JUDGMENT OF THE COURT (Second Chamber)

7 September 2006 *

In Case C-180/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunale di Genova (Italy), made by decision of 15 March 2004, received at the Court on 16 April 2004, in the proceedings

Andrea Vassallo

v

Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, G. Arestis and J. Klučka, Judges,

* Language of the case: Italian.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira,

having regard to the written procedure and further to the hearing on 14 July 2005,

after considering the observations submitted on behalf of:

— Mr Vassallo, by G. Bellieni and A. Lanata, lawyers,

— the Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, by C. Ciminelli, lawyer,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the Greek Government, by A. Samoni-Rantou and E. Mamouna, and by M. Apessos and I. Bakopoulos, acting as Agents,

— the Commission of the European Communities, by N. Yerrell and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of clauses 1 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999 ('the framework agreement'), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

2 The reference was made in the context of a dispute between Mr Vassallo and his employer, the Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate (Hospital Company, St. Martin's Hospital, Genoa, and associated university clinics; 'the hospital'), with regard to its failure to renew the employment contract between them.

Legal context

Community law

3 As provided in clause 1, the purpose of the framework agreement 'is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

4 Clause 2(1) of the framework agreement provides that it 'applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'.

5 Clause 5 of the framework agreement provides:

'1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, 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.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as "successive";

(b) shall be deemed to be contracts or relationships of indefinite duration.'

6 In accordance with the first paragraph of Article 2 of Directive 1999/70, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply therewith by 10 July 2001.

National law

7 The national legislature, by Law No 422 of 29 December 2000 laying down provisions to comply with the obligations arising from Italy's membership of the European Communities — Community Law 2000 (ordinary supplement to GURI No 16 of 20 January 2001; 'Law No 422/2000'), empowered the Italian Government to issue the necessary legislative decrees for the transposition of the directives included in the lists in Annexes A and B to that law. The list in Annex B includes, among others, Directive 1999/70.

8 Article 2(1)(b) of Law No 422/2000 provides inter alia that 'to avoid conflict with the rules in force in the various sectors affected by the provisions to be applied, the rules in question will be amended or consolidated where necessary, except for areas that are not covered by legislation or procedures that are in the course of administrative

simplification ...'; and Article 2(1)(f) provides that 'the legislative decrees shall in any case ensure that, in the areas covered by the directives to be implemented, the rules that are laid down comply fully with the requirements of the directives in question ...'.

9 On 6 September 2001, the Italian Government adopted, on the basis of Article 2(1)(f) of Law No 422/2000, Legislative Decree No 368 on the implementation of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (GURI No 235 of 9 October 2001, p. 4; 'Legislative Decree No 368/2001').

10 Article 1(1) of Legislative Decree No 368/2001 provides that 'an employment contract may be concluded for a fixed-term for technical reasons or for reasons related to imperative requirements of production, organisation or replacement of workers'.

11 By virtue of Article 4(1) of Legislative Decree No 368/2001, the duration of an employment contract may be extended only once if its initial duration was less than three years 'provided that it is for objective reasons and for the same work as that for which the contract stipulated a fixed-term'. However, in that event, the total duration of that contract may not exceed three years.

12 Article 5 of Legislative Decree No 368/2001, headed 'Expiry of time-limit and penalties. Successive contracts', provides:

'1. If an employment relationship continues after the expiry of the term initially fixed or subsequently extended as provided for in Article 4, the employer is required to pay the worker an increase in pay equal to 20 per cent per day up to the 10th day, and 40 per cent for each additional day.

2. If the employment relationship continues beyond the 20th day for contracts for a term of less than 6 months, or beyond the 30th day in other cases, the contract shall be considered to be of indefinite duration from those dates.

3. Where a worker is re-employed for a fixed-term as provided for in Article 1 within a period of 10 days from the expiry of a contract for a term of up to 6 months, or 20 days from the expiry of a contract for a term of more than 6 months, the second contract shall be considered to be of indefinite duration.

4. Where a worker is employed for two successive fixed-terms, which shall be understood to mean relationships between which there is no break in continuity, the employment relationship shall be considered to be of indefinite duration from the date on which the first contract was made.'

13 Article 10 of Legislative Decree No 368/2001 contains a list of cases to which the new rules on fixed-term contracts do not apply. None of those cases relates to the sector of public administration.

14 The national court states that Legislative Decree No 368/2001 entered into force on 21 September 2001. Article 11(1) thereof stipulates that 'with effect from the entry into force of this legislative decree ... provisions of law that ... are not expressly mentioned in the present legislative decree are repealed'. The third paragraph of that article adds that 'individual contracts drawn up in accordance with the provisions previously in force shall continue to have effect until such time as they expire'.

15 Moreover, Article 36 of Legislative Decree No 165 of 30 March 2001 on general rules for the organisation of employment by the public authorities (ordinary supplement to GURI No 106 of 9 May 2001; 'Legislative Decree No 165/2001') provides:

'1. The public authorities, in accordance with the provisions on the recruitment of staff referred to in the preceding paragraphs, shall use the flexible forms of contract for the recruitment and employment of staff provided for in the Civil Code and the laws on employment relationships in undertakings. National collective agreements shall include provisions governing fixed-term contracts, training and employment contracts, other training relationships and the provision of temporary employment services ...

