EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/5 An undefined number of consecutive fixed-term contracts for the duration of 12 years does not necessarily violate EU law (AT/EU)

On 3 October 2019, in case C-274/18 (Schuch-Ghannadan), the ECJ held that a national regulation, which provides for different maximum total durations of successive fixed-term employment contracts for part-time workers on the one hand and full-time workers on the other, could result in a discrimination of part-time workers and an indirect discrimination of women.

By Ines Kager (Teaching and research assistant at WU Vienna University of Economics and Business)

Legal background

The Austrian statutory labour law does not contain a general regulation on successive fixed-term employment contracts. However, Austrian Labour and Social Courts have limited their use. The established line in case law is that successive fixed-term employment contracts are permitted only when justifiable by economic or social reasons. The first fixed-term contract does not have to be justified. A renewal of a fixed-term contract with yet another limitation in time that cannot be justified is deemed to be a contract for an indefinite period. Consequently, the employment relationship is deemed indefinite from the very beginning with all legal rights that come along with it. This case law draws upon Section 879 of the Austrian Civil Code which expressis verbis declares contracts with immoral and unlawful content null and void. Nevertheless, this can either affect the validity of the whole contract or just individual provisions as far as the initial purpose is not being undermined.

Clause 5 of the framework agreement on fixed-term work (implemented by Directive 1999/70/EC) aims to prevent "abuse arising from the use of successive fixed-term employment contracts or relationships" by obligating the Member States to provide:

"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) the number of renewals of such contracts or relationships."

These measures can be applied optionally by the Member States. None of these options have been implemented into Austrian law. The Austrian legislator tries to justify this fact by referring to the existing case law as an equivalent measure already being in place for the desired purpose.

Having said that, the Austrian legislator still implemented regulations on consecutive fixed-term contracts for specific sectors. Among these, the Federal Act on the Organisation of Universities and their Studies (Universities Act 2002, hereinafter "UG") contains such a regulation for employees of Austrian universities. Section 109 UG comprises two of the required measures. Section 109(1) provides for a maximum duration of six years for fixed-term contracts. Section 109(2) allows consecutive fixed-term contracts for certain groups of employees only, which can be regarded as a form of objective reasons for justification. The latter rule applies to employees whose employment is linked to either a project financed by third party funds or a research project in general, regardless of its financing. Also, university staff that are only active in teaching and persons substituting other employees fall within the personal scope of Section 109(2). Thus, special forms of employment were chosen as these allegedly require more flexibility. Section 109(2) also provides for maximum total durations. Accordingly, such consecutive fixed-term contracts can only be agreed upon for the maximum total duration of six years or eight years when it concerns part-time workers. Additionally, there can be one more renewal linked to the completion of a project or publication resulting in a maximum total duration of ten or twelve years respectively. Academics developed a translation method for Section 109(2) UG regarding consecutive contracts with different working hours so that for each employee only one maximum total duration is applicable. In a proceeding all contracts can then either be treated as part-time or full-time contracts by converting times of one kind into the other according to their relation in Section 109(2) UG.

The conversion factor is based on the relation of 6:8 years of the different maximum durations and then reduced to 3:4. Accordingly, the conversion factor 3:4 is applied to convert part-time periods into full-time periods and 4:3 to gain the opposite result.

Section 109 UG forms a derogation from the general system, because within that maximum total duration renewals of the contract do not have to be justified. Also, the maximum durations only apply to contracts immediately succeeding each other which requires a case-by-case assessment.

As this regulation provides different maximum total durations for full-time workers opposed to part-time workers, it could not only violate the Directive on fixed-term work but also Directive 97/81/EC by potentially discriminating against part-time workers. Furthermore, in many sectors, women make up a significantly larger part of part-time workers and thus are more likely to be affected by such measures. Consequently, this raises the question whether the provisions of Section 109(2) UG also indirectly discriminate against women and therefore violate Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Facts

Minoo Schuch-Ghannadan (the claimant) was employed by the Medical University of Vienna ("MUW" or defendant) from 9 September 2002 until 30 April 2014 within 11 fixed-term contracts. There was only one longer interruption between the employment relationships when her contract ended in August of 2005 and the consecutive contract only started in October of 2006. Her working hours varied between the various contracts. In total, she was employed full-time for about 59 months and part-time for about 62 months. The relevant period of time, however, is the one beginning from October 2006 as the interruption previous to this contract prevents it being deemed as a consecutive one. Since then she was employed within part-time contracts for 62 months and full-time contracts for 26. After almost 12 years in total the university allowed the contract to expire without concluding a new one.

