SUMMARY

2017/33 Time starts to run for breaches of the rules on fixed term contracts from the date when the less favourable treatment began (MA)

<p>The period within which an employee can file a claim under the Regulations entitled "Contracts of Service for a Fixed Term" (which are Subsidiary Legislation under Maltese law) starts from when the employee became subject to less favourable treatment and not from when the employee could have known that the Regulations were being breached.</p>

Summary

The period within which an employee can file a claim under the Regulations entitled "Contracts of Service for a Fixed Term" (which are Subsidiary Legislation under Maltese law) starts from when the employee became subject to less favourable treatment and not from when the employee could have known that the Regulations were being breached.

Facts

The appellant was employed with the Government of Malta as a Technical Attaché, representing Malta in Brussels. She was employed on various fixed term contracts, the first of which was valid for a three-year period from 24 September 2004 to 24 September 2007. On the 24 September 2007, her employment was extended for another three years. One of the conditions of this second contract was that it could not be extended again. On 15 June 2007, the Subsidiary Legislation dealing with Contracts of Service for a Fixed Term was extended to apply to civil servants. Note that this Subsidiary Legislation is a transposition of EU Directive 1999/70 of 28 June 1999 concerning the framework agreement on fixed-term work.

The Ministry in charge of the Environment Portfolio had circulated new parameters in relation to the extension of fixed term contracts. Pursuant to an email dated 1 December 2009, the appellant was informed by the Government of Malta that "the first of these decisions is that the overall period of service that may be served by any officer in technical attaché/research officer position/s cannot exceed a total of five years and nine months. This means therefore, that if warranted by an officer's performance, an original three-year Agreement may be extended for a further period up to a maximum of thirty-three months." Notwithstanding the newly established parameters, on 29 November 2011 the appellant was given an additional backdated fixed term contract as a Technical Attaché (Environmental Horizontal) and this was described as a "position of trust". The fixed term contract was for three years, commencing on 25 September 2010 and lasting until 25 September 2013.

Subsequently, the contract commencing on the 25 September 2010 was renewed:

first 31 January 2014;
then until 20 April 2014;
then until 30 August 2014.

After 30 August 2014, the contract was not further renewed. The appellant filed a claim before the Industrial Tribunal on 11 December 2014. She argued that the Government of Malta had breached the Subsidiary Legislation on Contracts of Service for a Fixed Term when it did not renew her last fixed term contract, since the fixed term contracts had converted by operation of law into an indefinite term contract.

Her argument was based on a principle found in the Subsidiary Legislation, stipulating that a contract of service for a fixed term shall become an indefinite term contract if: "the employee has been continuously employed under such a contract for a fixed term, or under that contract taken in conjunction with a previous contract or contracts of service for a fixed term in excess of a period of continuous employment of four years."

Subsidiary Legislation 452.81: Contracts of Service for a Fixed Term Regulations, Regulation 7 (1)(a).

The defendants held that the claim was time-barred since it had not been filed within four months, as stipulated in the Subsidiary Legislation: "the Industrial Tribunal shall not consider a complaint under this regulation unless it is presented within a period of four months, beginning from the date of the less favourable treatment."

Subsidiary Legislation 452.81: Contracts of Service for a Fixed Term Regulations, Regulation 8 (2).

The Industrial Tribunal decided that these four months started to run from when the employee should have seen a 'red light', which in this case, the Tribunal interpreted as being the signing of the final extension of the contract by the employee on 17 June 2014. This was because she was subject to successive fixed term contracts and when she asked whether her contract should transform into an indefinite term contract, she was informed that it would remain a fixed term contract. Moreover, the Government kept issuing fixed term contracts until she was terminated. The Tribunal reasoned that the employee should have filed a complaint when she became aware that the Regulations were being breached, referring to this as the 'red light'.

The appellant appealed this decision.

Judgment

During her appeal, the appellant argued that the four months started to run from the moment the employment was terminated, this being the less favourable treatment. The appellant argued that whilst she was still in employment, she was not subject to less favourable treatment and therefore the article in the Subsidiary Legislation which gives the employee four months to file the case should be interpreted restrictively.

The Court of Appeal agreed with this argument and referred to the relevant section of the law, which states that "the Industrial Tribunal shall not consider a complaint under this regulation unless it is presented within a period of four months, beginning from the date of the less favourable treatment."

Subsidiary Legislation 452.81: Contracts of Service for a Fixed Term Regulations, Regulation 8 (2).

Further, the Court of Appeal argued that a contract converts from a fixed term into an indefinite term contract automatically, by operation of law, and the employee does not need to trigger this process. Therefore, the four months cannot start to run from the date of conversion of a fixed term contract into an indefinite term contract. When the fixed term contract was converted into an indefinite term contract, the appellant suffered no prejudice. She only suffered less favourable treatment when the Government of Malta refused to renew the contract, and thus the four months started to run on that date. This meant that her claim was not time-barred, as had originally been decided by the Industrial Tribunal.

Commentary

The Court of Appeal made it very clear that the four months start to run when the employee's employment is terminated. The Court emphasised that the law speaks of less favourable treatment and not about the ability of the employee to foresee when the contract would be terminated.This judgment clarifies the meaning of unfavourable treatment and provides certainty to employees as to when a claim may be filed. It is now clear that this needs to be done within four months of termination.

Directive 1999/70 does not specify when employees should file their claims. In line with the EU principle of judicial effectiveness however, Member States need to implement the Directive in such a way as to give individuals an effective judicial remedy. Therefore, the Industrial Tribunal should not interpret Regulation 8(2) of the Subsidiary Legislation restrictively, as this would avoid the application of Directive 1999/70 and deny employees an effective remedy in conformity with the Directive.

Comments from other jurisdictions

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): In Germany, all limitations on employment contracts must comply with the rules contained in the Act on Part-time and fixed-term Employment Contracts (Teilzeit- und Befristungsgestz, TzBfG). According to Section 14(1) TzBfG, there needs to be an objective reason for a fixed term contract. If there is no objective reason, Section 14(2) provides that a fixed term contract is only valid for two years, but within the two years, the contract can be extended up to three times.

According to Section 16 of the TzBfG, the contract is regarded as having been concluded for an indefinite period if the limitation of the contract is invalid.

Employees are entitled to make a claim for a declaration by the court that the limitation of their contract is invalid and the employment contract is for an indefinite period. Section 17 of the TzBfG states that the employee must make any such claim within three weeks of the termination of the fixed term contract. Otherwise it will be time-barred.

Subject: Fixed-term work

Parties: Natalie Chetcuti – v – Direttur Generali et

Court: Court of Appeal

Date: 19/05/2017

Case Number: 28/2015/1

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Publication: http://www.justiceservices.gov.mt/courtservices/Judgements/

Creator: Court of Appeal
Verdict at: 2017-05-19
Case number: 28/2015/1