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Pitfalls when drafting probationary periods as part of fixed term employment contracts

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Fixed term employment contracts are popular in practice as they offer certain benefits, especially to employers. Fixed term employment contracts frequently include probationary periods during which the (fixed term) employment contract may be terminated (during the probationary period) with a (reduced) notice period of two weeks. As a fixed term employment contract naturally only lasts for a certain period of time the question that inevitably always arises is how long is a probationary period allowed to be in a fixed term employment contract and what consequences are there to a probationary period that is too long. Does the statutory notice period or the notice period agreed in the employment contract simply apply here, meaning that the employment contract may be terminated with a notice period of four weeks to the 15th or the end of the month as a general rule? Or is the right to ordinary termination partly or even completely excluded in such a case?

Starting position

The starting position for these deliberations is the statutory provisions in section 622 (3) of the German Civil Code (Bürgerliches Gesetzbuch, BGB) and section 15 (3) and (4) of the Act on Part-Time Work and Fixed-Term Employment (Teilzeit- und Befristungsgesetz, TzBfG).

In accordance with section 15 (4) TzBfG, a fixed term employment contract is only subject to ordinary termination if this is individually agreed in the contract (or in an applicable collective agreement). The parties to the employment contract must then explicitly provide for the right of ordinary termination in the employment contract in order to be able to ordinarily terminate the fixed term employment contract. If this is not the case, ordinary termination is excluded and the fixed term employment contract will first cease on the end date stipulated in the contract. In particular, problems arise when the right of ordinary termination has been regulated in conjunction with a probationary period. Pursuant to section 622 (3) BGB an employment contract may be terminated with a notice period of two weeks during an agreed probationary period of no later than six months.

A new regulation came into force on 1 August 2022 with section 15 (3) TzBfG. This states that if a fixed term employment contract is agreed with a probationary period, the probationary period must be proportional to the expected duration of the fixed term and the type of work.

This provision implemented Art. 8 (2) sentence 1 of the Directive (EU) 2019/1152 of the

European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union ("*Working Conditions Directive*"). Neither the wording of Art. 8 (2) sentence 1 of the Directive nor section 15 (3) TzBfG contains any assistance in determining the permitted maximum duration of a probationary period during a fixed term employment contract. The uncertainty of the EU law was also acknowledged by the German legislature when implementing the Directive, though a more precise arrangement and confirmation of the actual requirements of section 15 (3) TzBfG was not implemented, but rather was placed in the hands of the Labour Courts.

Previous decisions of the LAGs

To date only a few LAGs have dealt with the issue of how long of a probationary period is (still) reasonable for fixed term employment contracts and stated what a corresponding period is in practice since the new regulation in section 15 (3) TzBfG came into force.

On 2 July 2024, the Berlin-Brandenburg LAG (case no.: 19 Sa 1150/23) held that when the duration of the fixed term is one year the probationary period may be no longer than three months or 25% of the duration of the fixed term, but deviations from this may be possible on an individual basis. It held that agreeing a probationary period of four months for a one-year fixed term employment contract was too long in the case at hand and therefore invalid. The employment contract could therefore not be terminated with the reduced notice period of two weeks, but rather required the standard notice period of four weeks. The LAG ruled that the invalidity of the agreed probationary period also did not result in the ordinary right of termination being excluded because the parties had provided for termination provisions in the employment contract independent of the agreed probationary period.

However, the Schleswig-Holstein LAG ruled judgment dated 18 October 2023 (case no.: 3 Sa 81/23) that a probationary period is reasonable if it is half the length of the fixed term, meaning that a probationary period of six months was generally in order in the event of a fixed term employment contract of one year. The characteristic that applied in the case underlying the ruling was that the probationary period, during which the employment contract could be terminated with a reduced notice period, was six months and following this the employment contract was to convert into a permanent employment contract without a fixed duration if the employment contract continued after completion of the probationary period. In this case the probationary period corresponded to the entire fixed term. The Schleswig-Holstein LAG allowed the appeal on a point of law to the BAG due to the fundamental nature of the legal issue and lack of any previous case law on this issue at highest level of the judicature.

