

The Non-Continuation of Fixed-Term Employment Relationships – On the Employer's Freedom and Commitment in the Contractually Predefined Space

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Abstract

In the German labour market, around 8% of employees are employed on a fixed-term basis. In 2019, this amounted to around 2.8 million people. The figures are even larger for new hires: two out of every five employment contracts have been concluded on a fixed-term basis in recent years. The discrepancy between the fixed-term employment rate in the existing workforce and in new hires reflects, amongst other things, the fact that many employment contracts are extended indefinitely over time. Indeed, fixed-term employment contracts are not only used to meet temporary labour needs. Instead, the majority of fixed-term employment contracts are based on a longer-term need for labour. Employers (permissibly) use fixed-term employment contracts to react flexibly to personal and economic imponderables by committing themselves for a limited period of time before deciding whether to take over, extend or terminate the employment relationship. Employee interest in an initially unlimited contract is therefore often supplemented or overlaid by an interest in a continuation of the contract after its expiration. The freedom of employers to decide when a contract expires creates a high degree of legal uncertainty for employees and pressure to perform particularly well, to not miss days of work due to illness, to postpone family planning and not to be active in trade unions or works councils. This further weakens the already precarious legal position of temporary employees.

While the legal limits of permissible terminations and fixed-term agreements are the subject of ongoing political controversies, extensive case law and a lively discourse in legal literature, this paper addresses the inadequately researched question of how freely employers may decide on the continuation of effectively fixed-term employment relationships after their expiration and to what extent the conclusion of the contract in the contractually predefined space – the pre-existing fixed-term employment relationship – is determined by the previous conduct of the employer or by prohibitions under labour law. For this purpose, the weight and scope of the private autonomy of employers are examined and, on the basis of constitutional and private law dogmatic standards, it is investigated how it is to be reconciled *de lege lata* with various protective concerns of employees.



The paper is divided into four parts: in the first part, the system and purpose of the fixed-term contract law in the TzBfG are elaborated on and the effects of the concept of grandfathering on the freedom of employers to continue with the contract after the expiration of the fixed term are examined. The second part deals with different groups of cases of self-binding of employers regarding a continuation of the contract. Firstly, the legal and extra-legal binding according to contract law dogmatic principles and then self-binding based on the general principle of equal treatment under labour law are examined. The third part of the thesis is devoted to prohibitions of discrimination under labour law, specifically the prohibition of discrimination pursuant to § 7 I AGG and prohibitions of repression. Since their scope and relationship to the freedom of employers to conclude contracts are particularly controversial, a dogmatic foundation is first laid by presenting the regulatory objectives and the European legal sources relevant to interpretation. Subsequently, it is examined how the various discrimination laws affect the continuation of the contract after its expiration and which legal consequences result from a violation of this. The fourth part of the thesis examines whether and how the limits of the freedom to continue a contract apply in practice, and in particular how employees can demonstrate and prove an employer's self-commitment or discrimination in court.