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Newsletter
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“Previous Employment” does not have to oppose a fixed-term employment agreement

Federal Labor Court, Judgment of April 6, 2011 - 7 AZR 716/09

The previous employment of an employee does not exclude the possibility of the conclusion of a fixed-term contract without an objective reason if the previous contract of employment was more than three years ago.

The plaintiff was employed as a teacher by the Free State of Saxony under a fixed-term contract from August 1, 2006 to July 31, 2008. Six years prior, she had worked as a student assistant for the Free State for a period of just three months. The plaintiff relied on the invalidity of the limitation of her employment relationship because this was not permitted as a result of her prior employment.

According to the German Act on Part-Time Work and Fixed-Term Employment [TzBfG], the restriction of the term of an employment relationship is permitted for a maximum period of up to two years in the absence of objective grounds. This does not, however, apply if a fixed-term or unlimited employment relationship already previously existed with the same employer. According to the previously prevailing opinion, any employment relationship at any time in the past was considered “previous employment” in this sense. The amount of time between the previous employment relationship and the fixed-term relationship without objective grounds was thought not to matter.

The Federal Labor Court Federal Labor Court now held that a previous employment relationship does not constitute “previous employment” within the meaning of the TzBfG if it was more than three years ago. Prohibiting “previous employment” is intended to avoid situations where employers repeatedly enter into successive fixed-term employment agreements with their employees. This could, however, also create an obstacle to hiring. The risk of an improper chain of fixed-term agreements will generally no longer exist if the period between the end of the previous employment relationship and the new employment agreement that is limited without an objective reason is more than three years. This period is based on the usual statutory period of limitation.

Conclusion: The lifting of the general prohibition on prior employment makes it significantly easier for employers to enter into fixed-term employment relationships. The Federal Labor Court thereby preempted a scheduled amendment of the law. According to the coalition agreement, entering into fixed-term agreements without an objective reason shall also be permitted if more than a year has passed since the end of the previous employment. No bill has yet been drafted for this purpose.

No Obligation of Employer to Disclose the Reason for Entering into a Fixed-Term Agreement when Hiring

Federal Labor Court, Order of October 27, 2010 - 7 ABR 86/09

The Federal Labor Court had to decide the extent of the claim of the works council to be informed by the employer in case of a fixed-term hiring.

In the past, the employer had always informed the works council of the reasons why a fixed-term agreement was being entered into when new hires were taken on with fixed-term employment agreements. As of 2006, it no longer provided the relevant information. The works council stated its opinion that the employer was still obligated to inform it of the reasons why the employment relationship should be of a fixed term.

The Federal Labor Court rejected any disclosure obligation of this kind. The disclosure obligation of the employer in accordance with Section 99(1) German Industrial Relations Act [BetrVG] does not include the disclosure of whether a fixed term is imposed upon an agreement with or without an objective reason or what the objective reason is. The works council does not need this information in order to be able to duly exercise its right to participation in decisions. This only requires that the council should be informed of whether someone would be employed with a fixed-term or permanent employment contract. The works council cannot refuse approval based on the fact that the imposing of a fixed term on the employment contract is invalid. It is not one of the duties of the works council to examine the validity of imposing of a fixed term on an employment contract.

Conclusion: The employer must notify the works council about whether the employment agreement is fixed-term or permanent before hiring. The works council is not entitled to be informed whether hiring is performed with or without an objective reason and, if so, what the objective reason for entering into a fixed-term agreement is.

Reclaiming of a Company Vehicle after the Expiry of Mandatory Sick Pay

Federal Labor Court, Judgment of December 14, 2010 - 9 AZR 631/09

A sick employee who is unable to work no longer has a claim to continued availability of his company car for private use.

The defendant employer had provided its employee with a company vehicle also for private use. From March to mid-December 2008, the employee was unable to work as a result of illness. Because of the fact that the lease agreement for the vehicle had expired, the employer made a request to the employee that the company car be returned by mid-November 2008. The employee complied with this request, but later made a claim for compensation of damages in court because use of a vehicle was not provided for the time between the return of the company car and the return to work.

The claim to damages was unsuccessful in all instances. The Federal Labor Court decided that in principle an employee fundamentally has a claim to damages for lack of use if the employer removes the company car in a manner that breaches the contract. This claim, however, exists only for the period for which the employer is obligated to pay remuneration because the company car provided for private use is additional compensation for work performance.

Conclusion: The monetary benefit from the ability to use company vehicles for private purposes is part of the compensation for work. If the employee is unable to work beyond the period of the continuation of salary payments, the employer may require the return of the company car from the employee without compensation.

Forfeit of Vacation not Taken as a Result of Illness

Federal Labor Court, Judgment of August 9, 2011, 9 AZR 425/10

The vacation entitlement transferred from previous years expires in the same way as the vacation entitlement which was newly created at the beginning of the current vacation year.

