EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/18 Consideration of pre-employment as a freelancer in terms of checking fixed-term contracts by courts (GE)

Pre-employment as a freelancer must be taken into account when assessing the legality of a fixed-term contract due to the character of the specific deployment.

Summary

The German Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG') has held that pre-employment as a freelancer must be taken into account in relation to the number of years having been with a firm as a freelancer when assessing the legality of a fixed-term contract due to the character of the specific deployment.

Background

In Germany, employers can enter into fixed-term contracts of up to two years when hiring new employees according to Section 14(2) of the Act on Part-Time Work and Fixed-Term Employment (*TzBfG*). If fixed-term contracts extend beyond this period, one of the objective reasons stated in Section 14(1) *TzBfG* must be applicable. One of these reasons enables public service broadcasters to enter into fixed-term contracts with producers due to the character of the work pursuant to Section 14(1), second sentence. However, an employee can claim that such reason is invalid, as a result of which the employment contract converts into one for indefinite time. In its assessment of such a claim, the court must individually balance the interests of the employee in the protection of the continued service on the one hand which are protected by Article 12(1) of the German Constitution (*Grundgesetz*) against the necessary freedom and flexibility of the broadcaster on the other hand in order to fulfil its programme mandate which is itself protected by Article 5(1), second sentence, of the German

Constitution.

In the case at hand, the BAG, firstly, had to consider the conformity of this national provision and its prior rulings with European law and, secondly, if a long-lasting prior employment as a freelancer must be regarded as abuse of law.

Facts

The claimant had been employed since 1992 for the defendant, a public broadcaster. Until 1998 he worked as a freelancer on a small scale. From 1988 to 2010 he still worked as a freelancer but almost full time. Since 2010 he had been employed as a producer based on two consecutive fixed-term employment contracts. The latter expired in February 2016.

Subsequently, the claimant filed an action, as he claimed that the last contract had converted into one for indefinite time, as the reason for entering into a fixed-term contract was not valid. The broadcaster argued that the contractual duties fell within the scope of the exception which enabled it to offer a fixed-term contract, because of the programme-shaping influence a producer basically has (against the background of the freedom of broadcasting).

The first instance court ruled in favour of the plaintiff whereas the court of appeal rejected the claim. The case then came before the BAG.

Judgment

The BAG overturned the prior judgment and returned it to the court of appeal for further assessment.

Initially, the BAG referred to its prior decisions on justifications for offering fixed-term contracts based on specific duties. It held that German law complies with Section 5(1)(a-c) of the Framework Agreement on fixed-term work, annexed to Directive 1999/70. With reference to the second and third paragraphs of its preamble and points 8 and 10 of its general considerations, the Framework Agreement expressly accepts that fixed-term employment can be characteristic of certain sectors or occupations. The BAG held – only very briefly – that the German provisions at issue complied with the Framework Agreement.

Secondly, the BAG pointed out the importance of balancing the conflicting parties' interests in terms of working for an indefinite period or in fixed-term work which lead to the crucial point, namely, how to take the pre-employment as a freelancer into consideration.

According to the BAG there were two separate aspects to bear in mind.

Firstly, it agreed with the court of appeal that the pre-employment as a freelancer was

basically irrelevant with regard to employee protection, as he was not an employee as falling within the national notion of employment at the time. When assessing whether a fixed-term contract could be justified by a legally given ground pursuant to Section 14(1) *TzBfG* or not prior periods of services rendered to the employer without an employment contract are irrelevant and those periods would not count for the question – following established ECJ judgments – if the number of years of service for the employer could indicate an abuse of law by it.

However, differing from the court of appeal, the BAG found that long-term pre-employment as a freelancer actually could indicate that there was no objective reason to offer a fixed-term contract. In this context, it was relevant that the claimant's duties had been very much the same for a very long time, both as an employee and as a freelancer, and for a very long time in an almost full time capacity. This indicated that offering a fixed-term contract might have been inappropriate, as apparently the work and, particularly, the actual person in charge for this broadcast programming protected by Article 5(1), second sentence, of the *Grundgesetz* had been needed for a very long time. Therefore, an indefinite term contract probably would have been the way to proceed.

Consequently, the BAG remitted the case to the court of appeal for further assessment of the specific situation and the tasks the claimant had carried out during his freelance work as well as afterwards during his employment.

Commentary

The statutory notion of 'character of occupation' in Section14 (1) *TzBfG* is particularly vague and only concretised through case law. Therefore, its conformity with European law is questionable at least. But that is, in the view of the BAG, not the crucial issue in the case at hand. The Court is convinced that this notion in connection with its rulings must be seen as compliant with the Framework Agreement and shall be interpreted as concise enough to be regarded as a legal measure by meaning of the '*effet utile*'.

