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Probationary Period in Fixed-Term Employment Relationship and Effects on the Waiting Period according to the Protection Against Unfair Dismissal Act

Dear Reader,

We are back from the summer break and hope that you had a relaxing vacation and are back at work full of energy. Today we would like to inform you about a recent decision of the Berlin-Brandenburg Regional Labor Court (judgment of 02.07.2024 - 19 Sa 1150/23), which is likely to be of considerable practical importance for most employers and will help to clarify the drafting of fixed-term employment contracts.

I. Appropriateness of the Probationary Period

In order to implement the European "Directive on Transparent and Predictable Working Conditions" (hereinafter referred to as "ABRL"), Section 15 (3) of the Part-Time and Fixed-Term Employment Act (TzBfG) has required since August 1, 2022 that the probationary period in a fixed-term employment relationship must be proportionate to the expected duration of the fixed-term contract and the nature of the work. However, the legal regulation does not contain any precise specifications as to when the length of the probationary period is appropriate.

II Case Law to Date

Subsequently, several district courts had to deal with the question of the appropriate duration of the probationary period and fill the undefined legal concept of "relationship" with life. A decision by the Federal Labor Court is still pending.

For example, the Schleswig-Holstein Regional Labor Court ruled (judgment of October 18, 2023 - 3 Sa 81/23) that a probationary period comprising half of the fixed-term period is always appropriate. Consideration of the special nature of the job could also justify a longer fixed term in exceptional cases.

III. Consequences of an Inappropriate Probationary Period

In the cited decision, the Schleswig-Holstein Regional Labor Court also stated that an unreasonably long probationary period is invalid in itself and means that a termination with the shortened probationary period of notice is not possible. The ineffective probationary period notice of termination must then be reinterpreted as an ordinary notice of termination with a statutory notice period in accordance with Section 140 German Civil Code.

The question of whether an unreasonably long and therefore ineffective probationary period has an effect on the parallelly applicable waiting period under dismissal law within the meaning of Section 1 (1) of the Protection Against Unfair Dismissal Act (KSchG), however, did not have to be addressed in detail by the Schleswig-Holstein Regional Labor Court.

Pursuant to Section 1 (1) KSchG, the first six months of employment automatically count as a waiting period under dismissal law without the need for an express agreement. During this period, the employment relationship can be terminated by the employer without the existence of a special - behavioral, personal or operational - reason for termination.

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IV. Decision of the LAG Berlin-Brandenburg

The parties to the employment contract agreed an employment relationship for a fixed term of one year. A four-month probationary period was agreed in the employment contract, during which the employment relationship could be terminated by either party with two weeks' notice. In addition, the right to ordinary termination was expressly reserved, irrespective of the agreed time limit.

During the first four months of employment, the employer terminated the employment relationship "within the probationary period with due notice to the next possible date", against which the employee brought an action before the Berlin Labor Court.

The Berlin Labor Court only partially granted the plaintiff's request, stating that the employment relationship was not terminated with the shortened probationary notice period, but with the statutory notice period of 4 weeks. The claim was otherwise dismissed.

Both the plaintiff and the defendant lodged an appeal and a cross-appeal against this decision.

The plaintiff based her appeal on the fact that the agreed four-month probationary period was unreasonably long and therefore violated Section 15 (3) TzBfG. This would have the consequence that the termination was not only invalid with the shortened probationary period, but as a whole. This is against the following background: In view of the invalid probationary period agreement, there would be no room for the application of the otherwise applicable (basic) notice period of four weeks. In this case, the Protection Against Unfair Dismissal Act would have applied from the outset outside the waiting period of Section 1 (1) KSchG or the waiting period under dismissal law would have been shortened.

The waiting period in accordance with Section 1 (1) KSchG serves as a trial period and makes it easier to terminate the employment relationship, just like the probationary period. It is therefore also a type of "probationary period" within the meaning of the European ABRL and is also subject to appropriateness checks. As the possibility of ordinary termination must be expressly agreed for fixed-term employment relationships, the waiting period under Section 1 KSchG would only apply by agreement. However, an agreement on the statutory waiting period of six months would be unreasonably long according to the above principles for the probationary period and therefore invalid. This would mean that the KSchG would apply to the employment relationship from the outset and the termination would require a special reason for termination. In any case, the waiting period should be reduced to the maximum permissible duration of the probationary period by way of an interpretation in line with the directive.

The defendant employer, however, maintained the validity of the probationary period termination.

The Berlin-Brandenburg Regional Labor Court dismissed both the plaintiff's appeal and the defendant's cross-appeal as unfounded.

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In the grounds for the ruling, the Berlin-Brandenburg Regional Labor Court stated that a probationary period of a maximum of 25% of the total duration, i.e. 3 months, is generally appropriate for a one-year fixed-term contract. In order to justify a longer probationary period, it is also necessary that this appears necessary due to special features of the type of activity. In the opinion of the Berlin-Brandenburg Regional Labor Court, the defendant employer was unable to sufficiently demonstrate and prove such a necessity.

Against this background, the Berlin-Brandenburg Regional Labor Court confirmed the invalidity of the agreed probationary period, but at the same time rejected any effect on the terminability of the employment relationship in general or on the duration of the waiting period under dismissal law. The protection against dismissal under the KSchG does not come into effect by virtue of an agreement, but by law, even in the case of fixed-term employment relationships, and does not constitute a probationary period. It is also not apparent from the European ABRL or the associated recitals that the European legislator - in addition to regulating the probationary period - also intended to bring forward the protection against dismissal under the KSchG.

V. Outlook and Practical Significance

Both parties have been granted leave to appeal against the decision of the Berlin-Brandenburg Regional Labor Court. It can be assumed that the case will be decided by the Federal Labor Court in the near future, which may result in further findings, which we will of course keep you informed about.

However, until the Federal Labor Court has clarified the issues raised, particular caution is required when agreeing probationary periods in the context of fixed-term employment relationships.
For reasons of legal certainty, probationary periods of more than 25% of the duration of employment should be avoided as a matter of principle. If a longer probationary period is agreed in individual cases, you as the employer should document why this is justified due to the specific nature of the job.

Feel free to contact us! Our employment law team will be happy to answer any questions you may have regarding the drafting of fixed-term employment contracts in your company.

Your employment law team at

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