Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 January 2012*

(Social policy — Directive 1999/70/EC — Clause 5(1)(a) of the Framework Agreement on fixed-term work — Successive fixed-term employment contracts — Objective reasons liable to justify the renewal of such contracts — National rules justifying the use of fixed-term contracts in cases of temporary replacement — Permanent or recurring need for replacement staff — Taking into account of all circumstances surrounding the renewal of successive fixed-term contracts)

In Case C-586/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decision of 17 November 2010, received at the Court on 15 December 2010, in the proceedings

Bianca Kücük

v

Land Nordrhein-Westfalen,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (President of the Chamber), U. Lõhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator

having regard to the written procedure and further to the hearing on 9 November 2011,

after considering the observations submitted on behalf of:

— Bianca Kücük, by H. Rust and B. Jaeger, Rechtsanwälte,

— the *Land* Nordrhein-Westfalen, by T. Kade, Rechtsanwalt,

— the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Clause 5(1)(a) of the Framework Agreement on fixed-term work, concluded on 18 March 1999 ('the FTW Framework Agreement'), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

2 The reference was made in proceedings between Ms Kücük and her employer, the *Land* Nordrhein-Westfalen ('the *Land*'), concerning the validity of a series of fixed-term employment contracts between her and the *Land*.

Legal context

European Union legislation

3 Directive 1999/70 is founded on Article 139(2) EC and its purpose, as provided in Article 1, is 'to put into effect the [FTW] Framework Agreement … concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP)'.

4 Clause 1 of the FTW Framework Agreement states that the purpose of that agreement is to 'establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

5 Clause 5 of the FTW Framework Agreement, entitled 'Measures to prevent abuse', states:

'1. 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.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as "successive";

(b) shall be deemed to be contracts or relationships of indefinite duration.'

6 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) lays down certain minimum requirements for the protection of such workers.

7 As regards maternity leave, Article 8 of Directive 92/85 provides for a right to a continuous period of maternity leave of at least 14 weeks including compulsory maternity leave of at least two weeks.

8 The Framework Agreement on parental leave concluded on 14 December 1995 ('the Framework Agreement on parental leave'), which is annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4), lays down minimum requirements aimed at facilitating the reconciliation of parental and professional responsibilities for working parents.

9 Clause 2 of the Framework Agreement on parental leave provides:

'1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.

...

5. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

...'

National legislation

10 Paragraph 14 of the German Law on part-time employment and fixed-term employment contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) of 21 December 2000 (BGBl. 2000 I, p. 1966), as amended by Paragraph 1 of the Law of 19 April 2007 (BGBl. 2007 I, p. 538, 'the TzBfG'), entitled 'Possibility of limiting the duration of contracts', provides:

'(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:

...

3. one employee replaces another;

...'

11 In the event of invalidity of the fixed-term employment contract, it is to be reclassified as a contract of indefinite duration pursuant to Paragraph 16 of the TzBfG.

12 Paragraph 21(1) of the Law on parental leave and benefit (Gesetz zum Elterngeld und zur Elternzeit) of 5 December 2006 (BGBl. 2006 I, p. 2748), as amended, provides:

'Objective grounds for a fixed-term employment contract exist where one employee is taken on to replace another for the duration of a prohibition on staff working under the Law on maternity protection [Mutterschutzgesetz], for the duration of parental leave, for the duration of leave taken to look after a child under a collective agreement, works agreement or an individual contract, or for a combination of such periods or part thereof.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Ms Kücük was employed by the *Land* between 2 July 1996 and 31 December 2007 under a total of 13 fixed-term employment contracts. She was employed as a clerk in the court office of the civil procedural division of the Amtsgericht Köln (District Court, Cologne). The fixed-term employment contracts were always concluded because of temporary leave, including parental leave and special leave, having been granted to court clerks employed for an indefinite duration and served in each case to replace them.

14 By application lodged on 18 January 2008 before the Arbeitsgericht Köln (Labour Court, Cologne), the appellant in the main proceedings argued that her employment relationship was indefinite in nature and that her latest employment contract, concluded on 12 December 2006 and expiring on 31 December 2007, was therefore unlawful.

