Case C-322/23 (Lufoni) [1]

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:

24 May 2023

Referring court:

Tribunale di Lecce (Italy)

Date of the decision to refer:

22 May 2023

Applicant:

ED

Defendants:

Ministero dell'Istruzione e del Merito (formerly MIUR)

Istituto Nazionale della Previdenza Sociale (INPS)

Subject matter of the main proceedings

Application for a declaration of the applicant's right to recognition of the length of service completed during the period of service prior to the date of the applicant's recruitment to the permanent staff, under several fixed-term contracts, with effect from the respective start dates. The applicant claims to be discriminated against by the application to him of a flat-rate calculation mechanism for periods of service before being admitted to the permanent staff.

Subject matter and legal basis of the reference

Reference for a preliminary ruling under Article 19(3) TEU and Article 267 TFEU, for the interpretation of clause 4 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

[1] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

Questions referred for a preliminary ruling

(1) Does clause 4 (of the Framework Agreement) of Directive 99/70 preclude national legislation such as Articles 485 and 489 of Legislative Decree No 297/1994, Article 11(14) of Law No 124/99 and Article 4(3) of Presidential Decree No 399/88, which provide for the length of service prior to becoming a permanent member of staff, taking into account the aforementioned Article 11(14), to be counted in full only for the first four years and, for the subsequent years, at a rate of two thirds for legal and salary purposes and of the remaining one-third solely for salary purposes and after reaching a certain length of service as provided for by Article 4(3) of Presidential Decree No 399/88?

(2) In any event, for the purposes of assessing whether there is discrimination under clause 4 (of the Framework Agreement) of Directive 99/70, must the national court take account only of the length of service prior to becoming a permanent member of staff recognised at the time of admittance to the permanent staff, or, on the contrary, must it take account of the entire body of rules concerning the treatment of that length of service and thus also of the rules which provide, in periods following admittance to the permanent staff, for full recovery of length of service for salary purposes only?

Provisions of EU law and EU case-law cited

Clauses 1 to 4 of the Framework Agreement.

Judgments of 20 September 2018, *Motter* (Case C-466/17, ECLI:EU:C:2018:758), and of 18 October 2012, *Valenza and Others* (Joined Cases C-302/11 to C-305/11, EU:C:2012:646).

Provisions of national law cited

Decreto legislativo del 16 aprile 1994, n. 297 - Approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado (Legislative Decree No 297 of 16 April 1994 - Consolidated Law incorporating legislative provisions on education relating to schools of every type and level) (Ordinary Supplement No 79 to GURI No 115 of 19 May 1994):

Article 485(1) ‘The periods of service completed by teaching staff under fixed-term contracts at state and equivalent secondary and art schools, including those located abroad, shall be recognised as periods of permanent employment for legal and salary purposes, in full for the first four years and at a rate of two thirds for any period thereafter, and at a rate of the remaining one-third solely for salary

purposes. The financial rights stemming from such recognition are preserved and taken into account in all pay grades subsequent to the grade assigned at the time of recognition'.

Article 489(1): 'For the purposes of the recognition referred to in the preceding articles, teaching service shall be deemed to be a full school year if it has been of the duration laid down for the purposes of the validity of the year by the education system in force at the time of performance'.

Legge del 3 maggio 1999, n. 124 - Disposizioni urgenti in materia di personale scolastico (Law No 124 of 3 May 1999 – urgent measures concerning school staff) (GURI No 107 of 10 May 1999):

Article 11(4): 'Article 489(1) of the consolidated law is to be understood as meaning that temporary teaching services carried out since the 1974/75 academic year are treated as a full academic year if they were provided for at least a minimum of 180 days or if they were carried out continuously from 1 February until the end of the final grading process'.

Decreto del Presidente della Repubblica del 23 agosto 1988, n. 399 - Norme risultanti dalla disciplina prevista dall'accordo per il triennio 1988-1990 del 9 giugno 1988 relativo al personale del comparto scuola (Decree of the President of the Republic No 399 of 23 August 1988 – rules resulting from the provisions laid down in the Agreement for the three-year period 1988-1990 of 9 June 1988 concerning staff in the schools sector) (Ordinary Supplement No 85 to GURI No 213 of 10 September 1988):

Article 4(3): 'On completion of the 16th year for graduate teachers of higher secondary school, the 18th year for administrative coordinators, nursery and primary school teachers, middle school teachers and for teachers of higher secondary school who have a secondary school diploma, the 20th year for auxiliary staff and assistants, the 24th year for teachers of music conservatoires and academies, the length of service for salary purposes alone shall be fully valid for allocating subsequent salary levels'.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant has been a permanent employee of MIUR as a secondary school teacher since 1 September 2015. The applicant was not recruited by means of a public competition, but by drawing on a list of suitable candidates. Previously, he worked as a teacher on short and ad-hoc contracts (17, of which 14 lasted longer than one semester), from the school year 1996/97 to the school year 2014/15. Once he was confirmed as a permanent member of staff, the applicant requested that the period of fixed-term service he had carried out be included in his length of service for the purposes of his classification in the appropriate salary grade and recovery of the difference in remuneration ('career reconstruction' procedure).

