JUDGMENT OF THE COURT (Fourth Chamber)

24 June 2010 *

In Case C-98/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Trani (Italy), made by decision of 9 June 2008, received at the Court on 6 March 2009, in the proceedings

Francesca Sorge

v

Poste Italiane SpA,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: N. Jääskinen,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2010,

after considering the observations submitted on behalf of:

— Ms Sorge, by V. Martire and V. De Michele, avvocati,

— Poste Italiane SpA, by R. Pessi, L. Fiorillo and A. Maresca, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

— the European Commission, by M. van Beek and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2010,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Clause 8(3) of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), contained 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 That reference has been made in proceedings between Ms Sorge and her employer, Poste Italiane SpA ('Poste Italiane'), concerning the lawfulness of the clause indicating that the applicant's contract of employment was concluded for a fixed term without mentioning either the name of the worker replaced or the reasons for that worker's absence.

Legal context

The relevant provisions of European Union law

3 The basis of Directive 1999/70 is Article 139(2) EC and its purpose, as provided in Article 1, is 'to put into effect the framework agreement'.

4 It is stated in recital 3 in the preamble to the Directive that:

— 'Point 7 of the Community Charter of the Fundamental Social Rights of Workers provides, inter alia, that "the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work".'

5 The second paragraph in the preamble to the framework agreement states:

'The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers.'

6 According to the third paragraph in that preamble, the framework agreement sets out the general principles and minimum requirements relating to fixed-term work, establishing, in particular, a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on a basis acceptable to employers and workers.

7 The seventh general consideration in the framework agreement states:

'Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;'.

8 Clause 2 of the framework agreement provides:

'1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.

2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:

(a) initial vocational training relationships and apprenticeship schemes;

(b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.'

9 Clause 3 of the framework agreement is worded as follows:

'1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.'

10 Clause 5 of the framework agreement 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.'

11 Clause 8 of the framework agreement provides:

‘1. Member States and/or the social partners can maintain or introduce more favourable provisions for workers than set out in this agreement.

…

3. Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.

…

5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practice.

…’

The relevant provisions of national law

The legislation repealed

12 Article 1 of Law No 230 on fixed-term employment contracts (Legge No 230, disciplina del contratto di lavoro a tempo determinato) of 18 April 1962 (GURI No 125 of 17 May 1962, 'Law No 230/1962'), provided:

'An employment contract shall be considered to be an open-ended contract, without prejudice to the exceptions set out below:

A contract may state the date on which it is to end:

…

(b) where the recruitment takes place in order to replace absent workers who are entitled to retain their post, provided that the fixed-term employment contract gives the name of the replaced worker and the reason for his replacement;

…

Any date stated on which the contract is to end shall be ineffective unless recorded in writing.

The employer must provide the employee with a copy of the written document.

…'

The legislation applicable to the case in the main proceedings

13 Article 11 of Legislative Decree No 368 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (decreto legislativo n. 368, attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES) of 6 September 2001 (GURI No 235 of 9 October 2001, p. 4, 'Legislative Decree No 368/2001'), adopted pursuant to Law No 422 laying down provisions to comply with the obligations arising from Italy's membership of the European Communities – Community Law 2000 (legge n. 422, disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – legge comunitaria 2000) of 29 December 2000 (ordinary supplement to GURI No 16 of 20 January 2001) repealed Law No 230/1962 as from 24 October 2001.

14 Article 1 of that Legislative Decree provides:

'1. An employment contract may state the date on which it is to end for technical, production or organisational reasons, or for the purpose of replacing employees.

The fixing of a date for the end of the contract shall be ineffective unless recorded, directly or indirectly, in a written document specifying the reasons set out in paragraph 1.

…'

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

15 It is apparent from the order for reference that Ms Sorge was engaged by Poste Italiane under a fixed-term employment contract concluded on 29 September 2004. According to the terms of the contract, she was engaged 'for replacement reasons relating to the specific need to replace personnel assigned to the delivery service of the Puglia Basilicata mail office absent during the period from 1 October 2004 to 15 January 2005'.

