

SUMMARY

## **ECJ 26 January 2012, case C-586/10 (Bianca Küçük - v - Land Nordhein-Westfalen), Fixed-term work**

### **Facts**

Ms Küçük was employed as a court clerk for over eleven years pursuant to thirteen consecutive fixed-term contracts. Each contract had been offered to her because of the temporary absence of a permanent employee. Ms Küçük was hired each time to replace such a permanent colleague for the duration of that colleague's absence. When she was informed that her 13th contract would expire without a new contract being offered, she brought legal proceedings, arguing that she had become a permanent employee, because the court's need for replacement of temporarily absent staff was permanent, as evidenced by the fact that she had worked in the same position for over eleven years.

### **National proceedings**

The courts of first and second instance dismissed Ms Küçük's claim, citing the following provision of German law: "*A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where [...] one employee replaces another*". Ms Küçük appealed to the highest court for matters of employment law, the BAG. It referred two questions to the ECJ. The questions related to the interpretation of Clause 5 of the Framework Agreement annexed to Directive 1999/70 ("Clause 5"), which provides:

"1.

To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [É] shall, where there are no equivalent legal measures to prevent abuse, introduce [É] one or more of the following measures:

a)

objective reasons justifying the renewal of such contracts or relationships;

b)

the maximum total duration of successive fixed-term employment contracts or relationships;

c)

the number of renewals of such contracts or relationships.

2.

Member States [É] shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

a) [É]

b) shall be deemed contacts or relationships of indefinite duration.”

### **ECJ's findings**

1.

The referring court's first question was whether the need for temporary replacement of staff such as in the main proceedings may constitute an objective reason under Clause 5(1)(a), even where that need is, in reality, permanent or recurring and might also be met through the hiring of a permanent employee, regardless of the cumulative duration of previous fixed-term contracts between the same parties (¶ 21).

2.

The German government argued that, if fixed-term contracts were not allowed where there is a regular or recurrent need for replacement of permanent staff, employers would need to establish a permanent reserve of staff, which is only feasible in very large organisations (¶ 22).

3.

After recalling the objective of Clause 5(1), namely to combat abuse, the ECJ notes that the concept of "objective reasons" refers to "precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term contracts". A national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner by a rule of statute or secondary legislation, does not satisfy this requirement. Such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need and is appropriate for achieving the objective pursued and necessary for that purpose (¶ 25-29).

4.

A provision such as the one at issue is not per se contrary to the Framework Agreement. In an administration with a large work force, it is inevitable that temporary replacements will frequently be necessary due to, *inter alia*, the unavailability of employees on sick, maternity, parental or other leave. The temporary replacement of employees in those circumstances may constitute an objective reason, particularly where this also pursues objectives recognised as legitimate social policy objectives, such as protecting maternity and enabling men and women to reconcile their professional and family obligations (¶ 30-33).

5.

The authorities must be in a position to verify whether the renewal of fixed-term contracts actually responds to a genuine need and is appropriate and necessary. The mere fact that fixed-term contracts are concluded in order to cover an employer's permanent or recurring need for replacement staff does not in itself suffice to rule out the possibility that each of those contracts, viewed individually, was concluded in order to ensure a temporary replacement. It is for the authorities of the Member State concerned to ascertain whether this is the case, taking into account all the circumstances of the case such as the number of successive contracts concluded with the same person or for the purposes of performing the same work. Thus, the number and duration of successive contracts concluded in the past may be relevant in the context of the court's overall assessment (¶ 34-45).

6.

The mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of indefinite duration does not mean that an employer who decides to use fixed-

term contracts to address temporary staffing shortages, even where these shortages are recurring or even permanent, is acting in an abusive manner. To require automatically the conclusion of permanent contracts when the size of the organisation means that the employer is faced with a recurring or permanent need for replacement staff would go beyond the objectives pursued by the Framework Agreement (α 46-55).

### **Ruling**

Clause 5(1)(a) of the Framework Agreement on fixed-term work [É], must be interpreted as meaning that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue as to whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, in matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

---

**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2012-01-26

**Case number:** C-586/10