Case C-652/19

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:

2 September 2019

Referring court:

Tribunale di Milano (Italy)

Date of the decision to refer:

5 August 2019

Applicant:

KO

Defendant:

Fallimento Consulmarketing SpA

Interveners in support of the applicant:

FILCAMS CGIL, CGIL

Subject of the action in the main proceedings

Appeal lodged by KO against the ruling issued in proceedings for interim relief by the Tribunale di Milano, Sezione del Lavoro (District Court, Milan, Labour Division). KO submits that the ruling, which found all the redundancies being challenged unlawful, yet ordered all the applicants except KO to be reinstated, constitutes an unjustified difference in treatment of KO.

Subject matter and legal basis of the reference

The interpretation, on the one hand, of the principles of equal treatment and non-discrimination laid down in clause 4 of the framework agreement on fixed-term work annexed to Directive 99/70/EC ('Clause 4 of the Framework Agreement') and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights') and, on the other, of the content of

the effective, appropriate and dissuasive protection against unjustified dismissal guaranteed by Council Directive 98/59/EC, Articles 20 and 30 of the Charter of Fundamental Rights and Article 24 of the European Social Charter.

Article 267 TFEU.

Questions referred

(1) *'Do the principles of equal treatment and non-discrimination enshrined in clause 4 of Directive 99/70/EC on employment conditions preclude the legal provisions of Article 1(2) and Article 10 of Decreto Legislativo 23/15 (Legislative Decree No 23/15), which, with regard to collective redundancies that are unlawful due to non-compliance with the selection criteria, provide for a dual and differentiated system of protection whereby in the same procedure appropriate, effective and dissuasive protection is provided for employment relationships of indefinite duration created prior to 7 March 2015 — for which reinstatement and the payment of employer's contributions are envisaged as possible remedies — yet limited compensation only, between maximum and minimum amounts, is offered for fixed-term employment relationships having the same length of service, in that they were created prior to that date but converted to an open-ended contract after 7 March 2015, which is a less effective and dissuasive form of protection?'*;

(2) '*Do the provisions contained in Articles 20 and 30 of the Charter of Fundamental Rights and in Directive 98/59/EC preclude a legal provision such as Article 10 of Legislative Decree No 23/15 which introduces exclusively for workers hired (or whose fixed-term contract was converted) for an indefinite duration after 7 March 2015 an arrangement whereby, in the event of collective redundancies that are unlawful due to non-compliance with the selection criteria, reinstatement is not an option — unlike for the other similar employment relationships established beforehand and involved in the same procedure — and which instead introduces a concurrent system of compensation only which is insufficient to make good the financial consequences resulting from the loss of employment and which is inferior to the other coexisting model, applied to other workers whose relationships have the same characteristics with the sole exception of the date of conversion or creation?'*

Provisions of EU law cited

Directive 98/59/EC: in particular recital 2 thereof, according to which 'it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community'; recital 4, on the aim of the Directive to eliminate differences in the relevant legislation; and Article 5, which allows Member States to adopt laws, regulations or administrative provisions which are more favourable to workers.

Clause 4 of the Framework Agreement, pursuant to which: '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'.

Charter of Fundamental Rights: in particular Article 20 on the principle of equal treatment; Article 21 on the principle of non-discrimination; Article 30, according to which 'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'; and Article 52(7), which requires the courts of the European Union and of the Member States to give 'due regard' to the explanations.

Explanation annexed to Article 30 of the Charter of Fundamental Rights (2007/C 303/02), which explains that Article 30 'draws on Article 24 of the revised Social Charter'.

Article 24 of the European Social Charter, which sets out the parameters of 'adequate compensation or other appropriate relief' in the event of unlawful dismissal.

Provisions of national law cited

Article 18, fourth paragraph, of legge 20 maggio 1970 n. 300 (Law No 300 of 20 May 1970; 'the Workers' Statute'), as amended by Article 1(46) of legge n. 92/2012 (Law No 92/2012), according to which 'the court, where it finds that the justified objective grounds or just cause adduced by the employer do not exist …, shall annul the redundancy and order the employer to proceed with the reinstatement referred to in the first paragraph and to pay compensation commensurate with the last de facto aggregate remuneration from the date of redundancy until the date of effective reinstatement …. In any event, the amount of compensation may not exceed 12 months' de facto aggregate remuneration. The employer shall also be ordered to pay social security contributions from the date of redundancy until the date of effective reinstatement …'.

Legge 23 luglio 1991 n. 223 (Law No 223 of 23 July 1991): in particular, Article 4, which governs the collective redundancy procedure; Article 5(1) on the selection criteria and (3), pursuant to which: 'In the event of non-compliance with the selection criteria provided for in paragraph 1, the system referred to in the fourth paragraph of Article 18 shall apply'; and Article 24, concerning cases of collective redundancy.