15 According to the appellant in the main proceedings, the conclusion of that fixed-term contract on the basis of point 3 of Paragraph 14(1) TzBfG, which refers to an objective reason, namely the replacement of another employee, was not justified. A total of 13 fixed-term employment contracts concluded successively and without interruption over a period of 11 years cannot, in any event, be deemed to be a response to a temporary need for replacement staff. The appellant in the main proceedings maintains that an interpretation and application of national law by which such 'consecutive fixed terms' are considered valid are incompatible with clause 5(1) of the FTW Framework Agreement. She accordingly asked the Arbeitsgericht Köln to hold that the employment relationship between the parties on the basis of the fixed-term contract concluded on 12 December 2006, for the period from 1 January to 31 December 2007, had not been terminated.

16 The Arbeitsgericht Köln dismissed the action brought by the appellant in the main proceedings as unfounded. The appeal brought by her before the Landesarbeitsgericht (Higher Labour Court) was also dismissed. The appellant in the main proceedings accordingly brought an action for 'revision' (appeal on a point of law) before the Bundesarbeitsgericht (Federal Labour Court).

17 Before the national courts, the *Land* argued that the fixed-term employment contract challenged by Ms Kücük was justified on the basis of point 3 of Paragraph 14(1) TzBfG. Fulfilment of the conditions required in order for the replacement of another employee to constitute an objective reason is unrelated to the number of fixed-term contracts successively concluded. The interpretation and application of the German rules in that manner is not contrary to clause 5(1) of the FTW Framework Agreement.

18 In its decision, the referring court explains, in respect of point 3 of Paragraph 14(1) TzBfG, that what characterises a replacement and remains inherent therein relates to the fact that the replacement is temporary and its objective is the performance of tasks by the substitute employee to satisfy a need for a limited period of time. That court further states that, under German law, the justification for using a fixed-term contract in cases where an employee is to be replaced lies in the fact that the employer is already in an employment relationship with an employee who is temporarily prevented from working and expects that employee to return to work. Hence the employer expects the staffing need to come to an end once the employee being replaced returns to work.

19 The referring court questions whether the need for replacement staff can be qualified as an objective reason under clause 5(1)(a) of the FTW Framework Agreement. It asks, first, whether the fact that that need is permanent or frequent and may also be met through the conclusion of contracts of indefinite duration might not rule out the possibility of a replacement constituting such an objective reason. Second, that court asks the Court for clarification as to whether and, if so, how, the national courts, in the context of the review they are bound to carry out of potentially abusive use of replacement of another employee as a reason justifying the conclusion of a fixed-term employment contract, must take account of the number and the duration of the fixed-term employment contracts

concluded in the past with the same employee. It adds in that regard that, in recent case-law, the Bundesarbeitsgericht ruled out the possibility that the variable number of fixed-term contracts might intensify the judicial review of the scope of the objective reason.

20 In view of the foregoing, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does clause 5(1) of the [FTW Framework Agreement implemented by Directive 1999/70] preclude a national provision, which — like point 3 of Paragraph 14(1) [TzBfG] — provides that the renewal of fixed-term employment relationships is justified for objective reasons where one employee replaces another, from being interpreted and applied as meaning that there are also objective reasons where there is a permanent need for replacement [staff] although the need for replacement [staff] could also be met by the employee concerned being employed for an indefinite duration in order to ensure replacements arising from recurring unavailability of staff, whilst allowing the employer to decide anew in each case how it is to respond to a specific loss of staff?

(2) If the answer to the first question should be in the affirmative, does clause 5(1) of the [FTW Framework Agreement implemented by Directive 1999/70] preclude the interpretation and application of a national provision such as point 3 of Paragraph 14(1) TzBfG as set out in the first question, in the circumstances described in the first question, where the national legislature provides in a national provision such as Paragraph 21(1) of the Law on parental leave and benefit [as amended], that a fixed-term employment relationship with a replacement is justified, provided that a social-policy objective is pursued with a view to making it easier for employers to grant special leave and for employees to avail themselves thereof, inter alia for the purposes of protection of maternity or parenting?'

