SUMMARY

2013/55 “Uncertain funding” can make work “special”, thus justifying the renewal of fixed term contracts (CZ)

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Facts

The employer in this case was a research institute and the employee was a scientist. The

research was funded by grants made for a fixed period. The employer concluded an agreement with trade unions by which 'uncertain funding' for research was accepted as a valid reason for qualifying the work performed by the employer's scientists as "work of a special nature" within the meaning of Czech law. On this basis the employer concluded roughly eight separate fixed term contracts with the employee between 2000 and 2008.

By Czech law, the restrictions on concluding and renewing fixed term employment relationships do not apply in cases where an employee performs work of a special nature and the employer has concluded an agreement with trade unions in which the special nature of the work is specified for these purposes. In the case of employers where no trade unions operate, the agreement may be substituted by an internal regulation issued by the employer.

In 2008, when the employee's eighth employment contract was not renewed, the employee notified the employer that in his view fixed term employment had not been lawful in his case and his contract should have been for an indefinite term. The employer maintained that the employment relationship had terminated as agreed and therefore the employee's union O.P.O.R.A. brought a claim in court. The employee claimed that the fact that the work is funded by grants does not mean that the work performed by the employee could be considered as work of a special nature.

The court of first instance and the appeal court both decided in favour of the employee. The appeal court's view was that if employers could consider uncertain funding as meaning that the work was of a special nature, this would exceed the scope of the statutory rules enabling employers to specify work of a special nature. The court held that the funding of work is an organisational issue and does not concern the nature of the work.

Judgment

The Supreme Court ruled that the relevant legal regulation does not specify any conditions as to how the 'special nature of the work that is to be performed by the employee' should be defined in the agreement concluded between an employer and trade unions. (Note that the agreement between the employer and trade unions must be considered as a source of law, in a wider sense.)

Therefore, the Court reasoned, the agreement may include not only reasons relating to the nature of the work of one particular employee but also the nature of work of many other employees. Further, the reasons may, according to the Supreme Court, be based not only directly on particular work performed by employees but may also be based on the wider conditions which affect the conclusion of employment contracts and work performance within the organisation. The Supreme Court felt that the funding of the work was important in

this wider context.

For the above reasons, the Supreme Court annulled the decisions of the lower courts and returned the whole case to the court of first instance for fresh proceedings.

Commentary

The decision concerns the definition of the 'special nature of the work that is to be performed by the employee'. According to the Supreme Court, the definition can be drawn quite widely and include, for example, the funding of employer activities. This means that there will be many cases where employers may get around the statutory limitation on fixed term employment.

Where there are trade unions operating at the employer, the employer must agree on what is meant by the 'special nature of the work'. This represents a natural restriction on employers, as trade unions are unlikely to agree to define this very extensively. However, where there is no trade union operating at the employer, the employer is entitled to define what is meant by the 'special nature of the work' in its internal regulations. Such an employer would only be limited by what the Supreme Court calls the wider conditions affecting the conclusion of employment contracts and work performance within the organisation. Without further judicial guidance, this could potentially include almost anything.

Directive 99/70 brought into effect the framework agreement on fixed term work. The framework agreement states that in order to prevent abuse arising from the use of successive fixed term employment contracts or relationships, member states must introduce one or more of the following: (i) objective reasons justifying the renewal of fixed term employment; (ii) the maximum total duration of successive fixed term employment; and (iii) the number of permitted renewals.

In my view, the legal regulation in the Czech Republic does not entirely meet these requirements, because it enables there to be an unending succession of fixed term employment contracts under certain circumstances, contrary to (ii) and (iii) above. Nevertheless, the Czech regulation is not irrational and for some types of work (e.g. seasonal work) it can be useful. However, I believe the Supreme Court should have ensured that usage of the rules was strictly limited and should not have interpreted them as widely as it did in this case. It is also unfortunate that the Supreme Court did not consider EU law in making this ruling.

