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NEWSLETTER

GÖRG
YOUR BUSINESS LAW FIRM

LABOUR AND EMPLOYMENT LAW

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Sports and labour law?

With the so-called „Müller decision“ brought before the German Federal Labour Court (Bundesarbeitsgericht, „BAG“) in 2018 (Reference: 7 AZR 312/16), the world of professional sports was thrust into the spotlight for labour law concerns, though only for a brief time. What were the circumstances? Heinz Müller, goalkeeper and contract player for 1. FSV Mainz 05 at the time, contested the fixed term in his employment contract, a common regulation in professional sports that he considered unlawful,

and progressed through successive stages of appeal all the way to the Federal Labour Court. Ultimately, the Federal Labour Court rejected the appeal filed against the decision of the Rheinland-Pfalz District Court. In the view of the Erfurt judges, the high-level athletic performance demanded of professional athletes cannot be delivered on a long-term basis and therefore justifies fixed-term employment based on factual reasons pursuant to Section 14 (1) No. 4 of the Law on Part-Time Work and Temporary Employment Contracts (Teilzeit- und Befristungsgesetz, „TzBfG“) owing to the „unique nature of the work“. Despite an initial media response, the legal debate concerning fixed-term employment and labour law in professional sports as a whole has abated once again. This is likely due in part to the outcome of the Federal Labour Court case in question, but also can largely be attributed to the particular framework conditions that apply in the world of professional sports. From a legal perspective, there are numerous labour law questions in professional sports that continue to receive little attention, and considerable legal uncertainties remain.

Federal Labour Court/Cologne District Court: Possibilities for fixed-term employment of (top-class) athletes

The Federal Labour Court assumes the possibility of fixed terms for the employment contracts of professional athletes pursuant to the Law on Part-Time Work and Temporary Employment Contracts („TzBfG“). This law only applies because professional athletes, at least contract players attached to a specific team, are treated as employees under established opinion despite the often exorbitant salaries and unique characteristics of professional sports. In the view of the Federal Labour Court, fixed terms for employment contracts are generally possible for the following reasons under Section 14 (1) No. 4 TzBfG as a result of the „unique nature of the work“:

- It is not possible to retain the peak athletic performance required through retirement age. This is already evident at the start of a contract player‘s career.
- The fixed term is also in the interest of the players because flexible arrangement of the squad can make the team more successful. Furthermore, „systematic fixed terms“ among contract players regularly open up new employment opportunities for players with other clubs.
- Ultimately, the rotation caused by fixed terms ensures revenue for athletic funds and the possibility of high earnings.
- When players are integrated into the international transfer system, the possibility of fixed terms is necessary to prevent distortion of competition at the international level.

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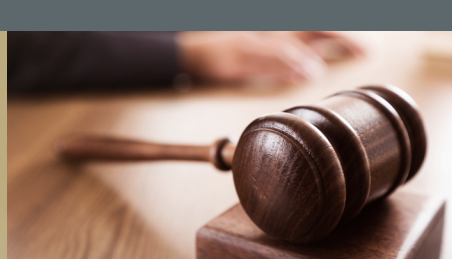

Although the outcome should be supported, the Federal Labour Court's dogmatic justification is only partially convincing and leaves considerable room for criticism. One of the court's less convincing arguments, for example, is that fixed terms are also in the players' interests since this ensures regular vacancies in other clubs. This dynamic is not a unique characteristic of (professional) sports, but rather a general principle of supply and demand that could be applied to many professional fields. The Federal Labour Court's assertion that „fixed terms are common in professional sports" cannot be considered a substantiating argument, since it is merely a description of the current actual practice. Ultimately, the question arises as to whether the argument of „temporally limited performance capacity" would have to be invoked for other work involving high physical strain (e.g. tilers or roofers).

The Federal Labour Court's decision did not address the time limits for fixed terms and limits for successive fixed terms of a short duration. This is in line with settled case law, which does not generally provide for a separate review as to whether the specific duration of the fixed term is objectively justified. However, the duration of the fixed term is inseparably connected to the objective reasons and must be oriented on this basis. In grey areas, such as players at the start of their careers who are expected to play at the same high level for many years, it is reasonable and necessary to consider the objective justification for the specific duration of the fixed term.

