ECLI:EU:C:2020:823

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

14 October 2020 (*)

(Reference for a preliminary ruling – Social policy – Directive 2008/104/EC – Temporary agency work – Article 5(5) – Equal treatment – Appropriate measures to prevent misuse of temporary agency work – Obligation for Member States to prevent successive assignments – No limits in national law – Requirement to interpret national law in conformity with EU law)

In Case C-681/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale ordinario di Brescia (District Court, Brescia, Italy), made by decision of 16 October 2018, received at the Court on 31 October 2018, in the proceedings

JH

v

KG,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, A. Kumin (Rapporteur), T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– JH, by A. Carbonelli, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and G. Rocchitta, avvocato dello Stato,

– the European Commission, initially by M. van Beek and C. Zadra, then by M. van Hoof, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(5) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

2 The request has been made in proceedings between JH and KG concerning the application by JH, a temporary agency worker assigned to KG, for recognition as a permanent employee of the latter on account, in particular, of the fact that the maximum number of extensions of temporary agency contracts permitted under national law had been exceeded.

Legal context

EU law

3 Recitals 10 to 12 and 15 of Directive 2008/104 state:

‘(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings’ needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

…

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.’

4 Article 1 of Directive 2008/104, which concerns the scope of that directive, provides in paragraph 1:

‘This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.’

5 Article 2 of that directive, headed ‘Aim’, provides:

‘The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.’

6 In Article 3 of that directive, headed ‘Definitions’, paragraph 1 provides:

‘For the purposes of this Directive:

…

(b) “temporary-work agency” means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

(c) “temporary agency worker” means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

(d) “user undertaking” means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;

(e) “assignment” means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;

(f) “basic working and employment conditions” means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay.’

7 Article 4 of Directive 2008/104, entitled ‘Review of restrictions or prohibitions’, provides in paragraph 1:

‘Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.’

8 Article 5 of that directive, headed ‘The principle of equal treatment’, is contained in Chapter II dealing with working conditions. That article is worded as follows:

‘1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;

must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

The arrangements referred to in this paragraph shall be in conformity with [Union] legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.

5. Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.’

9 Article 6 of Directive 2008/104, headed ‘Access to employment, collective facilities and vocational training’, provides, in paragraphs 1 and 2:

‘1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.’

10 Article 9 of that directive, headed ‘Minimum requirements’, provides:

‘1. This Directive is without prejudice to the Member States’ right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This is without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are respected.’

Italian law

Legislative Decree No 276/2003

11 Article 20 of decreto legislativo n. 276 – Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30 (Legislative Decree No 276 on the application of delegations in matters relating to employment and the labour market laid down by Law No 30 of 14 February 2003) of 10 September 2003 (GURI No 235, Ordinary Supplement No 159, of 9 October 2003), as amended by decreto-legge n. 34 – Disposizioni urgenti per favorire il rilancio dell’occupazione e per la semplificazione degli adempimenti a carico delle imprese (Decree-Law No 34 laying down urgent measures to stimulate employment and simplify formalities imposed on undertakings) of 20 March 2014 (GURI No 66 of 20 March 2014), converted into law, with amendments, by Law No 78/2014 (GURI No 114 of 19 May 2014) (‘Legislative Decree No 276/2003’), is headed ‘Legal conditions’ and essentially provides, in paragraph 3, that contracts for the supply of workers may be concluded for a fixed term or an indefinite term and that the supply of workers for an indefinite term is permitted only for certain types of occupations and activities listed in that provision.

12 Article 20(4) of Legislative Decree No 276/2003 provides:

‘The establishment, even in a non-uniform manner, of quantitative limits on the use of fixed-term supply work shall be dealt with in national collective agreements entered into by the comparatively most representative trade unions, in accordance with the provisions of Article 10 of [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 (Legislative Decree No 368 transposing Directive 1999/70/EC concerning the framework agreement on fixed-term work

concluded by ETUC, UNICE and CEEP) of 6 September 2001 (GURI No 235 of 9 October 2001)].'