Previous proceedings

The claimant sought a declaration that her employment with the MUW continued to exist beyond April 2014 and therefore had to be deemed a permanent contract. She argued that the maximum total duration of eight years for part-time workers was already exceeded as her contracts immediately succeeded one another from October 2006 to April 2014. Therefore, she converted all of her contracts into part-time periods resulting in a total of 98.67 months. Thus, the contract should be treated as one contract for an indefinite period beginning in October

2006. However, the claimant also included very short interruptions. Those do not hinder a conversion as such, but shall not be considered in assessing the maximum total duration. Thus, using the conversion factor of 4:3, the 26 months of full-time employment equal 34.67 months of part-time work resulting in a total of 96.67 months (= 8.06 years) of consecutive part-time employment, which still exceeds the threshold of eight years. She further claimed that Section 109(2) UG openly discriminated against part-time workers and therefore also indirectly against women. As the unequal treatment could not be objectively justified, it thus violated EU law (Directives 97/81/EC and 2006/54/EC). The respondent, however, claimed that the maximum total duration relevant to this contract was 12 years because the last renewal of the contract enabled the claimant to continue working on a project. In its judgment, the Labour and Social Court agreed with the latter opinion but the Court of Appeal remitted the case for not taking into account the potential violation of EU law. Then, the Labour and Social Court suspended the proceeding to request a preliminary ruling essentially posing the following questions:

Is the pro rata temporis principle in clause 4(2) of the framework agreement on part-time work in conjunction with the principle of non-discrimination in clause 4(1) applicable to a regulation like Section 109(2) UG as regards different maximum durations for part-time workers whose employment is linked to third party funded projects or research projects?

Does a legal provision like the one in question indirectly discriminate based on gender pursuant to Article 2(2)(b) of Directive 2006/54 when female employees are affected by a significantly higher percentage than male employees?

Does Article 19(1) of Directive 2006/54 have to be interpreted in the way that a woman, who claims to be indirectly discriminated against by a national regulation because women are de facto more likely to have a part-time contract, has to provide the court with specific statistics or other specific evidence on that fact?

Judgment

As for compliance of Section 109(2) UG with the Directive on part-time work, the ECJ more or less followed the opinion of the European Commission and the claimant that this regulation is in fact disadvantageous for part-time workers. It stated that the regulation seems to diminish part-time workers' prospect for a permanent position compared to full-time workers' chances. The question whether or not the provision is de facto disadvantageous to part-time workers shall be answered by the national court. A disadvantageous unequal treatment could, however, still be compliant with the Directive when this could be justified by objective reasons. This

question was left for the national court to decide but the ECJ still elaborated on the requirements for the potential justification brought forward by the Austrian government and the respondent (MUW). This was based on the argument that part-time workers hereby get the chance to reach the same level of knowledge and experience as full-time workers within a shorter period. The ECJ critically assessed this argument and emphasised that this conclusion is in many cases not true and has to be regarded as a case-by-case decision. The national court therefore has to carry out an individual assessment of the relation between actual hours worked and the acquisition of experience and skills regarding the personal scope of Section 109(2) UG.

Also, the ECJ ruled that Section 109(2) UG does not represent the pro rata temporis principle due to the regulation's generality concerning the provision on part-time workers. In fact, the regulation applied a longer maximum duration of eight respectively twelve years to all part-time workers regardless of their actual working hours, which the ECJ found contrary to the said principle.

The ECJ further clarified that the percentage of disadvantaged female employees has to significantly exceed the number of disadvantaged male employees to assume an indirect discrimination of women resulting from the unequal treatment of part-time workers. This assessment shall only cover employees that fall into the personal scope of this very regulation, which is to be carried out by the national courts of the Member States using their national regulations or customs for such discrimination cases. For the actual case that means that the ECJ affirmed the possibility to allow for any kind of evidence on a national level. This also applies to evidence based on statistics (referring to previous judgments Seymour-Smith and Perez, C-167/97, recital 59 and Voß, C-300/06, recital 40). In this case, the claimant could not gain access to the statistics needed for the very group affected by the regulation in question. Therefore, the ECJ granted her the right to use statistics representing part-time workers in Austria in general for prima facie evidence according to Article 19 of Directive 2006/54.

Commentary

The ECJ's ruling on this matter is actually in line with its settled case law. Accordingly, the Court only deals with questions that do not go beyond or alter the substance of these very problems (cf. Phytheron International, C-352/95). For example, the Court often raises the question whether the specific EU law is applicable to the given case. However, one could argue that the referring court did make this Directive a subject of discussion by including it in the preliminary reference by stating that the application is unproblematic – which it obviously is not. Following up on this, the compliance with the Directive could then be seen as a

precondition to the other questions. Especially because a negative assessment would render those obsolete. As the Advocate General stated in his Opinion, there are some judgments going in that direction, however, these only make up a very small proportion and are therefore a minority viewpoint in the ECJ's case law.

