SUMMARY

ECJ 10 March 2011, case C-109/09 (Deutsche Lufthansa AG – v – Gertraud Kumpan), Fixed-term work

<p>Clause 5(1) of the Framework Agreement must be interpreted as meaning that the concept of “a close objective connection with a previous employment contract of indefinite duration concluded with the same employer” in Paragraph 14(3) TzBfG must also be applied to situations in which a fixed-term contract has not been preceded less than six months previously by an indefinite contract, where the initial employment relationship continued for the same activity by means of an uninterrupted succession of fixedterm contracts.</p>

Facts

Ms Kumpan was a Lufthansa stewardess whose employment contract was governed by a collective agreement. Article 19 of this agreement provided: "1. The employment contract shall end – without any notice being required – at the end of the month in which the age of 55 is reached. 2. Where physically and occupationally fit, a cabin staff member's employment contract may be extended beyond the age of 55 by mutual agreement. Where a cabin staff member's employment contract is renewed, it shall end – without any notice being required – at the end of the month in which the cabin staff member's next birthday falls. Further renewal is permitted. The employment contract shall in any event end – without any notice being required – at the end of the month in which the cabin staff member reaches the age of 60." Ms Kumpan's contract was originally for an indefinite period of time (permanent contract). When it ended at age 55, she entered into five consecutive one-year contracts, the last of which

expired on 30 April 2005, the month in which she turned 60. She asked Lufthansa if she could continue working and, when her request was denied, she lodged a claim with the Labour Court in Frankfurt. She submitted that Article 19(2) of the collective agreement was incompatible with Paragraph 14(3) of a German law known as "TzBfG" ("Gesetz über Teilzeitarbeit und befristete Arbeitsverträge"), which is the German transposition of Directive 1999/70 on fixed-term work (the "Directive"). Paragraph 14(1) TzBfG provides that a fixed-term employment contract may only be concluded, if there are objective grounds for doing so, such as a temporary need for manpower. By way of exception, paragraph 14(2) TzBfG allows fixed-term contracts in the absence of objective reasons, but only for a maximum of two years and three consecutive contracts. Paragraph 14(3) TzBfG, which was at the heart of this dispute, was amended on 1 January 2003 and again on 1 January 2007. In the relevant period 2004/2005, paragraph 14(3) TzBfG provided: "The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 52 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close objective connection with a previous employment contract of indefinite duration concluded with the same employer. Such a connection shall be presumed to exist inter alia where the interval between the two employment contracts is less than six months".

National Proceedings

The court of first instance dismissed Ms Kumpan's application, but this judgment was overturned on appeal. Lufthansa appealed to the highest German court in employment matters, the "BAG", which referred three questions to the ECJ. The first question asked whether EU law on age discrimination precludes a provision of national law that allows fixed-term contracts to be agreed without further conditions simply because a worker has reached a certain age. The second question asked whether Clause 5(1) of the Framework Agreement on Fixed-Term Work, annexed to the Directive, (the "Framework Agreement") precludes such a provision of national law. Thirdly, the BAG wished to know whether, if the answer to question 1 and/or question 2 was affirmative, the national courts must dis-apply the relevant provision of their domestic law.

ECJ's ruling

1. The ECJ, addressing the second and third questions first, begins by analysing Clause 5(1) of the Framework Agreement. This clause compels the Member States "where there are no equivalent legal measures to prevent abuse", to limit the use of fixed-term contracts by introducing one or more of three measures: (a) objective reasons, (b) maximum total duration, and (c) maximum number of renewals. This allows the Member States a certain discretion as to how they achieve the Framework Agreement's objective of preventing abuse. This

discretion must, however, be exercised in compliance with EU law (§ 30-37).

2. The purpose of Paragraph 14(3) TzBfG is to promote vocational integration of unemployed older workers. However, it applies to all older workers, including those who are employed, depriving those workers of the protective measures set out in Clause 5(1) of the Framework Agreement (§ 38-41).

3. As already held by the ECJ in its Adeneler judgment (case C-212/04), a national provision that allows successive fixed-term contracts in a general and abstract manner by a rule of statute or secondary legislation, does not accord with Clause 5(1), unless the national legislation in question contains another effective equivalent measure to prevent and, where relevant, penalise the misuse of successive fixed-term contracts (§ 42-44).

4. Paragraph 14(3) TzBfG limits the use of fixed-term contracts for older employees by prohibiting such contracts "where there is a close objective connection with a previous employment contract of indefinite duration concluded with the same employer", such a connection being presumed to exist where the interval between the two contracts is less than six months. This limitation does not apply to an older worker such as Ms Kumpan, whose fixed-term contract (the fifth in a row) began more than six months after her permanent contract ended. This means that older workers whose permanent contract is succeeded by one or more fixed-term contracts with a duration exceeding six months, lack all protection against abuse of fixed-term contracts. This makes Paragraph 14(3) TzBfG incompatible with Clause 5(1) of the Framework Agreement (§ 45-50).

5. Given that Clause 5(1) allows the Member States discretion as to the measures they adopt to comply with it, Clause 5(1) is neither unconditional nor sufficiently precise for individuals to rely on it before a national court. Therefore, it has no direct effect. However, the national courts must do all they reasonably can to interpret their domestic law in line with the Directive (§ 51-56).

6. In view of the above, it is not necessary to answer the first question (§ 58).

Ruling

Clause 5(1) of the Framework Agreement must be interpreted as meaning that the concept of "a close objective connection with a previous employment contract of indefinite duration concluded with the same employer" in Paragraph 14(3) TzBfG must also be applied to situations in which a fixed-term contract has not been preceded less than six months previously by an indefinite contract, where the initial employment relationship continued for the same activity by means of an uninterrupted succession of fixedterm contracts.

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