16 On 18 February 2008, Ms Sorge brought an action against Poste Italiane, for a declaration that that the clause fixing a term to that contract was unlawful, because it did not expressly state the name of the worker replaced or the reason for that replacement.

17 Poste Italiane denies that it was obliged to mention those matters, pleading the fact that Article 1(2)(b) of Law No 230/1962 was repealed by Article 11(1) of Legislative Decree No 368/2001.

18 The national court notes that the contract at issue in the main proceedings is governed by Legislative Decree No 368/2001, the object of which is the transposition into Italian law of Directive 1999/70. That decree repealed Law No 230/1962 and its subsequent amendments, including Article 1(2)(b).

19 According to the national court, it follows that the matter of the replacement of a worker is henceforth governed by Article 1(1) of Legislative Decree No 368/2001, which merely permits 'an employment contract to be concluded for a fixed term for reasons related to replacement of workers', without requiring the name of the person replaced and the reasons for his replacement to be given in the contract. That change amounts to a reduction in the protection afforded to workers.

20 Those were the circumstances in which the Tribunale di Trani decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Clause 8 of the Framework Agreement put into effect by Directive 1990/70/EEC be interpreted as precluding domestic rules (such as those laid down by Articles 1 and 11 of Legislative Decree No 368/2001) which, in implementation of Council Directive 1999/70 …, repealed Article 1(2)(b) of Law No 230/1962, according to which it was "permitted to impose a time-limit on the duration of the contract … where the recruitment" took "place in order to replace absent

workers" who "retained the right to their post, provided that in the fixed-term contract" "an indication was given of the name of the worker replaced and the reasons for his replacement", substituting for it a provision which no longer imposes that obligation to give details?

2. If the answer given to the first question is affirmative, is the national court required to disapply the national legislation that conflicts with Community law?'

Admissibility of the reference for a preliminary ruling

21 Poste Italiane claims that the questions referred lack relevance and are, therefore, inadmissible.

22 Poste Italiane takes the view that an answer to the first question was given in Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071. That judgment makes it clear that the Court leaves to the national court the task of ascertaining independently whether the domestic law is compatible with the principles enshrined in Clause 8(3) of the framework agreement.

23 With regard to the second question, and relying on paragraphs 208 to 212 of *Angelidaki and Others*, Poste Italiane considers that none of the provisions of Legislative Decree No 368/2001 has given rise to any unfavourable changes in the rules applicable to the workers concerned. The Court, for its part, refused to consider that Clause 8(3) of the Framework agreement may have direct effect. It follows that the national court could not refrain from applying the national rules, even those incompatible

with European Union law, but could only give them an interpretation in conformity with the provisions of that law.

24 It is to be borne in mind that, according to the Court's case-law, in the context of the cooperation between the Court and national courts under Article 234 EC, it is for the national court before which the dispute has been brought, which alone has direct knowledge of the facts giving rise to that case and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, when the questions submitted by the national court concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 34 and 35; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 41; and the order of 12 June 2008 in C-364/07 *Vassilakis and Others* [2008] ECR I-0090, paragraph 42 and case-law cited).

25 In this connection, the questions whether domestic legislation such as Legislative Decree No 368/2001 is incompatible with Clause 8 of the framework agreement and, if so, what consequences may possibly follow from such incompatibility are clearly not unrelated to the subject-matter of the case in the main proceedings and concern the interpretation of European Union law.

26 In the light of those considerations, the reference for a preliminary ruling must be considered admissible.

Concerning the questions referred

The first question

27 By its first question, the national court asks whether Clause 8(3) of the framework agreement must be interpreted as precluding domestic legislation such as Legislative Decree No 368/2001 which, on the transposition into domestic law of Directive 1999/70 and the framework agreement, abolished the requirement for the employer to indicate in the fixed-term contract concluded for the purpose of replacing absent workers the names of those workers and the reasons for their replacement.

