Case C-226/24 [Barbavi] [i]

Request for a preliminary ruling

Date lodged:

26 March 2024

Referring court:

Corte d'appello di Firenze (Italy)

Date of the decision to refer:

8 January 2024

Appellant:

A.M.

Respondent:

Istituto nazionale della previdenza sociale (INPS)

LA CORTE DI APPELLO DI FIRENZE (Court of Appeal, Florence, Italy)

Sezione lavoro (Labour division)

[…]

in the proceedings […] brought by

A.M. […]

APPELLANT IN REFERRAL PROCEEDINGS

against

Istituto nazionale della previdenza sociale – INPS […]

RESPONDENT IN REFERRAL PROCEEDINGS

and against

[i] The name of the present case is fictitious. It does not correspond to the real name of any of the parties to the proceedings.

Agenzia delle entrate Riscossione

DEFENDANT IN REFERRAL PROCEEDINGS, NOT APPEARING

referral proceedings following the order of the Corte di Cassazione-Sezione Lavoro (Court of Cassation – Labour Division) n. […] of 27 April 2022.

[…] has made the following

ORDER FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING ON THE INTERPRETATION OF EU LAW (ART. 267 TFEU)

THE DISPUTE BEFORE THE COURT OF APPEAL

1 The subject matter of the proceedings is the opposition brought by A.M. against two debit notices issued by the INPS (the Italian National Social Welfare Institution) in December 2013, and served by the then Equitalia Centro s.p.a. (now Agenzia delle entrate Riscossione (Revenue Agency – Collection)), containing an order to pay disparities in contributions and civil penalties in relation to fixed-term agricultural workers employed by A.M. in 2007, for whom the contributions had been calculated by the employer on the basis of the hours actually worked and not on the daily working time of 6.30 hours established by the Contratto Collettivo Nazionale di Lavoro (National Collective Labour Agreement, 'CCNL'). More particularly:

- notice No 351 2013 00015706 01 000, ordering payment of the sum of EUR 4.1, in respect of the I.V.S. contributions (contributions made for dependent employees in respect of injury and old-age) and the corresponding civil penalties for fixed-term agricultural workers employed during the first quarter of 2007;

- notice No 351 2013 00015707 02 000, ordering payment of the sum of EUR 3 932.27 in respect of the I.V.S. contributions and the corresponding civil penalties for fixed-term agricultural workers employed in the second quarter of 2007.

2 The Corte d'appello di Firenze – Sezione Lavoro (Court of Appeal – Labour Division, Florence, Italy), […], reversing the judgment of the Tribunale di Grosseto (District Court, Grosseto, Italy), dismissed the objection and held that the claim which was the subject of the debit notice was well founded, on the ground that the pay of fixed-term agricultural workers should be calculated on the basis of 6.30 hours of work per day and not on the basis of the hours actually worked.

3 The Court of Cassation – Labour Division, […] referred the case back to this Court of Appeal, stating the following principle of law: *'The social security contributions payable by agricultural employers on the wages paid to fixed-term agricultural workers must be calculated, in accordance with the combined*

provisions of Article 1(1) of decreto legge n. 338/1989 (Decree Law) No 338/1989) […], *and Article 40 of the CCNL of 6 July 2006, exclusively on the hours actually worked, unless it appears in practice that, in the event of interruptions due to force majeure, the employer has ordered the worker to remain on the premises at his disposal'.*

In short, according to the Court of Cassation:

- Article 30(1) of the CCNL of 6 July 2006 for agricultural workers and floriculturists, which provides that *'working time is set at 39 hours per week, i.e. 6.30 hours per day',* merely indicates the maximum normal weekly and daily working time, but says nothing about the minimum working time

- Article 40 (1) of that CCNL, by providing that *'a fixed-term worker shall be entitled to payment for the hours actually worked during the day'*, lays down a rule which is logically incompatible with the concept of weekly and daily working time, as it means that the remuneration due is not tied to pre-established working hours that are identifiable in general and abstract terms

- that provision, based on the specific nature of fixed-term agricultural work, is entirely consistent with Article 16(1)(g) of decreto legislativo n. 66/2003 (Legislative Decree No 66/2003), which, in implementing Directives 93/104/EC and 2000/34/EC, provides that fixed-term agricultural workers are excluded from the scope of the rules on normal weekly working time;

- […] *[other considerations not relevant to the question referred]*

- Article 1(1) of Decree Law No 338/1989 […] – as regards contributions – provides that the pay to be taken as the basis for calculating social security and welfare contributions may not be lower than the remuneration amounts established by laws, regulations or collective agreements concluded by the most representative trade union organisations at national level, or by other collective agreements or individual contracts (and for fixed-term agricultural workers, the pay due under the national collective agreement is in fact that due on the basis of the hours worked);