13 In Article 21 of Legislative Decree No 276/2003, headed 'Form of contracts for the supply of workers', paragraph 1 provides:

'Contracts for the supply of workers shall be concluded in writing and shall contain the following information:

…

(c) the technical, production, organisational or replacement-related circumstances and reasons referred to in Article 20(3);

…'

14 Article 22 of that legislative decree, entitled 'Rules applicable to employment relationships', is worded as follows:

'1. Where a worker is supplied for an indefinite term, the employment relationship between the agency and the worker shall be governed by the ordinary rules of law on employment relationships set out in the Civil Code and in specific legislation.

2. Where a worker is supplied for a fixed term, the employment relationship between the agency and the worker shall be governed by the provisions of Legislative Decree No 368/01 of 6 September 2001, in so far as they are compatible, and, in any event, excluding Article 5(3) *et seq.* thereof. The initial term of the employment contract may in all cases be extended, with the written consent of the worker, in the circumstances and for the duration stipulated in the collective agreement by which the agency is bound.

…'

15 In Article 27 of that legislative decree, entitled 'Unlawful supply of workers', paragraphs 1 and 3 provide:

'1. Where the supply of workers does not observe the limits and conditions laid down in Article 20 and Article 21(1)(a), (b), (c), (d) and (e), a worker may, by means of legal proceedings under Article 414 of the Code of Civil Procedure, even if brought against the service user alone, request that an employment relationship be declared to exist in his or her capacity as employee of that service user, with effect from the beginning of the supply.

…

3. For the purposes of assessing the grounds referred to in Article 20(3) and (4) for allowing the supply of workers, review by the courts shall be exclusively limited, in accordance with general principles of law, to ascertaining whether or not grounds exist which justify such supply, and may not extend to examining the substance of the assessments and the technical, organisational or production choices made by the user.'

16 In Article 28 of that legislative decree, entitled 'Fraudulent supply of workers', paragraph 1 provides:

‘Without prejudice to the penalties laid down in Article 18, where workers are supplied for the specific purpose of circumventing mandatory provisions of the law or of a collective agreement applying to the worker, the agency and the user shall be liable for a fine of EUR 20 for each worker involved and for each day of supply.’

Legislative Decree No 368/2001

17 Article 1 of Legislative Decree No 368 of 6 September 2001, in the version applicable to the main proceedings (‘Legislative Decree No 368/2001’), provides:

‘01. Permanent employment contracts are the usual form of employment relationship.

1. An employment contract entered into by an employer and a worker for the performance of duties of any kind, whether in the form of a fixed-term contract or a fixed-term contract for the supply of workers, within the meaning of Article 20(4) of Legislative Decree [No 276/2003], may include an end date where the contract does not exceed 36 months, including any extensions. …’

18 Article 4(1) of Legislative Decree No 368/2001 provides:

‘The term of a fixed-term contract may be extended, with the employee’s consent, only if the initial duration of the contract is less than three years. In that situation, no more than 5 extensions in total shall be permitted over the period of 36 months, irrespective of the number of renewals, provided that they relate to the same occupational activity as the one for which the fixed-term contract was concluded. In that case only, the total duration of the fixed-term employment relationship may not exceed three years.’

19 Article 5 of that legislative decree, headed ‘Expiry of term and penalties – Successive contracts’, provides, in paragraphs 3 to 4 bis:

‘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 for an indefinite term. …

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 permanent 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 permanent relationship …’

The collective agreement

20 Article 47 of the Contratto collettivo nazionale di lavoro per la categoria delle agenzie di somministrazione di lavoro (national collective labour agreement for the category of temporary-work agencies), in the version applicable to the main proceedings (‘the collective agreement’),

provides that contract extensions are to be governed exclusively by that agreement. Under the collective agreement, fixed-term contracts may be extended up to six times in accordance with Article 22(2) of Legislative Decree No 276/2003. Each contract, including extensions, may not exceed 36 months.

The Civil Code

21 Articles 1344 and 1421 of the Civil Code provide that contracts concluded in order to circumvent the application of mandatory rules are invalid.

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

22 JH, an employee hired by a temporary-work agency, was assigned, as a temporary agency worker, to the user undertaking KG between 3 March 2014 and 30 November 2016 by means of several successive temporary agency contracts (8 in total) and various extensions (17 in total).

