

Joint opinion issued by the National Working Groups on University, Students, and Research, of the Executive Board of the National Sector of Education, Science and Research in the United Services Trade Union, ver.di, on the

# “First Law Amending the Law on Fixed-Term Employment Contracts in the Science and Research Sector”

(“Erstes Gesetz zur Änderung des Wissenschaftszeitvertragsgesetzes”, WissZeitVG)

Expectations were high but also highly contradictory. While science organizations have continued to insist on maximum flexibility, unions and works and staff councils have always focused on implementation of the principles of predictability, transparency, and life – work balance in the science and research sector.

It was also necessary to amend the law because errors and technical flaws in its wording had led to abuse in practice and drawn criticism accordingly. In the evaluation of the Law on Fixed-Term Employment Contracts in the Science and Research Sector (“Wissenschaftszeitvertragsgesetz,” henceforth WissZeitVG) a number of leverage points were specified. The amendment has now come into effect. This joint opinion represents ver.di’s first evaluation of that amendment.

## Background

The WissZeitVG is a law that grants considerable privileges to public universities and research institutions with regard to fixed-term employment contracts for their staff. These privileges are generally justified by referring to the special conditions in the science sector, where guiding outstandingly qualified graduates towards a further academic degree (doctorate and/or subsequent habilitation) is seen as a core task of universities. The research work required to attain these formal qualifications can also be carried out at non-university research institutions.

ver.di acknowledges that fixed-term employment contracts can make sense as a way to en-

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sure that the employee achieves his/her scientific qualification aims. As long as the fixed-term employment is devoted solely to that purpose, it can be said that the interests of both sides are in balance, as employees are offered the opportunity to obtain their academic qualification, thereby benefiting from arrangements of this kind. Article 5 of German Basic Law is often invoked as a rationale for the need for flexibility. Within reasonable limits all of this is acceptable.

In the *WissZeitVG*, two types of fixed-term employment contracts are specified: unfounded fixed-term contracts, and fixed-term contracts in third-party funded projects. So, what kinds of modifications have been enacted for each of these two types of fixed-term employment contracts?

### **The Unfounded Fixed Term for Qualification Purposes**

In this case, the law was amended by adding a mandatory condition requiring that the fixed-term employment contract must be “devoted to the purpose of furthering the employee’s own scientific and artistic qualification.” In addition, the duration of the employment contract must be “appropriate for attaining the intended qualification goal.” At initial glance, this looks like an improvement, but law makers did not limit the concept of “qualification” strictly to formal academic qualification, such as pursuit of a doctorate or habilitation. The examples invoked in the explanatory memorandum give rise to the concern that, in absence of a stricter legal definition, the term “qualification” could be too broadly construed. Fears are that this would result in further abuse, especially reliance on short-term employment contracts; or that risk-averse personnel administrators would be thus inclined towards considerably more reserve in drawing up employment contracts. There are documented cases of employers who consider that to draw up an employment contract following the conclusion of an employee’s work in a third-party or research-grant-funded project, which would ensure that the employee could continue his or her formal academic pursuits, represents too great a hazard or risk in hiring. In particular, as regards a post-doctoral level hiree, the question is, given the decreasing significance of the habilitation, what might then be considered a “qualification goal”. A conceivable worst-case scenario could be fixed-term employment contracts concluded on the basis of reasons that are, legally speaking, on the safe side (i.e. in accordance with article 14 paragraph 1, *TzBfG*<sup>1</sup>), whereby

employees fulfill tasks that have nothing whatsoever to do with their doctorate, while at the same time all these periods are taken into account for the maximum legal duration of their fixed-term employment preceding and/or succeeding the obtainment of the doctorate, that is, for the very periods that, according to the law under discussion here, are reserved for qualification. This does not make sense at all and, again, reveals technical flaws in the wording of the amendment. Nor does it stand in agreement with the exceptional reasons for fixed-term employment contracts in the science sector.

Whether the amendment actually fulfills the central purpose specified in the explanatory memorandum, i.e. creating predictable and reliable career paths, seems to be a moot point. The legislator’s refusal to define or at least narrow down the term “qualification”, and the decision instead to frame it as a vague legal concept leaving excessive leeway for interpretation will lead to considerable uncertainty among employers as well as works and staff councils and employees. The law thus shifts responsibility to the governing boards of the universities and the non-university research institutions, which are forced to act within the (only partially self-imposed) limitations of conflicting interests and financial constraints, and for whom, as experience has shown, good working conditions are not necessarily a priority.