- nor can a contradictory conclusion be reached regarding the calculation of contributions on the hours actually worked, *'in the light of the Community case-law cited in the judgment under appeal concerning the prohibition of […]discrimination against fixed-term workers laid down in Clause 4 of Directive 99/70/EC, since ... that prohibition concerns the employment relationship between the parties and can, at most, legitimise any claims from the worker to receive more than he has actually been paid, but certainly does not allow the social security institution to make a different, larger claim in relation to social security contributions, as the question of a worker's social security relationship does not fall within the scope of the provisions of EU law'.*

4 [A.M.] resumed the proceedings, requesting, in accordance with the principle of law formulated by the Court of Cassation, that the debit notices which are the subject of the opposition be annulled on the ground that it had already paid the contribution for the fixed-term agricultural workers, calculated on the basis of the hours actually worked.

5 The INPS, which lodged a defence in the referral proceedings, has asked whether the principle of law formulated by the Court of Cassation is consistent with the prohibition of discrimination laid down in Clause 4 of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, which provides, in the first paragraph: *'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.'*

According to the INPS, if it were considered that contributions in respect of fixed-term agricultural workers must be paid with regard to remuneration calculated on the basis of the hours actually worked (as provided for in Article 40 of the CCNL) and not on the basis of the 6.30 hours of working time per day which applies to agricultural workers engaged for an indefinite period (as provided for in Article 30 of the CCNL), irrespective of the hours worked, despite the fact that they perform the same tasks, this would leave the former workers with less favourable social security conditions, with regard to both the contributions payable by the employer and the social security benefits recognised by the INPS, which, in so far as they are based on contributions, are likely to be lower than those from which the latter workers will be able to benefit.

Furthermore, while the function of the principle of non-discrimination is to ensure that the use of a fixed-term employment contract does not adversely affect the situation of the worker concerned by placing him in an unfavourable position in relation to a worker engaged for an indefinite period, the term *'employment conditions'* in Clause 4 must not be understood in a restrictive sense, limited solely to the conditions applied by the employer, but in a broader sense, encompassing all the legal effects which influence the substantive legal position of the worker and the employer, including therefore also the social security position, both as regards the amount of the contributions and the corresponding amount of social security benefits, during or after the termination of the relationship.

The INPS has therefore requested this Court to stay the proceedings and to refer the following questions to the European Court of Justice for a preliminary ruling:

[…] *[questions similar to those subsequently referred by the national court]* […] In substance, upon the conclusion of the preliminary ruling proceedings, it has requested that the opposing party's appeal be dismissed as unfounded in fact and in law.

The Revenue Agency – Collection, on the other hand, did not enter an appearance.

6 By subsequent documents lodged on 30 June 2023, [A.M.] requested that the request for a preliminary ruling be rejected […] because the compulsory social security contribution does not fall within the objective scope of Directive 1999/70/EC and because the Directive does not have horizontal, but only vertical, direct effect and therefore cannot be relied upon in relations between the INPS and the employer;

[…] *[matters of national procedural law]* […] *[internal procedure]* […]

GROUNDS FOR THE DECISION

7 The referring court, which is called upon to give a ruling in the referral proceedings, is required, under national law, to abide by the decision of the Court of Cassation, Article 384 of the Code of Civil Procedure expressly providing that the referring court must comply with the principle of law and, in any event, the rulings of the Court (most recently, Court of Cassation Case No 27155/2017 on the binding effect of the legal principle affirmed by the court with jurisdiction to rule on legality)

8 The subject matter of the proceedings, as they now stand, therefore concerns the application to the specific case of the rule that the employer, the appellant, was required to pay contributions for fixed-term agricultural workers on the basis of the hours actually worked.

9 The applicable provisions of national law are those of Article 40 of the CCNL of 6 July 2006 for agricultural workers and floriculturists, in so far as it provides that *'fixed-term workers shall be entitled to payment of hours actually worked during the day'*, as interpreted by the Court of Cassation, and Article 1(1) of Decree Law No 338 of 1989 […], which links the amount of the contributions to the relevant pay, according to the rule that the pay to be taken as the basis for calculating social security and welfare contributions may not be lower than the remuneration amounts set by laws, regulations or collective agreements concluded by the most representative trade union organisations at national level, or by other collective agreements or individual contracts where this results in a higher amount of pay than that provided for in the national collective agreement. According to that provision, in accordance with the legal principle laid down by the Court of Cassation, in the case of fixed-term agricultural workers, the contribution must be paid on the basis of the hours actually worked because it is only in respect of those hours that the workers are entitled to pay, in accordance with the collective rules.