23 In February 2017, JH brought an action before the referring court, the Tribunale ordinario di Brescia (District Court, Brescia, Italy), seeking a declaration that there was a permanent employment relationship between him and KG owing to the unlawful use of successive and uninterrupted assignments between March 2014 and November 2016. He also asked that court to find and declare that the temporary agency contracts assigning him to KG were unlawful and/or improper and/or invalid.

24 In that connection, JH submits that the national provisions on temporary agency work applicable to the main proceedings are contrary to Directive 2008/104 as they do not place any limits on successive assignments of workers to the same user. In particular, it is apparent from recital 15 of that directive that, in general, employment relationships should take the form of a contract of indefinite duration. In addition, the first sentence of Article 5(5) of that directive requires Member States to take appropriate measures with a view to preventing successive assignments designed to circumvent the directive's provisions.

25 Furthermore, JH argues that the successive temporary agency contracts assigning him to KG were also unlawful under Article 1344 of the Civil Code, since they infringe both national and EU law, and under Article 1421 of that code, since they contravene the prohibition on the fraudulent supply of workers within the meaning of Article 28 of Legislative Decree No 276/2003 and are therefore invalid.

26 The referring court observes at the outset that the application of Legislative Decree No 276/2003 to the dispute before it should in principle lead it to dismiss the action brought by JH. As a consequence of the amendment made to it by Decree-Law No 34/2014, Article 20(4) of Legislative Decree No 276/2003 no longer provides, as it once did, that the supply of workers for a fixed term is permitted only for technical, production, organisational or replacement-related reasons, even if those reasons concern the ordinary business activity of the user, or that those reasons must be stated in the written contract.

27 Thus, Legislative Decree No 276/2003 does not limit the permitted number of successive assignments of temporary agency workers to the same user undertaking, since Article 22 thereof precludes the application of Article 5(3) *et seq.* of Legislative Decree No 368/2001, which, in relation to fixed-term contracts, restricts the possibility of concluding several successive fixed-term contracts and establishes, in any event, a ceiling of 36 months' employment.

28 The referring court further states that the rules set out in the collective agreement do not apply to the employment relationship between JH and KG, since those rules apply only to the relationship between workers and temporary-work agencies. In any event, that agreement also does not require the reasons for having recourse to supply work to be stated in the contract and does not prohibit the conclusion, without interruption, of a new contract immediately after the termination of the sixth extension of the previous contract.

29 The referring court takes the view that that national legislation is at odds with Directive 2008/104, particularly Article 5(5) thereof read in conjunction with recital 15, in so far as it does not make provision for any judicial review of the reasons for having recourse to temporary agency work and places no limits on successive assignments of the same worker to the same user undertaking.

30 In those circumstances, the Tribunale ordinario di Brescia (District Court, Brescia) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 5(5) of Directive 2008/104 be interpreted as precluding the application of [Legislative Decree No 276/2003], 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?'

Consideration of the question referred

Admissibility

31 The Italian Government disputes the admissibility of the request for a preliminary ruling and observes, in that regard, that the referring court gives no indication of the nature of the employment contract between JH and the temporary-work agency, specifically whether it is a fixed-term or permanent contract, whereas the legislation invoked by the referring court applies only to fixed-term employment relationships.

32 It also states that the main proceedings concern a dispute between individuals and that Directive 2008/104 does not have horizontal direct effect. The answer to the question referred for a preliminary ruling therefore has no bearing on the outcome of that dispute. The only favourable outcome possible for JH would be to obtain damages from the Italian Republic if its transposition of Directive 2008/104 were found to be incomplete or imperfect.

33 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, 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, where the questions submitted concern the interpretation of a

rule of EU law, the Court is in principle bound to give a ruling (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 33 and the case-law cited).

34 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 34 and the case-law cited).

35 It must be held that this case does not fall within any of the categories in which the Court may refuse to answer questions referred for a preliminary ruling. The referring court asks the Court for an interpretation of Article 5(5) of Directive 2008/104, a provision which is, as evidenced by the factual and legal context put forward by that court, relevant to the main proceedings. As is apparent from paragraphs 26 to 29 of this judgment, the referring court also sets out the reasons why it considers that interpretation to be necessary. The Court must therefore find that the referring court's account of both the factual circumstances of the main proceedings and the questions of law raised is sufficient to enable the Court to give a useful answer to the question submitted.

