SUMMARY

ECJ 15 March 2012, case C-157/11 (Guiseppe Sibilio - v - Comune di Afragola), Fixed-term work

Facts

Mr Sibilio was employed by the municipality of Afragola for over three years as a "socially useful worker" (*lavoratore socialmente utile*) before becoming a regular employee of this municipality. According to an Italian law introduced in 1997, Legislative Decree 468/97, certain categories of persons, such as individuals who were made redundant, can be placed on a "mobility list" (*liste di mobilità*), in which case they can be employed in the public sector for a certain maximum period (since 2001: 6 + 8 months) to perform certain types of socially useful work. Such socially useful workers are paid low-level social benefits by a national employment fund (*Fondo nazionale per l'occupazione*). Decree 468/97 provides that socially useful workers do not qualify as employees.

After becoming a regular employee, Mr Sibilio claimed the balance between what he would have earned in the period during which he worked as a socially useful worker had he been a regular employee and what he actually earned during that period. He based his claim on the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement"), which prohibits employers from treating fixed-term workers less favourably than their employees with a permanent contract.

National proceedings

The court of first instance, the *Tribunale di Napoli*, was not sure whether Decree 468/97, in providing that socially useful workers do not qualify as employees, is compatible with the Framework Agreement. It noted that the public sector had been making use of individuals placed on a mobility list for over a decade. Those lists, although intended as a temporary measure to combat unemployment, had lost their temporary nature and the work performed

by the socially useful workers was commonly used to fulfil permanent needs rather than needs of an exceptional nature. Although the Member States are free to establish the rules determining whether a relationship qualifies as one of employment, it is not evident that they may exclude a category of persons from the scope of the Framework Agreement simply by exempting persons based on the mere fact that they have been placed on a mobility list. Accordingly, the court referred two questions to the ECJ.

The first was whether the relationship between a socially useful worker and a public body making use of his services falls within the scope of the Framework Agreement. If so, the second question was: is paying a socially useful worker less than an employee with a permanent contract in a similar position and with the same seniority, with the only justification being that he was hired after being placed on a mobility list, compatible with the Framework Agreement?

ECJ's findings

1.

The ECJ rejected Afragola's arguments (i) that the questions referred to the ECJ were unrelated to the actual dispute, in that the answer to those questions could not determine the outcome of the case, (ii) that the questions were of a hypothetical nature and (iii) that the ECJ had not been provided with all the relevant facts, and that therefore the referral to the ECJ was not receivable (¤ 25-34).

2.

Contrary to other Directives in the social field, Directive 1999/70 provides that the definitions of "employment relationship" and "worker" shall be as determined under national law. It is also noteworthy that Clause 2(2)(b) of the Framework Agreement gives the Member States the right to exclude certain relationships from the scope of that agreement, such as apprenticeships and relationships concluded within the framework of a public or publicly supported training, integration and vocational retraining programme (¤ 36-37).

3.

The Framework Agreement recognises permanent employment contracts as the norm and aims to limit successive fixed-term contracts to situations where they satisfy the needs of both employers and employees (¤ 38-40).

4.

Where EU legislation refers expressly to national laws and practice, as in the Framework Directive, the ECJ may not accord expressions used in that legislation an autonomous and uniform meaning (¤ 43).

5.

At first sight, given Decree 468/97, socially useful workers fall outside the scope of the Framework Agreement. However, it should be noted that Italian case law recognises that work performed in the context of socially useful work can, in reality, display the characteristics of regular paid work, in which case Italian law qualifies the workers concerned as regular employees. This accords with the Framework Agreement, which prohibits Member States from causing Directive 1999/70 to lose its effectiveness (see the ECJ's ruling in *O'Brien*) (¤ 44-50).

6.

Even if the Italian court were to find that the relationship between Mr Sibilio and the municipality of Afragola was, in reality, one of employment, it would still be possible for that relationship to fall within the scope of Clause 2(2) of the Framework Agreement, which confers on Member States a margin of appreciation in determining whether a relationship is concluded "*within the framework of a public or publicly supported training, integration and vocational retraining programme*" (¤ 51-55).

7.

The criteria applied under said margin of appreciation must be transparent and verifiable, which it is for the national courts to determine (¤ 56-57).

8.

Given the above, there is no need to answer the second question (¤ 59).

Ruling

Clause 2 of the Framework Agreement is to be interpreted as not standing in the way of

national rules which provide that the relationship between socially useful workers and public bodies is excluded from the scope of the Framework Agreement, where those workers do not qualify as employees (which is for the national courts to determine) or where the Member State has exercised its right under paragraph 2 of said clause.

Creator:
Verdict at: 2012-03-15
Case number: C-157/11