Case C-326/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 April 2019

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

28 November 2018

Applicant:

EB

Defendants:

Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers)

Ministero dell'Istruzione, dell'Università e della Ricerca — MIUR (Minister for Education, Universities and Research)

Università degli Studi Roma Tre

Subject matter of the main proceedings

Action seeking annulment of the memorandum of 21 November 2017 relating to a 'Reply to a request for an extension of the contract of a type-A fixed-term researcher within the meaning of Article 20(8) of Legislative Decree No 75 of 2017' and Circular No 3/2017 adopted by the Minister for Simplification and Public Administration, and a finding that the applicant has a right to be employed as a researcher for an indefinite period or to undergo an appraisal pursuant to Article 24(5) of Law No 240 of 2010 for the purposes of appointment to the post of associate professor.

Subject-matter and legal basis of the reference

Compatibility of Article 29(2)(d) and (4) of Legislative Decree No 81 of 15 June 2015, Article 36(2) and (5) of Legislative Decree No 165 of 30 March 2001 and Article 24(1) and (3) of Law No 240 of 30 December 2010 with Clause 5 of the framework agreement on fixed-term work referred to in Directive 1999/70/EC.

Questions referred

(1) Although there is no general obligation on Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, does Clause 5 of the framework agreement on fixed-term work 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, headed 'Measures to prevent abuse', preclude, also in the light of the principle of equivalence, national legislation, such as that laid down in Article 29(2)(d) and (4) of Legislative Decree No 81 of 15 June 2015 and Article 36(2) and (5) Legislative Decree No 165 of 30 March 2001, which does not allow in respect of university researchers employed on a three-year fixed-term contract, which may be extended for two years pursuant to Article 24(3)(a) of Law No 240 of 2010, the subsequent establishment of a relationship of indefinite duration?

(2) Although there is no general obligation on Member States to provide for the conversion of fixed-term employment contracts into contracts of unlimited duration, does Clause 5 of the framework agreement on fixed-term work 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, headed 'Measures to prevent abuse', preclude, also in the light of the principle of equivalence, national legislation, such as that laid down in Article 29(2)(d) and (4) of Legislative Decree No 81 of 15 June 2015 and Article 36(2) and (5) Legislative Decree No 165 of 30 March 2001, from being applied by the national courts of the Member concerned in such a way that a right to maintain the employment relationship is granted to persons employed by public authorities under a flexible employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed on fixed-term contracts by those authorities under administrative law, and (as a result of the above provisions of national law) no other effective measure is available under the national legal system to penalise such abuse with regard to workers?

(3) Although there is no general obligation on Member States to provide for the conversion of fixed-term employment contracts into contracts of unlimited duration, does Clause 5 of the framework agreement on fixed-term work 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, headed 'Measures to prevent abuse', preclude …, also in the light of the principle of equivalence, national legislation such as that laid down in Article 24(1) and (3) of

Law No 240 of 30 December 2010, which provides for the conclusion and extension for a total period of five years (three years and a possible extension of two years) of fixed-term contracts between researchers and universities, making the conclusion of the contract subject to the availability of 'the resources for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities' and also making extension of the contract subject to a 'positive appraisal of the teaching and research activities carried out', without laying down objective and transparent criteria for determining whether the conclusion and renewal of those contracts actually meet a genuine need and whether they are capable of achieving the objective pursued and are necessary for that purpose, and therefore entails a specific risk of abusive use of such contracts, thus rendering them incompatible with the purpose and practical effect of the framework agreement?

Provisions of EU law relied on

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP ('Directive 1999/70'), and in particular Clause 5 of the framework agreement

Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (2005/251/EC)

Provisions of national law relied on

Legge del 30 dicembre 2010, n. 240, 'Norme in materia di organizzazione delle università, di personale accademico e reclutamento, nonché delega al Governo per incentivare la qualità e l'efficienza del sistema universitario' (Law No 240 of 30 December 2010 laying down rules on the organisation of universities, academic staff and recruitment and delegating powers to the Government to enhance the quality and efficiency of the university system) ('Law No 240/2010'). In particular, Article 24, headed 'Fixed-term researchers', which provides, in the first two paragraphs, that, for the purposes of carrying out research and teaching activities, universities may conclude fixed-term employment contracts with applicants selected through open selection procedures governed by rules laid down by the universities themselves, which must be published in the Official Journal and on the websites of the university, the Ministry and the European Union, for which a research doctorate or equivalent qualification is one of the eligibility requirements. Selection must also be preceded by a preliminary appraisal of the applicants on the basis of their qualifications, curriculum vitae and academic output. Under paragraph 3 of that article, the contracts in question may take the form of '(a) three-year contracts, which may be extended only once for a period of two years, subject to a positive appraisal of the teaching and research activities carried out' (type A researcher contract) or '(b) three-year contracts reserved for applicants 'who have been employed under contracts of the type

referred to in subparagraph (a)' or applicants 'who have obtained the national academic qualifications entitling them to work as a category 1 or category 2 teaching staff' and other types of applicants (type B researcher contract). As regards holders of type B researcher contracts who have obtained the requisite academic qualification, the university is required, in the third year of the contract in question, to carry out an appraisal of them, for the purposes of determining whether they may be appointed to the post of associate professor and, if the appraisal is positive, the contract holders are, on the expiry thereof, to be appointed to the post of assistant professor.

