



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 23 April 2020¹

Case C-681/18

JH
v
KG

(Request for a preliminary ruling from the Tribunale ordinario di Brescia (District Court of Brescia, Italy))

(Social Policy — Directive 2008/104 — Temporary employment — Successive contracts with the same user undertaking — Article 5(5) — Equal treatment — Circumvention of the provisions of the Directive)

1. The present case gives the Court its first opportunity to interpret Article 5(5) of Directive 2008/104 on temporary agency work.² More precisely, the Court is required to clarify whether, in circumstances in which a worker is hired by a temporary work agency and assigned as a temporary agency worker to the same user undertaking by eight successive contracts for the temporary supply of work and 17 extensions, there have been ‘successive assignments designed to circumvent the provisions of [that] Directive’.

Legal Framework

The Charter of Fundamental Rights of the European Union

2. Article 31 of the Charter of Fundamental Rights of the European Union (‘the Charter’)³ provides that:

- ‘1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.’

¹ Original language: English.

² Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 (OJ 2008 L 327, p. 9).

³ OJ 2007 C 303, p. 1.

Directive 2008/104

3. Directive 2008/104, as its first recital explains, respects the fundamental rights and principles recognised by the Charter and is designed to ensure full compliance with Article 31 thereof. The Directive establishes a protective framework for temporary agency workers which is ‘non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations’.⁴ Within that framework, ‘the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job’.⁵

4. Recital 15 explains that ‘employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking’.

5. Recital 21 indicates that ‘Member States should provide for administrative or judicial procedures to safeguard temporary agency workers’ rights and should provide for effective, dissuasive and proportionate penalties for breaches of the obligations laid down in this Directive’.

6. Article 1 defines the scope of the Directive:

‘1. This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.

2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.

...’

7. In accordance with Article 2 thereof, the purpose of Directive 2008/104 ‘is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working’.

8. Article 3(1) defines various terms relevant to the application of the Directive:

‘(a) “worker” means any person who, in the Member State concerned, is protected as a worker under national employment law;

(b) “temporary-work agency” means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

(c) “temporary agency worker” means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

⁴ Recital 12.

⁵ Recital 14.

- (d) “user undertaking” means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
- (e) “assignment” means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;
- (f) “basic working and employment conditions” means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
 - (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
 - (ii) pay.’

9. Article 4(1) provides that ‘prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented’.

10. Article 5(1) provides that ‘the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job. ...’.

11. Pursuant to Article 5(5), ‘Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures’.

12. Article 6 provides that:

‘1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.

...’

13. Pursuant to Article 10(1), ‘Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced’.

Italian law

14. The referring court explains that it is the Decreto legislativo 10 settembre 2003, No 276 (Legislative Decree No 276/2003 of 10 September 2003 on the application of delegations in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003, as amended by Decree Law No 34/2014, converted into law with amendments by Law 78/2014, ‘the Legislative Decree No 276/2003’) that is applicable in the present case.

15. The legislative amendment enacted by Law 78/2014 deleted from Article 20(4) of Legislative Decree No 276/2003 both the provision stating that ‘the supply of fixed-term workers is permitted for technical, production or organisational reasons, or for replacement purposes, even if those reasons relate to the ordinary business activity of the user’ and the requirement to indicate such reasons in the written contract.

16. Article 22(2) of Legislative Decree No 276/03 provides that where fixed-term supply work is used, the employment relationship between the agency and the worker is governed by the provisions of Legislative Decree No 368/01 ‘with the exclusion of Article 5(3) et seq. thereof.’ The initial term of the employment contract may be extended with the written consent of the worker, in the circumstances and for the duration provided for in the Contratto collettivo nazionale di lavoro (national collective labour agreement for the category of temporary-work agencies, signed on 27 February 2014, ‘the CCNL’) by which the agency is bound.

17. Article 27 of Legislative Decree No 276/03, entitled ‘Unlawful use of temporary workers’, provides that, if the supply of workers does not remain within the limits and conditions laid down in that same legislative decree, a worker may, by means of an action which may be brought only against the user undertaking, request that an employment relationship be declared to exist between himself and the user undertaking, with effect from the beginning of the supply.