2. In any case, infringement of binding provisions on the recruitment or employment of workers by the public authorities cannot serve to justify the establishment of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction. The worker concerned is entitled to compensation for damage incurred as a result of working in breach of binding provisions. The authorities must recover any sums paid in that connection from the managers responsible, whether the infringement is intentional or the result of gross negligence.'

The main proceedings and the questions referred for a preliminary ruling

16 The applicant in the main proceedings was employed as a cook by the hospital under two successive fixed-term contracts, the first covering the period 5 July 2001 to 4 January 2002 and the second, signed on 2 January 2002, extending that period until 11 July 2002.

17 The applicant's second contract was not renewed by the hospital when it expired and the hospital formally dismissed him when he arrived at his workplace on the date of expiry of his contract.

18 The applicant challenged the decision to dismiss him before the Tribunale di Genova, asking it, firstly, to hold that, on the basis of Legislative Decree No 368/2001, there was an employment contract of indefinite duration with the hospital and, secondly, to order the hospital to pay salary owed and compensation for the damage suffered.

19 The hospital submits that Article 5 of Legislative Decree No 368/2001 does not apply in the present case, since Article 36 of Legislative Decree No 165/2001 prohibits public authorities from concluding employment contracts of indefinite duration.

20 The national court takes the view that Legislative Decree No 368/2001 did not repeal Article 36 of Legislative Decree No 165/2001, which is a *lex specialis* arising from constitutional principles relating to the operation and organisation of public services.

21 It relies, in that regard, on judgment No 89 of the Corte costituzionale (Constitutional Court) of 13 March 2003, from which it appears that the first sentence of Article 36(2) of Legislative Decree No 165/2001 is compatible with the constitutional principles of equality and sound management set out respectively in Articles 3 and 97 of the Italian Constitution. The Corte costituzionale took the view that the fundamental principle that access to employment in public bodies is by way of competition, by application of the third paragraph of Article 97 of that

constitution, legitimises the existing difference in treatment between workers in the private sector and those in the public sector where there has been unlawfulness in the conclusion of successive fixed-term contracts.

22 However, according to the national court, it is impossible that the Italian legislature intended to implement Directive 1999/70 by means of Legislative Decree No 165/2001. It is uncertain whether the system put into place by Article 36 of that legislative decree includes 'equivalent legal measures to prevent abuse' within the meaning of clause 5(1) of the framework agreement. Furthermore, should it become necessary to accept that the Italian Republic failed completely to transpose that directive since it transposed it solely with regard to employment relationships in the private sector, the national court is doubtful whether the directive confers on individuals a specific right to conversion of their employment relationship or whether, taking into account the specific requirements of the organisation of employment in the public sector and, therefore, the fact that it is impossible to apply to it the provisions of Legislative Decree No 368/2001, such a failure may give rise only to rights to compensation against the defaulting Member State, in accordance with the case-law laid down in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

23 It is against that background that the Tribunale di Genova decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) In view of the principles of non-discrimination and effectiveness, having regard in particular to the measures taken by Italy in relation to employment relationships with non-public-sector employers, must Council Directive 1999/70/EC of 28 June 1999 (Article 1, and Clauses 1(b) and 5 of the ETUC-UNICE-CEEP framework agreement on fixed-term work set out in the directive) be interpreted as meaning that it precludes national provisions such as those in Article 36 of Legislative Decree No 165 of 30 March 2001 which do not determine "under what conditions fixed-term employment contracts or relationships ... shall be deemed to be contracts or relationships of indefinite

duration", and in fact contain an absolute prohibition from the outset on the establishment of employment relationships of indefinite duration resulting from abuse relating to the use of fixed-term contracts and relationships?

(2) If the answer to the first question is in the affirmative, in view of the expiry of the time-limit for its implementation, must ... Directive 1999/70 ... (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered, also in the light of Legislative Decree No 368/2001 and particularly Article 5 thereof, which provides as a usual consequence of abuse of fixed-term contracts or relationships for conversion to a relationship of indefinite duration, to confer on individuals an actual right, which may be exercised immediately, in accordance with the national law most relevant to the present case (Legislative Decree No 368/2001) to recognition of the existence of an employment relationship of indefinite duration?

(3) If the answer to the first question is in the affirmative and the second question in the negative, in view of the expiry of the time-limit for its implementation, must ... Directive 1999/70 ... (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered to confer on individuals a right to reparation for any loss or damage caused by the failure of the Italian Republic to adopt appropriate measures to prevent abuse relating to the use of fixed-term contracts and/or relationships with employers in the public sector?'