Ultimately, the Cologne District Court issued a decision on 15 August 2018 (Reference: 11 Sa 991/17) extending the Federal Labour Court's justifying logic to apply to regional leagues. The court's reasoning is likely consistent. At the same time, transporting the issue into „normal pay ranges" takes it away from the area of top earners, who are easy to accept as exceptional cases. The criticisms outlined above against the Federal Labour Court's argumentation apply equally here, while the argument of integration in an international transfer system is not relevant for players in lower leagues.

General possibilities of fixed terms in the area of sports?

If the possibility of fixed terms is accepted as an outcome, a exciting follow-up question arises: what happens with other „protagonists" in the field of professional sports? Can the possibility of fixed-term employment also be applied with the same reasoning to trainers, co-trainers, coaches, physiotherapists, sports directors, managers or other staff members? Justified doubts will likely arise here. Considering the employment relationships of trainers or coaches, most of the arguments provided for the possibility of employing contract athletes for fixed terms are impossible to transfer. This is true for at least one of the central arguments, namely that it is not possible to maintain the peak performance required through retirement age. This assumption can be refuted by a number of examples from practice. Just look at football trainers Jupp Heynckes or Alex Ferguson, who were able to motivate their teams to achieve absolute peak performance even after reaching retirement age. Furthermore, since trainers are much less integrated in international transfer systems than players, that line of reasoning also fails to apply. The reasoning cited by the Federal Labour Court in a decision from 1999 (Reference: 12 Sa 5/96) and in discussions among legal scholars, namely that trainers could suffer a certain loss of motivation after several years, seems to be of a speculative nature in view of the trainers mentioned above. At any rate, this reasoning does not apply for trainers in team sports involving a rolling system of players where trainers have the opportunity or obligation of working with new players again and again. This is most apparent for team trainers in the field of youth sports, where player squads are completely exchanged every one to two years and it is common for players to remain on the team for a shorter time than their trainer. For this reason, scholarly debate will need to take a closer look at the extent to which Section 14 (1) No. 4 TzBfG, that is, the „unique nature of the work", can serve as grounds for fixed-term employment, particularly given that the strict requirements for the specific objective reasons justifying fixed-term employment have been emphasised again by the ECJ in recent years.

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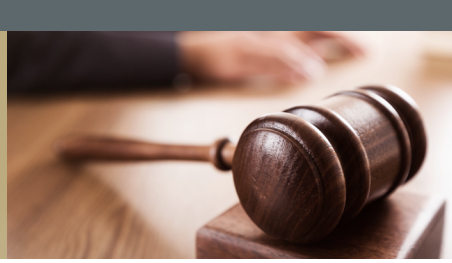

Conclusion: Legal grey area

In the final analysis, it must first be stated that with the „Müller Decision", the BAG has established important cornerstones for the possibilities of fixed-term employment for professional athletes. Nevertheless, it appears that considerable legal uncertainties remain concerning the possibilities of fixed-term employment contracts for trainers, and likely for managers, sports directors, coaches and other staff members. It therefore remains to be seen how discussions will develop among legal scholars concerning this issue and other topics in professional sports labour law (contractual penalties, release, paid leave entitlements etc.). Overall, some of the specific requirements are difficult to fit in the general regulatory framework for labour law. It would be unreasonable to expect another court ruling in the near future to offer legal certainty in line with a second „Müller Decision". This applies for issues of fixed-term employment as well as other topics in labour law. This is primarily due to the „particular circumstances in professional sports" mentioned above. The extremely limited labour market in this field, combined with the attractive nature of the relevant jobs, are likely to make employees think twice in the future before demanding a judicial review of grey areas in labour law that could attract media attention and leave them permanently blacklisted in the sector. On the other hand, the clubs themselves have little interest in publicly requesting labour courts to resolve matters of labour law, which could establish precedents.

PHILLIP RASZAWITZ

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Unfounded fixed-term contracts: limits of the previous employment ban

Decision

The German Federal Labour Court has once again issued a decision concerning the validity of unfounded fixed-term contracts and has specified the limits of the ban on previous employment (BAG 22.08.2019 – 7 AZR 452/17).
In the case underlying the decision, an employer re-hired an employee 22 years after the employment relationship had ended. The parties agreed on fixed-term employment. However, there was no legally acknowledged material reason underlying the fixed term. Fixed-term contracts without material reasons pursuant to Section 14 (2) of the Law on Part-Time Work and Temporary Employment Contracts (Teilzeit- und Befristungsgesetz, „TzBfG“) are permitted as a rule unless a previous employment relationship existed with the same employer. Due to the significant amount of time between the two periods of employment in the case in question, the Federal Labour Court restricted the ban on previous employment and declared the unfounded fixed-term contract to be valid.

