

SUMMARY

ECJ 26 November 2014, joined cases C-22/13, C-61-63/13 and C-418/13 (Raffaella Mascolo and others – v – Ministero dell’istruzione), Fixed-term work

Facts

The plaintiffs in these cases were teachers employed by the State or a municipality for periods ranging from 4 to 11 years, on the basis of multiple successive fixed-term contracts. Taking the view that this method of employing them was unlawful, they brought proceedings before several courts, seeking conversion of their contracts into permanent contracts, establishment as tenured staff, salaries corresponding to that status and payment of salary for the periods in between the fixed-term contracts.

National proceedings

In cases C-22/13 and C-61-63/13, the *Tribunale di Napoli*, believing the Italian legislation at issue to infringe Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70 (the ‘Framework Agreement’), referred seven questions to the ECJ. In case C-418/13, the *Tribunale di Roma* and the *Tribunale di Lamezia Terme* referred a preliminary issue to the Italian Constitutional Court (*Corte Costituzionale*), which in turn referred two questions to the ECJ.

ECJ’s findings

1. Many of the questions raised by the referring courts bear no relation to the main

proceedings and are hypothetical. Therefore, the entire request for a preliminary ruling in case C-63/13 and one of the questions in cases C-22/13, C-61/13 and C-62/13 are inadmissible. The principal remaining question is whether clause 5 of the Framework Agreement precludes national legislation which authorises the renewal of fixed-term employment contracts to fill posts of teachers and administrative, technical and auxiliary staff that are vacant and unfilled without setting a definite period for the completion of selection procedures for the recruitment of tenured staff and without compensating for harm suffered on account of such renewal (§ 46-65).

2. The Framework Agreement does not exclude any particular sector, such as the education sector, from its scope (§ 66-71).

3. The purpose of Clause 5(1) of the Framework Agreement is to place limits on successive fixed-term contracts and prevent the status of employees from being insecure. It is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers. The measures laid down in Clause 5(1) relate to (a) objective reasons justifying renewal, (b) the maximum total duration of successive contracts and (c) the number of renewals. The Member States have the choice of relying on one or more of these measures, or on existing equivalent legal measures. They are free to choose how to prevent abuse of successive fixed-term contracts, provided that they do not compromise the objective or the practical effect of the Framework Agreement (§ 72-76).

4. Where EU law does not lay down any specific penalties in the event that instances of abuse are established, it falls on the national authorities to adopt measures that are proportionate, sufficiently effective, no less favourable than those governing similar domestic situations (principle of equivalence) and such that they do not render the exercise of rights conferred by EU law impossible or excessively difficult (principle of effectiveness) (§ 77-79).

5. The Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term contracts into contracts of indefinite duration (§ 80).

6. The Italian legislation at issue in the main proceedings enables teachers to be recruited under successive fixed-term contracts in order to provide temporary replacements, without laying down any measure limiting the maximum total duration, or the number of renewals, of those contracts and without Italian law containing any measure equivalent to those set out in Clause 5(1). The statutory provision that fixed-term contracts exceeding 36 months are converted into permanent contracts does not apply to schools administered by the State. For this reason, it is necessary for the renewal of fixed-term contracts in State schools to be justified by an “objective reason” within the meaning of Clause 5(1)(a) (§ 84-85).

7. The concept of objective reasons refers to precise and concrete circumstances characterising a given activity. Those circumstances may result, in particular, from the specific nature of the tasks for which the employee was recruited or from the pursuit of a legitimate social-policy objective of a Member State. A national provision which merely authorises recourse to successive fixed-term contracts in a general and abstract manner does not accord with these requirements (see *Kücük*, C-586/10) (§ 86-88).

8. Under Italian Law 124/1999, staff are recruited in State schools

(1) by means of the grant of tenure or (2) for a fixed period by way of temporary replacement. Tenure is granted for half of the vacant posts each year by way of competition on the basis of tests and qualifications and for the other half by recourse to permanent ranking lists which include teachers who have passed such a competition without obtaining a tenured post. Appointments by way of temporary replacement are made by means of recourse to the same lists, whereby a series of replacements by the same teacher results in his moving up the list and thereby increasing his chance of being granted tenure (§ 89).