18. Article 5(3) to (4-bis) of the Decreto legislativo 6 settembre 2001, n. 368 (Legislative Decree No 368 of 6 September 2001 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP)⁶ in the version applicable *ratione temporis* provides that:

‘... 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.

4-bis. Without prejudice to the rules on successive contracts set out in the preceding paragraphs and without prejudice to the various provisions set out in collective agreements ... , where, as a result of a succession of fixed-term contracts for the performance of equivalent tasks, an employment relationship between the same employer and the same worker continues for an overall period of more than 36 months, including any extensions and renewals, disregarding any breaks between one contract and another, the employment relationship shall be regarded as being a relationship of indefinite duration ...’.

⁶ 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).

19. Article 47 of the CCNL provides that extensions of contracts are regulated exclusively by the CCNL. Thus, extensions under Article 22(2) of Legislative Decree No 276/03 in the case of contracts of definite duration can take place up to six times. Each contract, including extensions, cannot exceed 36 months.

20. Articles 1344 and 1421 of the Italian Civil Code provide that contracts concluded in order to circumvent the application of mandatory rules are invalid.

Facts, procedure and the question referred

21. JH is a worker employed by a temporary-work agency. He was assigned as a temporary agency worker to the user undertaking KG, where he was employed as a machine and lathe worker from 3 March 2014 to 30 November 2016 with successive contracts for the temporary supply of work (eight in total) and various extensions (17 in total).

22. On 21 February 2017 JH brought proceedings against KG before the Tribunale ordinario di Brescia (District Court of Brescia, Italy). Essentially, he claims that the referring court should: (a) find and declare that the contracts for the temporary supply of work under which he worked for KG are unlawful and/or invalid; (b) declare the existence of an employment relationship of indefinite duration between himself and KG since 3 March 2014; (c) order KG to reinstate him and to pay due compensation and the corresponding social security contributions and taxes. JH also asked the referring court to submit to this Court a preliminary question concerning the interpretation of Directive 2008/104 and in particular Article 5(5) thereof.

23. The referring court observes that the legislation applicable at the material time (see point 15 above) does not (i) provide that the contracts must indicate the technical, production or organisational reasons, or replacement purposes for using temporary supply work; (ii) provide that such reasons must be temporary in nature; or (iii) place any limit on successive assignments of a worker to the same user undertaking. Furthermore, the referring court states that the CCNL (see point 19 above) is inapplicable, as that only governs the relationship between temporary agency workers and temporary-work agencies, not between temporary agency workers and user undertakings. The referring court points out that in any event, those rules, in the version applicable at the material time, do not require the reasons for the use of temporary supply work to be indicated in the contract, or prohibit the conclusion of a new contract, immediately after the termination of the sixth extension of the previous contract, without interruption.

24. The referring court has doubts as to the compatibility of that national legislation with Directive 2008/104, and especially recital 15 read with Article 5(5) thereof, since it does not make provision for judicial review of the reasons of using temporary supply work and does not place limits on successive assignments of the same temporary agency worker to the same user undertaking.

25. Against that background, the referring court seeks a preliminary ruling on the following question:

‘Must Article 5(5) of [Directive 2008/104] be interpreted as precluding the application of Legislative Decree No 276/2003, as amended by Decree Law 34/2014, which: (a) does not place limits on successive assignments of the same worker to the same user undertaking; (b) does not require that, in order for the use of fixed-term supply work to be lawful, there must be technical, production, organisational or replacement reasons for having recourse to such supply work; (c) does not provide that, in order for the use of such a form of employment contract to be lawful, the production requirement of the user undertaking must be temporary in nature?’

26. Written observations were submitted by JH, the Italian Government and the European Commission. Although JH requested a hearing, giving reasons, the Court decided to proceed without holding one in accordance with Article 76(2) of the Rules of Procedure.