Practical relevance

With this decision, the Federal Labour Court is implementing the ruling of the Federal Constitutional Court (BVerfG 06.06.2018 – 1 BvL 7/14, 1 BvR 1375/14). In that ruling, the Federal Constitutional Court declared that the Federal Labour Court‘s case law, which states that the ban on prior employment pursuant to Section 14 (2) Sentence 2 TzBfG only applies for employment relationships up to 3 years in the past, constitutes an unlawful judicial development of the law and is therefore unconstitutional. However, the Federal Constitutional Court upheld the Federal Labour Court‘s assertion that the ban on previous employment cannot be extended to an undefined point in the past. In cases of previous employment that occurred „a very long time ago“, it is unreasonable for the employer to apply the ban on previous employment, and an unfounded fixed-term contract is permitted as an exception for the new employment relationship.

The Federal Labour Court already addressed the question of what is considered a „very long“ time in this context with two decisions at the beginning of last year (BAG 23.01.2019 – 7 AZR 13/17 and 7 AZR 733/16). In these cases, the court declared unfounded fixed-term contracts to be unlawful five and eight years, respectively, after previous employment with the same employer. Now the Federal Labour Court has further specified the criteria for unreasonable time periods, clarifying that in any case, a prior employment more than 22 years in the past is no longer subject to the ban on previous employment. For cases in between these periods involving a previous employment more than eight years but less than 22 years in the past, the legal situation is still unclear. It remains to be seen how the Federal Labour Court will further substantiate this issue.

Nevertheless, it is still recommended for employers to ask employees about any previous employment at the company during the hiring process and to obtain written confirmation from them regarding the absence of previous employment. If these statements prove to be untrue, the employment contract with an invalid fixed term may be terminated by rescission in the individual case.

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PIA PRACHT

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Are employers obligated to notify employees with long-term illnesses regarding paid leave that is going to lapse?

With its judgment of 19 February 2019 (Reference: 9 AZR 541/15), following the specifications of the ECJ, the Federal Labour Court has ruled that employers are generally obligated to request their employees to make use of leave days that are at risk of lapsing and to inform them that unused leave days will generally be forfeited at the end of the year or by 31 March of the following year if they carry over. If the employer fails to do so, the employee's leave entitlement will not expire.

The Hamm District Court has now addressed the question of whether this applies to the expiration of leave days for employees with long-term illnesses (Hamm District Court, ruling of 24.07.2019, Reference: 5 Sa 676/19).

The decision

In the case discussed here, the plaintiff had been continuously ill since 2017 and was unable to make use of her remaining paid leave entitlement of 14 days for that year. She therefore requested her employer to compensate her for the unused period of leave from 2017 amounting to 14 days. When her employer refused to do so, she filed legal action for performance claiming that she was still entitled to 14 days of paid leave for the 2017 calendar year.

In particular, the plaintiff asserted that her remaining leave entitlement from 2017 had not expired since the employer failed to inform her of their impending expiration.

The Hamm District Court, like the labour court of first instance before it, rejected the plaintiff's reasoning. The employer was not obligated to request the plaintiff to use her paid leave days or to inform her regarding their potential expiration, nor would this have been possible, since the plaintiff was on long-term sick leave and would not have been able to use her paid leave anyway. It would only make sense to inform the employee that unused leave days were going to expire if the employee could

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respond to the request by actually taking leave. In case of long-term incapacity for work, this is not possible.

As a result, the corresponding instructions would have only been required once the employee was again able to work, which did not occur.

Practical relevance

The Hamm District Court appropriately developed the case law of the Federal Labour Court by coupling the employer's duty to instruct with the employee's ability to take leave. If it is impossible to grant leave for reasons owing to the employee, such as a long-term illness, the employer has no duty to instruct. However, if the employee recovers, the duty to instruct applies once more.

The employee must be informed of the consequences of unused leave in a clear and timely manner with reference to the specific circumstances.

