Key Issues: **Social Policy – Use by employer of successive fixed term contracts**

Case: **Florentina Martínez Andrés v Servicio Vasco de Salud**

Reference: **Case C-184/15, CJEU (Tenth Chamber), 14 September 2016**

Legislation: **Directive 1999/70/EC**

On 2 February 2010, Ms Martínez Andrés was appointed by Servicio Vasco de Salud (Basque Health Service, Spain) as administrative assistant to provide services of a temporary, auxiliary or extraordinary nature. That appointment was subsequently renewed on 13 consecutive occasions, but none of the renewals contained any specific reference to the reason for the renewal, save for a general reference to "*service requirements*". The appointment of Ms Martínez Andrés was terminated on 1 October 2012.

Ms Martínez Andrés brought an action against the decision to terminate her appointment and her action was dismissed by a judgment of the Juzgado No 6 de lo Contencioso-Administrativo de Bilbao (Administrative Court No 6 of Bilbao, Spain) of 30 July 2013.

Ms Martínez Andrés appealed against that judgment to the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) on the ground that Article 9(3) of the framework regulations for regulated health service staff had been infringed, as the three situations which are provided for therein cannot be grouped into a single general category to justify the existence of a fixed-term employment relationship.

. The High Court decided to stay the proceedings and to refer a number of questions to the CJEU for a preliminary ruling.

Consideration by CJEU

These requests for a preliminary ruling concern the interpretation of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999.

The CJEU noted that one of the objectives of the framework agreement is to place limits on successive recourse to fixed-term employment contracts or relationships. Clause 5 of that agreement requires Member States to adopt one or more of the measures listed in a manner that is effective and binding, where domestic law does not include equivalent legal measures. The measures listed relate to:

- objective reasons justifying the renewal of such employment contracts or relationships

- the maximum total duration of successive fixed-term employment contracts or relationships, and

- the number of renewals of such contracts or relationships

Therefore, where abuse resulting from the use of successive fixed-term employment contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to penalise that abuse and nullify the consequences of the breach of EU law. According to the very wording of Article 2(1) of the Directive, Member States must "*take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [that] directive*".

In that respect, it should be clarified that clause 5 of the framework agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. Indeed, clause 5(2) of the framework agreement in principle leaves it to the Member States to determine the conditions under which fixed-term employment contracts or relationships are to be regarded as contracts or relationships of indefinite duration. It follows that the framework agreement does not specify the conditions under which contracts of indefinite duration may be used.

However, in order for legislation, which prohibits absolutely the conversion into a contract of indefinite duration of a succession of fixed-term employment contracts, to be regarded as compatible with the framework agreement, the domestic law of the Member State concerned must include another effective measure to prevent and, where relevant, penalise the misuse of successive fixed-term employment contracts. Furthermore, it must be pointed out that it is not for the CJEU to rule on the interpretation of provisions of national law; that being exclusively for the national courts which must determine whether the requirements set out in clause 5 of the framework agreement are met by the provisions of the applicable national legislation.

The CJEU held that:

1. **Clause 5(1) of the framework agreement must be interpreted as precluding national legislation from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to determine.**

2. **The provisions of the framework agreement on fixed-term work which is set out in the annex to Directive 1999/70, read in conjunction with the principle of effectiveness, must be interpreted as precluding national procedural rules which require a fixed-term**

worker to bring a new action in order to determine the appropriate penalty where abuse resulting from the use of successive fixed-term employment contracts has been established by a judicial authority, to the extent that it results in procedural disadvantages for that worker, in terms, inter alia, of cost, duration and the rules of representation, liable to render excessively difficult the exercise of the rights conferred on him by EU law.

Why is this decision important?

There is evidence of an increasing use of successive fixed term contracts by employers in the EU with particular use in the public healthcare sector. As a result of this decision, employers may need to review their use of such contracts if national law does not provide an effective remedy for the affected employees.

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