28 According to that court, Legislative Decree No 368/2001 constitutes 'a reduction' of the general level of protection afforded to fixed-term workers for the purpose of Clause 8(3) of the framework agreement, because the worker may no longer, on signing the contract, demand to be given certain information which was formerly compulsory and which enabled the worker to assess in advance whether the reason for the contract was genuine and actually existed, to be fully informed and, lastly, to decide whether it would be appropriate to bring legal proceedings.

29 In order to rule on the questions referred, it is necessary to examine, in the first place, whether the conclusion of a first fixed-term contract falls within the ambit of the framework agreement and, in the second place, whether the amendment of the domestic legislation by Legislative Decree No 368/2001, intended to transpose Directive 1999/70 and the framework agreement, may, on the one hand, be regarded as linked to the 'implementation' of that agreement and, on the other, relate to the 'general level of protection' afforded to workers within the meaning of clause 8(3) of the agreement (*Angelidaki and Others*, paragraph 130).

The ambit of the framework agreement

30 According to the actual wording of clause 2 of the framework agreement, the agreement applies to any fixed-term worker having an employment contract or relationship defined by the legislation, collective agreements or practice in force in each Member State (*Angelidaki and Others*, paragraph 114).

31 By virtue of clause 3 of the framework agreement, the definition of 'fixed-term worker' covers 'a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event' (*Angelidaki and Others*, paragraph 115).

32 Lastly, clause 8 of the framework agreement provides that implementation of the latter by the Member States or the social partners may not constitute 'valid grounds for reducing the general level of protection afforded to workers' in the field covered by the agreement.

33 It is, therefore, clear both from the objective of Directive 1999/70 and the framework agreement and from the wording of the relevant provisions thereof that, contrary to what the Italian Government in essence maintains, the sphere of that agreement is not limited solely to workers having entered into successive fixed-term employment contracts; on the contrary, the agreement is applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer, whatever the number of fixed-term contracts concluded by those workers (*Angelidaki and Others*, paragraph 116 and case-law cited).

34 Furthermore, it follows from the Court's case-law, first, that in the light of its objectives clause 8(3) of the framework agreement cannot be interpreted restrictively (*Angelidaki and Others*, paragraph 113) and, secondly, that the existence of a 'reduction' for the purposes of clause 8(3) of the framework agreement must be considered in relation to the whole of a Member State's domestic law relating to the protection of workers in the context of fixed-term employment contracts (*Angelidaki and Others*, paragraph 120).

35 The Court inferred therefrom that clause 8(3) of the framework agreement must be interpreted as meaning that the 'reduction' to which it refers must be considered in relation to the general level of protection applicable, in the Member State concerned, both to workers having entered into successive fixed-term employment contracts and to workers having concluded a first or single fixed-term employment contract (*Angelidaki and Others*, paragraph 121).

The interpretation of clause 8(3) of the framework agreement

36 It is to be noted at the outset that, given that it is for the national courts alone to interpret national law, it is for them to determine to what extent the abovementioned amendments made by Presidential Decree No 368/2001 to previous national law, as contained in Law No 230/1962, entailed a reduction in the protection of workers having entered into a fixed-term employment contract, by comparing for that purpose the degree of protection afforded by each of those provisions of national law.

37 By contrast, it is for the Court, where appropriate, in giving a preliminary ruling, to provide the referring court with guidance to assist it in its assessment whether that possible reduction in the protection of workers having entered into a fixed-term employment contract constitutes a 'reduction' for the purposes of clause 8(3) of the framework agreement. In order to do so, it is necessary to consider to what extent the amendments introduced by the national legislation intended to transpose Directive 1999/70 and the framework agreement may be deemed to be connected to the 'implementation' of that agreement and, moreover, may relate to the 'general level of protection' afforded to workers within the meaning of clause 8(3) (*Angelidaki and Others*, paragraph 130).