The BAG's decision

The appeal on a point of law was the BAG's first opportunity to deal with the legal issue of how long of a probationary period is (still) reasonable for a fixed term employment contract and what the legal consequences of an invalid probationary period agreement are. In its judgment dated 5 December 2024 (case no.: 2 AZR 275/23) the BAG ruled that a probationary period agreed as part of a fixed term employment contract may not correspond to the entire fixed term, without special circumstances being involved. Regrettably, this solution meant that the BAG did not have to conclusively rule on which principles applied to the relationship between the duration of a fixed term employment contract and the agreed probationary period.

Thus, there continues to remain a definite legal uncertainty in this area. However, the BAG also clarified that if an agreement on the probationary period or a supplementary agreement contained a provision regarding ending the fixed term employment contract by way of ordinary termination, the validity of such a provision remains unaffected by the invalidity of a disproportionately long probationary period. The BAG stated that the disproportionate duration of the probationary period may then only result in the termination of the employment contract not ending with the (reduced) notice period (of two weeks) in section 622 (3) BGB.

Comments

Even if the BAG had not conclusively commented on the question of what principles apply to the relationship between the duration of a fixed term employment contract and the agreed probationary period and also did not provide any concrete guidelines in this context, it has at least clarified that generally it is unreasonable for the duration of the probationary period and the fixed term to be correlated and is therefore disproportionate, subject to particular circumstances on an individual basis. However, a disproportionately long probationary period does not lead to a general exclusion of right of ordinary termination, in particular in accordance with the decision by the BAG, but merely that the reduced notice period of two weeks does not apply and instead the somewhat longer statutory standard notice period applies (in general). The termination of the employment contract will merely apply somewhat later, and in any case does not continue for the entire fixed term (any more).

Following this ruling of the BAG and the past decisions of the LAGs employers are advised that for a fixed term employment contract they agree a probationary period of maximum of 25% of the fixed term. Furthermore, and even more importantly, in a (fixed term) employment contract a clear distinction should be made both linguistically as well as systematically between the probationary period on the one hand and the right to ordinary termination on the other hand. In any case this will ensure that the (fixed term) employment contract may also be ordinarily terminated. In their fixed term employment contracts employers should therefore draft multiple independent subsections where on the one hand it is regulated that a probationary period of, for example, three months (depending on the duration of the fixed term) applies, within which the employment contract may be terminated with a notice period of two weeks and on the other hand is (additionally) regulated that the employment contract may be ordinarily terminated (subject to the applicable notice periods).

With this last point care should taken that the provisions are clear, understandable and above all independent regulations which linguistically do not include any other additional regulations. It should be ensured that the regulation does not fall victim to invalidity due to any potential lack of transparency.

If these requirements are not met, employers will also risk the probationary period being not only disproportionately long and thus invalid, but also that the fixed term employment contract cannot be ordinarily terminated, thereby meaning it will only end on the end date stipulated in the employment contract. This may result in significant economic consequences for employers, depending on how long the fixed term employment contract was supposed to last, if the (invalidly terminated) employment contract continues and the employee can no longer be meaningfully employed or if the invalidity of the termination is first discovered after the expiry of the fixed term and alongside (retroactive) salary payments the employee's claims to annual leave entitlement, bonuses and potentially

additional claims to payment for the duration of the continued employment contract must also be settled.

Therefore, particular care must be taken when drafting fixed term employment contracts, especially in conjunction with probationary periods. We would be happy to assist you in these matters.

Note

This overview is solely provided for information purposes and should not replace professional legal advice. In case of any queries, please get in touch with your designated GÖRG contact person or the author Timo Rehfisch on +4922133660541 or trehfisch@goerg.de. Information about the author is available on our website www.goerg.de.

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