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# Action required for fixed-term employment relationships without an objective reason for the fixed term: 3-year limit for prohibition of prior employment overturned

Employment law – in brief...

The German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) restricted the option of concluding fixed-term employment contracts without an objective reason with applicants who have worked for the employer previously (German Federal Constitutional Court judgment of 6 June 2018 – 1 BvL 7/14 and 1 BvR 1375/14). This has consequences for current fixed-term contracts and for the future hiring practice.

## **Statutory prohibition of prior employment**

According to Section 14 (2) sentence 2 German Part-Time and Fixed-Term Employment Act (*TzBfG*), fixing the term of an employment contract without an objective reason is impermissible if the employee had a fixed-term or permanent employment relationship with the same employer already previously. The prohibition of prior employment is supposed to prevent successive fixed-term employment contracts and a circumvention of the protection against unfair dismissal. This means that an applicant may not be hired (again) on a fixed-term basis without an objective reason if he or she had been employed by the company already many years previously.

## **Previous rulings of the German Federal Labour Court (*Bundesarbeitsgericht, BAG*)**

Since 2011 the Federal Labour Court's interpretation in this regard has been restrictive: the prohibition of prior employment was not supposed to apply and a (new) fixed-term contract without objective reason was supposed to be permissible if the previous employment relationship had ended more than three years earlier

(Federal Labour Court, judgment of 6 April 2011 – 7 AZR 716/09). This three-year limit developed by the courts was facing considerable criticism; in particular, numerous lower courts did not follow the ruling of the Federal Labour Court because the wording of Section 14 (2) sentence 2 German Part-Time and Fixed-Term Employment Act did not provide for a limitation of the prohibition of prior employment in terms of time (most recently, Saxony-Anhalt Regional Labour Court, judgment of 29 May 2017 – 6 Sa 405/15; Baden-Württemberg Regional Labour Court on 16 November 2016 – 17a Sa 14/16).

## **Decision by the Federal Constitutional Court**

Based on preliminary proceedings before the Braunschweig Labour Court and a complaint about a constitutional violation filed by an employee, the Federal Constitutional Court had to review whether the statutory prohibition of prior employment in general and the three-year limit established by the Federal Labour Court are in line with constitutional law.

## **Prohibition of prior employment in line with constitutional law**

The Federal Constitutional Court came to the conclusion that the prohibition of prior employment is reconcilable with the German Basic Constitutional Law (*Grundgesetz*). The fact that, as a rule, applicants who already worked with the employer in the past are likely to lose out to applicants without prior employment when competing for a position with a fixed term without objective reason does not mean that the prohibition of prior

employment is impermissible, according to the Federal Constitutional Court. Applicants who wish to enter into a new employment relationship with the same employer again could be employed on the basis of a permanent contract or a fixed-term contract for an objective reason. The negative consequences for applicants who had been previously employed would have to be accepted in order to exclude the risk of long "fixed-term careers".

### **3-year limit contradicts German Basic Constitutional Law**

The Federal Constitutional Court holds that the limitation of the prohibition of prior employment to three years developed by the Federal Employment Court violates constitutional law, however. In this regard, the Federal Labour Court had exceeded the limits of permissible further development of the law by judges and would not be permitted to place its own concept of justice above the lawmakers' concept of justice.

### **Exceptions from the prohibition of prior employment still possible**

The Federal Constitutional Court also recognises, however, that an unlimited prohibition of prior employment can unreasonably restrict the option of fixed-term contracts without objective reason. Therefore, it finds that concluding a (new) fixed-term contract without objective reason is possible despite prior employment if there is obviously no risk of successive fixed-term employment contracts. Such successive fixed-term employment contracts are excluded according to the Federal Constitutional Court if the prior employment ended long before, was of a completely different type or of a very short duration.

### **No protection of legitimate expectations for employers**

The decision by the Federal Constitutional Court must be respected by all courts and employers with immediate effect. It also applies above all to current fixed-term contracts without objective reason, which should therefore be reviewed by employers. If an employment contract was concluded for a fixed term without objective reason although the relevant employee had been employed with the same employer previously, employers are not able to cite the previous rulings of the Federal Labour Court. There is no protection of legitimate expectations. The numerous regional labour courts that opposed the rulings of the Federal Labour Court gave reason to expect the decision by the Federal Constitutional Court. It is irrelevant in this context whether the individual employer followed the court rulings and could anticipate that the three-year limit would be not be upheld. Consequently, there is a risk that the current fixed-term contracts without objective reason that were

concluded in reliance on the three-year limit are invalid and a permanent employment relationship exists (Section 16 sentence 1 German Part-Time and Fixed-Term Employment Act).

### **No quick remedy provided by lawmakers**

According to the coalition agreement between the German political parties SPD and CDU/CSU, the repealed rulings of the Federal Labour Court are to be established by law in the future. Concluding a fixed-term employment contract without objective reason is thus supposed to be possible if the prior employment ended more than three years ago. It appears to be doubtful, however, whether the law will be amended to this effect soon. The act to introduce a "bridging part-time employment" (right to temporary reduction of working hours) that also contains changes to fixed-term employment law and currently undergoes the legislative procedure does not contain this amendment in any case.

### **Recommended courses of action**

As a first step, employers should get an overview of whether they currently have fixed-term employment contracts without objective reason with regard to which prior employment of the relevant employee is known. If this is the case and if it is not intended to extend the relevant employment relationship for an indefinite term anyway, it would have to be reviewed in the individual case whether the fixed term can be "saved". Despite prior employment, the fixed term would be valid if the prior employment ended long ago (e.g. employment during apprenticeship long ago), was of a completely different type (e.g. concerned a completely different function) or of a very short duration. A "re-interpretation" as fixed-term contract for an objective reason pursuant to Section 14 (1) German Part-Time and Fixed-Term Employment Act also comes into consideration, but only if this objective reason already existed at the time the contract was concluded.

If it turns out that a current fixed-term contract is invalid, the further procedure must be determined on a case-by-case basis in the case of doubt. It would be conceivable, for instance, to conclude a new fixed-term employment contract for an objective reason or to conclude a termination agreement. Another option would be to wait for the planned end of the contract and to hope that the employee will not bring an action against the fixed-term employment within three weeks (Section 17 sentence 1 German Part-Time and Fixed-Term Employment Act). If the employer is lucky, the statutory fiction of a valid fixed-term employment can be cited if such an action is not brought (Section 17 sentence 2 German Part-Time and Fixed-Term Employment Act).

This approach does not, however, make reliable personnel planning possible.

With regard to future hiring on the basis of fixed-term contracts without objective reason, the employers should have the applicant confirm that no prior employment existed. If the applicant cannot give such a confirmation due to one or more than one prior employment relationship, it must be reviewed whether a fixed-term employment contract without objective reason can be concluded on the basis of the requirements imposed by the Federal Constitutional Court. However, this is likely not to be the case as a rule.

Kind regards

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