Case C-681/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

31 October 2018

Referring court:

Tribunale ordinario di Brescia (Italy)

Date of the decision to refer:

16 October 2018

Applicant:

JH

Defendant:

KG

Subject matter of the action in the main proceedings

Action brought by a temporary agency worker seeking the establishment of an employment contract of indefinite duration with the user undertaking, claiming in that regard that the latter's uninterrupted use of supply work from 3 March 2014 to 30 November 2016 by means of repeated extensions of the contract in question was unlawful.

Subject matter and legal basis of the reference

Interpretation of the restrictions imposed by Directive 2008/104/EC on temporary agency work and, in particular, the question of whether national legislation which allows the general use of supply work by the same user undertaking, beyond precise time limits and specific technical, production, organisational or replacement reasons, is contrary to that directive.

Article 267 TFEU

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Question referred

Must Article 5(5) of Directive 2008/104/EC of 19 November 2008 be interpreted as precluding the application of Legislative Decree No 276/2003, as amended by Decree Law 34/2014, which: (a) does not place limits on successive assignments of the same worker to the same user undertaking; (b) does not require that, in order for the use of fixed-term supply work to be lawful, there must be technical, production, organisational or replacement reasons for having recourse to such supply work; (c) does not provide that, in order for the use of such a form of employment contract to be lawful, the production requirement of the user undertaking must be temporary in nature?

Provisions of EU law invoked

Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work: in particular recitals 10 and 15 and Articles 1, 2, 3 and 5

Provisions of national law invoked

A) Decreto legislativo 10 settembre 2003, n. 276, recante "*Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30*", come modificato dal decreto legge 34/2014, convertito con modificazioni dalla legge 78/2014 (Legislative Decree No 276/2003 on the application of delegations in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003, as amended by Decree Law No 34/2014, converted into law with amendments by Law 78/2014) ('Legislative Decree No 276/2003')

In particular, the legislative amendment of 2014 removed from Article 20(4) of Legislative Decree No 276/2003 both the provision which stated '*the use of fixed-term supply work is permitted for technical, production or organisational reasons, or for replacement purposes, even if those reasons relate to the ordinary business activity of the user*', and the requirement to indicate such reasons in the written contract.

Article 22(2) of Legislative Decree No 276/03 provides that where fixed-term supply work is used, the employment relationship between the agency and the worker is governed by the provisions of Legislative Decree No 368/01, '*with the exclusion of Article 5(3) et seq. thereof*.' The initial term of the employment contract may in any event be extended, with the written consent of the worker, in the circumstances and for the duration provided for in by the CCNL (national collective labour agreement) by which the agency is bound.

Article 27 of Legislative Decree No 276/03, headed 'Unlawful use of temporary supply workers', provides that, if the supply of workers does not remain within

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the limits and conditions laid down in that same legislative decree, a worker may, by means of an action which may be brought only against the user, request that an employment relationship be declared to exist between himself and the user, with effect from the beginning of the supply.

(B) Decreto legislativo 6 settembre 2001, n. 368 recante "*Attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CESA*" (Legislative Decree No 368 of 6 September 2001 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) in its version applicable *ratione temporis*.

Article 1. Imposition of a fixed term

'01. Employment contracts of an indefinite duration shall be the general form of employment relationship.

1. A fixed term may be established for the duration of a contract of employment; such term shall be no longer than 36 months, inclusive of any extensions, and shall be concluded between an employer and a worker for the performance of any kind of duties, either in the form of a fixed-term contract, or under a fixed-term contract for the supply of work, pursuant to ... Legislative Decree No 276 of 10 September 2003. ...'

Article 5. Expiry of term and penalties — Successive contracts

'... 3. Where a worker is re-employed for a fixed term as provided for in Article 1 within a period of 10 days from the expiry of a contract for a term of up to 6 months, or 20 days from the expiry of a contract for a term of more than 6 months, the second contract shall be considered to be of indefinite duration. ...

4. Where a worker is employed for two successive fixed terms, which shall be understood to mean relationships between which there is no break in continuity, the employment relationship shall be considered to be of indefinite duration from the date on which the first contract was made.

4-bis. Without prejudice to the rules on successive contracts set out in the preceding paragraphs and without prejudice to the various provisions set out in collective agreements ..., where, as a result of a succession of fixed-term contracts for the performance of equivalent tasks, an employment relationship between the same employer and the same worker continues for an overall period of more than 36 months, including any extensions and renewals, disregarding any breaks between one contract and another, the employment relationship shall be regarded as being a relationship of indefinite duration ..'.

(C) Articles 1344 and 1421 of the Italian Civil Code, which provide that contracts entered into for the purpose of circumventing the application of mandatory rules are invalid

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Succinct presentation of the facts and the procedure in the main proceedings

1 JH, a worker hired by a temporary-work agency, was employed at the company KG (the user undertaking), as a machine and lathe worker from 3 March 2014 to 30 November 2016 by means of successive contracts for the temporary supply of work (eight in total) and extensions (16 in total).

