Information about the follow up brought to the complaints registered under reference CHAP(2013)01917

The European Commission has received numerous complaints regarding possible abuse of successive fixed-term contracts in the Spanish public sector.

The complaints indicate that the Spanish government has concluded an agreement with the Trade Unions on 29 March 2017. Complainants fear that the Spanish government, by means of this agreement, wants to remedy ["regularizar y blanquear"] the situation of those public sector employees who were previously on successive fixed term contracts and thus avoid infringement procedures.

Applicable EU law

Clause 5 (1) of the Framework Agreement on fixed term work concluded by ETUC, UNICE and CEEP annexed to Directive 1999/70/EC ("the Framework Agreement") provides that in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, in the absence of existing equivalent legal measures, shall introduce one or more of the following measures:
(a) objective reasons justifying the renewal of such contracts or relationships; or
(b) the maximum total duration of successive fixed-term employment contracts or relationships; or
(c) the number of renewals of such contracts or relationships.

According to settled case-law of the Court of Justice of the EU, employment situations may be qualified as "abuse" for the purpose of Clause 5 (1) of the Framework Agreement, if fixed term contracts are deployed in this sector to meet a staffing need of the employer which is fixed and permanent[1].

The Commission is assessing the conformity of the Spanish legislation governing the situation of public sector employees with clause 5 of the framework agreement on fixed-term work, which obliges Member States to adopt measures to prevent the abuse of successive fixed-term contracts.

On the alleged requirement to convert existing fixed term contracts into open ended contracts

Complainants indicate that, in line with the agreement of 29 March 2017, the Spanish government will not convert the successive fixed term contracts of public employees sector into open ended contracts, but will instead recruit permanent employees via open competitions.

The Court of Justice of the EU ('CJEU' or 'Court') has held that, since clause 5(2) of the Framework Agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used, it gives Member States a margin of discretion in the matter (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 47).

It follows that clause 5 of the Framework Agreement does not preclude, as such, a Member State from treating abuse of successive fixed-term employment contracts or relationships

[1] See, to that effect, judgments of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 39 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 101.

differently according to whether those contracts or relationships were entered into with a private sector or public sector employer (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 48).

However, in order for national legislation which, in the public sector only, prohibits a succession of fixed-term contracts from being converted into an employment contract of indefinite duration — to be regarded as compatible with the Framework Agreement, the domestic law of the Member State concerned must include, in that sector, another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts (judgment of 7 September 2006, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 49).

To sum up:

- 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;
- the Framework Agreement does not prevent Member States from adopting different measures in the public and in the private sector;
- the Framework Agreement does not cover instances of discrimination between two categories of fixed-term workers (only discrimination between a fixed-term worker and the comparable permanent worker);
- effective measures to prevent and, where relevant, punish the abuse of successive fixed-term contracts need to be present in national law.

<u>On the alleged requirement to take age and experience into account when organising open competitions</u>

Complainants allege that the fact that their age and experience are not being taken into account in the organisation of the open competitions, in which they will have to compete with younger and more inexperienced candidates, and that this constitutes discrimination on the basis of age, which is prohibited by Council Directive 2000/78/EC of 27 November 2000.

It should be pointed out that Member States (as employers) are in principle free to decide what are the most effective selection procedures to choose their own staff and to assess the qualities of the candidates in accordance with these processes, provided that there is no discrimination on any of the grounds prohibited by EU law.

Articles 1 and 2 of Council Directive 2000/78/EC of 27 November 2000 prohibit discrimination based on age and Article 3 states that the public sector is included within its scope. However, no sufficient evidence of age discrimination in this case was presented.
In order for a case to amount to discrimination, there should be differential treatment which is not objectively justified. However, in the case at hand, no evidence of such differential treatment has been presented: those employees who have been in the past on successive fixed-term contracts can participate in the same way in the newly announced open competitions as candidates who have not been employed in the public sector previously.

Spain has transposed Directive 2000/78/EC in its internal legal order, in particular through Law 62/2003, as subsequently amended. The Commission has currently no evidence indicating that Directive 2000/78/EC has not been transposed correctly in the Spanish legal order.