Assessment

Admissibility

27. The Italian Government submits that the preliminary reference is inadmissible. First, it argues that whereas the national legislation invoked by the referring court applies only to fixed-term employment contracts, the referring court provides no indication about the nature (fixed-term or otherwise) of the employment contract between JH and the temporary-work agency. Second, the dispute before the referring court is a dispute between private persons and Directive 2008/104 does not have horizontal direct effect. Thus, the answer to the preliminary question would have no influence on the outcome of the dispute before the referring court: the only positive result possible for JH would be to obtain damages from the Italian State in the event that the latter were found to have transposed Directive 2008/104 incompletely or incorrectly.

28. According to settled case-law, ‘questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it’.⁷

29. In the latter regard, the need to provide an interpretation of EU law which will be of use to the national court means that that court must define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based. The Court is empowered to rule on the interpretation or validity of EU provisions only on the basis of the facts which the national court puts before it. The referring court must also set out the precise reasons why it is unsure as to the interpretation of certain provisions of EU law and why it considers it necessary to refer questions to the Court for a preliminary ruling. It is also essential that the national court should provide at the very least some explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link which it establishes between those provisions and the national legislation applicable to the proceedings pending before it.⁸

30. It is apparent from the reference for a preliminary ruling that the referring court seeks guidance from this Court on the interpretation of Article 5(5) of Directive 2008/104. The referring court explains that that guidance is necessary in order to resolve the case before it. In that context, the Italian Government’s arguments concerning the impossibility of applying the Directive’s provisions directly to a dispute between private persons are irrelevant. It is clear from the Court’s case-law that the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of EU law irrespective of whether or not they have direct effect as between the parties to the litigation in question.⁹

⁷ Judgment of 11 April 2013, *Della Rocca*, C-290/12, EU:C:2013:235, paragraph 29 and the case-law cited. The Court may also *reject* a reference for a preliminary ruling on that last-mentioned basis: see judgment of 16 February 2012, *Varzim Sol*, C-25/11, EU:C:2012:94, paragraph 29.

⁸ Judgment of 2 May 2019, *Asendia Spain*, C-259/18, EU:C:2019:346, paragraphs 17 and 18 and the case-law cited.

⁹ Judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 35 and the case-law cited.

31. I consider that the order for reference provides a sufficient presentation of the factual circumstances on which the preliminary question is based to enable the Court to give a useful answer to the question referred.

32. I therefore conclude that the reference for a preliminary ruling is admissible.

The question referred

33. By its preliminary question, the referring court asks whether Article 5(5) of Directive 2008/104 precludes national legislation which: (a) does not place limits on successive assignments of a temporary agency worker to the same user undertaking; (b) does not require that, in order for the use of fixed-term supply work to be lawful, there must be technical, production, organisational or replacement reasons for having recourse to such supply work; (c) does not specify that, in order for the use of such a form of employment contract to be lawful, the production requirement of the user undertaking must be temporary in nature.

34. In order to give a useful answer to the referring court, I shall also consider the broader context, namely the question of whether the provisions of Directive 2008/104 are being circumvented.

35. That requires me to examine the aim and scope of Directive 2008/104 as well as the purpose, wording and context of Article 5(5) thereof.

36. Directive 2008/104 is based on the former Article 137(1) and (2) EC (now Article 153 TFEU), which empowered the institutions to ‘adopt, ... by means of directives, minimum requirements for gradual implementation’ relating, inter alia, to ‘working conditions’. It was adopted to complement two earlier directives concerning atypical work, which address part time work and temporary work relationships respectively.¹⁰ The overall objective of the European Union’s action in this area has been to develop flexible forms of work, while seeking a greater degree of harmonisation of the social law applicable to it. The regulatory model behind such action is designed to achieve a balance between flexibility and security in the job market and has been named ‘flexicurity’.¹¹

37. Directive 2008/104 therefore operates a balancing exercise between the objective of ‘flexibility’ sought by undertakings and the objective of ‘security’ corresponding to the protection of workers. Accordingly, recital 11 states that the Directive is intended to meet not only undertakings’ needs for flexibility but also employees’ needs to reconcile their working and private lives and thus contributes to job creation and to participation and integration in the labour market.