The referring court also points out that Article 30 of the CCNL, which in respect of permanent workers provides, by contrast, that '*working time is set at 39 hours per week, i.e. 6.30 hours per day'*, with the effect that the employer is required, in any event, to pay the worker for that time, even if the performance of services is not actually requested, except in cases where work is interrupted due to force majeure, and to pay contributions on the corresponding pay.

10 The referring court doubts whether the principle of law stated by the Court of Cassation is consistent with EU law, in particular Clause 4 of Directive 1999/70/EC on fixed-term work, and considers that the conditions for a reference to the Court of Justice for a preliminary ruling, as requested by the INPS, are met.

Admissibility of the reference for a preliminary ruling under national law

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[…] *[national and EU case-law according to which a reference to the Court of Justice is admissible]*

Applicability of EU law in the present case

14 Furthermore, from a substantive point of view, the Court considers that EU law is applicable in the present case, having regard to the principle of non-discrimination set out in Clause 4 of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, which, in paragraph 1, provides: *'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.'*

15 In the first place, there is the question of *'employment conditions'*, a concept which must be understood not restrictively, but in a broad sense as encompassing all the benefits the worker receives from the employer by reason of the employment relationship and therefore also concerns the amount of pay (Court of Justice, 13 September 2007, Case C-307/05, *Del Cerro Alonso*; Court of Justice, 12 December 2013, Case C-361/12, *Carratù*; Court of Justice, 15 April 2008, Case C-268-06, *Impact*).

According to the judgment in *Del Cerro Alonso*, *'the question whether in applying the principle of non-discrimination laid down in clause 4(1) of the framework agreement, one of the constituent parts of the pay should, as an employment condition, be granted to fixed-term workers in the same way as it is to permanent workers …[comes] within the scope of Article 137(1)(b) EC and therefore of Directive 1999/70 and the framework agreement adopted on that basis'* (paragraph 47). Accordingly, the concept of equal treatment in relation to 'employment conditions' must be interpreted as encompassing pay terms, the extent of which must undoubtedly be left to the national legal systems, but which cannot be determined differently to the detriment of fixed-term workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds.

16 First, in fact, in the present case, the request directly concerns the pay due to fixed-term agricultural workers, given that, under national law, contributions, that is to say, the consideration claimed by the INPS, are payable on the total amount of pay due to the employees.

17 In addition, from another point of view, it must be held that the term 'employment conditions' also covers the contributions demanded by the INPS, in so far as they are used to pay social security benefits provided by occupational pension schemes, that is to say, benefits which are also covered by the [EU law] concept of pay (see Court of Justice, 17 May 1990, Case C-262/88, as well as Court of Justice, 13 November 2008, Case 46-07, *Commission* v *Italy* and Court of Justice 15 April 2008, Case C-268-06, *Impact*, which includes in that concept *'pensions which derive from an employment relationship between the worker and the employer, excluding statutory social security pensions, which are determined less by a working relationship than by considerations of social policy …'*).

18 In fact, Directive 2006/54 defines as occupational social security schemes systems which provide protection against sickness, invalidity, old age, industrial accidents, occupational diseases and unemployment which are not covered by the rules laid down in Directive 79/7/EEC (relating to the general social security scheme) and the purpose of which is *'to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'*.

This is a concept which has been consistently adopted by the Courts of the European Union, from which it may be inferred that what distinguishes occupational social security schemes from the general social security scheme is not the welfare objective behind the forms of protection provided or the nature of the risks covered, but rather the type of beneficiary and the reasons justifying the relationship: social security management schemes provide benefits for all persons, in accordance with the law and adopting criteria based on solidarity and support for the weakest categories, while occupational schemes provide benefits which are complementary to or replace those provided by statutory public security schemes, for workers belonging to an enterprise, to an economic branch or occupational sector, as an integral part of their employment relationship.

19 The present case concerns contributions intended for the payment of benefits deriving from an employment relationship, the amount of which is proportionate to the duration of the employment relationship and which are linked to the amount of pay, since the contributions are based on the amount of pay. The consequence of this is that a reduction in the amount of pay, resulting in a reduction in the amount of the contributions due, also leads to a reduction in the social security benefits provided, which is clearly detrimental to individual workers, and also increases the costs borne by the community in granting those workers benefits which are borne fully by the public security system.

20 As far as the present case is concerned, another question to be dealt with is therefore the benefits which may be paid to a fixed-term agricultural worker who, being entitled to pay solely on the basis of the hours actually worked, compared with the guarantee given to permanent workers that they will always receive a minimum wage fixed by the collective agreement, irrespective of the hours actually worked, will undoubtedly be entitled to benefits at a lesser rate.

21 In any event, there can be no doubt that the present case concerns 'employment conditions' referred to in Clause 4 of Directive 99/70/EC and that it therefore falls within the scope of EU law.