Similarly, the stipulation, as now specified in the amendment, that employment contracts devoted to qualification must be of an “appropriate” duration is another point on the list of wordings that are not workable in practice. In the absence of clear statutory provisions in this respect, ambiguous wording will lead to legal uncertainty and problems, just as it did in the case for the notion of “qualification.” Again, the door is open to abuse. The law does not specify how qualification is to be accounted for in the employment contract and in the job description. Nor does it offer sustainable solutions for extensions and bridging times, especially if the mode of funding changes. Reliable standards for employees will, unfortunately, take years to obtain through rulings by labor courts. It is now up to workplace-based ver.di members’ groups as well as ver.di members on works and staff councils of universities and non-university research institutions to engage in discussions with employers with the aim to set clear and unequivocal standards for fixed-term employment contracts, permitting as little leeway as possible in interpretation.

Any effort taken in this regard must always do so with the aim of creating predictable and reliable career paths. Regret-

<sup>1</sup> *Teilzeit- und Befristungsgesetz (TzBfG)* = Law on Part-Time Work and Fixed-Term Employment Contracts.

tably, in its present form, the law fails to provide a workable tool for achieving this goal.

### **Enhancement and Clarifications Concerning Contract Extensions and Maximum Duration of Termed Employment**

Enhancing the possibilities of contract extension for employees in the qualification phase is a clearly positive element of the amendment. The changes are specified in sentences 1 and 2 of article 2, paragraph 1 with regard to maximum terms (in addition to childcare, disability or a chronic health condition have now been included as reasons); and in article 2 paragraph 5 (new no. 6) with regard to a sixth fact (in practice most likely periods of payment of sickness benefits) that may justify the extension of a fixed-term employment contract. The long-overdue specification of the term “child” (with reference to article 15, paragraph 1, BEEG<sup>2</sup>), and the clarification that bonus times can be transferred to another employer are additional positive elements to the amendment. A negative aspect, however, is the fact that the extension of the maximum term (family-policy and disability-policy components) continues to be just a voluntary option.

### **New Article 6 on Scientific and Artistic Ancillary Employment While Taking a Degree Course**

An undoubtedly positive change in the amended version of the law has been the clear specification that periods of scientific and artistic ancillary employment during degree courses will not be taken into account for the maximum duration of termed employment after graduation. The new article 6 creates legal certainty in this matter.

### **Fixed-Term Employment Contracts for Third-Party Funded Projects**

According to the amendment, the duration of the fixed-term of employment is now expected to be in line with the period allowed for the project. It remains to be seen whether this improvement will have the desired effect. Many problems arising from the existing practice remain unresolved. To mention just one, the amendment fails to take into account the fact that a considerable number of researchers pursuing doctoral degrees are doing so in the context of third-party funded research projects for which they are employed and

which are vital for their dissertations. The amendment also failed to include third-party-funded project employees in the granting of contract extensions according to article 2, paragraph 5, or the family-policy and/or disability-policy components.

### **No Fixed-Term Employment Contracts for Non-Scientific Staff in Third-Party Funded Projects**

Eliminating the opportunity for employers to rely on this law to justify fixed-term employment contracts for technical and administrative staff is a definitely positive aspect of the amendment. The reasons put forward for reducing restrictions on fixed-term employment contracts in the science sector have never constituted justification for extending the scope of application of the WissZeitVG to non-scientific staff. Therefore, putting an end to this practice must be seen as the right decision.

There is no doubt that technical and other non-scientific staff are indispensable in third-party funded research. At present, however, there are considerable uncertainties regarding the conditions of employment for this category of personnel. In some cases employers will opt against employing experienced staff as a result of balancing risks and benefits. In the past 10 years the case law on chain contracts has evolved and thus limited, with good reason, employers' options for fixed-term contracts. There will still be legitimate and justified fixed-term employment contracts in accordance with article 14 paragraph 1, TzBfG (i.e., with substantive reason) in the future, but they will not be the rule.

