EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/39 Supreme Court decision on part-time work and fixed-term employment (DK)

The Danish Supreme Court has held there was no discrimination against four part-time teachers at a university in that they did not receive pension contributions. Their positions could not be compared to those of full-time teachers, who were entitled to pension contributions. However, it did constitute a violation of the Danish rules on fixed-term work that the teachers had, for a number of years, been employed on several fixed-term contracts, as they had, in effect, been continuously employed in the same position. Consequently, the teachers were awarded compensation.

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Legal background

Directive 97/81/EC concerning the framework agreement on part-time work lays down the general principle for the non-discrimination of part-time workers. In Denmark, the Directive is implemented in the Danish Act on Part-Time Work. According to this Act, part-time

workers cannot be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless differential treatment is justified on objective grounds.

Directive 1999/70/EC concerning the framework agreement on fixed-term work is implemented in Danish law through the Danish Act on Fixed-Term Employment. Under this Act, fixed-term workers cannot be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or employment relationship unless differential treatment is justified on objective grounds.

Further, the Danish Act on Fixed-Term Employment lays down a general rule that the successive renewal of fixed-term contracts is only allowed if this is justified on objective grounds, such as unforeseeable absence for sickness, pregnancy or maternity leave. The Act does, however, contain a specific exception from this general rule. The exception specifies that fixed-term employees performing teaching and research activities at state institutions, for example, cannot successively be renewed more than twice.

Facts

The case concerned four part-time teachers at a Danish university who had been employed on several fixed-term contracts for a number of years. The teachers' working hours had typically varied between 300 and 400 hours per semester. The university also employed full-time teachers on a permanent basis. According to the applicable collective agreement, the full-time permanent teachers were entitled to pension contributions. Both types of teacher carried out their work on equal terms on the undergraduate programme. However, the permanent full-time teachers also carried out other research and teaching tasks, including on the post-graduate (masters) programme.

Prior to the autumn semester of 2014, the teachers were told that the university was unable to offer them continued employment, referring to the fact that it would be contrary to the rules on fixed-term employment to extend their fixed-term contracts more than twice.

Following that, the teachers commenced proceedings against the university, claiming that it had violated their rights under the Danish Act on Part-Time Work and the Danish Act on Fixed-Term Employment.

Firstly, the teachers claimed that they were entitled to pension contributions proportionately corresponding to the contributions that the permanent teachers received. This claim was

based on the Danish Act on Part-Time Work or, alternatively, the Danish Act on Fixed-Term Employment. In regards to this claim, the teachers argued that their positions were comparable to those of the full-time permanent teachers entitled to pension contributions. The teachers also argued that they should be awarded compensation for this violation of their rights under the Danish Act on Part-Time Work.

Secondly, the teachers claimed that contrary to the specific Danish rule regarding fixed-term employees carrying out teaching and research activities at, for example, state institutions, the university had successively renewed their fixed-term contracts more than twice. The teachers argued that they should therefore be awarded separate compensation based on the rules regarding fixed-term employment.

Judgment

In regards to the claim that the four teachers had been discriminated against on grounds of part-time and fixed-term employment, the Danish Supreme Court held that this was not the case and therefore they were not entitled to any pension contributions, either under the Danish Act on Part-Time Work or the Danish Act on Fixed-Term Employment.

The reasoning of the Court was that the positions of the full-time permanent teachers, which entitled them to pension contributions, were not comparable to those of the four teachers in regards to the rules on part-time and fixed-term employment. In its assessment of the comparability between the different positions, the Court took into account the description of the structure of the positions laid down in Circular No. 9427 of 13 June 2007 of the Danish Ministry of Finance, according to which there was a distinction between the duties of the different positions to carry out research. For this reason, the positions were not comparable.

Consequently, the four teachers were neither entitled to receive pension contributions nor compensation under the Danish Act on Part-Time Work.

The Court also had to assess whether the teachers' rights under the Danish Act on Fixed-Term Employment had been breached. As the teachers' fixed-term employment fell within the scope of the exception regarding fixed-term employees performing teaching and research activities at, for example, state institutions, the Court only needed to establish whether the teachers' fixed-term employment had been renewed more than twice. It did not need to assess whether the renewals were objectively justified.

Even though the teachers had had different job titles over the years, the Court found that the

teachers had, in effect, performed similar teaching duties during their employment at the university. As the university had continuously employed the teachers in the same position, the Court ruled that the university had violated the teachers' rights under the rule that fixed-term employees performing teaching and research activities at state institutions cannot successively be renewed more than twice. Accordingly, the four teachers were entitled to compensation.

In terms of the compensation, the Court emphasised that there had been a number of violations of the prohibition against successively renewing the teachers' fixed-term contracts. The university had satisfied its continuous need for teaching and the performance of administrative tasks for its undergraduate programme without employing the teachers permanently, despite the fact that the teachers had spent most of their work life at the university.

