

# Legal Update

## Labor and Employment

### Fixed-Term Employment in the Absence of an Objective Reason and Previous Employment Pursuant to Section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts

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#### Headnote

In the absence of an objective reason for a definite term, fixed-term contracts for a total period of up to two years are now legal unless the employee in question has worked for the employer in the preceding three years.

#### Facts

The claimant started to study to become a teacher in the '90s. While she was a student, she worked for the Free State of Saxony – the employer in this case – for a total of 50 hours between 1 November 1999 and 31 January 2000, and she then applied to the Free State of Saxony for a teaching position after she completed her studies. Her application was accepted, and she was employed as a teacher from 1 August 2006 to 31 July 2008. She was expressly employed for a fixed term, and no reason was provided for this qualification (section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts). She then contested termination of her employment, relying on the fact that the third sentence of section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts prohibits employment for a definite term un-

der such circumstances. According to the wording of this legislation, a fixed-term contract is invalid in the absence of an objective reason in the case of candidates who have already worked for the same employer previously.

#### Decision

The Federal Labor Court dismissed the action in the final instance (Federal Labor Court, judgment of 6 April 2011, 7 AZR 716/09). The court rendered a decision that runs counter to the unambiguous wording of the second sentence of section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts. According to this decision, the term “previously” is not to be constructed to mean “in the entire past,” but rather as meaning within the past three years. The court argued that to construct the provision prohibiting employment of previous employees for a fixed term differently would defeat the intent and purpose of this law. The reason for this is that the purpose of the Act on Part-Time Employment and Fixed-Term Contracts enacted in 2001 was to prevent abusive use of successive fixed-term employment contracts. In addition, the court reasoned that

the idea behind employment for a fixed term was to enable certain groups of individuals to transition to the workforce. Excessively restrictive construction of the provision prohibiting fixed-term employment of former employees would thus, according to the court, defeat the purpose of the legislation. The court elaborated that there was no longer any danger of abuse of the use of fixed-term employment contracts after a period of three years. Furthermore, literal construction would unreasonably restrict the freedom of contract of the parties to employment contracts and, as a result, the freedom to choose freely one's vocation. After all employees entering the labor market would be at a disadvantage if they were to be excluded from consideration for a position – due to fears that a fixed term might prove illegal – simply because they had once worked for the same employer in the past. The court concluded that there was some question as to whether prohibition of employment of former employees for a fixed term would be constitutional if it were to turn out to be a barrier to employment.

## Comment

The decision is likely to be very much welcomed by both employees and employers, all the more so since it came as a surprise. The prohibition of employment of employees for a definite term seemed to be carved in stone. When the legislation was enacted, a few scholarly authors did plead the necessity of allowing the possibility of employment for a definite term. However, due to the clear wording of the law, this opinion did not prevail. More recently, strict construction of the prohibition of employment of previous employees for a fixed term has been found to constitute an unreasonable barrier to employment, and instances have also been reported in the media. For example, unemployed persons have been denied employment for a fixed term in the public sector. This was grounded in concern that fixed-term employment was not possible since the applicants had already worked for the same employer in the past. Applicants who find themselves in this situation will not be confronted with this problem in the future. In addition, employers will no longer have to fear that fixed-term employment contracts may be illegal because they may have “overlooked” a candidate's previous employment.



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