### **What We Are Calling For: Open-Ended Employment Contracts in the Science and Research Sector**

For us, as trade-unionists, reliance on open-ended employment contracts in the science and research sector is a distinct priority. To ensure the financing of staff working on open-ended employment contracts, appropriate budgetary and statutory frameworks will have to be established. While this may be felt as a painful curtailing of authority as practiced today in many a professorial chair, we feel that it is the only promising approach to meeting the present-day needs of employees in the research and science sector. A look at conditions in the private sector could be helpful in this respect, because it boasts highly efficient research departments, whose staff members are employed on an open-ended con-

<sup>2</sup> Bundeselterngeld- und Elternzeitgesetz (BEEG) = German federal law on parental allowance and parental leave.

tractual basis. It is also our intention, as trade unionist, to ensure that this provision applies as well to members of the scientific staff in third-party funded projects who are not, or no longer, in an academic qualification phase of their careers.

It should be noted here that what is needed for putting the regular use of open-ended employment contracts on solid footing are not only new ways of distributing existing financial means, including third-party funding, but also the implementation of the same legal provisions at state level, by each of the *Bundesländer*, as well as on the federal level. At present, the persistence of rigid staff appointment schemes and budget management regulations virtually rules out open-ended employment contracts, especially in cases of dual funding (e.g., central budgetary resources plus third-party funds) or bridging funds. Here, policymakers are called upon to take swift action, building on the expertise of scientific institutions.

Action should also be taken by the providers of third-party funding, in particular public-sector agencies. While the German Research Foundation (DFG) (*Deutsche Forschungsgemeinschaft*) has exhibited some openness towards fixed-term employment contracts for scientists in accordance with article 2, paragraph 1, and indeed provides the financial means to cover possible costs arising from contract extensions, the German Federal Government seems to feel itself under no such obligation. Although the involvement of staff working on open-ended employment contracts in third-party funded projects is considered to be possible in principle, an explicit distinction is made between project promotion, on the one hand, and personnel development or management, on the other; the interrelation between them is accordingly and stubbornly ignored (cf. BT-Drucksache<sup>3</sup> 18/7014, 14.12.2015). In our union's view, this understanding can only be termed as irresponsible.

### Appropriate Funding and Personnel Policy

As we trade unionists see it, the reason for these problems is the dysfunctional mode of science funding in Germany. If universities and other tertiary educational institutions were granted sufficient basic funding for both of their primary functions – research and teaching – they would also be able to employ the personnel needed to fulfill these tasks, relying on open-ended employment contracts to the extent required.

<sup>3</sup> *Bundestagsdrucksache* = a document issued by the German Federal Parliament.

But as long as nationwide competition for third-party funds is the primary mode of research financing, and as long as the number of scientific personnel in tertiary educational institutions is invariably tied to capacity regulations, specifically to the number of students, no fundamental change will occur in the dire conditions for the staff of such institutions.

What ought to be implemented, rather than vaguely worded justifications for fixed-term employment contracts, is a mandatory commitment to a clear-cut personnel policy. Scientists are entitled to financially secure conditions when pursuing their doctorates. Post-doctoral employees (perhaps pursuing the habilitation) are entitled to a clear outlook concerning their chances for remaining in the academic community and science system. In our view as trade unionists, binding agreements delineating a clear-cut qualification goal and guaranteeing subsequent conversion of fixed-term employment contracts into open-ended employment contracts are a practicable means to this end.

Because of the present impossibility for employers and unions to develop contractual provisions in derogation of the law ("Tarifsperr" or collective bargaining restrictions, as fixed in the *WissZeitVG*), the bargaining parties will remain unable to conclude supplementary and enhanced collective agreements in the years to come. We will nevertheless continue our critical monitoring of the voluntary commitments made by universities and research institutions.

### Conclusion

ver.di remains of the view that open-ended employment contracts must become the norm at universities and non-university research institutions. Permanent positions for permanent tasks and sufficient financing by the Federal government and the Länder will remain our central demand.

The present amendment to the *WissZeitVG* is of limited practical use as a building block in this endeavor, since it fails to follow through with its initial promise to curb employer reliance on precarious fixed-term employment. ver.di therefore welcomes all initiatives that seek to improve the support given to junior scientists and non-professorial teaching staff.

In the long run, an increase in open-ended employment contracts is inevitable/unavoidable for sub-professorial positions in the science sector in Germany. ●