



Key Issues: Fixed Term Work Contracts

Case: European Commission v Luxembourg

Reference: Case C-238/14, CJEU (Third Chamber), 26 February 2015

Legislation: Council Directive 1999/70/EC

By its application, the European Commission claims that the Court of Justice of the European Union (CJEU) should declare that, by maintaining in force, with respect to occasional workers in the entertainment arts, derogations from measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement on fixed-term work of 18 March 1999 ('the **Framework Agreement**'), which is set out in the Annex to Council Directive 1999/70/EC.

On 12 March 2009, the Commission sent a letter to the Grand Duchy of Luxembourg asking that Member State to provide clarification of certain points of Luxembourg law concerning: (i) the lack of any definition of 'comparable permanent worker'; (ii) the existence of derogations from measures designed to prevent the abusive use of successive fixed-term contracts; and (iii) the absence of an obligation for employers to provide fixed-term workers with information about employment opportunities. Not being satisfied with the reply, the Commission decided to bring the present action.

Consideration by CJEU

The Commission submits that Clause 5 of the Framework Agreement, which requires Member States to adopt measures to prevent the abusive use of successive fixed-term contracts, was transposed into Luxembourg law by Article L. 122-4 of the Labour Code, paragraph (1) of which provides that '[w]ith the exception of seasonal employment contracts, the duration of the contract concluded for a fixed term on the basis of Article L. 122-1 may not, in respect of the same employee, exceed twenty-four months inclusive of renewals'.

Paragraph (3) of Article L. 122-5 of the Labour Code provides, however, that '[b]y way of derogation from the provisions of the present Article, fixed-term employment contracts may be renewed more than twice, even for a total period exceeding twenty-four months, without being deemed to be permanent contracts of employment, where those contracts are concluded: ... 2. by occasional workers in the entertainment arts, as defined in Article 4 of [the amended Law of 30 July 1999]'.

According to the Commission, it is therefore apparent that, in the case of occasional workers in the entertainment arts, Luxembourg law does not require any objective reason, enabling the abusive use of successive fixed-term contracts to be prevented. In its reply to the letter of formal notice, the Grand Duchy of Luxembourg confined itself to arguing that contracts concluded with occasional workers in the entertainment arts pursuant to Article L. 122-5 of the Labour Code 'are in all cases subject to the limits imposed by paragraphs (1)

and (2) of Article L. 122-1'. The Commission argues, however, that, on the contrary, those provisions exclude occasional workers in the entertainment arts from all protection: in accordance with the actual terms of those provisions, contracts involving those workers are not subject to the requirement that there be an objective reason justifying renewal of the fixed-period employment contract, or to a limitation of the number of times that such contracts may be renewed, or to any limit regarding the total duration of a series of such contracts.

The CJEU noted that the purpose of Clause 5(1) of the Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure. The benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers.

Accordingly, Clause 5(1) of the Framework 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 in Clause 5(1)(a) to (c) relate, respectively, to objective reasons justifying the renewal of such 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. Member States enjoy a certain discretion in that regard since they have the choice of relying on one or more of the measures listed, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers.

In that way, Clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve this, provided that they do not compromise the objective or the practical effect of the Framework Agreement.

Moreover, Clause 5(1) of the Framework Agreement gives Member States the discretion, when implementing the agreement, to take account of the particular needs of the specific sectors and/or categories of workers involved, provided that that is justified on objective grounds. However, that cannot be understood as allowing that Member State to consider itself, in respect of that sector, relieved of the obligation to provide an adequate measure to prevent and, if necessary, to penalise the abusive use of successive fixed-term contracts. To permit a Member State to rely on an objective such as the flexibility deriving from the use of fixed-term employment contracts in order to regard itself as relieved of that obligation would be in contradiction with one of the objectives pursued by the Framework Agreement, namely stability of employment, considered to be a major element in the protection of workers, and would also be likely to reduce significantly the categories of person able to enjoy the benefit of the protective measures provided for in Clause 5 of the Framework Agreement.

The CJEU declared that:

- 1. By maintaining in force, with respect to occasional workers in the entertainment arts, derogations from the measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement on fixed-term work of 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.**

Why is this decision important?

Although this judgement relates to national laws affecting fixed term contracts and the obligations of the Member States, employers should review carefully the use of fixed term contracts and, in particular, their policy on the renewal of fixed term contracts as the growing use of such contracts by employers across many sectors means that this judgment is likely to have a wider application.

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