SUMMARY

ECJ 1 October 2010, case C-3/10 (Franco Affatato – v – Azienda Sanitaria Provinciale di Cosenza), Fixed-term work

<p>Clause 5 of the Framework Agreement does not preclude national legislation, such as Article 36(5) of Decree 165, prohibiting conversion of fixed-term contracts into permanent contracts, where the legal order of that Member State contains other effective measures to avoid and, as necessary, penalise the abusive use of successive fixed-term contracts. It is for the national courts to assess to what extent such measures are adequate, provided they are not less favourable than those governing similar situations and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law.</p>

Facts

Mr Affatato was employed by a public health authority in Italy and was given six consecutive fixed-term contracts. When the last of these expired on 20 June 2003 he was not given a further contract and therefore lost his job. He brought an action before the local court, seeking (i) conversion of his last fixed-term contract into a permanent contract, (ii) reinstatement and (iii) payment of his salary from 21 June 2003. He based his claim on the fact that none of his six contracts had specified the reason that it was temporary rather than permanent, despite the fact that Italian law (Decree 368/2001), as it read in the relevant period, provided that a fixed-term contract may only be entered into for technical reasons or for reasons of production, organisation or replacement, in the absence of which reasons the fixed-term

clause is invalid, i.e. the contract is permanent. The defendant admitted that the reason for not offering Mr Affatato a permanent contract was not technical or in relation to production, organisation or replacement, but purely that the defendant was prohibited by financial legislation from offering permanent employment. However, the defendant pointed out that in 2001 parliament had passed Decree 165, which, inter alia, provided in Article 36(5) that in the public sector a fixed-term contract can never convert into a permanent one. It also provided that a worker wrongly taken on for a fixed term is eligible to receive compensation, for which the individual responsible for hiring the worker may, under certain circumstances, be personally liable.

National proceedings

The court doubted whether Article 36(5) is compatible with the Framework Agreement implemented by Directive 1999/70. It therefore found it necessary to refer 16 questions to the ECJ. Questions 1-12 related to certain special categories of workers (e.g. postal workers and teachers). Questions 13 and 14 asked whether Clause 5 of the Framework Agreement precludes a national law that makes it impossible for a fixed-term contract to convert into a permanent one. Questions 15 and 16 asked how strongly a Member State must penalise abuse of fixed-term contracts.

ECJ's findings

1. The ECJ considers questions 1-12 to be hypothetical and irrelevant to the main proceedings, for which reason they are not receivable and remain unanswered (§ 24-33).

2. Questions 13 and 14 have already been answered in the ECJ's rulings in Adeneler, Marrosu, Vassallo, Angelidaki, Vassilakis, Koukou and Lagoudakis. As is apparent from those judgements, Clause 5 of the Framework Agreement does not require the Member States to provide for the conversion of fixed-term contracts into permanent ones, neither does it require them to provide in detail under which conditions fixed-term contracts may be used. Point 2(b) of Clause 5 merely provides that the Member States, "where appropriate" must determine under what conditions fixed-term contracts must be deemed to be contracts of indefinite duration. Thus, there is no obligation to treat workers in the private and public sectors in the same way. Moreover, Clause 5 does not impact the Member States' fundamental political and constitutional structures as provided in Article 4(2) TEU (§ 36-41).

3. If a national law prohibits the conversion of fixed-term contracts in the public sector, the Member State in question must provide for an effective measure to avoid and, where necessary, penalise the abuse of consecutive fixed-term contracts. Where, as in this case, EU law lacks specific sanctions against abuse, the Member States must adopt measures that are

proportionate, effective and dissuasive to guarantee the principles laid down in the Framework Agreement. Although it is up to the Member States to determine what such measures are, they must be no less favourable than those governing similar situations (equivalency principle) and must not be such as to render the exercise of the rights bestowed by the Framework Agreement impossible or excessively difficult (effectiveness principle), as mandated by Article 2 of Directive 1999/70 (§ 42-47).

4. It would appear that the Italian legislation in question complies with these principles, but it is up to the domestic courts to determine whether this is truly the case (§ 48-50).

5. The criteria for determining whether a sanction against the abuse of fixed-term contracts is adequate must be determined in accordance with domestic law. The national courts must apply the equivalency and effectiveness tests (§ 52-62).

Ruling

Clause 5 of the Framework Agreement does not preclude national legislation, such as Article 36(5) of Decree 165, prohibiting conversion of fixed-term contracts into permanent contracts, where the legal order of that Member State contains other effective measures to avoid and, as necessary, penalise the abusive use of successive fixed-term contracts. It is for the national courts to assess to what extent such measures are adequate, provided they are not less favourable than those governing similar situations and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law.

Creator: European Court of Justice (ECJ)
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