SUMMARY

ECJ 18 October 2012, joined cases C-302/11 - C-305/11 (Rosanna Valenza et al - v - Autorità Garante della Concorrenza e del Mercato), Fixed-term work

Facts

In 2006, Italy adopted Law No 296/2006. It provides for the “stabilisation” of non-managerial staff employed by public bodies on the basis of a private-law fixed-term contract. In many cases these contracts were unlawful and the workers concerned should have been employed permanently. Law 296/2006 allowed workers who had been employed for no less than three years, to apply to become permanent civil servants. Following their appointment as civil servants, their remuneration was set at the starting rate, no account being taken of the length of service accrued under their previous fixed-term contracts.

The five plaintiffs in this case had worked for the AGCM, a public body, under successive fixed-term contracts. They applied to become civil servants. Their applications were accepted and they were placed at the starting level of the pay scale category that applied to them at the time their fixed-term contracts were terminated (with certain compensation for the pay differential). They objected to the fact that their prior service with the AGCM was disregarded.

National proceedings

The plaintiffs brought proceedings against the AGCM before an administrative court and, on appeal, with the Council of State. This judicial body noted three things. First, Law 296/2006 makes it possible to recruit certain fixed-term workers directly, without them

having to compete with other applicants, as is the normal rule. The national legislature had not intended retroactively to validate unlawful fixed-term recruitment by converting a series of fixed-term contracts into a permanent contract. Instead, it had viewed the length of service accrued in fixed-term employment as a qualification justifying conversion to a permanent employment relationship without the need for the employees to go through the general competitive process for joining the public authority's permanent staff. The fact that length of service is set at nought is justified by the need to avoid reverse discrimination against workers who are already on the permanent staff and who were recruited based on an open competition.

The second point noted by the Council of State is that within the public administration there is a rule (deemed lawful by the ECJ in its Affatato ruling, case C-3/10) [Editor: see EELC 2010-1], prohibiting the conversion of a fixed-term contract into one of indefinite duration.Thirdly, the Council of State noted that it had previously held Law 296/2006 to be compatible with the Framework Agreement annexed to Directive 1999/70 on the ground that the Framework Agreement only prohibits less favourable treatment of a fixed-term worker during the fixed-term employment relationship, not afterwards. The Framework Agreement does not prevent termination of a fixed-term contract followed by a new employment relationship in which no account is taken of previous length of service.

However, the Council of State also noted that the Labour Court of Turin took a different approach. It therefore decided to refer questions to the ECJ.

ECJ's findings

1. The ECJ summarised the questions as being whether Clause 4 of the Framework Agreement, read in conjunction with Clause 5, precludes national legislation which prohibits periods of service completed by a fixed-term worker for a public authority being taken into account in order to determine the length of service of that worker upon recruitment on a permanent basis by that authority as a civil servant under a "stabilisation" procedure (§ 29).

2. Clause 4 provides that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Clause 4 also provides that period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers, except where different length-of-service qualifications are justified on

objective grounds. Clause 5 provides that Member States shall introduce measures to combat abuse of successive fixed-term contracts.

3. The Italian government disputed the applicability of Clause 4. In its opinion, the previous fixed-term contracts merely constitute a condition for admission to the stabilisation procedure. That procedure has the effect not of transforming or converting fixed-term contracts into permanent contracts, but of establishing a new employment relationship which includes an obligation to complete a period of training. In other words, the difference in treatment invoked by the plaintiffs is a difference between two groups of permanent employees. The ECJ rejects this line of argument. To exclude application of the Framework Agreement automatically in cases such as at issue in the main proceedings would effectively reduce the scope of the protection against discrimination, contrary to the ECJ's case law, including Rosado Santana (C-177/10, para § 44) [Editor: see EELC 2011-3] (§ 30-38).

4. It is, in principle, for the national court to determine whether the plaintiffs, when they were working under fixed-term contracts, were in a situation comparable to that of career civil servants employed on a permanent basis by the AGCM, having regard to the nature of the work, training requirements and working conditions (§ 39-43).

5. The fact that the plaintiffs have not passed the general competition for obtaining a post in the public sector does not mean that they are in a different situation compared to career civil servants, given that the conditions for stabilisation (i.e. minimum duration of fixed-term employment and recruitment through a selection procedure) are specifically intended to enable the stabilisation of only those fixed-term workers whose situation may be viewed in the same way as that of career servants (§ 44-45).

6. The duties performed by the plaintiffs as career civil servants following their stabilisation seem to be the same as those they performed previously under their fixed-term contracts. Should, however, the national court find that this is not the case, the alleged difference in treatment would not be contrary to Clause 4, as that difference in treatment would relate to different situations. By contrast, if the duties performed before and after the stabilisation correspond, the difference in treatment would need to be justified (§ 44-49).

7. A difference in treatment between fixed-term and permanent workers may not be justified on the basis that the difference is provided for by a general, abstract national norm such as a law or a collective agreement. Justification requires the existence of precise and specific factors, characterising the employment condition to which it relates, in the

particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result from the specific nature of the tasks for which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, alternatively, from the pursuit of a legitimate social-policy objective of a Member State (§ 50-51).

8. Reliance on the temporary nature of the employment of staff of the public authorities, does not meet those requirements and is therefore not capable of constituting an objective ground within the meaning of Clause 4(1) and 4(4) (§ 52).

9. Some of the differences between career civil servants and former fixed-term workers recruited as civil servants under the stabilisation programme, such as the method of recruiting (with or without an open competition) and the nature of their duties, could, in principle, justify different treatment. The Member States enjoy discretion as regards the organisation of their own public administration and may therefore lay down conditions for people to become career civil servants, along with conditions for their employment, provided such conditions are applied in a transparent way and are open to review (§ 53-61).

10. Although preventing reverse discrimination against career civil servants recruited after passing a general competition may constitute an 'objective ground', it cannot justify disproportionate national legislation which completely and in all circumstances prohibits all periods of service completed by workers under fixed-term employment contracts from being taken into account, in order to determine their length of service upon their recruitment on a permanent basis and, thus, their level of remuneration. The principle of non-discrimination set out in Clause 4 would be devoid of all content if, under national law, the new nature alone of an employment relationship were able to constitute an 'objective ground'. By contrast, it is important to have regard to the specific nature of the duties performed (§ 62-65).

11. There is no need to interpret Clause 5 (§ 69).

12. Clause 4 is unconditional and sufficiently precise for individuals to be able to rely on it as against the State.

Ruling

Clause 4 of the framework agreement on fixed-term work […] which is annexed to Council

Directive 1999/70 [...] must be understood as precluding national legislation, such as that at issue in the main proceedings, which prohibits periods of service completed by a fixed-term worker for a public authority being taken into account in order to determine the length of service of that worker upon his recruitment as a career civil servant on a permanent basis by that same authority under a stabilisation procedure specific to his employment relationship, unless that prohibition is justified on 'objective grounds' for the purpose of clause 4(1) and/or (4). The mere fact that the fixed-term worker completed those periods of service on the basis of a fixed-term employment contract or relationship does not constitute such an objective ground.

Creator: European Court of Justice (ECJ)
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Case number: C-302/11 and C-305/11