

Legal Update

Labour and Employment

Fixed-term employment of works council members without an objective reason under the Act on Part-Time Employment and Fixed-Term Contracts

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Headnote

According to § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), fixed-term employment contracts of works council members which are not based on objective reasons expire as of the agreed term as in the case of such contracts with other temporary employees. The scope of application of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts may not be purposively reduced, for example, for reasons of EU law. The provision governing deviations from collective agreements contained in the third sentence of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts, which also permits deviations that are disadvantageous for employees, is compatible with EU law.

Facts

The Federal Labour Court was called upon to decide whether it was legally permissible to terminate the fixed-term employment of a member of a works council which was not based on objective reasons as of the end of the fixed term.

The employment relationship between the plaintiff and the defendant, a security provider, fell under collective agreements between the Bundesverband Deutscher Wach- und Sicherheitsunternehmen e.V., an association of security providers, and the trade union ver.di. According to § 2 of the respective industry-wide collective bargaining agreement, fixed-term employment contracts may without an objective reason be extended up to a maximum of four times limited to a total duration of 42 months. In 2006, the parties entered into an employment relationship for a term extending up to 31 July

2007 under this collective agreement. The initial term was extended a first time up to 31 July 2008 and then up to 11 January 2010 under an agreement dated 8 April 2008. In September 2009, the plaintiff was elected to the company's works council as a deputy member.

The plaintiff sought, among other things, a declaration to the effect that the provision calling for a limited term was void.

Decision

The action was dismissed by the lower courts and then ultimately by the Federal Labour Court in the final instance. The Federal Labour Court ruled that the fixed-term provision was permissible under the provisions of the collective agreement, finding that § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts allows collective agreements that call for extensions and a maximum duration of such extensions that differ from what is otherwise permitted by law – even if to the disadvantage of individual employees – and that the provision governing deviations from collective agreements provides no occasion for reservations as regards compatibility with EU law.

According to the court, limitation of fixed-term employment to a maximum of 42 months without an objective reason as called for in the collective agreement and a maximum of four extensions represent moderate expansion of the possibilities as regards fixed-term employment without an objective reason allowed under § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts in the present case.

The court also ruled that the plaintiff's position as a member of a works council did not stand in the way of limitation of an employment relationship, arguing that

EU law requires no purposive interpretation of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts in the case of fixed-term employment relationships with members of works councils which are not based on objective reasons and the European directive does not require that employees' representatives be accorded greater protection against dismissal.

Comments

The decision of the Federal Labour Court is to be welcomed and confirms previous case law on the contractual autonomy of parties to collective agreements. According to the Munich Labour Court's decision of 8 October 2010, fixed-term employment of members of works councils without an objective reason was illegal under European law. However, the Federal Labour Court has now made it clear that § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts does indeed allow fixed-term employment of elected members of works councils without an objective reason since the application of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts is not restricted by EU law.

The Federal Labour Court does, however, make a strict distinction between fixed-term employment and discrimination due to works council membership on the one hand and fixed-term employment agreed – as in the present case – without any regard to works council membership on the other hand. As a result, the court therefore once again confirmed the priority of agreements limiting the duration of employment over rights to special protection, for mothers, works council representatives, etc. The Federal Labour Court held in that regard that fixed-term employment of a (deputy) works council representative without an objective reason would not offer adequate protection or security if termi-

nation of that employee's employment could be justified on the basis of works council membership or activities. If, however, that is not the case, even a smaller chance of regular employment or continuation of the employ-

ment relationship upon election to a works council would not justify any increase in protection.

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

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