Newsletter Labour and employment

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FOREWORD

Our fourth and final issue of this year's Newsletter takes a decision of the Higher Labour Court as grounds for re-examining the question of fixed-term employment without an objective reason. The Baden-Württemberg Higher Labour Court openly diverged from the case law of the Federal Labour Court and stated that the Federal Labour Court had in connection with "relaxed fixed-term employment" simply handed down a judgment that was inconsistent with the law.

In addition, we consider the distinction between works contracts and employment contracts, which is also an item on the agenda of the coalition partners. The Federal Labour Court has handed down a judgment that clarifies this issue and which by chance is relevant for the current political debate. Finally, we analyse a Federal Labour Court judgment that deals with cut-off date rules – i.e. the necessity for the existence of an employment relationship on the date a bonus is paid; this is a further judgment rendered in connection with the law governing general terms and conditions and serves to extend the existing case law.

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

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 employment to a ban for a limited period of 3 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 Employment 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.

Jens Völksen

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.

Federal Labour Court: Distinction between Employment Contracts, Agreements with Independent Contractors and Works Contracts

Headnote

A works contract involves an agreement to create or modify a physical object or to achieve specific results through work or the performance of a service (§ 631(2) of the German Civil Code (Bürgerliches Gesetzbuch – BGB). A works contract can hardly be considered to exist in the absence of a contractually defined work that can be attributed to a "contractor" as the product of his efforts and is amenable to formal reception since the "principal" would then first have to define the product of the service to be performed by the "contractor" by providing further instructions and thereby organise the work and the deployment of resources in a binding manner.

Facts

The Federal Labour Court again had to rule on the distinction between an employment relationship, a relationship with an independent contractor and a works contract. The plaintiff had been working for the Bavarian State Office for Historic Preservation (Bayerische Landesamt for Denkmalpflege – BLfD) with brief interruptions since 2005 under 10 contracts that were referred to as works contracts, the most recent of which dated from 1 April 2009 and called for completion of the agreed services on 30 November 2009. Under that contract, the plaintiff was responsible for the preparatory work required to expand and revise the official list of historic monuments in the State of Bavaria. This included but was not limited to registration of ongoing activities (excavations, etc.), assessment of the results of such activities and submission of suggestions for additions to or revision of the list of historic monuments. The plaintiff carried out these activities exclusively on the premises of the Bavarian State Office for Historic Preservation irrespective of the locations of the sites covered by the records. The plaintiff was not in possession of a key to the various premises. The plaintiff carried out his work on a regular basis during usual office hours between 07:30 and 17:00 CET at a PC workstation that was made available to him. After the last "works contract" expired as planned, the plaintiff asked the court to rule that no such works contract had existed and that the legal relationship existing between the parties qualified as employment and remained in effect beyond 30 November 2009.

Decision

As had the lower courts, the Federal Labour Court concurred with the opinion of the plaintiff. Despite the fact that the agreement between the parties was designated as a works contract, no such contract existed. Given the actual nature of the agreement, the plaintiff and the defendant were parties to an employment relationship. Since the plaintiff had already commenced work prior to the execution of the most recent written agreement of 1 April 2009, the employment relationship also continued beyond 30 November 2009. The court found that any understanding as regards a limited term would constitute

a formal error and therefore be invalid. According to the court, the nature of the legal relationship between the parties must be determined on the basis of an assessment of all relevant circumstances involved in the individual case. In cases in which the name given to a contract differs from the concrete situation, the latter is determinative. If two parties explicitly define work to be performed and its scope, a works contract can be assumed to exist. The court reasoned that a works contract will regularly not be considered to exist in the absence of a definition of the work that can be attributed to the contractor and is amenable to formal reception since the "principal" must in such cases then first organise the work to be performed in a binding manner through further instructions.

In the present case, according to the court, the underlying contractual documents show that the agreement did not call for the work to yield any specific results or outcome. It reasoned that a works contract could cover the creation of a complete inventory of monuments, but only part of the work required for the creation of such an inventory was covered by the contract at issue in the present case, and the contract also specified the means to be employed to carry out the work. After the court rejected application of the provisions of law governing works contracts in the present case, it went on to address the issue as to whether the relationship with the principal was in actual practice that of an employee or an independent contractor. In this connection, the Federal Labour Court relied primarily on the organisational integration of the activity into the operational organisation of the Bavarian State Office for Historic Preservation.

Due to this integration into an organisational structure and the duty to follow instructions, the activity must be considered to have been carried out in the context of an employment relationship and not in the capacity of an independent contractor.

Comment

The deployment of personnel under "works contracts" is a popular construction occasionally resorted to by employers to reduce costs. However, it can be difficult to distinguish between traditional employment relationships and agreements with independent contractors or works contracts or temporary employment in certain cases. In addition, the legal implications of misclassification of activities are often underestimated by the parties involved. This can result not only in significant back payments of compensation but also entail consequences for violation of regulatory provisions and criminal law, in particular when the services of temporary employees are illegally provided under feigned works contracts (§ 16 of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG); §§ 15, 15a of the Temporary Employment Act, § 266a of the Criminal Code (Strafgesetzbuch – StGB) and § 370 of the Fiscal Code (Abgabenordnung – AO)). The results of damage to the image of a company due to the use of feigned works contracts should also not be taken lightly in such situations, as the Daimler group recently found (Baden-Württemberg Higher Labour Court, judgment of 1 August 2013 - 2 Sa 6/13).

The nature of a works contract is such that it requires that the work performed under the contract yield a concrete "result" and not consist exclusively of an "effort".