Legge delega n. 183/2014 (Enabling Law No 183/2014), and in particular Article 1(7) thereof, in accordance with which the legislator seeks to 'boost the opportunities for jobseekers to find employment'.

Decreto legislativo 4 marzo 2015 n. 23 (Legislative Decree No 23 of 4 March 2015): in particular, Article 1(2), on the basis of which it is not the date of creation of the employment relationship and the previous length of service that are relevant for the purpose of sanctions, but the date of conversion of the relationship; Article 3(1), according to which the court declares the employment relationship terminated on the date of redundancy and orders the employer to pay compensation, without social security contributions, of an amount equal to two months of the last salary used to calculate severance pay, for each year of service, and the amount may not be less than four or more than 24 months' salary; and Article 10, which requires compensation to be paid as a sanction in the event of unlawful dismissal.

Decreto legge 12 luglio 2018 n. 87 (Decree-Law No 87 of 12 July 2018), converted with amendments into legge n. 96 del 9 agosto 2018 (Law No 96 of 9 August 2018), which in the event of unlawful dismissal after 13 July 2018 imposes a penalty ranging from a minimum of six and a maximum of 36 months' salary, calculated on the basis of the salary used for the purpose of severance pay.

Outline of the facts and the proceedings

1 On 14 January 2013, KO was hired on a fixed-term employment contract by Consulmarketing SpA, and that contract was subsequently converted into an open-ended contract on 31 March 2015.

2 On 19 January 2017, Consulmarketing SpA began collective redundancy proceedings involving 350 employees, including KO, under Article 4 of Law No 223/1991. KO and her colleagues brought an action before the Milan District Court, claiming that the redundancy was unlawful on the grounds of non-compliance with the selection criteria.

3 Milan District Court declared the redundancy unlawful and ordered the reinstatement of all applicants except KO. The court found that the protection provided for in Article 18 of the Workers' Statute – namely, reinstatement – did not apply to KO. Instead compensation alone introduced by Legislative Decree No 23/2015 applied, since the date of conversion of her employment contract was after 7 March 2015.

4 KO challenged the difference in treatment resulting from that judgment and the non-compliance with the selection criteria by Consulmarketing SpA, lodging an appeal with the Milan District Court. The Federazione Italiana Lavoratori Commercio Turismo e Servizi (Italian Federation of Workers, Business, Tourism and Services – FILCAMS) and the Confederazione Generale Italiana del Lavoro (Italian General Confederation of Labour – CGIL) intervened in support of her case.

5 Consulmarketing SpA entered an appearance, contending that KO's claims should be dismissed. During the appeal, the company was declared insolvent. Since it is

still in the appellant's interest to obtain a judgment of reinstatement, notwithstanding her employer's insolvency, the proceedings were resumed against Fallimento Consulmarketing SpA (Consulmarketing SpA in insolvency).

The essential arguments of the parties to the main proceedings

6 KO submits that the judgment delivered by Milan District Court applies two different forms of protection to workers in the same situation and that such difference in treatment cannot be justified on the basis that they were hired on different dates. Moreover, this difference is contrary to the Italian Constitution and EU law.

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

7 The referring court notes that the implementation of Directive 98/59/EC by the Italian legislature has resulted in the coexistence of three different types of sanction, which theoretically could apply to identical employment relationships subjected to the same comparison in the same collective redundancy procedure.

8 For employment relationships of indefinite duration created prior to 7 March 2015, full reinstatement applies as provided for in Article 5(3) of Law No 223/1991 in conjunction with Article 18 of the Workers' Statute. With that type of sanction, a worker who has been unlawfully dismissed can challenge the dismissal using a fast-track procedure. The worker is entitled to reinstatement in the role previously held, to compensation equal to 12 months' salary – calculated on the basis of the de facto aggregate remuneration – and to social security contributions from the date of redundancy until the date of effective reinstatement. As an alternative to reinstatement, the worker can opt for compensation, which includes an additional 15 months' salary.

Conversely, for workers who are unlawfully dismissed and whose employment relationship of indefinite duration was created after 7 March 2015 or, as in the present case, whose fixed-term employment relationship was converted into one of indefinite duration after that date, compensation alone applies as provided for in Article 3 in conjunction with Article 10 of Legislative Decree No 23/2015. That compensation is determined by the court as ranging from a minimum of four and a maximum of 24 months' salary, taking into account not the de facto aggregate remuneration, but the lower amount calculated for severance pay purposes. Furthermore, by virtue of judgment No 194/2018 of the Corte costituzionale (Constitutional Court, Italy), the court calculates that compensation – subject to the abovementioned limits – taking into account not only the length of service, but also the size of the company, the conditions, and the conduct of the parties. The worker is not entitled to reinstatement or to payment of social security contributions, but, like every dismissed worker, receives a monthly unemployment benefit ('NASpI'). However, this does not ensure that the full amount of the contribution is paid during the period of unlawful dismissal.