36 It should also be borne in mind that it follows from the Court's case-law that the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of EU law irrespective of whether or not they have direct effect between the parties to the underlying dispute (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 35 and the case-law cited). Therefore, the Italian Government's arguments concerning the impossibility of applying the provisions of Directive 2008/104 directly to a dispute between individuals are irrelevant.

37 In those circumstances, the reference for a preliminary ruling is admissible.

Substance

38 By its question, the referring court enquires, in essence, whether the first sentence of Article 5(5) of Directive 2008/104 must be interpreted as precluding national legislation which does not limit the number of successive assignments that the same temporary agency worker may carry out at the same user undertaking and does not make the lawfulness of the use of temporary agency work subject to the prerequisite that it must be justified by technical, production, organisation or replacement-related reasons.

39 In that regard, it must be borne in mind that Directive 2008/104 was adopted to supplement the regulatory framework established by Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) and 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), on the basis of Article 137(1) and (2) EC, which empowered the institutions to adopt, by means of directives, minimum requirements for gradual implementation relating, inter alia, to working conditions.

40 Thus, given that recitals 10 and 12 of Directive 2008/104 state that there are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union, that directive is intended to establish a protective framework for those workers which is non-discriminatory, transparent and

proportionate, while respecting the diversity of labour markets and industrial relations. Accordingly, under Article 2 of that directive, the purpose of that directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

41 To that end, Directive 2008/104 provides only for the introduction of minimum requirements, as is apparent from its legal basis, recalled in paragraph 39 of this judgment and Article 9 of the directive. Those minimum requirements seek (i) to ensure observance of the principle of equal treatment of temporary agency workers, established in Article 5 of that directive, and (ii) to review the prohibitions and restrictions applying to temporary agency work laid down by Member States so that only those which are justified on public interest grounds and which relate to the protection of workers, as provided for in Article 4 of the directive, are retained.

42 The first sentence of Article 5(5) of Directive 2008/104, which contains one of those minimum requirements, provides that Member States are to take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of that article and, in particular, to preventing successive assignments designed to circumvent the provisions of that directive. That provision therefore does not require Member States to limit the number of successive assignments of the same worker to the same user undertaking or to make the use of that form of fixed-term work subject to the prerequisite that the technical, production, organisational or replacement-related reasons be stated. Furthermore, neither that provision nor any other provision of that directive lays down any specific measure which the Member States should take for that purpose.

43 That finding is borne out by Article 4(1) of Directive 2008/104, which provides that where Member States have laid down prohibitions or restrictions on the use of temporary agency work in national law, those prohibitions or restrictions must be justified on grounds of public interest relating, in particular, to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

44 It follows from the case-law of the Court that that provision must be understood as restricting the scope of the legislative framework open to the Member States in relation to prohibitions or restrictions on the use of temporary agency workers and not as requiring any specific legislation to be adopted in that regard, including in order to prevent abuse (see, to that effect, judgment of 17 March 2015, *AKT*, C-533/13, EU:C:2015:173, paragraph 31)

45 Lastly, contrary to what JH claims in his written observations, the case-law established by the judgment of 25 October 2018, *Sciotto* (C-331/17, EU:C:2018:859), concerning the interpretation of Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, set out in the Annex to Directive 1999/70, cannot be transposed to this case. While Clause 5 of that framework agreement lays down specific obligations to prevent abuse arising from the use of successive fixed-term employment contracts, the same cannot be said of the first sentence of Article 5(5) of Directive 2008/104.

46 It follows from the foregoing considerations that it cannot be inferred from the first sentence of Article 5(5) of Directive 2008/104 that that provision requires Member States to lay down, in their domestic legislation, all or some of the specific measures referred to in the question referred.

47 However, it must be borne in mind that the referring court, in its request for a preliminary ruling, as is apparent from paragraph 29 above, enquires more generally as to whether the national legislation at issue in the main proceedings could be regarded as contrary to Directive 2008/104, particularly the first sentence of Article 5(5) read in the light of recital 15 thereof, inasmuch as, by failing to make provision for such measures, the same worker could be given successive assignments to the same user undertaking with a view to circumventing the provisions of that directive and, in particular, the temporary nature of temporary agency work. The referring court is uncertain whether that incompatibility with EU law should also be inferred from Article 1(1) of that directive, which assumes that the worker's assignment to the user undertaking is temporary, and from Article 3(1) thereof, points (b) to (e) of which define the concepts of 'temporary-work agency', 'temporary agency worker', 'user undertaking' and 'assignment' in language suggesting that that type of employment relationship is essentially temporary in nature.

