JUDGMENT OF THE COURT (Second Chamber)

7 September 2006 *

In Case C-53/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Genova (Italy), made by decision of 21 January 2004, received at the Court on 10 February 2004, in the proceedings

Cristiano Marrosu,

Gianluca Sardino

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, Principal Administrator,

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

after considering the observations submitted on behalf of:

— Mr Marrosu and Mr Sardino, 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 D. Del Gaizo and P. Gentili, avvocati dello Stato,

— the Greek Government, by I. Bakopoulos, acting as Agent,

— 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 Marrosu and Mr Sardino and their 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 contracts between them.

Legal context

Community legislation

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 legislation

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.'

16 The national court indicates that the Corte costituzionale (Constitutional Court, Italy) held in its judgment No 89 of 13 March 2003 that the first sentence of Article 36(2) of Legislative Decree No 165/2001 complies with the constitutional principles of equality and good administration set out in Articles 3 and 97 respectively of the Italian Constitution. The Corte costituzionale took the view that the fundamental principle that access to posts in the public authorities is by way of competitive examination, by application of the third paragraph of Article 97 of that constitution, legitimises the existing difference in treatment between private sector employees and public sector employees where illegality is found in the conclusion of successive fixed-term contracts.

The main proceedings and the question referred for a preliminary ruling

17 The applicants in the main proceedings were employed as technical kitchen staff by the hospital under a series of successive fixed-term contracts, the most recent of which were concluded during the month of January 2002 for a period of six months.

18 They were recruited from a list of suitable candidates drawn up following a public competition organised in 1998 by the hospital with a view to employing, on a temporary basis, 'technical kitchen staff', in which the applicants in the main proceedings were successful.

19 The last of the fixed-term contracts, which expired in July 2002, were not renewed by the hospital, which formally dismissed the applicants in the main proceedings when they arrived at their workplace on the date of expiry of their respective contracts.

20 The applicants in the main proceedings challenged the decision to dismiss them before the Tribunale di Genova, asking it, firstly, to hold that, on the basis of Legislative Decree No 368/2001, there were employment contracts of indefinite duration with the hospital which ran from the start of the first employment relationships current when that legislative decree entered into force and, secondly, to order the hospital to pay salary owed and compensation for the damage suffered.

21 In the present case, the national court finds, in respect of each case at issue before it, that eight days elapsed between the expiry date of the penultimate contract concluded with the hospital and the date on which the last contract was entered into

with it. Article 5(3) of Legislative Decree No 368/2001 provides that, where a worker is re-employed for a fixed-term 'within a period of 10 days from the expiry of a contract for a term of up to 6 months', the second contract shall be considered to be of indefinite duration.

22 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.

23 The national court notes that the framework agreement does not identify any sector of activity which may be excluded from its application, with the exception of certain professional training relationships or employment relationships referred to in Clause 2(2) of that framework agreement, which are, however, irrelevant to the case before the court. Furthermore, Law No 422/2000, which empowered the government to implement Directive 1999/70, does not lay down any restriction as to its application to public authorities. Legislative Decree No 368/2001 contains no such restriction. Being subsequent to Legislative Decree No 165/2001, it even expressly repealed 'all incompatible provisions of law not expressly mentioned in the present legislative decree'.

24 The national court is doubtful as to the compatibility of the first sentence of Article 36(2) of Legislative Decree No 165/2001 with Community law to the extent that, with regard to the consequences of a breach of imperative provisions on successive fixed-term contracts, that sentence makes a very clear distinction between them according to whether they were concluded with the public authorities or with private sector employers. The court observes, in that regard, that protection in the form of indemnity, which is generalised in the national legal order, having regard in particular to questions of the burden of proof of the damage which the workers in

question have suffered, cannot be considered equivalent to that which follows from re-employment in the post previously held. The latter form of protection corresponds better to the need to prevent abuses which an employer may commit by concluding successive fixed-term contracts.

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

'Are Article 1 of Directive 1999/70/EC and Clauses 1(b) and 5 of the [framework agreement] ... to be interpreted as precluding provisions of national law (in force before the directive was implemented) which differentiate between employment contracts signed with the public authorities and contracts with employers in the private sector by excluding the former from the protection afforded by establishing an employment relationship of indefinite duration in the event of an infringement of binding rules on successive fixed-term contracts?'

The question referred for a preliminary ruling

Admissibility of the question referred for a preliminary ruling

Observations submitted to the Court

26 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.