Despite the ruling, my view is that employers should act cautiously in defining the 'special nature of the work'. It seems to me that the courts are likely to make adjustments over time,

and so meanwhile, employers must take care to avoid any abuse.

Comments from other jurisdictions

Austria (Andreas Tinhofer): Even before Directive 99/70 was enacted, the renewal of a fixed term employment contract was lawful in Austria only in very limited situations. Although there is no explicit statutory rule for that purpose, the courts require employers to demonstrate a legitimate reason for such a renewal. On the basis of this longstanding case law it is generally assumed that no specific statutory measures are needed in order to implement the Directive.

The courts take a rather strict approach as to what can be a legitimate reason. The standards being applied are getting stricter the more often an employment contract is renewed. Uncertainty about the economic future of a company and about the need for personnel is part of normal business risk and can therefore not be a reason for the renewal of a fixed term contract. It is safe to say that it is generally very hard for employers to justify the renewal of a fixed term employment contract.

Seasonal businesses that are closed for a longer period of time (e.g. a hotel in a summer resort) are generally exempted from the prohibition against renewing fixed term employment contracts. In one case, the Supreme Court held that musicians of an orchestra going on tour with a circus could be employed on the basis of such repetitive 'chaincontracts' (*Kettenarbeitsverträgen*). The same was decided regarding professional soccer players, the rationale being that chain contracts are standard in this area, allowing employers and employees to remain flexible and able to adapt to "the requirements of the competition". However, it was not accepted that a theatre would not employ ushers during the summer break of two months (in July and August), offering the employment contracts only from September to June each year.

As can be seen from the above examples, it can be hard to predict the outcome of a court case when the business is interrupted. The Czech case reported above may well have been decided in the same way in Austria. Some scholars do argue that if employment is dependent on funding by a third party, the renewal of a fixed term employment contract could be justified.

Germany (Elisabeth Höller): In Germany every limitation of employment must comply with the regulations of the Act on Part-time Work and Fixed-term Employment Contracts ('Teilzeit- und Befristungsgesetz', or 'TzBfG').

According to s14 TzBfG a limitation on an employment contract is valid if justified by an objective reason. Section 14 TzBfG gives special examples where such justification is possible.

In relation to the Czech case, the following examples could be considered:

there is an objective reason if the operational demand for the job to be performed is only temporary (s14,(1) (1) TzBfG);
the special nature of the work justifies the limitation of the employment contract (s14,(1) (4) TzBfG); and
the remuneration of the employee is based on a public budget (s14, paragraph 1 no 7 TzBfG).

As long as an objective reason is given, there is no temporal limitation on fixed-term contracts.

In terms of the Czech case, the limitations on the employment contracts could be justified by s14(1) (1) TzBfG if the employer predicts at the time the fixed term employment contract is concluded that there will not be an operational need for the job after the end of the fixed term. In Germany, the objective reason of 'special nature of work' (s14(1) (4) TzBfG) is mainly used by companies such as public broadcasting institutions, universities and public research centres. The special nature of work may also justify a limitation to the employment if it is reasonable to expect the employee will show signs of wear and tear after a time and the nature of the work means that the employee is only required when he or she is on best form, for example, elite sports coaches. However, s14(1) (7) TzBfG only refers to public employers, such as the federal government, states or local authorities and other legal persons governed by public law.

In the scientific sector, particularly universities and other public academy institutions, the special conditions of the Act on Temporary Science Employment Law ('Wissenschaftszeitvertragsgesetz', the 'WissZeitVG') apply. According to s2(1) WissZeitVG, limitations on employment contracts with employees without a doctorate are valid for six years and for those with a doctorate for a further six years. By s2(2) WissZeitVG, a limitation is even valid if the employment is predominantly funded by third parties; the funding is granted for a specific project and time period; and the employee is employed in accordance with the purposes of the funding.

Hungary (Gabriella Ormai): Under Hungarian law, the parties may only extend a fixed term contract or only conclude a new fixed term employment within six months of the expiry of the previous fixed term if there is 'legally valid interest' on the employer's side.

