

SUMMARY

ECJ 7 March 2018, case C-494/16 (Santoro), Fixed-Term Work

The abuse of successive fixed-term contracts in the public sector can be treated differently to the abuse of successive fixed-term contracts in the private sector, as long as the measures in place fulfil the principles of effectiveness and dissuasion and effectiveness. This must be verified by the national court.

Giuseppa Santoro – v – Comune di Valderice, Presidenza del Consiglio dei Ministri, Italian case

Facts and legal background

The case concerned the framework agreement on fixed-term work concluded on 18 March 1999 ('Framework Agreement'), set out in the annex to Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Clause 5 of the Framework Agreement stipulates that EU Member States shall, where there are no equivalent measures to prevent abuse, introduce measures to prevent abuse from the use of successive fixed-term employment contracts.

Italy has enacted various different measures for the employees of public authorities and those working in the private sector. In effect, whereas a chain of fixed employment contracts in the private sector can be converted into an indefinite contract, this is not possible in the public sector. Also, in the private sector, employees can claim higher compensation – up to 14 times the last month's salary. This compares to up to 12 times the last month's salary plus the possibility of compensation either for the loss of opportunity to find employment or if there is evidence that the employee would have been hired again by the same employer following a selection procedure. There are also provisions stipulating that the management of public

sector workers are liable for breaches of the rules on fixed contracts. Compared to the private sector also, the likelihood of public sector workers obtaining damages is smaller.

In 2006, the ECJ held that Italy's provision that public sector fixed-term contracts cannot be converted into indefinite contracts, was not of itself incompatible with the Framework Agreement, provided another effective measure to prevent – and sanction – the abuse of successive fixed-term contracts was put in place.

The lower courts have since tried to act on this by granting higher compensation to workers. However, the Court of Cassation has disapproved of this approach, as the law itself only provides for limited damages, plus compensation for the loss of other opportunities.

Ms Santoro was a public worker on consecutive fixed-term contracts, and, given the background described above, the referring court questioned the approach it should take (and doubted the correctness of the advice of the Court of Cassation). It put a preliminary question to the ECJ.

Question

Must clause 5 of the Framework Agreement be interpreted as precluding national legislation which does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him or her to obtain full compensation for harm by proving the loss of opportunities to find employment or by proving that, if a recruitment competition had been duly organised, s/he would have been successful?

Judgment

The ECJ emphasized that the Framework Agreement tries to prevent insecurity based on the type of contract under which an employee works. Article 5 of the Framework Agreement provides that Member States must adopt one or more of three measures to take account of the needs of specific sectors and categories of workers. The measures are: (a) objective reasons justifying the renewal of fixed term contracts; and/or (b) the maximum total duration of successive fixed-term employment contracts or relationships; and/or (c) the number of renewals of such contracts or relationships. Thus Member States enjoy a certain margin of appreciation in how they decide to implement.

Where – as here – EU law does not specify penalties for cases of abuse, the national

authorities must adopt measures that are proportionate, dissuasive and effective. The principle of effectiveness means not making it excessively difficult for people to access a remedy. The measures they implement must also comply with the principle of equivalence, meaning they must not be less favourable in some situations than others.

But it is notable that Article 5 of the Framework Agreement does not preclude treating abuse in the public sector differently than in the private sector. In terms of the effectiveness of the measures, this is a matter for the national courts to decide. The ECJ found that Italian law does include certain additional measures aimed at punishing abuse and these are directed against managers. The ECJ stated that it was for the referring court to verify whether those measures were effective.

Ruling

Clause 5 of the Framework Agreement on fixed-term work concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national legislation which, on the one hand, does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but, on the other hand, provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him or her to obtain full compensation for the harm by demonstrating, by way of presumption, the loss of opportunities to find employment or that, if a recruitment competition had been duly organised, s/he would have been successful, provided that such legislation is accompanied by an effective and dissuasive penalty mechanism, a matter which is for the referring court to verify.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-03-07

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