The questions referred for a preliminary ruling

The first question

21 By its first question, the referring court asks, in essence, whether the need for temporary replacement staff provided for by national legislation, such as that at issue in the main proceedings, may constitute an objective reason under clause 5(1)(a) of the FTW Framework Agreement, whether that is also the case where that need for replacement staff is, in reality, permanent or recurring and might also be met through the hiring of an employee under a contract of indefinite duration and whether, in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by objective reasons as referred to in that clause, account must be taken of the cumulative duration of the employment contracts or relationships of that kind concluded in the past with the same employer.

22 The *Land* submits that the temporary replacement of an employee comes within the objective reasons referred to in clause 5(1)(a) of the FTW Framework Agreement. The temporary absence of the employee to be replaced implies a short-term need to hire an additional employee which will be necessary only for a period where there is a shortage of labour. The fact that there is a certain permanent need for replacement staff does not, in the *Land*'s submission, render a fixed-term contract for the purpose of replacement invalid under point 3 of Paragraph 14(1) TzBfG. It is necessary to ascertain the objective reason relied on in each specific replacement case and not rule out cases of permanent, frequent and repeated replacements. If the validity of a specific fixed-term employment contract were contingent thereon, employers would be forced to establish a permanent reserve of staff, which would be feasible only for very large undertakings. In the *Land*'s submission, employers' management freedom must be upheld, so that they may remain free to decide how and when to use such a reserve in order to address a recurring need for replacement staff.

23 The German and Polish Governments also rely on the discretion employers have under the FTW Framework Agreement and argue that European Union law allows for justification of a fixed-term employment contract for the purposes of replacement in cases of a recurring need for replacement staff. That situation is clearly different from that of a 'fixed and permanent need', as the factors preventing the employees who have been replaced from working are limited in time. Those employees have a right to return to their posts, a right which the employer is bound to uphold.

24 The appellant in the main proceedings did not submit written observations.

25 It should be borne in mind that the purpose of clause 5(1) of the FTW Framework Agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 63, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 73).

26 Thus, clause 5(1) of the FTW Framework Agreement requires Member States, in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, actually to adopt in a binding manner one or more of the measures listed where domestic law does not include equivalent legal measures. The measures listed in clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such employment contracts or relationships, the maximum total duration of those successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (see *Angelidaki and Others*, paragraph 74, and order of 1 October 2010 in Case C-3/10 *Affatato*, paragraphs 43 and 44 and case-law cited).

27 The concept of 'objective reasons' for the purposes of clause 5(1)(a) of the FTW Framework Agreement must, as the Court has already held, be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. 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 (*Angelidaki and Others*, paragraph 96 and case-law cited).

28 On the other hand, a national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner by a rule of statute or secondary legislation, does not accord with the requirements as stated in the previous paragraph (*Angelidaki and Others*, paragraph 97 and case-law cited).

29 Such a provision, which is of a purely formal nature, 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 and is appropriate for achieving the objective pursued and necessary for that purpose. Such a provision therefore 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 FTW Framework Agreement (see, to that effect, *Angelidaki and Others*, paragraphs 98 and 100 and case-law cited).

30 It should be observed, however, that a provision such as the one at issue in the main proceedings, which allows for the renewal of fixed-term contracts to replace other employees who are momentarily unable to perform their tasks, is not per se contrary to the FTW Framework Agreement. The temporary replacement of another employee in order to satisfy, in essence, the employer's temporary staffing requirements may, in principle, constitute an objective reason under clause 5(1)(a) of the FTW Framework Agreement (see, to that effect, *Angelidaki and Others*, paragraph 102).

31 In an administration with a large workforce like the *Land*, it is inevitable that temporary replacements will frequently be necessary due to, inter alia, the unavailability of employees on sick, maternity, parental or other leave. The temporary replacement of employees in those circumstances may constitute an objective reason under clause 5(1)(a) of the FTW Framework Agreement, justifying fixed-term contracts being concluded with the replacement staff and the renewal of those contracts as the need arises, subject to compliance with the relevant requirements laid down in the FTW Framework Agreement.

32 This conclusion is all the more compelling where the national legislation justifying the renewal of fixed-term contracts in cases of temporary replacement also pursues objectives recognised as being legitimate social policy objectives. As evidenced by paragraph 27 of this judgment, the concept of objective reason in clause 5(1)(a) of the FTW Framework Agreement encompasses the pursuance of such objectives.