38. Directive 2008/104 establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. Article 2 provides that the Directive’s purpose is to protect temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for using that type of work with a view to contributing effectively to creating jobs and developing flexible forms of working.¹²

10 These are Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) and Council Directive 1999/70, cited in footnote 6 above.

11 See Recital 9 and Common Principles of Flexicurity, adopted by the Council on 5 and 6 December 2007 and approved by the Brussels European Council of 14 December 2007 (Council doc. 16201/07) as well as the Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled ‘Towards Common Principles of Flexicurity: More and better jobs through flexibility and security’ (COM(2007) 359 final of 27 June 2007). See also the Opinion of Advocate General Szpunar in *AKT*, C-533/13, EU:C:2014:2392, point 33.

12 Judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 35, condensed.

39. Directive 2008/104 thus covers both working conditions for temporary agency workers and the conditions which apply to the use of temporary agency work. The Directive's dual objective is also reflected in its structure. Leaving aside the introductory provisions (scope, aim and definitions) and the final provisions, Directive 2008/104 is organised into two parts. Article 4, which concludes Chapter I ('General provisions') addresses restrictions on the use of temporary agency work. Chapter II ('Employment and working conditions'), comprising Articles 5 to 8, covers equal treatment, access to employment, collective facilities and vocational training, representation and information.¹³

40. Whilst those provisions bring temporary agency work closer to 'usual' employment relationships, it is clear¹⁴ that the starting point of Directive 2008/104 is that the general form of employment relationship is (and, I add, should be) employment contracts of indefinite duration. The Directive therefore aims to stimulate temporary agency workers' access to permanent employment at the user undertaking, an objective reflected in particular in Article 6(1) and (2) thereof.¹⁵

41. Directive 2008/104 applies to 'workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction' (Article 1(1)) and to 'public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain' (Article 1(2)). The Court has interpreted the concept 'worker' as 'covering any person who carries out work, that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration, and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of [the] legal relationship between those two persons and the form of that relationship'; and the concept of 'economic activity' by indicating that 'any activity consisting in offering goods or services on a given market is economic in nature'.¹⁶

42. An important component of Directive 2008/104 is the principle of equal treatment. Thus, in accordance with Article 5(1) thereof, the temporary agency worker must, during his assignment to a user undertaking, benefit from at least the basic working and employment conditions that would apply had he been recruited directly by that undertaking to occupy the same job.

43. The concept of 'basic working and employment conditions', which determines the scope of the principle of equal treatment to be applied to temporary agency workers, is defined in Article 3(1)(f). A report prepared by an Expert Group set up by the Commission suggests that the Commission takes the view that the list of such conditions in Article 3(1)(f)(i) and (ii) is not exhaustive.¹⁷

44. I have sympathy with that approach. Directive 2008/104 is designed to ensure 'full compliance' (see recital 1) with Article 31 of the Charter, which refers to 'working conditions' in more general terms. The Explanations relating to the Charter¹⁸ indicate that that expression is to be understood in accordance with Article 156 TFEU.¹⁹ That article lists 'working conditions' as being one of the areas where the Commission may intervene in order to encourage cooperation between the Member States

13 See Opinion of Advocate General Szpunar in *AKT*, C-533/13, EU:C:2014:2392, points 30 and 35.

14 Recital 15.

15 See Engel, Chris, "Regulating temporary work in the European Union: The Agency Directive", in *Temporary work in the European Union and the United States*, Bulletin of comparative labour relations No 82, 2013, p. 19.

16 Judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraphs 43 and 44.

17 European Commission, Report — Expert Group — Transposition of Directive 2008/104/EC on temporary agency work, August 2011, p. 21.

