Never Say "Never Again" – Judgment of the Federal Labor Court on the Possibility of a Repeated Limitation of Contracts for no Material Reason

Introduction	Many initial employment contracts today are entered into as fixed term contracts. Among other things, this gives companies the opportunity to try out employees over a longer period before making the final decision to keep them. Employers frequently avail themselves of the possibility of limiting the term of the employment contract for no material reason. This type of limitation is only possible under the wording of the law if the employee had not already been in the employ of this employer (Sec. 14 (2) sentence 2 Part-time and Fixed-Term Employment Act [TzBfG]). This wording has previously been construed by the Federal Labor Court (BAG) to mean that every past employment relationship between the parties will prohibit a limitation for no material reason at a later point in time. The government coalition thus felt compelled to announce the intention to pass an amendment in the coalition agreement of October, 2009, under the terms of which a new limitation of an employment contract for no material reason would be possible after the expiration of one year after the termination of an employment contract. This has not yet occurred. The BAG has now executed an unexpected turnaround in its judgment of April 6, 2011. Limitations for no material reason are now supposed to be possible even if an employment relationship between the parties had existed in the past. It is required that the termination of the old employment relationship occurred more than three years prior to the new contract.
Facts and Findings of the Judgment of the Federal Labor Court of 6 April 2011 (File No: 7 AZR 716/09)	The decision of the BAG, which as yet has only been announced in a press release, is based on the following facts: The plaintiff had been employed by the State of Saxony as a teacher on a temporary basis from 1 August 2006 to 31 July 2008. Shortly before the temporary contract was to expire, the plaintiff demanded that her employment be continued and - following a refusal - filed suit in court that the provision limiting her employment was void. She argued, amongst other things, that no ground for the limitation was stated in the limitation clause, that she had been employed at a university in Saxony as an assistant from November, 1999 to January, 2000 and that the teacher training course in the classroom (Referendariat) was not "education" within the meaning of Sec. 14 (1) sentence 2 No. 2 TzBfG. The lower court instances had dismissed the complaint. They based their decision on the fact that there had been a material reason within the meaning of Sec. 14 (1) sentence 2 no. 2 TzBfG. The term "education" in this law was to be broadly applied so that it also included the teacher training course in the classroom following the completion of university studies. The TzBfG does not require the statement of the ground for the limitation in order for the limitation clause to be valid. A limitation for no material reason was precluded due to the prior employment of the plaintiff. The BAG has now dismissed the complaint on the ground that a fixed-term employment contract had been validly concluded. A "prior employment" does not exist if a previous employment relationship dates back to more than three years. This follows from an interpretation oriented to the spirit and purpose of the provision of Sec. 14 (2) sentence 2 TzBfG and in conformance with the Constitution. The law is supposed to open up flexibility for the employer in light of fluctuating business and changes in market conditions; for employees the law is

	supposed to create a crossover to permanent employment. In addition, it is supposed to curb the abuse of fixed-term employment contracts and prevent a chain of fixed-term contracts. The danger of a chain of fixed-term contracts will not typically exist if the previous employment was a long time ago. In such cases, the law does not justify the limitation of the freedom of contract of the parties to an employment contract and of the employee ś freedom to choose a profession. Upon application of the evaluation by lawmakers, which is expressed in the regular statute of limitation in civil law, it can be assumed that the danger of a chain of fixed-term contracts will no longer exist if there is a period of more than three years between the termination of the early employment relationship and the new employment contract limited for no material reason.
Comment	The BAG had already rejected an appeal against the non-admittance of an appeal in July, 2009 which was intended to bring about a review of the interpretation of Sec. 14 (2) sentence 2 TzBfG (Order dated 29 July 2009 – 7 AZN 368/09). According to that decision, the wording of the provision is unequivocal and the length of the time period between the early employment relationship and the new employment relationship limited without material reason is irrelevant. The court was familiar with arguments made in the literature, but they were not found to be convincing. As far as one can see from the current press release, they apparently now are. Irrespective of the legal misgivings against the prior interpretation of Sec. 14 (2) sentence 2 TzBfG by the BAG, it had also created very real practical problems and questions. Employers were faced with the problem of their limited ability to trace past employment relationships. In addition to the purely physical problem of maintaining files on former employees, there was also the question of the permitted periods for keeping files on record. This issue was often dealt with by questions in personnel forms concerning previous employment, whereby false answers were supposed to justify a rescission of the employment contract. In the case now decided by the BAG, the plaintiff submitted that she had not completed this form until after the employment contract had been made. A rescission would have been excluded. In addition, the renaming of the company name of employer could also exclude an intentional deception on the part of the employee, and the rescission would not succeed. These issues will now only play a limited role, as the required discontinuation period is moderate. It remains to be seen whether the starting date for the three-year period can be unequivocally derived from the grounds of the BAG judgment. The terms of the statute of limitations are generally set up so that they commence at the end of the year of the event triggering the statute of limitation. In the case at hand, this period would thus not commence upon the end of the employment relationship, but at the end of the year in which the employment relationship ended. This would at least simplify the calculation of the calendar year in which an employment relationship could again be limited for no material reason. However, linking this date directly to the end of the employment relationship would make sense. According to the press release, this would appear to be the obvious alternative.
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