

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Elimination of tenure-track contract model for university assistants – no infringement of principle of equality

Austrian Constitutional Court
Judgment of 10 October 2002
B 913/ 02

Facts of the case

Until the amendment of the Public Service Employment Act – Universities, Federal Law Gazette I No. 87/2001, ("Dienstrechts-Novelle 2001 – Universitäten", hereinafter: "amendment") a limited term employment contract up to four years was initially offered to university assistants (Sec. 174, paragraph 1 and Sec. 175, paragraph 1 of the Civil Service Employment Act ["Beamten-Dienstrechtsgesetz 1979", hereinafter: "BDG"]). For a subsequent transformation into a permanent – public - employment (Sec. 176 BDG) a PhD, a doctorate or an equal academic or artistic qualification had to be acquired (No. 21.2, annex 1 of the BDG). The amendment introduced a new Paragraph 3 of Sec. 174 of the BDG according to which, with effect from 30 September 2001, temporary public employment **could** no longer be established for university assistants. Moreover, a new Paragraph 6 was added to Sec. 176 BDG, which became effective on 1 August 2001, whereupon any transformation into a permanent employment was barred for those assistants whose temporary employment contract ended after 1 September 2001. According to Sec. 176 a BDG, in these cases only the contracts of those assistants with a PhD, a doctorate or an equal academic or artistic qualification completed before that (so-called "Post-Docs") were to be transferred into a permanent employment contract.

The complainant became university assistant with effect from 1 December 1997, therefore her temporary, four-year contract would have ended on 30 November 2001. Her application for a permanent employment, filed on 10 January 2002, was dismissed in compliance with Sec. 176, paragraph 6 BDG in its version of the amendment with reference to the fact, that her original contract had ended before, that was: after the key date of 1 September 2001. In her appeal to the Austrian Constitutional Court (hereinafter: "Court"), the complainant claimed a violation of her constitutionally guaranteed right to equal treatment of all citizens; Sec. 176, paragraph 6 BDG in its version of the amendment should be rendered unconstitutional because of the abrupt change without any transitory provisions. Her long-term career planning was seriously harmed. From one day to the other, an extension of her contract had become impossible; no

solution for hardship cases was provided. In her view, her professional career was simply left to chance. Besides, the legislator had not taken into account that her constitutional right to practice every kind of gainful activity ("Erwerbsfreiheit") and to choose and train her vocation ("Berufsausübungsfreiheit")¹. Sec. 176, paragraph 6 BDG in its version of the amendment had a retroactive effect as the termination of her career as a university teacher could be seen as a negative legal consequence of her initial, temporary contract.

Relevant provisions

"Art. 2 Staatsgrundgesetz

All citizens are equal before the law."

"Austrian Federal Constitution

Art. 7

(1) All citizens are equal before the law. (...)"

The Court's Assessment

The Court rejected the admissible appeal as ill-founded and stated that because of the fact Sec. 176 paragraph 6 BDG in its version of the amendment had become effective on 1 August 2001, there was no case in point of retroactive effect. The Court referred to its jurisprudence concerning cases of "many years of official duties", which had been the only relevant one in the present context of legal restrictions with effects for the future². This case law, however, does not apply in the special case of a limited term employment contracts, which normally are established at the start of a career. At best, the wish for a continuing legal situation were not fulfilled, but these expectations are not specifically protected in the constitution³. Regarding the complainant's argument of her career left to chance, the Court conceded that – referring again to its case law – provisions are inconsistent with the principle of equality if legal consequences only depend on "randomness, especially manipulative circumstances" like a governmental decision⁴. Nevertheless, there was no comparable provision as the legal consequences did not rely on the application itself, but depended exclusively on the question whether the complainant's contract originally ended before or after the key date of 1 September 2001. The court also saw no violation of the principle of equality in the different treatment of cases depending on the time of

1 Refer to *Anneliese Legat/Rudolf Feik*, Dienstrechts-Novelle 2001 – Universitäten (BGBl I 2001/87) und die Überleitungsanträge in das "provisorische Dienstverhältnis" gemäß § 176 BDG, Bundeskoordination Internationalismus (BUKO-Info)/ UNILEX Info-Spezial 2/2002, Zentralausschuss für die Universitätslehrer beim Bundesministerium für Bildung, Wissenschaft und Kultur, 1 ff.