2 National legislation allows only partial recognition of service prior to becoming permanent, with a penalty in salary progression. In order to determine the salary grade due at the time of admittance to the permanent staff, of the periods of fixed-term work, only the first four years, plus two thirds of the years subsequently worked, are taken into account, whereas the remaining one third is relevant only at a later stage in the calculation of the total length of service. Any period of teaching completed prior to becoming permanent for the minimum duration laid down by law is to be considered a (full) year of service; shorter periods are disregarded.

3 The application of the internal rules led to the recognition of the applicant's service prior to becoming permanent valid for legal and salary purposes, and therefore for the purposes of initial salary classification, of 10 years, 5 months and 10 days, plus a further period of 3 years, 2 months and 20 days (corresponding to the remaining one third of length of service) valid for salary purposes only, to be added to the applicant's length of service on completion of the 16th year of service (including prior to becoming permanent).

4 On the basis of clause 4 of the Framework Agreement, the applicant considers that that calculation is discriminatory in so far as, if the service provided were considered in its entirety, as is the case for comparable teachers recruited on a permanent basis from the outset, this would result in length of service, at the date of admittance to the permanent staff, of 10 years, 10 months and 17 days. The applicant therefore seeks recognition, reassessment and payment of the higher entitlement.

Principal arguments of the parties in the main proceedings

5 The applicant relies on the equal economic treatment of permanent and temporary staff, as provided for in clause 4 of the framework agreement and the settled case-law of the Court of Justice. The applicant focuses, in particular, on the judgment in *Motter* and the principle of law which the Corte di cassazione (Supreme Court of Cassation, Italy) derived from it (judgment No 31149/2019), according to which the mechanism established by Articles 485 and 489 of Legislative Decree No 297/94 must be disregarded if it would lead to the recognition, as regards a fixed-term worker, of a shorter length of service than that which a teacher recruited from the outset on a permanent basis would accrue for the same function in the same period of time. According to the Court of Cassation, the verification of discrimination must be conducted on a case-by-case basis, by carrying out a double calculation – actual and theoretical – of length of service at the time admittance to the permanent staff and applying the most advantageous calculation. It is precisely as a result of such a 'specific comparison' that the applicant claims a length of service, at the date of admittance to the permanent staff, of almost 5 months longer.

Succinct presentation of the reasoning in the reference for a preliminary ruling

6 The referring court asks the Court whether the 'case-by-case' method developed in the judgment of the Court of Cassation No 31149/2019 is fully consistent with the principles laid down in that regard by EU case-law. In the *Motter* judgment cited above, in particular, the Court has indeed already held that clause 4 of the Framework Agreement does not in principle preclude national legislation which, for the purposes of length of service, takes account, for workers admitted to the permanent staff on the basis of qualifications, of the first four years of fixed-term service in full and, after beyond that limit, to the extent of two thirds.

7 With respect to the *Motter* case, the factual and legal situation, the conditions of relevance and admissibility, and the objective requirements put forward by the Italian Government remain unchanged. The need to make this reference for a preliminary ruling arises in order to bring to the Court's attention also the provisions of Article 4(3) of Presidential Decree No 399/88, which had not been mentioned at all, and those of Article 11(14) of Law No 124/99, which were mentioned only incidentally. The objective justification for the unequal treatment complained of by the applicant could also lie in the subsequent recovery, on completion of the 16th year of his career, of the length of service accrued, pursuant to Article 4(3) of Presidential Decree No 399/88. In addition, under Article 11(14) of Law No 124/99, the applicant has had various teaching periods prior to becoming permanent recognised as full years of service, for fractions of time considerably shorter than a year, and with different weekly working hours.

8 The non-application of the mechanism established by Articles 485 and 489 of Legislative Decree No 297/94 cannot be partial or result in the application to the worker recruited on a fixed-term basis of rules which are different from those from which the comparable worker recruited on a permanent basis can benefit. Consequently, by applying the method of calculation proposed by the Court of Cassation, the applicant would lose the right to the calculation of non-full years under Article 11(14) of Law No 124/99, which is intended specifically for fixed-term teachers, and would also lose recovery of the length of service under Article 4(3) of Presidential Decree No 399/88, in so far as it is linked to the mechanism for reducing the number of years prior to becoming permanent following the fourth. The question is therefore whether the approximately five months of actual length of service lost at the time of the applicant's first salary grading in the permanent post are, actually and adequately, compensated by the three years, two months and 20 days' length of service resulting from the theoretical calculation, which may be fully recovered in possible future and potentially different circumstances from those of another individual.

9 In such a situation, the method drawn up by the Court of Cassation would not necessarily lead to more favourable results for a fixed-term worker than for those ensured by the legislation regarded as discriminatory, but could, on the contrary, have an unfavourable effect taking into account the entire working life.

In the judgment in *Valenza and Others*, the Court has already held that the non-permanent nature of the employment relationship cannot justify disparities in the calculation of the length of service acquired. The referring court therefore asks the Court what is the decisive moment for the assessment of discrimination.