SUMMARY

ECJ 12 December 2013, case C-361/12 (Carmela Carratù - v - Poste Italine SpA), Fixed-term work

Facts

The Italian law transposing Directive 1999/70 provides that a fixedterm clause is ineffective unless it results from a document specifying one or more of the following reasons for not offering permanent employment: technical, production or organisational reasons or the replacement of another worker. Where a fixed-term contract has been concluded without any of these conditions having been satisfied, the court can convert the fixed-term contract into a permanent contract. In 2010 a new law came into force which, in Article 32(5), provides that, "In cases in which a fixed-term contract is converted, the court shall order the employer to compensate the employee by setting comprehensive compensation ranging from a minimum of 2.5 to a maximum of 12 months' actual overall pay, having regard to *[the employer's size, length of service, conduct of the parties and terms of employment]*". In other words, the penalty for unlawfully inserting a fixed-term clause in an employment contract is capped at 12 months' salary, regardless of the employee's actual loss compared to a situation in which he or she had had a permanent contract.

Ms Carratù was hired by Poste Italiane under a fixed term contract for the period 4 June - 15 September 2004. The contract stated that the use of a fixed-term clause was justified by the need to provide for the replacement of staff absent during the summer holiday period. After her contract had expired, Ms Carratù claimed that this fixedterm clause was too broadly worded, in that it failed to identify the employees to be replaced or to indicate the duration of or reasons for their absence.

National proceedings

Ms Carratù brought proceedings before the *Tribunale di Napoli* seeking (i) conversion of her

fixed term contract into a permanent contract, (ii) reinstatement and (iii) payment of the remuneration which she had accrued in the meantime.

In a part-judgment of 25 January 2012 *[eight years later, Editor]*, the *Tribunale di Napoli* found that a permanent contract had indeed arisen. However, being unsure about the consequences, in particular in view of the cap provided in said Article 32(5), it referred seven questions to the ECJ.

ECJ's findings

The ECJ rejected a request by Ms Carratù to reopen the oral proceedings following the Advocate-General's opinion and rejected a submission by Poste Italiane requesting that it declare the questions inadmissible (§ 17-26).
A directive has direct effect against any body which, whatever its legal form, has been made responsible, pursuant to a measure adopted by a public authority, for providing a service in the public interest subject to the control of that public authority and, for that purpose, enjoys exceptional powers. Poste Italiane is such a body (§ 27-31).
Clause 4(1) of the Framework Agreement on fixed-term work annexed to Directive 1999/70 provides that, in respect of employment conditions, fixed-term workers shall not be treated less favourably than comparable permanent workers solely because they have a fixed-term contract, unless the different treatment is objectively justified. Does the concept of 'employment conditions' in this clause 4(1) cover the compensation to be paid on account of the unlawful insertion of a fixed-term clause into an employment contract? The ECJ, referring by analogy to Bruno (C- 395/08), replied affirmatively (§ 32-38).
Italian law provides for a more favourable remedy for permanent employees who have been unlawfully dismissed than for fixedterm employees who have wrongfully been denied continued employment. The compensation that courts can order in such cases is not capped at 2.5 - 12 months' salary. Is this difference in treatment objectively justified? Clause 4 of the Framework Agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer from using fixed-term contracts to deny those workers rights which are recognised for permanent workers. However, as is clear from its wording, the principle of equal treatment does not apply to workers with a fixed-term contract and non-comparable permanent workers. Therefore, whether the persons concerned can be regarded as being in a comparable situation must be examined (§ 39-43).
The compensation paid in respect of the unlawful insertion of a fixed-term clause into an employment relationship is less than that paid in respect of the unlawful termination of a permanent contract. However, these situations are significantly different (§ 44-45).

The Member States may maintain or introduce provisions that are more favourable for fixed-term workers than those provided in the Framework Agreement (§ 46-47).

Ruling

Clause 4(1) of the Framework agreement on fixed-term work, annexed to Council Directive 1999/70 [...] must be interpreted as meaning that it may be relied on directly against a State body such as Poste Italiane SpA.
Clause 4(1) of the framework agreement on fixed-term work must be interpreted as meaning that the concept of 'employment conditions' covers the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixedterm clause into his employment contract.
While the Framework agreement does not preclude Member States from granting fixed-term workers more favourable treatment than that provided for by the Framework agreement, clause 4(1) of the Framework agreement must be interpreted as not requiring the compensation paid in respect of the unlawful insertion of a fixedterm clause into an employment relationship to be treated in the same way as that paid in respect of the unlawful termination of a permanent employment relationship.

Creator: European Court of Justice (ECJ)
Verdict at: 2013-12-12
Case number: C-361/12