33 As is apparent from the Court's case-law, measures aimed at offering protection for pregnancy and maternity and to enable men and women to reconcile their professional and family obligations pursue legitimate social policy objectives (see, to that effect, Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 42, and Case C-284/02 *Sass* [2004] ECR I-11143, paragraphs 32 and 33). The legitimacy of those objectives is also confirmed by the provisions of Directive 92/85 or those of the Framework Agreement on parental leave.

34 It should be noted, however, that although the objective reason provided for in national legislation such as that at issue in the main proceedings may, in principle, be accepted, the competent authorities must, as is clear from paragraph 27 of this judgment, ensure that the actual application of that objective reason satisfies the requirements of the FTW Framework Agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out. In the application of the relevant provision of national law, those authorities must therefore be in a position to identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need and is appropriate for achieving the objective pursued and necessary for that purpose.

35 In the present case, the Commission argues that the successive renewal of an employment relationship and the conclusion of numerous successive fixed-term contracts, together with the duration of the period during which the employee concerned has previously been employed under such contracts establishes abuse under clause 5 of the FTW Framework Agreement. In the Commission's submission, the conclusion of a number of successive fixed-term contracts, including over a considerable period of time, tends to demonstrate that the work required of the employee concerned does not meet merely a temporary need.

36 It should be borne in mind in that regard that the Court has held previously that the renewal of fixed-term employment contracts or relationships in order to cover needs which are, in fact, not temporary in nature but, on the contrary, fixed and permanent, is not justified under clause 5(1)(a) of the FTW Framework Agreement (see, to that effect, *Angelidaki and Others*, paragraph 103).

37 Such use of fixed-term employment contracts or relationships conflicts directly with the premiss on which the FTW Framework Agreement is founded, namely that contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (see *Adeneler and Others*, paragraph 61).

38 However, as the Polish Government has, in essence, argued, the mere fact that fixed-term employment contracts are concluded in order to cover an employer's permanent or recurring need for replacement staff does not in itself suffice to rule out the possibility that each of those contracts, viewed individually, was concluded in order to ensure a temporary replacement. Whilst the replacement covers a permanent need, in that the employee hired under a fixed-term contract performs specifically-defined tasks which are part of the undertaking's usual activities, the fact remains that the

need for replacement staff remains temporary in so far as the employees who have been replaced are supposed to return to work at the end of the leave, which leave is the reason why those employees are prevented temporarily from performing their tasks themselves.

39 It is for all the authorities of the Member State concerned to ensure, for matters within their respective spheres of competence, that clause 5(1)(a) of the FTW Framework Agreement is complied with by ascertaining that the renewal of successive fixed-term employment contracts or relationships is actually intended to cover temporary needs and that a provision such as point 3 of Paragraph 14(1) TzBfG is not, in fact, being used to meet fixed and permanent needs (see, by analogy, *Angelidaki and Others*, paragraph 106).

40 As observed by the Commission, it is for those authorities to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term employment contracts or relationships, even those ostensibly concluded to meet a need for replacement staff, are not abused by employers (see, to that effect, order of 12 June 2008 in Case C-364/07 *Vassilakis and Others*, paragraph 116, and *Angelidaki and Others*, paragraph 157). Although the assessment of the objective reason put forward must refer to the renewal of the most recent employment contract concluded, the existence, number and duration of successive contracts of that type concluded in the past with the same employer may be relevant in the context of that overall assessment.

41 It is clear in that regard that the fact that the number or duration of fixed-term contracts may be the subject of preventive measures provided for in clause 5(1)(b) and (c) of the FTW Framework Agreement does not mean that those factors may not have any impact on the assessment of the objective reasons provided for in clause 5(1)(a) and relied on to justify the non-renewal of successive fixed-term contracts.

42 Contrary to the German Government's submissions, such an interpretation of clause 5(1) of the FTW Framework Agreement does not in any way affect the discretion that that provision allows the Member States as to the choice of methods.

43 As observed by the Commission, given the objective pursued by all of the measures adopted under clause 5(1) of the FTW Framework Agreement, the competent authorities must, even where there is an objective reason justifying in principle the use of successive fixed-term employment contracts or relationships, take account, where necessary, of all the circumstances surrounding the renewal of those employment contracts or relationships, as those circumstances may reveal signs of abuse which that clause is aimed at preventing.