Based on an overall assessment, the Court fixed the compensation for each of the teachers at DKK 75,000 (approximately EUR 10,050). The Danish High Court had previously found that the continuous fixed-term employment of teachers in similar positions had constituted a breach of the rules on fixed-term employment. The High Court had, however, fixed the compensation for each of the teachers at DKK 25,000 (approximately EUR 3,350).

Commentary

The Danish courts have not decided very many cases concerning the Danish Act on Part-Time Work and the Danish Act on Fixed-Term Employment. For that reason, this Supreme Court judgment will probably contribute greatly to the Danish courts' future approach to cases on part-time and fixed-term work.

First of all, the judgment gives some guidance as to what factors the Danish courts will take into account when determining whether a part-time or fixed-term position is comparable to a full-time or permanent position. In this case, the Supreme Court attached great importance to the description of the role, as set out in Circular No. 9427 of 13 June 2007 of the Danish Ministry of Finance. The Court was then able to take a view on the different duties involved in the various types of position.

It should be remembered that the judgment relates to a specific rule – that regarding employees performing teaching and research activities at, for example, state institutions. But despite its limited scope, we can still draw some general conclusions from it about the Danish Act on Fixed-Term Employment.

In terms of compensation, the Court based its order on the particular facts of the case, but did not provide further guidance as to how compensation should be calculated in other cases. It did hint however, that a large number of renewals of a fixed-term contract may be an aggravating factor. The Court did refer to ECJ case law on compensation, however, and stated that compensation should not only be proportionate but also effective and a sufficient deterrent.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans): According to Wikipedia, Roskilde University is a public institution. This means that directives 97/81 (on part-time employment) and 99/70 (on fixed-term contracts) apply directly.

Clause 4 of the Framework Agreement annexed to Directive 97/81 defines 'comparable full-time worker' as: *"a full-time worker [...] who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills."* Clause 4 of the Framework Agreement annexed to Directive 99/70 gives a similar definition of 'comparable permanent worker'. In both definitions, the key elements relevant to this case are 'similar work' and 'qualification/skills.'

The ECJ has in recent years delivered a significant number of judgments on the issue of comparability, mainly in cases where Spanish 'interim' workers compared themselves to permanent employees. See, for example, *Rosado Santana* (C-177/10), *Valenza* (C-302/11), *Diego Porras* (C596/14), *Rodrigo Sanz* (C-443/16), *Grupo Norte* (C-574/16), *Montero Mateos* (C-677/16) and *Viejobueno* (C-245/17). The ECJ has consistently held that comparability is to be examined (A) *"in the light of a number of factors, such as the nature of the work, training requirements and working conditions"* and (B) in relation to the rule at issue, in this case, the rule governing eligibility for pension contributions.

As regards (A), the Danish Supreme Court's reasoning strikes me as straightforward. The plaintiffs' work seems to have been limited to teaching to undergraduates, whereas the comparators' work included teaching to post graduates and performing research. I can imagine that a Dutch court would also have seen these differences as relevant for the purpose of determining whether the nature of the plaintiffs' work was 'similar' to that of the comparators.

The case report does not indicate whether the court took element (B) into consideration. As I

see it, two (groups of) workers can be comparable within the meaning of the said directives in relation to one issue (such as, for example, dismissal or severance compensation) but not in relation to another issue (such as salary or pension). Suppose, for example, that all 'regular' employees of the university, regardless of their number of weekly working hours and regardless of their type of contract (permanent or fixed), receive pension contributions, the part-time/fixed-term teachers being an exception, then the different nature of their work as compared to that of the comparators would seem to be less relevant.

Belgium (Peter Pecinovsky, Van Olmen & Wynant): In Belgium, part-time teachers are entitled to pension benefits *pro rata* their employment. However, there is a difference between fixed-term (temporary) teachers and permanently appointed teachers. The latter will receive a public sector civil service pension, whilst temporary teachers will receive a lower pension, from within the private sector. However, this is far from the only significant benefit that only appointed teachers receive, and there is an ongoing debate as to whether the difference in treatment between appointed and temporary teachers should be maintained.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): In Finland, it is obligatory for employers to contribute to pension for employees. The basic principle under the Employee Pensions Act (395/2006, as amended) is that the pension contributions are determined according to annual salary.

Under the Employment Contracts Act (55/2001, as amended), the fact that a person is employed part-time must not result in their being treated in a different way unless there are objectively justifiable reasons for the different treatment. Established case law provides that employment-related benefits, such as employees' pension contributions, should be paid to part-time workers on a *pro rata* basis. As such, if a Finnish court were faced with a similar question, the court would probably rule that the part-time teachers would be entitled to pension contributions relative to their working hours.

The Employment Contracts Act provides for an employer to agree a fixed-term employment contract requires justified grounds. If justified grounds cannot be proved, the employment contract is considered to be in force indefinitely. Agreeing on multiple successive fixed-term contracts is also not acceptable, if the amount or the combined length of the fixed-term contracts or the situation as a whole, indicate that the demand for the employees is permanent in nature. In a similar situation, a Finnish court would probably rule that the employment contracts have been in force indefinitely and the employer would have to pay compensation for unlawful termination of the employment relationships.

Subject: Part-time work, fixed-term work

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