

Case Reports

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Successive fixed-term employment contracts (RO)

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Summary

The Craiova Court of Appeal has ruled that the continuous extensions of a fixed-term employment based on national provisions is not in accordance with the European jurisprudence. Relying on the findings of ECJ case C-614/15, the Craiova Court of Appeal made an exhaustive analysis of the relying arguments for subsequent extensions of fixed-term employment agreements for long periods of time and the objective reasons behind such use of contracts.

Legal background

Council Directive 1999/70/EC of 28th June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP has been transposed into Romanian law by Law no. 53/2003 – Labour Code.

According to it, employment contracts are, as a rule, concluded for an indefinite duration. They may be concluded for a fixed term by way of derogation subject to conditions specifically laid down in law or in order to complete work, projects or programmes. 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, program or specific piece of work. Two further consecutive fixed-term employment contracts – a maximum of 12 months each – can be concluded by the same parties within a maximum three

months from the expiration of the previous fixed-term employment contract.

In the case of establishments dealing with the slaughter of animals, official inspections are carried out by specialized staff employed within the Veterinary Health and Food Safety Directorate under fixed-term employment contracts.

Moreover, the specific provisions provide that employment contracts which were concluded for the maximum term provided for by the labour legislation, can be extended, if the parties so agree, so long as the circumstances in which they were concluded continue to exist, provided that the financial resources available in that respect are guaranteed, and until a new individual open-ended employment contract is concluded following the organisation of a competition in this respect.

Facts

Mr. P. was employed as a veterinary assistant within Gorj Veterinary Health and Food Safety Directorate based on a fixed-term employment agreement for a period of 36 months, starting on 20 March 2015. The contract was extended by successive addenda. The last addendum, signed on 28 December 2018, extended the duration of the employment agreement starting on 1 October 2019, up until a new individual open-ended employment contract was to be concluded following the organisation of a competition for the position of veterinary assistant but not later than 31 December 2019.

Previously to the conclusion of the respective employment contract, as of 2005, Mr. P. had continuously been employed within Gorj Veterinary Health and Food Safety Directorate in view of performing the same inspection activity as in its current employment contract and in all cases based on concluding fixed-term employment contracts.

On 28 January 2019, Mr. P. instituted proceedings against the Veterinary Health Directorate before the Gorj Tribunal seeking to have the last extension of his employment contract declared null and void and to have it recategorized as a “contract of indefinite duration”.

By judgment of 18 April 2019, the Gorj Tribunal admitted his claims and declared the last addendum to the employment agreement null and void and obliged Gorj Veterinary Health and Food Safety Directorate to conclude an individual employment contract for an indefinite period of time. The decision was appealed by the Gorj Veterinary Health and Food Safety Directorate before the Craiova Court of Appeal.

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Judgment

The national court chose to refer to case C-614/15, respectively to the set of preliminary questions referred by the same Craiova Court of Appeal given the numerous litigation proceedings that involved the subject.

The Court applied the findings of the ECJ ascertained in case C-614/15, respectively that the renewal of successive fixed-term employment contracts must aim to cover temporary needs and that a national provision as the one applicable in the case at hand, namely to employees engaged in veterinary health inspections based on fixed term employment contracts, must not be used to satisfy permanent needs.

The Craiova Court of Appeal made also reference to the Court's consideration for the need to perform a case by case analysis, respectively to take into consideration, among others, the number of employment contracts concluded with the respective person and the scope for which they were concluded.

In the present case, given the extended collaboration of the parties for over 14 years, with no interruptions of activity, in view of performing the same inspection activities, the court considered that Gorj Veterinary Health and Food Safety Directorate should have concluded an employment agreement for indefinite time with the respective employee right after the execution of the third fixed-term contract, with the observance of the Labour Code provisions, regulations which the national authority considered it derogates from.

The national court also rejected the arguments of the national authority which claimed that such renewals were based on the fact that the inspections performed by staff were non-permanent by nature due to the variations in volume of the activities of the establishments to be inspected, as well by budgetary considerations, respectively of the funds destined for personnel expenses.

