

## Is it Permissible to Fix the Term of Employment after a Person has reached Retirement Age?

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Cologne, 15.10.2015

### Decision

The Federal Labor Court was called upon in a case on 11 February 2015 to decide on the legality of fixed-term employment following the attainment of retirement age (Ref. 7 AZR 17/13). The original employment contract did not provide for employment to automatically terminate upon the employee reaching retirement age. It was not until after the employee had reached retirement age that the parties to the employment contract agreed on a number of time limits on his employment.

The Federal Labor Court referred the matter to the lower court, which was the Berlin-Brandenburg Higher Labor Court. The Federal Labor Court did, it is true, determine that fixed-term employment can be justified on the facts for personal reasons residing with an employee under § 14(1) sent. 2 no. 6 of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG). However, in the case at hand, there were insufficient findings of fact to enable a conclusive decision to be made. Furthermore, it held that the fact that the employee had reached retirement age was justification for the imposition of a fixed term. In addition, it found that the agreement on the fixed term must relate, at the time it is made, specifically to the employer's personnel planning arrangements.

### Implications for Practice

In order to be valid, agreements on fixed term employment that are made with employees who have reached retirement age must be based on an objective reason. According to § 14(1) sent. 2 no. 6 of the Act on Part-Time Employment and Fixed-Term Contracts, a time limitation can be justified on the basis of reasons residing with the employee.

The decision handed down by the Federal Labor Court shows that, where retirement age has been reached, the requirements for validity may in part vary according to the time that an agreement to fix the term of employment is concluded. In any event, the employee's eligibility to receive a pension from the statutory pension insurance scheme is a prerequisite for validity. Furthermore, it is necessary, in those cases where the agreement for a fixed term is made after the employee reaches retirement age, that such agreement is, at the time it is made, specifically connected with the employer's personnel planning arrangements, e.g. training of a replacement for the employee or for filling his position until a replacement can be found for him.

It is in principle necessary to take § 41 sent. 3 of Social Code VI (Sozialgesetzbuch – SGB VI) into account in those cases where the limit on the length of employment is based on the employee's reaching the statutory pension age. This legal provision allows parties who have incorporated a clause on retirement into their employment contract to postpone termination of the contract (if need be, multiple times) in order, for example, to make transitional arrangements until a successor for the employee can be found. However, the provision only applies to agreements limiting the length of employment which are concluded after 1 July 2014.

Although limitations on the term of employment that are based on the attainment of retirement age are in principle a form of age discrimination, this kind of unequal treatment is, however, permissible pursuant to § 10 sent. 3 no. 5 of the General Equal Treatment Act (AGG – Allgemeines Gleichbehandlungsgesetz). In any case, it is advisable to include a clause in the original employment contract which provides for its termination upon attainment of the statutory retirement age in order to be certain that the employment relationship will actu-

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ally end when the employee starts to draw a pension. If the employer thereafter wishes to enter into a fixed-term contract with the employee, the principles mentioned above should be taken into account in order to ensure

that the contract entered into is not one for an unlimited term that could remain in force for years.

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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