The questions referred for a preliminary ruling

Admissibility of the reference for a preliminary ruling

Observations submitted to the Court

24 The hospital takes the view that the reference for a preliminary ruling is inadmissible since Directive 1999/70 is not directly applicable to the main proceedings, given that

directives do not have horizontal direct effect, since the hospital is run neither by the Italian State nor by a ministry. It is an autonomous establishment with its own directors who are required, within the framework of their management, to apply the provisions of national law which they cannot challenge and from which they may not derogate.

25 The Italian Government also submits that the reference for a preliminary ruling is inadmissible. It considers it entirely irrelevant to the resolution of the dispute in the main proceedings since the first contract was concluded before expiry of the time-limit for transposition of Directive 1999/70, fixed at 10 July 2001.

Findings of the Court

26 With regard, firstly, to the plea of inadmissibility raised by the hospital, it is sufficient to state that it is apparent from the order for reference that the national court regards it as established fact that the hospital constitutes a public sector institution attached to the public authorities. It has consistently been held that a directive may be relied on not only against State authorities, but also against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service (Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 31; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 19; and Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24).

27 Accordingly, the plea of inadmissibility cannot be accepted in the present case.

28 Secondly, with regard to the first plea of inadmissibility raised by the Italian Government, it is clear from Directive 1999/70, the time-limit for transposition of which expired on 10 July 2001, that it is intended to prevent abuse arising from the use of successive fixed-term employment contracts or relationships and its provisions relate principally to the renewal of fixed-term contracts and the conditions to which such renewal is subject. Renewal of the contract at issue in the main proceedings took place on 2 January 2002 and is therefore subsequent to the date on which the directive was to have been transposed into domestic law. In those circumstances, it cannot validly be alleged that interpretation thereof is entirely irrelevant to the resolution of the dispute before the national court.

29 Accordingly, that plea of inadmissibility cannot be accepted either.

30 It follows from the foregoing considerations that the reference for a preliminary ruling is admissible.

Substance

The first question

31 By its first question, which is essentially identical to that referred in the case in which judgment was delivered today, Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, the national court asks essentially whether the framework agreement is to be interpreted as precluding national legislation which — where abuse arises from a public sector employer's use of successive fixed-term contracts or working

relationships — prevents the latter from being converted into indefinite contracts or working relationships, even where such conversion applies to contracts and working relationships concluded with a private-sector employer.

32 With a view to giving an answer to the question submitted, it should be made clear at the outset that, contrary to the submissions of the hospital and the Italian Government, Directive 1999/70 and the framework agreement can apply also to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 54).

33 As the Court has held in paragraph 48 of the *Marrosu and Sardino* judgment, 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 differently according to whether those contracts or relationships were entered into with a private-sector or public-sector employer.

34 However, as is apparent from paragraph 105 of the judgment in *Adeneler and Others*, in order for national legislation, such as that at issue here — which, in the public sector only, prohibits a succession of fixed-term contracts from being converted into an indefinite employment contract — 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 misuse of successive fixed-term contracts.

35 With regard to the latter condition, it should be noted that clause 5(1) of the framework agreement places on Member States the mandatory requirement of effective adoption of at least one of the measures listed in that provision intended to

prevent the abusive use of successive fixed-term employment contracts or relationships, where domestic law does not already include equivalent measures.

36 Furthermore, where, as in the present case, Community law does not lay down any specific sanctions should instances of abuse nevertheless be established, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation which must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the framework agreement are fully effective (*Adeneler and Others*, paragraph 94).

37 While the detailed rules for implementing such provisions fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of the Member States, they must, however, not be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and *Adeneler and Others*, paragraph 95).

38 Therefore, where abuse of successive fixed-term contracts 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 punish that abuse and nullify the consequences of the breach of Community law. According to the very wording of the first paragraph of Article 2 of Directive 1999/70, the Member States must 'take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [the] directive' (*Adeneler and Others*, paragraph 102).

39 It is not for the Court to rule on the interpretation of national law, that being exclusively for the national court which must, in the present case, determine whether the requirements set out in the preceding three paragraphs are met by the provisions of the relevant national legislation. However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 76 and 77).

40 In that regard, it should be noted that national legislation such as that at issue in the main proceedings which lays down mandatory rules governing the duration and renewal of fixed-term contracts and the right to compensation for damage suffered by a worker as a result of the abusive use by public authorities of successive fixed-term employment contracts or relationships appears, at first sight, to satisfy the requirements set out in paragraphs 36 to 38 of the present judgment.

41 However, it is for the national court to determine to what extent the conditions for application and effective implementation of the first sentence of Article 36(2) of Legislative Decree No 165/2001 constitute a measure adequate for the prevention and, where relevant, the punishment of the abusive use by the public authorities of successive fixed-term employment contracts or relationships.

42 In the light of the foregoing considerations, the answer to the question referred must be that the framework agreement must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, even though such conversion is provided for in respect of employment contracts and relationships with a private-sector employer, where that legislation includes another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public-sector employer.

The second and third questions

43 In the light of the answer given to the first question, there is no need to answer the second and third questions.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, even though such conversion is provided for in respect of employment contracts and relationships with a private-sector employer, where that legislation includes another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public-sector employer.

[Signatures]