Decreto legislativo del 25 maggio 2017, n. 75, 'Modifiche e integrazioni al decreto legislativo 30 marzo 2001, n. 165 (…)' (Legislative Decree No 75 of 25 May 2017 amending and supplementing Legislative Decree No 165 of 30 March 2001 ...') ('Legislative Decree No 75/2017'). In particular, Article 20, headed 'Overcoming job insecurity in employment with public authorities', provides, in paragraph 1, that the authorities may, for the purpose of overcoming job insecurity and reducing recourse to fixed-term contracts, in the three-year period 2018-2020, employ for an indefinite period staff who '(a) are in service after the date of entry into force of Law No 124 of 2015 on a fixed-term contract with the authority employing them ...; (b) are recruited for a fixed term in respect of the same activities by competitive procedures, including those organised by public authorities other than the employing authority; (c) have accrued, as at 31 December 2017, in the employ of the employing authority referred to in subparagraph (a), at least three years' service, continuous or otherwise, in the previous eight years'. Furthermore, under paragraph 2 of that article, in the above three-year period the authorities may, under certain conditions, organise open competitive selection procedures reserved for staff who '(a) who hold, after the date of entry into force of Law No 124 of 2015, a flexible employment contract with the authority which organises the competition; (b) have accrued, as at 31 December 2017, at least three years' service under contract, continuous or otherwise, in the previous eight years, with the authority which organises the competition'. Under paragraph 8 of the article in question, the authorities may extend flexible employment relationships with those participating in the procedures outlined in paragraphs 1 and 2 described above until the conclusion thereof. Finally, paragraph 9 of Article 20 provides that the latter 'shall not apply to the recruitment of academic, teaching, administrative, technical and auxiliary staff in State schools and educational establishments' and that the fellows of public research bodies fall, on the other hand, within the scope of paragraph 2 of the article in question.

Decreto legislativo del 30 marzo 2001, n. 165, 'Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche' (Legislative Decree No 165 of 30 March 2001 laying down general rules on the organisation of employment with the public authorities) ('Legislative Decree No 165/2001'). In particular, Article 3, headed 'Staff governed by public law', provides, in paragraph 2, that '[t]he employment relationship of fixed-term or permanent university lecturers and researchers shall continue to be governed by the relevant

provisions in force pending specific rules which will govern it in a systematic manner'. Article 36 of that Legislative Decree, in the wording in force since 22 June 2017, provides, in the first two paragraphs, that the public authorities are, as a rule, to recruit staff solely on employment contracts of indefinite duration but may resort to flexible forms of contractual employment of staff provided for in law to meet exclusively temporary or exceptional requirements. Under paragraph 5 of that article, '[i]n any event, infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction which those authorities may incur. The worker concerned shall be entitled to compensation for damage suffered as a result of working in breach of mandatory provisions.' Subsequent paragraph 5-*quater* provides that employment contracts concluded in breach of Article 36 are to be null and void. Finally, subsequent paragraph 5-*quinquies* provides that the article in question 'shall, without prejudice to paragraph 5, not apply to the recruitment of fixed-term academic, teaching, administrative, technical and auxiliary staff in State schools and educational establishments …'.

Decreto legislativo del 15 giugno 2015, n. 81, 'Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183' (Legislative Decree No 81 of 15 June 2015 on the systematic regulation of contracts of employment and the amendment of the legislation on employment related duties, in accordance with Article 1(7) of Law No 183 of 10 December 2014) ('Legislative Decree No 81/2015'). In particular, Article 19, in the version applicable to the present case and prior to the amendment made by Decree-Law No 87/2018, provided that the maximum duration of fixed-term employment relationships between the same employer and the same worker, by operation of successive contracts, was to be 36 months. Article 29(2)(d), of the Legislative Decree in question, in force since 12 August 2018, provides that '[t]he following, in addition, shall be excluded from the scope of this Chapter: … (d) fixed-term contracts within the meaning of Law No 240 of 30 December 2010'. Finally, under paragraph 4 of that article, this is to be '[w]ithout prejudice to the provisions of Article 36 of Legislative Decree No 165 of 2001'.

