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When Fixed-Term Employment in Germany is Actually Indefinite: Understanding Recent Labor Court Decisions



COMMENTARY  
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## When Fixed-Term Employment in Germany is Actually Indefinite: Understanding Recent Labor Court Decisions

### IN SHORT

**The Situation:** The German Federal Labor Court had to decide on the question whether a seemingly fixed-term employment is actually an indefinite employment. Prior to the latest hire, the same employee was already employed for a term of one and a half years until about eight years ago.

**The Result:** The Federal Labor Court held that in the circumstances at hand the employment is deemed to be indefinite. Even eight years between two employment relationships do not automatically permit a fixed term upon conclusion of the second employment agreement.

**Looking Ahead:** In the absence of specific justification for fixed-term employment, it remains questionable under which circumstances a re-hire may be performed on a fixed-term basis in a valid way. Apparently, their demands are high.

The German legislature prefers "indefinite" employment relationships, but the Part-Time and Fixed-Term Employment Act ("*TzBfG*") nevertheless permits two types of fixed-term employment: (i) if there is a specific justification for the fixed-term, such as if work is only needed for a limited time period or to temporarily replace another employee; or (ii) if there is no specific justification, but other requirements are met. In the latter situation, the maximum term of employment is two years and there must not have been any employment relationship in place between the same parties before. Otherwise, even an employment relationship providing for a "fixed term" will be considered indefinite.

Naturally, this begs the question of how far back in history there must not have been a relationship between the same employer and employee. The *TzBfG* remains silent on this and case law has been inconsistent in interpreting this provision of the law. Some opinions claimed that a fixed term employment without specific justification would not be permissible if there was any previous employment, ever, between the employer and employee. In 2011, the Federal Labor Court (*Bundesarbeitsgericht*) held that a time gap of "more than three years" would suffice to permit a new fixed-term employment without specific justification. However, this opinion was overturned as unconstitutional by the Federal Constitutional Court (*Bundesverfassungsgericht*). On June 6, 2018, the Federal Constitutional Court held that the requirements of the *TzBfG* are constitutional themselves, and that the labor courts are not permitted to overturn the legislature's intention to avoid excessive use of fixed-term employments.

Nevertheless, the Federal Constitutional Court allowed for some exceptions. It stated that a prohibition of fixed-term employment without a specific justification can be unreasonable if the previous employment relationship was "a very long time ago, of a completely different type or was of very short duration." The Court did not expand on this, except to provide examples such as previous marginal employments, employment during a student's summer vacation, or employment only for training purposes.

For employers, the most reasonable conclusion to draw from these cases is that if an employee was employed before, at any



time, whether on a fixed-term basis or not, it is more than dangerous to re-hire the employee on a fixed-term basis unless the employer has a specific justification for doing so.



In a new case brought after the Federal Constitutional Court's decision, the Federal Labor Court had to rule again in a case where the previous employment was similar in character, but occurred eight years ago and lasted only 1.5 years. In other words, the gap between the two employments was more than five times as long as the initial employment.

On January 23, 2019, the Federal Labor Court published a press release stating that the employment case in question was "indefinite employment," reasoning that eight years is "not a very long time." This view is questionable, considering that the standard limitation period for remuneration claims is three years. Additionally, the press release provided no guidance on what time period between the employment relationships the Court would have considered "a very long time." Even more disturbing, the Federal Labor Court also stated that the employer could not rely on the previous case law of the Federal Labor Court (discussed above) because the employer should have "taken into account the possibility" that the court's interpretation of the TzBfG would be declared unconstitutional by the Federal Constitutional Court.

For employers, the most reasonable conclusion to draw from these cases is that if an employee was employed before, at any time, whether on a fixed-term basis or not, it is more than dangerous to re-hire the employee on a fixed-term basis unless the employer has a specific justification for doing so. Without such justification, labor courts are likely to scrutinize the circumstances of the re-hire and be inclined to assume that "indefinite employment" exists.

### THREE KEY TAKEAWAYS

1. The German Federal Labor Court had to decide on the question whether a seemingly fixed-term employment is actually an indefinite employment. Prior to the latest hire, the same employee was already employed for a term of one and a half years until about eight years ago.
2. The Federal Labor Court held that in the circumstances at hand the employment is deemed to be indefinite. Even eight years between two employment relationships do not automatically permit to provide for a fixed term upon conclusion of the second employment agreement.
3. In the absence of specific justification for fixed-term employment, it remains questionable under which circumstances a re-hire may be performed on a fixed-term basis in a valid way. Apparently, there demands are high.



Georg Mikes  
Frankfurt

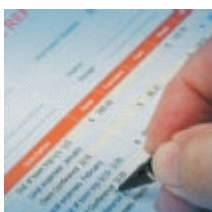


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