The right to vacation in Germany has been changing since the "SchultzHoff" decision by the European Court of Justice on the question of whether vacation not taken as a result of illness expires. In its decision dated March 24, 2009, the Federal Labor

Forfeit of Vacation not Taken as a Result of Illness

Court gave up its previous constant precedent on the expiry of vacation in case of illness. According to this decision, employees may potentially accumulate vacation entitlements over more than one year and must be removed from the working process again after their recovery because they are continually taking their vacation.

The case now to be decided was based on the following facts: The plaintiff had been sick and unable to work for several years up to June 6, 2008. After his recovery, the defendant granted the plaintiff the total annual vacation of 30 days for 2008. The plaintiff made a claim in court for his remaining vacation of 90 days for the time when he was ill.

The complaint was unsuccessful. The Federal Labor Court decided that the claim to remaining vacation expired on December 31, 2008 at the latest. Unless otherwise specified, vacation not taken will expire at the end of the vacation year unless there is a reason for it to be transferred in accordance with the German Federal Leave Act. If a sick employee who is initially incapable of working regains his health so quickly that he can take vacation during the time remaining in the vacation year, the vacation entitlement originating from previous years will expire along with the entitlement newly created at the beginning of the current vacation year.

The Federal Labor Court left open the question of whether and, if applicable, to what extent, employees can collect vacation entitlements over several years. At the request of the Hamm State Labor Court, the European Court of Justice has now considered this question. The Advocate General's view, as stated in her opinion dated July 7, 2011, is that an entitlement to collect vacation without any limitation is not necessary under Union law. Rather, a limitation of the transfer period, after which the employee's vacation entitlement will expire, is permissible under Union law. A transfer period of 18 months would be sufficient.

Conclusion: The ECJ ruling remains to be seen. If the ECJ, as is often the case, follows the opinion of the Advocate General, it will have been established that unlimited increasing of vacation entitlements in case of long-term illness is not necessary under European Union law. The introduction of a transfer period by legislators, which will then be permitted, would be desirable for human resources practice.

Relocation of Part of a Business to a Neighboring Foreign Country

Federal Labor Court, Judgment of May 26, 2011 - 8 AZR 37/10

If the employee relocates part of its business to a neighboring foreign country, it cannot terminate the employees assigned to this part of its business as a result of a closure of that part of its business for urgent operational reasons.

The Federal Labor Court had to rule on the validity of an ordinary dismissal for operational reasons. The defendant employer is based in South Baden and a subsidiary of an international group. The employer moved part of the operation, in which the plaintiff was employed, to Switzerland. The main tangible and intangible means of production were moved to the new site of a Swiss subsidiary, which was less than 60 kilometers away. The plaintiff was subject to ordinary termination based on the (alleged) closure of the part of the business in Germany.

The 8th Senate of the Federal Labor Court considered the termination to be ineffective. In case of a transfer of operations to a foreign country, the review is performed based on the same principles as for a domestic case. Under German law, the relocation of a portion of operating results to a neighboring foreign country, while at the same time transferring significant material and immaterial means of production constitutes the transfer of part of a business in accordance with Section 613a German Civil Code [BGB]. This excludes the possibility of this being considered a closure of part of the business.

Conclusion: In future, employers must take into account that a relocation of operations may result in a transfer of operations in accordance with Section 613a BGB even if the relocation is to another country. The Federal Labor Court left open the issue of the maximum distance within which a transfer of operations is (still) to be assumed.

Changes in Operations as a Result of Staff Reductions in Small Businesses

Federal Labor Court, Judgment of 11/09/2010 - 1 AZR 708/09

In small businesses with up to 20 employees, a change in operations for which a reconciliation of interests is mandatory solely through staff reductions will only be in place if a minimum of six employees is affected.

The defendant, a shipping company with far in excess of one hundred employees, employed 13 workers in a small operation. The defendant terminated four employees, including the plaintiff. The plaintiff made a claim for compensation of damages because the employer had failed to negotiate a reconciliation of interests with the works council.

The Federal Labor Court dismissed the complaint. A change in operations for which a reconciliation of interests is mandatory as defined under Section 111 German Works Council Constitution Act [BetrVG] is given only if a substantial portion of the workforce is affected. In small businesses with up to 20 employees, the point at which the threshold is exceeded was previously disputed. The Federal Labor Court has now clarified that a staff reduction is subject to participation in small businesses if at least six workers are affected by the termination.

Conclusion: The verdict brings welcome clarity for employers as to whether a planned staff reduction measure in a small business with 20 or fewer employees requires negotiation with the works council on a reconciliation of interests and a social plan prior to implementation.

Ineffectiveness of a Tariff Preservation of Margin Clause

Federal Labor Court, Judgment of March 23, 2011 - 4 AZR 366/09

"Preservation of margin clauses" in tariff agreements that ensure that union members are in a better position than non-union members, are ineffective.

