

Legal Update

Labour and employment

New Judgments on Successive Fixed-Term Employment Contracts

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We had already discussed the decision of the European Court of Justice (ECJ) on the legality of successive fixed-term employment contracts in the last issue of our Newsletter. Following the ECJ's decision to the effect that successive fixed-term employment contracts need not always be considered abusive practice, the decisions that were awaited from Germany's Federal Labor Court have now been forthcoming.

Facts 1

In one case, the plaintiff had been employed in the public sector for 11 years under a total of 13 temporary employment contracts. Each of the contracts was concluded for a limited period due to the need for a replacement for another employee as allowed by clause no. 3 of the second sentence of section 14(1) of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG).

Decision

In line with the decision of the ECJ, the Federal Labor Court (judgment of 18 July 2012 – 7 AZR 443/09) found that a permanent need for replacement personnel did not rule out the possibility of a legitimate need for an employee on a replacement basis and that the principles of objective assessment could be applied without reservation. The decision, which is available in the form of a press release, did, however, contain mention of the fact that a fixed-term employment contract may under certain circumstances be considered to constitute abusive practice and therefore be illegal even despite the existence of an objective reason. This would reflect application of the good faith requirement pursuant to section 242 of the German Civil Code (Bürgerliches Gesetzbuch – BGB). However, the court set a high bar for claiming abusive practice, requiring that all circumstances be taken into account in the individual case, in particular the total duration of employment and the number of successive fixed-term agreements with the same employer in the past.

In the case at hand, the court reasoned that the total duration of employment of more than 11 years and a total of 13 fixed-term contracts would indicate that the employer had abused the possibility of limiting the duration of employment in the case of temporary replacements. The Federal Labor Court therefore referred the case back to the Higher Labor Court in order to give the employer an opportunity to present special circumstances that would refute the seemingly obvious abusive practice.

Facts 2

I The Federal Labor Court's denial of the request of another plaintiff for judicial review of the validity of a

fixed-term employment contract was also consistent with the above ruling (judgment of 18 July 2012 – 7 AZR 783/10). The plaintiff had been employed from 1 March 2002 up to 30 November 2009 under four separate fixed-term employment contracts. The most recent contract, executed in January 2008, involved replacement of an employee on parental leave and therefore fell under clause no. 3 of the second sentence of section 14(1) of the Act on Part-Time Employment and Fixed-Term Contracts. In its decision, the court found that the successive fixed-term employment contracts were essentially legitimate. In view of the total duration of employment of seven years and nine months under only four fixed-term contracts, the Federal Labor Court also saw no indication of the existence of any impropriety.

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: Dr. Jessica Blattner +49 221 33660-503 or jblattner@goerg.de. For further information about the author visit our website www.goerg.com.

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