44 At the hearing, in response to a question asked by the Court, both the *Land* and the German Government recognised the possible existence of circumstances in which an employer would be obliged to take account of the nature and scope of the fixed-term contracts concluded with an employee.

45 Since clause 5(1) of the FTW Framework Agreement applies only where there are successive fixed-term employment contracts or relationships (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 41 and 42), it is logical that the existence of a succession of fixed-term employment contracts or relationships will be relevant in respect of all measures taken on the basis of that clause.

46 In the context of its first question, the referring court also asks whether the fact that the need for replacement staff is, in reality, permanent or recurring and that the employer may also cover that need through the hiring of an employee under a contract of indefinite duration might rule out the possibility that a need for replacement staff may constitute an objective reason under clause 5(1)(a) of the FTW Framework Agreement.

47 It should be borne in mind in that regard that, as is apparent from paragraph 10 of the general considerations of the FTW Framework Agreement, the agreement allows the Member States and social partners to define the detailed arrangements for application of the principles and requirements which it lays down, in order to ensure that they are consistent with national law and/or practice and that due account is taken of the particular features of specific situations (*Adeneler and Others*, paragraph 68, and *Angelidaki and Others*, paragraph 71).

48 As observed by the German and Polish Governments, it follows that, by virtue of clause 5(1) of the FTW Framework Agreement, the Member States have a certain discretion as to how they achieve the objective referred to in that clause, provided nevertheless that they guarantee the result imposed by European Union law, as is clear not only from the third paragraph of Article 288 TFEU, but also from the first paragraph of Article 2 of Directive 1999/70 read in the light of recital 17 in the preamble to that directive (*Angelidaki and Others*, paragraph 80 and case-law cited).

49 That discretion is also apparent from clause 5(1) of the FTW Framework Agreement when it makes it possible for Member States to take account of the needs of specific sectors and/or categories of workers involved, provided it is justified on objective grounds (Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 45).

50 The mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of indefinite duration does not mean that an employer who decides to use fixed-term contracts to address temporary staffing shortages, even where those shortages are recurring or even permanent, is acting in an abusive manner, contrary to clause 5(1) of the FTW Framework Agreement and the national legislation implementing that agreement.

51 As is clear from paragraph 43 of this judgment, the existence of an objective reason under clause 5(1)(a) of the FTW Framework Agreement precludes, in principle, there being abuse, except where an overall assessment of the circumstances surrounding the renewal of the relevant fixed-term employment contracts or relationships reveals that the work required of the employee does not meet merely a temporary need.

52 The Court has, moreover, held previously that clause 5(1)(a) of the FTW Framework Agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used, giving Member States a margin of discretion in the matter (*Adeneler and Others*, paragraph 91; *Marrosu and Sardino*, paragraph 47; and *Angelidaki and Others*, paragraphs 145 and 183).

53 Thus, clause 5(2)(b) of the FTW Framework Agreement provides merely that the Member States may, 'where appropriate', determine under what conditions fixed-term employment contracts or relationships are to be 'deemed to be contracts or relationships of indefinite duration'.

54 To require automatically the conclusion of contracts of indefinite duration when the size of the undertaking or entity concerned and the composition of its personnel mean that the employer is faced with a recurring or permanent need for replacement staff would go beyond the objectives pursued by the FTW Framework Agreement and Directive 1999/70 and would disregard the discretion those instruments leave the Member States and, where applicable, the social partners.

55 It is for the referring court to assess, in the light of the foregoing considerations, whether, in the circumstances of the case in the main proceedings, the employment of an employee over a period of 11 years on the basis of 13 successive fixed-term contracts complies with clause 5(1) of the FTW Framework Agreement.

56 Accordingly the answer to the first question is that clause 5(1)(a) of the FTW Framework Agreement must be interpreted as meaning that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the FTW Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

The second question

57 Since Question 2 arises only if the answer to Question 1 is in the affirmative, there is no need to answer it.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Clause 5(1)(a) of the Framework Agreement on fixed-term work, concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as meaning that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, for matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

[Signatures]