Abstract instructions in the employment contract, a bulletin or a collective agreement (for instance a works agreement) are not generally considered sufficient.

In its judgment on 19 February 2019 (Reference: 9 AZR 541/15), the Federal Labour Court states that the employer can regularly fulfil the duty to instruct by notifying the employee at the start of the calendar year in text form (email is sufficient) regarding the employee's leave entitlement for the calendar year, requesting the employee to apply for annual leave so that it can be used during the ongoing leave year and inform the employee of the consequences that will occur if this leave is not applied for as requested.

DR. HAGEN STRIPPELMANN

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No leave entitlement during the release phase of partial retirement

Decision

In its judgment of 24 September 2019 ((BAG 24 September 2019 – 9 AZR 481/18), the Federal Labour Court decided that employees in the release phase of partial retirement are not entitled to leave. The case underlying the

decision involved an employee who was initially employed full-time. Then a change to partial retirement was agreed starting 1 December 2014 that was planned to last until 31 July 2017. According to the block model agreed upon, the employee would work full-time up to and including March 2016 and then be released until 31 July 2017. For the entire period of partial retirement, the employee would receive his salary calculated based on the reduced working time. Under the employment contract, the employee was entitled to 30 annual leave days in principle. In 2016, the employer only granted a pro rata leave entitlement. No leave entitlement was granted or settled for the year 2017. However, the employee was of the opinion that his full annual leave entitlement was owed for his release years as well, that is, 2016 and 2017. Since granting leave after the end of the employment relationship would no longer be possible, the employer would be required to settle the claim.

Practical relevance

After a recent change in case law concerning the establishment of leave entitlements during special leave (for more on this, see Edition 02/2019 of the Labour Law newsletter), the Federal Labour Court has now made another decision regarding a different leave issue with practical relevance and denied the leave entitlement of employees during the release phase of partial retirement due to their lack of a work obligation.

By reducing working hours, partial retirement models facilitate a smooth transition into retirement. The block model is particularly attractive for many employers and employees. This model is divided into a work phase during which the employee works full time and a release phase during which the employee is released from work. The employee is remunerated continuously.

With its latest decision, the Federal Labour Court has clarified that no leave entitlement is established during the release phase of partial retirement and once more clearly stated that the statutory leave entitlement pursuant to Section 3 (1) BurlG (Federal Leave Act) is determined

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based on the number of days worked during the leave year (calculation formula: 24 working days x number of days with

work duties divided by 312 working days). With a five-day working week, this results in a statutory leave entitlement of 20 days. However, in the release phase of partial retirement there are no work duties, meaning that „zero" working days could be applied for this period and therefore no leave entitlement is established. If the transition from the

work phase to the release phase occurs during the calendar year, a proportional leave entitlement is granted with respect to the work phase. The same evidently applies for extra contractual leave exceeding the statutory leave as long as the parties have not reached any deviating agreements in this regard.

As a result, employers will no longer have to worry that they might be confronted with leave settlement claims after the end of partial retirement periods..

PIA PRACHT

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Obstructive works councils, or: When co-determination is too stubborn to succeed

Decision/problem

A remarkable case came before the Federal Labour Court on 12 March 2019 (Reference: 1 ABR 42/17). Specifically, the case addressed whether a works council that had persistently refused to exercise its co-determination right pursuant to Section 87 (1) No. 2 BetrVG (Works Constitution Act) in the past when drawing up the duty roster could hold the employer accountable for a failure to grant this co-determination right. The decision was based on the following circumstances:

The employer operates a hospital. Once a month, the employer submitted the duty rosters for the following month to the works council and requested the council's approval. The works council rejected most of the duty rosters and no agreement was reached. As a result, the employer was forced to bring about an agreement by involving the arbitration committee (Section 87 (2) BetrVG).

