

SUMMARY

2018/16 Fixed-term employment of an actor for more than 18 years justifiable (GE)

<p>The German Federal Labour Court has held that it was justifiable for the employment of an actor to be limited in time because of the “type of work” involved and the fact that the work was with a film production company, even though the actor was given a number of fixed term employment contracts over around 18 years.</p>

Facts

The plaintiff, Mr Sanoussi-Bliss, was the actor who played the main character in the crime TV series 'Der Alte', which was televised and produced for the German public service broadcaster ZDF over a period of 18 years. The parties made separate employment contracts for each episode.

The last employment contract (dated October 2014) was for a total of 16 days of filming, in order to produce two episodes over a period of about two months. It was not specifically labelled as a fixed term contract, but the parties agreed on the filming dates and according to a clause in the agreement, the employment would end on 18 November 2014. The production company also informed Mr Sanoussi-Bliss by a letter dated 21 November 2014 that the employment had ended on 18 November 2014 because the work had been completed, as his role was written out of the show.

The Mr Sanoussi-Bliss claimed that his employment was for an indefinite period – and therefore could not be terminated – and that the production company should pay him salary. He argued that the clause providing an end date in the last employment contract was ineffective, as it constituted an abuse of successive fixed-term employment contracts. He

believed that no justifying reasons had been given to him and that his notice of termination had also been void.

Judgment

The BAG ruled that the term of the last employment contract was valid and had simply expired. It held that the use of a fixed-term contract was justified by an objective reason contained within the expression “type of work” under German law.

Essentially, the BAG considered the creation of a TV show, regardless of its standard, as art. A TV show is a free creative presentation in which impressions, universal experiences and the particular experiences of the artists are brought before an audience – and that this together constitutes art. Further, the BAG held that a production company, as maker of a TV show, was entitled to claim this right to artistic freedom, as according to the German Constitution (*Grundgesetz*, ‘GG’), everyone has the right to artistic freedom and art itself is free. Legal entities such as the production company could also claim the right to artistic freedom. The BAG held that a production company, as the maker of a TV show, had the freedom to design and organise its TV show independently. Therefore, the writing of the script – including the plot, the staff and their development as well as any recasting of roles – were protected by the German Constitution.

The BAG therefore concluded that the production company needed to be able to develop the story as it wished, including deciding whether a particular character should continue to be part of the show. But this required the ability to end the employment contract when needed, and for that reason, it was justifiable for the production company only to make employment contracts for a fixed term.

However, freedom of art is not enough in itself to justify a restriction defined in German law. Freedom of occupation, which is also protected by the German Constitution, guarantees a minimum of protection for employees. The court therefore has to balance the interests of the parties carefully. In this case, the interests of the employer in being able to limit the term of its employment contracts prevailed over the interests of the actor. This was because actors also have a significant influence on an artistic work. Mr Sanoussi-Bliss had argued otherwise in this case, saying that the script and the instructions of the director were a significant restraint, and that this is typical in the industry.

Further, the BAG found that a restriction would also be justified if the work was only needed temporarily. As the broadcaster only commissioned one episode at a time, the production company was not able to plan ahead. The need for the actor therefore only arose when the broadcasting company asked for another episode. Even though the broadcasting company

continued to do so 18 years, it was never possible to know in advance whether it would do so again. Therefore, the actor was not entitled to trust that the engagement would continue. In fact, the opposite was more likely. It was to be expected that the production company would change the cast to accommodate audiences' changing interests and would try to provide varied entertainment.

The BAG ruled that it was irrelevant that the contract had not been explicitly labelled as a fixed-term contract. By indicating the episodes it covered and using the term "contract period" it was clear that the contract was for a fixed term.

Commentary

Although the BAG ruled that in this case, a limitation of the contract was justified, it usually argues that the requirement for reasoning rises with the length of the employment – and the length of time in this case was very long. In the case of repeated fixed terms (so-called '*Kettenbefristungen*', or 'chain contracts'), all the circumstances of the individual case must be taken into account, in particular the total duration and number of successive fixed-term contracts concluded with the same person to perform similar work. This is intended to prevent the abuse of fixed-term contracts. Under German law, this additional assessment must be carried out in accordance with the principles of institutional abuse of rights, as defined under German law. Thus, the BAG held in a case in July 2012 that a total length of eleven years of employment and 13 renewals at least *indicate* an abusive use of fixed-term contracts.

The decision at hand clarifies the reasoning that could be used to justify a number of renewals of fixed term employments contracts over a very long period and it therefore seems that in the case a specific type of work, such as artistic work, that depends for its continuation on external factors such as audience approval, fixed-term employment contracts can be concluded almost infinitely. But, in all other cases, the justification must be made very carefully and considered afresh upon each renewal – particularly when the total duration of employment exceeds a threshold of roughly ten years, as practice has shown.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier Attorneys Ltd.): According to Finnish Employment Contracts Act (55/2001), repeated use of fixed-term contracts requires a justified reason for each contract. Otherwise, the employment relationship is regarded as having been concluded for an indefinite period. However, the term 'justified reason' is subject to interpretation. The Finnish courts take into account the number of fixed-term contracts, their total duration and the similarity of the employee's duties under the different contracts. However, the crucial

factor is whether there is a legitimate reason for each fixed-term contract. This means that the total length of the fixed-term contracts does not affect the employer's burden of proof of the justified reason. And even if based on a justified reason, the Finnish court might interpret the employment relationship to be indefinite based on overall assessment, especially if the total length of the fixed term contracts is particularly long.

In terms of whether there would be a justified reason for the repeated use of fixed-term contracts for 18 years in Finland, one would have to conclude that the employer's need for employees was only temporary. Although the Finnish courts have not assessed the fixed-term contracts of actors, the legislative preamble to the Employment Contracts Act states that inconsistency of demand and uncertainty of the work may form a justification for the use of repeated fixed-term contracts. In addition, the Supreme Court has found that where the employer's business is based on using fixed-term service agreements, or where the employee's job is project-specific, fixed term contracts may be justified regardless of the overall duration. Therefore, it is possible that a Finnish court would have ended up making the same decision in a similar case.

Portugal (Maria de Lancastre Valente and Mariana Azevedo Mendes, SRS Advogados): In Portugal, the ruling would likely have been similar to that of the BAG. However, the legal reasoning would have been less complex, as there is a specific legal framework aimed at regulating the employment contracts of individuals who work in show business, including, but not limited to, actors (Law no. 4/2008 of 7 February, as amended).

In fact, the Portuguese legislator – similarly to the BAG – has acknowledged the specific characteristics of this industry/type of work, but in doing so has created a specific regime for fixed term hiring that is much more flexible than that laid down in the Portuguese Labour Code (PLC).

For example, in Portugal a fixed term contract entered into with an actor is subject to a maximum duration of six years (against a maximum duration of three years provided by the PLC) and is not subject to any limit regarding renewals (conversely, the PLC foresees that fixed term contracts are subject to a maximum of three renewals).

More importantly, Law no. 4/2008 of 7 February states that fixed term employment contracts entered into with these types of professionals (including actors) are not subject to the restrictions set out in the PLC regarding successive hiring. This means that regardless of the maximum duration of the fixed term contract (six years), the same employer may enter into another fixed term employment contract with the same actor (or, although unlikely, a different actor) for the same job, without having to observe any waiting period.

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