The Santoro Case: on compensation for past abuse

In September 2016 an Italian civil court (*Tribunale di Trapani)* made a request for a preliminary ruling to the Court of Justice of the European Union ('CJEU' or 'the Court'), asking for guidance on whether Italian law provides effective protection – in particular adequate compensation - for public sector employees whose rights under clause 5(1) of the Framework Agreement have been breached.[2]

This question arose in a context where national rules in this respect applied differently to private and public sector employees. If an employee is employed in the private sector beyond the time limit established in the contract or beyond the maximum limit of 36 months, Italian legislation provides for the automatic conversion of a fixed term employment contract into an indefinite contract in the private sector. By contrast, where public sector employees are concerned, compensation is limited to the form of a flat-rate sum and payment for damages for the loss of favourable opportunities.

In its ruling of 7 March 2018 (Case C-494/16, *Santoro*) the CJEU confirmed that Member States may treat abuse of successive fixed-term contracts differently in the public sector, provided that other effective measures exist.

The CJEU also confirmed that, as there is no legal obligation of conversion of fixed-term contracts into permanent contracts for workers in the public service (as the latter have to pass an open competition before they can become permanent), these workers are not entitled to a compensation for lack of conversion to which the private sector employees are entitled. However, the public sector employees should be entitled to a compensation for the loss of opportunity. The calculation of this compensation is left to the national court, but the CJEU has indicated through its reference to the difficulties inherent in demonstrating the existence of a loss of opportunity that the burden of proof that this loss of opportunity did not exist should not be on the employee.

An excessively high burden of proof might deprive a measure of its effectiveness. The Court noted that, given the difficulties inherent in demonstrating the existence of loss of opportunity, a mechanism of presumption designed to guarantee a worker who has suffered a loss of employment opportunities, due to the misuse of successive fixed-term contracts, the possibility of nullifying the consequences of such a breach of EU law would satisfy the requirements of effectiveness.

The Court also refers to other existing measures to prevent and penalise the misuse of fixed-term contracts, such as managers' liability as enshrined in Article 36(5) of Legislative Decree No 165/2001.

The Court concludes that it is up to the referring court to verify whether the existing penalties imposed on public authorities (the lump sum compensation, the loss of opportunity compensation and the manager's liability) are sufficiently effective and dissuasive so as to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective. Hereby the Court refers again to the importance of the possibility for the employee to rely on a presumption such that it is for the State to prove that the employee who was subject to abusive successive fixed term contracts did not face any loss of opportunity to find employment or would not have been successful if a recruitment competition had been duly organized.

The ruling will make it easier in the future for public sector workers who have been employed on abusive successive fixed term contracts in breach of Clause 5 of the Framework Agreement

[2] Case C-494/16, *Santoro*, EU:C:2018:166 .

to obtain compensation for the loss of opportunity they have faced due to these abusive successive fixed term contracts.

It is, in principle, for the national authorities of the Member State concerned, including the courts, to apply the national law, including the provisions transposing EU law, in each individual case. Indeed, national authorities are better placed to decide on the merits of each particular case. If complainants consider themselves victims of abusive successive fixed term contracts and have suffered damages as a result, they may bring a claim for compensation before the competent national labour court.

The Sanchez Ruiz Case

Furthermore, in separate proceedings, (Case C-103/18 Sanchez Ruiz), the Juzgado de lo Centtencioso-Administrativo No 8 de Madrid made a request for a preliminary ruling to the CJEU[3], asking for guidance on the following four questions:

1) The first question relates to the meaning of the phrase 'use of successive fixed-term employment contracts or relationships' in Clause (5)(1) of the Framework Agreement.