48 Thus, the referring court also raises the question whether, by adopting Directive 2008/104, the objective pursued by the EU legislature, as is apparent in particular from the first sentence of Article 5(5) thereof, is not to require Member States to preserve the temporary nature of temporary agency work, by prohibiting unlimited renewals of assignments which actually cover the permanent staffing needs of the user undertaking concerned and thereby circumvent the provisions of that directive.

49 There is nothing to prevent the Court, in accordance with its settled case-law, from giving a useful answer to the referring court by providing it with the guidance as to the interpretation of EU law necessary to enable that court to rule itself on the compatibility of the national rules with EU law (judgment of 16 February 2012, *Varzim Sol*, C-25/11, EU:C:2012:94, paragraph 28 and the case-law cited, and order of 16 January 2014, *Baradics and Others*, C-430/13, EU:C:2014:32, paragraph 31).

50 To that end, it must be pointed out, in the first place, that recital 11 of Directive 2008/104 states that that directive is intended to meet not only undertakings' needs for flexibility, but also employees' need to reconcile their working and private lives and thus contributes to job creation and to participation and integration in the labour market. Directive 2008/104 is therefore designed to reconcile the objective of flexibility sought by undertakings and the objective of security corresponding to the protection of workers.

51 That twofold objective thus gives expression to the intention of the EU legislature to bring the conditions of temporary agency work closer to 'normal' employment relationships, especially since, in recital 15 of Directive 2008/104, the EU legislature expressly stated that employment contracts for an indefinite term are the general form of employment. That directive therefore also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking, an objective reflected in particular in Article 6(1) and (2) of that directive.

52 The principle of equal treatment, as laid down in Article 5(1) of Directive 2008/104, contributes to that objective. That provision requires the basic working and employment conditions of temporary agency workers to be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

53 In the second place, the concept of 'basic working and employment conditions', which determines the scope of the principle of equal treatment to be applied to temporary agency workers, is defined in Article 3(1)(f) of Directive 2008/104 and refers to the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, and pay.

54 However, as the Advocate General stated in point 44 of her Opinion, it is apparent from recital 1 of that directive that the directive is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights of the European Union, paragraph 1 of which establishes in general terms the right of every worker to working conditions that respect his or her health, safety and dignity. The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) indicate, in that regard, that the expression 'working conditions' is to be understood in accordance with Article 156 TFEU. However, that provision merely refers, without any further definition, to 'working conditions' as being one of the areas of the European Union's social policy in which the Commission may intervene to encourage cooperation between Member States and facilitate the coordination of their action. In the light of the objective of Directive 2008/104 to protect the rights of temporary agency workers, that lack of precision supports a broad interpretation of the concept of 'working conditions'.

55 In the third place, to the same effect, the first sentence of Article 5(5) of Directive 2008/104 imposes two separate obligations on Member States, namely to take appropriate measures with a view to preventing, first, misuse of the derogations from the principle of equal treatment permitted under Article 5 itself and, secondly, successive assignments designed to circumvent the provisions of Directive 2008/104 as a whole.

56 In that regard, it should be noted that, as the Advocate General observed in point 46 of her Opinion, the words 'and, in particular' used in the first sentence of Article 5(5) of that directive to link the two obligations cannot, contrary to what the Commission maintains in its written observations, be interpreted as meaning that the second obligation is automatically and fully subordinate to the first, so that that provision applies exclusively to the misuse of the permitted derogations from the principle of equal treatment, the specific scope of which for the purposes of that directive is defined in Article 5(1) to (4).

57 The two obligations imposed on Member States are very different in scope. The first requires them to take appropriate measures solely to avoid misuse of the derogations permitted under Article 5(2) to (4) of Directive 2008/104. By contrast, the second obligation is more widely set out and aims to have Member States take appropriate measures with a view to preventing, in particular, successive assignments designed to circumvent the provisions of that directive as a whole.

