SUMMARY

2013/8 Employer breached its “good employer” obligations by denying one more fixed-term contract (NL)

<p>A tour guide with annual contracts for the duration of one season, who had worked on that basis for about 15 years, could not be denied a new contract without good reason.</p>

Summary

A tour guide with annual contracts for the duration of one season, who had worked on that basis for about 15 years, could not be denied a new contract without good reason.

Facts

The plaintiff was a tour guide on bus trips organised by the defendant, a tour operating company. The trips were organised mainly in the summer season, from April to November, with occasional trips in the winter months. The plaintiff had performed this work every year since 1989, with only one or two exceptions. Initially she was not paid salary, merely receiving free food and lodgings, as well as tips and commission. Since 1999 (the year in which the current law on fixed-term contracts was introduced) the parties had entered into annual fixed- term contracts, each for the duration of one season, with payment of a certain salary for every trip. According to Dutch law (see below) each of these contracts terminated automatically at the end of the relevant season, i.e. without either party needing to give notice. The 2005 season ended on 1 November of that year. Two days later the plaintiff and her boss had a “frank” conversation in which the plaintiff was told that she had to improve her performance as there had been complaints. However, she was allowed to guide a Christmas/New Year tour to Italy in December 2005, her last day of employment being 2 January 2006. Following this tour, management again received complaints about the way the

plaintiff had behaved. This led the defendant to inform the plaintiff on 2 March 2006 that she would not be offered new contracts.

The plaintiff brought legal proceedings, seeking injunctive relief. In those proceedings, the defendant was ordered, by way of temporary relief, to pay the plaintiff € 9,280 as an advance on her salary for the 2006 season. Neither party appealed this provisional judgment and the defendant paid said amount.

In April 2007, the plaintiff was offered a contract for the 2007 season, but she turned down the offer on her doctor's advice.

Meanwhile, the plaintiff had brought regular proceedings, seeking, *inter alia*, a declaratory judgment that she was employed by the defendant on the basis of a permanent employment contract and an order to provide her with a certain minimum amount of work with payment as per the collective agreement for tour guides.

Judgment

The court of first instance awarded the plaintiff about € 20,000, turning down her demand for a declaratory judgment that she was employed on a permanent basis. The plaintiff appealed and the defendant cross-appealed.

The main issue was whether the plaintiff was entitled to (i) salary for the 2006 season and (ii) continued employment in 2007 and beyond. In this regard, the plaintiff's most far-reaching argument was that Dutch law is incompatible with Clause 5 of the Framework Agreement on Fixed-TermWork annexed to Directive 99/70/EC, which reads:

"1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a)objective reasons justifying the renewal of such contracts or relationships;

(b)the maximum total duration of successive fixed-term employment contracts or relationships;

(c)he number of renewals of such contracts or relationships.

2.Member States [...] shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as 'successive'

(b) shall be deemed to be contracts or relationships of indefinite duration."

Dutch law transposing Clause 5(1), inasmuch as is relevant here, does not require objective reasons justifying the renewal of fixed-term contracts (criterion a), but merely provides that the maximum total duration of successive fixed-term contracts must not exceed three years (criterion b) and that the number of renewals may not exceed three (criterion c). In transposing Clause 5(2), Dutch law provides that contracts separated by more than three months are not regarded as "successive".

The Court of Appeal held that Dutch law is perfectly compatible with Clause 5. However, it went on to hold - as per established case law

-that an employer that makes use of the statutory option of allowing someone to work on the basis of consecutive fixed-term contracts can, under certain circumstances, be said to be abusing the system. In this particular case there was no abuse, given that there was very little work for the defendant's tour guides outside the summer season, and that it was therefore logical and reasonable to offer the plaintiff fixed-term contracts for every season, separated by intervals of over three months.

The next question the court addressed was whether the defendant should nevertheless have offered the plaintiff a contract for the 2006 season. The court answered the question affirmatively, because:

-the parties had worked together on more or less the same basis for many years;

-the plaintiff was financially dependent on her work for the defendant;

-the defendant had not warned the plaintiff during their conversation on 3 November 2005 that if new complaints were raised against her after the Christmas/New Year trip to Italy, she would not be offered a new contract;

-there was sufficient work in 2006 that the plaintiff could have performed;

-the notification that the plaintiff would not be offered a contract for the 2006 season came shortly before the start of that season.