Lastly, for workers made redundant after 13 July 2018, compensation alone applies as provided for in Decree-Law No 87/2018, which is subject to a minimum of six and a maximum of 36 months' salary.

9 As regards the first question referred for a preliminary ruling, the referring court considers that Legislative Decree No 23/2015 results – as in the present case – in an unjustified difference in treatment, contrary to Clause 4 of the Framework Agreement. Indeed, that legislative decree, and particularly Article 1(2) thereof, infringes the principle of non-discrimination enshrined in that clause, introducing a dual system of protection for workers with the same length of service and start date (based on the date of recruitment or conversion of the fixed-term contract), and disregarding the date of creation of the previous fixed-term employment relationship – and thus the length of service accrued before conversion of the employment relationship – for the purposes of the applicable protection. As a result, recruitment as a fixed-term worker would be penalised with regard to the 'employment conditions'.

10 The referring court notes that, according to the case-law of the Court of Justice, Clause 4 prohibits in general and unequivocal terms any difference in treatment which is not objectively justified in relation to fixed-term workers as regards the employment conditions. Since this is unconditional and precise enough to be relied upon by an individual before a national court, it leads to the disapplication of the conflicting provision of national law. A difference in treatment regarding the employment conditions may in particular only be justified by working arrangements in which there are specific and genuine elements of differentiation pertaining to the nature and characteristics of the duties performed (see judgments of 8 September 2011, [*Rosado Santana*,] C-177/10; of 15 April 2008, [*Impact*,] C-268/06; of 13 September 2007 [*Del Cerro Alonso*,] C-307/05; and of 18 October 2012, [*Valenza and Others*,] C-302/11 and C-305/11).

11 According to the referring court, there are no such objective reasons in the case at issue for the difference in treatment resulting from Legislative Decree No 23/2015. The duties compared in the collective redundancy procedure are identical. Therefore, the length of service cannot be assessed differently on the basis of the duration of the contract in question in order to determine the sanctions applicable in the event of unlawful dismissal. Moreover, the conversion of the fixed-term employment relationship into an employment relationship of indefinite duration does not constitute 'new recruitment' since, as the Corte di cassazione (Court of Cassation, Italy) has ruled, the existing employment relationship is altered solely in relation to the duration of the contract, the parties' obligations remaining identical. It is not, therefore, a question of the normal succession over time of laws governing the same case, but the coexistence of rules relating to the same cases. Lastly, the distinction between identical cases on the basis of the recruitment date alone is clearly irrational from the point of view of reasonableness, proportionality and equal treatment.

12 That irrationality is primarily due to the coexistence of two forms of protection, one stronger than the other, which causes the employer to prefer employment relationships that offer workers less protection. Consequently, the duration of the employment relationship, a factor unconnected to the general and abstract selection criteria imposed by the legislature, assumes the attendant significance. By contrast, according to the referring court, the sanctions provided for in Law No 223/1991 – and particularly the protection established under Article 5(3) thereof – fulfil the purpose of dissuading the employer from making arbitrary redundancies in the event of a company crisis.

13 Having a dual system of sanctions is equally irrational in that it reduces the level of protection of fundamental relationships – for which the legal system imposes a constricted and non-arbitrary choice – without simultaneously increasing the protection of another interest with equivalent status. Lastly, it is irrational because it is inconsistent and inappropriate in view of the objective pursued – namely the strengthening of permanent employment, according to Article 1 of Enabling Law No 183/2014. The referring court notes that a provision that seeks to increase employment through a retrograde change to existing safeguards is neither relevant nor congruous and is therefore inappropriate in view of the end goal.

14 Applying the case-law of the Court of Justice in the *Mangold* case (see judgment of 22 November 2005, C-144/04), the referring court examines whether the sanctions provided for in Legislative Decree No 23/2015, among the various possible instruments that can be used to achieve the goal of employment growth, is the least restrictive of the rights compared, or whether it introduces obligations proportionate to the objectives pursued. To that end, it compares the actual effects of that decree with those it was meant to have in theory. Based on the documents used (World Economic Outlook 2016, Evaluation Document No 7 of the Senate Impact Assessment Office) and Italy's experience of implementing the decree, the court concludes that the anticipated effect – that is to say, the increase in stable employment – has been found to be very negative. Accordingly, it finds that Legislative Decree No 23/2015 does not strike a fair balance between the right to work and the interest of the undertaking, or between job protection and employment as a 'public-interest objective' justifying the reduction of safeguards.

