EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

# 2020/35 Employment contract for an indefinite term with exclusion of work and remuneration for a certain period is valid and does not conflict with the law on fixed-term work (GE)

***The Federal Labour Court of Germany (Bundesarbeitsgericht, 'BAG') had to decide on a case in which an employee argued that his contract was not terminated by a provision that restricted the mutual duties to a certain time period for the yearly season within his contract and that the employer had to employ him during the off season. However, his lawsuit was unsuccessful as the Court found that, even though he did have an indefinite contract, the employer was not obliged to employ and pay him during the off season due to the valid provision of fixed-term employment for the time from April to October during the time of the season.***

**Summary**

The Federal Labour Court of Germany (Bundesarbeitsgericht, “BAG”) had to decide on a case in which an employee argued that his contract was not terminated by a provision that restricted the mutual duties to a certain time period for the yearly season within his contract and that the employer had to employ him during the off season. However, his lawsuit was unsuccessful as the Court found that, even though he did have an indefinite contract, the employer was not obliged to employ and pay him during the off season due to the valid provision of fixed-term employment for the time from April to October during the time of the season.

## Legal background

In Germany, employers may offer their employees fixed-term contracts only within the strict regulation of the law on part-time and fixed-term work (*Teilzeit- und Befristungsgesetz*, 'TzBfG'). This law was introduced to implement Directive 1999/70/EC of 28 June 1999. The underlying assumption was that the indefinite contract serves as the regular model. Therefore, the TzBfG requires the employer to have an objective reason for the fixed-term contract. Section 14(1)(1) TzBfG states as one recognized reason for using such a contract is that the employer's demand for employment, due to its operational needs, exists only temporarily.

This seasonal employment of workers as an objective reason for fixed-term contracts is in accordance with European law, as last seen in the ECJ's ruling concerning multiple contracts with teachers that were fixed-term to exclude the summer holidays (21 November 2018, C-245/17 (*Viejobueno Ibánez and de la Vara González*)). The temporary operational needs were based on a prognosis of the employer at the time of the conclusion of the contract, which is revisable by the courts. This is compliant with European law, even if it concerns multiple agreements, if it is ensured that this prognosis is accurate and not used by the employer to prevent an indefinite employment (ECJ 13 March 2014, C-190/13 (*Samohano*)).

In this case, however, the Court had to decide whether the provision was a fixed-term agreement at all. Furthermore, every contract that includes provisions that are presented by one party to the contract only, without specific negotiation of the individual provision, are classified as 'standard business terms' under the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). Under Section 307(1) BGB a provision is legally ineffective if it unreasonably disadvantages the other party or lacks transparency. Whether this is the case is evaluated by an assessment of the consequences and interests regarding both parties. As the provision in question was not subject to individual negotiation between the parties, but unilaterally offered by the defendant to the plaintiff, this would have to be considered.

## Facts

The plaintiff had been an employee of a local municipality in the federal state of Niedersachsen since July 2000, and had been working almost exclusively in an outdoor public pool. Apart from his work as a lifeguard and occasional cleaning duties, he was mainly occupied with the preparations that were part of the season's opening and closing of the pool. In 2005 the respondent's indefinite contract was terminated and simultaneously he was offered the contract the subject of this dispute. Section 1 of the contract stated that the plaintiff was employed as a full-time employee for the season from 1 April to 31 October each year.

The plaintiff worked for the respective period each year until 2016. Additionally, the parties agreed on amended contracts for the years 2006 and 2013 to 2015 that extended his duties until the 31 December in 2006 and 30 November during 2013 to 2015. During the period from 2013 to 2015 those amendments had the exclusive aim of offering time compensation for accumulated overtime during the season. The plaintiff did not perform any tasks in the additional months.

The plaintiff took the view that his contract was not terminated on 31 October 2016. Furthermore, he claimed that the contractual duties had not been discontinued during the period of the off season from November to March each year. He asserted this with the outlined provision, which he argued to be in violation of the TzBfG. Both courts of lower instances, the industrial tribunal in the city of Verden (*Arbeitsgericht Verden*) and the Court of Appeal of Lower Saxony (*Landesarbeitsgericht Niedersachsen*) dismissed his claim. They found that section 1 of the respective contracts constituted an unlimited number of fixed-term agreements in accordance with the requirements of the TzBfG. They found the respondent's prognosis on its operational needs only during the season of the outdoor pool to be accurate.

The plaintiff then brought his case before the BAG.

**Judgment**

The BAG rejected the revision.

Deviating from the findings of the Court of Appeal, the 7th senate of the BAG deemed the contract from 2006 as an indefinite contract and not an unlimited number of fixed-term agreements. The judges in particular considered both parties' interest for one fixed agreement, that would regulate the plaintiff's duties for the following years. They also acknowledged the previously terminated contract, which resulted in the underlying provision being drawn up. As another indication they regarded the parties' opinion themselves, who did not consider this provision a fixed-term agreement, but a seasonal limitation of those duties.

Therefore, the clause was not to be examined as to its compliance with the TzBfG, but rather whether the employment conditions offered were legitimate 'standard business terms' under the BGB. It was thus to be decided whether section 1 of the contract constituted an unreasonable disadvantage for the plaintiff, which Section 307(1) BGB prohibits.