The Commission and the Advocate General argue that the regulation does not actually prevent abuse of consecutive fixed-term contracts. This argument seems valid considering the underlying case. It showcases very well that the lack of limitation on the number of renewals enables the employer to conclude a large number of contracts with the same employee for quite a long time, especially taking into account that 12 years could make up a third of a career.

Apart from that, when talking about Section 109(2) UG as a regulation representing a measure according to Article 5 of the Directive on fixed-term work, clause 8 of the corresponding framework agreement should also be taken into consideration. Clause 8(3) states that "implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement." The aforementioned case law in Austria regarding the prohibition of successive fixed-term employment contracts requires an objective justification for every consecutive renewal of the contract that comprises fixed-term clauses. In contrast, Section 109 UG is usually interpreted as a possibility to enter into an undefined number of fixed-term contracts as long as the maximum duration of six respectively eight years has not yet been exceeded. This results in cases like the one in question, where employees are forced to enter into a relatively large number of extremely short employment contracts with the same employer. Thus, Section 109(2) UG does reduce the employees' level of protection in that regard. However, the same provision could also be seen as a stricter system. It restricts the application of consecutive fixed-term contracts in the university sector to certain groups of employees. Therefore, the question arises whether or not this limitation equals a measure according to clause 5(a) of the framework agreement. In academia this is being questioned in regard to the first two groups, namely employees whose employment is linked to either a project financed by third party funds or a research project in general regardless of its financing. The problem with these exceptions does not lie in the link to projects, which actually would most certainly be deemed as a valid justification, but rather in the fact that Section 109 UG does not require the university to limit the employment to this very project. In fact, universities can take advantage of this provision to hire employees using consecutive short-term contracts to then work for various projects of such nature. Thus, on a substantive level there are good grounds to agree with the Advocate General's opinion that the provisions fail to actually prevent abuse of consecutive fixed-term contracts.

These issues in combination with the fairly long maximum time periods in Section 109(2) UG could therefore violate the Directive on fixed-term work. This should have led the Austrian court to also pose a question on the compatibility of this regulation with the Directive on fixed-term work instead of assuming its accordance.

As the ECJ did not elaborate on the fact that Section 109(2) UG in this case allowed for a constellation where the employee concludes 11 consecutive fixed-term contracts with the same employer, this judgment can hardly be compared to the previous case law regarding the issue of fixed-term work (e.g. Kücük, C-586/10). Also, for example in the Kücük case, the ECJ was rather hesitant when it came to definite requirements for consecutive fixed-term employment contracts according to Directive 1999/70/EC. Even though the questions raised limited the Court's ability to assess much further on the measures in Section 109 UG, the total lack of a critical evaluation of the excessive use of consecutive contracts in this case seems to go in line with its mentioned hesitance on that issue.

As regards the actual questions posed by the Austrian court concerning potential discrimination of part-time workers on the one hand and an indirect discrimination of women on the other hand by Section 109(2) UG, the ECJ predominantly ruled in line with its settled case law. But the aforementioned hesitance can also be discerned in its reasoning on whether the regulation in question is actually disadvantageous to part-time workers. It stated that such provisions seem to go in that direction but still left this for the national court's discretion. Yet, in my opinion, this very fact could have already been subject to the judgment as the regulation clearly tries to prevent abuse by providing maximum total durations for consecutive fixed-term contracts. A longer duration is clearly disadvantageous for the affected employees when it comes to reaching a certain level of a stable employment and protection against dismissal. Even if the ECJ had clarified this, it could still have been left for the national court to decide whether this unequal treatment can be objectively justified.

This question is equally important to the assessment of a potential indirect discrimination on women as this also requires unequal and disadvantageous treatment of the disproportionally affected group. Nonetheless, the ECJ rightly focuses on the precondition of whether Section 109(2) UG actually disproportionally affects women as the further considerations practically equal the ones for part-time workers.

Finally, in my opinion, the ECJ is right in allowing the claimant to refer to general statistics for the required prima facie evidence. Article 19 of Directive 2006/54/EC provides that the burden of proof in proceedings regarding the discrimination on the basis of gender should generally

lie with the respondent when the claimant provides prima facie evidence. This provision was clearly implemented to relieve the claimant of the burden of proof. Its paragraph 2 furthermore allows for even more favourable rules of evidence. In fact, the Supreme Court of Justice in Austria allows for the prima facie evidence to be quite general. It regularly considers the fact that in Austria women are more likely to be employed as part-time workers as sufficient for that purpose. Consequently, national case law that accepts a rather general evidence on this, especially when statistics for a specific group are not accessible for the claimant, is in line with EU law.

Comments from other jurisdictions:

Germany (Marcus Bertz, Luther Rechtsanwaltsgesellschaft mbH):

It can be assumed that the decision of the ECJ will not have any direct impact on the German fixed-term employment law, as German law does not differentiate between full-time and part-time employment with regard to the permissible period of fixed-term contracts (of academic and scientific personnel).

