

SUMMARY

2011/15: Damages are not an effective and adequate sanction against the abuse of fixed-term contracts in public employment (IT)

<p>The abuse of fixed-term contracts in the Italian public sector has become so widespread that a court has declared unlawful the distinction between the law in the public sector.</p>

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Facts

Laura Wilmer (“the plaintiff”) was an assistant in a state school in Italy, hired for a fixed term that ended on 30 June 2008. When her contract was not renewed, she claimed that she had been hired to satisfy permanent, not temporary, needs of the school. She claimed that she should therefore have been hired for an indefinite period of time and that, as a result, her contract should be converted into a permanent one. Accordingly, she demanded to be reinstated. This demand was based on the fact that Italian law, pursuant to Clause 5 of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70/EC (the “Framework Agreement”), allows the conclusion of fixed-term contracts only when there are organisational or technical reasons for not offering a permanent contract. It is a breach of the rules for an employer to hire someone for a fixed term without there being a good reason for not hiring that person permanently. In the private sector the penalty for such a breach is, essentially, that the contract is deemed to be permanent. In the public sector, however, the penalty is that the employee can make a claim for pecuniary damages. For this reason, the plaintiff requested the court, in the alternative (i.e. in the event the court were to turn down

her demand for reinstatement) to award her damages equal to the income she would have earned until retirement age, had she continued in her job¹. It should be noted that Italian law specifically provides that in the public sector a fixed-term contract cannot convert into a permanent contract. Knowing this to be the case, the plaintiff argued that abuse is so widespread in the public sector (employers preferring to pay damages than to comply with the rules), that the penalty for abuse is an ineffective deterrent. This is incompatible with the Framework Agreement, so the plaintiff argued, and therefore, the same penalty should be applied as in the private sector, namely conversion into permanent employment. The plaintiff brought an action before the local labour court.

Judgment

The Tribunal of Siena ruled that the legal sanction against the abuse of fixed-term contracts in public employment cannot follow rules that differ from those in private employment. More precisely, the judge held that the duty to pay damages is not an effective and adequate sanction against the abuse of fixed-term contracts in public employment, as evidenced by their continuous use in the public sector to satisfy stable requirements. The judge referred to ECJ case law, including the ruling in Angelidaki (2009, case C-378-380/07), in which the ECJ ruled that “it is [...] for the referring court to determine to what extent the conditions for application and effective implementation of the relevant provisions of domestic law constitute a measure adequate for the prevention and, where relevant, the punishment of the misuse by the public authorities of successive fixed-term employment contracts or relationships”. Accordingly, the plaintiff’s employment was declared to be of a permanent nature and the defendant was ordered to reinstate her.

Commentary

This is the first time an Italian judge has found that damages are not an adequate and effective sanction against the abuse of fixed-term contracts in public employment. Beyond that, the judgment is interesting because it is the first time an Italian judge has expressly treated the termination of an employment contract by expiry of an unjustified fixed term as a wrongful dismissal, ruling that in both cases the principle formulated in Article 30 of the Charter of Fundamental Rights of the EU should be applied. This provision states that “every worker has the right to protection against unjustified dismissal”. Based on this, the judge held that the plaintiff’s contract was only partially invalid, inasmuch as it contained a fixed-term clause. Accordingly, the judge declared the existence of a permanent contract between the parties i.e. the conversion into a contract of indefinite duration of the fixed-term employment contract, which having been intended to cover both fixed and permanent needs of the employer, must be regarded as constituting abuse. The conclusions reached are interesting when compared to

other jurisprudence of the same and other Tribunals², which has normally focussed on the amount of compensation that would be adequate and effective to compensate for abuse of the law on fixed-term contracts.

Comments from other jurisdictions

Germany (Paul Schreiner): German law does not distinguish between public and private employers with regard to sanctions. If an employer concludes fixed-term contracts without a valid reason (it is possible in Germany to conclude a fixed-term employment contract without a specific reason for the first two years of employment), the employment is deemed to be concluded for an indefinite period of time.

The Netherlands (Peter Vas Nunes): The increased use of fixed-term employment contracts in many European countries has undoubtedly been caused by the high level of protection accorded to workers on a permanent contract. In The Netherlands, the difference in dismissal protection between fixed-term workers and permanent workers is so enormous that, when one takes into account that fixed-term workers tend overwhelmingly to be young, female and/or of foreign descent, there is an issue of social unfairness, often referred to in Dutch literature as the “insider/outsider” issue. Those already in the regular labour market are protected at the expense of the underprivileged “outsiders”. I can imagine that the Italian judge in the case reported above may have been inspired by this unfairness to deliver a judgment that to me seems daring, even revolutionary.

United Kingdom (Anna Sella): The Framework Agreement is incorporated into UK law by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which apply to public sector employees in the same way as to other employees (apart from some narrow exceptions, e.g. for the armed forces). There is no split, as in Italian law, between remedies in cases of private and public employment. Under the 2002 Regulations, fixed-term employees must not be treated less favourably than permanent employees, unless the employer can objectively justify such treatment, in relation to: - any period of service qualification relating to any particular condition of service (e.g. making certain benefits conditional upon a certain number of years’ service); - the opportunity to receive training; or - the opportunity to secure any permanent position in the establishment. The last strand would open the way for someone in Ms Wilmer’s position to argue that they ought to be employed under a permanent contract. Additionally, under the Regulations, those who have been employed for four or more years on two or more successive contracts automatically become permanent employees, on the same terms and conditions as their fixed-term contracts, except that their contracts will then be for an indefinite period. Finally, fixed-term employees whose contracts are not renewed are entitled to claim unfair dismissal in the same way as permanent

employees.

Footnotes

¹ The criteria for calculating the amount of damages vary from court to court. Some courts refer to the rules on unfair dismissal (under which the employee can choose to receive 15 months' salary, if he or she does not demand reinstatement), others add further damages (some around five months' salary, which is the legal minimum in the event the employee does not demand reinstatement) and some courts have recently opted for a new criterion, based on the average time needed to find a new job.

² See for example Trib, Genova 14 December 2006 (not published) and Trib, Rossano Calabro 4 June 2007 – in Foro Italiano, 2007, I, 2589.

Subject: Fixed-term work

Parties: Laura Wilmer – v – Ministero dell'istruzione dell'Università e della Ricerca e Ufficio Scolastico Regionale per la Toscana (Ministry of Education; University and Research and Regional education office for Tuscany)

Court: Tribunale di Siena

Date: 15 October 2010

Case number: RGL 662/2010 (i.e. the registration number. Note that in Italy many first instance judgments do not have a case number and are identified by the names of the parties)

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Creator: Tribunale di Siena

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