For these reasons, the court awarded the plaintiff a sum of money equal to what it was estimated she would have earned had she worked the 2006 season. Although the court did not specify the legal basis for this award, it would seem to be the Dutch doctrine, codified in the Civil Code, of "good employership".

The court saw no reason why the plaintiff should have been offered contracts for 2007 and beyond. Her performance had been criticised for good reason and she had turned down the defendant's offer of a 2007 contract.

Commentary

Dutch law makes it hard to dismiss employees with a permanent contract. This has led to an increase in the percentage of workers who are employed either on a self-employed basis, as 'temps', on 'casual work' or fixed-term contracts. Whereas permanent employees have a high degree of dismissal protection, these other categories of workers have little or no protection. There is consensus that something needs to be done about this increasing division of the labour force into two groups, one consisting mainly of older/native-born/male/ better-educated employees who are frequently in need of the least but have the most dismissal protection, and the other consisting disproportionately of young/foreign-born/female/less well-educated people who are often most vulnerable and yet are unprotected. However, despite many attempts in the recent past, it has proved impossible to reach agreement on the way to achieve a more equitable balance. Increasing the rights of temporary and casual workers is an option, but employers, supported by a large contingent of Parliament, will only go along with that on condition of a trade-off with a reduction in the rights of permanent employees. That, however, is anathema to the unions. Currently another attempt to find a solution is underway.

The failure of politics to redress the imbalance between permanent and temporary/casual workers may have reinforced the courts' tendency to help the latter category, for example by finding certain usages of the system as "abusive" or in breach of the employer's obligation to act as a "good employer", as in this case.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): The abovementioned Clause 5(1) of the Framework Agreement on Fixed-Term Work annexed to the Directive 99/70/EC was transferred into the Czech Labour Code, as follows:

Criterion A: Czech law does not require any objective reasons justifying the renewal of fixed-term contracts;

Criterion B: the maximum total duration of a successive fixed-term contract is three years;

Criterion C: a fixed-term contract may be renewed twice, i.e. together with the first contract there can be three possible fixed-term contracts in succession. Any extension to such a

contract is considered to be a renewal.

Clause 5(2) of the Framework Agreement on Fixed-Term Work was transposed into a condition to the effect that contracts separated by at least three years are not regarded as 'successive'. Moreover, if the two criteria (B and C) are not met by the employer and if the employee informs the employer in writing that he or she insists on further employment by the employer (before the originally agreed fixed-term period terminates), the employment relationship is considered to be a contract of indefinite duration.

At present, an amendment to the Labour Code providing an exception to these limits is being prepared. This had previously been included in the Labour Code, but had been repealed. The exception is for significant operational reasons of the employer, allowing employers with an active trade union to be able to agree to the exception and employers with no trade union to provide for the exception in an internal regulation.

Where the exception applies, employers will be able to conclude fixed- term contracts for longer than three years and more than three times in succession.

Germany (Paul Schreiner): In Germany a court would also have checked whether or not the contract would have ended under the time limits. German law foresees two different types of fixed term contracts: those where there is a valid reason for the limitation and those where there is no such reason. The latter category can only be validly agreed if there has been no employment relationship between the parties in the past three years. Such a fixed-term contract has a maximum duration of two years and can be renewed three times within the two year period.

In the case at hand, the plaintiff was apparently employed each season, which would probably constitute a valid reason for a time limitation under German law. Section 14(1)(1) TzBFG ('*Teilzeit- und Befristungsgesetz*', the Act on Part time Work and Fixed Term Employment) allows the parties to agree on a fixed term contract if the employer only requires the work for a certain period. This was probably the case here. Therefore, the limitation would probably also have been valid under German law.

Subject: Fixed-term work

Parties: Carola Publiekhuysen - v - SRC Cultuurvakanties B.V.

Court: Gerechtshof (Court of Appeal) Leeuwarden

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Date: 18 December 2012

Case number: 200.025.218

Hardcopy publication: JAR 2013/52

Internet publication: www.rechtspraak > uitspraken en registers > LJN > BY 7478

Creator: Gerechtshof Leeuwarden (Court of Appeal Leeuwarden)
Verdict at: 2012-12-18
Case number: 200.025.218