

Consecutive Fixed-Terms of Employment and Abuse of Law – News on Fixed-Term Employment Contracts

INTRODUCTION

This is another year with new developments in German case law on fixed-term employment contracts. Most notably, a recent decision handed down by the Federal Labor Court on June 18, 2012 in the *Kücü̇k* matter after submission to the European Court of Justice, which so far is available only in the form of the press release, addressed the issue of whether the need to temporarily replace a permanent employee with a substitute employee is a valid justification for consecutive fixed-terms of employment, even if the employer essentially has a permanent need for substitutes that could also be met by hiring an employee for an unlimited term.

DECISION OF THE FEDERAL LABOR COURT DATED JULY 18, 2012 – CASE NO. 7 AZR 443/09

In the case decided by the Federal Labor Court the plaintiff had been employed by the Federal State of North-Rhine Westphalia in the clerk's office of the Local Court of Cologne for more than 11 years on the basis of a total of 13 (!) employment agreements with fixed-terms of employment. Almost without exception, the fixed-terms of employment were justified by the State on the grounds that substitute employees were needed to temporarily replace other court employees with unlimited terms of employment who were on parental or special leave.

The plaintiff sued claiming that the fixed-term of employment of the last employment agreement signed in December 2006 was invalid. The plaintiff argued, in particular, that the State's multiple use of fixed-terms of employment over a time period of approximately 11 years amounted to an abuse of the employer's legal right to fixed-terms of employment to temporarily replace another employee. The Regional Labor Court of Cologne initially denied the complaint.

On appeal the judges of the Federal Labor Court however had doubts as to whether current German case law according to which even consecutive fixed-terms of employment are lawful as long as there is a valid justification for the last fixed-term of employment – such as the need to temporarily replace another employee – was reconcilable with EU law.

Because the Federal Labor Court's doubts about its own prior case law were based on EU law, the Federal Labor Court initially submitted the issue to the European Court of Justice. By judgment dated January 26, 2012 (C-586/10, *Kücü̇k*), the European Court of Justice ruled that even under EU law consecutive fixed-terms of employ-

ment, in principle, do not necessarily lack a valid justification. However – the European Court of Justice held – an abuse of law may be presumed under special circumstances.

Following the reasoning of the European Court of Justice, the Federal Labor Court then found – in view of the total length of employment and the high number of agreements with fixed-terms of employment – that there were definite indications that the State's conduct amounted to an abuse of law. However, the Federal Labor Court has not yet made a final decision in the matter. Instead, the case was remanded to the Regional Labor Court of Cologne to provide the State of North-Rhine Westphalia with another opportunity to present special circumstances showing that a presumption of abusive conduct would be unjustified in this case.

ANALYSIS

In this decision the Federal Labor Court, at the very least, modified its prior, more liberal case law on the employer's right to fixed-terms of employment to temporarily replace other employees. According to the press release, the facts that provided circumstantial evidence of an abuse of law in this case were, in particular, that the State and the plaintiff had entered into not less than 13 consecutive employment agreements with fixed-terms over a total time of employment of 11 years.

It is interesting to note, however, that the Federal Labor Court at the same time also decided a similar case, yet reached a different conclusion due to the different circumstances of that case: There, a female employee had sued a retailer after she had been employed for a total time period of seven years and nine months on the basis of four consecutive employment agreements with fixed-terms of employment. In that case, too, the employer had sought to justify the last fixed-term of employment on the grounds that the employer needed to replace another employee who was on parental leave. Unlike in the *Kücü̇k* case, the Federal Labor Court however decided there that no indications of abuse of law were apparent (decision dated July 18, 2012, case no.: 7 AZR 783/10).

To summarize: Now as before, consecutive employment agreements with fixed-terms of employment to temporarily replace other employees are generally lawful. Situations in which the surrounding circumstances indicate an abuse of law by the employer should remain rare. However, caution is indeed warranted if multiple, consecutive

fixed-terms of employment fall into a relatively short time period of employment (e.g., 13 limit terms of employment within approximately 11 years, as in the *Kücüik* case). At the present time, there is no general answer to the question of how many consecutive terms of employment would exceed the legal limit and amount to an abuse of law. It's expected that the detailed rationale to be provided by the Federal Labor Court in support of its decision will shed a little more light on this issue. In any case, it is advisable for employers – in view of the above case law – to carefully document the reasons for consecutive employment agreements with fixed-terms of employment, in order to be able to defeat, if necessary, any future charges of abusive conduct in this regard.

OTHER DEVELOPMENTS

In addition to the above issue, the Federal Labor Court recently also addressed § 14 para. 1 sent. 2 no. 8 of the German Law on Part-Time Employment and Fixed-Term Employment Contracts (*TzBfG*), according to which a fixed-term employment is generally justified if the fixed-term of employment is based on a court settlement.

In the case decided by the Federal Labor Court on February 15, 2012 (case no.: 7 AZR 734/10), the employer had - in accordance with § 278 para. 6 of the German Code of Civil Procedure (*ZPO*) – proposed, and the employee had agreed, to enter into a written settlement that provided for a fixed-term employment of one year. The Federal Labor Court has now held that the settlement in that case did not amount to a "court" settlement within the meaning of § 14 para. 1 sent. 2 no. 8 *TzBfG*

and therefore was no valid justification for a fixed-term of employment. According to the Federal Labor Court, a "court" settlement requires that the terms and conditions of the settlement are negotiated with the assistance of the court, which is not the case if the parties propose a settlement and the court merely records that settlement. Rather, the Federal Labor Court held, a valid agreement on a fixed-term of employment requires that the court submits a settlement proposal which is then accepted by the parties.

This is another reason why German law on consecutive fixed-terms of employment warrants great caution so as to avoid bad surprises in the form of the invalidity of the last fixed-term of employment and the resulting continuation of employment for an unlimited term!

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