2 JH brought proceedings against the company KG before the referring court pursuant to Article 27 of Legislative Decree No 276/2003.

3 The applicant claimed that the referring court should:

(a) find and declare that the contracts for the temporary supply of work under which he worked for the defendant company are unlawful and/or invalid;

(b) declare, in his favour, that an employment relationship of indefinite duration exists between the applicant and the defendant;

(c) order the defendant to reinstate the applicant, and to pay him due compensation and the corresponding social security contributions and taxes in respect of him.

4 The defendant company has not defended this action.

Main arguments of the parties in the main proceedings

5 The applicant put forward the following pleas:

(a) exceedance of the maximum number of extensions allowed and failure to indicate the reasons for using temporary supply of work, contrary to the CCNL (national collective labour agreement) for the category of temporary-work agencies, signed on 27 February 2014;

(b) absence of exceptional, temporary or interim reasons for the individual contracts and, in any event, infringement of the EU rules on successive supply contracts, in particular Article 5(5) of Directive 2008/104/EC;

(c) consequent invalidity, pursuant to Articles 1344 and 1421 of the Civil Code, of the contracts entered into with the defendant, for the purpose of circumventing the application of mandatory rules.

6 However, the applicant has noted that the national law on temporary agency work applicable *ratione temporis* to his case:

(a) provides for no limitations on giving temporary supply workers ‘successive assignments’ to the same user undertaking, contrary to Article 5(5) of Directive 2008/104/EC;

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(b) does not require that, in order for the use of temporary supply work to be lawful, the production requirement must be temporary, contrary to Directive 2008/104/EC, in particular recitals 15 and 10 thereof;

(c) does not prohibit, upon expiry of the sixth extension of the contract and without interruption, the conclusion of a new contract.

7 Accordingly, the applicant has asked the referring court to submit a request to the Court of Justice of the European Union that it interpret that directive with reference to the national legislation at issue.

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

8 The referring court has decided to refer a question to the Court of Justice of the European Union for a preliminary ruling, observing, in summary, as follows.

9 The legislation applicable *ratione temporis* to the contracts at issue in this case is Legislative Decree No 276/2003, as amended by Decree Law 34/2014, converted into law with amendments by Law 78/2014.

10 In particular, the legislative amendment of 2014 removed from Article 20(4) of Legislative Decree No 276/2003 the provision which stated '*the use of fixed-term supply work is permitted for technical, production or organisational reasons, or for replacement purposes, even if those reasons relate to the ordinary business activity of the user*', as well as the requirement to indicate such reasons in the written contract.

11 In the light of those provisions, the application brought by JH would inevitably have to be dismissed.

12 Indeed, that legislation does not provide:

(a) that the contracts must indicate the technical, production or organisational reasons, or replacement purposes for using temporary supply work;

(b) that such reasons must be temporary in nature;

(c) for any limit on successive assignments of a worker to the same user undertaking, given that Article 22 of Legislative Decree No 276/2003 expressly excludes the applicability of Article 5(3) of Legislative Decree No 368/2001, which, with regard to fixed-term contracts, limits the possibility of entering into successive contracts and establishes, in any event, a maximum duration of 36 months.

13 Those provisions appear to be at variance with Directive 2008/104/EC in so far as they do not allow for any judicial review of the reasons for use of temporary supply work and do not place limits on successive assignments of the same worker to the same user undertaking.

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14 In particular, the referring court agrees with the applicant's observation that the national legislation in question is contrary to recital 15 of Directive 2008/104/EC, which recognises contracts of indefinite duration as being the general form of employment relationship, and to Article 5(5) of that directive, which requires Member States to take appropriate measures to prevent successive assignments designed to circumvent its provisions.

15 In addition, the referring court points out that the national legislation is contrary to Articles 1(1) and 3(1)(b), (c), (d) and (e) of Directive 2008/104/EC: all of these are provisions which presuppose and stress the *temporary nature* of the assignment of workers to user undertakings.

16 Lastly, the referring court excludes the applicability of the CCNL (national collective labour agreement for temporary-work agencies), signed on 27 February 2014, invoked in the present action, on the basis that it applies only as regards the relationship between workers and temporary-work agencies. Moreover, those rules, in their version applicable at the time of the facts, do not require the reasons for the use of temporary supply work to be indicated in the contract, or prohibit the conclusion of a new contract, immediately after the termination of the sixth extension of the previous contract, without interruption.

17 With regards to the relevance of the question referred, the referring court notes that, if Directive 2008/104/EC were found to preclude the national legislation referred to above, JH's action would have to be upheld; otherwise, it would have to be rejected.

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