Since the wording of the statute is vague, it falls to the courts to interpret it. Based on court practice the employer needs to prove, for example, that there was a business or service-related circumstance that provided an occasional or cyclic demand for the employment and was directly connected to the job. In a specific case, the court argued that the general business

requirement to operate at the lowest cost possible is too inspecific and is likely to apply to the whole business of the employer. Therefore, it cannot serve as legally justified interest on the employer's side such as to enable it to extend a specific fixed term contract.

Court practice has also highlighted that the employer's legally valid interest needs to be objective and independent of the parties. In consequence, in one case the local Labour Court rejected the employer's argument, finding that a position involving strong physical work cannot justify the conclusion of fixed term employments repeatedly just because the employer would not be able to periodically assess the employee's fitness. The court highlighted that the employer is able to assess the employee's physical abilities at the very beginning. In the given case after permanent employment, the parties had repeatedly (four times) concluded fixed term employment contracts.

Normally, the courts accept an extension if the reason of the extension is the same as the conclusion of the initial fixed term contract, i.e. if an employee is contracted to temporarily fill a post as maternity cover and the term has to be extended since the employee has decided to stay longer at home, this can be a valid reason to extend the contract.

Based on the above, in Hungary although the law fulfils the requirements of Directive 99/70, due to its vague wording and some still-uncertain court practice, it is difficult to judge which circumstances may serve as legally valid interests, particularly in the changing economic environment. Therefore, a more flexible approach, similar to the Czech example above, would be welcome.

The Netherlands (Peter Vas Nunes): The issue of whether and to what extent fixed term contracts should be allowed is a highly political one. The basic principle is that employment contracts should be permanent, i.e. for an indefinite period. However, Dutch dismissal law is so protective of permanent employees that employers, ever since the 1950s, have sought ways to hire staff without the risk of not being able to dismiss them should the need arise. One method is to hire staff for a fixed term. Until 1999, this was only allowed once unless a collective agreement concluded with one or more unions allowed for more than one consecutive fixed term. For example, an employee could be hired for one year and at the end of that year the employer would have to choose between letting the employee go and offering him or her a permanent contract (or waiting at least one month and then offering another fixed-term contract). In 1999 the law was relaxed slightly. Employers may now hire staff for three fixed-term contracts in a row, (the 'chain' may have a maximum of three 'links', as the saying goes), provided the total duration of the three contracts does not exceed three years (again, unless a collective agreement allows for more than three consecutive contracts and/or a total duration exceeding three years). Since 1999, the percentage of employees on a fixed-

term contract has increased. What is more, employees on insecure temporary contracts are disproportionately young, female, poorly educated and/or ethnic minorities, many of whom may never in their lifetime manage to secure a 'real' job allowing them, for example, to obtain a mortgage. In brief, there is an 'insider/outsider' issue: the insiders with permanent jobs and hence strong dismissal protection live in a different legal world from the outsiders, who move from one temporary low-paid job to another. At this moment a Bill is pending in Parliament that aims to reform the system. One of the proposals is to limit the number of consecutive fixed-term contracts to three with a maximum overall duration of two years, with a new series of fixed-term contracts not being allowed until after a period of at least six months during which the employee performs no work for the employer. It is hoped that this will encourage employers to offer permanent employment after two years, but many commentators fear that employees will now lose their job after two instead of three years.

Poland (Marek Wandzel): Out of three possible tools to combat abuse arising from the use of successive fixed-term contracts under the Directive 99/70 (objective reasons for renewal; maximum total duration; and the number of permitted renewals), Poland has used the last two, but on different occasions. As a general rule, a second renewal automatically leads to the conclusion of a contract for an indefinite period unless the break between the contracts exceeds one month. (In 2009, Poland temporarily modified this rule and allowed (but only until the end of 2012) for an unlimited number of renewals, provided that the duration of the fixed term contracts did not exceed 24 months in total. This provision - aimed at combatting the economic crisis - is not in force anymore.)