38 As regards, in the first place, the implementation of the framework agreement, the express purpose of Legislative Decree No 368/2001 is to transpose Directive 1999/70 and that decree was adopted in order to give effect to Law No 422 of 29 December 2000.

39 It is not inconceivable that the amendments to previous domestic law made by Legislative Decree No 368/2001 may be linked to the implementation of the framework agreement, since, according to the order for reference, when Directive 1999/70 and the framework agreement were adopted fixed-term workers had the benefit of the protective measures provided for by Law No 230/1962, irrespective of the fact that the content of Article 1 of that legislative decree does not relate to any express provision of the framework agreement.

40 In order to conduct such an assessment, it will be for the national court to ascertain whether the abolition of the employer's obligation to state, in the fixed-term contract concluded for the purpose of replacing absent workers, the names of those workers and the reasons for their replacement amounts to an alteration of the legal rules governing fixed-term employment contracts as a result of the national legislature's wish to achieve a fresh balance in the relations between employers and workers in that sphere, taking account of the new safeguards provided for by the framework agreement, or an alteration stemming from a clearly identified different objective.

The national court will have, in particular, to examine whether the abolition of the requirement laid down by Law No 230/1962 can be regarded as following from the wish to counterbalance, in order to alleviate the constraints weighing on employers, the rules regulating the protection of workers introduced by Legislative Decree No 368/2001 with a view to giving effect to the framework agreement.

41 It can already, however, be stated that it is not apparent from the order for reference that the national legislature wished, by making the amendments at issue in the main proceedings, to pursue any objective other than to give effect to the framework agreement, which also is for the national court to establish.

42 As regards, in the second place, the condition that the reduction must relate to the 'general level of protection' afforded to fixed-term workers, this implies that only a reduction on a scale likely to have an effect overall on national legislation relating to fixed-term employment contracts is capable of being covered by clause 8(3) of the framework agreement (*Angelidaki and Others*, paragraph 140, and order of 24 April 2009 in Case C-519/08 *Koukou* [2008] ECR I-0065, paragraph 119).

43 In the present case, the amendments of previous domestic law made by Legislative Decree No 368/2001 do not affect all workers having concluded a fixed-term employment contract but only those having concluded such a contract in order to replace another employee, the opportunity to make use of those contracts being one of those provided for in Article 1(1) of that legislative decree.

44 In so far as the latter workers do not represent a significant proportion of workers employed for a fixed term in the Member State concerned, which it is for the national court to ascertain, the reduction in the protection afforded to that limited category of

workers is not, in itself, likely to have an effect overall on the level of protection applicable under the domestic legal order to workers bound by fixed-term employment contracts.

45 In addition, according to Article 1(2) of Legislative Decree No 368/2001, fixed-term contracts must be in writing and must state the reasons for their use. If not, the indication of the date on which the contract is to end will be ineffective. Law No 230/1962 merely provided that the term of the contract must be stated in writing, without the objective reason for the conclusion being given, except in the situation in which an employee is replaced.

46 Lastly, as the Advocate General has observed in point 54 of his Opinion, the amendment of the domestic legislation at issue in the main proceedings must be assessed having regard to all the other safeguards it provides in order to protect workers employed under fixed-term contracts, such as measures to prevent the wrongful use of successive fixed-term contracts or those designed to prohibit discrimination against workers having concluded such contracts.

47 In those circumstances, it must be concluded that amendments to domestic legislation, such as those at issue in the main proceedings, do not constitute a 'reduction' in the general level of protection afforded to fixed-term workers for the purposes of clause 8(3) of the framework agreement, in so far as they concern a limited category of workers having entered into a fixed-term employment contract or are offset by the adoption of other safeguards or protective measures, which it is for the national court to ascertain.