In response, the works council formed an unprecedented blockade:

- The works council refused to voluntary collaborate in establishing an arbitration committee
- The works council lodged a complaint against the appointment resolution of the labour court (Section 100 ArbGG [Labour Courts Act])
- The works council then refused to collaborate in scheduling the arbitration board
- At times, the works council refused to delegate any committee members
- The works council refused to participate in factual argumentation with the arbitration board

Due to the extreme obstructive conduct of the works council, it was impossible to implement co-determined duty rosters over a period of months. For this reason, the employer was forced to implement the duty rosters unilaterally in order to guarantee staff deployment for patient care in the hospital.Ultimately, the works council took the employer to court due to the employer's unauthorised actions and was even successful in two instances. However, the works council was denied by the Federal Labour Court. The court stated the following in its justification: First, the Federal Labour Court underscored that the employer must comply with the co-determination process when drawing up duty rosters. In case of infringement, the works council is entitled to assert a claim for injunctive relief. Due to the obstructive conduct in the individual case, however, the court rejected the works council's petition for injunctive relief. The conduct of the works council manifestly violated the principle of cooperation in good faith. Pursuant to Section 74 (1) Sentence 2 BetrVG there is an obligation to negotiate contested matters with a genuine intention of reaching an agreement. The works council continually violated this obligation. As a result, the petition for injunctive relief against the employer was denied due to unlawful exercise of rights (Section 242 BGB). The Federal Labour Court explicitly declares that the works council exhibited a „blockade mentality“ and „obstructive conduct“.
In other words: The works council's co-determination right failed because of its own stubbornness.

Practical relevance

The extent of the blockade mentality evidenced by the works council, which thwarted the creation of co-determined duty rosters over the course of months, is shocking in itself. But the fact that the works council's petition

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for injunctive relief succeeded in two instances despite this mentality is difficult to understand, even if the works council was concerned with drawing attention to a staffing shortage. The 1st Court Panel of the Federal Labour Court found appropriate words for this conduct: This kind of blockade, particularly in a hospital, is irresponsible. Nevertheless, the practical relevance of this decision will remain limited in scope. Employers should not view this decision as a carte blanche to unilaterally implement duty rosters just because there is a little friction in their cooperation with the works council. In its decision, the Federal Labour Court therefore explicitly underscored that an objection against the unlawful exercise of rights can only be considered „in serious, strictly limited exceptional cases". When drawing up duty rosters, the following continues to apply:
The employer must adopt preventive organisational measures to ensure that the co-determination process can be concluded in good time before the duty rosters are implemented. This process also includes conducting proceedings with an arbitration board where necessary. Although it can be a difficult road, the process must be followed. To avoid losing time, it is recommended to establish a permanent arbitration board (Section 76 (1) Sentence 2 BetrVG). This board can convene in a timely fashion if there is disagreement when drawing up the duty roster. It is also recommended to conclude a framework agreement for duty roster planning that governs the procedure and principles of duty planning in advance.

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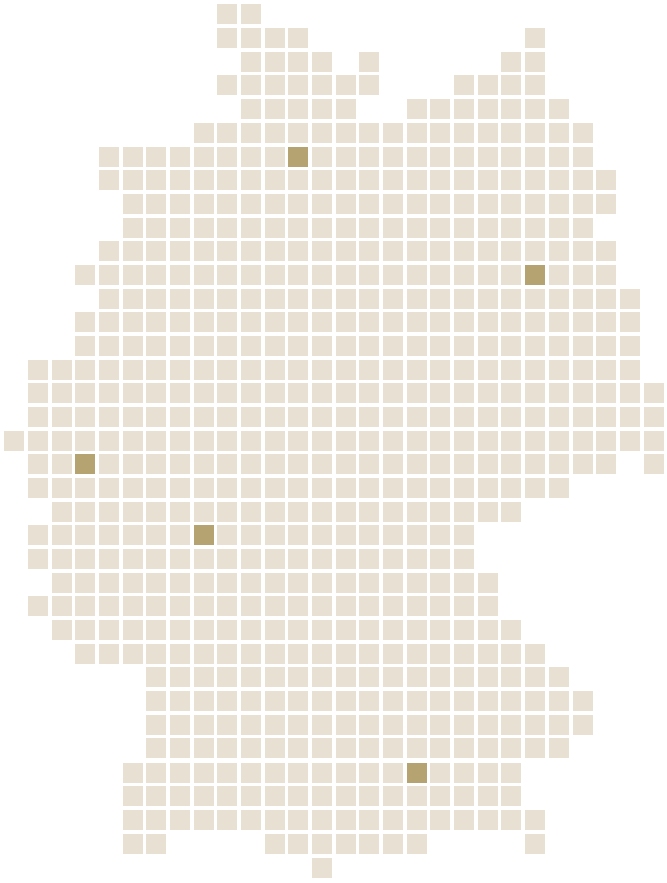

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