22 Nor is the agricultural sector excluded from the scope of that Directive.

23 As regards the purely vertical effect of the Directive, which, according to the appellant's defence, cannot be relied on in a dispute between private individuals, this theory is contradicted, in the first place, by the fact that the directive in question was duly implemented by the national law with decreto legislative n. 368/2001 (Legislative Decree No 368/2001), which, in Article 6, also incorporates the principle of non-discrimination in the Italian system (now, with the same effect, Article 25 decreto legislativo n. 81/2015 (Legislative Decree No 81/2015)), thereby also producing a horizontal direct effect on relations between individuals and between individuals and organisations.

24 In the second place, the principle of non-discrimination is a general principle of EU law with full direct effect, including that of a horizontal nature, at least in cases where it has been clarified in sources of secondary law, as in the present case by Directive 99/70/EC (see Court of Justice, Case C-555/07, *Kucukdeveci*)

25 Lastly, it must be held that the prohibition contained in the aforementioned Clause 4.1 has been held to be unconditional and sufficiently precise to dispense with the need for measures to implement the directive internally, being subject merely to justified grounds based on objective reasons (subject to judicial review, Court of Justice, C-268/06, *Impact*, p. 65 and 68), which must be understood as referring to *'precise and concrete circumstances characterising a given activity'* (Court of Justice, C-307/05, *Del Cerro Alonso* p. 53 to 58).

26 Having established, therefore, that Clause 4.1 of the Directive in question is applicable to the pay of fixed-term agricultural workers and to the related contributions, it is considered in practice that the principle of law stated by the Court of Cassation regarding the calculation of the contributions which the employer must pay on the basis of the hours actually worked leads to an infringement of that provision, in so far as it leads to conditions that are less favourable than those reserved to permanent agricultural workers, without there being any real objective reason.

27 As regards the comparability between the two categories, there is no doubt and it is undisputed that fixed-term agricultural workers performed the same duties as those engaged for an indefinite period […].

28 As regards the less favourable conditions, it is clear that the application of the principle of law formulated by the court with jurisdiction to rule on legality would result in fixed-term workers being offered worse conditions than those given to comparable permanent workers, given that, in a precarious agricultural relationship, and only in such relationships, the employer would be free to determine unilaterally the content of the reciprocal obligations of the parties, those relating to work and those relating to pay, and consequently the amount of contributions, and subsequently, the rate of social security benefits, whereas permanent workers are in any event entitled to a minimum daily wage, calculated on the basis of 6.30 hours, irrespective of the work actually carried out, with the resulting effects in terms of contributions and the corresponding benefits paid by the INPS.

29 As regards the absence of objective reasons for the difference in the conditions applied, it should be noted that neither of the parties describes the objective reasons which refer to *'precise and concrete circumstances characterising a given activity'* (Court of Justice C-307/05, *Del Cerro Alonso*, p. 53 to 58), whereas, according to the case-law of the Court of Justice, that concept requires that the difference in conditions be justified by the existence of *'precise and concrete factors characterising the employment condition in the particular context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that difference meets a genuine need, is appropriate for attaining the objective pursued and is necessary for that purpose'* (Court of Justice, 19 October 2023, Case C-660/20).

30 In the present case, there are no objective circumstances connected with the performance of the service or precise and concrete factors from which it may be concluded that the difference in the conditions applied to fixed-term workers is actually necessary, given also that the risks inherent in agricultural activity, due to the particular impact of unforeseeable weather conditions, concern the general nature of the services, without the type of employment contract having any relevance whatsoever.

ON THESE GROUNDS

The Court

having regard to Article 267 TFEU

refers the following questions to the European Court of Justice for a preliminary ruling:

(1) Must Clause 4(1) of the framework agreement be interpreted as precluding a provision of national collective agreement, such as that contained in Article 40 of the CCNL [national collective labour agreement] for agricultural workers and floriculturists of 6 July 2006, as interpreted by the Court of Cassation in a manner that is binding on the referring court, which recognises, with regard to fixed-term agricultural workers, the right to be paid for the hours actually worked during the

day, in contrast to Article 30 of the CCNL, which precedes it, which, in respect of permanent agricultural workers, recognises the right to pay on the basis of a working day of 6.30 hours?

(2) If the answer to the previous question is in the affirmative, must Clause 4(1) of the framework agreement be interpreted as meaning that the determination of the amount of the compulsory social security contribution payable in respect of fixed-term agricultural workers under an occupational social security scheme also falls within the definition of employment conditions, with the result that it must be determined on the basis of the same criterion as that laid down for permanent agricultural workers and therefore on the basis of the daily working time established in the collective agreement, and not on the basis of the hours actually worked?

Stays the proceedings until the publication of the decision of the Court of Justice on those questions.

Orders the Court Registry to forward this order to the Court of Justice of the European Union […].

[…] Florence, 8 January 2024

[…]