18 OJ 2007 C 303, p. 17.

19 Article 156 TFEU provides that 'with a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to: — employment, — labour law and working conditions, — basic and advanced vocational training, — social security, — prevention of occupational accidents and diseases, — occupational hygiene, — the right of association and collective bargaining between employers and workers.'

and facilitate the coordination of their action. It does not, however, define that term. It seems to me that the fact that the Directive promises ‘full compliance’ with Article 31 of the Charter, coupled with the Directive’s stated ‘protective’ purpose, militates in favour of not construing ‘working conditions’ in an overly restrictive way,²⁰ notwithstanding the apparently exhaustive nature of the listing in the text.

45. Article 5(5) of Directive 2008/104 requires Member States to take appropriate measures to prevent misuse in the application of Article 5 and, in particular, to prevent successive assignments designed to circumvent the provisions of that Directive.

46. That provision imposes two separate obligations on Member States. The *first* is to prevent misuse in the application of Article 5 itself. The *second* is to prevent successive assignments designed to circumvent the provisions of Directive 2008/104 *taken as a whole*. I do not read the use of the words ‘and, in particular,’ to link the two obligations as meaning that the second obligation is automatically and fully subordinate to the first. The two obligations address different aspects of employment at a user undertaking. The first concerns ‘misuse in the application’ of Article 5 (and only that Article). The second obligation is more widely drawn and aims to prevent successive assignments that are designed to ‘circumvent the provisions of this Directive’ (in their entirety).

47. It follows that I do not agree with the Commission’s written submission that Article 5(5) applies exclusively to misuse of the principle of equal treatment as enshrined in Article 5(1) to (4). That narrow interpretation overlooks the fact that Article 5(5) has two limbs, the second of which refers to ‘preventing successive assignments designed to circumvent the provisions of this Directive’. It also sits ill with the express purpose of the Directive, which is to protect temporary agency workers and improve the quality of temporary agency work.

48. It thus seems to me that the obligation imposed on Member States by Article 5(5) to prevent successive assignments that are designed to ‘circumvent the provisions’ of Directive 2008/104 must be construed as relating to *all* the provisions of that Directive, as interpreted in the light of the Directive’s scheme and purpose.

49. Against that background, does Article 5(5) of Directive 2008/104 impose an obligation for Member States to prevent successive assignments that are designed to ‘circumvent the provisions’ of that Directive, so as to ensure that temporary agency work with the same user undertaking does not all too easily become a permanent situation into which temporary agency workers are ‘trapped’?

50. I begin by recalling, at the risk of tautology, that a ‘temporary agency worker’ is defined by Article 3(1)(c) as working ‘temporarily’ under the supervision and direction of the user undertaking to which they have been assigned.

51. The very title of Directive 2008/104 makes clear that the employment relationships it covers are (and are by definition supposed to be) *temporary*. That term is used, inter alia, in the provisions defining the scope of the Directive (Article 1), its purpose (Article 2) as well as in the definitions of its key terms in Article 3(1)(b), (c), (d) and (e). The word temporary means ‘lasting for only a limited period of time’; ‘not permanent’.²¹ The Directive states, moreover, that ‘employment contracts of an

20 See Robin-Olivier, Sophie, « Article 31: conditions de travail justes et équitables », in *Charte des droits fondamentaux de l’Union européenne*, Picod, Fabrice, Rizcallah, Cécilia, Van Drooghenbroeck, Sébastien, Bruxelles, Bruylant, 2019, p. 789-805.

21 See Oxford Dictionary of English. In French, the word used for ‘temporary’ in the title of the Directive, in the provisions setting out its scope and purpose and in its key definitions is ‘intérimaire’, which is described as ‘travailler de manière temporaire’ (in Articles 1(1), 3(1)(b), (c), (d) and (e)). ‘Intérimaire’ is defined by the Petit Robert de la langue française as meaning ‘temporary’ or ‘transitory’ and ‘temporaire’ as meaning ‘limited in time’. In Italian, the language of the procedure, the words used are ‘interinale’ and ‘temporaneamente’.

indefinite duration’ (thus, permanent employment relationships) are the general form of employment relationships and that temporary agency workers must be informed of vacant posts in the user undertaking so that they have the same chances as other workers to find permanent employment (see recital 15 and Article 6(1) and (2)).²²

52. I agree with the Italian Government and the Commission that Directive 2008/104 does not define any specific measures that Member States must adopt in order to prevent successive assignments of the same temporary agency worker to the same user undertaking ‘designed to circumvent’ the provisions of the Directive. Thus (for example), Directive 2008/104 does not oblige Member States to make the use of such successive assignments subject to an explicit obligation to explain the reasons justifying the adoption or renewal of the contracts in question. However, I do not conclude from that that Article 5(5) is essentially aspirational — put more bluntly, that it has no teeth.

