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2023/35

Supreme Court: Courts must judge about violations of 'temporary' agency work (IT)

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Summary

The Italian Supreme Court with a decision of 2023 confirmed that although in Italy there is no explicit provision on the temporary duration of temporary agency work, this does not preclude this requirement being considered implicit in temporary agency work, in accordance with the Directive 2008/104/EC. Therefore, it will be for the Court to establish, on a case-by-case basis, whether the reiteration of agency work assignments with the same user exceed the limit of a duration that can reasonably be regarded as temporary, in violation of the Italian law and EU rules.

Legal Background

Italian legislation on agency work provides for detailed regulation of the assignment of an agency worker at a user undertaking, which can be either open-ended or fixed-term.

At the time of the facts examined by the Italian Supreme Court, Italian law provided for fixed-term agency work that the lawfulness of such contract was not subject to (*i*) the existence of any reasons to justify its use, (*ii*) a maximum duration of the different agency work assignments at the same user, or (*iii*) a limitation on the number of renewals or extensions of the same fixed-term contract. Italian legislation provided only for quantitative limits of use as indicated by national collective bargaining agreements applied by the user undertaking.

Directive 2008/104/EC (the "Directive") on temporary agency work defines agency workers as workers with a contract of employment with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and directions. The term "temporary" is used also in the definition of work agency, to underline the temporariness of the work carried out at the user undertaking.

In two decisions (C-681/18 of 14 October 2020 and C-232/20 of 17 March 2022) the ECJ held that the term "temporary" used in the Directive has the purpose of define the way to put a worker at the disposal of a user undertaking: therefore, it is apparent from the definitions used in the Directive that the employment relationship with a user undertaking is, by its nature, temporary.

Today, in accordance with Article 5(5) of the Directive, regarding fixed-term agency work contracts, also Italian law provides for a maximum limit for each employee working by the same user equal to 24 months. This limit is calculated taking into account not only the duration of fixed-term agency work contracts but also of any fixed-term employment contracts that may have existed directly between the employee and the same user; which, in case the temporary contracts with the same user last longer than 24 months, the contract will be converted into an open-ended contract.

However, until 30 June 2025, as an exception to the above, the sanction of converting the contract into an open-ended contract by the user would not apply if the employee sent on mission to the same user for more than 24 months was an employee hired on an open-ended contract by the work agency.

Facts

An employee, who was employed on a cruise ship by the user on the basis of three separate fixed-term agency work contracts that followed one another without interruption for a total period of more than four years, claimed against the user requesting the conversion of the employment contract into an open-ended one on the basis that she had worked continuously for the latter, always performing the same tasks.

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doi: 10.5553/EELC/187791072023008004007

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Judgment

The employee challenged the decision of the Court of Appeal which had held that the user had not abused the provisions of the agency work contracts. Indeed, the Court of Appeal had held that, although there were no interruptions in the agency work contracts, three separate assignments had effectively taken place for a total of more than four years; and, according to the Court's interpretation, this circumstance was not contrary to the law in force at the time of the facts.

In particular, the Court pointed out that, at the time of the facts, the law did not stipulate a maximum limit on the duration of assignments in relation to agency work contracts, which, on the other hand, was set only for the duration of fixed-term employment contracts, which could not exceed 36 months.

In this regard, according to the Court of Appeal, the employee's interpretation that the aforementioned time limit could also be extended to agency work contracts with the same user was therefore wrong.

The Italian Supreme Court, granting the employee's appeal, recalled on this point the principles already expressed by the Court of Justice, which, in its judgments C-681/18 of 14 October 2020 and C-232/20 of 17 March 2022, had indicated certain indexes revealing a possible abuse of the repetitive use of fixed-term agency work contracts aimed at eluding the purpose of Directive 2008/104 on the temporary nature of contracts. On that point, the Supreme Court observed that although the Italian legislation does not expressly provide for a temporary duration of employment agency work contract, this does not preclude that requirement from being implicitly considered, in accordance with the EU law, so that such a reading does not entail a *contra legem* interpretation. In this regard, the Courts will have to consider on a case-by-case basis whether there is an abuse of the regulations occurring when «successive assignments of the same temporary agency worker to the same user lead to a length of working activity that is longer than can reasonably be classified as "temporary"».

Therefore, on the basis of these principles, the Italian Supreme Court held that Court of Appeal's assessment in the case was at least partial and, in any case, not in accordance with the principles of law indicated by the Court of Justice. Indeed, even if the Court had ascertained that the temporary agency work contract had lasted for a total of more than 36 months, which at the time was the limit for fixed-term contracts, it had not examined whether, in the case concerned, the repetition of the agency worker's assignments with the same user led to a length of working activity that is longer than can reasonably be classified as "temporary", so as to give rise to a breach of mandatory rules and, specifically, of the purposes provided for by EU Directive 2008/104, from which, according to the domestic legal system, the contracts are null and void.