The result of the application of the general rule that a second renewal will automatically lead to a contract for an indefinite term, is that employers tend to conclude fixed term contracts for several (often five or even ten) years each, with the option to terminate upon only two weeks' notice and without need to give reasons for termination - whereas the termination of an indefinite contract needs to be with reasons and generally three months' notice needs to be observed. However, the courts accept such long fixed term contracts only if there are reasons to conclude them (e.g. the employer invested in a special economic zone or there is an infrastructural or medical project financed for a fixed period only). Normally such contracts should be indefinite ones.

Slovakia (Beáta Kartíková): Compared to the Czech Labour Code, the Slovak legislator gave more detail when implementing the provisions of Council Directive 1999/70/EC concerning exemptions from measures to prevent the abuse of successive fixed employment contracts. The Slovak Labour Code stipulates that further extension or re-agreement of employment for a definite period less than or in excess of two years is permitted only on specific statutory grounds, being: (i) the substitution of an employee during maternity or parental leave,

temporary sickness, or during the discharge of a public or trade union function: (ii) the execution of work that requires a material increase in the workforce for a maximum of eight months in one calendar year; (iii) the execution of seasonal work for a maximum of eight months within a calendar year; and (iv) other execution of work, as agreed in a collective agreement.

University teachers and scientists are regulated separately. Under the relevant provisions of the Slovak Labour Code, the further extension of employment for a definite period within two years or in excess of two years of a university teacher or creative employee engaged in science, research and development is possible also in cases for which there is an objective reason resulting from the nature of the work.

Whereas in Czech law the term 'special nature of the work' is not further defined, the Slovak Labour Code states that any "objective reason arising from the nature of work" will be "set out in special regulations". This implies that according to Slovak law there is no place for interpretation and that the objective reasons for the renewal of fixed term contracts will be provided for regulations for that purposes – as they are in relation to universities.

Slovenia (Petra Smolnikar): In Slovenia, the two permitted reasons for concluding fixed-term employment contracts that are most similar to the Czech 'special nature of work' reason are 'temporary increased volume of work' and 'project work'.

Contrary to Czech law, employers and unions cannot influence the existence of either of these reasons by entering into a case-by-case agreement that effectively circumvents the restrictions on concluding and renewing fixed-term contracts. Under Slovenian law there is a two-year restriction on concluding or renewing fixed-term contracts for the same work. This maximum period may be exceeded in cases of project work where a collective bargaining agreement applying to a whole branch of industry or commerce sets out the scope and (branch-related) nature of the project that does not fall within the statutory limitation of two years. Contrary to the Czech decision, by Slovenian case law, the fact that business operations are unclear or uncertain because they are, dependent on orders being placed by business partners, cannot be a substantiated reason for the conclusion or renewal of fixed term contracts. This is because the law does not permit employers to conclude fixed term contracts solely because the volume of work may reduce in future. Further, according to leading labour law experts, the external financing or the manner of funding of a particular activity, in particular where it is temporary, or seasonal, is not a sufficient reason to deny employees their right to full time employment. The temporary nature of the work or a temporary increase in volume should be sufficiently predictable at the time the fixed term contract is concluded or renewed that the employer should be fairly certain when the end of the temporary work increase will be (*Katarina Kresal*

Šoltes: ZDR s komentarjem, GV Založba, Ljubljana 2008, page 240).

Therefore, generally, the Slovenian courts are more likely to hold that where there is uncertainty about on-going funding, the conclusion or renewal of fixed-term contracts for the same work, exceeding the statutory limit, is not lawful. However, if the funding of work was deemed to be so important in the respective branch of industry that it is covered in a collective bargaining agreement as a permitted reason for the conclusion of fixed term contracts for project work, the court could consider it lawful. As project work may last two or more years, in our opinion the Slovenian courts could permit multiple renewals (exceeding the two-year time limit) but only if an end-point for the project could be envisaged in the (near) future.

Subject: Fixed-term work

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