53. The wording of the first sentence of Article 5(5) of Directive 2008/104 (‘Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive’) is clear, precise and unconditional. It brings to mind without undue difficulty the classic test for direct effect. In that context, ‘national law and/or practice’ is to be viewed as the *vehicle* through which the Member State discharges its obligation; but neither detract from the clarity, precision or unconditionality of the obligation as such. Member States are to make sure — of course, within the parameters of the Directive — that the mischief identified *does not happen*. In a ‘vertical’ context, where the defendant was the State or an emanation of the State,²³ a temporary agency worker would be able to derive strong support from the Directive itself.

54. In so saying, I bear fully in mind that Directive 2008/104 is, as is apparent from its legal basis (see point 36 above), a minimum requirements directive. Its wording and scheme indeed do not permit one to write in sharp-edged, specific obligations that are absent from the text. That does *not* mean, however, that one can ignore or gloss over such obligations as the Directive does impose on Member States.

55. A number of additional points bear to be made.

56. First, since Directive 2008/104 is a minimum requirements directive, it is clear that a Member State remains at liberty to introduce such specific legislation. I note, of course, that Article 4(1) of Directive 2008/104 provides that national legislation containing prohibitions or restrictions on the use of temporary agency work must be justified on grounds of general interest relating, in particular, to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.²⁴ If successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is (significantly) longer than what can reasonably be regarded as ‘temporary’, that

²² In cases concerning Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70, I note (without suggesting that the reasoning may be transposed as such to the present case: see point 66 below) that the Court has held that ‘the renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of clause 5(1)(a) of the framework agreement, in so far as such use of fixed-term employment contracts or relationships *conflicts directly with the premise on which the framework agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship*, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities’ (emphasis added). See judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 76 and the case-law cited.

²³ The *locus classicus* for that formulation of when there is ‘vertical’ direct effect is the judgment of 12 July 1990, *Foster v British Gas*, C-188/89, EU:C:1990:313. More recently, see judgment of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, together with my Opinion in that case (EU:C:2017:492).

²⁴ Judgment of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173, paragraphs 23 and 32.

constitutes, in my view, precisely such an abuse. Whilst a national measure preventing such a situation from arising would indeed be a ‘restriction[s] on the use of temporary agency work’, such a restriction would readily be justifiable on the grounds of general interest expressly listed in Article 4(1) — namely, protection of temporary agent workers and prevention of abuses.

57. Second, often-repeated successive assignments of the same temporary agency worker to the same user undertaking circumvent the very essence of the provisions of the Directive and amount to a misuse of that form of employment relationship. They also (self-evidently) alter the balance struck by the Directive between ‘flexibility’ for employers and ‘security’ for workers (see points 36 and 37 above) by undermining the latter.

58. Third, it seems to me that, to the extent that — in any particular case — *no* objective explanation is offered as to why the user undertaking is resorting to successive contracts involving the assignment of a temporary agency worker, the national court is under a particular duty to be vigilant. (That is *a fortiori* the case when it is the *same* temporary agency worker who is assigned to the user undertaking by the series of contracts in question.) *Without* going beyond the parameters of the Directive, the national court should therefore examine — within the context of the national legal framework and having regard to the circumstances of each case — whether *any* of the provisions of the Directive are being circumvented by the use of such successive assignments.

59. Thus, when examining whether the obligation set out in Article 5(5) of Directive 2008/104 is respected, the national court should bear in mind not only the principle of equal treatment in respect of ‘working and employment conditions’ enshrined in Article 5(1), but also other provisions such as Article 6(1) and (2) facilitating temporary agency workers’ access to permanent employment.