48 The answer to the first question is, therefore, that clause 8(3) of the framework agreement must be interpreted as not precluding domestic legislation, such as that in issue in the main proceedings, which has abolished the requirement for the employer to indicate in fixed-term contracts concluded for the purpose of replacing absent workers the names of those workers and the reasons for their replacement, and which merely provides that such fixed-term contracts must be in writing and must indicate the reasons for the use of those contracts, in so far as those new conditions are offset by the adoption of other safeguards or protective measures or concern only a limited category of workers having entered into a fixed-term employment contract, which it is for the national court to ascertain.

The second question

49 By its second question, the national court seeks in essence to ascertain whether it is bound, by virtue of European Union law, to disapply domestic legislation, such as Legislative Decree No 368/2001, if that legislation is not compatible with the provisions of the framework agreement and, if so, whether it must apply Article 1 of Law No 230/1962.

50 It is to be borne in mind that the Court has held that clause 8(3) of the Framework Agreement does not fulfil the conditions required in order to have direct effect. First, clause 8(3) relates only to the 'implementation' of that agreement by the Member States and/or the social partners, on whom it is incumbent to transpose the agreement into the domestic legal order, prohibiting them from justifying, in that transposition, a reduction in the general level of protection afforded to workers by the need to put the Framework Agreement into effect. Second, by simply prohibiting, in its own words, 'reducing the general level of protection afforded to workers in the

field of [that framework] agreement', that clause implies that only a reduction on a scale likely to have an effect overall on national legislation relating to fixed-term employment contracts is capable of falling within its ambit. However, individuals would not be able to infer from such a prohibition any right that would be sufficiently clear, precise and unconditional (see to that effect *Angelidaki and Others*, paragraphs 209 to 211, and *Koukou*, paragraph 128).

51 Nevertheless, the national courts are bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the framework agreement in question in order to achieve the result sought by the latter and, consequently, to comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law concerns all provisions of national law, whether adopted before or after the framework agreement in question (see, by analogy, *Adeneler and Others*, paragraph 108, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 48).

52 It is true that the obligation that the national court should refer to the content of the framework agreement when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see, by analogy, *Adeneler and Others*, paragraph 110).

53 The principle that national law must be interpreted in conformity with European Union law none the less requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by the latter, with a view to ensuring that the framework agreement in question is fully effective and achieving an outcome consistent with the objective pursued by it (see, by analogy, *Adeneler and Others*, paragraph 111).

54 In addition, as the Advocate General has observed in point 68 of his Opinion, that principle of interpretation in conformity with European Union law cannot have the effect of rendering applicable to the case before the national court rules of national law which are not formally valid or relevant either *ratione materiae* or *ratione temporis*.

55 The answer to be given to the second question is, therefore, that because clause 8(3) of the framework agreement has no direct effect, it is for the national court, if it should be led to conclude that the national legislation at issue in the main proceedings is incompatible with European Union law, not to disapply it but, so far as possible, to give it an interpretation in conformity with Directive 1999/70 and with the objective pursued by the framework agreement.

Costs

56 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 (Fourth Chamber) hereby rules:

1. Clause 8(3) of the framework agreement on fixed-term work, concluded on 18 March 1999 contained 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 not precluding domestic legislation, such as that in issue in the main proceedings, which has

abolished the requirement for the employer to indicate in fixed-term contracts concluded for the purpose of replacing absent workers the names of those workers and the reasons for their replacement, and which merely provides that such fixed-term contracts must be in writing and must indicate the reasons for the use of those contracts, in so far as those new conditions are offset by the adoption of other safeguards or protective measures or concern only a limited category of workers having entered into a fixed-term employment contract, which it is for the national court to ascertain.

2. Because clause 8(3) of that framework agreement has no direct effect, it is for the national court, if it should be led to conclude that the national legislation at issue in the main proceedings is incompatible with European Union law, not to disapply that provision but, so far as possible, to give it an interpretation in conformity with Directive 1999/70 and with the objective pursued by that framework agreement.

[Signatures]