

Legal Update Labour and Employment

More stringent conditions for employers in the case of fixed-term employment without an objective reason?

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Background

The availability of fixed-term employment without an objective reason under § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge -TzBfG) is an important instrument under employment law since it allows employers to limit employment contracts to a maximum period of two years without an objective reason thereby increasing flexibility. However, the legislature added a catch to the statutory provision by inserting the words „previously“ because employment contracts with employees may only be made for a fixed term without objective reason if no previous employment agreement has ever been concluded between the parties. It was not uncommon in practice for an employee with a fixed-term employment contract without an objective reason for, e.g. two years, to successfully

challenge the validity of the fixed term after its expiry on the basis that the employer had employed him 20 years earlier as a student trainee for a period of four weeks. The rationale for and purpose of this unlimited prohibition on previous employment is not really clear to anyone and thus the Federal Labour Court recognised this when it held on 6 April 2011 that periods of previous employment are only relevant if they occurred within the last three years. Thus cases such as the one described above would not have been possible prior to 6 April 2011.

Now, however, in its judgment of 26 September 2013, the Baden-Württemberg Higher Labour Court has called this – at least from the point of view of employers – positive development into question. It is not prepared to accept a decision by the Federal Labour Court in which the Federal Labour Court completely ignores the statutory wording and reduces an unlimited ban on previous em-

ployment to a ban for a limited period of three years, without even the slightest support for this in the explanatory memorandum to the law let alone in the wording of the law itself. The Baden-Württemberg Higher Labour Court is therefore of the view that the Federal Labour Court should at the time have referred the case to the Federal Constitutional Court (Bundesverfassungsgericht) and, in addition, that it should have consulted the Grand Senate (Großen Senat) of the Federal Labour Court since the judgment rendered on 6 April 2011 by the Seventh Senate departs from the rulings of the Second Senate. The Baden-Württemberg Higher Labour Court has therefore allowed an appeal in a case in which an employee had been employed more than three years previously, and in this way has called upon the Federal Labour Court to deal with this topic again.

Headnote

The conclusion of a fixed-term employment contract without an objective reason is impermissible if the person concerned was previously employed by the same employer.

Facts

The plaintiff had worked for the defendant-employer for a short period of time during 2007 – in total four months – on the basis of a fixed-term employment contract. He re-applied to the defendant-employer in 2011 and was engaged again under a fixed-term contract. There were no objective reasons for the limitation. The fixed term was subsequently extended twice and totaled two years. Upon expiry of this time and the termination of the employment relationship, the plaintiff challenged the validity of the fixed term and sought a continuation of the employment relationship for an unlimited term.

The Baden-Württemberg Higher Labour Court ruled in the employee's favour in its judgment of 26 September 2013 (6 Sa 28/13).

Grounds

The Higher Labour Court based its judgment on the wording of the legislation. Sentence 2 of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts provides that employment for a fixed term without an objective reason is impermissible if the employee previously had either a fixed-term or an unlimited employment relationship with the same employer. In the present case, there was previous employment. The plaintiff-employee had already worked for the same employer in 2007.

Employment at that time was for four months and had been for a fixed term. In the court's view the existence of the previous employment meant that the employer was not permitted to re-engage the employee in 2011 for a fixed term without an objective reason. Furthermore, the court found that the wording of the law was unambiguous. The employee had in fact previously worked for the same employer. According to sentence 2 of § 14 (2) of the Act on Part-Time Employment and Fixed-Term Contracts, this prevented another contract for a fixed term without an objective reason.

Comments

The court's reasoning appears at first glance to be entirely conclusive, which leads one to ask what is so special about the decision of the Baden-Württemberg Higher Labour Court. The headnote reflects precisely the content of sentence 2 of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts. To this

extent, the judgment appears entirely self-evident. Apparently, the court only needed to take a look at the statute books to reach its decision.

At the same time, the judgment is, in the context of fixed-term employment law, surprising since it is tantamount to a declaration of war by the Swabian judges on their brethren at the Federal Labour Court in Erfurt. This is because the Higher Labour Court openly adopts a view contrary to the view espoused by the Federal Labour Court in its judgment. Not so long ago the latter had held in what was quite a „sensational“ judgment (judgment of 6 April 2011 (7 AZR 716/09)) that the word „previously“ really meant: „the last three years“. In what was an extremely controversial decision, the Federal Labour Court diverged from the clear language of the statute and restricted the „ban on previous employment“ to three years. As a result, previous employment with the same employer would only be an obstacle to another fixed term if it had occurred during the last three years.

It is difficult to find a basis in law for the judgment by the Seventh Senate of the Federal Labour Court as the word „previously“ is so unambiguous that it can hardly be construed as meaning „the last three years“. Nevertheless, as a policy judgment the judgment has met with some approval. Indeed one does have to concede that sentence 2 of § 14(2) of the Act on Part-Time Employ-

ment and Fixed-Term Contracts is questionable from the point of view of labour market policy since the ban on previous employment has been shown to slow down hiring. This is because it has led in the case of large employers in particular (including those in the public sector) to a situation where employers cannot engage a person for a fixed term for no other reason than the person has already worked for them many years ago. The Federal Labour Court's decision of 6 April 2011 has counteracted this effect and given many employees the chance of a job albeit one for a fixed term.

It will be very exciting to see how things develop. The Baden-Württemberg Higher Labour Court has allowed the appeal. If the Federal Labour Court really hears the appeal, it will be faced with a dilemma: should it decide in favor of the plain meaning of the statute, which would be the cleanest solution in terms of legal methodology, or should it defend its highly controversial but sensible in terms of labour market policy decision of 2011. Will the Federal Labour Court wind back the clock? As is so often the case, the legislature could clarify the legal situation by amending sentence 2 of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts and restricting the ban on previous employment in a manner that was reasonable from the point of view of labour market policy.

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 himself: Jens Völksen on +49 221 33660-503 or jvoelksen@goerg.de. For further information about the author visit our website www.goerg.com.

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