60. At this point, it is helpful to examine the reasoning of the Court in *Sciotto*,²⁵ on which JH placed much reliance.

61. Ms Sciotto, a ballet dancer, was employed by the Fondazione Teatro dell’Opera di Roma under multiple fixed-term contracts renewed on the basis of various artistic performances programmed between 2007 and 2011. Her employment contracts did not indicate the existence of specific technical, organisational or production-related requirements justifying the use of fixed-term employment contracts rather than a contract of unlimited duration. She therefore sought to have those contracts declared unlawful, the conversion of her employment relationship into a contract of unlimited duration and compensation for the loss incurred.

62. The applicable EU law in that case was the Framework Agreement on fixed-term work annexed to Directive 1999/70. Clause 5 of that Framework Agreement introduced specific measures to prevent abuse arising from the use of successive fixed-term employment contracts.²⁶ As the Court expressly noted, ‘Clause 5(1) of the Framework Agreement *requires*, with a view to preventing abuse of successive fixed-term employment contracts or relationships, the *effective and binding adoption* by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures. The measures listed in Clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships ...’²⁷ The Court recalled that ‘the concept of “objective reasons” must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore

²⁵ Judgment of 25 October 2018, C-331/17, EU:C:2018:859 (*Sciotto*).

²⁶ Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70 states, at point 1, that ‘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’.

²⁷ Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 32, emphasis added.

capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State'.²⁸

63. Against that legislative and jurisprudential background, the Court found that 'a national provision which merely authorises recourse to successive fixed-term employment contracts in a *general and abstract manner* by a rule of statute or secondary legislation does not accord with [those] requirements. Such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. Such a provision therefore carries a real risk that it will result in misuse of that type of contract and, accordingly, is not compatible with the objective of [the Framework Agreement on fixed-term work annexed to Directive 1999/70] and the requirement that it have practical effect'.²⁹

64. The Court accordingly held that Clause 5 must be interpreted as precluding national legislation pursuant to which the rules governing employment relationships intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date are not applicable to the sector of activity of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector.³⁰

65. JH argued in his written observations that *Sciotto* can be *transposed as such* to the present case.

66. I reject that submission. It is obvious that the outcome in *Sciotto* derives from a provision of EU law that is different in nature from Article 5(5) of Directive 2008/104.³¹ Thus, Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70 lays down *specific obligations* in order to prevent abuse arising from the use of successive fixed-term employment contracts. Article 5(5) of Directive 2008/104 lays down a *general obligation* to prevent successive assignments designed to circumvent the provisions of that Directive. Given also that Directive 2008/104 only lays down minimum requirements, it is not possible to write into Directive 2008/104 detailed and specific obligations — such as maximum total duration of successive employment contracts or a (maximum) number of renewals of such contracts — akin to those that are expressly stipulated by Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70.

67. That said, it is worth also recalling those passages of the Court's reasoning in *Sciotto* that are of a more general nature. Thus, the Court emphasised that, 'Where EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to [the EU law provision in question] are fully effective. Where abuse of successive [fixed-term] employment contracts or relationships 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 EU law'.³² It is settled case-law that 'the Member States' obligation, arising from a directive, to achieve the result envisaged by that directive, and their duty under

28 Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 39.

29 Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 40 and the case-law cited.

30 Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 72 and operative part.

31 It is also apparent from the Court's case-law that Directive 1999/70 and Directive 2008/104 have a different scope. Thus, the fixed-term employment relationships of a temporary worker made available to a user undertaking by a temporary employment business do not come within the scope of Directive 1999/70. See judgment of 11 April 2013, *Della Rocca*, C-290/12, EU:C:2013:235, paragraph 42.

32 Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraphs 64 and 65.

Article 4 TEU to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts'.³³ Against that background, the Court held that 'it is for the court seized of the case, *so far as possible*, and where there has been *misuse* of successive fixed-term employment contracts, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to penalise the abuse and to nullify the consequences of the breach of EU law'.³⁴

68. I also recall that in *Pfeiffer*,³⁵ the Grand Chamber provided helpful guidance to national courts as to the correct approach to adopt when considering the impact of a provision of a directive that has direct effect in the context of litigation between private parties.