15 The referring court therefore considers it necessary, particularly with regard to the fundamental right recognised by Article 30 of the Charter of Fundamental Rights, to ask the Court of Justice whether – in accordance with the principle of non-discrimination in respect of employment conditions laid down in Clause 4 referred to above – the date of conversion of the fixed-term employment relationship is an 'objective ground' for differences in the type of protection granted. Specifically, it asks whether, in accordance with the abovementioned provisions, a period of service accrued in the context of the same converted fixed-term employment relationship can be excluded by the legislation of a Member State in order to prevent the application of stronger employment protection, which is provided by contrast for employment relationships of indefinite duration created in the same period of employment prior to conversion.

16 As regards the second question referred for a preliminary ruling, the referring court finds that the dual system of sanctions introduced by Legislative Decree No 23/2015 is contrary to the principles that underpin the protection intended by Directive 98/59/EC for all workers in the event of unjustified dismissal. The aim of that directive is to ensure practical and substantial regulatory uniformity and effective and adequate protection so as to prevent differences in legislation from constituting an unjustified disadvantage for particular workers in situations of company crisis.

17 First of all, Legislative Decree No 23/2015 is, it is argued, contrary to the principle of equal treatment enshrined in Article 20 of the Charter of Fundamental Rights, since two systems of protection against unlawful collective redundancies coexist which – although based on the same assumptions made at the same time – envisage, for two employment relationships with the same characteristics, stronger protection for some and weaker protection for others, depending on the recruitment date. On that point, the referring court recalls that, according to the case-law of the Court of Justice, the principle of equal treatment is infringed if two categories of people whose factual and legal situations are essentially the same are treated differently.

18 Nor, it is argued, does such a dual system of protection comply with the principle of non-discrimination enshrined in Article 21 of the Charter of Fundamental Rights, since the length of service of a fixed-term worker is treated differently from that of a worker hired on an open-ended contract.

19 Moreover, such a system runs counter to the principles of adequacy, effectiveness and deterrence on which protection against unlawful dismissal must be based under Article 30 of the Charter of Fundamental Rights and Directive 98/59/EC. In order to determine the minimum content of the right to protection against unlawful dismissal in EU law, the referring court observes that Article 30 of the Charter of Fundamental Rights, while recognising that Member States have the power to regulate the consequences of unlawful dismissal, requires them to exercise that power 'in accordance with Union law'. Article 30 should therefore be read with due regard to the Explanations (2007/C 303/02) annexed to the Charter of Fundamental Rights, which refer to the content of Article 24 of the revised Social Charter. This sets out the specific parameters for the provision of 'adequate compensation' or 'other appropriate relief', as interpreted by the European Committee of Social Rights (ECSR).

20 With regard to the concept of 'adequate compensation' in particular, the ECSR considers that it should include: (a) the reimbursement of the financial losses incurred between redundancy and the determination of the application; (b) the possibility of reinstatement; and (c) sufficient financial compensation to remedy the damage and deter the employer from repeating the offence. Therefore, compensation – if envisaged as an alternative to reinstatement – is considered an appropriate form of protection only when it is sufficient to compensate the worker essentially in full for the pecuniary damage suffered. By contrast, the concept of

'other appropriate relief' must necessarily include reinstatement, which is the remedy par excellence capable of returning the worker to the *status quo ante*. Consequently, the ECSR considers that capped compensation schemes are incompatible with Article 24 of the European Social Charter, since they inevitably lead to a disparity between the actual loss and the amount of settlement.

21 According to the referring court, that interpretation – which is, moreover, consistent with the provisions of Article 10 of the Termination of Employment Convention, 1982 (No 158) of the International Labour Organisation, which was not ratified by Italy – means that compensation should be envisaged only where reinstatement cannot be arranged.

22 In that regard, the referring court cites the case-law of the Court of Justice, according to which fundamental social rights enshrined in Union law must be protected by 'real and effective' sanctions which have a 'real deterrent effect' on the employer (see also, to that end, the protection of fundamental rights provided for in Article 18 of Directive 2006/54/EC and Directive 2000/78/EC). The choice of compensation as a remedy generally means full compensation of the victim's loss, in which the provision of a maximum amount and measures unable to remedy the effluxion of time are inadequate safeguards for this purpose (see judgments of 2 August 1993, [*Marshall,*] C-271/91; of 4 December [*Evans,*] 2003, C-63/01; and of 10 April 1984, [*von Colson and Kamann,*] C-14/83).

23 The referring court therefore considers it necessary to ask the Court of Justice whether the right to equality enshrined in Article 20 of the Charter of Fundamental Rights and the right to protection against unjustified dismissal provided for in Article 30 of that Charter, inspired by the European Social Charter, allow, in the context of a collective redundancy procedure governed by Directive 98/59/EC, two different systems to be introduced in the same procedure in the event of non-compliance with the selection criteria, whereby some workers are reinstated while others merely receive a limited amount of compensation, calculated differently depending on the contract applied, and in the absence, moreover, of social security contributions.