Succinct presentation of the facts and the main proceedings

1 EB, the applicant, is a university researcher employed under a fixed-term contract at the Università degli Studi 'Roma Tre'.

2 He was successful in an open competition organised pursuant to Article 24(2) of Law No 240/2010 for employment as a fixed-term researcher on a contract of three years' duration, which could be extended only once for a maximum period of two years. In October 2014 he also obtained the national academic qualification for the academic sector IUS/10 — Administrative law, pursuant to Article 16 of that law.

3 Before the expiry of his contract, the applicant requested from his department a two-year extension, which he was granted on 14 May 2015.

4 In the following two years, the Law Department of 'Roma Tre' appointed, as regards administrative law in particular, to the post of associate professor two permanent researchers who had obtained the category 2 national academic qualification, in accordance with the provisions of Law 240/2010. No procedure of that kind was organised for fixed-term researchers.

5 On 8 November 2017, the applicant submitted a request for an extension of his contract based on Article 20(8) of Legislative Decree No 75/2017, arguing that the provisions of that article are applicable also to university teaching staff and asked the Università degli Studi 'Roma Tre' to initiate, as from 2018, the stabilisation procedure provided for in paragraph 1 of the decree in question.

6 By memorandum of 21 November 2017, the university refused the applicant's request on the ground that Article 20(8) of Legislative Decree No 75/2017 does not apply to the position of fixed-term researcher and that, under Law No 240/2010, universities are no longer able to use procedures previously in force in relation to the position of a fixed-term researcher.

7 By application served on 6 December 2017 and filed on 11 December 2017, the applicant contested before the referring court the memorandum in question and Circular No 3/2017 adopted by the Minister for Simplification and Public Administration, claiming that they should be annulled. The applicant further claims that it should be found that he has a right to be employed for an indefinite period as a researcher or undergo an appraisal pursuant to Article 24(5) of Law No 240 of 2010 for the purposes of appointment to the post of associate professor.

8 The Minister for Education, Universities and Research and the Università degli Studi 'Roma Tre' contend that the application should be dismissed.

The essential arguments of the parties to the main proceedings

9 The applicant claims that Article 20 of Legislative Decree No 75/2017 is of general application in the sense that it also applies to employment relationships governed by public law and therefore also to type A researchers. By stating that the article in question is not applicable to employees governed by public law, contested Circular No 3/2017 infringes the framework agreement on fixed-term work referred to in Directive 1999/70/EC, which subjects to strict conditions employers' ability to use fixed-term contracts, requiring for such contracts objective reasons which cannot give rise to abuse.

10 In the applicant's view, if the above article were considered not to be applicable to fixed-term researchers, that would give rise to different treatment vis-à-vis researchers in public research bodies, who have the possibility of securing permanent employment.

11 The applicant further claims that the exclusion — laid down to in Article 29(2)(d) of Legislative Decree No 81/2015 — of fixed-term contracts concluded under Law No 240/2010 from the scope of the rules on fixed-term work laid down in that legislative decree — and in particular from the scope of the provision setting the maximum duration of a fixed-term contract at 36 months — is not compatible with EU law, on account of the lack of objective reasons why a university researcher should be employed for a fixed term, in particular where the employment relationship can, as it has done in the applicant's case, exceed the three-year period. In the latter case, the employment relationship, which has exceeded 36 months, is not compatible with the claim that the employer has only temporary requirements.

12 Furthermore, in so far as it does not allow type A researchers who have obtained the national academic qualification entitling them to be assessed for the purposes of appointment to the post of associate professor, Article 24(5) of Law 240/2010 is contrary to the principle of non-discrimination laid down in Clause 4 of the framework agreement contained in Directive 1999/70.

13 Finally, the applicant also invokes the EU-law principle of equivalence, according to which, in the absence of a more favourable rule, reference must be made to cases involving workers in the private sector (for whom provision is made for the automatic conversion of the employment relationship into one of indefinite duration), school teachers (for whom there are reserve lists and other tenure-granting procedures) and all other civil servants (to whom Article 20 of Legislative Decree No 75/2017 applies).

14 The Università degli Studi 'Roma Tre', the defendant, considers that Article 20 of Legislative Decree No 75/2017 is not applicable to staff governed by public law, such as university researchers, pursuant to Article 3(2) of Legislative Decree No 165/2001. It also contends that the article in question does not entail any unequal treatment between type A researchers and other employees, such as the fellows of research bodies, since the latter do not fall within the category of staff governed by public law.

15 The defendant further contends that the difference in rules governing type B and type A researchers, as provided for in Law 240/2010, is reasonable in view of the greater research experience accrued by the former.