69. Thus, in particular, 'Although the principle that national law must be interpreted in conformity with [EU] law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive'.³⁶ In short, 'the principle of interpretation in conformity with [EU] law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that [the directive in question] is fully effective'.³⁷

70. Applied *mutatis mutandis* to a case falling within the ambit of Article 5(5) of Directive 2008/104, those considerations mean that: (i) within the parameters of Directive 2008/104, it is for a Member State to ensure that its national legal system contains appropriate measures to ensure the full effectiveness of EU law with a view to preventing the use of successive assignments designed to circumvent the temporary nature of the employment relationships covered by Directive 2008/104; and (ii) the principle of interpretation in conformity with EU law requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 2008/104 is fully effective by penalising the abuse in question and nullifying the consequences of the breach of EU law.

71. In the light of all the foregoing considerations, I conclude that Article 5(5) of Directive 2008/104 does not preclude national legislation which: (a) does not place limits on successive assignments of a worker to the same user undertaking; (b) does not require that, in order for the use of fixed-term supply work to be lawful, there must be technical, production, organisational or replacement reasons for having recourse to such supply work; and (c) does not provide that, in order for the use of such a form of employment contract to be lawful, the production requirement of the user undertaking must be temporary in nature.

72. However, successive assignments of the same worker to the same user undertaking that, taken together, exceed a duration that can reasonably be regarded as 'temporary' and that do not relate to a permanent contract of employment between the temporary agency worker and the temporary work agency circumvent the very essence of the provisions of Directive 2008/104 and amount to a misuse of that form of employment relationship. It is for the national court to assess those circumstances. Where there has been misuse of successive assignments, the duty of sincere cooperation and the

³³ Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 67; judgment of 5 October 2004, *Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldhut eV* ('*Pfeiffer*'), C-397/01 to C-403/01, EU:C:2004:584, paragraph 67.

³⁴ Judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 69 (emphasis added).

³⁵ Judgment of 5 October 2004, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 107 to 119.

³⁶ Judgment of 5 October 2004, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 115.

³⁷ Judgment of 5 October 2004, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 118. See also the Opinion of Advocate General Szpunar in *AKT*, C-533/13, EU:C:2014:2392, which concerned Article 4(1) of Directive 2008/104, at paragraph 134. In paragraph 135 of that Opinion, Advocate General Szpunar underlined that the lack of specific implementing measures in respect of Article 4(1) of Directive 2008/104 does not prevent the national court from ascertaining, on the basis of national law considered as a whole, whether it can, by means of interpretation, achieve an outcome consistent with EU law.

principle of interpretation in conformity with EU law require the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 2008/104 is fully effective by penalising the abuse in question and nullifying the consequences of the breach of EU law.

Conclusion

73. I propose that the Court should answer the question referred by the Tribunale ordinario di Brescia (District Court of Brescia, Italy) as following:

- Article 5(5) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 does not preclude national legislation which: (a) does not place limits on successive assignments of a worker to the same user undertaking; (b) does not require that, in order for the use of fixed-term supply work to be lawful, there must be technical, production, organisational or replacement reasons for having recourse to such supply work; and (c) does not provide that, in order for the use of such a form of employment contract to be lawful, the production requirement of the user undertaking must be temporary in nature.
- Successive assignments of the same worker to the same user undertaking that, taken together, exceed a duration that can reasonably be regarded as ‘temporary’ and that do not relate to a permanent contract of employment between the temporary agency worker and the temporary work agency circumvent the very essence of the provisions of Directive 2008/104 and amount to a misuse of that form of employment relationship. It is for the national court to assess whether those circumstances arise in any particular case.
- Where there has been misuse of successive assignments, the duty of sincere cooperation and the principle of interpretation in conformity with EU law require the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 2008/104 is fully effective by penalising the abuse in question and nullifying the consequences of the breach of EU law.