Commentary

This decision follows four decisions of the Supreme Court of 2022 (Cass. 21st July 2022, no. 22861; Cass. 27th July 2022, n. 2353 and 23494; Cass. 11th October 2022, no. 29597) already commented on no. 2023/2 of this magazine. Indeed, the decision is very important because it confirms the temporary nature of work agency contracts even in cases where this requirement is not provided for by the law. This is a confirmation of how the belonging to the European Union implies some legal requirements even if there are not clearly stated in our legal system.

Comments from other jurisdictions

Bulgaria (Ivan Punev, DGKV): The rules governing temporary work agency arrangements (within the meaning of Directive 2008/104/EC on temporary agency work) are implemented in Bulgaria in two main local pieces of legislation – the Labour Code and the Law on Encouragement of Employment.

Pursuant to the Bulgarian temporary agency framework, employees hired by a temporary work agency and leased to a user undertaking can only be hired under one of two types of fixed-term employment agreement – either (i) for completion of a specific project, or (ii) for substitution of an absent employee.

In other words, in a temporary work agency setting employees cannot be hired under an indefinite-term employment agreement, and the temporary nature of the arrangements initially laid down by Directive 2008/104/EC and confirmed in the case law of the ECJ is applied by definition under Bulgarian law. However, the law does not provide for a specific maximum time period (e.g. number of days, months, years) for which the relevant fixed-term employment agreement can be concluded, nor for a maximum number of consecutive fixed-term employment agreements to be concluded with one and the same employee for one and the same client (user undertaking) of the temporary work agency. Thus, there is still room for case-by-case assessment of whether a particular situation complies with the requirement to be regulated by one of the two types of fixed-term employment agreement, as well as if the duration of such fixed-term employment agreement is actually of a temporary nature.

There is some case law of Bulgarian courts on the rules governing fixed-term employment agreements. Based on the interpretation confirmed in that case law, a fixed-term employment agreement for completion of a specific project must contain a clear, detailed and unambiguous definition of the type, scope and quality of work to be completed, respectively this would allow to determine easily when the work can be considered completed, and the agreement terminated. Furthermore, the

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court decisions generally confirm the position that the consecutive conclusion of fixed-term employment agreements for completion of a specific project between an employer and one and the same individual violates the purpose of the fixed-term employment agreements, as such approach shows that the need for the individual's employment is neither temporary in nature, nor satisfied with the completion of the work as defined.

Croatia (Dina Vlahov Buhin, Schoenherr): Croatian law does not condition acquisition of the annual leave to 'actually worked' time with the employer. This means that the employee is entitled to annual leave of at least four weeks also in case (s)he is on sick leave due to sickness or disease or accident (regardless of the cause which triggered the sick leave). However, Croatian law limits the carry-over period of paid annual leave entitlements until 30 June of the year following the year in which the employee acquired the right to the annual leave, with the exception for employees on maternity, parental and adoption leave and leave for the care of a child with severe developmental disabilities, who are entitled to carry over their accrued annual leave from the previous calendar year until the end of the following calendar year (in which they returned to work). From the available practice of the Croatian courts, in particular rather rare reliance on EU case law in their judgments and lack of reliance on horizontal effect of EU law, it is highly questionable whether the Croatian courts would, even if there would be any non-compliance with EU law, set aside provisions of the Croatian law the way the French Supreme Court did. It would probably take years, similar as to what happened in the French case, to bring the legal framework in line with the EU law, where this would probably be done through pressure upon the legislator.

Finland (Janne Nurminen, Roschier, Attorneys Ltd): Finland has implemented Directive 2008/104/EC on temporary agency work in its national legislation by amending the Employment Contracts Act (55/2001). Since directives only set out a goal that Member States must achieve and it is up to the individual countries to devise their own law on how to reach these goals, Finnish legislation on temporary agency work differs quite a bit from the wording set out in the Directive, as well as the Italian legislation explained in this commented case.
The Directive applies to workers who are employed by a temporary work agency and who are assigned to user undertakings to work temporarily under the user undertakings' supervision and direction. However, Finnish legislation on temporary agency work does not recognize the term 'temporary'. This means that the duration of the employment in temporary agency work is governed by the same general employment legislation concerning the duration of the employment contracts as all other employment relationships. The general rule is that employment contracts should be valid indefinitely and employment contracts may not be agreed for a fixed term if the employer's labour need is permanent.

If an employment contract is agreed for a fixed term at the employer's initiative without a justifiable reason, the employment contract shall be regarded as being valid indefinitely. This applies to temporary agency work, i.e., if the work agency's labour need is permanent, the employee should be offered an employment contract valid indefinitely.
If the case at hand had taken place in Finland, the court would have assessed the length of fixed-term employment contracts, similarly as the Italian Supreme Court did. However, the assessment would concern the circumstances of the work agency and the work agency's justifiable reason to agree a fixed-term employment contract with the employee. Further, it would be assessed if the use of multiple consecutive fixed-term employment contracts showed that the work agency's labour need was permanent.

Subject: Temporary Agency Work
Parties: Unknown
Court: Corte di Cassazione (Supreme Court)
Date: 1 August 2023
Case number: 23445/2023
Internet publication: not available.

doi: 10.5553/EELC/187791072023008004007