2) The second question concerns the content of the judgments in Martínez Andrés and Castrejana López and in Pérez López. Specifically, the Pérez López judgment addresses the concepts of objective reason and permanent need, and the referring court is not sure of the implications of these concepts specifically as regards the public sector and, more particularly, essential public services (health, education and justice). It refers to the relevant Spanish case-law, which holds that if there exists a reason for each and every one of the contracts being temporary, then there is no evasion of the law in a temporary appointment, nor would the use of successive contracts amount to evasion, because nothing prevents several successive temporary contracts being concluded with the same worker, provided that the reason for each of them matches the grounds for the particular form of appointment in question and that the appointment satisfies the other formal requirements and conditions established by law. This leads to the conclusion, which in the view of the referring court is incompatible with the case-law of the CJEU, that because of the particular characteristics of an essential public service, misuse will never arise in the public sector, Directive 1999/70/EC will never apply, and therefore replacement/casual/cover workers will never achieve the objectives of stability advocated by the Directive.

3) The third query is how to determine whether there are in national law any penalties or restrictions to prevent abuse of temporary appointments through the use of successive temporary contracts; and, if there are, whether they are effective and proportionate and, if they do not exist, what the consequences should be. The referring court concludes that: there are no maximum limits to temporary appointments, the statutory limits designed to prevent extended use of temporary contracts (Articles 10 and 70 EBEP) are not observed, and are therefore not effective, and that, by law, the consequences of misuse of temporary appointments established for private-sector employers may not be visited upon a public-sector employer. In the opinion of the referring court, the conversion of the appointment into a non-permanent indefinite appointment, as established by the Tribunal Supremo (Supreme Court) for staff employed under contracts of employment, would not satisfy the requirements of the Directive either, for it allows the post to be done away with or the worker to be dismissed when the post is taken up by a permanent member of staff, and is therefore simply another form of temporary employment. Therefore, in its view, there is no effective national measure to prevent and, where appropriate, penalise abuse of successive fixed-term contracts.

[3] OJ C 161, 07.05.18, p.23

4) The fourth query addresses procedural issues. Its starting point is that a temporary worker (whether a casual, replacement or cover worker) is prevented from exercising his EU rights, because of the application of a procedural rule requiring temporary workers actively to challenge or appeal against all successive appointments and terminations of employment, and final judgment is given without achieving the protection offered by the Directive. In short, the referring court notes that there are final administrative decisions (terminations of employment, appointments, competitions) and judicial decisions issued at first instance and at final instance that, on becoming final, make it difficult for workers to complain about irregularities and to achieve the objectives laid down in Directive 1999/70/EC, particularly in the case of final judicial decisions founded on case-law made by courts of sole instance whose interpretation is inconsistent with the case-law of the CJEU and which did not refer the matter for a preliminary ruling, even though they were obliged to do so. In the referring court's view, even if the situation were held to involve final administrative acts (the successive terminations of employment, appointments and selection competitions), in view of the principle of cooperation arising under Article 4(3) TFEU, the administrative body would be obliged, when faced with an application calling on it to re-examine a final decision, to take account of the relevant interpretation of EU law. However, national courts may not establish the content of provisions incompatible with EU law or of the acts they annul: all they can do is set aside the national rule in order thus to apply the EU law, thereby accomplishing its objectives. The question arises, therefore, whether EU law requires final judicial decisions/administrative acts to be reviewed in these circumstances, when the four conditions laid down in the judgment in Kühne & Heitz are satisfied.

The Commission is awaiting the judgement in this case.

Conclusion

The Commission is aware of the situation of fixed-term workers in the Spanish public sector.

The Commission is assessing the conformity of the Spanish legislation governing the situation of public sector employees with clause 5 of the framework agreement on fixed-term work.

Before it finalizes its assessment, the Commission will await the ruling of the Court of Justice of the EU in case C-103/18 Sanchez Ruiz, which will be of relevance for the above mentioned assessment.

The recent ruling in case C-494/16 Santoro has clarified the questions concerning compensation for breaches of Clause 5 of the Framework Agreement and will make it easier in the future for public sector workers who have been employed on abusive successive fixed term contracts to obtain compensation for the loss of opportunity they have faced due to those abusive successive fixed term contracts.

Complainants will be keep informed through this website[4] of the results of the Commission's investigation and of the follow-up that the Commission may decide to give to this investigation.

[4] https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/joining-similar-complaints/decisions-multiple-complaints_en