EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/45 Usage of fixed-term employment contracts for professors restricted (LV)

The Constitutional Court of the Republic of Latvia has ruled that provisions of the Law on Higher Education Institutions stipulating that professors and associate professors are elected to the office for a fixed period of time, i.e. for six years, and that only fixed-term employment contracts are to be concluded with them are not compatible with the Constitution of the Republic of Latvia (Latvijas Republikas Satversme) (the 'Constitution'), which among other things provides that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. The restriction of this right in this case cannot be regarded as proportionate since the legislator has failed to implement the requirements of the Fixed-term Work Directive 99/70/EC.

Facts

The applicant, Jānis Kārkliņš, worked on a fixed-term employment contract as associate professor at the Faculty of Law of the University of Latvia until 31 January 2018. Since he wanted to continue his employment there, he participated in an open competition for the position of associate professor.

On 22 January 2018 the council of professors elected him to the post of associate professor and a new employment contract for a period of six years was concluded with him. Conclusion of a new employment contract requires an affirmative vote of the council of professors each time the term of the previous employment contract expires.

The applicant challenged the compatibility of Article 27(5) of the Law on Higher Education Institutions, which in essence states that an employment contract with a person elected to an academic position (professor, associate professor, docent, lecturer or assistant) shall be concluded for the period of election – six years – and that the maximum period of the fixed-term employment contract – five years – does not apply, with the first sentence of Article 106 of the Constitution providing that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. Likewise, the applicant asserted that Article 30(4) of the Law on Higher Education Institutions providing that associate professors shall be elected in an open competition for a time period of six years also contradicted the Constitution.

The applicant asserted that the conclusion of the fixed-term contract with him in circumstances when he actually performed both permanent and long-term work restricted his right to work enshrined in the Constitution. He further argued that the employer, when concluding a new fixed-term employment contract each time, can include provisions in the contract which are unfavourable to the employee. Moreover, if the person is not repeatedly elected to the academic position s/he will not get statutory severance pay and such a person can only to a limited extent make use of maternity and/or child-care leave since the fixed-term employment expires on a certain date irrespective of any other circumstances. Finally, he referred to Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (the 'Framework Agreement') indicating that according to it and the relevant case law of the ECJ conclusion of such a fixed-term employment contract can only be justified if there are 'objective reasons', which was not the case in his situation.

The parliament of the Republic of Latvia (*Latvijas Republikas Saeima*) as the institution which had adopted the disputed legal act argued that the particular articles of the Law on Higher Education Institutions were not in breach of the Constitution. Other state institutions, i.e. the Ministry of Education and Science, the Ministry of Welfare, and the Ombudsman, which were invited to present their opinion, also shared this position.

Judgment

The Constitutional Court declared that the disputed provisions are not compatible with the Constitution, insofar as they do not ensure protection against consecutive abuse of the conclusion of fixed-term employment contracts.

First, the Court decided that since the procedure for electing and concluding employment contracts is the same for both associate professors and professors it also ruled on the legality of Article 28 part 2 of the Law on Higher Education Institutions concerning the election term for professors as well as associate professors.

Referring to the ECJ judgments in cases C-494/16 *Giuseppa Santoro*, C-16/15 *María Elena Pérez López* and in joined cases C|22/13, from C|61/13 to C|63/13 and C|418/13 *Raffaella Mascolo and Others*, the Court concluded that the content of Clause 5(1) of the Framework Agreement is sufficiently clear and it was not obliged to submit to the ECJ a request for a preliminary ruling.

The first sentence of Article 106 of the Constitution provides that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. The Court admitted that although in principle this right can be restricted, in this particular case such restriction cannot be regarded as proportionate, since the legislator with respect to professors has not implemented the requirements of the Framework Agreement, i.e., legal acts do not contain limits for renewals of fixed-term employment contracts and maximum limits for the periods professors can be employed on the basis of fixed-term employment contracts. The Court referred to the ECJ judgment in case C-190/13 (*Antonio Márquez Samohano*) and concluded that in principle concluding fixed-term employment contracts with professors is allowed, however, in Latvia successive fixed-term employment contracts with professors are concluded to satisfy permanent and long-term needs for the employers. Notwithstanding this, the Law on Higher Education Institutions does not contain any measures which could protect employees against the risk of successive abuses of the conclusion of fixed-term employment contracts.

Commentary

The Constitutional Court accepts constitutional complaints from individuals only in cases where all other options have been used to protect the specified rights guaranteed by the Constitution with general remedies for protection of rights (a complaint to the higher authority or higher official, a complaint or statement of claim to a general jurisdiction court, etc.). It also accepts constitutional complaints if no such option exists. The Court, when deciding on the admissibility of the case, concluded that the disputed provisions manifestly required the higher educational institution to conclude the fixed-term employment contract with the associate professor, thus, the applicant did not have any other legal remedy with which to challenge the fact that such a contract is concluded with him.

As it was indicated in the explanations to the Court provided by the Ministry of Education and

Science, the legislator had stated that fixed-term employment contracts have to be concluded in other fields of social importance as well, e.g., with heads of state and self-government agencies, heads of culture and art institutions, and heads of medical institutions. Further, due to procedural rules, the Court did not address the fact that with other academic staff also, e.g., docent, lecturer or assistant, only fixed-term employment contracts are allowed.

In any event, this judgment is likely to put to an end to the practice of concluding successive fixed-term employment contracts in the public sector and additionally in cases when the work in essence is permanent and needed in the long term.

Comment from other jurisdiction

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft): In Germany, special provisions apply for fixed-term contracts of most employees in the area of university education and science (WissZeitVG). According to the WissZeitVG contracts can be concluded as fixed-term contracts with a maximum duration of six years before and six years after conferral of a doctorate. In some cases the maximum duration may be extended to more than six years (e.g. parental leave, incapacity for work). A further justification such as non-permanent workload is not necessary. That is why the WissZeitVG massively exceeds the legal frame of 'regular' fixed-term contracts in other areas of employment (usually only two years without further justification). Apparently these provisions lead to a high rate of fixed-term contracts in the area of university education and science of between 40% and 50%.

According to a former decision of the Federal Labour Court the WissZeitVG does not violate European provisions such as Council Directive 1999/70/EC (judgment of 21 June 2006 – 7 AZR 234/05). The Court stated that – unlike in Latvia – the WissZeitVG complied with clause 5 no. 1(b) of the Directive (maximum total duration of successive fixed-term employment contracts). It is interesting though that the Court did not refer to the ECJ for a preliminary ruling according to Article 267 of the Treaty on the Functioning of the EU.

Interestingly, professors are excluded from the WissZeitVG as they are often (temporary) officials. Their status varies according to the federal state of the respective university. Professors regularly become established officials after a temporary period of five or six years.

Subject: Fixed-term work

Parties: *Jānis Kārkliņš and Latvijas Republikas Saeima* (the parliament of the Republic of Latvia) as the institution which has adopted the disputed legal act

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