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Fixed-term employment contracts: the exception?

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1. Introduction: the problem

Fixed term employment contracts are still widely used[1]. Some examples may suffice to prove this point. In *Belgium*, a first fixed term contract can be concluded freely. Successive fixed-term contracts are presumed to have been concluded for an indefinite period. In case of disagreement, the employer must show that the successive contracts are justified by objective reasons, such as the nature of the work. However, reforms during the 1990's have made recourse to successive fixed-term contracts (for a fixed-period or for a specific task) possible also under the following conditions: four successive fixed-term contracts, each of which must be of at least three months duration, can be concluded during a maximum period of two years. Six successive fixed-term contracts, each of at least six months duration, can be concluded during a maximum period of three years, provided that the employer has obtained prior authorization from the Labour Inspectorate. Non-observance by the employer leads to the transformation of the contract into an open-ended contract. The fixed-term contract comes to an end automatically by the arrival of the term envisaged; no warning or notice is necessary. If the parties, after the deadline of the term, continue the contract, it will be subject to the same rules as for open-ended contracts[2].

In the *Netherlands* a similar system prevails; even chain-fixed-term contracts, whereby a job is filled in by fixed term workers, which succeed each other, seem to be legally allowed[3].

The same happens at *EU level*, where many European contractual agents are recruited on the basis of a contract of a maximum length of three years. In certain cases, such as an auxiliary contract and/or service provider, the period can be prolonged by a maximum of three years. Very often, the contractual agents carry out permanent tasks and functions. Moreover, contractual agents are paid on the basis of a scale different from that applicable to permanent officials (i.e. less attractive)[4].

Table 1 – Overview of the number of contract agents in the European bodies and agencies[5].

Service	Contract agents	Interim personnel
Commission (Brussels en Luxemburg)	3 184	530
- Joint Research Center	889	3
- OIB (infrastructure)	423	5
- PMO (personnel files)	240	3
- Delegations in third countries	734	/
Agencies of the EU	701	/
European Parliament	501	/
Court of Auditors	47	/
Committee of the Regions	53	/
Econ. & Social committee	55	/
Council of the EU	71	/
TOTAL (2007)	6 898	541

The question arises whether these rules and practices in as well Member States as in the EU are in conformity with the European 1999 Framework

Agreement on fixed-term work.

2. The normal employment contract: a contract of an indefinite duration

Contracts of an indefinite duration are and will remain the general form of employment relations between employers and workers. This fundamental principle is contained in and recognised by the Framework Agreement on fixed-term work, signed by the EESC, BusinessEurope (UNICE) and the CEEP on 19th March 1999. This Framework Agreement is obligatory in all the Member States of the Union, following the adoption of Council directive n. 1999/70 of 28th June 1999.

It is to be noted that a contract of indeterminate length can, in principle, be ended provided a period of notice is respected; fixed-term contracts come to an end at the end of the period provided for.

In the recitals to this Framework Agreement of 1999 between the social partners, we read:

«6. Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance; 7. Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse; 8. Whereas fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers».

With good reason, the Court of Justice has judged that the contract of an indefinite duration is the general type and «is a major element in the protection of workers, whilst the fixed-term contract may satisfy the needs of the employers as much as the workers in certain circumstances (see second indent of the preamble and point 8 of the recitals of the Framework Agreement)»[6].

3. Fixed-term contract: the exception

If the contract of an indefinite duration is the general rule, then the fixed-term contract must be considered to be the exception. This exception must therefore be interpreted in a restrictive way and must be justified on the basis of objective reasons.

3.1. Conclude a fixed-term employment contract

Objectivity must be interpreted in the framework of the aim and the result to be achieved as provided for in the Framework Agreement. This means that a reason set out in a general way is not suitable. The Court of Justice, rightly, requires that reasons be appreciated on the basis of precise and concrete circumstances which characterise the activity in question, in order to justify recourse to fixed-term contracts. Such specific justification is necessary, otherwise the beneficial effect of the Framework Agreement could be nullified.

In short, objectivity is a functional criterion, which is directly linked to the tasks and functions for which the employee has been engaged on a temporary basis[7].

Striking examples are seasonal working, such as in agriculture, for a theatre season, during the holiday period (e.g. July-August), during a summer school, a fixed term contract for a professional football player in order to guarantee an homogeneous team during a certain period, a temporary increase in workload.

To sum up, according to the Court's reasoning, the departure point of the

said directive, that employment stability is the general rule, demands justification for temporary employment. Using objective criteria expressing a temporary need, given the direct link with the nature of the tasks or the activities[8]. Employees can consequently not be hired in the framework of a fixed term contract to perform a permanent job.

3.2. Conclude successive fixed-term contracts

In order to conclude successive fixed-term contracts, clause 5 of the Framework Agreement must be applied. Clause 5 states:

«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».

