

Information about the follow up brought 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 field of Higher Education in Art and Music (AFAM), including music academies, fine arts academies and dance academies
- staff employed in the Italian operatic and orchestral foundations
- teaching, educational, administrative, technical and auxiliary staff (ATA) at state schools and educational establishments
- staff working at public research institutions

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 cover temporary needs, and that a national provision is not being used to meet fixed and permanent staffing needs of the employer².

The Commission is assessing the conformity of the Italian 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.

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), 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

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.

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 .

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 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.

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.

The Commission is awaiting the judgement in this case.

The Commission is assessing the conformity of the Italian 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 CJEU in case C-494/17 Rossato, which will be of relevance for the above mentioned assessment. The recent ruling in case C-494/16 Santoro has clarified the questions concerning the adequacy of the right to compensation and 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 those abusive successive fixed term contracts.

The Commission will keep the complainants informed through this website⁵ of the results of the Commission's investigation and of any follow-up that the Commission may decide to give to this investigation.

⁴ Case C-494/17 Rossato.

⁵ https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/joining-similar-complaints/decisions-multiple-complaints_en