciary](#), an extension within the meaning of [section 14 \(2\) sentence 1 Act on Part-Time Work and Fixed-Term Employment \(Teilzeit- und Befristungsgesetz, TzBfG\)](#) does not exist if further contractual content is altered in addition to changing the termination date of the fixed-term employment contract.

Alterations to working conditions made when implementing a fixed-term extension of the employment contract beyond retirement age deemed harmless

The Baden-Württemberg Regional Labour Court (Landesarbeitsgericht, LAG) adopted a position in this dispute with its judgment dated 30 April 2020 ([case no.: 3 Sa 98/19](#)). According to the Baden-Württemberg LAG, an extension to the employment contract beyond statutory retirement age and the accompanying alterations to contractual working conditions are considered to be harmless with regard to the review of the validity of a fixed-term employment contract (Befristungskontrolle).

To begin with, the Baden-Württemberg LAG correctly noted that the wording of [section 41 sentence 3 SGB VI](#) does not in itself state anything regarding contractual content changes to working conditions. It then pointed out that, contrary to opposing views in academic literature, nothing else can be derived from the legislative materials in [section 41 sentence 3 SGB VI](#). The court argued further that the rationale and purpose of the provision is in itself a compelling reason to conclude that the provision in [section 41 sentence 3 SGB VI](#) does not preclude the working conditions being altered. This purpose is, explained the court, to enable the contracting parties to continue the employment contract past the retirement age and simultaneously alter the contractual content to the new situation in a flexible manner and with legal certainty. An employee who has already reached the statutory retirement age is less in need of protection than an employee who is at the beginning of their career and has to be protected from content alterations to the employment contract in the context of an extension of a fixed-term employment contract without justification on objective grounds within the meaning of [section 14 \(2\) sentence 1 TzBfG](#). Any risk of abuse, concluded the LAG, could be countered by the institutional abuse of rights principle.

Comments

The decision of the Baden-Württemberg LAG is very persuasive. The clear statement that it is precisely the interests of the parties to the employment contract which speak for such an interpretation of the standard, is welcomed. This decision provides, for the time being, legal certainty to those extensions that have already been carried out. However, the last word has yet to have been had on the matter, as an appeal against the decision has been lodged with the Federal Labour Court (Bundesarbeitsgericht, BAG). Until the BAG's decision, the remaining legal uncertainties should be countered with corresponding contractual drafting. We can only hope that the BAG also agrees with the opinion of the Baden-Württemberg LAG and that the reciprocal interests of the parties to employment contracts carry sufficient weight. We look forward to keeping you up to date on this matter.

Note

This overview is for general information only and does not substitute for specific legal advice in individual cases. Please contact the authors if you have any questions. Information on the authors can be found on our homepage www.goerg.de.

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