ECJ 25 October 2018, case C-331/17 (Sciotto), Fixed-term work

Martina Sciotto – v – Fondazione Teatro dell'Opera di Roma, Italian case

Legal background

The Framework Agreement on fixed-term work, annexed to Directive 1999/70/EC, aims to combat the abuse of fixed-term employment contracts. Clause 5 stipulates that Member States shall, if equivalent measures are absent, introduce one or more of the following measures: in a way that takes into account the needs of specific sectors and categories of workers:

i. objective reasons justifying the renewal of fixed-term contracts;
ii. a maximum total duration of successive fixed-term contracts;
iii. a maximum number of renewals of such contracts.

Italy has introduced several measures in line with the Framework Agreement. However, it is expressly provided that none of them apply to operatic and orchestral foundations, which originally were governed by public law, but later became private.

Facts

Ms Sciotto was a ballet dancer at the Fondazione Teatro dell'Opera di Roma. She worked under several fixed-term employment contracts from June 2007 until October 2011. She claimed that she had been a permanent staff member and sought a declaration that her employment contract had converted into one for an indefinite period. The District Court of Rome dismissed her claim as the regulations containing limitations to fixed-term contracts did not apply to operatic and orchestral foundations. The referring court wondered whether this complied with EU law and asked a preliminary question to the ECJ.

Question

Must Clause 5 of the Framework Agreement be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules governing employment relationships – and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration where the employment relationship goes beyond a specific date – do not apply to operatic and orchestral foundations?

Consideration

Clause 5 of the Framework Agreement aims to limit successive recourse to fixed-term contracts, by laying down a number of protective provisions. These aim to strengthen the principle of stable employment, which can only be altered where fixed-term contracts can respond to the needs of both employers and workers. Therefore, Member States must implement at least one of the measures set out in Clause 5(1). Member States enjoy a certain discretion and also can use existing legal measures, provided these do not compromise the objectives of the Framework Agreement. There is also room to take into account the particular needs of specific sectors and/or categories of workers, provided that that is justified on objective grounds.

In the case at hand, the sector of operatic and orchestral foundations is expressly excluded from the scope of the Italian limiting provisions. This sector lacks any specific limitations whatsoever. Consequently, it needs to be verified whether there is an objective reason within the meaning of Clause 5(1)(a) for this. Objective reasons must refer to precise and concrete circumstances, and must be linked to the specific nature of the tasks, which require the use of fixed-term contracts. A general provision arbitrarily disapplying limitations to fixed-term contracts in certain sectors, for example, would not suffice.

The Italian government argued that there were various reasons to exclude operatic and orchestral foundations from the scope of the rules. Firstly, although the employers are in the private sector, these foundations are comparable to public entities.

However, this does not prevent an employee from being protected. In fact, Clause 3(1) of the Framework Agreement provides protection to workers in both the public and private sector. The Italian government also argued that the sector had traditionally used fixed-term contracts against the (constitutionally protected) background of development of Italian culture and the safeguarding of Italian historic and artistic heritage. The ECJ responded that, not only has this no legal basis in the Framework Agreement, to accept this argument would clearly be contrary to its objectives. In any event, Italy did not explain how these objectives would result in a requirement for employers to take on only fixed-term staff.

The Italian government said it was a feature of this sector that each artistic performance was unique and therefore new employment contracts should be made for each artistic performance. This led to a need for temporary recruitment. However, the ECJ clarified that the law does not provide for this situation. Moreover, it felt that the successive use of fixed-term contracts in this case

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indicated that in fact, these were not real needs. Ultimately, of course, this is a matter to be determined by the national court.
The Italian government also argued that budgetary considerations required the employer to use fixed-term contracts, as the foundations are financed by the state. The ECJ felt that while this consideration may underlie a social policy choice, budgetary considerations do not of themselves constitute an aim pursued and, therefore, cannot justify the lack of a measure to prevent the misuse of successive fixed-term contracts.
The fifth argument made by the Italian government was that under Italian law there are mandatory competitions for indefinite positions and the use of fixed-term contracts circumvents those. The ECJ felt that this could form an objective reason. Whilst the Framework Agreement does not lay down a general obligation on Member States to provide for the conversion of fixed-term contracts, there must still be an effective way of doing this. In the operatic and orchestral sector, there is no way of doing this at all.
The Italian government's last argument was that adequate protection of workers is guaranteed by the fact that the directors of operatic and orchestral foundations are liable for all contracts that are contrary to law. The ECJ responded that EU law requires that measures taken by Member States are not only proportionate, but also effective and sufficiently deterrent and that it was discriminatory to disapply these rules for employees of operatic and orchestral foundations, when comparable workers in other sectors remain entitled to their protection.

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 precluding national legislation, such as that at issue in the main proceedings, pursuant to which the common law rules, governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date, are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.

ECJ 6 November 2018, case C-619/16 (Kreuziger), Paid leave

Sebastian W. Kreuziger – v – Land Berlin, German case

Legal background

Article 7(1) of (Working Time) Directive 2003/8/EC grants workers annual leave of at least four weeks, subject to the conditions for entitlement laid down by national law and practice. Article 7(2) prohibits replacing the minimum period of paid annual leave by an allowance in lieu, except where the employment relationship is terminated.
The German regulation on the annual leave of officials and judges (EUrlVO) states that leave must generally be taken during the leave year. Leave which has not been taken within 12 months after the end of the leave year lapses. Unlike the German Federal Law on Leave (which does not apply in this case), the regulation does not provide for an allowance in lieu for untaken leave upon termination of the employment relationship.

Facts

Mr Kreuziger worked as a legal trainee for the Land of Berlin between May 2008 and May 2010. In 2010, he did not take any leave. After his employment had ended, he claimed an allowance for untaken leave, but this was denied. His appeal of that decision was dismissed on the grounds that the applicable regulation lacked that option. In the subsequent appeal proceedings, it was established that Mr Kreuziger was a worker within the meaning of Directive 2003/88. However, there was debate as to whether entitlement to an allowance of Article 7(2) of the Directive is based on the premise that the person concerned is unable to take leave for reasons not attributable to him or her. Ultimately, the Higher Administrative Court asked preliminary questions (which the ECJ rephrased into one question).

Question

Must Article 7 of Directive 2003/88 be interpreted as precluding national legislation such as Paragraph 9 of the EUrlVO, insofar as that legislation entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to termination of the employment relationship, he automatically loses the days of paid annual leave to which he is entitled under

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