

Employment & Benefits - Poland

Non-discrimination of fixed-term employees

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On March 13 2014,⁽¹⁾ the European Court of Justice (ECJ) ruled that the Polish Labour Code provision regarding notice periods applicable to fixed-term employment contracts infringes the prohibition against treating fixed-term employees less favourably than permanent employees⁽²⁾ if the situations of those employees are comparable. Until this provision is amended, it remains to be seen how the judgment will affect Polish court practice in similar matters.

Facts

The employee was employed by a public entity from May 12 1986 until February 15 2010, when the employment contract was terminated by mutual agreement at the request of the employee, who wished to take early retirement. For most of the employment period, the parties were bound by an open-ended employment contract. Subsequently, the parties concluded a fixed-term employment contract for the period from February 16 2010 to February 3 2015. Pursuant to the contract, the employer could unilaterally terminate the contract with two weeks' notice without justification, in accordance with Article 33 of the Labour Code. On April 3 2012 the employer terminated the contract with notice, with effect from April 21 2012.

The employee filed suit against the employer before the labour court and requested that the fixed-term contract be reclassified as an open-ended contract, in which case she would have been entitled to three months' notice, given the length of her service. The employee argued that the conclusion of a fixed-term contract for a period of several years was unlawful, as it was intended to circumvent national law and deprive her of the rights she could have relied on had the employment contract been open ended.

The labour court decided to suspend the proceedings and to refer the question to the ECJ for a preliminary ruling concerning the discriminatory nature of Article 33 of the Labour Code. This provides that a fixed-term contract of more than six months' duration may provide for a two-week notice period; for an open-ended contract, that period is between two weeks and three months, depending on the employee's length of service.

Decision

The ECJ held that Article 33 infringes the prohibition against treating fixed-term employees less favourably than permanent employees if the situations of such employees are comparable.

Clause 4(1) of the Framework Agreement on Fixed-Term Work (March 18 1999), which is annexed to EU Directive 1999/70/EC, prohibits employers from treating fixed-term employees less favourably than comparable permanent employees solely because they have fixed-term contracts, unless such different treatment is justified on objective grounds.

The court held that employees' situations are comparable if they carry out work that is identical or similar. In the court's view, the fact that the employee previously held the same job as the employee with an open-ended contract suggested that their situations were comparable.

In the court's opinion, the mere temporary nature of employment – which was cited by the Polish government – did not constitute objective grounds for distinguishing the employee's situation from that of a permanent employee. Different treatment with regard to employment conditions cannot be justified on the basis of a criterion which refers precisely to the term of the employment. If the mere temporary nature of an employment relationship were held to justify such a difference, the objectives of the EU Directive 1999/70 and the Framework Agreement would be negated.

Comment

As a consequence of the court's judgment, Article 33 should be amended. Until this provision is

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amended, it remains to be seen how the judgment will affect Polish court practice in similar matters. Polish courts may assume that until the provisions of the Labour Code in this respect are amended, the two-week notice period applicable to fixed-term contracts remains in force. In particular the courts may state that the obligation to interpret the national law in line with the directive and EU law in general cannot result in a conflict with national law.

However, a refusal to allow a two-week notice period due to the inadmissible differences in the situation of fixed-term employees and based on direct effect cannot be ruled out. In an April 15 2008 judgment⁽³⁾ the ECJ stated that Clause 4(1) of the Framework Agreement is unconditional and sufficiently precise for individuals to rely on it before a national court. Although there seems to be no doubt regarding the legal nature of this provision and its vertical direct effect (ie, between an individual and the state), it is still unclear whether an individual can invoke this provision in relation to another individual – that is, whether horizontal direct effect is also possible. Unless the case pertains to a public sector employer, it is unlikely that a private employer will suffer the consequences of the improper implementation of EU law. Even if a court refuses to apply the directive directly, the employee can claim compensation for damages caused by the improper implementation of EU law against the state.

In the case at hand the labour court, which heard the case following the ECJ's judgment, ruled that as the employer was a public entity, the directive could have direct effect and thus the employer was liable for the improper implementation of EU law. Consequently, the employee was awarded compensation.

In similar cases the courts will first likely decide whether the parties to an employment contract are entitled to conclude a fixed-term employment contract. Although Polish law sets down no maximum period for such contracts, in practice, in the absence of a specific reason for conclusion of a fixed-term contract rather than an open-ended one, anything longer than two or three years could be deemed to be a contract for an indefinite period. In such cases, the court can rule that the fixed-term employment contract concluded between the parties is in fact open-ended, and thus the longer notice period should apply.

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Endnotes

(1) C-38/13.

(2) EU Directive 99/70/EC of June 28 1999 concerning the framework agreement on fixed-term work concluded by European Trade Union Confederation, Union of Industrial and Employers' Confederations and European Centre of Employers and Enterprises.

(3) C-268/06.

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