The plaintiff is a port logistics company, which agreed as part of a tariff agreement with the trade union ver.di in 2008 that ver.di members would receive an extra annual payment of EUR 260.00 gross ("simple differentiation clause"). The agreement also anticipated that in case of corresponding or other benefits from the employer to non-union members ver.di members would in addition automatically be entitled to an equal claim ("preservation of margin clause" or distance clause). In this way, it should not be possible for the "advantage," which intended the tariff agreement to be exclusively for union members, to be offset by a voluntary payment by the employer to the non-union members.

With its complaint, the company asserted a claim with regard to the ineffectiveness of the simple differentiation clause and the preservation of margin clause. The Federal Labor Court considers the special payment for non-union members (simple differentiation clause) to be effective. The Senate, on the other hand, considered the preservation of margin clause to be ineffective. It takes away the opportunity from the employer to put the employees who are not organized in a union or who are otherwise organized into the same position as union members. A tariff agreement may only regulate working conditions of union members in a mandatory and direct manner, not the working conditions of the employees who are not organized into a union or who are otherwise organized. If tariff regulations have an influence on this, the tariff power of the unions is being exceeded.

Conclusion: The Federal Labor Court's judgment opposes the opinion of the unions that a tariff agreement can provide for special benefits exclusively for its members. In future, employers therefore no longer have to pass on automatically to union members voluntary compensation payments made to non-union members.

Exclusion Periods Applicable in a Hiring Company Do Not Apply to Temporary Agency Workers

Federal Labor Court, judgment of March 23, 2011 - 5 AZR 7/10

Exclusion periods applicable to the employment relationships of the permanent staff of a company do not apply to temporary agency workers who are employed in that company.

The plaintiff, a temporary agency worker, demanded that his employer, the employment agency, pay him back pay for several years. He referred to the fact that C-GmbH, for which he was working, paid its permanent staff higher compensation. According to the equal pay requirement of the German Act on Temporary Workers [AÜG], he has a claim to this higher compensation. The employment agency objected that the tariff agreement applicable to C-GmbH included exclusion periods. According to that agreement, claims are to be asserted in writing within three months of their due date, otherwise, they will expire. The employment agreement of the plaintiff did not provide for any exclusion periods.

In a change from the previous decision by the court of appeal, the Federal Labor Court decided that the tariff exclusion periods that apply in hiring companies, do not apply to temporary agency workers. The AÜG, however, provides that that the same material employment conditions must apply to temporary agency workers as to the permanent staff of the client. Collectively agreed exclusion periods, however, in the view of the Federal Labor Court, do not represent "material employment conditions." The plaintiff may therefore still pursue his claim to compensation retroactively up to the end of the three-year period of limitation.

Conclusion: According to the "equal pay requirement" the same material employment conditions must apply to temporary agency workers as for comparable permanent staff of the hiring company. This may, for example, include wages and working hours. Exclusion periods in tariff agreements, however, do not have to be applied. This allows temporary agency workers to be put in a better position than the permanent staff of the hiring company, whose employment relationships are subject to exclusion periods.

Act to Prevent Abuse of Temporary Workers

Federal Law Gazette part I no. 18 of April 29, 2011 p. 642 et seqq.

On May 1, 2011, regulations to prevent abuse of temporary agency workers came into force. Further amendments to the German Act on Temporary Workers [AÜG] are to follow on December 1, 2011.

Extension of the Authorization Obligation

One of the key innovations of the AÜG is that in the future all companies that provide temporary agency workers as part of their economic activities must obtain a permit for this. Previously this was only necessary when the provision of temporary agency workers was performed on a commercial basis, i.e. for profit.

Concept of Temporary Employment

In future, the provision of temporary agency workers should only be "temporary". Maximum limits for assignments, however, have not been defined by the law.

Group Privilege

The former group privilege has been restricted. If the worker is hired and employed for the purpose of being provided as a temporary agency worker, this is a situation in which a permit is required. The legislature's intention is not to provide a privilege to human resources management companies whose sole purpose is the hiring and assignment of personnel within the group.

Revolving Door Provision

A „revolving door" clause is intended to prevent permanent staff being discharged and immediately reinstated under inferior working conditions in order to be loaned within the Group. For this purpose, the AÜG provides that employees who left the company during the past six months prior to being assigned are not employed again by the same group under worse conditions than the permanent staff of their former employer or another company within the same group. This, however, does not apply to temporary employment contracts, which were established prior to December 15, 2010.

Duties of the Employment Agency's Client

Temporary agency workers should also be given improved rights within the company to which they are assigned. For example, in the future they will have to be informed about vacancies and be given access to the community facilities and services (such as childcare facilities, canteen, transportation) under the same conditions as the permanent staff of the hiring company.

Minimum Wage

The originally planned introduction of a minimum wage for temporary agency workers has not become law. The law allows the Federal Ministry of Labor and Social Affairs to issue a legal regulation in order to establish a minimum wage. This right, however, has so far not been exercised.

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