The judgment of the Federal Labour Court clearly enunciates the pitfalls associated with the use of works contracts in the area of employment. The nature of a works contract is such that it requires that the work performed under the contract yield a concrete "result" and not consist exclusively of an "effort". In such cases, the contractor operates its own undertaking within another undertaking and assumes commensurate responsibility.

It is first necessary in such situations to determine whether the activity is of such a nature as to be amenable to achievement of self-contained results. As in the present case, this vital criterion is in practice often not met, and self-contained results that can be attributed to the contractor are found to be lacking. In such cases, other contractual understandings that are basically indicative of the existence of a works contract such as the extension of warranties or, in particular, the exercise of warranty rights will then regularly no longer suffice to buttress the assumption of the existence of a works contract.

The problem complex entailed by feigned works contracts will not become less relevant. The issues involved here not only occupy the labour courts at regular intervals, but also rank very high on the list of political priorities. This is also underscored by the coalition agreement adopted by the Grand Coalition for the 18th legislative period. Prevention of abuse of works contracts (and temporary employment) is even called for in the preamble to the agreement. In concrete terms, measures to increase the frequency and efficiency of controls by regulatory authorities are considered necessary. This is to be achieved not only through organizational and personnel measures, but also by anchoring in law the criteria that are considered significant and have been elaborated in the case law for distinguishing between the legitimate use of external personnel and abusive use. In particular as regards the latter point, it is at the very least doubtful whether this will actually come to pass in view of many legislative initiatives that have been announced but have never materialised in the past.

Dr. Christoph Müller

Federal Labour Court: Cut-Off Date Clauses for Special Payments of a Mixed Nature

Headnote

Special payments at the end of the year which are intended to reward employees for their loyalty to their employer as well as the work they have performed during the year ("special payments of a mixed nature") cannot be made contingent in general terms and conditions of business on the existence of an employment relationship on the 31st of December of the respective year (Federal Labour Court, judgment of 13 November 2013 – 10 AZR 848/12, which is currently only available in the form of a press release).

Facts

The plaintiff had been employed by the defendant, a publishing house, as a controller since 2006. Each year he received together with his November salary what was initially described as a "bonus", and from 2007 on as a "Christmas bonus", as a special payment in the amount of his November salary. Every autumn the defendant sent all of the employees a letter with "rules" governing such payments. The 2010 letter contained, among other things, a statement that payment "would be made to publishing house employees whose employment contracts had not been terminated as of 31 December 2010".

The letter provided that publishing house employees would receive an amount equal to 1/12 of their gross monthly salary for every calendar month of paid work for the company. Furthermore, the letter advised that employees who joined the company in the course of the year should receive the special payment under the rules on a pro rata basis. Following the end of his employment relationship on 30 September as a result of his termination, the plaintiff brought an action to obtain pro rata payment (9/12) of the special bonus.

Decision

Although the lower courts rejected his claim, the plaintiff succeeded on his appeal to the Federal Labour Court, which ordered the defendant to pay him the amount sought. The court held that since the bonus served simultaneously as remuneration for work performed during the year, the cut-off date rule in the guidelines discriminated unreasonably against the defendant and was therefore invalid under sentence 1 of § 307(1) of the German Civil Code. In addition, the court was of the opinion that the rule conflicted with the underlying idea in § 611(1) of the German Civil Code because it deprived employees who leave the company before the end of the year of salary they have already earned. This is because the right to remuneration was acquired monthly on a pro rata basis according to the guidelines. Furthermore, the court found that there was nothing to indicate that the special payment was intended primarily for the period after the plaintiff left the company or was supposed to be for special work which the plaintiff failed to perform.

Comments

This decision of the Federal Labour Court, which is currently only available as a press release, would seem to indicate that the court is maintaining its most recent case law on cut-off date rules in respect of special payments of a mixed nature.

According to the Federal Labour Court's previous case law, it was basically permissible to subject the making of special payments – including those of a mixed nature – to cut-off date clauses provided that the payments did not only constitute consideration for work already performed. In its decision of 18 January 2012, the Federal Labour Court diverged from this case law in a case where the special payment of a mixed nature was made

dependent on the employment contract not having been terminated on a date outside of the reference period of the special payment, namely the 15th of April of the following year (Federal Labour Court, judgment of 18 January 2012 - 10 AZR 612/10). In this case, the Federal Labour Court based its decision on the fact that the cut-off date rule at issue conflicted with the underlying idea in § 611(1) of the German Civil Code because it deprived employees of salary which they had already earned. While the lower court had assumed that the principles outlined in the decision of 18 January 2012 could not be applied to a situation where – as in the case at issue – the cut-off date fell on the 31st of December and thus was within the reference period for the bonus, the Federal Labour Court expressly applied this reasoning to such a case for the first time. The written grounds for the judgment are not yet available. However, according to the press release, the Federal Labour Court appears to have again based its decision largely on the fact that employees who leave the company before the end of the year cannot be deprived of salary already earned through the application of a cut-off date rule. Since this reasoning in the case of special payments of a mixed nature can be applied to every cut-off date rule, it can generally be assumed that cut-off date clauses in the case of special payments of a mixed nature will be invalid in the future.

As a result, cut-off date clauses are likely to only be permissible where the purpose of the special payment is solely to reward past and/or future employee loyalty. In this connection, the Federal Labour Court held in a recent decision that the fact that a special payment requires solely that the employment relationship not have been terminated on the day of payment does not constitute unreasonable discrimination even if responsibility for termination (for example, in the case of dismissal due to redundancy) does not necessarily have to lie with the employee (Federal Labour Court , judgment of 18 January 2012 – 10 AZR 667/10).

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