According to sec. 4 para. 1 sentence 1 of the German Part-Time and Fixed-Term Employment Act (Teilzeitbefristungsgesetz – TzBfG), a part-time employee may not be treated less favourably than a comparable full-time employee on account of part-time work, unless objective reasons justify different treatment. This law contains the basic rule on the treatment of part-time workers and applies to all working conditions, including the maximum duration of the employment relationship. According to sec. 4 para. 1 sentence 2 TzBfG, a part-time employee is to be granted remuneration or other divisible pecuniary benefits at least in the amount corresponding to the proportion of his or her working time in relation to the working time of a comparable full-time employee. For pecuniary benefits – and only for these – the pro-rata-temporis principle is standardised as a special form of the principle set out in sec. 4 para. 1 sentence 1 TzBfG. Section 4 para. 1 TzBfG implements the provisions of sec. 4 paras. 1 and 2 of the EU Framework Agreement on Part-Time Work on a one-to-one basis.

Section 14 para. 2 sentence 1 TzBfG allows the unfounded calendrical limitation of up to a maximum duration of two years; and up to this maximum duration, the employment relationship can be extended three times. If the employee was previously already employed with the same employer, a new fixed-term contract without a material reason is not permissible. These provisions apply irrespective of whether the employee was employed on a part-time or full-time basis. If a fixed term is not permissible for the aforementioned reasons, the employment relationship may only be limited if there is a material reason for this in accordance with sec. 14 para. 1 TzBfG. In accordance with the basic rule of sec. 4 para. 1 TzBfG,

the material reasons are not linked to a possible status as a part-time employee. In this respect, too, Germany lawfully complies with the requirements of EU law in sec. 5 of the Framework Agreement on Fixed-Term Contracts.

It is therefore not possible under German law to limit the duration of a part-time worker solely on the basis of this characteristic, if at all, in contrast to a full-time worker. This can also be seen in the German Scientific Time Contract Act (Wissenschaftszeitvertragsgesetz – WissZeitVG), which contains special regulations for the higher education sector deviating from sec. 14 para. 2 TzBfG, namely longer fixed-term contracts. In this respect, the WissZeitVG is the equivalent of sec. 109 of the Austrian University Act. At no point in the WissZeitVG is there a distinction between part-time and full-time employees.

Romania (Andreea Suciu and Teodora Manaila, Suciu I The Employment Law Firm):

The application of the principle of non-discrimination between part-time and full-time employees within the context of fixed-term employment contracts implies that part-time employees are not to be treated less favourably solely because they work part-time (i.e. based on their work status), unless such different treatment is justified on objective grounds.

European employment law is based on the premise that contracts of indefinite duration are the general form of employment relationship, thus, fixed-term contracts are an exception to the rule and therefore must be performed in specific circumstances.

The Romanian employment legislation provides very specific cases for concluding such fixed-term employment contracts without providing however a maximum duration of such contracts based on the criteria used by the Austrian legislation. According to the Romanian Labour Code, a fixed-term employment contract may not be concluded for a period exceeding 36 months. The 36-month period may be however extended, subject to certain conditions, by written agreement of the parties for the period needed to complete a project, programme or specific piece of work (and not more).

When linking the differentiation of the maximum length of fixed-term employment contracts with the scope of providing equal chances to part-time employees in order to achieve the same level of experience and training as full-time employees, and therefore making them more eligible to access full-time positions within an open-ended employment contract, several aspects should be examined:

Given the reasoning expressed in the case for the application of such provisions it can be

interpreted that the conclusion of a part-time fixed-term employment contract is, in most cases, not a matter of choice (in view of increasing work flexibility) but rather a compromise in view of achieving a position within the academic system.

Furthermore, it could be analysed whether such measure would represent a positive discrimination measure in view of providing support to part-time employees to enter open-ended employment contracts.

Such interpretation is countered by the non-application of the pro rata principle, as ascertained by the ECJ; therefore the two-year extension of the fixed-term employment contract in the case of part-time employees (i.e. up to eight years compared to six years) is not proportionate and, consequently, cannot lead to the scope mentioned above (i.e. same experience, same chances).

Considering the above, in our opinion the Romanian courts would likely determine the provisions to be discriminatory, as they do not offer sufficient reasonings for such variations of the maximum duration of the fixed-term employment contract, nor are they proportionate to their final scope (i.e. to equalise experience and chances of part-time employees in relation to full-time employees).

Subject: Fixed-term Work, Part-time work, Gender Discrimination

Parties: Minoo Schuch-Ghannadan – v – Medizinische Universität Wien

Court: European Court of Justice

Date: 3 October 2019

Case number: Case C-274/18

Internet publication: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0274 (no English translation available yet)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Creator: European Court of Justice (ECJ)
Verdict at: 2019-10-03
Case number: C-274/18