The pivotal point in this case was the similarity by type and scope of the work as a freelancer to the subsequent fixed-term employment. In this context, one can ask why the Court could not have saved itself the complicated detour but could have based its decision on the European notion of employment instead. With regard to former Article 141(1) of the Treaty of Rome, which now is Article 157(1) TFEU, there is long-established case law that an employee is someone who, during a certain period of time, performs services for another person in accordance with the other person's instructions for which they receive compensation in return (for example, case C-256/01, *Allonby*). Applying this concept of employment, it would be

irrelevant whether the employment relationship is set up in the form of freelancing or regular employment, because a freelancer in that sense can in fact be working full-time under their employer's instructions and must be regarded as an employee instead of self-employed following the national law. Following that notion, the claimant might have been working as an employee since 1998. Consequently this time then should have be taken into consideration, as using fixed-term contracts for more than four times the maximum normal term of two years (pursuant to Section 14(2) *TzBfG*) indicates abuse of law by the employer instead of stressing the questionable idea when the broadcaster's right to enter into fixed-term employments must be limited by the specific circumstances of the employment and why its constitutionally protected rights shall be less important in that context now. With this given opinion, the judgment is hardly convincing. Using the ECJ's notion of employment, it would have been easier to decide on the appeal. And, perhaps more important, the BAG's judgment could have been clearer in its ramifications for other employers who could not refer to Article 5 of the German Constitution but only to Section 14(1) *TzBfG*.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): Pursuant to the Bulgarian Labour Code ('LC') the possibilities for execution of fixed-term employment contracts are quite narrow. There are several forms of fixed-term employment contracts: (i) agreements with a fixed date of termination; (ii) agreements that expire upon completion of a particular assignment; (iii) agreements for the employment of substitutes; (iv) agreements for the completion of a job that will be occupied by a nominee selected by competitive examination; and (v) agreements for the term of office set for the particular position.

The agreements with a fixed date of termination may be concluded for periods of three years or less. However, the LC sets certain limitations for their execution. Thus, that type of fixed-term contract may only be concluded for the performance of work that is temporal, seasonal, or short-term in character, or with employees who are hired by companies in bankruptcy or liquidation proceedings. The LC recognizes that those type of fixed-term contracts may also be concluded in other 'exceptional cases' for performance of works that do not qualify as temporal, seasonal, or short-term, where the minimum duration of such agreement should be one year. Upon written request of the employee, such agreements may be concluded for a shorter period of time. The LC defines as an exception the presence of economical, technological, financial, market and other similar circumstances out of the control of the employer, that exist as of the moment of execution of the labour contract, requiring the limitation of its term and specified therein. Such a contract may be renewed only once, for a period of at least one year.

Similar to Germany, if a contract with a fixed termination date is concluded in violation of the statutory limitations, then that contract shall be considered to be a labour agreement of unlimited duration. However, unlike Germany, pre-employment as a freelancer is irrelevant when assessing the legality of a fixed-term contract.

Italy (Caterina Rucci, Katariina's Guild): Under Italian case law, the crucial point in this case would have been whether the period as a freelancer had the characteristics of an effective freelance activity or of a normal employment contract: this being the case, not only no-fixed-term would have been justified, but the employee would already have been under the general protection against termination by the time they were offered a fixed-term contract, due to successive conversion of their freelance period into an open-ended employment. In any case, Italian legislation requires that any claim against a fixed-term contract should be brought in writing within 120 days from the end of the fixed-term contract, and it would be also mandatory to deposit the corresponding lawsuit within 180 days. Italian legislation on fixed-term contracts has changed several times from 1962 – when only specific cases allowed for fixed-term contracts – to today, when any fixed-term contract cannot exceed 12 months: after that period, one of the specific reasons indicated by the law is required, otherwise the fixed-term will become an open-ended contract.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): In Finland, according to Chapter 1, Section 3 of the Employment Contracts Act (55/2001, as amended) an employment contract is valid for an indefinite period unless it has been made for a fixed-term period based on a justified reason. Contracts that have been concluded for a fixed-term period on the employer's initiative without a justified reason are considered to be valid for an indefinite period. The law does not include any examples of what these justified reasons could be. However, according to the legislative preworks of the Employment Contracts Act (government proposal 157/2000), for example, the work's character, a temporary position and a traineeship or a reason similar to these as well as another reason related to a company's activities or the work itself can be considered a justified reason. The indefinite period is therefore the principal rule and it is not permissable to conclude a fixed-term contract only on the grounds of hiring a new employee. Of course, the contract can be concluded for a fixed-term period on the employee's initiative.

Since 2017, it has been possible to conclude a fixed-term employment contract with a long-term unemployed person without further justification. According to Chapter 1, Section 3a of the Employment Contracts Act, if a person has been an unemployed jobseeker for at least 12 months without interruption, the employer does not need a justified reason referred to in Section 3 to conclude the contract for a fixed-term period. In this case, the maximum period of the fixed-term employment contract is one year. The contract may be renewed twice during a one-year period, but the total combined duration of the contracts may not exceed one year.

This is the only exception when the employment contract can be concluded for a fixed-term period on the employer's initiative without a justified reason.

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