The Court also emphasised the failure to objectively justify the need for such renewals by making reference to the ECJ jurisprudence which determined that an "objective reason" must be understood as referring to precise and concrete circumstances characterising a given activity, which is therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts.

In the case at hand, the national authority chose to justify its renewals only on financial reasons, thus, failing to observe the ECJ requirements.

Further, the national judge analysed as well the derogatory limits of the provisions concerning employees engaged in veterinary health inspection from the provisions of the Labour Code, and concluded that it does not provide any limitation on the duration of such employment contract or the allowed number of renewals as the Labour Code provides.

In its judgment, the ECJ expressly ascertained that the Framework agreement on fixed-term work, which is set out in the Annex to Council Directive 1999/70/EC

concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP is also applicable to the veterinary health inspection sector.

By lacking the means to control the usage of such provisions, as required by the Framework Agreement on fixed-term work, it had led to an abusive usage of fixed-term employment agreements for such a long period of time.

Commentary

The ECJ decision, respectively the decision of the national court highlights the change of interpretation given to the above legal provisions.

At the time when the preliminary questions were referred, the majority opinion of the Craiova Court of Appeal was that the performance of official veterinary health inspections, which is governed by specific legislative provisions, is assimilated to a specific assignment and thus within the exception laid down in Article 83(1)(h) of the Romanian Labour Code, which provided that fixed-term employment contracts can be concluded for the period needed to complete a project, program or specific piece of work. The majority opinion considered that with each change in the assignment of the establishments to be inspected, a new fixed-term employment contract was to be concluded.

Although the ECJ does not pronounce itself, should such opinion have been adopted by the national court it would have endangered every working relation, as each instruction given to an employee may be interpreted as a specific project, leaving employers to speculate the use of fixed-term employment contracts even more than the scope of the social European policies adopted so far.

This case illustrates that even national authorities can display abusive behaviours towards their employees yearlong and that control from specialised public authorities, like the Labour Inspectorate, is greatly required.

Comment from other jurisdiction

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH):

The legal framework in Germany is similar to the situation in Romania. The German Act on Part-Time Work and Fixed-Term Employment (TzBfG) allows fixed-term contracts without objective reasons for a maximum duration of two years. Exceeding this two-year duration requires objective reasons to justify the conclusion of fixed-term contracts. For instance, these objective reasons are met:

- in case of temporary operational needs such as project work (Section 14(1) No. 1 TzBfG); or

- if the employee substitutes another one on an interim basis such as parental leave substitution (Section 14(1) No. 3 TzBfG); or
- if the employee is remunerated from budgetary funds that are intended for temporary employment (Section 14(1) No. 7 TzBfG).

As Nos. 1 and 3 are often raised for justification of fixed-term contracts, the labour courts in Germany have developed a legal framework concerning the interpretation of Council Directive 1999/70/EC. Case law focuses on a ‘traffic light’ solution for abusive use of fixed-term contracts.

A red light indicates abusive use of fixed-term contracts. The employer has to prove special circumstances that prevent an indicated abusive use. A red light is given if:

- the maximum duration of fixed-term contracts exceed ten years; or
- fifteen contract renewals are concluded (regardless of the maximum duration); or
- twelve contract renewals are concluded if the maximum duration exceeds eight years.

A yellow light leads to a comprehensive abuse control by the courts. Abusive use depends on the circumstances of the individual case. A yellow light is given if:

- the maximum duration of fixed-term contracts exceed eight years; or
- twelve contract renewals are concluded (regardless of the maximum duration); or
- nine contract renewals are concluded if the maximum duration exceeds six years.

If the values fall below those indicated above (‘green light’) fixed-term contracts are usually not subject to abuse control. Section 14(1) No. 7 TzBfG? was taken from the former Higher Education Framework Act. It is available only to public employers but – like in Romania – its compatibility with EU law is highly questionable. Not only in case C-614/15, but as well in cases C-586/10 (a German case) and C-190/13 the ECJ pointed out certain requirements. It is the predominant view that these requirements are not met and that No. 7 violates European law.

Subject: Fixed-term Work

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