58 The Commission's narrow reading of the first sentence of Article 5(5) of Directive 2008/104 is at odds not only with the actual wording of that provision, which expressly imposes two obligations on Member States, the second relating to Directive 2008/104 generally, but also with the clear purpose of that directive being to protect temporary agency workers and to improve the conditions of temporary agency work.

59 It follows that the obligation imposed on Member States by the first sentence of Article 5(5) of Directive 2008/104, requiring them to take appropriate measures with a view to preventing successive assignments designed to circumvent the provisions of that directive, must, in the light of its scheme and purpose, be understood as covering all the provisions of that directive.

60 In the fourth place, Directive 2008/104 also seeks to have Member States ensure that temporary agency work at the same user undertaking does not become a permanent situation for a temporary agency worker.

61 In that regard, it should be recalled that Article 3(1)(b) to (e) of that directive defines the concepts of 'temporary-work agency', 'temporary agency worker', 'user undertaking' and

‘assignment’ and that it is apparent from those definitions that the employment relationship with a user undertaking is, by its very nature, temporary.

62 Furthermore, although the directive does indeed refer to employment relationships which are temporary, transitional or limited in time, and not permanent employment relationships, it nevertheless states, in recital 15 and Article 6(1) and (2), that ‘employment contracts of an indefinite duration’, that is to say permanent employment relationships, are the general form of employment relationship and that temporary agency workers are to be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

63 Finally, it should be noted that the first sentence of Article 5(5) of Directive 2008/104 requires Member States, in clear, precise and unconditional terms, to take appropriate measures to prevent abuse consisting of giving a worker successive assignments of temporary agency work designed to circumvent the provisions of that directive. It follows that that provision must be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work.

64 In that connection, it follows from the Court’s settled case-law that Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 4(3) TEU and Article 288 TFEU to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, inter alia, judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 59 and the case-law cited).

65 To fulfil that obligation, the principle of interpretation in conformity with EU law requires the national authorities to do everything within their power, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and achieving an outcome consistent with the objective pursued by it (judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 60 and the case-law cited).

66 However, the principle of interpretation of national law in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem* (judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 61 and the case-law cited).

67 In the present case, it is in the light of the foregoing considerations that the referring court is to review the legal classification of the employment relationship at issue in the main proceedings, having regard to both Directive 2008/104 itself and the national law transposing it into Italian law, in such a way as to determine whether, as JH maintains, it is a permanent employment relationship concealed behind successive temporary agency contracts designed to circumvent the objectives of Directive 2008/104, in particular the temporary nature of temporary agency work.

68 For the purposes of that assessment, the referring court may take the following considerations into account.

69 If successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is longer than what can reasonably be

regarded as ‘temporary’, that could be indicative of misuse of successive assignments, for the purpose of the first sentence of Article 5(5) of Directive 2008/104.

70 In the same vein, as the Advocate General stated in point 57 of her Opinion, successive assignments of the same temporary agency worker to the same user undertaking circumvent the very essence of the provisions of Directive 2008/104 and amount to misuse of that form of employment relationship, since they upset the balance struck by that directive between flexibility for employers and security for workers by undermining the latter.

71 Finally, where, in a given case, no objective explanation is given for the decision of the user undertaking concerned to have recourse to a series of successive temporary agency contracts, it is for the national court to examine, in the context of the national legislative framework and taking account of the circumstances of each case, whether any of the provisions of Directive 2008/104 has been circumvented, especially where the series of contracts in question has assigned the same temporary agency worker to the user undertaking.

72 It follows from all the foregoing considerations that the first sentence of Article 5(5) of Directive 2008/104 must be interpreted as not precluding national legislation which does not limit the number of successive assignments that the same temporary agency worker may fulfil at the same user undertaking and does not make the lawfulness of the use of temporary agency work subject to the prerequisite that it must be justified by technical, production, organisation or replacement-related reasons. On the other hand, that provision must be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

The first sentence of Article 5(5) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as not precluding national legislation which does not limit the number of successive assignments that the same temporary agency worker may fulfil at the same user undertaking and does not make the lawfulness of the use of temporary agency work subject to the prerequisite that it must be justified by technical, production, organisation or replacement-related reasons. On the other hand, that provision must be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole.

[Signatures]

---

* Language of the case: Italian.