Succinct presentation of the reasons for the request for a preliminary ruling

16 The referring court is uncertain as to the compatibility of Article 29(2)(d) and (4) of Legislative Decree No 81/2015 and Article 36(2) and (5) of Legislative Decree No 165/2001 with Clause 5 of the framework agreement contained in Directive 1999/70, specifically as regards the case of university researchers referred to in Article 24(3)(a) of Law 240/2010 (known as 'type A researchers').

17 Article 29(2)(d) of Legislative Decree No 81/2015 actually precludes the conversion of the fixed-term relationship of such employees into a relationship of indefinite duration, by way of derogation from the general rules contained in that legislative decree, which provided in respect of fixed-term contracts, at the material time, for a maximum duration of 36 months, after which the employment contract was converted automatically into a contract of indefinite duration.

18 Paragraph 4 of that article refers, in turn, to the provisions of Article 36 of Legislative Decree No 165/2001 which states, in paragraph 2 thereof, that the public authorities may use flexible forms of contractual employment of staff provided for in law to meet exclusively temporary or exceptional requirements and, in paragraph 5, that '[i]n any event, infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment relationships of indefinite duration with those public authorities, without prejudice to any liability or sanction which those authorities may incur. The worker concerned shall be entitled to compensation for damage suffered as a result of working in breach of mandatory provisions.' The latter provision thus also expressly precludes the conversion of the employment relationship into one of indefinite duration.

19 In this regard the referring court refers to the judgment of the Court of Justice in Case C-184/15, in which it found that 'in order for legislation, which, in the public sector, prohibits absolutely the conversion into a contract of indefinite duration of a succession of fixed-term employment contracts, 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, penalise the misuse of successive fixed-term employment contracts'. In that judgment the Court of Justice also stated that Clause 5(1) of the framework agreement contained in Directive 1999/70 'must be interpreted as precluding national legislation ... from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to determine'.

20 It follows from Article 20 of Legislative Decree No 75/2017 that in Italian law there is a right to maintain an employment relationship for persons employed by the authorities under a flexible employment contract governed by the rules of employment law. It should be noted that the applicant, as a researcher, falls within the category of staff employed under administrative law.

21 As regards that category of persons, the referring court considers that there is in national law no effective measure, as an alternative to conversion of the

employment relationship, that penalises abuse of recourse to fixed-term contracts. The only effective measure in this regard is in fact compensation for failure to establish an employment relationship of indefinite duration.

22 The remedy of damages provided for in Article 36(5) of Legislative Decree No 165/2001, as set out in paragraph 18 above, does not therefore constitute an effective measure since the remedy thus provided consists of a flat-rate payment of damages, which is simply compensation. Therefore, no compensation commensurate with the damage suffered, even less specific compensation, consisting in the restoration of the situation *ex ante*, is guaranteed.

23 In the view of the referring court, in so far as it provides that infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment relationships of indefinite duration with those public authorities, Article 36 of Legislative Decree No 165/2001 raises various doubts as to its compatibility with EU law, in particular as regards the specific context of this case.

24 The applicant successfully participated in a selection procedure — as provided for in Article 24 of Law 240/2010, which observes the principle of sound public administration — leading to the creation of a fixed-term employment relationship, which constitutes an abusive use of a fixed-term contract and thus a breach of the principle laid down in Article 36(1) of Legislative Decree No 165/2001, under which the authorities are to employ staff only on contracts of indefinite duration. It should be noted that paragraph 2 of that article provides that use of another type of contract may be made only to meet 'exclusively temporary or exceptional requirements that have been substantiated'.

25 It is therefore apparent from foregoing paragraphs that, under Article 36(2) and (5) of Legislative Decree No 165/2001, the employee is deprived both of the employment contract, which will not be converted, and of effective compensation protection, in breach of the provisions of Clause 5 of the framework agreement referred to in Directive 1999/70 and of the principles of equivalence and effectiveness and dissuasiveness. In this regard the referring court also refers to the judgment of the Court of Justice in *Sciotto*, C-331/17.

26 Furthermore, the referring court is uncertain as to the compatibility with EU law of Article 24(1) and (3) of Law 240/2010, which sets the duration of researchers' contracts at three years, with a possible two-year extension.

27 Renewal of fixed-term employment contracts within the meaning of Clause 5 (1)(a) of the framework agreement referred to in Directive 1999/70 must be justified by objective reasons and it is not sufficient for a national provision to authorise recourse to successive fixed-term employment contracts in a general manner, as is also established in the above judgment of the Court of Justice.

28 Finally, neither reasons relating to authorities' budgets nor a requirement such as that relating to a 'positive appraisal of the teaching and research activities carried

out', to which the two-year renewal is subject, can justify the failure to provide for adequate measures to combat the abusive use of a succession of fixed-term employment contracts, in accordance with Clause 5 of the framework agreement.