2 Cf. in VfSlg. 11.309/ 1987.

3 Cf. VfSlg. 13.461/ 1993, 13.657/ 1993, 14.842/ 1997.

4 Cf. VfSlg. 7708/ 1975, 7813/ 1976, 10.620/ 1985, 12.688/ 1991.

the decision on the application, before or after 1 August 2001, even if there were hardship cases⁵.

Moreover, the provision was also determined to be objective. The distinction between assistants with or without a PhD, a doctorate or an equal academic or artistic qualification completed before the temporary employment contract is objectively justifiable, as the "Post-Docs" had already been able to concentrate on improving themselves beyond PhD level with the beginning of their temporary contract. In addition, the Court made it clear that the general elimination of transforming a temporary contract into a permanent public contract for university assistants is not against the constitutional idea of the Civil Service due to the special character of the duties at universities⁶.

All in all, the Court made it clear that Sec. 176 paragraph 6 BDG in its version of the amendment was in accordance with the constitution.

Note

"Too much confidence is often foolishness, too much mistrustfulness always unhappiness!" was stated once by the Austrian poet J. N. Nestroy. But neither is private confidence a category of written law, nor is the hope of a continuing legal situation as such a-priori protected.

According to legal doctrine, the Austrian Constitutional Court draws on the principle of equality and not the Rule of Law principle, unlike for instance the German Federal Constitutional Court does. In default of any objective scope of protection ("sachlicher Schutzbereich") of the constitutional right to equal treatment, always just referring to comparison in contrast to fundamental civil rights and liberties, the Austrian Court therefore always sees itself forced to decide extremely case-related, strengthening the general tendency towards the forensic Case Law inside the scholastic German-Austrian Civil Law jurisdictions. As so often, the concrete legal asset affected by the amendment as opposed to the unprotected frustration of unfulfilled expectations or dashed hopes remain undetermined and vague here, too. That is also why every analysis of the postulated "particular" protection relating to the constitutional rights to practice every kind of gainful activity ("Erwerbsfreiheit") and to choose and train one's vocation ("Berufsausübungsfreiheit") is totally missing. Instead of this, the Court states briefly, albeit legally correct, that at hand there was no case of (real) retroactive effect, which, nevertheless, still is a questionable legal institution according to legal doctrine. Referring to the Court's standing jurisprudence on legal restrictions with effects for the future, only sudden and grave interferences into trustable legal positions are constitutionally protected. More or less carefree, the Court qualified the question as irrelevant, whether university assistants had a legal title to have their temporary contract transformed into a permanent employment relationship. The more so, as in other judgments the Court did not

5 Cf. VfSlg. 14.268/ 1995.

6 Refer to VfSlg. 11.151/ 1986.

demand any "general minimum duration" of a trustable legal position⁷. The Court therefore left open not only a controversial legal question, but also a decisive one for the present case⁸.

In the end, one must agree with the result of the Court's judgment that the complainant could not really be treated as entirely trustworthy: According to the legal situation before and also after the amendment became effective (!) Sec. 174, paragraph 2 BDG specified two parallel goals of the temporary contracts for university assistants: The first, and more institutional one is to prove the qualification as a university teacher, the second, and more personal one is to support their professional education. De facto, a great number of university assistants used their temporary contract to finance their doctorate, as the author of these lines himself did naively long time ago, too. That is why an academic career is and was always before just handled as a single opportunity, in order to gain additional qualifications – especially in case of negation of the academic career option – for an extramural professional life.

Finally, the judgment was fully in line with the standing jurisprudence of the Austrian Constitutional Court, in which it repeatedly invoked the importance of a legitimate margin of appreciation and discretion.

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7 See VfSlg. 15.936/ 2000; cf. *David Leeb*, Zur Gleichheitswidrigkeit von § 176 Abs 6 iVm §§ 175 a und 176 a BDG, *Zeitschrift für Hochschulrecht, Hochschulmanagement und Hochschulpolitik*, 2002, 161 ff.

8 Cf. *Thomas E. Walzel von Wiesentreu*, Vertrauensschutz und generelle Norm – Anmerkungen zu einem komplexen Problem und seiner verfassungsrechtlichen Lösung, *Österreichische Juristenzeitung*, 2000, 1 ff.