Against this background of ideas, the Advocate-General J. Kokot, in his conclusions of 27th October 2005 in the case *Adelener*, cited above, stated with good reason: «The concept of succession is one of the main legal concepts in the Framework Agreement. Of course, the Framework Agreement and, by extension, directive n. 1999/70 are not intended primarily to obstruct the conclusion of individual fixed-term employment relationships; on the contrary, they are focused above all on the possibilities for pursuing abusive practices by concluding such contracts in succession (successive employment relationships), as well as on improving the quality of such fixed-term employment relationships. In particular where a number of fixed-term employment relationships have been concluded in succession, there is a danger that the employment relationship of indefinite duration, the employment relationship model defined by management and labour, will be circumvented, thus giving rise to the problem of abuse. That is why clause 5 (1) of the Framework Agreement expressly requires that measures be introduced to prevent abuse arising from the use of successive fixed-term employment relationships»[9].

In the *Adelener* case, the Court of Justice ruled: «Clause 5 (1) (a) of the Framework Agreement on fixed-term work, is to be interpreted as precluding the use of successive fixed-term employment contracts where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State. On the contrary, the concept of objective reasons within the meaning of that clause requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out».

«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.

On the other hand, 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 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 and the requirement that it have practical effect.

Thus, to admit that a national provision may, automatically and without further provision, justify successive fixed-term employment contracts would effectively have no regard to the aim of the Framework Agreement, which is to protect workers against instability of employment, and render meaningless the principle that contracts of indefinite duration are the general form of employment relationship.

More specifically, recourse to fixed-term employment contracts solely on the basis of a general provision of statute or secondary legislation, unlinked to what the activity in question specifically comprises, 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 appropriate for achieving the objective pursued and is necessary for that purpose».

4. Equal pay

The fact that contractual EU agents on fixed-term contracts, are paid at lower rates compared to permanent officials to do the same jobs clearly contravenes the fundamental principles of equal pay.

This is explicitly recognised in the Framework Agreement of 18th March 1999 concerning fixed-term working. Clause 4 of this agreement defines the principle of non-discrimination: «In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds».

A Comparable permanent worker is an employee with employment conditions on an indeterminate basis, in the same institution, doing the same, or similar, work, depending on his abilities.

5. Scope of application: public and private sector

It goes without saying that the general principles of law and the fundamental social rights of workers in terms of fixed-term employment contracts and equal pay apply equally to all employees.

According to the jurisprudence of the Court of Justice, all these rules are applicable equally in the public sector, this being a general principle of law. This follows clearly from the *Adelener* case, mentioned above, and the *Vasallo* case[10]. In this latter case, the conversion of a fixed-term employment contract into one of an indeterminate period was accepted.

In the *Adelener* case, the Court of Justice clearly confirmed this.

«It should be made clear at the outset that directive n. 1999/70 and the Framework Agreement can apply also to fixed-term employment contracts concluded with the public authorities and other public-sector bodies.

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.

On the contrary, first, as it 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.

Second, 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»[11].

These ruesd also apply to the employees of the EU, as general principles of law. Indeed, the EU, in conformity with article 6 (2) of the TEC, is obliged to respect the general principles of (European) law. The rules concerning the nature of the employment contract, already mentioned, are part, of course, of these general principles of law. They constitute, as the Court of Justice has clearly confirmed, an essential element of worker protection.

6. Conclusion

It seems clear from the above that employment contracts of an indefinite duration constitute the general rule and that fixed term employment contracts are the exception. Fixed term contracts need to be justified by objective reasons. This goes as well for the first as for consecutive contracts, even if clause 5 (b) seems to deviate from this. The social partners better amend this clause of the 1999 agreement on fixed term contracts and thus make and end to possible confusion on this issue.

The sanction can be that

- fixed-term employment contracts are de jure converted into contract for an indeterminate period, which can only be terminated by notice and in respect of the notice deadline. When a contract is terminated without notice, the termination is considered unlawful and will give rise to compensation as a factor of the salary which would have been paid during the period of notice
- or otherwise provide for adequate compensation.

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1 Report by the Commission services on the implementation of Council directive n. 1999/70/EC, of 28th June 1999, concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP (EU-15) Brussels, 11th August 2006, SEC(2006) 1074.

2 Art. 10-*bis* of the Act of 3rd July 1978 governing individual labour contracts.

3 A.G. VELDMAN, *Recente Europese Rechtspraak. Sociale drempels voor flexibele arbeidsmarkt – en werkgelegenheidsstrategieën?*, in *Arbeid Integraal*, 2007, n. 1, 34.

4 Example: a secretary (permanent official) has an initial gross salary of € 2.450 per month, whilst her contract colleague has a basic salary of € 1.790. Most of these contract agents do precisely the same work as their permanent colleagues.

5 Agencies, including the executive agencies.

6 Court of Justice 22nd November 2005, *Mangold*, C-144/04 r.o. 64. See also T. JASPERS, *Bepaalde tijdcontracten in fasen*, in *Een inspirerende Fase in het social recht*, Liber Amicorum voor Prof. Mr. Wil Fase, Paris, Zutphen, 2007, 10; Tribunal de la Fonction Publique 26th October 2006, *Landgren Pia tg. Fondation Européenne pour la Formation (EFT)*, F-1/05, not published.

7 See Court of Justice 4th July 2006, *Adeneler Konstantinos and others*, C-212/04, in *Juris*, 2006, 6057. See also T. JASPERS, *op. cit.*

8 A.G. VELDMAN, *op. cit.*

9 See n. 64.

10 Court of Justice 7th September 2006, C-180/04.

[11] N. 54-57.