Information about the follow up to the complaint registered under reference CHAP(2013)2870

The European Commission refers to the series of complaints it has received concerning possible abuse of successive fixed-term contracts in the Italian public sector.

The employees concerned are:

- staff employed in the Italian operatic and orchestral foundations;
- fixed-term contracts concluded with teachers and administrative and technical auxiliary staff ('ATA staff') in order to fill temporary vacancies;
- fixed-term contracts concluded with healthcare staff, including managers, in the National Health Service;
- fixed term contracts concluded with workers in the higher art, music and dance education ('AFAM') for which the overseeing authority is the Ministero dell'Istruzione Università e Ricerca ('MIUR'), the Ministry of Education, Universities and Research;
- fixed-term contracts concluded in accordance with Law No 240 of 30 December 2010. Law No 240 of 30 December 2010 contains rules on the organisation of universities, academic personnel and their recruitment;
- employment relationships between agricultural employers and fixed-term workers as defined by Article 12, subparagraph 2 of Legislative Decree No 375 of 11 August 1993;
- call-ups of the voluntary staff of the national fire brigade.

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")[1] 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;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships.

In order for clause 5(1) of the Framework Agreement to be complied with, it must be verified that the renewal of successive fixed-term employment contracts or relationships is intended to

[1] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.07.1999, p. 43.

cover temporary needs, and that a national provision is not being used to meet fixed and permanent staffing needs of the employer[2].

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), in Case C-494/16, *Santoro* 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.[3]

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 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 exist should not be on the employee.

An excessively high burden of proof might deprive a measure of its effectiveness. The CJEU 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 CJEU also points to other existing measures to prevent and penalise the misuse of fixed-term contracts, such as the managers' liability as enshrined in Article 36(5) of Legislative Decree No 165/2001.

The CJEU 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.

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[2] 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.

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

Hereby the CJEU 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 Italian public sector workers who have been on abusive successive fixed term contracts to obtain compensation for the loss of opportunity they have faced due to these abusive successive fixed term contracts.

Furthermore, in separate proceedings, (Case C-494/17 *Rossato*)[4], the Corte d'Appello di Trento made a request for a preliminary ruling to the CJEU, asking for guidance on whether Law No 187 of 2015 provides effective protection - in particular adequate compensation - for AFAM employees whose rights under clause 5(1) of the Framework Agreement have been breached. The referring Court asked whether the measures foreseen in Law No 187 of 2015 are proportionate, sufficiently effective and sufficiently deterrent to ensure that clause 5(1) of the Framework Agreement on fixed-term work is effective.

Mr Rossato was a teacher for a period of eleven years and two months, under 17 fixed-term contracts.

While Italian law, as modified by the Dignity Decree (Decree-Law of 12 July 2018 No. 87, converted and modified by Law 9 August 2018, No. 96) provides that a person employed in the private sector on a series of fixed term contracts for an overall period of more than 12 months (and in some cases 24 months) shall be considered to be employed with a contract of indefinite duration, employees in the public sector are excluded from this rule.

An Italian law was enacted in 2015 (Law No 107 of 2015) introducing a 36-month maximum limit on the length of fixed-term contracts as from 1 September 2016 and established a special recruitment procedure for teaching staff, which allows for 'stabilisation' of that contract. This does not automatically convert successive fixed-term contracts into an indefinite contract, but provides for a new contract of indefinite duration.

In the case of public sector workers, Italian legislation provides for compensation for the damage incurred in two forms, flat-rate compensation, or damages for the loss of favourable opportunities, but this compensation is not applicable to the school sector. The rationale for this difference seems to be that public sector employees outside the school sector cannot benefit from contract stabilisation, whereas public sector employees employed in the school sector can (but only after the entry into force the of Law No 107 of 2015).

The referring judge in the *Rossato* case asked the CJEU the following question:

'Must Clause 5(1) of the Framework Agreement be interpreted as precluding the application of Article 1(95), (131) and (132) of Law No 107/2015, which provide for the conversion of temporary teachers' fixed-term contracts into contracts of indefinite duration with respect to the future, without retroactive effect and without compensation for damage, as measures that are proportionate, sufficiently effective and a sufficient deterrent to ensure that the measures

[4] Case C-494/17 Rossato, ECLI:EU:C:2019:387.

laid down in the Framework Agreement are fully effective as regards breach of that agreement resulting from the misuse of successive fixed-term employment contracts during the period prior to that in which the measures set out in the provisions in question are intended to have legal effect?'

The judgment delivered by the CJEU states that:

- The conversion of the abusive fixed-term contract is, by itself, an effective measure to prevent the abuse and, therefore, the Framework Agreement does not impose a compensation for the damage suffered prior to the conversion.

- While the education sector displays a particular need for flexibility, Member States cannot disregard the obligation to lay down appropriate measures designed to duly punish the misuse of successive fixed-term employment contracts. Nevertheless, the Framework Agreement leaves to them the choice as to how to achieve it.

- Such a measure to punish abuse should be proportionate and effective. Whereas the Member State can take the needs of a certain sector into account, it cannot excessively limit the retroactive effect of the seniority. Seniority in this context should be understood as taking into account the years worked under fixed-term employment contracts at the moment when the worker concerned is granted tenure. The date from which seniority is granted should take the duration of the abuse (in this case more than 11 years) into account.

The Commission has examined Italian national law regarding its compliance with clause 4 and clause 5 of the Framework Agreement and has come to the conclusion that it is not in compliance with these provisions. Therefore the Commission has sent a letter of formal notice to Italy on 25 July 2019. For more information on this procedure, the Commission would like to refer to its press release of 25 July 2019.[5]

The Commission will keep the complainants informed through this website[6] of any follow-up that the Commission decides to give to this infringement procedure.

[5] https://ec.europa.eu/commission/presscorner/detail/en/inf_19_4251
[6] https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/joining-similar-complaints/decisions-multiple-complaints_en