27 The Italian Government also argues that the reference for a preliminary ruling is inadmissible. It considers, first, that it is purely hypothetical, since the referring court, which has sole jurisdiction to interpret rules of national law, was in no doubt as to the applicability to the dispute in the main proceedings of Article 5 of Legislative Decree No 368/2001, which derogates from Article 36 of Legislative Decree No 165/2001.

28 Secondly, it is of the opinion that the reference is wholly immaterial to the resolution of the dispute in the main proceedings since the initial contracts were concluded before expiry of the time-limit of 10 July 2001 laid down for transposition of Directive 1999/70.

Findings of the Court

29 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).

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

31 Secondly, with regard to the first plea of inadmissibility raised by the Italian Government, it is clear from case-law that, in the context of a reference for a preliminary ruling under Article 234 EC, it is not for the Court to determine whether provisions of national law are compatible with Community law (see, inter alia, Case 75/63 *Unger* [1964] ECR 177 and Case C-40/04 *Yonemoto* [2005] ECR I-7755, paragraph 27).

32 However, it must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, paragraph 29).

33 Only in exceptional circumstances may the Court examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the 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 (see, inter alia, *Bosman*, paragraph 61, and *Stichting Zuid-Hollandse Milieufederatie*, paragraph 30).

34 In the present case it cannot validly be claimed that the interpretation of Directive 1999/70 has no connection with the facts or subject-matter of the dispute in the main proceedings or that the problem is hypothetical, since that interpretation, sought by the national court, is intended precisely to permit that court to answer a question concerning the compatibility of a provision of national law with that directive.

35 That plea of inadmissibility must therefore also be rejected.

36 Thirdly, with regard to the second plea of inadmissibility raised by the Italian Government, it is sufficient to note that it is clear from Directive 1999/70, whose time-limit for transposition 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 that its provisions relate mainly to the renewal of fixed-term contracts and the conditions to which such renewal is subject. The contracts at issue in the main proceedings were renewed on 10 and 11 January 2002 respectively and those dates are thus after the date on which the directive was to be transposed into national law. Under those circumstances, it cannot validly be claimed that interpretation of the directive is irrelevant to the resolution of the disputes before the national court.

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

Substance

38 By its question, 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.

39 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 Italian Government at the hearing, 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).

40 The provisions of those two instruments contain nothing to permit the inference that their scope is limited to fixed-term contracts concluded by workers with employers in the private sector alone (*Adeneler and Others*, paragraph 55).

41 On the contrary, firstly, as is apparent from the very wording of clause 2(1) of the framework agreement, the scope of the framework agreement is conceived in broad terms, covering generally 'fixed-term workers who have an employment contract or

employment relationship as defined in law, collective agreements or practice in each Member State'. In addition, the definition of 'fixed-term workers' for the purposes of the framework agreement, set out in clause 3(1), encompasses all workers without drawing a distinction according to whether their employer is in the public or private sector (*Adeneler and Others*, paragraph 56).

42 Secondly, clause 2(2) of the framework agreement, far from providing for the exclusion of fixed-term employment contracts or relationships concluded with a public-sector employer, merely gives the Member States and/or the social partners the option of making the framework agreement inapplicable to 'initial vocational training relationships and apprentice schemes' and employment contracts and relationships 'which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme' (*Adeneler and Others*, paragraph 57).

43 It should also be recalled, as is apparent from clause 1(b) of the framework agreement, that its purpose is to 'establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

44 To this end, clause 5(1) imposes on Member States the obligation to introduce into domestic law one or more of the measures listed in clause 5(1)(a) to (c) where equivalent legal provisions intended to prevent effectively the misuse of successive fixed-term employment contracts do not already exist in the Member State concerned (*Adeneler and Others*, paragraph 65).

45 However, it is important to note that, as is clear from its wording, that provision makes it possible for Member States to take account of the needs of specific sectors and/or categories of workers involved, provided it is justified on objective grounds.

46 It is true that clause 5(2) of the framework agreement does not give Member States the same ability with regard to laying down under what conditions successive fixed-term employment contracts or relationships are to be regarded as being of indefinite duration.

47 However, since the framework agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used (*Adeneler and Others*, paragraph 91), it gives Member States a margin of discretion in the matter.

48 It follows that clause 5 of the framework agreement does not preclude, as such, a Member State from treating misuse 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.

49 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 abuse of successive fixed-term contracts.

50 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.

51 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).

52 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).

53 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).

54 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).

55 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 51 to 53 of the present judgment.

56 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.

57 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.

Costs

58 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]