The BAG found the provision to be in accordance with those requirements as the defendant had an objective reason for it and it did not put any undue strain on the plaintiff. The

defendant presented the contract with the provision because it did not require the plaintiff's services during the time of the off season from November to March each year. The Court found this to be viable. The plaintiff's services as a lifeguard, in terms of cleaning and preparations for the opening and closing of the pool each year, concerned seasonal work only. The defendant had no need or opportunity to adequately employ the plaintiff during the months from November to March. The BAG gave more weight to this concern than it did to the plaintiff's interest in year-round employment.

This would, said the Court, have justified numerous fixed-term contracts under Section 14(1)(1) TzBfG, as the required work was only seasonal. Therefore, in offering the plaintiff an indefinite contract, the defendant not only took its own legitimate interest into consideration, but also the plaintiff's concerns for continuous employment and future planning.

**Commentary**

Two aspects of this decision are particularly noteworthy with regard to European law.

The decision of the Court to subject the contract to national law only results in a long-standing agreement that offers the employee planning security, thus ensuring an opportunity to assume other work during those times of non-labour and securing a reliable workforce for the employer, as specifically contemplated by the BAG. Under the requirements of Section 307(1) BGB, the Court considered the affected interests of both parties, which offers more flexibility. Under the prognosis decision regarding an objective reason for a fixed-term agreement under the TzBfG, the only question is whether the employer can justifiably offer a fixed-term agreement due to its operational needs.

However, following this line of reasoning, it raised the question whether this will be applied in other cases where the underlying provision would not constitute an objective reason in terms of Section 14(1) TzBfG but would still be in the interests of both parties under Section 307(1) BGB. This was not an issue in this case, for the BAG – even though they did not apply the TzBfG – still reasoned that the provision would have been in compliance with it and used this to argue the reasonability under Section 307(1) BGB. If the courts continue to base the legal effectiveness of such provisions on the standards imposed by the TzBfG there will be no relevant conflict with European law.

One may still argue that limiting the scope of the TzBfG is a problematic way to withhold cases from the ECJ's jurisdiction. On the other hand, the Court's finding seems in line with the European Directive that considers indefinite contracts to be the standard model to protect

employees. This is also the stance that the BAG took, as they diverged from both courts of lower instances to consider the agreement indefinite, even though it limited the contractual duties to a specific time.

From this point of view, the BAG's ruling is in accordance with European law.

**Comment from other jurisdiction**

*Bulgaria (Rusalena Angelova, Djingov, Gouginski, Kyutchukov and Velichkov):* Unlike German legislation, the Bulgarian Labour Code provides that employees performing seasonal work shall be employed only under fixed-term labour contracts. The nature of the work carried out by the employee implies conclusion of such a fixed-term contract as it is only temporary, and its period of validity depends on the specific objective circumstances. It shall be noted that fixed-term contracts are strictly regulated under Bulgarian law and are applicable only in strictly indicated cases.

Employers should take into account the fact that labour contracts shall be deemed to be fixed-term only if all statutory requirements are met. If this is not the case, these labour contracts will be considered as contracts for an indefinite term.

Moreover, the Bulgarian Labour Code does not envisage a procedure for transferring an employee from a contract for an indefinite term to a fixed-term contract, unless the employee has granted their explicit consent. Such action would constitute a violation of the Bulgarian labour legislation.

*Croatia (Dina Vlahov Buhin, Vlahov Buhin i Šourek d.o.o.):* Croatian law recognizes the institute of permanent seasonal work, which was introduced in the Croatian legal system in 2001. Namely, one characteristic of Croatia (and other Mediterranean countries) is the demand for flexible employment in the tourism, catering, construction and agricultural industries. Therefore, employment rates during the summer season are higher compared to the rest of the year.

Permanent seasonal work actually means entering into a fixed-term employment contract for a permanent seasonal job, which obliges the employer to pay contributions for the seasonal employee throughout the year unlike a regular fixed-term employment contract. Additionally, a contract for a permanent seasonal job obliges the employer to offer the respective employee a new (fixed-term) employment contract for the following season. If an employee refuses the new employment contract without objective grounds, the employer has the right to a refund of contributions paid for the respective employee during the off-season. Although this institute is

problematic from the perspectives of both the employer (as it obliges the employer to offer a job even though it cannot be sure how successful the next season will be) and the employees (who are less motivated to accept another (perhaps more lucrative) job offer because in that case they must refund paid contributions to their previous employer), it is commonly used in Croatia.

With the exception of the above institute, other provisions regulating fixed-term contracts resemble provisions of the German legal system (contracts for an indefinite term are a standard while fixed-term contracts may be concluded in case of existence of objective terms, etc).

In light of the above institute, the Croatian courts would likely decide the case in a different way. There would be no contract for an indefinite period of time provided the employer was complying with its obligations to pay mandatory contributions during the off-season, i.e. the period during which the employee is not employed and to offer a new fixed-term contract for the upcoming season.

**Subject**: Fixed-Term Work

**Parties**: Unknown

**Court**: *Bundesarbeitsgericht* (Federal Labour Court of Germany)

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