9. In a sector with a large workforce, such as the education sector, it is inevitable that temporary replacements will frequently be necessary due to, *inter alia*, the unavailability of staff on sick, maternity, parental or other leave. Moreover, schools must ensure a certain teacher-pupil ratio, which depends on factors that may be difficult to control or predict, such as migration flows or pupils' subject choices. Finally, where access to permanent employment is granted only to staff who have passed a competition, it may be objectively justified for the posts that are to be filled to be covered by successive fixed-term contracts pending the completion of the competitions (§ 92-96).

10. Whilst national legislation permitting the renewal of successive fixed-term employment contracts in order to replace staff pending the outcome of competitive selection procedures is capable of being justified by an objective reason, the actual application of that reason must be consistent with the requirements of the Framework Agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out. When applying the relevant provision of national law, the competent authorities must therefore be in a position to identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose (§ 99).

11. As the Court has already held on many occasions, the renewal of fixed-term contracts in order to cover needs which are, in fact, not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of clause 5(1)(a) of the Framework Agreement.

Such use of fixed-term employment contracts conflicts directly with the premises on which the Framework Agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (§ 100).

12. The period required for teachers to be granted tenure under the legislation at issue in the main proceedings is both variable and uncertain. This follows from two circumstances. First, that legislation does not set any definite period so far as concerns organisation of the competitive selection procedures, which is dependent upon the State's financial capacity and the authorities' discretion. Thus, no competitive selection procedure was organised between 2000 and 2011. Second, since the grant of tenure as a result of teachers' progressing up the ranking list is dictated by the overall duration of the fixed-term employment contracts and by the posts that have in the meantime become vacant, such grant depends on fortuitous and unpredictable circumstances. It follows that, although recourse to fixed-term contracts is expressly limited to just a temporary period that comes to an end when the competitive selection procedures are completed, the legislation at issue does not make it possible to be sure that the actual application of that objective reason is consistent with the requirements of the Framework Agreement (§ 105-108).

13. In the absence of any specific date for the organisation and completion of competitive selection procedures bringing replacement to an end and, therefore, of a genuine limit on the number of times the same worker acts by way of replacement on an annual basis for the purpose of filling the same vacant post, legislation of that kind is such as to permit, in breach of clause 5(1)(a) of the Framework Agreement, the renewal of fixed-term employment contracts in order to cover needs which are, in fact, not temporary in nature but in fact fixed and permanent, because of the structural shortage of posts for tenured staff in the Member State concerned. It appears that, depending on the year and source, approximately 30%, or even 61%, of the administrative, technical and auxiliary staff of schools administered by the State are employed under fixed-term employment contracts and that between 2006 and 2011 the teaching staff of those schools who had such contracts accounted for between 13% and 18% of the total teaching staff (§ 109).

14. Whilst budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts as referred to in clause 5(1) (§ 110).

15. The national legislation at issue in the main proceedings excludes any right to compensation for the damage suffered on account of the misuse of successive fixed-term contracts in the education sector. That legislation likewise does not permit the successive fixed-term contracts to be converted into a permanent employment contract. It follows that the only possibility for a worker who has acted by way of temporary replacement in a school administered by the State to have his successive fixed-term contracts converted into an employment contract of indefinite duration, is to be granted tenure as a result of progressing up the ranking list. However, since such a possibility is dependent on chance, it cannot be regarded as a sufficiently effective means of ensuring that the provisions adopted pursuant to the Framework Agreement are fully effective (§ 114-117).

Ruling

Clause 5(1) of the framework agreement on fixed-term work [...] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, pending the completion of competitive selection procedures for the recruitment of tenured staff of schools administered by the State, authorises the renewal of fixed-term employment contracts to fill posts of teachers and administrative, technical and auxiliary staff that are vacant and unfilled without stating a definite period for the completion of those procedures and while excluding any possibility for those teachers and staff to obtain compensation for any damage suffered on account of such a renewal. It appears, subject to the checks to be carried out by the referring courts, that such legislation, first, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of those contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose, and second, does not contain any other measure intended to prevent and punish the misuse of successive fixed-term employment contracts.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-11-26

Case number: C-22, C-61-63 and C-418/13